DANGEROUS POLITICS:

AN INTERPRETIVE POLITICAL ANALYSIS OF THE IMPRISONMENT FOR PUBLIC PROTECTION SENTENCE, 2003-2008

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DPHIL CRIMINOLOGY

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ABSTRACT

The thesis constitutes a detailed historical reconstruction of the creation, contestation and subsequent amendment of the Imprisonment for Public Protection sentence, the principal 'dangerous offender' measure of the Criminal Justice Act 2003. Underpinned by an interpretive political analysis of penal politics, the thesis draws on a detailed analysis of relevant documents and 53 interviews with national level, policy-oriented actors. The thesis explores how actors' conceptions of 'risk' and 'the public' interwove with the political beliefs and political traditions relied upon by the relevant actors. It is argued that while there was general recognition of a 'real problem' existing in relation to dangerous offenders, the central actors in the creation of the IPP sentence crucially lacked a detailed understanding of the state of the art of risk assessment and management (Kemshall, 2003) and failed to appreciate the systemic risks posed by the IPP sentence. The creation of the IPP sentence, as with its subsequent amendment, is argued to highlight the extreme vulnerability felt by many government actors. The efforts of interest groups and other pressure participants to have their concerns addressed regarding the systemic and human damage subsequently caused by the under-resourcing of the IPP sentence is explored, and the challenge of stridently arguing for substantial change while maintaining 'insider' status is discussed. As regards senior courts' efforts to rein in the IPP sentence, it is argued

that the increasingly conservative nature of the judgments demonstrate that the judiciary are not immune from the creep of a ‘precautionary logic’ into British penal politics. Regarding the amendment of the IPP sentence, the Ministry of Justice’s navigation between the twin dangers of a systemic crisis and a political crisis are explored. In conclusion, the IPP story is argued to demonstrate a troubling ‘thoughtlessness’ by many of the key policymakers, revealing what is termed the ‘banality of punitiveness.’ The potential for a reliance on political beliefs and traditions to slip into this thoughtless state, and possible ways of ensuring that such policy issues are engaged with in a more inclusive and expansive manner, are discussed.

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Glossary of Acronyms

APPPAG	All-Party Parliamentary Penal Affairs Group
CA	Court of Appeal
CCJS	Centre for Crime and Justice Studies
CJA	Criminal Justice Act 2003
CJIA	Criminal Justice and Immigration Act 2008
DfID	Department for International Development
DPP	Detention for Public Protection
DSPD	Dangerous and Severe Personality Disordered
ECHR	European Convention on Human Rights
ECL	End of Custody Licence
HC	High Court
HL	House of Lords
HMIPP	Her Majesty's Inspectorates of Prisons and Probation
Howard League	Howard League for Penal Reform
HRA	Human Rights Act
IPP	Imprisonment for Public Protection
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MoJ	Ministry of Justice
MP	Member of Parliament
NOMS	National Offender Management System
NSPCC	National Society for the Prevention of Cruelty to Children
OASys	Offender Assessment System
POA	Prison Officers Association
PGA	Prison Governors Association
PRT	Prison Reform Trust
SCMH	Sainsbury Centre for Mental Health

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INTRODUCTION

The Imprisonment for Public Protection (IPP) sentence, whether measured in terms of its form or effects, stands as a striking development in recent British sentencing policy. Vastly expanding the scope of indeterminate sentences, over 6,500 IPP sentences had been imposed as of 31 March 2012 (Prison Reform Trust, 2012: 21). This has contributed to a fundamental change in the nature of the prison population, with one in five prisoners now serving indeterminate sentences (Prison Reform Trust, 2012: 21).[1] Widely criticized as over-broad and ill-conceived (Jacobson and Hough, 2010; HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2010), the IPP sentence has been seen by some scholars as reflecting a wider trend towards pre-emption and prevention in the penal sphere (Zedner, 2009; Zedner and Ashworth, 2008), while being viewed by others as demonstrating the pursuit by populist politicians of expressively tough measures to bolster their electoral prospects (Tonry, 2004).

This thesis offers an empirically-grounded, historical reconstruction of the three key moments in the IPP story: the creation, contestation and amendment of this sentence by national-level, policy-oriented actors, between 2003 and 2008. Drawing on detailed analysis of available documents and 53 interviews with relevant ministers, officials, judges and others, these three moments in penal politics are used as a lens through which to explore the preventive and populist trends noted above, commonly termed the 'new punitiveness' (Pratt et al., 2005). The reconstruction explores how relevant terms – risk, justice, the public and so on – were understood, experienced and acted on in this particular political context. The thesis thus attempts to understand, in relation to this particular case study, the influence of politics –

[1] At January 2010, 97 per cent of IPP prisoners were male, while two thirds were aged between 21 and 39 (Jacobson and Hough, 2010: 14). The IPP sentence was abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Relevant provisions were implemented on 3 December 2012.

as beliefs; as tradition; as contestation – on the course of such developments, and the interaction between politics and concepts relevant to these broader trends. To put it simply, the thesis constitutes an attempt to trace in detail *what happened* in relation to the IPP story,[2] and by reference to relevant actors' aims, beliefs and understandings of their context, to explore *why the IPP story took that particular form.*[3]

Chapter 1 provides a brief overview of the IPP story, followed by a discussion of the relevant historical, cultural, technological and political context. Chapter 2 discusses the methodological framework which underpins this research project. An interpretive political analysis of penal policy is advanced, drawing primarily on Hay's (2002) *Political Analysis* and Bevir and Rhodes' (2003; 2006b) promotion of an interpretive approach to political analysis.

Chapters 3-7 draw on the empirical research to present a detailed reconstruction and analysis of the creation, contestation and amendment of the IPP sentence. Chapters 3 and 4 explore the creation of the sentence. The former primarily focuses on the pressures and problems which impelled the development of the IPP sentence. The latter focuses on the processes by which the IPP sentence was developed, exploring the role of political ideologies, expertise and lay sentiment in the process which resulted in provisions contained in the Criminal Justice Act 2003. Chapter 5 explores the concerns of interest groups, parliamentarians and other relevant organizations, and the nature of their attempts to 'have an effect' (Hay, 2002: 185) on politicians' and officials' thoughts and actions regarding the

[2] The term 'IPP story' is used as shorthand for the key moments explored in the thesis: the creation, contestation and subsequent amendment of the IPP sentence, 2003-2008.

[3] For clarity, it should therefore be emphasized that the thesis is not an abstract, theoretical consideration of the possible moral or philosophical justifications for such a sentence (Floud and Young, 1981); nor does it address, except tangentially, the question of how the IPP was interpreted by the various 'street level bureaucrats' (Lipsky, 1980) – the trial judges, probation officers, prison staff and so on – who were charged with implementing the sentence. Nor does it attempt to state conclusively whether the IPP did or did not 'work.' However, key actors' views on these issues are an important part of the interpretations made and findings presented.

unfolding problems relating to the IPP sentence. Chapter 6 charts the various ways in which the senior judiciary sought to challenge and alter the nature and effects of the IPP sentence: primarily, the efforts of the Court of Appeal to limit the use of the IPP sentence;[4] and the series of judicial review cases, culminating in *James, Lee and Wells*[5] in the House of Lords, regarding the continued detention of post-tariff IPP prisoners.

Having explored the concerns with the IPP sentence, and efforts to promote change, Chapter 7 reconstructs the amendment of the IPP sentence as part of the Criminal Justice and Immigration Act (CJIA) 2008. Drawing on Hood's (2011) typology of blame avoidance techniques, the chapter traces Justice Minister Jack Straw's navigation between the twin dangers of a systemic crisis (the overloading of the prison estate, caused in part by the rising numbers of IPP-sentenced prisoners) and a political crisis (the electoral harm caused by a dismantling of these much-heralded 'dangerous offender' provisions).

Chapter 8 draws together the above chapters, discussing the findings from this exploration of key moments in the IPP story. The central role of politics as beliefs, as traditions and as contestation is noted. In particular, it is argued that all actors relied on the shared understandings of legitimate action flowing from the Westminster tradition (Rhodes et al., 2009: chapter 3). This importantly conditioned the relevant actors' aims and actions. The themes of risk and uncertainty are thus seen to have permeated these moments in penal politics, but through the lens of these particular ideologies and traditions. With this in mind, the IPP story is suggested to demonstrate the potential dangers of actors' (inevitable) reliance on such ideologies and traditions: namely, a slippage into 'thoughtlessness', a reliance on 'imaginary penalities' (Carlen, 2008a). The notion of the 'banality of punitiveness' is

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[4] The leading case is *R v Lang et al*. [2005] EWCA Crim 2864 ; [2006] 1 WLR 2509

[5] *R. (James) v Secretary of State for Justice (Parole Board intervening); R. (Lee) v Same (Same intervening); R. (Wells) v Same (Same intervening)* [2009] UKHL 22; [2009] 2 WLR 1149.

introduced, in order to capture this potentiality.[6] Recent developments following the 2010 General Election are noted, suggesting that developments such as the IPP sentence are less fixed than they might otherwise appear, but nevertheless emphasizing the need for an improvement in the quality of penal politics and policymaking.

[6] This concept draws on the Arendtian notion of the 'banality of evil' (2006 [1965]), Hayden's (2007; 2010) discussion of Arendt's work and Bauman's Modernity and the Holocaust (1989).

CHAPTER 1

SITUATING IMPRISONMENT FOR PUBLIC PROTECTION

This chapter will first provide a brief history of the creation, contestation and amendment of the IPP sentence, in order that the reader can better navigate the detailed exploration of these three key moments in the IPP story in the following chapters.[7] The relevant historical, cultural, technological and political context of the IPP sentence is then explored. We see that, set in a historical context, the IPP sentence stands as the latest iteration of a recurring trend in British sentencing policy: a renaissance of efforts against the 'dangerous' (Bottoms, 1977). The recurrence of concern with dangerous offenders in the 1970s-1980s provides a striking comparator, in terms of both the proposals made and the nature of their development, against which the subsequent discussion of the IPP story is set. As McSherry and Keyzer (2011: 3) note, while 'there will always be groups of individuals deemed to be "dangerous" by society...which groups will be targeted may vary according to culture, place and time.' Relevant cultural developments are thus noted, described by many as constituting the coming of 'late modernity' (Garland, 2001; Giddens, 1991), including the dominance of uncertainty and insecurity and the rise of the 'public voice' (Ericson, 2006; Ryan, 2005). 'Technological' developments will then be discussed, focusing upon the purported rise of risk; of 'actuarial justice' (Feeley and Simon, 1992; 1994). This discussion will give rise to two expectations as regards key drivers of the IPP story: namely, that the IPP story will prove to be exemplary of two key trends marking the criminal justice landscape of the early twenty-first century encapsulated in the term 'the new punitiveness' (Pratt et al., 2005). These trends are first, the

[7] See also Appendix II, which provides a Timeline intended as a useful reference point for the reader.

centrality of risk and uncertainty to penal politics and policymaking and second, penal populism as the overriding driver of penal policy.

However, the thesis is underpinned by a view of political combat ‘as pivotal in determining the character of crime control under late modern conditions’ (Loader and Sparks, 2004: 16). Therefore, the political context of the period is discussed below in some detail. This discussion leads us to a nuanced view of the hypotheses set out above, noting the anticipated role of the Third Way political ideology, the ‘Westminster tradition’ and the political battles of the time, in the course taken by the IPP story.

The Rise and Partial Fall of the IPP

A new sentencing regime for ‘dangerous offenders’ was created by Part 12, Chapter 5, of the Criminal Justice Act (CJA) 2003. The legislation provided a framework whereby those deemed to be dangerous by the trial judge would be liable either to imprisonment for life, imprisonment for public protection, or an extended sentence. This replaced the automatic life sentence; longer than proportionate sentences for sexual and violent offenders; extended sentences;[8] and to a large extent the discretionary sentence of life imprisonment (Ashworth, 2005).[9] The sentence is structured thus: if the offender is found to be ‘dangerous’ the trial judge states the minimum term commensurate with the seriousness of the offence (the ‘tariff’).[10] After expiry of the tariff, the offender is released on licence only if the Parole Board is satisfied that he no longer poses a risk to the public.[11] In summary then, the IPP ‘falls little short of life imprisonment – but it applies to “serious offences” for which life

[8] Confusingly, the 2003 Criminal Justice Act replaced the former ‘extended sentence’ with a different measure, which nonetheless bears the same name.

[9] See Ashworth (2000: 183-196) for discussion of these precursor sentences.

[10] To reflect the policy that determinate-sentenced prisoners were, at that time, released at the half-way point of their sentence, the tariff would be set at half the equivalent determinate sentence length for the offence committed: s82A, Powers of Criminal Court (Sentencing) Act 2000 (Thomas, 2005: 8).

[11] The legislation is written using the masculine pronoun. In 2010, 97 per cent of the IPP prison population were male (Jacobson and Hough, 2010: 14).

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).

To qualify for an IPP sentence, the offender was required to have been convicted of a 'specified offence' (one of the 153 listed in Schedule 15 of the Act) which was also 'serious' (one which carries a maximum sentence of at least 10 years). It was then necessary for the court to be 'of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences' (s225(1)(b) CJA 2003). While the court was required to have regard to pre-sentence and psychiatric reports if available, this was not compulsory (Sentencing Guidelines Council, 2008). Section 229 CJA 2003 provided that for those over 18, if the above requirements were met, the court must assume that the defendant is dangerous, unless 'it would be unreasonable to conclude that there is such a risk' in light of the information provided to the court concerning the offender and his current and previous offences. If the offender had a previous conviction for a Schedule 15 offence, the judge was compelled to impose a sentence of Imprisonment for Public Protection.[12] The sentence as originally enacted did not provide for a minimum tariff. In other words, while in all but very exceptional circumstances the tariff period for a prisoner sentenced to life would be approximately 13 years,[13] the tariff period of an IPP prisoner could potentially be measured in months, if not weeks.[14]

Key 'landmarks' in relation to the introduction of the IPP sentence are generally seen as the publication of 'Making Punishments Work' (Halliday, 2001); the publication of the

[12] For discussion of the other 'Dangerous Offender' sentences introduced by the Criminal Justice Act 2003, see Ashworth (2005: 210-217).

[13] In 2002 the average tariff given to those sentenced to a mandatory life sentence was 13.2 years, while by 2009 this had increased to 17.5 years (Prison Reform Trust, 2012: 21).

[14] The shortest reported tariff for an IPP prisoner sentenced under the 2003 Act was 28 days (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008: 2).

'Justice for All' White Paper (Home Office, 2002); and the development and bringing into law of the 'Dangerous Offender' provisions of the Criminal Justice Act 2003. In May 2000, Sir John Halliday was asked by the Home Office to review the sentencing framework of England and Wales. The issue of 'dangerous offenders' was discussed, with the report recommending the creation of a special type of sentence for those offenders who did not fall under the provisions of the Mental Health Act 1983 and who did not receive a life sentence (Halliday, 2001: chapter 4). This would be a *determinate* sentence whereby, upon conviction of a specified violent or sexual offence and meeting other threshold criteria, the offender would serve the whole of the second part of their sentence unless the Parole Board decided that it was safe to order their early release. This 'dangerousness threshold,' while not set out in detail, would require high levels of risk and of resulting harm (Halliday, 2001: paras 4:25-4:35).

The Halliday review was conducted in the context of a concerted attempt by the Home Office, with the Department of Health, to address 'dangerous and severe personality disordered' (DSPD) individuals (Forrester, 2002; Seddon, 2008). The measures were intended to address the perceived failings of the existing mental health system in relation to those individuals who posed a risk to the public, but were not 'treatable' and therefore could not be detained under the existing Mental Health Act 1983 (Rutherford, 2006). Following sustained resistance from the psychiatric community (Home Affairs Select Committee, 2000), legislative measures were abandoned, with a long-running 'pilot' instead resulting in the creation of a small number of DSPD units in prisons and high security psychiatric hospitals (de Boer et al., 2008; Rutherford, 2010: chapter 7).

The subsequent 'Justice for All' White Paper (Home Office, 2002) signalled a significant move away from the Halliday proposals. The White Paper stated that in the case of violent and sexual offenders an *indeterminate* sentence would be developed, whereby

> The offender would be required to serve a minimum term and would then remain in prison beyond this time, until the Parole Board was completely satisfied that the risk had been sufficiently diminished for that person to be released and supervised in the community (Home Office, 2002: para 5.41).

Many observers aired suspicions that the proposals were primarily intended to serve short-term political ends. Critics such as Tonry (2003: 17) complained that

> Nowhere...is there a trace of nuance or subtlety, a suggestion that the proposals involve fundamental trade-offs, or that prospective predictions of dangerousness are devilishly difficult and much more often than not inaccurate.

The very public promotion of the 'Justice for All' proposals by the then Home Secretary, David Blunkett, in the *Daily Mail* and *The Sun* (Clarke, 2001; Paveley, 2001) gave weight to this interpretation.

The sentence foreshadowed in 'Justice for All' was consequently enacted as the Imprisonment for Public Protection sentence of the Criminal Justice Act (CJA) 2003, described above. The CJA 2003 was passed with a large majority by both Houses of Parliament, with limited Parliamentary debate regarding the IPP sentence. These 'Dangerous Offender' provisions were brought into force on 4th April 2005. Within a year of creation, approximately 150 IPP sentences were imposed per month (Prison Reform Trust, 2007c), with over 3,000 IPP prisoners incarcerated by 9th October 2007 (Prison Reform Trust, 2007a).[15] Amidst growing concerns that sentencing judges were imposing IPPs too

[15] Further, only 13 having been released on licence (Prison Reform Trust, 2007a).

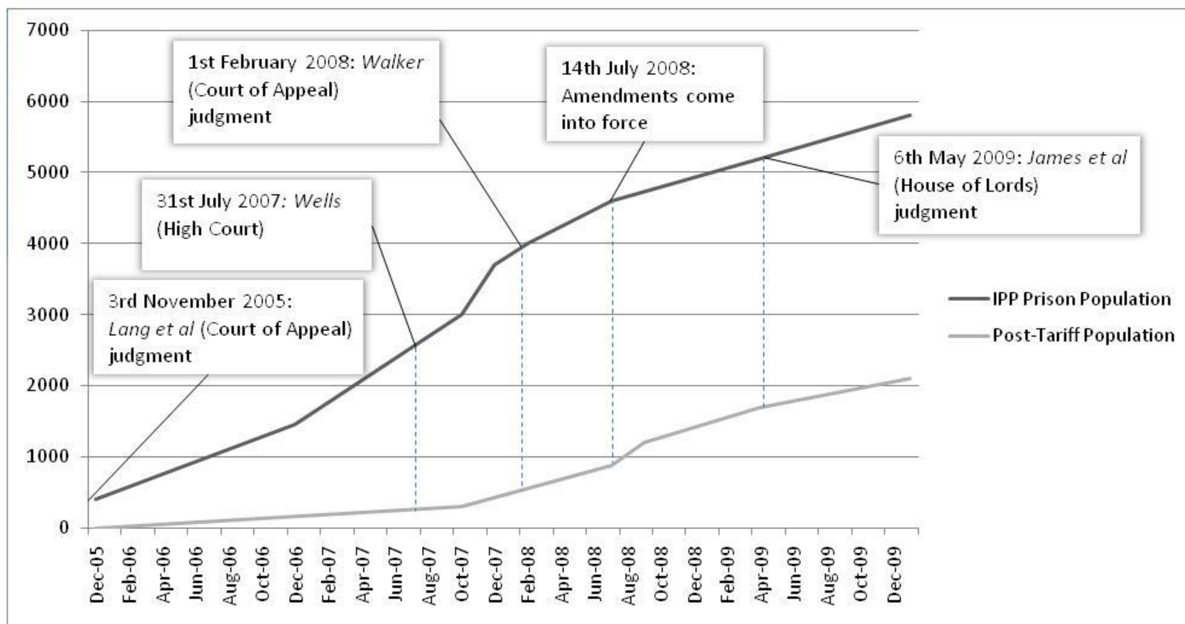
readily, the Court of Appeal acted in the case of *Lang et al*.[16] The Court tried to 'talk down' the IPP, stating that judges should only impose such a sentence where there is clear and compelling evidence that the defendant is 'dangerous'. In the midst of concern by the Sentencing Guidelines Council that judgments such as *Lang et al.*[17] had failed to have the desired effect, Dangerous Offender guidance was created, again attempting to ensure that the IPP sentence was only being imposed where absolutely necessary. This guidance was first published in 2007 (Sentencing Guidelines Council, 2007). A second version was published in 2008 (Sentencing Guidelines Council, 2008).

Despite these parsimony-encouraging efforts, the IPP population continued to rise (figure 1). Criticism was becoming more vocal, both in terms of moral concern at the provisions and the values they embodied (Howard League for Penal Reform, 2007; Prison Reform Trust, 2007c) and in terms of the serious damage being inflicted on the criminal justice system and the resultant harm to the prisoners within the system (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008; Sainsbury Centre for Mental Health, 2008).

[16] R v *Lang et al.* [2005] EWCA Crim 2864 ; [2006] 1 WLR 2509. The other leading case is *Johnson* [2007] 1 Cr.App. R (s) 674

[17] R v *Lang et al* (fn16)

Figure 1: IPP Prison Population 2005-2010



Source: Prison Reform Trust Bromley Briefings (Prison Reform Trust, 2007a; 2009b; 2009a; 2010; 2011; 2012)

The combination of an under-resourced Prison Service and a Parole Board wary of releasing potentially dangerous offenders led to an increasing number of IPP prisoners reaching the end of their tariff period, but finding themselves unable to demonstrate that they no longer represented a risk to members of the public, and often unable even to obtain a timely Parole Board hearing in which to argue their case (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008).

The challenges faced by post-tariff IPP prisoners reached the court in 2007, first in the case of *Wells*.[18] In this case, the High Court addressed an application for judicial review concerning the lawfulness of the continued detention of IPP prisoners after the expiry of their tariff period. The systemic and resource issues set out above meant that for many of those serving IPPs their ability to progress through the lifer system,[19] to undertake the training programmes seen as vital to their 'reduction of risk' and to obtain a timely hearing before a

[18] *R. (Wells) v Parole Board; R. (Walker) v Secretary of State for the Home Department* [2007] EWHC 1835; [2008] 1 All ER 138

[19] *Wells* (fn18), paras 20-21, reproducing 'Lifer Manual', PSO 4700.

Parole Board panel was severely hampered. The case was argued on the grounds of the 'irrationality', or '*Wednesbury* unreasonableness,'[20] of the Secretary of State's failure to properly resource the system for IPP prisoners and also on Articles 5(1) and 5(4) European Convention of Human Rights (ECHR) rights.[21]

Lord Justice Laws, founding his judgment on the first of these arguments, concluded that

> Without current and periodic means of assessing the prisoner's risk the regime cannot work as Parliament intended, and the only possible justification for the prisoner's further detention is altogether absent. In that case the detention is arbitrary and unreasonable on first principles, and therefore unlawful.[22]

This decision was followed by Collins J in a subsequent claim for judicial review.[23] The result of these judgments, startling for the government if upheld, was that post-tariff IPP prisoners who were unable to access training courses and a timely Parole Board hearing were unlawfully detained and thus should be released – notwithstanding their potential dangerousness. The claimant prisoner's release was stayed pending a combined appeal to the Court of Appeal. It was soon made known that the government was in the process of formulating amendments to the IPP sentence, intended to rectify the problems besetting the sentence and its operation.

In the subsequent hearing, the Court of Appeal upheld Laws LJ's judgment as regards the unlawfulness of the Secretary of State's failure to resource properly the prison service and Parole Board so as to enable the Dangerous Offender provision of the CJA 2003 to operate as

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[20] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223

[21] Article 5 concerns the deprivation of liberty and the conditions under which detention is, and is not, considered lawful.

[22] *Wells* (fn18), para 48

[23] *R. (James) v Secretary of State for Justice* [2007] EWHC 2027 (Admin)

intended.[24] However, the Court of Appeal concluded that, given the legislation in place, it was not possible to describe post-tariff IPP prisoners as 'unlawfully detained' and that accordingly the order for release in *James*[25] would be set aside.[26] Nevertheless, it was stated that if the present situation continued, with many Parole Board hearings constituting 'an empty exercise', a breach of Article 5(4) ECHR would likely be found.[27] Further, it was suggested that Article 5(1) may be breached 'when the stage is reached that it is no longer necessary for the protection of the public that they should be confined or if so long elapses without a meaningful review of this question that their detention becomes disproportionate or arbitrary.'[28] Leave for appeal to the House of Lords was granted by their Lordships on 15 January 2009.

During this time, two internal reviews relating to the IPP sentence were conducted, reflecting the deep concern within the department regarding the IPP sentence. The first, published October 2006, focussed upon the policies and practices in place in relation to the release of prisoners from indeterminate sentences (Home Office, 2006a). The second, published August 2007, proposed changes to the ways in which indeterminate sentenced prisoners were progressed through the custodial estate (Ministry of Justice, 2007b).

In addition, the Ministry of Justice (MoJ) was formed in May 2007, created out of the Department for Constitutional Affairs and taking on responsibility for the punishment and sentencing of offenders (thus including prisons, probation and the courts) from the Home Office. Following Gordon Brown's succession of Tony Blair as Prime Minister in June 2007,

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[24] *R. (Walker) v Secretary of State for Justice (Parole Board intervening); R. (James) v Same (Same intervening)* [2008] EWCA Civ 30; [2008] 1 WLR 1977

[25] *James* (fn23)

[26] *Walker and James* (fn24), paras 47 & 70

[27] *Walker and James* (fn24), para 67

[28] *Walker and James* (fn24), para 69

Jack Straw was appointed Secretary of State for Justice. Immediately recognising the need to address the prison population crisis, and the problems caused by the IPP sentence (see Chapter 7), Lord Carter of Coles' report 'Securing the Future' (Lord Carter of Coles, 2007) proposed both legislative amendments and administrative changes to the IPP sentence and the IPP system.

The IPP provisions were subsequently amended by the Criminal Justice and Immigration Act (CJIA) 2008. The main effect was the removal of the mandatory elements which had been seen by some as the most problematic aspect of the sentence (Thomas, 2008: 7): courts were afforded the *power*, but not compelled, to impose an IPP when the requirements were met. Further, Schedule 15 was replaced by Schedule 15A, which dramatically reduced the number of 'specified offences'. Section 13 CJIA 2008 introduced a 'notional minimum term' of at least two years (in other words, a four year determinate sentence equivalent). The court was also able to consider whether an extended determinate sentence would be more appropriate in circumstances where previously only an IPP (or alternatively a determinate sentence) would be imposed. These changes came into force from 14th July 2008. Modifications were also made to the management of IPP prisoners, so that they were treated as determinate-sentenced prisoners rather than lifers, with the intention of reducing bureaucracy in their management and improving their progression through the custodial estate (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008: 17). Additional resources were also provided by the Ministry of Justice, with Prisons minister David Hanson thus declaring himself 'confident that in short order such prisoners will be able to undertake the courses that they need to attend to progress through the system.'[29]

[29] HC Deb, David Hanson, 9 Dec 2008, col 401

The House of Lords, in a judgment delivered after implementation of the amendments, followed the Court of Appeal in declaring that the Secretary of State had breached his public law duties in failing to resource properly the system for IPPs.[30] This had by now been accepted by the then Secretary of State, Jack Straw.[31] It ruled, however, that Article 5(1) ECHR was not breached by the Secretary of State's failure to make adequate provision of training courses, to enable progression through the system and properly resource the Parole Board, although it was conceivable that a 'prolonged failure' – a period of years rather than months – to enable the prisoner to demonstrate that he was safe for release may result in a breach. Similarly, Article 5(4) was held not to have been breached, it being for the Parole Board to decide what, and how much, information is needed to make a decision on a prisoner's suitability for release. Despite the finding that 'the Secretary of State failed deplorably in the public law duty that he must be taken to have accepted when he persuaded Parliament to introduce indeterminate sentences for public protection,'[32] it was perhaps surprisingly accepted by their Lordships – to varying degrees – that 'the deficiencies [in the resourcing of the system] are, at last, being made good'.[33]

Surveying recent sentencing developments in England and Wales, Ashworth (2010b) has described the 'trifurcation' of sentencing, In addition to the two long-standing bifurcatory 'tracks' (Ashworth, 2010b: 421),[34] the 'third track', including measures such as the IPP sentence, 'is one that places the emphasis on the risk that an offender is believed to present rather than upon the offence(s) already committed' (Ashworth, 2010b: 421). For many

[30] *R. (James) v Secretary of State for Justice (Parole Board intervening); R. (Lee) v Same (Same intervening); R. (Wells) v Same (Same intervening)* [2009] UKHL 22; [2009] 2 WLR 1149

[31] *James, Lee and Wells* (fn30) para 28 per Lord Brown of Eaton-under-Heywood

[32] *James, Lee and Wells* (fn30), para 3 per Lord Hope of Craigshead

[33] *James, Lee and Wells* (fn30), para 121 per Lord Judge CJ

[34] 'Bifurcation' refers, in short, to a dichotomous reading of offenders. On the one hand are 'really serious offenders', who are dealt with very severely, and on the other 'the "ordinary" offender for whom, it is felt, we can afford to take a much more lenient line' (Bottoms, 1977: 88).

scholars, this trend is part of a renewed drive by many Western nations towards preventive, and indeed pre-emptive, efforts against the ‘dangerous’ (Brown, 2011; McSherry et al., 2009; Zedner and Ashworth, 2008).

Various works have sought to explain this dramatic increase in the use of preventive measures and the renewed focus on the ‘dangerous’. Before exploring these explanations, the broader historical context of state action against ‘dangerous offenders’ will be summarized. We will see how state measures have shifted over time, with the very object of concern itself altering. Consideration of the ‘dangerous offender’ discussions of the 1970s-80s illustrates the differences, and similarities, between that time and the present. Efforts drawing on Foucault’s notion of ‘governmentality’ (Rose et al., 2006; Foucault, 1991) will then be explored. Discussion will focus upon Pratt’s *Governing the Dangerous* (Pratt, 1997) and Feeley and Simon’s works on the ‘new penology’ and its relationship to efforts against the ‘dangerous’ (Feeley and Simon, 1992; 1994; Simon, 1998). Further, cultural accounts which have attempted to explain the recurrence of indeterminate sentences and their specific form will then be discussed. Such works have tended to focus on the effects of the rise of ‘post’ or ‘late’ modernity on the penal sphere (Bauman, 2000; Garland, 2001; Simon, 1998; Young, 2007).

Having surveyed the valuable contributions made by these works, the political context of the time is then discussed. The rise of New Labour is noted, in addition to discussion of the increasingly febrile nature of the ‘penal arms race’ and the relationship between the government, Parliament, civil service and judiciary. This discussion of the relevant historical, cultural, ‘governmental’ and political context leaves us well placed to address the questions which will guide the detailed historical reconstruction presented in Chapters 3-7.

The IPP in Historical Context

Given the central role of the dangerous 'other' to the construction and maintenance of social groups (Durkheim, 1972: chapter 3), a history of efforts against the dangerous could conceivably extend to the earliest records of human history. If we limit the scope of the present discussion to recent centuries, Radzinowicz and Hood (1980) note that during the nineteenth century, efforts abounded to define the 'criminal class':

> By all accounts, the criminal class was perceived as vast, self-contained, self-perpetuating, largely unreclaimable, implacably hostile, and alien to the interests of the State (Radzinowicz and Hood, 1980: 1308).

The dawn of the nineteenth century saw renewed efforts to deal with 'dangerous', 'habitual', and 'professional' offenders (the terms being used interchangeably: Radzinowicz and Hood, 1986). In 1846, for example, Matthew Davenport Hill, a leading penal reformer of the period, proposed a scheme which would provide for the indefinite detention of a criminal until they could demonstrate that they had reformed (Radzinowicz and Hood, 1980: 1318). With the prison 'a "hospital for moral diseases," those who proved to be incorrigibly depraved would be detained "until...released by death"' (Hill, 1846; cited in Radzinowicz and Hood, 1980: 1318). The late nineteenth century saw a series of legislative endeavours against dangerous, or habitual, criminals, including the setting of mandatory minimum terms of penal servitude for those with a previous conviction (Penal Servitude Bill 1864, Radzinowicz and Hood, 1980: 1334); 'preventive policing' (Habitual Criminals Act 1869, Radzinowicz and Hood, 1980: 1341-1342);[35] and proposals for long periods of detention where such habitual offenders were kept as a 'class apart' (Departmental Committee on Prisons, 1895; Radzinowicz and Hood, 1980: 1353).

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[35] These proposals essentially constituted an early forebear of the MAPPA system of post-sentence supervision (Baker and Sutherland, 2009).

In 1894, the question of recidivism was still viewed as 'the most important of all prison questions...the most complicated and difficult' (Departmental Committee on Prisons, 1895; Radzinowicz and Hood, 1980: 1353). Purportedly focussed on the most 'formidable' habitual offenders, the Prevention of Crime Act 1908 introduced a system whereby 'dangerous,' or 'professional,' criminals could be sentenced to a 5-10 year-long sentence of preventive detention, with release at the discretion of the Advisory Board (Radzinowicz and Hood, 1980: 1363-8).[36] The measures, heavily criticized by Radzinowicz and Hood (1980: 1360-63), were described as reflecting the changing views of the time, with 'habitual criminals...seen less as a warring class and more as social and biological misfits in a forward moving society' (Radzinowicz and Hood, 1980: 1313; see also Garland, 1985: 79).

However, the 'whole movement toward indeterminate sentencing was put into abeyance' by Winston Churchill, who from his arrival as Home Secretary in February 1910 continued to constrain and minimize the potential use of the 1908 provisions (Radzinowicz and Hood, 1980: 1371-1373). Due to these efforts and to the courts' reluctance to make use of such sentences, such practices had declined by the 1930s (Radzinowicz and Hood, 1980: 1377). While measures of preventive detention targeted at the 'dangerous' were again introduced by the Criminal Justice Act 1948 (and extended sentences introduced by the Criminal Justice Act 1967), as with previous efforts, these measures fell into near-disuse as 'courts could not be persuaded to make wide use of their new powers' (Radzinowicz and Hood, 1980: 1382; Freiberg, 2000). Given this situation, Radzinowicz and Hood (1980: 1385) felt able to declare that, 'habitual offender legislation in England is all but dead.'

[36] This interchangeability of the terms used alerts us to the overriding concern at that time with property crime, to an extent that might seem bizarre today: Pratt (1996)

The ‘Renaissance of Dangerousness’ in the 1970s

In the 1970s, the problem of the ‘dangerous offender’ again rose to prominence in England and Wales, to the surprise of many scholars (Bottoms, 1977). As Bottoms noted, the concept of ‘dangerousness’ in the mid-1970s evoked

> Overtones of the positivist schools of criminology of the Continent, and of various aspects of American penal practice...[seeming] very remote from the language of debate typically used in discussion of British penal matters (Bottoms, 1977: 71).

This renewed concern was prompted by the multiple poisonings committed by Graham Young after his release from Broadmoor Special Hospital and generated a number of reports, alongside academic, expert, and parliamentary debate. In 1975 the Home Office and Department of Health and Social Security published a joint report on *Mentally Abnormal Offenders* (the ‘Butler Committee report’: Home Office and Department of Health and Social Security, 1975), while the Scottish Council on Crime published a report entitled *Crime and the Prevention of Crime* (Scottish Council on Crime, 1975). Although the suggestions of the former were somewhat more restrictive in scope, both reports proposed the introduction of indeterminate custodial sentences predicated on the offender being assessed, at the time of sentencing, as dangerous.

In the same year the Home Office’s Advisory Council on the Penal System began a review of maximum penalties of imprisonment, reporting in 1978. They also pursued a bifurcatory approach to sentencing policy. The proposals of all three reports were strongly criticized by, among others, Leon Radzinowicz and Anthony Bottoms, two of the most active and influential penologists of the time. Radzinowicz and Hood (1978) argued that such ‘a broad definition [of dangerousness] would be received with open arms by any authoritarian state’ (1978: 1152), and pointed out that even a relatively minor increase in the rate of the

sentencing of offenders to life, or indeterminate, sentences would radically alter the nature of the prison population (1978: 1156). Bottoms and Brownsword (1982) argued that the reports played down the apparent impossibility of satisfactorily predicting future serious violence, relied on 'some of the discredited theoretical apparatus of criminological positivism', and ignored other forms of danger which may 'produce collectively greater loss of life' (Bottoms and Brownsword, 1982).

A fourth report was produced by a Working Party established by the Howard League for Penal Reform (Floud and Young, 1981). Its proposals considered in great detail the ethical and practical difficulties which a system of indeterminate imprisonment predicated on assessments of 'dangerousness' entailed. The report concluded that, despite all these problems, the concept of the 'dangerous offender' was necessary for a modern criminal justice system, as were indeterminate sentences to deal with those offenders who were not liable to a life sentence due to the nature of their offence, nor liable to a hospital order on the basis of mental abnormality. This conclusion was reached despite an admittance that,

> Preventive confinement of "dangerous" offenders is of only marginal value as a protective device' when 'measured against the full ranges of modern social hazards' (Floud and Young, 1981: 19).

Its appeal was argued by the Floud Committee to lie partly in its political utility, the existence of exceptional sentences for the dangerous making a general reduction in the use of imprisonment and shortening of custodial sentences possible. Nevertheless, this rather abstract discussion represented the extent of concern with media influence or public opinion in this or any of the above reports.

Despite this extensive debate, these proposals petered out, with no substantive changes in legislation or practice forthcoming. This was perhaps influenced by a view that attempts,

> To distil from the mass of persistent offenders the so-called “dangerous” criminals...is regarded with suspicion – not to say with enmity – because it is identified with oppressive and arbitrary systems of criminal justice (Radzinowicz and Hood, 1980: 1388-1389).

In a response that seems strikingly complacent from the perspective of today’s political climate, the Home Office appeared to be comfortable in concluding that ‘the infrequency of really serious crimes of violence, their apparently random quality and the rarity of anything like a “dangerous type”’ rendered selective incapacitation undesirable (Brody and Tarling, 1980: 37).

In terms of the political context in which this renaissance occurred, scholars have depicted the criminal justice polity of the 1970s as comprising a liberal elite of ‘Platonic guardians’ (Loader, 2006; Downes and Morgan, 1997). Civil servants, academics, practitioners, ministers and interest groups would discuss pressing issues and possible solutions, attempting to better shape crime policy (see Ryan, 2003; Radzinowicz and Hood, 1974). Academic criminologists were part of the ‘great and the good’ (Downes and Morgan, 2007: 222; Pratt, 1996: 61); part of a ‘liberal reforming movement’ concerned with utility, rationality, the rights of man and the rule of law (Garland, 2003a: 50).

It is striking to note how relatively insulated the Home Office appears to have been from media pressure, or ‘public opinion’, even during the late 1980s (Downes and Morgan, 1997). Notable also is the generally slow pace of change in the penal sphere, with extensive debates, lasting years, presaging the bringing into law of many sentencing measures (Ryan,

2003). Even in the 1980s, notwithstanding the Conservative government's law and order rhetoric (Downes and Morgan, 1997: 214), senior officials such as David Faulkner were given an 'unusually free hand' to develop policy and build consensus (Rutherford, 1996: 86-87).[37] With these latest 'dangerous' proposals declined, the liberal efforts of the 'Platonic guardians' culminated in the Criminal Justice Act 1991, regarded by many as not only the 'high point' of academic influence (Ashworth, 2010a: 342), but as representing the moment when 'the bid to relegate those with the characteristics of the ['classic'] dangerous offenders to a relatively insignificant position in the penal system perhaps reached its apogee' (Pratt, 2000: 43).

While the recurrence of concern with 'dangerous offenders' suggests renewed 'progressive' efforts (as part of a century-long trend),[38] the outcome of the 'dangerousness' debates and policy proposals of the 1970s and 1980s can be seen as illustrative of a liberal, Enlightenment-based ideology shared by ministers, civil servants and academics – at least those invited to sit at the policy-making table and minded to interject in the debate. From the present vantage point, this prolonged, deliberative approach to such issues is remarkable. Having noted the history of efforts against dangerous offenders during the nineteenth and twentieth century, we are well-placed to understand the IPP story discussed in the following chapters in its historical context. Relevant developments in the 'governance' (Foucault and Gordon, 1980) of dangerous offenders over recent decades and its cultural context will now be discussed, bringing us to a fuller understanding of the context in which the IPP story took place and expectations regarding the likely course of the IPP sentence.

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[37] David Faulkner worked for over 30 years in the Home Office, holding various posts relating to prison and sentencing policy. His longest appointment was as Deputy Secretary of the Home Office Criminal and Research and Statistics Departments from 1982 to 1990.

[38] Writing in 1980, Radzinowicz and Hood (1980) argued that from the 1820s to the 1970s,

> It was the progressives and social engineers who have championed preventive control of habitual criminality. (Radzinowicz and Hood, 1980: 1389)

The IPP in Technological context: Power/Knowledge and Dangerous Offenders

In the criminal justice context, scholars have noted an ascendance of risk, both in terms of recourse to technology (primarily actuarial risk assessment tools) as a means of 'identifying, classifying and managing groups assorted by levels of dangerousness' (Feeley and Simon, 1994: 173), and as a way of thinking, a 'risk-logic' (Adams, 2003; Garland, 2003b). Particularly relevant to the present thesis are Pratt's *Governing the Dangerous* (Pratt, 1997) and Feeley and Simon's exposition on the coming of the 'new penology', or 'actuarial justice' (Feeley and Simon, 1992; 1994). These works have drawn predominantly on Foucault's notion of 'governmentality' (Rose et al., 2006; Foucault, 1991).

Foucault directly addressed the issue of prisons in his landmark *Discipline and Punish* (Foucault, 1977). Foucault argues that the supplanting of corporal and capital punishment by the prison, and efforts to discipline prisoners and other 'abnormal' individuals, as the dominant form of punishment should not be read as a straightforward story of humanitarian progress. Rather, the rise of the prison is seen as the embodiment of a broader trend towards the 'power of normalization.' Foucault thus depicts the generation of a new kind of:

> Individual subjected to habits, rules, orders, an authority that is exercised continually around him and upon him, and which he must allow to function automatically in him (Foucault, 1977: 128-129; Garland, 1990: chapters 6 and 7).

Purportedly humanizing developments such as the discipline of psychiatry are seen as technologies of power which are an expression of, and themselves facilitate, subjugation of the soul (Foucault, 1977: 26-27), transmitting,

> Disciplinary norms into the very heart of the penal system and placing over the slightest illegality, the smallest irregularity,

> deviation or anomaly, the threat of delinquency (Foucault, 1977: 297).

Drawing on this approach, Pratt (1997) has provided a detailed account of, and explanation for, the historical trends in efforts against the 'dangerous'. Pratt (1997: chapter 7) suggests that the renaissance of dangerousness in the 1970s was influenced by the growth of methods of assessment and management predicated upon risk. Further, the anxieties generated by these technologies, bound up in a neo-liberal political project, were seen to have revitalised public demands for state action against 'dangerous offenders'. The term itself is seen to have narrowed, referring now to,

> That group of offenders whose propensity to repeatedly commit crimes of a non-capital but otherwise serious nature puts the well-being of the rest of the community at risk (Pratt, 2000: 35).

Debates had become increasingly 'medicalized', with arguments and approaches couched in the terminology of free will reshaped into 'interventions…aimed at correcting pathologies and remedying deficiencies in the light of scientific knowledge' (O'Malley, 2000: 24; Pratt, 1997: 173-175). Further, attempts to deal with such offenders were argued to have increasingly become entwined with the mental health system precisely because such offenders tend to be regarded as on the borders of these realms of knowledge, as being 'neither sane nor insane' (Kozol et al, 1972, quoted in Pratt, 2000: 35).[39]

Feeley and Simon (1992; 1994) advanced a similar, though arguably more dystopian, thesis. They chronicled the rise of 'actuarial justice', or the 'new penology' in the penal sphere. They depicted the displacement of the penal-welfare complex of the mid-late 20th century by a prioritization of 'groups, categories and classes' (Simon, 1998: 453). For Feeley and Simon, 'What distinguish[ed] the new priority of groups is the dominance of statistical

[39] On the development of the penal-welfare complex, see Garland (1985).

over characterological conceptions of group boundaries' (Simon, 1998: 453), with 'priority given to the language of risk in the administration of justice' (Simon, 1998: 453). For them,

> Justice was...increasingly to be focussed on the needs of the community for protection...The details of the individual case were relevant only insofar as they assigned the offender to a risk category for which an appropriate sentence was prescribed. In turn, the length of the sentence was...to be proportional to the magnitude of the risk, the intent being to remove significant risks from the community (O'Malley, 2010: 42).

According to Feeley and Simon (1994) and Rose (2002), we were witnessing at the turn of the century in the criminal justice domain (as in other social spheres) an effort to 'bring the future into the present' (Rose, 2002: 212), with 'the political obligation [being] to do whatever is necessary to prevent future uncertain dangers' (Hebenton and Seddon, 2009: 348). In order to understand why this might be so, we must move to consideration of cultural writings on risk: those exploring risk as *uncertainty*.

The IPP in Cultural Context: The Rise of Uncertainty

Disagreements exist as to whether we are entering a further stage of modernity, often described as 'late modernity' (Garland, 2001; Giddens, 1990; Young, 1999), or a fundamentally new stage of human society, termed 'post-modernity' (Bauman, 1992). What both positions share is a recognition of processes of fundamental societal and cultural change, including the 'hollowing out' of the state (Rhodes, 1994) as part of the 'disabling effects of globalization on the decision-making capacity of the state governments' (Bauman, 1998: 4); the loosening of traditional ties between and within communities (Garland, 2001); the increasing influence of a '24/7 mass media' and new communication technologies (Garland, 2001: 85-87); sustained increases in citizens' knowledge and skills and a concomitant decline of trust in, and deference to, politicians, experts and state institutions (Dalton, 2006: 252;

Loader and Sparks, 2007: 80);[40] and the rise of 'manufactured uncertainty' where the growth of knowledge only serves to generate more risks and more uncertainty (Beck, 2000: 217). In this context, uncertainty is seen to become 'the basic condition of human knowledge' (Ericson, 2006: 4).

In this vertigo-inducing situation (Young, 2007), 'we are left with questions where once there appeared to be answers' (Giddens, 1990: 49). With modernist certainties destroyed, a world of knowledge becomes one 'of doubt, suspicion, premonition, foreboding, challenge, mistrust, fear and anxiety' (Ewald, 2002: 294; cited in Ericson, 2006: 23). For Bauman (1999), the idea of risk, in a world of ontological insecurity (Giddens, 1991),

> Portrays faithfully (and allows one to grasp better) the fateful change in the meaning of 'crisis'. 'Being in a crisis' is no longer seen as a regrettable reversal of fortune or a misadventure, but an irremovable attribute of the human condition (Bauman, 1999: 147; 2000: 212).

In other words, the increasing centrality of risk as a late modern logic (risk assessment and management in criminal justice) takes place in a context of acute uncertainty (Ericson, 2006; Ewald, 2002). Driving a 'precautionary logic' (Ericson, 2006: 23), this 'logic of uncertainty...focuses on uncertainties that have no price, because the catastrophic loss of treasured lives, environments, and property is deemed beyond financial compensation' (Ericson, 2006: 23).

These resulting anxieties, insecurities and concerns of citizens are seen to have coalesced around concerns with crime and demands for security as a result of a 'transfer of anxiety' (Bauman, 1998: 116) where these wider fears, concerns and uncertainties come to be re-centred on the question of 'law and order'. This is actively encouraged by governments,

[40] As Hebenton and Seddon (2009: 357) put it, 'Expertise has never been so indispensable while at the same time so subject to resistance.'

with law and order being an issue by which, at least in blunt rhetorical terms, they can still display their sovereign might (Garland, 2001).

The changed context in which politicians operate has been described as the 'rise of the public voice.' The public are seen as being 'more embedded in the architecture of the policy making process' (Ryan, 2005: 134), expressing a strength and intensity of crime-related concerns not before seen in modern times (Loader, 2009a). While previously 'dummy players' (Pratt and Clark, 2005: 32), the increasingly commonplace situation where criminal justice policy is 'negotiated across a complex series of penal networks (and actors) rather than being simply handed down and executed by the state from the centre' (Ryan, 2005: 148) has led to a situation in which the public voice can no longer legitimately be ignored.

For Kemshall (2003), the state thus finds itself facing a 'meta-dilemma' to which a response must be found:

> [The need for] the delicate balance of social inclusion for the 'dangerous classes' without alienating the ontologically insecure, fearful and 'fretful' middle class. This policy objective is set against an increased 'institutionalized crime awareness' and increased demands for security and risk avoidance. The result is a paradoxical awareness of risk coupled with a desire to be free of it. (Kemshall, 2003: 46)

Accounts drawing on fundamental social transformations, such as those discussed above, are clearly of great value and provide us with certain expectations about the way in which we would expect the IPP story to unfold. In particular, we would expect the creation of the IPP sentence to reflect the two trends which mark the era of 'the new punitiveness' (Pratt et al., 2005): First, we would expect to see a fixation with risk assessment, risk management and the conceptualizing of issues through a 'risk logic' in the context of intense insecurity (Ericson, 2006; Feeley and Simon, 1994; Pratt, 1997). Second, we would expect to see penal

populism as a key driver of the IPP sentence, in a context of an irrevocable 'rise of the public voice' (Pratt, 2007; Ryan, 2003). In relation to the contestation and subsequent amendment of the IPP sentence, we would expect these developments to themselves be heavily conditioned by the 'culture of control' fostered by the developments discussed above (Garland, 2001).

However, as will be argued in Chapter 2, accounts of specific penological developments which seek to be attuned to the particularities of those events must ground these sometimes sweeping theoretical claims in a particular place (Therborn, 2006) and relate them to the particular political projects, motivated by certain political beliefs and traditions, of which they form part (Loader and Sparks, 2004; O'Malley, 1999). The IPP was created and implemented by a New Labour government and its public servants, and situated in early twenty-first century England. Therefore investigation of the nature of this government and a brief discussion of relations between the government and the civil service, the senior judiciary and others, will allow us better to understand the contours of the political landscape against which the IPP policy process occurred.

The IPP in Political Context

The Crisis of 'Old' Labour and the Rise of New Labour

The late 1970s and 1980s were a disastrous period for the Labour party and the left (Hall, 1988). Sweeping victories for Margaret Thatcher's Conservative Party in 1979, 1983 and 1987, and Labour's inability to defeat John Major's ailing Conservative Party in 1992, left 'old' Labour looking decidedly weak. The Conservatives (with the collusion of the tabloid press) successfully pinned the blame on the Labour Party for the 'ungovernability' of Great Britain in the 1970s (Downes and Morgan, 2007: 203). The Labour party appeared, in short, unelectable. This spurred on a renewal project that was at its most strident during the mid-1990s (Gould, 1999; Mandelson, 2010: chapter 4).

Labour's ideological and presentational metamorphosis into 'New Labour' involved, at its heart, a determination to throw off the Conservative's claim to be the 'natural party of government' (Downes and Morgan, 2007: 209). As one insider put it, Labour's modernisers,

> Took it as read that Labour could not be elected unless they had completely eradicated any connection to the discredited party of the winter of discontent and the 1983 manifesto. (Taylor, 2002, quoted by Shaw, 2007: 153)

This included their previous reputation as a party that sought to excuse, rather than punish, law-breaking.

New Labour's 'Third Way', developed primarily by sociologist Anthony Giddens (1998; 2000), was depicted as the carving out of a principled, modern, and progressive form of social democratic state policy. Whether it was a Thatcherite (Callinicos, 2000; Cohen, 2007), determinedly pragmatic (Finlayson, 2003: 107), or neo-socialist (Rhodes, 2002: 116) ideology, Lister (2002) perhaps put it best when she argued that,

> Underpinning the third way [was] a paradigm shift in Labour Party thinking and rhetoric from the goal and discourse of equality to those of the trinity of responsibility, inclusion and opportunity. (Lister, 2002: 127)

Linked to this focus on equality of opportunity rather than wealth has been a shift in rhetorical and political focus from rights to responsibilities. Reflecting an eclectic mix of popular communitarianism, Christian socialism, social liberalism and moral authoritarianism (Lister, 2002: 139; Freeden, 1999), those provided with state support were seen as having a moral obligation to make use of those services and opportunities, thereby to better themselves, and to act as responsible and productive members of their (local, business, faith-based, educational) community. When individuals do not meet these expectations, punishments are imposed and 'welfare becomes a (re)moralizing force for influencing

behaviour' (Lister, 2002: 139). In this way, these efforts recall the forceful 'working class values' which have long been a feature of the history of the Labour party; a tradition continued by prominent Labour politicians such as David Blunkett. With, 'freedom from the fear of crime' seen as 'a major citizenship right' (Giddens, 2002: 17), we will see that the criminal justice policies of New Labour reflected the dominant thrusts of this 'Third Way' ideology, as well as echoing the 'traditional' working class values held by a portion of the Labour party.

The attempt to dominate comprehensively the middle ground was a resounding success at the ballot box (Heath, 2001). Labour obtained a Commons majority of 179 in 1997, followed by an unprecedented two further election successes in 2001 and 2005. Labour had become 'the party of middle-income middle Britain' (Heath, 2001; Kavanagh, 2002). However, as discussed further in Chapter 3, the Labour government remained notably insecure. Upon coming to power, Tony Blair fashioned the Prime Minister's Office into an 'executive office in all but name' (Burch and Holliday, 2004: 2). Centralisation of power in 10 and 11 Downing Street greatly increased, with Tony Blair involving himself in the policies of many departments and Gordon Brown tightening the Treasury's grip through Comprehensive Spending Reviews and Public Spending Agreements (Bevir, 2007; Burch and Holliday, 2004). As Jack Straw – Home Secretary from 1997-2001 and Secretary of State for Justice from 2007-2010 – tellingly put it in 2002, Blair operated 'as chief executive of various subsidiary companies' (quoted by Hennessy, 2005: 10). It became clear that as regards criminal justice policy-making, Blair had no qualms about going over Ministers' heads in making announcements or dictating policy goals to further these populist aims (Hoyle and Rose, 2001).

Both in opposition and once in power, the New Labour leadership were determined to tame the news media and to shape the media agenda. This strategy, spearheaded by Alistair Campbell, was very successful, with the majority of the news media supporting the Labour party during the 1997 election campaign. 'Middle England', seen by New Labour insiders as essentially comprising readers of the *Daily Mail* and *The Sun*, were tenaciously wooed.

The relationship between New Labour and the civil service was uneasy at times, with Blair frustrated at a perceived lack of 'private and public sector best practice [in] civil service training and management' (Burch and Holliday, 2004: 7). This was seen to hinder the New Labour desire for policymaking which would be 'strategic, holistic, focussed on outcomes and delivery, evidence-based' (Cabinet Office, 1999; Kavanagh and Richards, 2001: 3-8). Senior New Labour actors' drive for a 'smaller strategic centre,' directing a civil service with 'a more strategic and innovative approach to policy' (Blair 2004 speech, quoted in Hennessy, 2005: 8), led to great structural change (Kavanagh and Richards, 2001: 13) and, in theory, increased the ability of the Prime Minister and his Cabinet members to have their plans implemented quickly and efficiently.

The Better Government Initiative (2010) has seen such developments as contributing to the civil service's gutting of strength, wisdom and professional leadership. The increasing valorisation of the 'generalist' civil servant, moving regularly within and between departments (Page and Jenkins, 2005), has been seen by some to have further diminished the standing of the civil service as an independent power base within the Home Office (Loader, 2006: 580; Hood and Lodge, 2006: chapters 4-7). In other words, a group of people able and willing to operate as protectors of the nation's long-term, rather than short-term departmental, interests, has been lost (Bogdanor, 2001).

With one potential source of forceful resistance apparently in terminal decline, the Labour government's position was further strengthened by a notably acquiescent Parliament, with Labour MPs reluctant to vote against their own party (Cowley, 2001). The persistent leaking of policy proposals in advance of their announcement in the Commons, coupled with Tony Blair's infrequent attendance, suggested that the Labour government was able to treat Parliament with a degree of contempt (Cowley, 2001; Flinders, 2002). Further, while Select Committees play an important role in holding the executive to account, their powers are relatively limited (Rush, 1990).

Conversely, judges have played an increasingly central role in British politics (Ewing, 2009; Select Committee on the Constitution, 2007). The judiciary's increasing willingness to hear claims for judicial review has been argued to have resulted in an increasingly fractious relationship between the government and the judiciary (Rozenberg, 1997). The Human Rights Act 1998 increased the judiciary's powers further, and tensions between the Labour government and the judiciary – and outright hostility from certain ministers – became a common feature of New Labour's time in power (Jowell, 2007).

Of course, government powers are, in part, a function of the structures and traditions in which they operate. While political systems such as that seen in the United States are expressly predicated on the need to constrain and frustrate political actors by way of a series of complex checks and balances (Storey, 2010: chapters 1, 8-10; Woll, 2011: chapters 6-9), in contrast the British constitution has traditionally been based on what is generally termed the 'Westminster model.' This denotes a belief in:

> The unitary state, parliamentary sovereignty, and strong government derived from the virtual fusion of executive and legislative functions, rather than a separation of powers. (Leach et al., 2011: 329)[41]

With Westminster and Whitehall perceived as the focal point of British politics, this view of legitimate political action 'sustains a top-down, closed and elitist system of government' (Richards et al., 2008: 488). While many have declared the obsolescence of the unified, centralized state (Giddens, 1998), heralding the rise of multi-level governance and the 'differentiated polity' (Marsh et al., 2001; Pierre and Peters, 2000), it will be argued below that as a tradition (Rhodes et al., 2009: chapter 3), the centrality of the Westminster model for those involved in the IPP story holds important interpretive value.

New Labour and Criminal Justice

Researching crime policy after the Second World War, Downes and Rock (2007) were struck by the extent to which issues 'relating to crime, policing and criminal justice were minor, taken-for-granted aspects of [the post-war] consensus' and were not central to general election campaigns (Downes and Morgan, 2007: 203). However, during the 1960s, recorded crime began to rise steeply. All three main political parties 'began to indicate how they would pursue policies more effectively to combat crime' (Downes and Morgan, 2007: 203), but the rising crime rate was not expressly attributed to the ruling government's policies.

However, from the 1979 general election onwards, the issue of law and order became increasingly politicized. In the face of their declining position in public opinion polls, key aspects of the carefully constructed 1991 Criminal Justice Act were swiftly dropped by the Conservative government (Downes and Morgan, 2007: 214). The then Home Secretary

[41] See further (Bevir and Rhodes, 2003: 26-27). As will be made clear in Chapter 2, this model is understood as a 'tradition', constituting and influenced by 'inherited beliefs and practices from [actors'] communities' (Bevir and Rhodes, 2003: 34).

Michael Howard's 'Prison Works' speech of 1993 was, for many, 'the climax to this somewhat panic-stricken shift' (Downes and Morgan, 2007: 214). As part of Labour's modernizing project, Tony Blair, and his successor as shadow Home Secretary Jack Straw, had since the mid-1990s been downplaying Labour's previous focus on the structural explanations of criminal behaviour and instead began to dare the Conservative Party to see just how far to the right they were willing to take their rhetoric on law and order (Downes and Morgan, 2007: 204). By the mid-1990s a bipartisan consensus had emerged, comprising promises of more police; more crime prevention; more support for victims; and support for the logic of 'bifurcation' (Downes and Morgan, 2007: 205). 'Prison worked' and for offending there could be no excuses. The killing of James Bulger in 1993 provoked widespread public outrage and crystallized the emerging condemnatory attitude towards offenders of that time (Green, 2008: chapter 1). The Labour opposition continued to stalk the Conservatives on crime, with the political terrain of 'law and order' becoming increasingly febrile, while the boundaries of what was politically 'sayable' became ever more restricted.

In a piece entitled *Principle, Pragmatism and Populism*, Randall (2004: 191) asserts that New Labour's broad policy can be summarised in the terms in which Muncie (1999) assessed the Crime and Disorder Act 1998:

> [An] amalgam of "get tough" authoritarian measures with elements of paternalism, pragmatism, communitarianism, responsibilisation and remoralisation. And all of this is worked within and through a burgeoning new managerialism (Muncie, 1999: 169).

Labour's criminal justice policies were thus seen by many to be of a piece with their overarching ideological, rhetorical and practical approach to government (Ramsay, 2010).

Once in power, New Labour embarked on a series of 'hyperactive' efforts to radically alter the shape of the criminal law and the penal system (Commission on English Prisons

Today, 2010: 14), a 'root-and-branch remaking of the criminal justice system of England and Wales' (Tonry, 2003: 1). Developments viewed more positively included the creation of Youth Offending Teams and the Youth Justice Board in 1998, the reformulation of local probation services as the National Probation Service in 2001, an increasing focus on the needs of victims of crime, the promotion of restorative justice programmes, and the implementation of the Human Rights Act (Hoyle and Rose, 2001; Solomon et al., 2007). However, many saw these successes as outweighed – and often directly undermined – by less positive developments brought in by the slew of criminal justice legislation introduced by the New Labour government. Speaking generally, Downes and Morgan (2007: 215) summarized New Labour's efforts as having shown themselves to be, not so much tough on crime as, 'tough on the *criminal'*.

Many have criticized New Labour for exhibiting a stridently populist approach to penal policymaking. For example, Tonry (2004) described the nature of the Criminal Justice Act 2003 and its constituent parts such as the IPP (and their public representation) as exemplary of a populist, self-interested government which 'desperately care[d] that it not be blamed when the next horrifying crimes occur' (Tonry, 2004: 20). Similarly, Roberts *et al.* (2003) see many policies of the New Labour era as having tended to be driven by politicians 'responding to short-term crises prompted by high profile crises and media campaigns' (Roberts et al., 2003: 61), rather than relying on detailed research or evidence (see also Randall, 2004: 192; Charman and Savage, 2002). Indeed, the importance of 'law and order' in setting the 'New Labour project' on firm foundations cannot be overestimated (Ludlam, 2004; Dean, 2012: chapter 3). During this time, dissatisfaction spread among some criminologists, who felt that despite the government's rhetorical and financial support for evidence-led policymaking, the reality was more commonly that academics, where engaged,

were employed to provide pre-judged, 'policy-led evidence' (Glees, 2005; Hope and Walters, 2008).

Given this context, we would expect, in relation to the creation of the IPP sentence, to see a fixation with risk and uncertainty, but for the policy to have been developed with a view to the broader New Labour political project and its underpinning Third Way ideology. Similarly, we would expect to see penal populism as a key driver of the IPP sentence, but to take a particular form given the political pressures experienced by the New Labour government, and by relevant ministers, in the particular context of early twenty-first century Britain. In relation to the contestation and subsequent amendment of the IPP sentence, we would expect these developments to be conditioned by the 'culture of control' discussed above (Garland, 2001), but further by the particular concerns and goals of, and relations between, groups such as the judiciary, penal reform groups and Parliamentarians. Further, we would expect political developments such as the succession of Tony Blair by Gordon Brown as Prime Minister to affect the course of the IPP story. Finally, we would expect the extant political traditions, what has been termed the 'Westminster model' and its concomitant notion of legitimate action, to have importantly conditioned actors' individual decisions and the resulting form taken by the IPP story.

Conclusion

To recapitulate, the thesis constitutes an attempt to understand in relation to the creation, contestation and amendment of the IPP sentence *what happened*, and further, by reference to relevant actors' aims, beliefs and understandings of their context, to understand *why the IPP story took that particular form*. In this chapter we have noted the central events in relation to the IPP story. The historical, cultural, technological and political contexts of this story were then set out, which served to develop a series of expectations in relation to the likely drivers

of this case study in penal politics. The extent to which these expectations are borne out by the empirical research is explored in Chapters 3-8.

CHAPTER 2

TOWARDS AN INTERPRETIVE POLITICAL ANALYSIS OF THE IPP STORY

> In so far as we have views and concerns about the current direction of penal policy, the recognition that 'politics matters' underlines that this direction is neither inevitable nor irreversible (Jones and Newburn, 2006: 799).

This chapter sets out the methodological framework underpinning the thesis, motivated by a recognition of the importance of the need to explore events such as the IPP story in a 'substantively political light' (O'Malley, 1999: 189). The approach set out, termed an interpretive political analysis of penal policy, is argued to facilitate a historical reconstruction of the three moments of the IPP story – its creation, contestation and amendment – in a manner which provides us with a 'way in' to investigating the relevant actors' understandings of their context and reasons for action. In other words, the methodological framework facilitates the exploration of the broad trends discussed in Chapter 1 – such as the 'rise of risk' (Beck, 2000; Pratt et al., 2005) and the 'rise of the public voice' (Ryan, 2005) – in a particular context, thus drawing connections with more proximate influences such as the political ideologies (Freeden, 1996; Loader and Sparks, 2004) and political traditions (Rhodes, 2011; Rhodes et al., 2009) relied on by relevant actors.

In order to locate the present approach, existing approaches to penal politics will first be discussed. This section will focus on *Punishment and Politics* (Tonry, 2004) and *Punishment and Prisons* (Sim, 2009), works which attend specifically to the Labour era, the IPP sentence and the Criminal Justice Act 2003. By constructively probing their respective strengths and limitations, the aims and orientation of an interpretive political analysis of penal policy will be made clear. The concepts underpinning the aforementioned interpretive

political analysis of penal policy are then set out. This discussion centres on the works of Hay (2002), Bevir and Rhodes (2006a; 2003) and Loader and Sparks (2004), while the utility of Skinner's 'historical hermeneutics' (Skinner, 1970; 2002) and Kingdon's depiction of the policy process (Kingdon, 1995) is also noted. It will be argued that this approach, an interpretive political analysis of penal policy, is capable of sustaining an active role for deliberative actors, while recognising that such actors are constrained by the context in which they find themselves. By recognising that ideas provide 'the point of mediation between actors and their environment' (Hay, 2002: 208), this approach is argued to bridge the 'analytical hiatus between these ideas [of long-term conceptual and technical change discussed above] and the detail of policy change (and politicisation) in specific cultural and political environments' (Sparks, 2000b: 39). We are thus well placed to draw out how the key actors involved in the IPP story understood their context, and how these understandings and political beliefs guided their actions.

The application of this approach to a reconstruction of the IPP story will then be discussed. The boundaries of the research are made clear: primarily, its focus upon national-level, policy-oriented actors and on the three moments in the IPP story: its development from 2001-2003; its contestation by interest groups, practitioners and in the courts from 2004-2008; and its amendment in 2007-2008. Finally, the methods utilized for the research will be briefly discussed.[42]

The Existing Terrain

The following survey of the dominant approaches to penal politics is not intended to be exhaustive, but rather to serve as a starting-point from which the approach underpinning the thesis, an interpretive political analysis of penal policy, can be set out. As well as Tonry

[42] These issues are discussed in greater detail in Appendix I, reflecting on the challenges, successes and limitations of the research.

(2004) and Sim (2009), this section discusses relevant works by Garland (2001), Windlesham (1996; 1993; 1987; 2001) and Rock (2004).

In discussing the existing terrain, we can usefully begin with Garland's (2001) hugely influential *The Culture of Control*. Garland's (2001) account, drawing on Foucault's work on governmentality, provides a 'history of the present' (Garland, 2001: chapter 1). This approach, with its focus on the ineluctable relationship between power and knowledge (Foucault and Gordon, 1980), is argued to reveal

> The '*conditions of possibility*' for new strategies: that is, the invention of 'ways of thinking' that make them possible...[Second,] the sensibilities and mentalities that make new strategies desirable; that is, it reveals their '*conditions of desirability*' (Seddon, 2007: 12).

Garland supplements this Foucauldian perspective with a more sociological framework drawing on, *inter alia*, the work of Giddens (1984; 1991). Further, a psychoanalytical framework is utilized to explain government's reaction to the late modern 'crime complex' depicted by Garland (2001).

Foucault's work has been tremendously significant within criminology and beyond, as demonstrated by the prominence of works including Garland's *Culture of Control* (Garland, 2001), Simon's *Governing Through Crime* (Simon, 2007),[43] and Pratt's *Dangerousness and Modern Society* (Pratt, 2000). More specifically in relation to dangerous offenders, we can note Simon's 'Managing the Monstrous' (1998). This draws on a Foucauldian methodology in order to depict the rise of the sex offender as 'a lesson in the intransigence of evil' (Simon, 1998: 452), with a 'waste management' approach to the long-term incapacitation of 'dangerous offenders' – so defined by recourse to the actuarial tools of the 'new penology' (Simon, 1998: 456).

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[43] Simon's (2007) influential work will not be discussed in detail here, given that its primary aim was to chronicle 'what the "war on crime" actually does to American democracy' (Simon, 2007: 25).

Nonetheless, theorists have increasingly tended to view such an approach as being insufficiently attuned both to the impact of cultural trends on the nature of penal politics and the importance of politics – as motivating beliefs and as a process of contestation – in relation to developments in penal policy (Garland, 2004; Pratt, 1997: chapter 1; Seddon, 2008). The latter issue will be returned to shortly. In relation to culture, we can now turn to Tonry's *Punishment and Politics* (2004).

'Why is England the only major Western country whose government has chosen to emulate American crime-control policies and politics of the past quarter century?' That is the central question which propels Tonry's *Punishment and Politics* (2004: vii). Examples of what for him are 'US-style' policies that were followed by the New Labour government include 'three-strikes' laws, mandatory minimum sentences, zero-tolerance policing, a 'hyperbolic anti-crime rhetoric' (2004: vii), the highest imprisonment rate in Europe and 'a Criminal Justice Act [2003] full of symbolic tough-on-crime measures', such as the IPP sentence (2004: viii, 141-3).

In explaining these developments, Tonry (2004) points to the English culture as facilitating the Labour government's approach to penal politics. Tonry suggests that there is a key structural explanation for England's acquiescence towards the pursuit of 'US-style' penal policies in contrast to the rest of Europe: culture. For him

> English culture is more risk-averse than other Western cultures. People...are especially susceptible to law-and-order appeals...English culture accords little respect to offenders as human beings entitled to equal respect and concern...Third, English cultural values are more punitive toward offenders than are those of many other Western countries (Tonry, 2004: 55).

What is most striking is the lack of an identification of causal mechanisms which would plausibly explain how these purported cultural trends were understood by, and influenced, the relevant actors and thus resulted in the above-mentioned policy outcomes.

Rather, we are provided with a stridently voluntaristic account where a handful of powerful, apparently largely unfettered, individuals determined and pushed through New Labour's criminal justice policies (see below), coupled with a structural account where the country's culture provides the 'background conditions' which drove the events discussed (Tonry, 2004: 55).

This is not to suggest that cultural accounts are not valuable. Rather, it is to point to the limits of such approaches where the goal is better to understand the nature of penal politics in particular instances. Loader and Sparks (2004) have argued convincingly that such approaches hold a fundamentally misguided view of the determinants of change in penal policy. For them, works such as *The Culture of Control* (Garland, 2001) fail to engage to a satisfactory extent with 'contestation and resistance' in the penal field (see also O'Malley, 2000: 162), failing to treat 'the conflict between cultural meanings and political ideas as central to understanding trajectories of change' (Loader and Sparks, 2004: 16). Before the favoured approach is set out, influenced by, and argued to be capable of addressing such concerns, we must conclude the survey of the existing terrain.

As noted above, Tonry (2004) combined a cultural explanation for penal change with an agent-centred account. This can be described as an 'intentionalist' account of penal policymaking – accounts which focus predominantly on the aims and actions of key actors and, to differing extents, view them as relatively unfettered, relatively autonomous, agents. Stating that politicians 'adopt bad policies for four kinds of reasons – evidence, ignorance, ideology and self-interest' (Tonry, 2004: ix), Tonry suggests that the latter two factors explain New Labour's approach to penal policy and politics. These factors are seen as emerging from a desire for policy-as-symbolic action, with little interest in whether the policy will actually work. In this regard, it is worth citing Tonry's explanation for the creation of the IPP in full:

> The government does not much care about civil liberties of offenders and desperately cares that it not be blamed when the next horrifying crimes occur. Sexual offences strike powerful emotional chords in many people. Why, by sensibly distinguishing between those that genuinely threaten serious harm and those that do not, risk having someone, anyone, accuse the government of insufficient vigilance concerning sexual deviance? (Tonry, 2004: 20)

Tonry's critique (wonderfully described by Morgan (2005) as an 'eloquently delivered head-butt') is forceful and not implausible. However, it is nonetheless problematic. This is because the work is underpinned by a straightforward dichotomy between universally bad and extremely powerful ministers, and wise but ultimately powerless officials (Tonry, 2004: ix, 146). On the other hand, the discussion of the effect of the punitive English culture implies that non-political actors resemble 'cultural dupes' (Jessop, 1996: 126), lacking the capacity to challenge or reject this presumably hegemonic culture.

Further, Tonry's focus on the political *rhetoric* and policy *proposals* of New Labour as regards his intentionalist account can be critiqued in the terms set forth by Zedner (2002) in relation to Garland's *The Culture of Control*. Zedner cautions the reader to remember that 'rhetoric is far from synonymous with policy and policy is not one and the same as practice' (Zedner, 2002: 348). The danger, ironic for such an agent-centred account such as Tonry's (2004), is that by 'reading off' intentions on the basis of policy documents, one risks a failure to explore the constraints and concerns which the governmental actors themselves faced; failing to recognise them as 'conscious, reflexive and strategic', and as constrained by (their conception of) the context in which they find themselves (Hay, 2002: 127). An account of causal mechanisms, actual or potential, is not provided and we are thus left to speculate about the way in which the apparently 'exceptional' English culture worked to condition the development of specific policies. Further, and disappointingly for a 'political' account of the development of the CJA 2003, the reader is presented with a narrative which largely ignores the role of members of the civil service, judiciary, Parole Board, Prison and Probation

Service, Parliamentarians, special advisers, penal reform groups, academics and others in such developments.[44] In short, an unhelpfully limited view of the political sphere is presented.

Another variant of 'intentionalist' work is that of Lord Windlesham (1987; 1993; 1996; 2001) and his detailed narrative historical account of the changing nature of crime control in the latter decades of the twentieth century. Constituting a Westminster-centric, insider account of these developments, he charts the decline of the 'liberal consensus' approach to the government of crime in the 1950s and 1960s and the rise of a populist and more muscular, hyperactive approach to these issues. For all of its merits as a historical resource, Loader and Sparks (2004) rightly argue that if one wishes to understand why these developments occurred, the 'scant reference to either the economic, social and cultural contexts within which they are played out, or to the criminological and political ideas that relevant actors implicitly or expressly mobilise and tussle over' leaves us with few sociological clues to go on (Loader and Sparks, 2004: 11).

Rock takes a similarly detailed approach in his account of the development of victims' rights in the United Kingdom (Rock, 1990; 2004). Underpinned by a symbolic interactionist methodological framework, the works constitute a detailed exploration of the ways in which certain issues develop in fits and starts, (fail to) gain 'critical mass', and are altered as different actors become involved in the process of policies moving out of the hands of their initial creators. This is of undoubted value; indeed, such detailed analysis will be argued below to be a crucial part of any interpretive undertaking. However, one can suggest that Rock's approach fails sufficiently to interrogate the wider cultural and political landscape on which these policy processes take place. In other words, while the detail of actors' aims

[44] Several of these actors do make tantalizingly brief appearances. See, for example, Tonry (2004: 146).

and efforts is crucial, one must avoid being so detailed that the connections of these developments with broader trends become obscured.

We move, finally, to Sim's *Punishment and Prisons* (Sim, 2009). Like Tonry, Sim is fiercely critical of the New Labour, and the preceding Conservative, governments' approach to penal policy. This work presents a re-appraisal of the history of penal politics and policy-making in England and Wales since the 1970s. Where Tonry's critique seems to reflect a modern Enlightenment belief in the potential of the responsible use of increasingly accurate and informative evidence to bring about positive change in the penal sphere, Sim argues that more fundamental change is required. He is stridently abolitionist (Sim, 2009: chapter 8), with the book reflecting a neo-Marxist approach succinctly captured in the chapter title, 'Those with no Capital get the Punishment' (Sim, 2009: chapter 6). His discussion in this chapter of the role of the 'deeply embedded' idea of the prison for the New Labour and preceding Conservative governments is striking and all the more powerful for its use of 'accounts from below' to depict the contrast between the ideology and the reality of the prison (Sim, 2009: 122-123).

In terms of his theoretical framework, Sim is keen to emphasize that 'the state is a much more contingent and contradictory set of institutions than early Marxist writers argued' (Sim, 2009: xi). He recognises that the state is not a unitary, omnipotent entity; that, rather, 'its powers...are activated through the agency of definite political forces in specific conjunctures' (Jessop, 1990; quoted in Sim, 2009: 366-7). Sim further notes the central role of ideas in the development of policy, thus arguing that:

> New Labour's prison philosophy and practice was...built on the idea that the working prison was an institution, which could, and would, play a key role in the lives of the socially excluded via the twin processes of normalization and reintegration. (Sim, 2009: 107)

Sim sees this general goal as connecting with an emerging risk discourse in which incapacitation becomes a key strategy (Sim, 2009: 112). It is here that the IPP sentence appears, provided as an example of these processes and the damage the confluence of these discourses have caused.

The critique Sim presents is powerful and persuasive. It is constructed on a view of developments as being not 'the result of an instrumental conspiracy involving various levels of the state and its servants coming together to crush challenges to the prevailing order,' but rather the result of contestation and contingency, albeit in the context of 'hegemonic power networks...oriented towards a vision of confinement' (Sim, 2009: 136-137). These processes are aided and abetted by a more general culture of 'disengagement, discontinuity and forgetting' (Bauman, 2004: 117, quoted by Sim, 2009 161).

Nonetheless, there is a tendency towards inevitability in *Punishment and Prisons*, in particular when government policies and politics are being discussed. A critical reader would suggest, therefore, that while the methodology utilized is capable of demonstrating how things might have been different and how we might go about challenging the hegemonic discourse Sim so eloquently describes, the conclusion does not fully achieve these aims. The roles and involvement of those actors notably absent from *Punishment and Politics* (Tonry, 2004) are discussed by Sim (2009). Nevertheless, we are again left unclear as to exactly *how*, for example, the media or policy advisers were important – what did they do and how did these efforts impact upon the beliefs and actions of the relevant state actors? Further, the persistent discussion and critique of 'the state' leaves Sim perilously close to falling back into the early Marxist works and a conceptualization of the state which he rightly criticizes as overly simplistic.

Notwithstanding these limitations, *Punishment and Prisons* (Sim, 2009), takes us closer to a position which explores the relationship between cultural developments, structural

change and politics in a way which allows for a nuanced, politically-sensitive account. It begins to overcome a central critique of many of the 'cultural' works noted above, in particular those attempting to construct a Foucauldian 'history of the present' (Foucault, 1977). Critics argue that such works, while gesturing towards 'countervailing forces' (Garland, 2001: xii) and the possibilities that the dominant cultures 'can still be rethought and reversed' (Garland, 2001: 201), fail to take seriously 'the "local" political and cultural struggles out of which "global" change is fashioned' (Loader and Sparks, 2004: 17). Because of this, because of the underlying theoretical framework, they in fact present a decidedly deterministic, dystopian, vision of the present and future (Zedner, 2002).

None of this is to suggest that issues of culture are unimportant in understanding the unfolding of 'critical moments' in penal history (Loader and Sparks, 2004). To take one pertinent example, Pratt's (2000) discussion of the relationship between the changing nature of modern society and the notion of 'dangerousness' is illuminating. However, while *Governing the Dangerous* (Pratt, 2000) is an important attempt to pay greater attention to culture in the analysis of 'dangerousness', much work is still required if we are to explain satisfactorily the creation of, and reaction to, 'dangerous offender' legislation in more localized contexts.[45]

For while politicians are often keen to portray themselves as tied by circumstance to acting as they did, these structural conditions are not 'cast iron cages' of inevitability (Cheliotis, 2006). Politicians (and judges, officials and so on) are not bound by fate to act as they do, but instead operate within a particular cultural, structural and institutional reality which presents constraints *and opportunities*. Fate, therefore, is 'something which is in part constructed by us' (Gamble, 2000 16).

[45] An argument with which Brown and Pratt appear to concur. See Brown and Pratt (2000).

This brings us back to the strength of *Punishment and Prisons* (Sim, 2009), but also a weakness: the structural-relational approach to political analysis pursued (Jessop, 1990; 1996; Hay, 2002) allows Sim to explore how the broader structural factors *worked through*, and were *mediated by*, actors and their understanding of the contexts in which they perceive themselves to be operating. However, the broad sweep of the book, taking in developments over 40 years in approximately 200 pages, to an extent works against the methodology utilized. We are provided with a richer tapestry, but as with many of the cultural works discussed above, we are left unclear as to exactly *how*, for example, the media or policy advisers were important – what did they do and how did this interact with the views and actions of the relevant state actors?

Having considered the existing terrain, I will now set out an approach which is argued to be capable of satisfying the criteria noted above for a desirable methodological framework. This approach, an interpretive political analysis of penal policy, is argued to be well-equipped to bridge the 'analytical hiatus between these ideas [of long-term conceptual and technical change] and the detail of policy change (and politicisation) in specific cultural and political environments' (Sparks, 2000b: 139).

Towards an Interpretive Political Analysis of Penal Policy

> 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).

It is argued that in order to make sense of the IPP story,[46] the central role of politics – as beliefs, traditions, contestation and contingency – must be taken seriously. As Loader and

[46] In other words, to understand why the Imprisonment for Public Protection provisions of the Criminal Justice Act 2003 were considered necessary, constructed in a particular form, amended as they were in 2008, and

Sparks (2004: 16) have put it, the aim is to develop ‘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.’ The interpretive political analysis of penal policy now set out provides a means of reaching such a goal.

This approach draws primarily on the constructive political analysis set out by Hay (2002) and the interpretive political analysis promoted by Bevir and Rhodes (2003; 2006b).[47] These works view the political world as ‘an inherently intersubjective domain’ (Hay, 2002: :24),[48] with the relationship between structure and agency being dynamic, and contingency being central to political activity. Bevir and Rhodes (2003; 2006b) make clear the central features of such an orientation. Such approaches ‘concentrate on meanings [and] beliefs’; reflect a view that ‘beliefs and practices are constitutive of each other’; and emphasize ‘the contingency of political life’ (Bevir and Rhodes, 2006b: 1-3). The term ‘belief’ is used to ‘remind ourselves that [actors’] understandings are the properties of situated agents’ (2006b: 7).

Bevir and Rhodes conceive of change as arising ‘as situated agents respond to novel ideas or problems. [Change] is 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, 2006b: 5).[49] And it is ideas which provide ‘the point of mediation between actors and their environment’ (Hay, 2002: 208). Therefore, actors are seen as reflexive, strategic and

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reacted to or contested by relevant actors such as the prison service, interest groups and the judiciary as they were.

[47] The terms ‘constructivism’ and ‘interpretivism’ are used somewhat interchangeably in this chapter. The term ‘constructivism’ is used here to refer to the work of those such as Kratochwil (1989), Krasner (1984) and promoted by Hay (2002), rather than the anti-realist, post-modern position which it sometimes denotes within sociology.

[48] As Leftwich (2004: 114) puts it, most of collective human activity ‘is inexplicable outside its collective context (let alone the meaning which actors themselves attribute to it).’

[49] For a similar approach to these issues, drawing on the concept of a ‘strategic actor in a strategically selective context’ (Jessop, 1996), see Hay (2002: 128).

purposive, but operating within a strategically selective context of which they have imperfect knowledge.

Here, ideas take on two forms. The first is as 'beliefs', which for Bevir and Rhodes (2006b) 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, 2006b: 7)

Beliefs here are seen as referring to actors' understandings of concepts such as legitimacy, justice, safety, fairness and so on (which in turn influence their understanding of the context and constraints which they encounter),[50] and also actors' political ideologies (liberal; social democrat; neo-liberal and so on). Political ideologies are here understood, following Freeden (1996), as a system of:

> 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. (Freeden, 1996: 43)

These beliefs and understandings are clearly likely to interact with and influence one another, affecting actors' understanding of relevant concepts such as risk, the public, and dangerousness. Both Bevir and Rhodes (2003; 2006b) and Freeden's (1996) definitions conceive of beliefs in a way which allows for them to be connected to the lived reality of relevant actors in particular events, thus facilitating the kind of case study research this thesis represents.

A second term introduced by Bevir and Rhodes, constituting the second form of 'idea' noted above, is the notion of 'tradition'. Tradition is used by Bevir and Rhodes to capture 'the social context in which individuals both exercise their reason and act' (Bevir and Rhodes,

[50] On likely central concepts, see Loader and Sparks (Loader and Sparks, 2004: 13).

2006b: 7), reflecting the constructivist recognition that 'political institutions, practices, routines and conventions appear to exhibit some regularity or structure over time' (Hay, 2002: 94). Predominantly a 'first influence on people' (Bevir and Rhodes, 2006b: 7), traditions are 'a set of understandings someone receives during socialization' (Bevir and Rhodes, 2006b: 7). A good, and as we will see very pertinent, example is the Westminster model of British politics (Rhodes et al., 2009). Traditions and beliefs are inter-related terms, with the former constituting combinations of the latter, starting points for actors situated in particular contexts. The Westminster model, on this view, denotes a set of beliefs which can be seen as a tradition into which politicians, civil servants are inculcated upon becoming involved with the internal world of British politics (Bevir and Rhodes, 2006b: chapter 8). The crucial point to be grasped is that it is these common understandings which '[make] possible common practices and a widely shared sense of legitimacy' (Taylor, 2004: 23).[51]

Of course, none of this is to argue that actors are entirely autonomous beings, free of constraints and untouched by fundamental cultural and social change. However, constructivist approaches move beyond a materialist, or 'structuralist', understanding of the drives and constraints of relevant actors. Rather, it is argued that 'it is *perceptions* of interests rather than material interests *per se*' which are of central importance (Hay, 2002: 20). An instructive example is globalization. Many argue that globalization has rendered the sustaining of a relatively closed, social-welfarist state near-impossible. However, the approach discussed here helps us to recognise that the material constraints are not *necessarily* as tight and inevitable as one may assume. Rather, it is an actor's *belief* that they are so constrained which works to sustain, nurture and even generate the reality which they perceive

[51] See also Skowronek's (1995) suggestion that when considering actors within state institutions, the 'distinctive criteria of institutional action are official duty and legitimate authority' and that therefore 'institutions do not simply constrain or channel the actions of self-interested individuals, they prescribe actions, construct motives, and assert legitimacy' (Skowronek, 1995: 94).

to already be in existence (Hay, 2002: 209).[52] Thus, 'the social construction of globalization becomes crucial to explaining political actions irrespective of our views about its adequacy as an account of the world' (Bevir and Rhodes, 2006b: 10). In short, then, the approach set out here emphasizes the crucial constitutive role of ideas in understanding the events under consideration and their relation to broader changes or trends seen within that state or society. It turns our interest away from, for example, accounting for the *effect* of the 'rise of risk' and the 'rise of the public voice' (Pratt et al., 2005; Ryan, 2005) *per se*, and towards an investigation of how the actors' beliefs and goals influenced their understanding of, and response to, specific problems (and indeed the construction of such 'problems') which relate to these purported broader trends.

Implicit in the above, and central to political activity, is politics as contestation: the importance of 'political combat' (Loader and Sparks, 2004: 16). The historical hermeneutics of Skinner (1988; 2002) is useful here in making sense of the output of political activity (speeches, reports, judgments and so on) in such terms. Skinner argues that, if we are to understand a certain statement or intervention, a 'speech act', in context, then we must situate that action of the minister, civil servant, senior judge (and so on), 'in its linguistic or ideological context' (Skinner, 1988: 9). He argues that,

> Whatever [illocutionary] intentions a writer may have, they must be conventional in the strong sense that they must be recognisable as intentions to uphold some particular position in argument, to contribute to the treatment of some particular topic, and so on.' (Skinner, 2002: 102)

In other words, we can only begin to understand what a relevant actor may have been trying to convey to their audience by grasping the range of possible ways in which a

[52] Hay argues that globalization is 'at best...a *tendency* to which *counter-tendencies* may be mobilised' (Hay, 2002: 255). Similar arguments have been made as regard shifts within criminal justice relating to risk-centred and managerialist discourses (see, eg, Loader and Sparks, 2004; Robinson and Burnett, 2007). Taking this view does not, of course, rule out the possibility that actors may consciously, and cynically, use such purported inevitabilities to justify political decisions.

particular concept (for example, dangerousness, risk, justice), in the discussion of a particular issue, at a particular time, could recognisably have been utilized. This demands, first, an understanding of the relevant norms and issues of that time, the political landscape on which the events under consideration occurred. While this speaks to the 'background' against which actions occur, connections with Bevir and Rhodes' (2006b) notion of 'tradition' are equally clear.

Having gained a sense of what counted as a legitimate – or indeed illegitimate – intervention into a particular debate, we must then discern the problematic political activity or activities to which the speech-act was a response. Thus we must pay close attention to context, to the multitude of potentially relevant concerns of the actors involved. To give one example, we might find that to make sense of the senior judiciary's dealing with reviews of the legality of the IPP, we must take into account the quality of the relationship between the judiciary and government and the ongoing debate over the changing constitutional location of the Parole Board.[53] With this framework taking shape, I will now make clear the understandings of key concepts which underpin this interpretive political analysis of penal policy.

The State

In conceptualizing 'the state',[54] the assertions of Peters (2004; Peters and Pierre, 2006b) are significant. The value of a pluralist conception of the state is emphasized, recognising the multiplicity of actors involved in the governance of issues of public concern (Smith, 2006). However, Peters and Pierre (2006a) remind us that government actors still tend to be the central, and most powerful actors, in the governance of most issues of public concern. As Peters (2004) puts it, politics is,

[53] See Chapter 6.

[54] For a discussion of various conceptions of the state, see Jessop (1990: 260-71) and Hay and Lister (2006).

> Predominantly organizational and institutional politics...[and] the day-to-day conflicts over policies will be primarily at the level of ministries, public bureaucracies and, perhaps, courts. (Peters, 2004: 27)

Therefore in conducting political analysis, one must take into account the relevant organizations and individuals within government, other state bodies such as the courts and Parliament and additionally the pressure groups, think tanks, journalists, academics and others who are potentially involved in or impact on the governance of a specific issue. Such a conception echoes Colebatch's (2002) discussion of policymaking as engaged in by 'policy collectives' and 'interested observers.'

While the tempered pluralism promoted by Peters (2004) is utilized in terms of recognising the variety of actors involved in developments such as the creation, contestation and amendment of the IPP, governance as a frame through which to make sense of such episodes will be resisted. Such an approach risks assuming too high a level of convergence between different actors' aims and interests, and to obscure the way in which political outcomes are often affected by concerns outwith the immediate issue under consideration and buffeted by apparently unrelated political conflicts. Therefore, the approach set forth here emphasizes the importance of conceiving of politics in terms of *process*. Politics is thus 'a universal and pervasive aspect of human behaviour', a 'pattern of interaction between people, resources – and power' (Leftwich, 2004: 100-1; see also Nicholson, 2004).

Power

Any political analysis involves recognition of 'the "transformatory capacity" of social agents, agencies and institutions' (Held and Leftwich, 1984: 114, quoted by Hay, 2002: 73-4). The approach set out here draws on Hay's (2002) promotion of two analytical notions of power: context-shaping (*i.e.* indirect), and conduct shaping (*i.e.* direct). Power is defined more generally as 'the ability of actors (whether individual or collective) to "have an effect" upon

the context which defines the range of possibilities of others' (Hay, 2002: 185). Drawing connections between the above discussion of constraints, context, beliefs and traditions, Jessop (1996; 1990) suggests that,

> If power involves an agent's production of effects that would not otherwise occur, it is essential both to identify the structural constraints and conjectural opportunities confronting those agents and the actions that they performed which, by realizing certain opportunities rather than others, "made a difference." (Jessop, 1996: 125)

Structure and Agency

One 'solution' to the perpetual 'problem' of the conceptualization of the relationship between structure and agency is Giddens' (1984) 'structuration theory'. Giddens argues – echoing Marx – that social processes are 'brought about by the active constitutive skills of...historically located actors', but 'not under conditions of their own choosing' (Giddens, 1976: 157). Thus structure is both the medium and the outcome of the conduct it recursively organises (Giddens, 1984: 374). While this seems to echo much of the above discussion, crucially he suggests that, while ontologically intertwined, epistemologically speaking they are 'two sides of a coin' and thus 'we as analysts are incapable of capturing that "real" duality of structure and agency, confined as we are to view the world from one side of the coin or the other at any given moment' (Hay, 2002: 120; Giddens, 1984: 288-93).

However, Jessop (1990; 1996) has proposed an alternative, and for the present purpose more profitable, approach, where it is argued that by focussing on the 'strategic actor within a strategically selective context' (Hay, 2002: 128; Jessop, 1996) we are able to,

> Emphasise the strategic content of action...that agents both internalize perceptions of their context and consciously orient themselves towards that context in choosing between potential courses of action (Hay, 2002: 129).

Therefore, actors are seen as reflexive, strategic and purposive, but operating within a strategically selective context of which they have imperfect knowledge.

Politics and Law

While ‘law is an essential part of politics’ (Drewry, 1975: 1), the meaning of this assertion varies greatly. One view, which we might term the traditional account, asserts that the law is expressly non-political and the judge a purely rational, impartial, interpreter of legislation and case law: ‘a political, economic and social eunuch’ (Griffith, 1997: 290).

This thesis rejects such an approach. As Stone Sweet puts it, ‘I reject the law/politics distinction on empirical grounds. The decision-making behaviours that constitutional review engenders are always both “judicial” and “political”’ (Stone Sweet, 2000: 139). Connections can be made here with writers who have sought to bring a cultural perspective to bear on the law in attempting to understand how, why and in what terms particular judgments were arrived at and justified (Nelken, 1997; Rosen, 2006; Sarat and Simon, 2003). Echoing aspects of the interpretive approach set out above, Rosen (2006) has argued that,

> Seen from a cultural perspective, even those systems that...speak of themselves in self-serving terms of rationality...nonetheless betray, at a broader level, those features of logic and socio-logic without which their utterances would be neither comprehensible nor accepted (Rosen, 2006: 134).

King (1997: 127) has argued, further, that, ‘Law, as a communicative social subsystem, has no access to reality except through its own selectivity.’ In the context of the theoretical framework set out above, we can suggest that this selectivity in the legal sphere can be seen as an example of the way in which actors understand their context, and orient their actions to that context, by reference to the beliefs they hold and the traditions in which they have been socialized (Bevir and Rhodes, 2006b: chapter 1). Applying an interpretive political analysis to legal judgments involves, therefore, their ‘deprivileging’. While their

legal character is recognised, broader issues such as the judges' sense of, for example, their role in the judicial hierarchy and the meaning of the doctrine of the separation of powers (and the possibility that particular judgments are intended, in part, as interventions on a particular political debate) are also taken into account.

Politics and Policymaking

This thesis is concerned with making sense of key moments in relation to the IPP sentence, which together have been termed the IPP story. Given that two of these moments involve the development of policies and resulting legislation, we can usefully consider the nature of policymaking and its relationship to politics. Kingdon's (1995) conceptualization of policymaking, the events leading up to authoritative policy decisions,[55] provides us with a useful heuristic device which strengthens the interpretive approach set out above, by enriching our conception of the processes which are subject to and (re)constituted by the contestation and contingency in the political process.[56]

Kingdon (1995: 16-7) conceives of the policy making process as consisting of three 'streams'. These are termed the 'problem' stream, the 'policy' stream and the 'political' stream. These come together to affect the setting of an agenda and the working up and consideration of alternatives which result in a particular legislative or administrative outcome.[57] He suggests that, 'speaking rather generally of our three process streams, the agenda is affected more by the problems and political streams, and the alternatives are affected more by the policy stream' (Kingdon, 1995: 168).

[55] The final vote and giving of Royal Assent to an Act of Parliament, for example.

[56] While Kingdon does not identify his work as interpretive or constructivist, his emphasis on contingency, the importance of human interactions and key political ideas means that the work can be read as a particularly straightforward depiction of the key tenets of an interpretive approach to political analysis (Kingdon, 1995: chapter 9).

[57] Kingdon (1995: 16-7) defines the agenda as 'the list of subjects of problems to which government officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time.'

As regards the problem stream, Kingdon (1995: 90) notes that, 'We put up with all manner of conditions every day...Conditions become defined as problems when we come to believe that we should do something about them.' We should therefore remain curious as to how and why a particular condition came to be seen as a 'problem' worthy of attention, at that time and in those terms. Kingdon suggests that problems often come to the attention of decision makers because data reveal a problem to be 'out there'. However, we are reminded that,

> The data do not speak for themselves. Interpretations of the data transform them from statements of conditions to statements of policy problems (Kingdon, 1995: 94).

Agendas are not only affected by the problem stream, but also by the political stream. Not only are there particular events – a plane crash, or horrific murder, for example – which may give an issue 'a little push' (Kingdon, 1995: 94), but a change of government or the appointment of a particular minister leads to some issues gaining prominence while others are effectively shelved (Kingdon, 1995: 94, 145). In terms of the dynamics at work, Kingdon suggests that,

> Independently of the problems and policy streams, the political stream flows along according to its own dynamics and own rules. It is composed of such factors as swings of national mood, election results, changes of administration...and interest group pressure campaigns (Kingdon, 1995: 162).

As regards the policy stream, Kingdon (1995: 16-7) reminds us that agendas and the alternative responses considered are commonly influenced by 'a process of gradual accumulation of knowledge and perspectives among the specialists in a given policy area, and the generation of policy proposals by such specialists.' In other words, while it is the minister who makes the authoritative choice as regards policy, the alternatives considered and the form of the eventual policy is generally not just

influenced, but often profoundly shaped, by the policy process and the actors – potentially civil servants, practitioners, interest groups, academics, politicians, political advisors and others – involved therein (Page, 2003; Page and Jenkins, 2005).

In terms of such work operating as a critical political analysis, research which focuses on ‘meanings that shape actions’ (Bevir and Rhodes, 2003: 17), on developing an ‘interpretation of interpretations’ (Bevir and Rhodes, 2006b: 1), holds within it the potential to open up a space between what actors considered to be inevitable, and the contingency and contradiction which one would expect to uncover. It makes it possible, in other words, for us to see ways in which things could have been, and can be, different.

Towards an Interpretive Political Analysis of the IPP Story

The IPP story comprises three key moments: the *creation* of the sentence; *contestation*: efforts by the senior judiciary, penal reform groups and others to ‘have an effect’ (Hay, 2002: 185) on the future course of the IPP story following its implementation; and the *amendment* of the sentence in 2007-2008. The temporal scope of the thesis is 2003-2008. However, as regards the first moment, given that ‘tracing origins involves one in an infinite regress’ (Kingdon, 1995: 71), earlier related developments, primarily the Halliday report (Halliday, 2001) and the DSPD proposals (Home Office, 2005) are explored where relevant. In other words, the starting point is proximate and the scope limited enough to allow us to focus in detail upon the ‘complex combination of factors’ which were involved in the development of the IPP (Kingdon, 1995: 71,76), while being extensive enough to capture the messy realities of political life. This first moment is explored in Chapters 3 and 4.

As regards contestation at the national level, efforts directed at the policy *as policy* occurred in several ways.[58] One aspect, explored in Chapter 5, is the efforts of penal reform groups, Parliamentarians, organizations such as the Prison Service and the Parole Board and relevant unions to promote their concerns in relation to the IPP sentence and to achieve positive change. The chapter focuses on the period between the sentence's implementation (April 2005) and its amendment (July 2008).

The senior judiciary were also heavily involved in the course of the IPP story in terms of the various legal challenges made and this aspect is explored in Chapter 6. As summarized in Chapter 1, the first set of cases involved the question of the way in which the sentence itself should be interpreted by the trial judiciary. The key case here is *Lang*.[59] The second set of cases involved the question of the legality of the continued imprisonment of IPP prisoners whose tariff period had expired, but whose efforts at release – or a meaningful hearing of their case – were being thwarted by the resource limitations of the prison service and the Parole Board. The issue was initially heard in the High Court,[60] before being appealed to the Court of Appeal[61] and finally the House of Lords.[62] These cases took place between November 2005 and May 2009.

Chapter 7 explores the developments leading to, and the process of, the amendment of the IPP sentence which culminated in the Criminal Justice and Immigration Act 2008

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[58] The term 'policy *as policy*' is intended to distinguish between the national-level events which are the focus of the thesis, and the various ways in which 'street level bureaucrats' may have attempted to nuance, shape or contest the IPP sentence in prisons, sentencing courts or elsewhere (Lipsky, 1980).

[59] *R v Lang et al* [2005] EWCA Crim 2864 ; [2006] 1 WLR 2509. The other leading case is *Johnson* [2007] 1 Cr.App. R (s) 674

[60] *R. (Wells) v Parole Board; R. (Walker) v Secretary of State for the Home Department* [2007] EWHC 1835; [2008] 1 All ER 138. The decision was followed in *R. (James) v Secretary of State for Justice* [2007] EWHC 2027 (Admin)

[61] *R. (Walker) v Secretary of State for Justice (Parole Board intervening); R. (James) v Same (Same intervening)* [2008] EWCA Civ 30; [2008] 1 WLR 1977

[62] *R. (James) v Secretary of State for Justice (Parole Board intervening); R. (Lee) v Same (Same intervening); R. (Wells) v Same (Same intervening)* [2009] UKHL 22; [2009] 2 WLR 1149

receiving Royal Assent on 8 May 2008. It begins with the appointment of Jack Straw as Secretary of State for Justice on 28 June 2007, though, as with the IPP's creation, earlier events – various reports and other efforts which preceded the new Secretary of State's arrival and in part prompted the resulting response – will also fall within the scope of the chapter.

The first aim of the thesis is therefore descriptive: to address, in relation to the creation, contestation and amendment of the IPP sentence, the deceptively simple question: *what happened?* However, the goals of the thesis go beyond this desire for a nuanced historical reconstruction of the IPP story. By reference to relevant actors' aims, beliefs and understandings of their context, the thesis seeks to understand *why the IPP story took that particular form*. In other words, the interpretive political analysis of penal policy set out in this chapter is utilized to explore how key concepts relating to the trends discussed in Chapter 1 – primarily the 'rise of risk' and the 'rise of the public voice' – were understood by the relevant actors, mediated as they were through the actors' political beliefs and traditions. By providing such an account of this important development in penal policy, the thesis contributes an account of how actors' understandings of these concepts, political beliefs and political traditions came together in relation to this particular iteration of the 'dangerous offender' problem.

Methods

I will now note briefly the methods which were utilized for this research project. For a more detailed, and more reflexive, discussion of the methods used, see Appendix I. The thesis draws on a range of documents, including Hansard records, legal judgments, government publications, newspaper articles and a small, though important, number of government documents not publicly available. In addition, the thesis draws on 53 interviews conducted

with pertinent ministers, officials, judges, penal reform group members, practitioners, academics and other relevant actors.

Documents were gathered in an iterative process, with further documents discovered following guidance by interviewees, or references within documents already obtained. Hansard records were obtained through a combination of word searches and reading of relevant Bill stage debates, while access to a substantial library of relevant newspaper clippings held by a prominent penal reform charity assisted with collection of this form of data. Freedom of Information (FOI)[63] requests provided access to an important, though limited, number of relevant internal reports, projections and meeting minutes. In addition, biographies and autobiographies of relevant public figures (primarily ministers) were a useful source. In relation to legal judgments, the 'deprivileging' of legal judgments which follows from the interpretive sociology employed (see above) meant that in addition to case reports, speeches, articles and other documents produced by, or speaking about, relevant judges were also collected.

The documents collected were intended to serve the reconstruction of the IPP story directly, but also to facilitate a detailed understanding of the context in which this story occurred and the other goals and concerns preoccupying the relevant actors at that time. Finally, document sources, generally considered to be more a more accurate source of factual information, were used for triangulation, where,

> Information obtained by interview was cross-checked with documentary information, the latter being a more reliable guide to factual and chronological data (Chan, 1992: 19).

As regards interviews, prospective interview subjects were identified initially by the use of relevant government publications, other publications (legal judgments, penal reform

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[63] Freedom of Information Act 2000.

group reports and so on) and resources such as the *Civil Service Yearbook*. After appropriate ethical approval was obtained from the University of Oxford, I contacted these individuals, explaining the nature of the research and setting out relevant ethical assurances. As the interviews were conducted, a snowball sampling method was used to identify additional prospective interviewees. The interviews were conducted from September 2010 to October 2011. In total, 53 completed interviews were obtained, with the majority being recorded and then transcribed.

In terms of the analysis of the data, QSR NVivo qualitative analysis software was used to code the interviews and documents obtained by reference to themes ('risk', 'legitimacy' and so on) and also historical moments ('creation', 'amendment development pre-Parliament', and so on). An initial reconstruction of the IPP story was drawn up and initial conclusions drawn regarding the themes emerging from the research. An iterative process then ensued whereby further analysis of interviews conducted and documents obtained would change – dramatically or more subtly – the interpretation of elements of the IPP story and actors' understanding of it. In part, this was due to more recent developments in relation to the IPP sentence prompting further public statements by relevant actors. In addition, the passage of time and the change of government meant that further relevant books and articles emerged which discussed the period 2003-2008 and the IPP sentence, or related events.[64] Let us now turn to the historical reconstruction which draws on the empirical research, beginning with the creation of the IPP sentence.

[64] Not least political biographies: see, for example, Blair (2010), Mandelson (2010) and Straw (2012).

CHAPTER 3

ORIGINS: POLITICAL VULNERABILITY, LEGITIMACY AND ILLUSORY DEMOCRATIZATION

> There is an observable and universal need to justify the possession of government by claiming legitimacy (Barker, 2001: 46).

> We recognise that this issue is of critical importance to the public and are determined to implement a range of proposals to address the fear many people have of being attacked (Home Office, 2002: 95).

This chapter focuses on the pressures driving the Imprisonment for Public Protection (IPP) sentence, considering the problems to which the IPP was seen as constituting a solution and the climate in which it was constructed. Chapter 4 then explores the process by which the IPP sentence was developed. Together, they constitute a reconstruction of the 'moment' of the creation of the IPP sentence and thus should be read as two parts of a whole. These chapters present the findings derived from the original empirical research conducted, as do Chapters 5-8.

It will be argued that the development of the IPP sentence was prompted, in part, by the widespread recognition among officials in the Home Office, Prison Service and others, that there did exist a 'real problem' of a penal system unable to deal adequately with determinate sentenced prisoners who, as their release date neared, clearly remained very dangerous.[65] Nonetheless, the actions of the dominant political actors (Home Secretary David Blunkett, Criminal Justice minister Lord Falconer and Prime Minister Tony Blair) meet the

[65] The terms 'official' and 'civil servant' are used interchangeably in this, and subsequent, chapters.

criteria of 'penal populism' provided by Roberts and colleagues (Roberts et al., 2003), namely that first

> Politicians...promote policies, which encourage electoral advantage without doing much about crime. [Second,] The more wilful that such politicians are in their disregard of the evidence about effectiveness and equity, the more we are inclined to regard them as penal populists (Roberts et al., 2003: 65).

It will be argued that ministerial desires for a populist approach were largely driven by a general feeling of vulnerability: the public voice could no longer be ignored. The IPP's development thus suggests that, for key actors, the tenets of democratic legitimacy have been altered by this 'rise of the public voice' (Ryan, 2005), with public activity in relation to crime problems perceived by politicians to be at a strength and intensity not seen before in modern times; a rattling of the political cage in a relentless clamour for security (Hope and Sparks, 2000; Loader, 2009a).

Further, the importance of the dominant and widely-shared Westminster tradition (Rhodes et al., 2009: chapter 3; Bevir and Rhodes, 2003: 24-28) to the IPP story is emphasized, given that the sentence was developed by actors (and indeed reacted to be others) wedded to this long-standing – though fluid – British political tradition. It is argued that the development of the IPP sentence reveals a somewhat paradoxical situation: while demonstrating, in some senses, a democratization of the policymaking process (with 'new players' on the scene in the form of prominent victims, political advisers and tabloid editors: Pratt and Clark, 2005: 315-316), it nonetheless constituted an exclusionary process where the public were essentially 'dummy players' (Pratt and Clark, 2005). The term 'illusory democratization' is proffered as one which captures the nature of this paradoxical trend.

The chapter thus moves from discussion of the pressures seen to compel the development of the IPP sentence, to an exploration of aspects of the nature of the

policymaking process. Chapter 4 continues this investigation of process, constituting a detailed exploration of the development of the IPP sentence, used as a lens through which to consider whether, and in which ways, these events speak to the voluminous literature on the rise of risk in the criminal justice sphere.

I will first explore the way in which many relevant actors, including Home Office and Prison Service officials, perceived a 'real problem' pertaining to 'dangerous offenders'. The way in which this concern related to two prominent crime-related 'moral panics' (Cohen, 2002) of the time is then discussed.

A 'Real Problem': Michael Stone, Roy Whiting and Public Pressure

The research interviews made clear that, for many Home Office officials, Prison Service officials and some members of other relevant organizations, a 'real problem' existed (Home Office official). While interviewees differed in their assessment of the scale of the problem, it was generally agreed that there was a long-standing problem with people:

> 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. I mean, there are lots of people released from prison all the time, who the prison authorities know, pretty much, will offend. And it will be largely low-level offending, albeit the kind of offending that impacts on communities...But [there are a small] number who are released with a pretty certain knowledge that they're going to commit a dangerous offence, a dangerous and violent offence (Representative, Prisons Inspectorate).

One Prison Service interviewee recalled an example of the 'classic problem' which was widely recognised:

> [A man's wife] left him, he went round and beat her within an inch of her life...he got a determinate sentence for that. While he was in prison he was not a violent man, nothing, but talk about his ex-wife...[and] he used to fly into an uncontrollable rage and we used to sit and say, "Why are you doing that?", "Well because she's out there", "But it doesn't matter what she's doing, she doesn't want you, so why don't you just move on with your life and let her get on with hers? Go and find somebody else". We never did anything with him.

> He went out and killed her. We knew he would, we told the Probation Officer he would, first chance he gets he will go to her house and he'll kill her...Classic example (Prison Service representative).

Because of such perceived lacunae in the system, a senior Prison Service official recalled that he 'supported the principle' of indeterminate imprisonment for such offenders. A senior official recalled that it was generally accepted that, 'there were gaps', that there existed a good deal of

> Background concern that there were people who clearly were regarded as dangerous, and often demonstrated that they were by committing further offences. And [the Halliday report's] extended sentences were meant to tackle that to some extent, but clearly didn't give the whole picture, didn't give a total solution to it.[66]

The issue of dangerous offenders, which had been recognised by many practitioners and officials as a perennially difficult issue, was substantially moved up the policy agenda by the murder of Sarah Payne in July 2000. As Savage and Charman (2010: 450) note, the issue was propelled by a powerful campaign that drew 'on the imageries and emotions associated with motherhood, loss and the grieving mother.' The murder of this eight year-old schoolgirl, by convicted paedophile Roy Whiting, captivated the tabloid press and television news media throughout 2000 and 2001 (Silverman and Wilson, 2002). Sarah Payne's mother, Sara Payne, began to campaign about the need for increased state efforts against sex offenders, concerned at the state of the system then in place (Payne and Gekoski, 2004: 92).

The *News of the World* soon began to campaign for a 'Sarah's Law', the central provision being public access to the details of convicted paedophiles living in one's area (Savage and Charman, 2010: 439). This flowed with, and arguably contributed to, a culture in which

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[66] As we will see in Chapter 4, a consensus regarding the existence of a 'dangerous offender' problem does not equate to agreement on the appropriate response.

> The symbolic figure of the victim [took] on a life of its own, [playing] a key role in political and policy argument...[with] the crime victim...now, in a certain sense, a representative character whose experience is assumed to be common and collective, rather than individual and atypical (Garland, 2001: 144).

The campaign was at its most forceful during New Labour's first term, when Jack Straw was the incumbent Home Secretary. However, the case continued to provide a totem around which concerns about dangerous repeat offenders, particularly sexual predators, would coalesce. In other words, it substantially raised the profile of the issue of 'dangerous offenders' for ministers, moving it up the policy agenda (Kingdon, 1995).[67]

Officials involved in the creation of the IPP recalled that the Whiting case did raise the profile of the issue of 'dangerous offenders'. There was a 'general climate of concern' (Home Office official), with such high profile cases, for dominant ministers

> show[ing] 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 extent of the influence of the Whiting case on the development of the IPP sentence can be seen in the following quote from the *Daily Mail* in January 2002:

> Paedophiles and other dangerous sex offenders could get 'one-strike-and-you're-out' life sentences to keep them off the streets for ever under laws being considered by David Blunkett. The move is a response to growing concern about soft sentencing for paedophiles, highlighted by the case of Roy Whiting. (Clarke, 2002)

On 8 June 2001, and one year after the death of Sarah Payne, David Blunkett was appointed Home Secretary following the Labour Party's victory at the 2001 General Election. On becoming Home Secretary, the issue of 'dangerous offenders' was again high on the policy agenda. This was prompted in part by cases 'very close to home': 'a rapist was

[67] The murder of Lin and Megan Russell by Michael Stone constituted a similarly high-profile, totemic case in 1999, in relation to the DSPD proposals (Rutherford, 2006).

released from Birmingham. He captured and kidnapped a girl in Sheffield, a student actually. By a miracle she escaped – because he would have murdered her. And we all said, "well what on earth is this guy doing out?"' (Political actor). Such high profile cases contributed to a 'general climate of concern' (Home Office official).[68]

It is notable that the earliest reference to an indeterminate sentence for 'dangerous offenders' – in other words, what became the IPP – is in a December 2001 story on the BBC News website, in relation to the murder of Sarah Payne by Roy Whiting (BBC News, 2001c). This measure was not only strongly promoted by the National Society for the Prevention of Cruelty to Children (NSPCC), but also supported by the well-respected then Director of Policy for Nacro, Paul Cavadino. He is quoted as saying that,

> The devastating effects of sexual offences on victims can justify very substantial restrictions on the liberties of sex offenders...The best way of protecting children from known and dangerous paedophiles is to ensure that they are not released from prison if they still pose a genuine risk (BBC News, 2001c).

This media report was part of general, sustained pressure for efforts against 'dangerous offenders', primarily driven by the *News of the World*.[69] Barring occasional interventions such as those seen in the above BBC article, interest group efforts were limited. Officials recalled that Helen Reeves, then Chief Executive of Victim Support, the most prominent and well-respected victim-oriented group, 'would never get involved in sentencing policy, as a matter of principle' (Home Office official). Further, Norman Brennan's Victims of Crime Trust (see BBC News, 2004), another potential source of sustained pressure, was relatively inactive during this period, its greatest activity being seen between 2003 and 2005.

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[68] For a report of this case of a 'sadistic kidnapper and rapist' in Sheffield, see Wainwright (2002). Another influential case, which also provides a point of connection between the DSPD measures and the IPP proposals, was that of a former civil servant murdering his wife (Blunkett, 2006: 288-289).

[69] It is notable that *News of the World* executives are recalled by Sara Payne as heavily pressing the issue at their own 'Sarah's Law' fringe events at the party conferences of 2000 (Payne and Gekoski, 2004: 105). Savage and Charman argue forcefully that Sara Payne's role as a driving force in the 'Sarah's Law' campaign should be recognised, rejecting accounts viewing her as (solely) an unfortunate patsy of a cynical tabloid newspaper (Savage and Charman, 2010).

There was then general recognition of a 'real problem'. The problematic scenario was seen as the situation, rare but by no means unknown, of prison authorities being of the clear view that a certain prisoner remained very dangerous, but being powerless to detain them further. If taken at face value, the logically consistent response to this problem would therefore have been a post-sentence, civil measure for indefinite detention as seen, for example, in Australia (McSherry and Keyzer, 2009), likely coupled with increased efforts at community protection (and perhaps the community notification desired by Sara Payne).

However, it was the media's reporting of these tragic crimes, their 'framing [of] reality to feed late modern anxieties but also [their] telling stories about the remedies to these anxieties and what political actors are doing or failing to do in "making things better"' (Roberts et al., 2003: 73), which propelled the issue of dangerous offenders onto the agenda. Sara Payne's tireless campaigning on behalf of her daughter, combined with the *News of the World*'s efforts and the influence of individual constituents' concerns, placed great pressure on the government of the day. I will now consider why these (heavily mediated) public concerns were felt so strongly by the New Labour government of the time and particularly the Home Office of David Blunkett.

New Labour, the Public Voice and Political Vulnerability

> The contemporary risk climate is one of proliferation, multiplication, specialism, counterfactual guesswork, and, above all, anxiety (Elliott, 2002: 294).

It will be argued that the IPP's creation makes clear the primacy of the *idea* of the public, a belief that it – notwithstanding the difficulties of establishing what 'it' is – *cannot* and *must not* be ignored. In other words, analysis of this 'dangerous offender' policy process lays bare

the felt vulnerability of many of the ministers and officials involved in the process.[70] In doing so, I draw upon Barker's (2001) assertion that much of elite actors' effort and time is focused on maintaining their legitimacy not only in the wider public's eyes, but to and for themselves and their immediate colleagues. Thumala, Goold and Loader (2011) describe this as 'legitimation work.' Claude (1966) suggests that power holders, by and large, 'cannot comfortably regard themselves as usurpers or tyrants but require some basis for convincing themselves of the rightness of their position' (quoted in Barker, 2001: 50). As we will see, responsiveness to the 'public voice' was seen by both ministers and officials as being central to this activity.

As Riddell (2005: 40) importantly reminds us, the New Labour honeymoon was 'remarkably short.' Struggling against what Blair, in his autobiography, referred to as 'the sheer force of the [media] storm that is in an almost perpetual swirl of scandal and intrigue' (Blair, 2010: 492; Stanyer, 2003), efforts were made in 2000 to renew the 'New Labour project', to prove that it was not all spin and no substance (see, for example, BBC News, 2001b).

There was a general sense that New Labour had failed to live up to the expectations of the first term; the 2001 election campaign was a plea for a 'second chance' (Assinder, 2001).[71] An internal memo penned by Tony Blair was leaked in mid-2000, reprinted by *The Guardian* on 17 July 2000. It revealed concern, in relation to crime that, 'as ever, we are lacking a tough public message along with the strategy... Something tough, with immediate bite which sends a message through the system' (see Hoyle and Rose, 2001).[72] It makes clear

[70] For, as Morgan (2006: 94, emphasis in original) notes, 'punitively populist policies [tend to] characterize fundamentally *insecure* administrations.' See also Ramsay (2010).

[71] The Iraq war was also mentioned by several interviewees as an important background factor. The considerable stress and political fallout of Tony Blair's decision to back the US invasion of Iraq made the need to display firm action on law and order even more acute.

[72] As Finlayson (2003: 49) put it, New Labour 'accepted that a policy which cannot properly be explained to a population is not much good.'

the desire by Blair – and indeed reflected those of many influential New Labour voices – to maintain public confidence. In addition to taking strong action on issues of law and order, it was important to bolster this with strident symbolic politics, with a clear public campaign (Newburn, 2002; Loader, 2009a).

The Conservative Party were seen as potentially constituting a great threat in the run-up to the general election. However, despite the Opposition leader William Hague's perceived mastery over Tony Blair in their Parliamentary encounters (Mandelson, 2010), this largely failed to materialize. Nonetheless it is striking how despite the electoral success in 2001, the view persisted, as one official interviewed put it, that 'Labour could never really believe that they had the popular vote'.

The important role of law and order to this project is seen in Labour's 2001 manifesto, where, amongst a raft of ambitious goals, sit the promises that,

> We will now: overhaul sentencing so that persistent offending results in more severe punishment [and] reform custodial sentences so that every offender gets punishment and rehabilitation designed to minimise reoffending (Labour Party, 2001: 7).

As a senior official recalled,

> The politics of the time is very important to understand. Blair had appointed Blunkett in order to get a more activist, populist, political lead on law and order. And he was trying to wrest law and order away from the Tories and make it a Labour issue. (Notes from unrecorded interview)

The idea of political vulnerability can usefully be applied to both Blair and Blunkett, notwithstanding Blunkett's robust and combative approach noted above. Respondents recalled how, in the early days of Blunkett's time at the Home Office, 'he thought he might be a great reforming Home Secretary' (Home Office official). One particular instance of this is seen in his proposals to reclassify cannabis from class B to class C (see Home Affairs Committee, 2001). The reaction to this was generally not favourable, and one interviewee

close to the Home Secretary recalled that he felt 'absolutely shredded by the popular press' (Home Office official).[73] It thus became clear that for Blunkett, as it was for Blair, any 'reforming' measures would have to be achieved by stealth (Dean, 2012: chapter 3). It was believed, in other words, that 'liberal' or 'progressive' measures had to be balanced by 'tough' talk and action (Blunkett, 2006: 357).[74]

Blunkett was an 'obsessive news watcher', with the constant glare of the media spotlight placing him under 'great strain' (Home Office official).[75] Several respondents related this to what became the Criminal Justice Act 2003, the legislation marking his desire to 'get a grip, let's show how tough we are' (Home Office official).

Having been trailed in the press in December 2001-January 2002 (BBC News, 2001c; Clarke, 2001), the general outline of what would become the IPP sentence was published in the 'Justice for All' White Paper (Home Office, 2002: 95-96). In addition to ensuring that 'on release there are rigorous and ongoing supervision and public protection measures', it stated that:

> We propose to develop an indeterminate sentence for sexual and violent offenders who have been assessed and considered dangerous. The offender would be required to serve a minimum term and would then remain in prison beyond this time, until the Parole Board was completely satisfied that the risk had sufficiently diminished for that person to be released and supervised in the community. The offender could remain on licence for the rest of their life (Home Office, 2002: 95).

Here, as elsewhere, it was made abundantly clear that this issue was being addressed, in large part, because

[73] See, for example, Pascoe-Watson (2002) and Baldwin (2002).

[74] In this vein, it should be recalled that Blunkett's early pronouncements as Home Secretary, though not unproblematic, were relatively balanced and reasonably well received (The Guardian, 2001).

[75] As Dean (2012) notes, Blunkett did not enjoy the opportunity to prepare for the post in the same way as he did prior to becoming Secretary of State for Education, a post which he shadowed before the 1997 election.

> 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, 2002: 95, emphasis added).

As will be seen in Chapter 4, the eventual solution proffered to the problem of soon-to-be released prisoners who continue to pose a danger to the public was not inevitable, but reflected the political beliefs of the dominant ministers (coupled, as we will see, with the legalistic approach of the relevant civil servants). However, in understanding the development of the IPP sentence, it is important to recognise that there existed, for ministers, a pervasive sense of being carried along by a force beyond their control: the rise of the public voice (Ryan, 2005). Not only were officials, by choice or otherwise, subservient implementers of ministerial wishes rather than collegiate policymakers (see below), many of the key political actors demonstrated a felt need to respond to the prevailing (and heavily mediated) public sentiment, which at times came close to a belief in their straightforward subservience to this public voice.

Ministers and officials alike were of the view that the political context had changed. Unless they were more responsive to the 'public voice', and developed and explained policy in those terms, their actions would not 'be justified in terms of shared beliefs' (Beetham, 1991: 18) and would thus potentially give rise to the political risks associated with what Beetham (1991) has termed a 'legitimacy deficit.' Many actors recalled that the IPP sentence was perceived by Blunkett and Falconer as one of a number of measures intended to balance the Criminal Justice Bill. As a measure which, once again, emphasized New Labour's determination to be 'tough on crime' the Bill, which Blair upon seeing a draft was recalled to have deemed 'a bit liberal' (Home Office official), was thus balanced out.[76] Canovan (1999) argues that such populist moves are generally efforts in making a robust and accepted claim

[76] On the pressure to avoid, or strengthen, 'soft' measures in the Criminal Justice Bill from Number 10, see Blunkett (2006: 278).

to their own legitimacy (1999: 4). In this light, the IPP's role as, in part, an effort at 'legitimation work' (Thumala et al., 2011; Barker, 2001) for the government, becomes clear.

Interestingly, as will be discussed further in Chapter 4, ministers focussed predominantly on the political vulnerability involved with being seen *not* to act, ensuring that the focus was entirely on senior Home Office ministers. In other words, there seemed to be no fear as regards the potential future blame if the measures proved to be ill-considered (Sparks, 2000b; Hood, 2011). Further, there was little, indeed no, effort at what Hood (2002) terms 'expertization': publicly assigning responsibility for policy to experts or officials and thus shifting 'blame for judgmental failure' (2002: 31). Newburn and Jones (2005) have, in line with Garland (2001), pointed to 'the coupling between symbolic politics and operational outcomes in criminal justice [becoming] ever looser' (Newburn and Jones, 2005: 73; see Boyd-Caine, 2010: 74) and this accords with the view by many of Criminal Justice minister Lord Falconer as taking a 'cynical' approach to the IPP (Home Office official). However, Blunkett's intentions were not for a decoupling but, rather, for a forceful fusion of these two strands. There was a desire, in other words, for a sentence which addressed (indeed, for Blunkett, eliminated) a 'genuine problem', while doing so in a way which sent a clear message to the public that Labour were continuing to be 'tough on crime'.

We can attribute this strident approach, given the severe political pressures in this 'risk society' (Beck, 1992), to Blunkett's general approach to policymaking.[77] Blunkett saw himself, as minister, as the one who should decisively 'make the call' on such difficult issues. Dismissive of Home Office officials and judicial expertise, Blunkett was not one to shy away from the political spotlight (Blunkett, 2006; Pollard, 2005).

[77] Gordon Brown's unfavourable depiction of Blunkett's approach to policymaking as constituting 'stirring up a media storm around issues, demanding money to solve them, and then failing to work out what needed to be done' (Mandelson, 2010: 384) was largely borne out by the subsequent use and impact of the IPP sentence.

Ministers' 'legitimation work' was not only directed towards the public and the media. In contrast to the public-facing statements described above, we will see in Chapter 4 that the IPP was presented to Parliament as a logical, technical and non-ideological response to the problems identified by 'Making Punishments Work' (Halliday, 2001). The Explanatory Note to the bill described the 'dangerous offender' proposals, of which the IPP was the flagship measure, as responding to the 'existing disparate set of provisions for sexual and violent offenders and...need for a more coherent sentencing structure to deal with this type of offender' (Parliament, 2002: para 66). As we will see in Chapter 4, probing amendments were put down by MPs in relation to the proposed IPP sentence.[78] Prisons minister Hilary Benn's tone, as well as the content of his responses, largely reassured MPs that the IPP was a sensible effort in relation to a serious problem.

Thus, while the tone set by the relevant ministers in the Commons and Lords spoke to Parliamentarians and interest groups, seeking to make IPP measures appear technical, uncontentious and an essential effort at public protection, the message to the public was clear and very different in tone. Politicians responded, in part, to the 'climate of fear' (Home Office official) generated by the media's hounding of the New Labour government and the intensive campaigns both against individual ministers (see, for example, Mandelson, 2010) and for specific measures such as 'Sarah's Law.' This is a vulnerability not only to the media in itself, but also, and perhaps primarily, as a conduit and primary definer of the 'public voice'. It is important to recognise that this concern with the public went beyond politicians; gauging and maintaining public confidence was seen as a crucial endeavour for both ministers and officials.

[78] The IPP sentence was debated in the House of Commons, at Committee Stage, on 11 February 2003. A probing amendment is one tabled by a Parliamentarian in order to understand better the government thinking behind a particular clause, or to seek assurances about the intended effect of the provisions in question.

Influencing the Intangible: Maintaining Public Confidence

Senior officials and ministers were clear that listening to the public, and maintaining public confidence, was an essential task. As one official explained

> [Public confidence] is a crucial thing and very hard to grasp or to measure. But you're not paralysed by its intangibility, you try to get something done (Home Office official).

A political adviser close to the policymaking process recalled that, in his view

> [Ministers] weren't seeking, deliberately, punitive outcomes particularly but they were very concerned about managing public opinion.

Similarly, speaking in relation to the IPP provisions, a senior Home Office official argued that public confidence is

> the crucial issue; if you don't have confidence in the system then it's very difficult to do anything. It's very intangible, but the media certainly have a role in promoting or undermining this. So it's a case of constant calibration.

There was a general recognition among officials, and some penal reform groups, of the difficult position in which politicians found themselves: feeling it crucial to gauge and respond to public sentiment, often under extreme time pressure (see Rutter, 2012), in a situation of severely limited knowledge.[79] A penal reform group member recalled that,

> When I started at [group], I thought "loads of what the government is doing is absolutely awful, this is madness." But then you think, "in terms of the public mood, what do ministers have to go on?" It's basically the media and their constituents.

As regards the media, it is notable that one of Blunkett's special advisers at the time was Kath Raymond, the long-time partner of News International executive chairman Les

[79] This somewhat sympathetic reading of politicians' perilous position was not universal. Most stridently, one penal reformer responded to this topic by describing the politicians involved as not only cynical populists, but 'positively evil...just plain evil.'

Hinton. While the extent of her direct involvement in the IPP's working-up remains unclear,[80] many interviewees commented on the tone which this both influenced and represented. For example, 'most [ministers] were very mindful of what the redtops would think and trying not to upset them' (Home Office official); 'New Labour was constantly running scared of the Murdoch press' (Home Office official), fostering 'a climate of fear' (Home Office official) within the Home Office.[81] This speaks again to the way in which the intense pressure felt by the Home Office, the 'politics of fear and insecurity' (Seddon, 2008: 312), was heavily influenced by the tabloid press of that time.

Further, Pollard (2005) has noted David Blunkett's reliance on his constituents as 'his permanent focus groups' (Pollard, 2005: 292). Consider, further, the following quote from an interview with a key special adviser:

> Did we sit around reading focus groups and reading opinion polls and stuff all the time? No. Did we listen to what newspapers said? Yes. Because newspapers are read by people and they influence them. Did [the minister] listen to his constituents...? Yeah, absolutely.

Scholars have bemoaned this myopic reading of the public voice, imploring politicians to rely on the more nuanced academic research on the nature and content of British 'public opinion' (Hutton, 2005; Roberts and Hough, 2002; Roberts et al., 2003). While these criticisms are convincing, for present purposes the point is that, first, for politicians an engagement with and responsiveness to public opinion was crucial and second, for them the tabloid media and the feedback from their weekly constituency surgeries *was* public opinion.

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[80] Several intended interviewees with connections to News International stopped responding to emails (having initially been open to involvement in the research) once the phone hacking scandal erupted in the summer of 2011 .

[81] The extent to which New Labour ministers sought to court the media, and particularly the tabloid media, has been laid bare in the many biographies and autobiographies since published. See, for example, Blair (2010), Mandelson (2010), Price (2006; 2010), and Riddell (2005).

Further, this reliance on constituents was recognised as entirely legitimate by senior officials within the Home Office and an important corrective to views of the insulated, 'somewhat naïve' policy officials at the Home Office (civil servant). As one official recalled, the Secretary of State's constituency surgeries acted as a valuable

> kind of...reality check. The civil servants had nothing. They'd go on visits on a Friday, but they're like Royal tours (Home Office official).[82]

As regards the relationship between this felt vulnerability and key actors' understandings of what the tenets of democratic legitimacy demanded, interviews with relevant ministers made clear that, in contrast to policymaking several decades ago (Loader, 2006; Ryan, 2003), the public voice was strident and *could not legitimately be ignored*. As a moderate Home Office minister of the time of the IPP's creation put it:

> If you've got someone who's committed a horrendous offence, comes out and does it again, and the public asks the question, "how can we be protected from that? Because it's my son, my daughter, who has suffered as a result." It's a perfectly legitimate question for society to ask, for politicians to reflect on and to try and find means which enable the management of risk to be more effective (Home Office minister).

It is important to note the implication of the view; it is not only being argued that 'dangerous offenders' are a legitimate area of governmental concern – this has been a truism, in a recognisably modern sense, since at least the 1900s (Pratt, 1997; Radzinowicz and Hood, 1980) – but one which it is right for *the public* to press the government on and which the government must respond to *in these terms* (Loader, 2006: 581).

It should be made clear that, in relation to the IPP and the Criminal Justice Bill more generally, the concern was often with *anticipated pressure* rather than actual pressure. As a member of the bill team recalled, the political pressure to 'toughen up' the bill – including

[82] Blunkett's diaries recall Home Office civil servants as being 'clearly not used to implementing anything, just legislating' (Blunkett, 2006: 270).

holding firm on the 'dangerous offender' proposals – largely reflected a worry 'about potential pressure more than pressure that had actually been experienced' (Bill Team official).[83] Similarly, it is notable that a civil servant quoted above referred to concerns among ministers about what the tabloid press '*would'* think, which emphasizes both the nebulous nature of policymaking environment and the recognition of the media's ability to be a primary definer of social problems (Becker, 1967: 241; Hall et al., 1978).[84]

Exclusionary policymaking: 'Dummy Players' and Tabloid Pressures

> They are the politicians and our job is to serve them...the 'servant' part [in civil servant] is not accidental (Home Office civil servant).

As noted above, there was a strong degree of media pressure and perceived public concern regarding 'dangerous offenders' at the time of the creation of the IPP sentence. However, it is important to recognise the role of what has been termed the 'Westminster tradition' (Rhodes et al., 2009: chapter 3) in the course of the IPP sentence's development. It will be argued that the pressures of the perceived context intermeshed with the extant political traditions of the time, demonstrably affecting the course of the development of the IPP sentence. The resulting policy process is characterized as an instance of illusory democratization. This term is intended to capture the situation in which the public, while constituting a great pressure on the process in the minds of many key actors, were effectively 'dummy players', excluded (along with 'troublesome' officials, academics, interest group representatives and others) from a highly insular policymaking process.

[83] On the influence of 'anticipated reactions' of Parliamentarians on government proposals, see Arter (1985: 68) and Blondel (1970).

[84] In this context, a senior official made clear the difficulties of pursuing evidence-based policymaking in,

> An arena where rationality and evidence is [not] going to drive the policymaking. I've had discussions with politicians – not about this particularly – where they say, "look, I know you're right, but nevertheless can't you see that in this climate we can't do that" (Senior official).

The 'Westminster tradition' refers to a set of beliefs including:

> a unitary state characterised by Parliamentary sovereignty, strong cabinet government, accountability through elections, majority party control of the executive – that is, prime minister, cabinet and the civil service – elaborate conventions of the conduct of Parliamentary business, institutionalised opposition and the rules of debate. (Bevir and Rhodes, 2003: 26-27; drawing on Gamble, 1990: 407)

Another important aspect is the 'doctrine of parliamentary supremacy, which takes precedence over popular sovereignty except during elections' (Verney, 1991: 637, cited in Bevir and Rhodes, 2003: 26). Richards, Blunkett and Mathers (2008: 488) suggest that this pervasive tradition 'sustains a top-down, closed and elitist system of government'.[85]

It will be suggested that the way in which the IPP sentence was developed demonstrates that while there were 'new experts' on the scene in the form of political advisers, prominent victims (or their families) and members of the tabloid news media (Pratt and Clark, 2005: 315-316), the public themselves were effectively 'dummy players'. In other words, what we see is a form of policy democratisation, albeit one in which the 'will of the people' is simply inferred. The resulting irony is that, despite widespread recognition of the way in which penal policymaking is increasingly developed by a 'complex series of penal networks (and actors) rather than being simply handed down...by the centre' (Ryan, 2005: 148; Marsh et al., 2001), in the case of the development of the IPP sentence, we see a form of

[85]See also Diamond and Richards (2012). The role of the Westminster tradition, as understood here, is well expressed in the following quote:

> Although it is commonplace to dismiss the convention of ministerial responsibility as part of the mythology of British government, it still acts as part of the 'critical morality' of the constitution – *a morality imbued in the psyche of politicians and bureaucrats alike – one that stipulates acceptable modes of behaviour, and provides criteria of assessment of political behaviour at any given time* (Judge, 1990: 33, emphasis added).

policymaking took a decidedly exclusionary form (of 'troublesome' officials, academics, Parliamentarians, practitioners and so on).[86]

The lead ministers – David Blunkett and Lord Falconer - made clear the expected outlines of the new sentence. As one official put it,

> Ministers wanted to create a sentence which meant that anyone who might be dangerous need not be let out, and it's as simple as that really. It was a very heavy-handed response to a particular 'hard case' and at the time, the politics of it were such that ministers were keen to capture as many people under these provisions as they could. And, that's what they achieved (Sentencing official).

It was not an inclusive and democratic process, drawing in a wide range of expert and lay views. As one senior official recalled,

> These were not provisions that were going to be resiled from. So it was a question of trying to refine them if necessary but, you know, they weren't going to suddenly back down and say, 'okay, just leave it all to the judges.' And certainly, David Blunkett was never going to say that (Home Office official).

It was an instance, in other words, of what Loader (2006: 581) has described as an increasing 'culture of impatience' (see also Bevir, 2005: 152). The majority of officials interviewed expressed their frustration and concern with this approach to policymaking.[87] The nature of the policy process was deplored by many interviewees for the way in which several senior sentencing officials, and other knowledgeable moderating voices, were sidelined. As one official recalled, some of the most senior sentencing officials, wary of proposals with such potentially far-reaching consequences, were

[86] The 'sofa government' of Tony Blair was criticized as undermining this Westminster tradition (Norton, 2008). In this context, it should be noted that such developments served to further exacerbate the exclusionary tendencies of the Westminster tradition.

[87] On the lack of clarity of the civil servant-minister relationship and the need for reform, see *Whither the Civil Service?* (House of Commons Library, 2003) and *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the permanent Civil Service* (Committee on Standards in Public Life, 2003).

> deeply frustrated trying to get [their] paws on the policy and not being able to. So, this was driven very much from within the bill team (Home Office official).

Bill team members, though by definition highly-proficient civil servants, are primarily judged by their ability to ensure that ministerial wishes are brought to legislative fruition in the time available (Page, 2003). This contrasts with senior sentencing officials, one of whom described their goal as being

> To do something to tackle any gaps, but in a sense to do it in the most modest way, rather than necessarily going to the extreme. To try and find a middle course that's sensible, that's not going to pull the system out of shape too much, particularly given that we were trying to create a nice new structure that would make some kind of sense (Sentencing official).

David Blunkett's abrasive manner meant that officials tended to be reluctant to speak up. Both Blair and Blunkett were described, bluntly, as 'clearly [having] decided that Home Office officials were a lot of leftwing wankers' (Home Office official), while penal reform groups were regarded as 'the chattering liberal classes who can afford to be generous [because] they don't live on the estates in Hackney' (Home Office official; see also Ryan, 2003).Widely condemned as a 'bully',[88] one observer recalled that Blunkett's manner importantly limited 'the extent to which [officials would] actually press the point, again and again, in the face of someone who's clearly determined to do something' (Prisons Inspectorate representative). One official spoke for many when complaining that

> One accepts that as civil servant one does one's best, whether one agrees with the minister or not. But the frustration is when the minister doesn't engage in the argument, which happened a lot with Blunkett.[89]

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[88] It should be noted that there was some divergence on this point. While the majority shared the view that 'Blunkett was a bully, people didn't like to challenge him, were afraid of him' (Home Office official), some suggested that, 'although he used to shout at people and all the rest of it, he was a Home Secretary who would actually listen to people' (Home Office civil servant).

[89] For a *mea culpa* in this regard, see Blunkett (2006: 285).

The other key political actor, Criminal Justice minister Lord Falconer, was regarded by most interviewees as an extremely pleasant person. However, as one senior official put it,

> I've an awful lot of time for Charlie [Falconer], he was very, very good. But on [the IPP], he – in my view – expressed a very political and cynical view.[90]

In other words, while Blunkett embodied the intention for a fusion of strong executive action and powerful rhetoric described above, Falconer – widely regarded as being in the Home Office to ensure that Blair's political goals were kept firmly in view during the working-up of the Criminal Justice Bill – was the embodiment *par excellence* of populist punitiveness (Bottoms, 1995). He demonstrated, in other words, the New Labour desire to take 'aggressively populist anti-liberal stances' (Anderson and Mann, 1997: 22) in the name of party image and electoral advantage (Newburn and Jones, 2005: 83).

The lack of consultation on the IPP provisions was widely criticized by interviewees. As seen in detail in Chapter 4, the provisions were not contained in the earlier review of the sentencing framework of England and Wales (Halliday, 2001), with the broad outlines of the sentence appearing in the White Paper 'Justice for All' (Home Office, 2002). While the draft provisions were contained in the Bill introduced to Parliament in November 2002, time for detailed scrutiny by Parliamentarians and others was extremely limited. The Home Secretary's mentality was described by one official thus: '[Blunkett] had a clear view of what he wanted to do so why ask anyone else, really?' (Home Office official). The general culture was, as one official put it,

> 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.

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[90] One senior official's response to his name was revealing: 'Oh yes, I'd forgotten all about him. He made things a lot worse!' (Home Office civil servant).

Despite officials' disquiet, there was a clear consensus that, following the Westminster tradition described above, it was entirely proper for ministers to lead the policy process due to their status as democratically elected politicians. As one official put it, these are questions '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'. Or, as another senior official argued, 'they are democratically elected ministers and officials are not. So they are the ones making the decisions and that's quite proper'. The irony that the IPP provisions were driven in large part by Lord Falconer, an unelected long-term friend of Tony Blair, and the charge of incoherence which this represented to officials' 'answers to [the] question about the "why" of institutional arrangements' (Barker, 2001: 37), did not seem to occur to interviewees at the time, nor upon later reflection.

Complaints about the nature of the policy process should not, therefore, be read as a desire for officials to determine the policy. Rather, it was a desire *to be heard*, to be shown respect and afforded autonomy as a professional class. Wedded to the Westminster tradition and its commitment to a particular view of legitimate power, officials were clear that it was for the relevant representatives of the democratically elected government to take decisions on policy and to shield them from the public (*i.e.* media) pressure which might otherwise come their way. The idea of the 'humble official' was explicitly mentioned by several officials interviewed and underpinned the reflections of others. It denoted both their, partly self-defined, subservient role and the security with which this provided them.[91]

The Westminster tradition can be seen therefore as serving to 'cocoon' officials from the 'ontological insecurity' (Giddens, 1991) actually or potentially encountered when facing the challenge – as posed by the IPP – of maintaining one's self-image as essentially 'good'

[91] Hood and Lodge (2006) include 'psychic income' – anonymity, job security and protection from public blame – in their discussion of the potential benefits for civil servants from their 'public service bargain'.

while constructing a sentence that was recognised by many officials to be flawed, over-broad and insufficiently thought-through. While some resistance will be seen in Chapter 4, refusing to 'play one's role' entirely in relation to the IPP sentence – refusing to draft the sentence, repeatedly challenging ministers, making concerns public 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; Rhodes and Wanna, 2009).

For, as Barker (2001) puts it, presentations of self fulfil both an outward-looking function, but also, and crucially, that of 'the self-knowledge and self-justification of the actor' (2001: 31); a 'means of achieving ethical coherence, of matching the account given of a person's identity to others of their actions' (2001: 37). For many, a need to 'quieten' this at-times-unsettling aspect of the civil servant role was explicitly recognised in the interviews conducted. For others, the question of the moral or ethical probity of the measures they were working on was, apparently, barely considered.[92]

Policymakers' work as regards the systemic risks posed by the IPP sentence is discussed in Chapter 4. For now, we can note that, as regards the duty of civil servants in relation to such risks, two views were expressed. The first view was that the civil servant's duty is 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 compels these longer-term considerations which inevitably involves a certain moral and ethical stance; such a conviction constitutes, we might say, belief in their 'official duty' *as civil servant* (Skowronek, 1995).

[92] On the dangers of obedience in the context of command-oriented organizations, see Kelman and Hamilton (1989).

The second view 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 – I don't know what you'd describe it as – 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?
>
> Civil servant: 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.[93]

We see here the belief that for the civil servant, issues of morality, of injustice or long-term systemic harm, boil down to what Bauman (1989) has damningly described as equating and limited to 'the commandment to be a good, efficient and diligent expert and worker' (1989: 101-2). It is not coincidental that the officials embracing this latter position tended to be centrally involved with the IPP's working-up, and indeed less concerned about the potential impact of the sentence, than those holding to the former position, who tended, as we saw above, to be sidelined from the process.

Conclusion

We have seen that there was widespread acceptance of the existence of a 'real problem': the penal system's impotence in the face of a determinate-sentenced prisoner, nearing the end of their sentence but being recognised by practitioners as remaining extremely dangerous. In this sense, we should pause before decrying the decision to address this issue as being motivated *solely* by populist motives.

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[93] '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 ministers'* (Barker and Wilson, 1997: 245, emphasis added). In a similar vein, a senior official recalled a discussion among colleagues where the general sentiment was that in order to offer sustained resistance,

> "You [would] have to be given an instruction [by a minister] that is immoral as it were, seriously immoral, not just you don't agree with it. [If] you're being told to gas people or something, then yeah of course, your obligation is not [to do it]." But other than that, the whole of the Civil Service is schooled to the idea that ministers get what they want.

However, we have seen that the government experienced sustained pressure from the media, as well as the public, both in the form of campaigning individuals such as Sara Payne and 'public opinion' as constructed by the tabloid press, following the murder of Sarah Payne by Roy Whiting in July 2000 and the subsequent *News of the World*'s campaign for a 'Sarah's Law'. The key political actors' responses to these events and their interpretation of the broader electoral landscape were argued to constitute an instance of penal populism (Pratt, 2007: chapter 1). We have seen that Home Secretary David Blunkett represented an approach within government that desired the forceful addressing of a real problem, though in a way which was symbolically potent, while Criminal Justice minister Lord Falconer embodied an approach which was more cynical, focussed primarily on electoral considerations.[94]

Investigating *why* such an approach was deemed to be necessary led us to recognise the felt vulnerability of many of the key political actors of the time. For ministers and for officials, the 'rise of the public voice' (Ryan, 2005) was recognised as a fundamental shift which could not, and indeed should not, be ignored. In this sense the understanding of the 'rules of the game' had altered. Policy could no longer be worked up by a 'relatively small metropolitan elite' (Ryan, 2003: 16), but had to respond, visibly, to public fears and perceived public desire for strong action. In this context, the IPP was argued to constitute, for key political actors, an effort at 'legitimation work' (Thumala et al., 2011); an effort at 'balancing' the potentially overly 'soft' Criminal Justice Bill and thus maintaining their legitimacy in the public's eyes.

Further, it has been argued that the events discussed in this chapter (and further in Chapter 4) demonstrated a paradoxical form of policymaking. The 'rise of the public voice'

[94] We will see further, in Chapter 4, that both of these positions could be contrasted with a small but important contingent within government who desired, and pressed for, a more liberal, considered approach to proposals such as the IPP sentence.

(Ryan, 2005) was intensely felt, with firm action against ‘dangerous offenders’ impelled and the room for manoeuvre severely restricted. However, the policy process itself was narrow and exclusionary, with a small number of (subservient) officials enacting the desires of senior ministers. Relevant interest groups, academics and ‘troublesome’ senior officials were largely marginalized, with ‘the public’ essentially constituting ‘dummy players’ despite the centrality of the idea of ‘the public’ to this policy process. This situation, while heavily criticized by excluded actors, was generally recognized as being legitimate under the widely-shared Westminster model of British politics. The contradictory term ‘illusory democratization’ was put forward as one which captures the nature of this form of policymaking.

Drawing on this depiction of the policymaking sphere, it was argued that the role of civil servants as subservient, rather anonymous, officials was welcomed by some, given the way in which it ‘cocooned’ them from the moral dilemmas otherwise posed by their role in the development of the IPP sentence. This approach by ministers and officials can, in differing ways, be termed a ‘thoughtlessness’ (Arendt, 2006 [1965]), an ‘uncritical reliance upon conventional attitudes as a shield against reality’ (Hayden, 2010: 455). This mindset will be further elaborated, explored and criticized in Chapter 8.

CHAPTER 4

CONSTRUCTION: IDEOLOGIES, EXPERTISE AND LAY KNOWLEDGE

> Sentences should: First and foremost protect the public. This is paramount (Home Office, 2002: 87).

> There was a big debate within government... it wasn't dumping people – it wasn't just dumping them in prison (Home Office Minister).

In a recent discussion of the ever-increasing focus on risk and on preventive measures against the 'dangerous' (McSherry et al., 2009), Brown (2010: 43) asks, 'Why, in modern liberal societies, do we seem so willing to trade away the liberty rights of those deemed dangerous and why in such a wholesale fashion?' Restricting the scope of this question to the creation of the IPP sentence, this chapter will trace its development and consider how we can understand this moment in penal politics. It will be argued that, for key political actors, the IPP sentence was conditioned by a complex confluence of a dominance of the Third Way ideology, a reliance upon lay sentiment or 'commonsense' and the marginalization of a substantial amount of expertise and expert knowledge. However, the important – and sometimes unintended – effects of influential *legal* experts and expertise, and counter-efforts motivated by liberal concerns, are recognised and explored. In this way, the chapter is intended to speak to the question of whether, and in what ways, the development of the IPP sentence might be described as a penal manifestation of the risk society.[95]

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[95] This term adapts Corbett and Westwood's (2005) depiction of the DSPD proposals as a 'psychiatric manifestation of the risk society.'

The 'Dangerous Offender' Problem and the Halliday Report

The 'dangerous offender' proposals in the Halliday report, *Making Punishments Work* (Halliday, 2001) are commonly regarded as the starting-point for the provisions eventually brought into law by the Criminal Justice Act 2003. The Halliday report (2001) was the culmination of an effort to consider sentencing policy *tout court* and propose a principled way forward. The report was initiated in May 2000 by Jack Straw, the then Home Secretary. Intended as 'a rigorous, evidence based exercise',[96] an official close to these events noted that, with the prospective general election expected to happen within the year,

> There was a sense I suppose in which it was parking this as a policy issue, "see what comes out of it and then we can decide what to do."[97]

Making Punishment Work was intended to investigate comprehensively the nature and effects of the sentencing legislation and practice that had built up over the years. Persistent offending was a particular concern of Jack Straw, as was the issue of 'dangerous offenders' – repeat offenders who blur the boundaries between sanity and insanity, penal and medical logics (Prins, 1995; Pratt, 1996) – which had risen to prominence during New Labour's first term (Seddon, 2007: chapter 6). As a senior official recalled,

> we went through a period when [Jack Straw] was very anxious to try and find ways of dealing with [the issue of dangerous offenders], and had us working on different policy ideas. At the same time, as always, there were pressures from the Treasury to reduce spending. And it was all becoming a bit of a mess, as these things quite often do. And the idea of the Halliday review was to try to provide a better framework to do it within the context of a proper, structured look at sentencing rather than a piecemeal approach (Home Office official).

The issue of 'dangerous offenders' – those 'assessed as having a high risk of committing a further offence that would cause serious harm to the public' (Halliday, 2001:

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[96] Lord Bassam, Hansard 16 May 2000: Column WA11

[97] The general election eventually took place on 7 June 2001. This was later than initially planned, partly due to the 'foot and mouth' epidemic of that time (Mandelson, 2010).

32) – was addressed in chapter 4 of the Halliday report. This was done not so much because it was considered to be a particularly pressing issue by the Halliday team, but due to recognition of existing agitation within the Ministry of Health and the Home Office about the issue of 'dangerous and severe personality disordered' (DSPD) individuals (Rutherford, 2006). In addition, there was an awareness of the desire from prominent voices within Number 10 to tackle 'prolific' offenders, driven and exemplified by 'A New Vision for the Criminal Justice System' (Birt, 2000). This 'Birt report', a rather 'murky' (Number 10 adviser) document which was never published and whose relation to formal policy processes was always unclear, introduced the notion of a 'hardcore' at any one time of 100,000 'active persistent offenders'. When the Halliday report was published, this 100,000 figure was reported as underpinning its recommendations (BBC News, 2001a; Travis, 2001), though this seems to be more a reflection of sympathetic advisers' efforts to promote the controversial Birt report than its actual influence on Halliday.

Halliday proposed a determinate sentence whereby, upon conviction of a specified violent or sexual offence and meeting other threshold criteria, the offender would serve the whole of the second part of their sentence unless the Parole Board decided that it was safe to order their early release (see Halliday, 2001: paras 4:25-4:35). Therefore, notwithstanding the terms of reference for the Halliday report, which 'steered the review clearly in the direction of new, more flexible types of sentence, paying more regard to the background and circumstances of offenders' (Halliday, 2001: 70) and the general risk averse climate of the time (Hebenton and Seddon, 2009; Simon, 1998), indeterminate sentences of the kind subsequently developed were resisted. Reflecting on the working-up of the report, one participant noted that

> The violent, sexual/dangerous issues did not loom large in the outward-looking consultations. Most of that ['dangerous offender'] section was the product of discussions internally (Home Office official).

The issue of 'dangerous offenders' was therefore seen as a necessary, but not the central component of the report.

Recalling the writing of the report, a member of Sir John Halliday's team exemplifies the wary, liberal mindset which is explored below: 'we saw everything happening within a determinate envelope, if you see what I mean, even for this ['dangerous'] category of offender.' Because of Halliday's experience of the history of penal reform since the 1991 Act onwards, the team were concerned about:

> The risks of producing a framework that was open-ended, [that involved] discretionary release...we were led to believe by researchers that the Just Deserts philosophy emerged as a reaction from some very open-ended systems in the States, which led to people spending inordinate times in custody, arguably unjustly.

While there was by no means universal agreement with the report, a great deal of discussion and engagement with officials, penal reformers, academics and practitioner groups took place (see Halliday, 2001: appendix 1).

It is also striking, given the continued dramatic rise of the prison population and the pressures seen in Chapter 7 of the thesis, to note that a key concern of Halliday was to question what was even then being viewed as a dramatic and troubling increase in the prison population. As one closely-involved official recalled,

> We couldn't find any rationale or justification for the quite staggering increase in the use of custody and size of the prison population other than a response to public, governmental and parliamentary pressure [on judges] for more severe punishments...[We were] trying to provide ammunition for someone like Jack Straw to say, "good god, we've been wasting our money here."

We have thus seen that the main problem to which the Halliday report was a response was the perceived need for a rational and prolonged consideration of how best to fashion the fragmented sentencing laws into a consistent and philosophically coherent framework. The commissioning of the report also served to 'buy time', allowing ministers to

be ready to forge ahead following Labour's widely anticipated victory in the upcoming June 2001 general election.

Second Term New Labour, the Third Way and the 'Eliminative Ideal'

> I have learnt of the importance of establishing the clear priorities of government... and then focusing on them relentlessly whatever events may come and go...There is no issue that touches our citizens more deeply than crime and law and order on our streets and we need to make the changes there so that we have a criminal justice system that punishes the criminal, but also offers those convicted of crime the chance to rehabilitate and get their way out of a life of crime (Blair, 2001a).

On 7 June 2001, New Labour were successfully re-elected, near-replicating the results of the comprehensive victory of 1997. In the following day's cabinet reshuffle, David Blunkett was appointed Secretary of State for the Home Office. We have noted that the Halliday report had been used by Jack Straw, in light of the upcoming election, to 'park' the issue of sentencing reform. However, the reader should be disabused of any impression of studied calm in the run-up to the general election.

As discussed in Chapter 3, New Labour – and Blair in particular – were looking distinctly vulnerable in the summer of 2000, though the media climate improved as the 2001 general election neared. Most Labour ministers had come into office with no experience of serving in government and were struggling to prove that they could live up to the promises made in opposition (Riddell, 2005: 40-1). Having successfully held the gains of the 1997 election, Tony Blair was determined to drive forwards in many policy areas, not least law and order. To this end, the Delivery Unit was constructed, with the Strategy and Policy Units which had been built up during Labour's first term strengthened (Barber, 2007; Kavanagh and Richards, 2001). In Blair's view, as one well-placed official recalled, 'the criminal legal system was not fit for purpose. That was what he really wanted to reform.' The Birt report,

the *Review of the Criminal Courts of England and Wales* (the 'Auld report': Auld, 2001), and this strengthening of the centre were all efforts towards this end.

The commissioning of the Birt report exemplified Blair's desire to drive forwards in relation to crime policy and to do so *from the centre* (Hennessy, 2005; Seldon and Kavanagh, 2005). As a Number 10 adviser put it,[98]

> I think 2001, whether it was the election itself or immediately before it, does mark something of a shift ... by which I mean the strategic centre in Downing Street and the Cabinet Office becomes much more pronounced... Not to say that there wasn't obviously a lot of resistance from Home Office officials. And I think throughout that time [there was] a lot of friction.

We will see below the tensions evident between 'Number 10' and the Home Office – ministers and officials – in relation to the construction of the IPP. We can, in this context, view the commissioning of the Birt report as the opening salvo, 'a direct challenge, almost, to the Home Secretary and to senior officials' (Number 10 adviser).

As Peter Mandelson recalls, Blair despaired for 'almost none of his ministers – he mentioned David Blunkett at Education as the exception – seemed on top of the challenges they faced' (Mandelson, 2010: 324). That Blair and Blunkett were, in the words of one former adviser, a 'very good', if not perfect, ideological fit in relation to law and order issues makes the appeal of appointing Blunkett as Home Secretary clear.

Respondents repeatedly noted the almost religious fervour with which Blair approached law and order. As a former adviser recalled, 'For him issues surrounding crime were also infused with morality; his approach was very moralistic, almost religious' (see Blair, 2010; Seldon, 2005). This desire for a more forceful approach to law and order was, in the words of one senior official, 'a matter of conviction too for Blunkett'; which took the

[98] The term 'Number 10', reflecting the usage by those interviewed, is used to denote the Prime Minister and his close political advisers.

form of a ‘traditional working class authoritarianism’ (Home Office official; see also Pollard, 2005).

The importance of sentencing reform increased as efforts to radically reform the legal system foundered:

> We got a report [Auld] that just wasn’t what Blair wanted at all, it basically said ‘leave everything alone’... And in a way that really made life difficult for the Home Office. Because although that strictly speaking wasn’t Home Office... I got the feeling all the time that his constant frustration and irritation with the Home Office was partly because he couldn’t get what he wanted in terms of legal reform (Home Office official).

‘Tough’ measures on issues such as ‘dangerous offenders’ thus became important for Blair not only as a declarative action, but also as an effort at taking substantive action in spite of the increasingly evident inability to effect the systemic change which Blair saw as being so desperately needed (Blair, 2001b). Thus, there was an expectation from Blair that the resulting Criminal Justice Act 2003 was to be a ‘flagship bill’ (Home Office official).[99]

Leading the Home Office was a great challenge not only for Blunkett, but also for the newly-appointed Permanent Secretary, John Gieve. In the words of one official,

> throughout that period there was continuing pressure from Number 10, not just for the kind of policies they wanted but also to say, “We’re really suspicious whether these can ever come out of the Home Office.”

Blunkett, along with his senior officials, was therefore under great pressure not only from the media, but also from Tony Blair and his advisers.

Though initiated by Jack Straw, on completion of the report John Halliday found himself reporting to a different Home Secretary in name and nature. Following the report, a Sentencing Framework team was tasked with beginning to develop the legislative proposals,

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[99] It was beyond doubt that a major criminal justice bill would be afforded a legislative slot. On the potential difficulties of obtaining such an undertaking, see Page (2003: 659-660).

while also engaging in public and professional consultation. As one member of the team noted,

> One of the key underlying principles of John Halliday's report was that criminal justice legislation should be given the opportunity to bed in rather than having a new Criminal Justice Bill every year. One of [our] main tasks was intended to be to develop dialogues with all the criminal justice agencies, including the judiciary, to try to encourage the outcomes which the criminal justice legislation were intended to produce.

However, both this mode of working and the determinate envelope within which Halliday's 'dangerous offender' proposals sat were forcefully challenged by Blunkett. In relation to the latter, Blunkett 'didn't think [Halliday] fully answered the questions' (Home Office official). As a senior official recalled,

> he immediately identified the fact that it's alright if you've got a mandatory life sentence for murder, but what about these other people who clearly do pose a risk?

The disjuncture between the Straw and Blunkett eras was so pronounced that many interviewees were clear that a view of the Halliday report as the basis of the IPP sentence was misguided:

> Ministers took [Halliday]...they took what they liked, they discarded what they didn't like and they put in their own bits. So I don't think it's right to regard Halliday as the origin of the IPP. (Home Office civil servant)

The early sightings of what would become the IPP sentence in news articles in December 2001-January 2002 (BBC News, 2001c; Clarke, 2001) and the 'Justice for All' White Paper (Home Office, 2002) have been noted in Chapter 3. Beyond this, the response to the White Paper was mixed, with relatively little attention being paid to the 'dangerous offender' proposals, amid general recognition that a 'genuine problem' existed (see Chapter 3). However, we have some way to travel in the IPP's construction before conclusions can be

drawn. For while the 'Justice for All' proposals reflected the general contours of the subsequent IPP sentence, there was still much work to be done.

It will be argued that the eventual nature of the IPP was the consequence not only of key actors' interpretation of the extant political context, ministers' populist urges and ignorance or dismissal of expert knowledge, but also the actions of the centrally-involved, legally-trained, officials.[100] Page (2003) helpfully separates the tasks involved in taking a bill from an early draft to the gaining of Royal Assent into:

> (1) *deciding the policy* which is to guide any legislative drafting; (2) *producing the legislative clauses* that make up an Act of Parliament; (3) *handling the parliamentary process* (including developing briefings that ministers can use in debates on the legislation) (Page, 2003: 653, emphasis in original).

As we have seen, Blunkett and Blair were both committed to the general policy. The incoming lead minister on the Bill, Lord Falconer, fully supported these aims. In terms of the production of the clauses, however, while worked-up under sustained political pressure and the time pressures concomitant with a bill as vast as the CJA 2003,[101] the actions and intentions of the relevant civil servants were crucial in affecting the ultimate form of the IPP sentence.

The 'key organization serving as a focus for the involvement of the bureaucracy in the development of legislation is the bill team' (Page, 2003: 653). In this case, the bill team grew out of the Sentencing Framework team which followed the Halliday report. However, many of those involved with the Sentencing Framework team departed at this point. One of the departing officials recalled doing so because the team's

[100] In other words, we must recognise that 'the idea that the politician is the author of legislation confuses constitutional formality with empirical reality' (Page, 2003: 674).

[101] A relevant official recalled that 'in relation to the bill as a whole, there was a great time pressure.' The authors of the Blackstone's guide to the Act describe it as 'the longest Act any of us has had to grapple with, weighing in at 339 sections, 38 Schedules and over 450 pages' (Taylor et al., 2004: xi).

> work (as a Halliday implementation team) quickly gave way to being transformed into a Bill team to implement the policy proposals of David Blunkett. So the original purpose of the team was largely lost (Home Office official, written correspondence).

While interviewees recognised that the nature of bill teams do vary, several officials complained that in this case the core bill team were not only managing the overall process, but ‘leading the policy’ (Home Office official). As one official forcefully put it,

> One of the reasons it was a mess was because far too much policy was driven from within the bill team, rather than by people who knew what they were doing, frankly.

The nature of the bill team meant that recognised experts on sentencing and criminal law within the department were at a remove from the detailed policymaking. In other words, what was 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)

In May 2002, Lord Falconer was appointed Minister of State for Criminal Justice, Sentencing and Law Reform, while Hilary Benn was appointed Prisons Minister. Lord Falconer was both an extremely close friend of Tony Blair (Seldon, 2005: chapter 36) and, unusually for a man who would become Lord Chancellor, a ‘can do minister’ (Number 10 adviser). Falconer was the lead minister on the Criminal Justice Bill, meeting with the head of the bill team ‘all the time, every day’ to ensure that the gargantuan Bill remained on course (Home Office official).[102] While the broad policy direction in relation to dangerous offenders was set before his arrival, the vast majority of interviewees identified him as a central protagonist in the development of the IPP sentence. Though widely praised as a sociable,

[102] A senior official recalled how the head of the bill team, Lorraine Rogerson, and Lord Falconer had been ‘helicoptered in’ due to concerns that the Bill would not be ready for its Parliamentary passage.

'charming' individual, the consensus was that on the IPP he had taken a deliberately 'political and cynical' approach (Home Office official). In other words, his focus was predominantly, perhaps even solely, on the benefits of such 'tough' measures for New Labour in continuing to win the penal arms race against the Conservative Party. Even in late 2002, with the next general election likely three years away, the political value of the IPP sentence was recognised.[103]

Ramsay (2012) has recently argued that clear connections can be identified not (only) between late modern culture and dangerous offender developments such as the IPP sentence, but that clear connections can be drawn between the nature of the IPP sentence and the dominant political ideology of the time: New Labour's 'Third Way' (Giddens, 1998). The view of rights as no longer being unconditional (Giddens, 1998: 65), and the emphasis on combating public fear of crime (and thus facilitating citizens' self-fulfilment: Ramsay, 2012: 135),[104] certainly meshes with the logic of the stated justifications of the Justice for All proposals (and the subsequent IPP sentence).[105] The connections between this 'eliminative ideal' (Rutherford, 1997) and ministerial motivations – whether driven by a Third Way position or a working class authoritarianism (in the case of Home Secretary David Blunkett) – can thus be seen as a key explanatory component of the IPP's development. The following quotes can be seen to support this interpretation. One official recalled that,

> "Better safe than sorry" was definitely David Blunkett's approach to it. The whole thing was about being safe rather than sorry.

More stridently, an adviser to Tony Blair of the time was clear that his

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[103] That 'the most high-risk violent offenders will now be detained in custody indefinitely' was highlighted in Labour's extensive chapter on 'Crime and Security' in their 2005 manifesto (Labour Party, 2005: 47-48).

[104] As Giddens puts it, 'freedom from the fear of crime [is] a major citizenship right' (Giddens, 2002: 17).

[105] In addition, we can make clear what is implied in the above discussion: that the Third Way position supports a strong role for the state *vis-a-vis* the security of its citizens. As Miller (2012: 4) puts it, '*security from violence is...the essence of statehood'* (see Garland, 1996: 448).

> 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?

While there was, as we have seen in this chapter and in Chapter 3, a 'very clear ministerial view as to where we needed to go' (Home Office official) on this issue, it is crucial to note that there was contestation and debate, both within and without government. There were important counter-efforts and, as we will see, disagreements within government over the very nature and meaning of the IPP provisions themselves. We will see that the liberal concerns embodied – to an extent – by 'Making Punishments Work' (Halliday, 2001) were repeatedly raised by concerned officials and ministers; that, while there was certainly inequality of arms, a limited battle was waged within government, in relation to the IPP sentence.

Liberal concerns and the Criminal Justice Bill

The IPP was primarily worked-up by reference to the existing life sentence provisions, along with the longer than determinate sentence contained in s2(2) of the Criminal Justice Act 1991 and the 'two strikes' sentence contained in s2 of the Crime (Sentences) Act 1997, a provision created by the outgoing Conservative government but implemented by the incoming Labour government (Ashworth, 2000: 183-9). The possibility of starting from scratch, of developing a novel system of civil detention similar to those in the US or Australia (McSherry et al., 2006), was ruled out by officials because

> apart from anything else, I guess, again there would have been concerns about everything that would go along with that. The kind of structure that would have to go along with that. The kinds of resources that would go along with that, when you've already got a whole existing structure, a court structure, which you could use (Home Office official).

Further, the European Convention of Human Rights (ECHR) was seen by officials as a considerable constraint on potential options for such a preventive measure. While Blunkett

> Didn't really have much truck with that sort of thing...[civil servants] were trying to construct the sentence [with] that in mind – how can we do it in a way that will not do too much damage in terms of the Convention? (Home Office official).

For some officials, this concern in relation to the ECHR intermingled with a more general sense of British fairness. As one official animatedly recollected,

> Even apart from the Human Rights Act, the idea that you could just go along to a prisoner and just say, 'you look dangerous', without him having done anything – and give him a longer sentence – you need some legal justification.

While civil detention measures had been considered by the Home Office 'from time to time' (Home Office official), the suggestion was made to one senior official that there seemed to be a general sentiment that 'that's not how we do things':

> Official: Not British!
>
> Interviewer: It sounds like there's some of that in it?
>
> Official: Well, I suppose inevitably there is.

A minister was undeniably right to emphasize that, in relation to policymaking, 'there's no "day zero". You're always building on what's happened before.' In this case the eventual form of the IPP sentence was due in large part to those civil servants involved in the process, their considerations combined with Blunkett's inability to grasp the detail. A senior bill team official recalled that Blunkett's behaviour was somewhat paradoxical:

> While in theory he knew everything that was going on, in reality he'd often be surprised [at meetings in relation to the Criminal Justice Bill]: "We're doing this?!" Nonetheless, he was very clear on what he wanted (Bill team official, notes from unrecorded interview).

In this way, it reflected Page's (2003: 673) suggestion that, even when driving the overall policy direction, 'Ministers typically know little about the law they are bringing in until they receive the submissions and briefings that their officials give them.'

In addition to these officials and their liberal, justice-oriented concerns, Baroness Scotland represented most clearly the countervailing liberal effort by government politicians in relation to the IPP sentence. The fallout from the decision to invade Iraq in 2003, with Clare Short eventually resigning her post as Secretary of State for the Department for International Development (DfID), led to Hilary Benn returning to DfID in May 2003, with Paul Goggins promoted to Prisons Minister. Baroness Scotland strengthened the Home Office ministerial team in the House of Lords, becoming Minister for the Criminal Justice System and Law Reform.

When Baroness Scotland arrived, the IPP had already been formulated, along with the majority of the Bill, which had begun to make its way through the Parliamentary process. She was noted by several respondents to have had deep concerns, in conjunction with many officials, with the breadth of Schedule 15[106] and a concern at the lack of discretion afforded to the trial judge. One closely-involved interviewee recalled her having

> to spend a considerable amount of time pulling it apart. Her view as always was that she would support a bill if she agreed with it 51%, but not 49%. And it took a great deal of work to get it to 51%.

Robust debate between the relevant departments – the Home Office, Lord Chancellor's Department and the Attorney General's office – had been a feature of the Criminal Justice Bill's development and Baroness Scotland's arrival gave these deliberations added impetus.

Interviewees recalled the existence of two 'camps' in the policy process and a 'big debate' between these camps throughout the working-up of the IPP sentence (Home Office minister). The first camp reflected desires for the criminal justice system to be as humane, as

[106] Schedule 15, Criminal Justice Act 2003 contained the 'specified offences' which leave a defendant open to the potential imposition of an IPP sentence.

decent, as possible.[107] Including Baroness Scotland, it desired a narrowly-focussed Schedule 15 and a strong emphasis on judicial discretion. This group's efforts reflected their view of the prison as:

> A most troubling and worrying institution because it is a point of focus where all liberal fears come together; the very purpose of imprisonment, after all, is to deprive an individual of his or her liberty (Young, 1992: 435).

The second and dominant camp included Blunkett and Falconer and demanded a broad Schedule 15 and the limiting of judicial discretion. This camp believed that judges would be extremely resistant to the IPP sentence. More generally, they also desired a forceful increase in the length of sentences in relation to serious offences.[108]

The final version of Schedule 15 was considerably longer than the list of offences initially introduced to Parliament as Schedule 11. While this could be seen as evidence of failure of the efforts of the 'liberal camp', several interviewees recalled that the Schedule would likely have been far longer but for Baroness Scotland's efforts.

The IPP was debated four times during the passage of the Bill; twice in the House of Commons and twice in the House of Lords. It was first debated at the Standing Committee stage of the House of Commons, where a thoughtful, if hurried, debate occurred.[109] The scope and nature of the sentence was probed at some length. Conservative MP James Clappison, for example, pressed Mr Benn on the practical workings of the sentence.[110] Humphrey Malins, drawing on Prison Reform Trust briefings, urged the government to require a 'substantial'

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[107] There are echoes here of Rutherford's (1994) discussion of the operating 'credos' in criminal justice. This first camp reflected some of the principles which Rutherford described as 'credo three', those desiring the 'pursuit of decency' (Rutherford, 1994: 18).

[108] This second camp can be conceived of as reflecting Rutherford's 'credos' one and two. These are respectively, 'a powerfully held dislike and moral condemnation of offenders, and the belief that...criminals...when caught, should be dealt with in ways that are punitive and degrading' (Rutherford, 1994: 11) and a 'pragmatic and expedient stance to criminal justice' (Rutherford, 1994: 18).

[109] Hansard Standing Committee B cols 909-939 (11 February 2003)

[110] Hansard Standing Committee B cols 923-939 (11 February 2003)

risk of serious harm, rather than 'significant'.[111] Simon Hughes (Liberal Democrat) warned of the 'need to avoid far-reaching and unexpected effects on future sentencing policy.'[112]

It is also notable that it was at this stage, in February 2003, that the government introduced an important amendment to the IPP provisions. As initially introduced to Parliament, s205(3) stated that if the offender met the requirements (in other words, was deemed to be a 'dangerous offender'), then an IPP should be imposed, *only if* the court considered:

> That the term of imprisonment which it would pass if it passed a sentence of imprisonment otherwise than under this section would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences.

In other words, if the trial judge believed that a determinate sentence (perhaps combined with supervision or treatment requirements) would sufficiently meet public protection concerns, then an IPP need not be imposed. Thus, substantial discretion was provided for the trial judge to decline to impose an IPP if deemed inappropriate.

This discretion was removed by the government amendment, with the provisions as enacted limiting the option to pass a determinate sentence in place of an IPP sentence to cases where deeming the offender to be 'dangerous' would be 'unreasonable in all the circumstances.' Hilary Benn stated that this tightening was because the absence of such a restriction on judicial discretion 'could undermine the purpose of the new provisions.'[113] A more measured, liberal version of the sentence was thus rejected as a result of internal Home Office discussions, with the judiciary's role as the responsible arbiters of justice in the individual case refuted. Nonetheless, MPs were reassured that, as regards

[111] Hansard Standing Committee B col 926 (11 February 2003)

[112] Hansard HC Standing Committee B col 929 (11 February 2003)

[113] Hilary Benn MP, Hansard HC Standing Committee B col 936 (11 February 2003)

> whether being found guilty of one of the [Schedule 15] offences would immediately put the person concerned into the category of a dangerous offender. The answer is of course no. As the hon. Member for Woking pointed out, the court would then have to apply the test of significant risk of serious harm. I repeat that that is the really important safeguard. In the end, the courts must be trusted to operate the provision sensibly, and to have regard to that test. A test of serious harm is quite a high threshold.[114]

We will see that these calming words were not borne out by the use of the sentence once introduced. While a substantial debate, MPs' efforts had little demonstrable impact on the eventual nature of the sentence. On this, it is important to recall that while Hilary Benn, a well-respected politician, was clearly open to listening to constructive criticisms,[115] it was Lord Falconer along with David Blunkett who were driving the policy process.

The IPP was debated briefly in the House of Lords on 16 June 2003, where Baroness Scotland – newly installed at the Home Office – fielded questions. Various concerns were then noted at Committee Stage on 14 October 2003,[116] summed up by Lord Dholakia's comment that, 'The wide power of the Parole Board to extend sentences, even if ECHR-compliant, is undesirable and not in the interests of justice and democracy.'[117] Baroness Scotland responded that the provisions represented, first,

> A valuable safety net [to the public], to ensure that all offenders convicted of two relevant offences are assumed to be dangerous, prior to the passing of the sentence...[and second, a] safety net

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[114] Hilary Benn MP, Hansard HC Standing Committee B col 923 (11 February 2003)

[115] Humphrey Malins MP noted, with some irritation, that,

> Of all the Ministers I have come across, I find it hard to think of one who listened as well as the Minister has in this Committee. He is a tremendously good listener. A problem, however, is that, having listened, he never accepts the argument. (Hansard HC Standing Committee B, 11 February 2003, col 917)

[116] The Committee stage involves detailed, clause by clause, schedule by schedule, scrutiny of a bill (Blackburn and Kennon, 2003: 325).

[117] Hansard HL Committee Stage col 769 (14 October 2003). Of course, formally the Parole Board do not 'extend' the indeterminate sentence, but rather decline to release the offender once their tariff period has expired (Powers of Criminal Courts (Sentencing) Act 2000, s82A).

> [against injustice] provided by the proper exercise of judicial discretion.[118]

Thus, while challenged in the Commons and the Lords, these limited efforts by a small number of Parliamentarians in no way matched the considerable furore, both in Parliament and in the media, regarding the double jeopardy, previous convictions and jury trial provisions.

In considering why this was the case, interviewees recalled that the Conservative party was 'not well organized', with concerns 'generally springing from what individual ministers were worried about' (Bill team member).[119] Meanwhile, penal reform groups recognised that Labour backbenchers could be relied upon to 'rebel, at best, on one issue' (Interest group member). The Liberal Democrats were a limited force, and were heavily reliant upon interest group reports and briefings to inform their Parliamentary probings.[120]

The majority of these interest groups – the most relevant being the Prison Reform Trust, JUSTICE and the Howard League for Penal Reform – saw the 2003 Act as a crucial piece of legislation, with some groups making an 'exceptional' effort to draw on sympathetic academics' expertise (Interest group member), while others probed and prompted government through direct discussion and via sympathetic Parliamentarians.

However, the IPP was not seen as a major issue for most interest groups. As one representative recalled, 'I don't remember everybody getting terribly upset about it at the time because it didn't seem like a huge thing.' Another prominent reform group were 'wary' of the 'dangerous offender' proposals, but the reassurances they received, both publicly and

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[118] Hansard HL Committee Stage col 776 (14 October 2003)

[119] The Conservative Party General Election manifesto for the 2001 election, which apes New Labour penal politics in most important respects, shows just how similar the parties' positions had become (Downes and Morgan, 2007).

[120] The relationship between penal reform groups and Parliamentarians – in particular the utilization of written questions via sympathetic Parliamentarians – is a fascinating and under-explored phenomenon. See, however, Chapter 5 below, and Ryan, Savage and Wall (2001).

privately, were that ‘this is going to concentrate on relatively few people.’ It is likely to be of some consequence that the Home Affairs Select Committee, in their pre-legislative scrutiny into the Criminal Justice Bill made no mention of the ‘dangerous offender’ proposals (Home Affairs Select Committee, 2002). The Select Committee had to construct their report ‘without a copy of the Bill in draft’ and thus focussed upon the most publicized and obviously controversial issues (Home Affairs Select Committee, 2002: 7).

Further, as seen above, Hilary Benn and Baroness Scotland, respected ministers, consistently emphasized the ‘justice safeguards’ which the judicial discretion and ‘significant risk of serious harm’ requirement was believed to represent. Indeed, a ‘camp one’ interviewee recalled their belief at the time that the IPP represented a ‘fair response to calls for far longer, determinate sentences.’ On this view, the sentence, with its reliance upon a detailed risk assessment represented ‘a more cogent, evidence-based reason for allowing [prisoners] to have their liberty.’ From this perspective, the form the IPP sentence took could be perceived, in fact, as a cautious, limited response to public calls for the naming and shaming of sex offenders seen in Chapter 3. While the nature and subsequent effects of the IPP sentence make this claim appear to be, at best, questionable, the point is that the course of the IPP’s development was influenced (albeit perhaps minimally) by political actors who endeavoured to ensure that the IPP sentence took a more limited form, with liberal concerns regarding potential injustices more clearly recognised.

Expert Judgment and Lay Knowledge

> It wasn’t a case of learning in hindsight; we knew [the dangers of the IPP provisions] in foresight, we just didn’t address them (Home Office minister).

> It was a mess. And it still isn’t right, we still haven’t got it right (Home Office minister).

The working-up of the IPP sentence is now explored in further detail, with particular focus on the involvement, or otherwise, of 'experts' and 'expertise'. We see that the nature of the IPP sentence was in large part the result of the dominance of ministers and their reliance on commonsensical understandings of 'dangerousness' and the nature of risk assessment. We see, as part of this, the sidelining of many potential sources of expert knowledge. However, the important role of officials involved in the development of the sentence is emphasized. In particular, their reliance on legal knowledge and expertise, but conversely commonsensical approach to the issues of risk and dangerousness, is highlighted as importantly affecting the course of the IPP's development. By recognising these aspects of the IPP story, we are well-placed to understand the reasons for the distance travelled between the 'real problem' (and its logically consistent response) which was noted in Chapter 3, and the sentence as contained in the Criminal Justice Act 2003.

Making the Sentence Work

We saw in Chapter 3 that senior officials sceptical of the IPP sentence, and wary more generally of the ministerial desire for substantial changes to sentencing policy, were largely sidelined from the policymaking process. Similarly, practitioners and those who were working on developments such as the OASys structured assessment tool within probation (and risk assessment and management more generally),[121] and thus potentially of great assistance, were not consulted in relation to the IPP sentence. The OASys system and other, more specialised, tools for risk assessment being developed from the late 1990s onwards

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[121] OASys, the Offender Assessment System, developed from 1999 onwards, was intended for use by probation officers and the prison service, providing,

> 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, 2003b: 119)

(Padfield, 2011; Robinson, 2003a)[122] were described by one minister interviewed as the 'enabling tools'. However, the consensus among interviewees was that, in fact,

> 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).

As a prominent expert in the assessment and treatment of dangerous offenders commented, 'it was just dropped on us.' Further, while the DSPD proposals were a historical precursor to the Halliday report, the officials and ministers involved with these developments were not centrally involved with the development of the IPP sentence.[123]

A common complaint among officials was that ministers, in particular Blunkett, were incapable of appreciating the important nuances necessary in relation to measures such as the IPP. The process, for them, was exemplary of the more general problem that 'politicians don't always value the evidence as much as they might' (Home Office official; see Goldson, 2010). As one official put it:

> There are two ways in which policy gets developed: One is a bunch of officials are sent away with a problem and come back with a careful analysis and a set of proposals and that gets developed into a policy. The other way that policy happens is that a politician comes along and says, "I want this, now you go and find the evidence and construct a case to give me that." And that's what happened, it was the latter.

Further, while officials well-versed in the detail and nuance of developments in risk assessment and management did exist, these voices went largely unheard. These actors, closely involved with the development of risk assessment and its potential, were open about

[122] Such developments were in addition to existing psychological tests and mental health assessments by psychiatric and medical professionals (Peay, 2007; Prins, 1999).

[123] This was the case, not least, because the IPP sentence was developed within the Home Office, while the DSPD proposals were a collaborative effort between the Department of Health and the Home Office (Home Office and Department of Health, 1999).

the limitations of such efforts; that 'it's always about *managing* risk, you never eliminate it' (Home Office official).[124] Similarly, a representative of the judiciary recalled the situation during that time:

> Interviewer: And in that regard, would you have discussions or opportunities to meet with ministers and officials?
>
> Respondent: Not at all. 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. [It was,] "We know what we are going to do and we are going to do it."

Further, a member of the Home Office Research Development Statistics Unit recalled the warnings provided directly to Blunkett at the time, in relation to the dangers of preventive sentences:

> You get false positives, false negatives and therefore it's hugely inefficient. And you'll end up keeping people locked up you don't need to keep locked up and you'll end up releasing people that you ought to lock up, if that's what you want to do. We do not have the technical instruments to do that kind of prediction.

Experienced as a 'gut politician, a populist politician' (senior official), Blunkett was recalled as being 'very anxious to do something about not just dangerous offenders, but of course the offence of murder' (Home Office official). However, with no legal background, he 'was finding his way initially...[he] needed a bit of a seminar on how it all worked' (senior official). Key ministers, in particular Blunkett, were described as

> seeing things very much in terms of what the common man would. "We're dealing with the scum of the earth," would be his view (Senior official, notes from unrecorded interview).

Another factor was the poor, and ever worsening, relationship between Blunkett and the senior judiciary. He was furious with the House of Lords' decision in *Anderson*,[125] which

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[124] Those officials interviewed who worked in the areas of risk assessment and mental health were some of those arguing most forcefully that a 'real problem' did, and does, exist. For these actors, the general consensus was that the IPP sentence 'was a bad attempt at doing a good thing' (Home Office official).

removed the Home Secretary's power to set murder tariffs in individual cases. The decision was handed down in November 2002, several days after the Criminal Justice Bill was introduced to Parliament. It was, however, anticipated for some time (Blunkett, 2006: 331-332; Butler, 2002) and it is not coincidental that the amended IPP proposals, including a substantial restricting of judicial discretion, were introduced to Parliament after this judgment. As one official recalled, 'the need to constrain judicial discretion was a big issue.' For Blunkett, the IPP and life sentence issues 'were all part and parcel of the same thing and I think he probably thought we were just silly officials trying to say, "no, no, this is different"' (Home Office official). As another official noted:

> If it hadn't been for the nature of the relationship between the politicians and the judiciary, I don't think the politicians would have wanted to make [the IPP] mandatory. Because they were trying to curtail judicial discretion, because this was high-profile.[126]

The murder tariff furore, and Blunkett's view of the judiciary and legal professionals as 'not living in the real world' (Travis, 2003), thus importantly conditioned the actions in relation to the IPP. This was not only in relation to the substantial restriction of judicial discretion described above, but also as regards what one official called the 'presentational aspects' of the sentence. As one key official recalled, by the time the instructions to the Parliamentary Counsel were prepared,

> All the details of the new indeterminate sentence were decided already *and the fact that this must be something distinct from a life sentence, with its own name* (emphasis added).

[125] *Anderson* [2002] UKHL 46; [2003] 1 AC 837

[126] On the relationship between Blunkett and the judiciary, see Stevens (2002: 129-136). The section is tellingly headed 'The Human Rights Act meets Bruiser Blunkett'.

Thus, while 'for all practical purposes, imprisonment and detention for public protection are exactly the same as a life sentence',[127] there was deep concern with presentational issues, that 'if you then started providing the same kind of sentence for people who hadn't committed murder it muddies the waters quite a bit' (Home Office official).

Notwithstanding the minutes of a meeting of the Prison Service Management Board which noted the 'high ministerial interest in, and public concern about' dangerous offenders and emphasized the desire 'that the Prison Service kept in step with – and influenced – policy developments in this area,'[128] several interviewees commented on the prison and probation service's 'reactive' nature and resultant failure to be 'quite alert enough to what the consequences for them would be' (Prisons Inspectorate representative).

Other relevant expert voices included the Parole Board and what was then known as the Lifer Unit,[129] responsible for parole reviews for life sentenced prisoners, as well as operational matters such as allocation within the open and closed prison estates. The CJA 2003 removed all determinate-sentenced prisoners from the Parole Board's remit. While many Parole Board members welcomed this potential reduction in Parole Board and prison numbers, the replacing of this (considerable amount of) 'bread and butter' work by the anticipated smaller number of IPP sentences was, at a personal level, of some concern (Parole Board member; see also Padfield, 2007). Similarly, the Lifer Unit, which was involved in discussions regarding the parole process for IPP prisoners, emphasized to ministers that they 'already had the necessary expertise and processes to deal with this area of work' (Lifer Unit member). In other words, the former 'had very little input into the creation of the IPP', indeed being 'rather shocked when we heard that it was coming in, because nobody had talked to us

[127] *R v Lang et al*, [2005] EWCA Crim 2864, Rose LJ para 8. Similarly, Ashworth (2005: 212) describes the IPP as falling 'little short of life imprisonment.'

[128] This minute is undated, but the context makes clear that the meeting was held during 2000, almost certainly June 2000.

[129] The Lifer Unit has since been renamed the Offender Management and Public Protection Group.

about resources and the like' (Parole Board representative), while the latter failed to recognise the potentially dramatic implications of the IPP sentence (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008).

We have seen, therefore, the dominance of ministers and of a commonsense approach to the IPP sentence, largely to the exclusion of potentially rich sources of experience, expertise and knowledge. However, it is important to note the strong influence of one form of expert knowledge: legal expertise. This has already been touched on in relation to ECHR considerations. We will now focus on the importance of these (predominantly) legally-trained officials' approach to one of the central issues in relation to the IPP sentence: the assessment of dangerousness. Drawing on Loughnan's (2012: chapter 3) notion of 'manifest madness', these actors' reliance on 'lay knowledge', on a commonsensical view of dangerousness as simply 'constituted in acts, intelligible to lay observers, and its meaning...derived from collective knowledge of it' (Loughnan, 2007: 400), is highlighted. That the IPP sentence reflects, indeed flows with, this typical legal mentality helps us to make sense of the eventual nature of the IPP sentence.[130]

The officials centrally involved in the IPP's development were predominantly lawyers by training. The approach taken by the legally-trained officials involved in the IPP's development was epitomised by the Parliamentary Counsel who, working from detailed instructions, fashion the government's policy intentions into legislative provisions (Page, 2009). For them, as with all legislation, the working-up of the IPP was treated as an abstract, technical, exercise in 'lawcraft.'[131] The question of how (well) it would work in practice was

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[130] In other words, while lawyers and legally-trained officials are expert in law, they are typically relying on a very limited understanding of risk, risk assessment and debates within relevant disciplines such as psychiatry (see Zedner, 2012).

[131] On the notion of lawmaking as craft, see the discussion of 'judgecraft' in *Social and Legal Studies*, volume 16 issue 3. In particular, see Tata's (2007) discussion of the 'internal aesthetic' of such work, the skill in acting 'to mollify conflicting audiences, to be read at a number of different levels and to hold at bay a variety of potentially critical voices' (2007: 441).

treated as something of a separate, secondary issue. The Parliamentary Counsel recognised that, 'whatever wording was used, [it was] going to be challenged and require judicial interpretation.' This, and the fact that it was made clear by the Home Office lawyers, liaising with the Parliamentary Counsel, that all key aspects of the sentence 'had been decided already' (Parliamentary Counsel), limited the room for manoeuvre for these officials.

These officials, proficient at the technical demands of lawcraft, in relation to risk merely operated on a distanced, limited understanding of the nature and limits of risk assessment. The point is not that the Parliamentary Counsel are particularly blameworthy for failing to have detailed knowledge of these issues.[132] Rather, it is that this description is applicable to the vast majority of the officials closely involved in the development of the IPP sentence. For a sentence which, as Sir Igor Judge put it in *Johnson*,[133] is centrally 'concerned with future risk and public protection...directed not to the past, but to the future, and the future protection of the public,'[134] this finding is troubling and, in terms of understanding the IPP's development, instructive.

Evident was a recurrent belief, a commonsensical view, that the trial judge will recognise dangerousness when he sees it, in other words that the risk will simply be 'manifest' (Loughnan, 2012).[135] Debates revolved around terms such as 'those who are seriously frightening' (Home Office minister) and those who 'leave me extremely worried' (Home Office minister). The problem is made clear if we consider the psychiatric view that,

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[132] Indeed, Parliamentary Counsel make a virtue of avoiding specialization even in one area of the law (Page, 2009: 797).

[133] *Johnson* [2007] 1 Cr.App. R (s) 674

[134] *Johnson* (fn133), para 3, per Lord Judge

[135] As Loughnan (2012: 54) suggests in relation to 'madness',

> The conceptual and evidentiary are not wholly separated...That is, what counts as 'madness' for criminal law purposes is what is manifest as 'madness' within criminal doctrines and practices. Put another way, at the point of intersection with crime...'madness' is what 'madness' does.

> 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; Prins, 2010)[136]

A minority of officials were alive to the fact that the crucial issue in relation to such a sentence was 'primarily an issue of having the right evidence to justify such measures' (Home Office official). However, such actors were unable to exert much influence on the policy process.

Officials' preoccupation with ECHR considerations meant that the response fashioned was some distance from the problem as generally conceived, that of prison governors finding themselves powerless to act against determined-sentenced prisoners who had shown themselves to be, or remain, dangerous during their custodial sentence. Rather, the IPP sentence typified the traditional Western legal approach of,

> Treat[ing] offenders as freewill rational beings in the...determination of guilt by the court (classicism); but in later stages, notably in prison and probation treatments, the emphasis typically shifts to pathology and psychic disturbance (positivism). (Bottoms, 1977: 92, fn8; Duster, 1970)

Bottoms (1977) suggests that this means that 'positivist-inspired proposal[s] for preventive confinement at the sentencing level' are greeted with far less concern than would proposals for 'a lessening of standard of proof in the criminal trial' (Bottoms, 1977: 92, fn8). In this way we can understand the IPP sentence as going 'with the grain' of traditional modern liberal legal thought and penal activity, despite it being rather exceptional in its

[136] On the predominant failure of the legal community to engage with debates regarding the ethics and practice of risk assessment (based on both actuarial risk assessment instruments and clinical expertise), see Zedner (2012: 232-241).

central concern with preventing future harm, rather than punishing acts already committed (Zedner and Ashworth, 2008).[137]

Thus, despite the growing dominance of the 'risk paradigm' during the early 21st century (Ward and Maruna, 2007), and the *prima facie* centrality of such developments to the creation of the IPP sentence, awareness of and reliance on such expert knowledge was noticeably absent from the IPP's development. Rather, there existed an assumption, shared by many of the central ministers and officials that, notwithstanding warnings by informed officials, the required risk assessment tools and techniques were available to render such a sentence workable (and therefore desirable).

Therefore, in order to understand the development of the IPP sentence, it is important to recognise the influence not only of Blunkett's commonsensical, authoritarian approach, but further the reliance of relevant officials on a particular, rather commonsensical, approach to the nature of risk assessment (Loughnan, 2012). Ministers' dominance, their imposition of a 'ministerial reality' (Home Office official), combined with these factors, leads us to a view of the centrally-involved officials (and indeed ministers) as operating in the realm of the 'imaginary penality' (Carlen, 2008b), acting '"as if" all objectives are realisable' (Carlen, 2008b: 6) despite the difficulties and dangers inherent in such a sentence (Floud and Young, 1981).

Predicting the Impact

By 2008 the prevailing political narrative was that the number of IPP sentences, and in particular the number of short tariffs, was a surprise to the government.[138] However, the

[137] This present case thus provides support for Zedner's (2006: 425) observation that, 'although risk may be presented as a matter of scientific analysis, and radical departure from rule-based systems, it has historically been a product of legal definition and judgment.'

[138] For example: 'It had not been envisaged that the sentences would be used so widely for less serious offenders.' Lord Hunt of Kings Heath, HL Deb, 26 February 2008 Col 616.

potentially dramatic impact of the IPP sentence was 'both predictable and predicted – within the projections prepared by the Home Office's own research department' (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008: 2). We will see that while the projections produced were broadly accurate, the systemic risk presented by the IPP sentence was under-appreciated by many, and deliberately underplayed by others.

Internal projections were produced by the Home Office Research and Statistics Directorate in 2002. This 'Correctional Services Review' stated that:

> The impact of the new sentences for dangerousness on top of the basic [sentencing] framework...would...lead to [the need for] an extra 950 [prison] places per annum (Home Office Research and Statistics Directorate, 2002).[139]

The implication of this projection was that the IPP prison population would swiftly expand to approximately 9,500 prisoners by 2015, with 1,900 prisoners by April 2007. This prediction was reasonably accurate, with 2,547 IPP sentences having been imposed by 20 April 2007 (Prison Reform Trust, 2007c: 2). As one closely-involved civil servant recalled:

> The interesting thing about the IPP projection is the inflow projection, the number of people getting IPPs, that's bang on. But that's quite easy to project, because you look at offence types and criminal histories and you can pretty much project it...What we got wrong and we're quite happy to hold our hands up to, we got wrong the release rate. So we thought there'd be people in this group who'd get short tariffs, but we thought they'd get out within a reasonable period of time. What we're seeing is five times past that short tariff. And that's difficult for us to model, that kind of behavioural stuff at the back end.

The same projections also contained a chart which suggested that the *net difference* in the total prison population as a result of the IPP provisions would be between 800 and 900 places, taking approximately five years to reach that point (see figure 1). The expectation was

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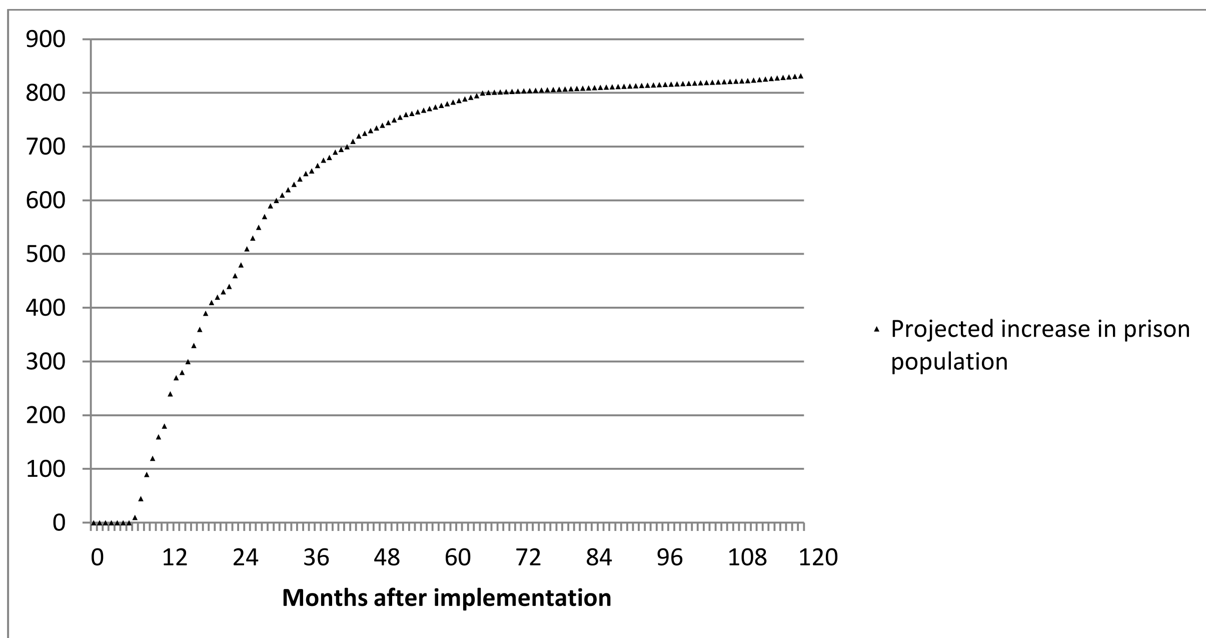
[139] This estimation closely echoes those contained in the Halliday report, Appendix 7, Annex A (Halliday, 2001). A proxy definition for dangerousness comprising 'the number of sexual and violent offenders in categories A and B, sentenced to anything from 4 years to less than life' suggested that there existed approximately 900 such offenders (Halliday, 2001: 157).

that other sentencing changes would compensate, to some extent at least, for this expansion in indefinite sentences (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008: 2). As Lord Falconer explained to the Home Affairs Select Committee in relation to the Criminal Justice Bill,

> Although there are some measures that will increase the prison population, like, for example, those relating to dangerous offenders – the indeterminate sentence on dangerousness – there are other measures...which will reduce the numbers of people that would otherwise go to prison. [Therefore] modelling suggests a figure of somewhere under 1,000 in relation to the overall increase, if one looks at the effect of the bill itself. (Home Affairs Select Committee, 2002: Q409)

Figure 2: Difference in prison population due to the new sentences for those classified as dangerous



(Source: Home Office Research and Statistics Directorate, 2002)

In the House of Commons, Prisons minister Hilary Benn was pressed by Simon Hughes on ‘the two obvious questions’:

> How many people a year could be expected, from the best predictions, to receive extended sentences; and what would that mean for the Prison Service, translated into people per year?[140]

Benn relied upon this latter projection (Figure 2) to reassure Hughes and other concerned MPs that the modelling suggested that, over time, 'there would be an additional 900 in the prison population' as a result of the IPP sentence.[141] Benn was open about the difficulties of predicting the impact of such a provision:

> It will depend on how the courts, having regard to the trigger offences and the thresholds that we have set, operate the assessment of "significant risk to members of the public of serious harm." That is quite difficult to know...the honest answer is that it is difficult to assess the effect, because it depends on the courts' interpretation of the provision.[142]

This statement reassured apprehensive MPs and groups including the Prison Reform Trust, who had raised concerns in relation to the IPP and indeed encouraged several parliamentarians to press ministers on this issue. A member of the bill team recalled that the IPP was 'seen as being potentially a very big issue' in terms of challenge by Parliamentarians. However, especially in light of Hilary Benn's reassuring statements, the prevailing view was that 'I don't think people by and large had any concerns about what was being proposed' (Home Office official).

Reflecting on these events, some interviewees saw the 900 figure as resulting from the 'common practice' of 'fixing the "exam question"...to give a particular answer' (Home Office official). In a situation where the Treasury were very wary of resource-hungry measures, the appeal of utilizing the projection which suggested a rather modest impact of the IPP on the

[140] Simon Hughes, HC Deb, 11 February 2003, Col 916. The terminology used here is somewhat confusing, given that an 'extended sentence' was also introduced by the CJA 2003 (s228). However, the context of the debate makes clear that Hughes was referring to the IPP sentence.

[141] Hansard HC Standing Committee B col 917 (11 February 2003).

[142] Hansard HC Standing Committee B col 917 (11 February 2003).

prison population, as opposed to the more alarming statement that approximately 950 would be imposed each year, is clear.[143]

Deep concern at the time regarding the size of the prison population meant that many officials and some ministers, 'weren't going into this wilfully to say "never mind what the consequence is for the prison population is"' (Home Office minister).[144] However, the relatively brief time at the Home Office during the Criminal Justice Bill's progress of ministers such as Hilary Benn, who prioritized such concerns, limited the ability to ensure that the likely effects upon the prison population were maintained as the overriding concern.

The Treasury had responded positively to the Halliday report's carefully costed proposals. This, however, turned to wariness and concern as the content of the Bill – its nature and the likely resource implications – changed. Nonetheless, the political will for the legislation to succeed meant that 'Treasury concern was ignored', with 'the decision taken over the heads of officials' (Home Office official). Negotiations between Treasury and Home Office ministers went 'right up to the wire', concluding with an '"on your head be it" kind of discussion' (Home Office official).[145]

However, officials were keen to emphasize that it would be unfair to cast these events solely as an instance of ministerial deception: 'I mean, sentencing behaviour is hard to model anyway. We're trying it all the time and we often get it quite wrong' (Home Office Official). As another official recalled:

> We had statisticians trying to produce a model of what the effects were going to be. But because you're changing the whole of the

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[143] See also Stevens' (2011) discussion of the dominance of the 'killer chart' in Home Office policymaking.

[144] For reflections on the severity of the pressures on the prison estate in early 2002, see Blunkett (2006: 360, 375).

[145] For a similar instance of such fractious negotiations at that time, see Eastham (2002). For further discussion of the Number 10-Treasury relationship of that time, see Naughtie (2001) and Thain (2004).

> [sentencing] framework, it's obviously going to be very difficult (Home Office official).[146]

Concerns about the likely effects of the IPP provisions were raised with David Blunkett. Bottoms' (1977) discussion of the 'Baxstrom patients affair',[147] as well as the Californian experience of 'three strikes' legislation (Zimring, 1996), were both cited as examples of the dangers of such measures. The warnings provided by officials to Blunkett at the time centred around two concerns. The difficulties of accurate risk assessment have been noted above. The second concern was the likely effect on the prison population:

> Because the thing that you had to explain to ministers carefully was [that] sentences like that – what particularly drives the prison population is an increase in long sentences. A lot of short sentences create a lot of churn, but you get a disproportionate effect when you start increasing the long sentences (Home Office researcher).[148]

Further, while several senior officials were well-aware that such a sentence was 'clearly going to skew resource requirements' (Home Office official) – even if IPP prisoners would not constitute additional prisoners as such[149] – these were the same officials sidelined from the policy decisions. Thus, despite these concerns, 'assumptions were made to the effect that "the overall impact of the legislation would be resource neutral."'[150] Therefore, no

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[146] The lack of direct engagement with the judiciary on the likely interpretation of the measures compounded the difficulties. While Baroness Scotland (HL Deb, 6 October 2003, col 36) reported to the House of Lords that there had been 11 meetings between representatives of the senior judiciary and Home Office between March 2002 and June 2003, the IPP was not specifically discussed.

[147] The 'Baxstrom patients affair' constituted a natural experiment which seemed to suggest that 'those patients [released] who, in the event, didn't assault anyone for four years after their Baxstrom transfer, would between them have been subjected to about 5,400 man-years of custodial detention, without achieving any societal protection whatsoever' (Bottoms, 1977: 77).

[148] On the important, but delayed, impact of sentencing measures on the prison population, see Ministry of Justice (2009).

[149] The projections discussed above made the assumption – still held during the amendment of the IPP in 2007-8 (Ministry of Justice, 2007b) – that IPP prisoners would, in most cases, have served relatively long prison sentences in any case and thus would not place additional strain on the need for prison *capacity* (as opposed to *resources*).

[150] *R. (Walker) v Secretary of State for Justice (Parole Board intervening); R. (James) v Same (Same intervening)* [2008] EWCA Civ 30; [2008] 1 WLR 1977, para 16 per Lord Phillips, quoting Tony Robson, Deputy Head of Public Protection Unit, NOMS.

additional resources were provided – not to the Parole Board for additional hearings, nor to prisons for additional interventions, nor elsewhere – as a result of the creation of the IPP sentence.

There seems to have been a 'lack of forethought' by those officials more heavily involved in the development of the IPP sentence (Justice Committee, 2008a). For some, this was because their focus rested only on their very limited area of expertise. They treated their duty as limited to that of being 'good, efficient and diligent expert[s]' (Bauman, 1989: 101-2), failing to consider the broader project of which their actions were a part. No-one had been expressly tasked with thinking through the short and long-term implications of the IPP, and therefore, this did not occur. There are echoes here of Peattie's (1984) discussion of nuclear warfare:

> It is not nuclear war which is unthinkable. It is its consequences. And generally we do not deal with consequences. Policy focuses on purposes... (Peattie, 1984: 36).

For others, rather more prosaic concerns were influencing their actions. As one official recalled:

> The Home Office was in a mess at that time, NOMS was being established, so there was a game of musical chairs with everyone trying to find a chair to sit on when the music stopped... the context meant that it was in no-one's interest to point out the problems, to point out that the emperor wasn't wearing any clothes.[151]

Conclusion

We have seen that the issue of 'dangerous offenders' had been a pressing concern from the early days of the New Labour government. However, this concern with determinate-sentenced 'dangerous' offenders by no means made the IPP's creation inevitable. David

[151] The National Offender Management Service (NOMS) came into being in June 2004 and involved a fundamental reorganization of the penal aspects of the Home Office. For a discussion of its history, see Gibson (2007: chapter 3).

Blunkett and Lord Falconer's appointments to the Home Office, as part of the drive from Number 10 for the intensification of law and order speech and action, provided the momentum which moved the policy position from that of the limited Halliday proposals to the indefinite, near-life sentence which was brought into law.

We have seen that the IPP sentence flowed with the dominant political project of the time (Ramsay, 2010). This is so both in term of the moralism and responsibilization inherent in what has been termed the Third Way variant of social democratic theory (Giddens, 1998) and in terms of the electorally-oriented penal arms race of the New Labour years. These beliefs drove towards an 'eliminative ideal' embodied by the IPP sentence and reminiscent, for some, of the Gulags of Russia and the penal colonies of the British Empire (Christie, 1994; Rutherford, 1997).

Despite the dominance of Blunkett and Falconer, and the exclusion of concerned or 'troublesome' officials, we have seen that counter-efforts were made by Ministers, Parliamentarians and others motivated by a liberal belief in the centrality of freedom of the individual and retributive justice. However, such efforts were able to have only a limited effect on the course of the IPP's creation, given the subservient position of these concerned actors.

The sentence's nature implies that it was driven by developments in, and the overriding influence of, the 'risk paradigm' (Ward and Maruna, 2007). However, we have seen that experts in such matters were sidelined or simply not consulted, with the sentence constructed 'as if' such risk assessments were entirely unproblematic (Carlen, 2008b). Rather, the officials tasked with working-up the sentence, while generally proficient in legal expertise, were seen to rely upon lay knowledge in relation to the central issue of the assessment of dangerousness. The approach was thus described as being analogous to that traced by Loughnan (2012) as regards insanity; namely, an assumption that such a status

would be straightforwardly 'manifest.' The influence of officials drawing on a 'traditional' legalistic approach – displayed both by the concern at the need for ECHR-compliance and the aforementioned approach to 'dangerousness' – on the eventual nature of the IPP sentence holds a certain irony given Blunkett and Blair's disdain for lawyers and legal niceties.

In addition, we have seen that the likely systemic risks flowing from the IPP sentence were indeed 'predictable and predicted – within the projections prepared by the Home Office's own research department' (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008: 2). However, the resource implications were apparently underplayed by ministers and dramatically under-appreciated by the relevant organizations including the Prison Service, Parole Board, Lifer Unit and the Probation Service. The dominance of the more proximate concerns of ministers and officials involved in the process can be said to have resulted in an absence of what Heclo (2008) has described as 'institutional thinking.'[152]

Finally, and an issue to which we will return in Chapter 8, the distance of ministers and officials from practitioners – those at the 'coal face', with first-hand experience of particular aspects of the penal system is notable. The approach of ministers and officials, discussed above, could be described as displaying an 'abstract, detached awareness' of the likely effects of their activities (Bauman, 1989: 99). The recollection of one Number 10 adviser that the concern of New Labour ministers primarily revolved around 'was about a theoretical notion of the offender, rather than someone who was actually in prison' applies equally, and no less problematically, to the officials involved in the creation of the IPP sentence.

[152] In short, a mindset which asks 'would I want to be my own successor in this office?' (Heclo, 2006: 741).

CHAPTER 5

CONTESTATION: POLICY PARTICIPANTS, PRESSURE GROUPS AND PARLIAMENTARIANS

This chapter explores the ways in which interest groups, parliamentarians and other concerned organizations attempted to 'have an effect' (Hay, 2002: 185) on politicians and officials' thoughts and actions as regards the unfolding problems relating to the IPP sentence. While the chapter focuses on the period from spring 2005 until summer 2008, the period between the sentence's implementation and its amendment, it concentrates predominantly on 2007-2008, when contestation efforts were at their most intense. We see that concerns revolved around the systemic failings in relation to the IPP sentence; moral concern at the resultant suffering of IPP prisoners; and in-principle resistance to indeterminate sentences. Drawing on the idea of legitimation work discussed in Chapters 1 and 4, we see the ways in which the need to be seen as 'responsible' constrained relevant actors in their efforts. We see that these policy participants, especially Parliamentarians and penal reform groups, were realistic about the extent to which such efforts were a 'game of odds', being heavily reliant upon ministerial (and Prime Ministerial) reshuffles and resulting government receptiveness to arguments for change under the Westminster tradition. In conclusion, the extent to which Ryan's (1978) observations as regards 'acceptable pressure groups' remain relevant today is discussed.

Pressure Participants and Motivating Concerns

The concerned groups included bodies such as the Prison Service, Parole Board, and the Chief Inspectors of Prisons and Probation.[153] Penal reform groups were also troubled by the IPP sentence and its operation. In addition, the Prison Officers' Association (POA), Napo (formerly National Association for Probation Officers), the Probation Service, practitioners and academics also expressed disquiet. Finally, and as we will see importantly, many parliamentarians – peers and MPs,[154] especially those on the Justice Committee and the Joint Committee on Human Rights – were also concerned with the IPP sentence.

In discussing the relevant actors, I adopt Jordan, Halpin and Maloney's (2004) terminology of 'pressure participants', 'policy participants' and 'interest or pressure groups'.[155] The former is a deliberately broad term, encompassing 'bodies attempting to influence outcomes' (Jordan et al., 2004: 207). The pressure participant category includes 'policy participants.' These are bodies which would generally be considered to be apolitical, but which 'sometimes act in ways that from a functional perspective make it appear as if it is a pressure group' (Jordan et al., 2004: 207).[156] The term 'interest group', or 'pressure group', is thus reserved 'for (normally) multi-member, politically oriented bodies of individuals' (Jordan et al., 2004: 205),[157] which seek 'to influence the formulation and implementation of...authoritative decisions taken by the executive, the legislature and the judiciary' (Grant,

[153] Of course the organizations discussed in the thesis are not discrete monolithic entities (except in a most formalistic sense). Rather, such groups comprise many individuals, who may agree or disagree, be more or less powerful within the organization and have different, opposing or indeed similar concerns. The distinct, though often consonant, perspectives and opinions expressed by Parole Board members and others in *Who to Release?* (Padfield, 2007) demonstrates this particularly well.

[154] For the avoidance of any confusion, peers are members of the House of Lords, while MPs – Members of Parliament – sit in the House of Commons.

[155] The terms 'interest group' and 'pressure group' are used interchangeably in this chapter.

[156] Jordan, Halpin and Maloney (2004: 207) give the example of a university intervening in the political process to resist cuts to the level of resources allocated.

[157] This caveat is introduced in order to avoid excluding organizations such as Greenpeace, which lack formal members but would generally be seen as an extremely prominent 'pressure group' (Jordan et al., 2004: 211).

2000: 14). In the present case, therefore, we can consider the Prison Service, the Parole Board, the Probation Service and HM Inspectorates Prisons and Probation (HMIPP)[158] as 'policy participants'. The Prison Reform Trust (PRT), Howard League, JUSTICE, Prison Officers Association (POA), Prison Governors Association (PGA) and Napo are 'pressure groups'. Finally, concerned MPs and peers, academics, and IPP prisoners and their families sit in the umbrella category of 'pressure participants'.[159] As we will see, the 'policy participants' were primarily, though by no means exclusively, concerned with the systemic problems posed by the IPP sentence, while the penal reform pressure groups were motivated primarily by anxiety about the suffering of IPP prisoners and in-principle disquiet with such sentences. The unions, most clearly in this case the POA, were primarily concerned about the potential dangers posed by disenchanted IPP prisoners to their members.

The concerns expressed by these actors, while inter-woven, can be separated into three distinct strands: systemic concerns; moral concerns; and concerns-in-principle. The first strand denotes concerns that the system was simply not functioning correctly, with great pressure being placed on prisons, probation and the Parole Board. As the Justice Committee (2008a) put it,

> the structure of the sentences is flawed and secondly...the systems surrounding their implementation and operation were not given enough thought or resources. (Justice Committee, 2008a: 21)

As we will see below, disquiet with systemic failings were motivated for some by the concern for the resulting negative impact on public protection, while for others the motivation

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[158] The Inspectorates of Prisons and Probation are separate entities. However, due to their joint work on the Thematic Report regarding the IPP sentence in 2008 (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008) and, due to considerations regarding anonymity, the Inspectorates are referred to as one entity for the purposes of this chapter.

[159] This chapter does not explore campaigns such as 'Justice for Joe' (<http://justiceforjoe.org.uk/> accessed 12 October 2012), such efforts being more recent. During the period this chapter explores, IPP prisoners' and families' concerns were channelled through groups such as PRT and the Howard League, their constituent MPs and, for some, the court cases discussed in Chapter 6.

was concern at the resulting unfairness for those serving IPP sentences. Such concerns are well-summarized by the following quotes:

> This warehousing of IPP prisoners, stuck in bureaucratic tailbacks...strikes at the heart of what makes prisons run smoothly and what promotes rehabilitation: fairness (Prison Reform Trust, 2007c: 6).

> [I]nadequate access to appropriate courses has been causing considerable difficulties for prisoners on IPPs...IPP prisoners are becoming increasingly aggravated and desperate to undertake resettlement work compatible with Parole Board release requirements (Howard League for Penal Reform, 2007: 18).

As we will see, penal reform groups and subsequently MPs' efforts were prompted in large part by moral concerns: unease at the human suffering inflicted by the IPP sentence. For example, the Sainsbury Centre for Mental Health (SCMH) raised concern at

> The initial shock of receiving an IPP sentence [and the following] high levels of stress, despair, and an erosion of hope caused by indeterminacy (Sainsbury Centre for Mental Health, 2008: 42).[160]

Third was principled resistance to the underlying premise of the IPP sentence. Several of the actors, including the penal reform groups, saw imprisonment based on what a person might do in the future as wholly unjustified. The following quote provides a flavour of the nature of such concerns:

> We believe that the IPP is a misguided sentence that should be abandoned. It is wrong for individuals to be sentenced to indeterminate periods in prison based on acts they might engage in - in the future. (Howard League for Penal Reform, 2007: 3)

As we will see below, many actors took a dual-track approach, offering constructive solutions to remedy the systemic failings but only after arguing for the abolition of this 'unjust' sentence. It is, however, also important to note that several of the organizations, including the probation service and prison service, took the alternative position that public

[160] See also HM Chief Inspector of Prisons and Probation (2008: 38).

protection as a principle, and thus sentences predicated on such a principle, were entirely legitimate (Nash, 1999).

Policy Participants

While the Prison Service was considered to have been '[not] quite alert enough to what the consequences for them would be' during the IPP's development, 'by the time [IPP prisoners] started coming into the system, alarm bells began to be raised very quickly' (Member, HMIPP). By late 2007, the IPP, in itself and as part of the general increase in the prison population, was recognised as severely troubling:

> The lifer system is under tremendous pressure. The number of lifers and IPP prisoners – because they're both in the same system, it makes no practical difference to the prisoner which system they're in – the numbers have gone up 2,000 over the last year... and that increase is set to continue... [We needed to make] sure, particularly for short tariff sentences, that there was a ready supply of appropriate interventions to match a needy group of prisoners who would have to have their criminogenic needs dealt with if they were to get out via the Parole process...[but interventions] were simply not stacked up (senior official, Chatham House Rules event).

As an HMIPP representative recalled, the situation was

> Catch 22...it was contributing to a rising prison population and because the prison population was rising so rapidly they couldn't do anything about it.

The Parole Board was deeply concerned by the IPP sentence, its effect on the Parole Board being that

> the judicial/member resources have been stretched up to and beyond their limits. Processes that worked in the past to deliver hearings, and disposal of cases, on time in almost all cases, have not worked to do so...in the current year the projections [and therefore funding] proved to be significantly underestimated in some key areas (Witness

> statement of Terry McCarthy, Head of Casework, Parole Board, for *Wells*).[161]

The effect of their inability to cope with IPP prisoners, in particular those with short tariffs, was well-appreciated:

> The strains are worse [for short tariff prisoners], because there is absolutely no time for the Prison Service to do anything. It is a six-month lead-in to write the various reports that go in the dossiers...and if you have only got a sentence of six, 12 months, there is no time to do any work, any sentence planning. So, effectively, the judge at sentence says, "You are too dangerous, therefore I give you this indeterminate sentence", and nothing can have changed in the meantime... it is pretty tough to make a decision that this risk assessment by the judge is wrong without more information. So, the Parole Board's hands are pretty tied without more [interventions or information] (Christine Glenn, Chief Executive of the Parole Board, Justice Committee, 2008b: Ev35-36).

The Probation Service was concerned by the IPP sentence, first, due to a perceived lack of clear guidance for probation officers on the assessment of 'dangerousness' for the purposes of the IPP sentence (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2010: 18-19) and second, because of rising concern at the resource implications of the sentence for the Probation Service as increasing numbers of IPP prisoners became eligible for release.

As regards the latter concern, a representative of HMIPP noted that

> although probation weren't picking anything up [in terms of released IPP prisoners], they were like somebody sitting on the shore watching a tidal wave coming in, because they knew it was going to hit them at some point.

The Probation Service's *raison d'être* increasingly has become the protection of the public (Nash, 1999), demonstrated by government efforts to ensure that probation officers focus more on the 'control' of offenders rather than the 'care' of clients (Annison et al.,

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[161] *R. (Wells) v Parole Board; R. (Walker) v Secretary of State for the Home Department* [2007] EWHC 1835; [2008] 1 All ER 138

2008). Given this direction of travel, it is perhaps not surprising that neither the Probation Service, nor Napo, challenged the underlying premise of the sentence. Indeed, though not necessarily representative, not only did the Probation Service or Napo not publicly challenge the underlying logic of the sentence, representatives of Napo and the Probation Service interviewed expressly supported them, the IPP's logic being described by one interviewee from these policy participant groups as 'a sound one'.

HMIPP was not only extremely concerned about the systemic failings, but also the suffering which this was causing to IPP prisoners. For example, the Prisons Inspectorate's 'Annual Report 2006-2007' commented that:

> Many IPP prisoners remained unclear about the implications of their sentence, and did not understand why they were being treated as lifers when they had committed relatively minor offences...Though IPP prisoners are now beginning to be moved from the local prisons where they languished for many months, there are still significant delays in moving both them and lifers to the first-stage lifer training prisons where they can begin to undertake work to address risk. Some additional resources are being provided to those prisons, but nothing additional has been provided to the local prisons where they may spend many months...There is still no clear strategic approach to managing IPP prisoners within the prison system, and balancing their needs against those of others (HM Chief Inspector of Prisons, 2008).

A representative of HMIPP reflected that the efforts made in relation to the IPP sentence were

> based around fairness, but also around practicality. This [was] going to be a very expensive deal and you've always got to think pragmatically, in terms of penal policy, where do you want to spend your money to the best effect?

Pressure Groups

As we saw in Chapter 3, the IPP sentence did not receive a great deal of attention from penal reform groups during the passage of the Criminal Justice Act 2003. However, once implemented, with the substantial use of the IPP sentence and its effect becoming clear,

groups including the Prison Reform Trust, the Howard League for Penal Reform, JUSTICE, the Centre for Crime and Justice Studies (CCJS), Nacro and the SCMH expressed increasing concern. Shared by all groups was the belief that the IPP sentence, though for some justifiable as a sentence-of-last-resort for a small number of very dangerous individuals,[162] was clearly over-broad, drawing in far too many individuals. This was coupled with a recognition that the resources to enable such a sentence to operate had not been forthcoming:

> [T]he criteria are too broad: far more people than the government expected have been dragged into the IPP net – and the resources have not been put in place to rehabilitate them (JUSTICE, 2007).

Following this identification of systemic failings came deep concern with the deleterious effects, actual and potential, of the IPP sentence on those caught up in its web. As one penal reform group representative recalled, 'with the IPPs, we were getting so many letters from [prisoners'] families.' The SCMH's *In the Dark*, reporting on work conducted throughout 2008, noted that

> the mental health implications of IPP have not been systematically examined. This report aims to fill that important gap (Sainsbury Centre for Mental Health, 2008: 1).

In addition, the PRT was concerned with the dangers posed by the IPP sentence to those with learning disabilities:

> One of the things we have identified, in particular, in relation to IPP... is that those with a learning disability or an IQ below a certain level are disbarred from attending these programmes...They are, in effect, serving a longer sentence because of a disability, which I think is a human rights breach. We have submitted evidence to the Joint Committee on Human Rights to that effect (Juliet Lyon, evidence to Ministry of Justice, 2008: 66).

As noted above, underpinning the concerns of many of these groups was a view that such a sentence, except in the most extreme cases, was simply unconscionable:

[162] A sentiment also expressed by Lord Woolf to the Constitutional Affairs Committee on 17 April 2007 (Home Affairs Select Committee, 2008: Ev6).

> [In addition to systemic concerns], we also question the entire approach of indeterminate sentencing for all but the most dangerous violent and sexual offenders (Memorandum submitted by JUSTICE, Justice Committee, 2008b: Ev75).[163]

The confluence of these concerns is perhaps best exemplified by the title of the Prison Reform Trust's 2007 report:

> INDEFINITELY MAYBE? How the indeterminate sentence for public protection is unjust and unsustainable (Prison Reform Trust, 2007c).

The need to act was recognised by many of these groups, with the PRT, Howard League and SCMH being most active.[164] As a penal reform group representative recalled, the motivation was that 'there was clearly going to be a build up [of IPP prisoners], the problem was going to get worse and worse and worse unless somebody did something.' The ways in which these groups sought to have an effect are discussed below.

Groups such as the POA were also concerned about the effect of the IPP sentence. The POA was particularly concerned about the dangers posed by demoralised, potentially very angry, IPP prisoners to their prison officer members:

> POA representative: IPP Prisoners... they are a big control problem within the prisons as well.
>
> Interviewer: Sure.
>
> POA Representative: Because...when you say to a prisoner, "You're going to prison for life", "When am I getting out?", "Never", what have they got to lose?

In addition, the IPP sentence was seen as exemplifying the continued failure by the government to consult practitioners when drawing up policies, or indeed when responding to

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[163] See also Howard League (2007: 3).

[164] While highly unlikely, the possibility that other groups were heavily involved in lobbying efforts 'behind the scenes' cannot be entirely discounted. In particular, absent from this account are groups arguing *for* the IPP sentence and *against* proposed amendments. A comprehensive search of relevant newspaper articles, detailed questioning of those interviewed and additional proactive investigation did not unearth any groups making these sorts of efforts.

resulting issues. Thus, concerns about the IPP sentence were inextricably bound up with disquiet about the government's treatment of prison officers, probation staff and their union representatives. The following plea from a representative of the POA interviewed is instructive:

> And that's what we're saying...when you want to come up with something please come and talk to us... and that's the thing. The IPP, when they brought it in, was a very good idea. Then people fuck it up like they do with most initiatives in prison.

The Prison Governors Association held similar concerns to those of the Prison Service as regards the systemic problems affecting the IPP and caused by it. As we would expect, their particular concern was to speak up for individual prison governors and the 'impossible' challenges they were facing as a result of the IPP sentence:

> Outcomes of the over-use of this sentence are that assessment resources and [offender behaviour programmes] in prisons, to whom the buck has been passed, are overwhelmed so that assessment and interventions do not happen until often well beyond tariff...[The sentence has] delivered to the prison and Parole Board an impossible task to assess let alone "treat" the offender in question in the timescale given. (Memorandum submitted by the Prison Governors Association, Justice Committee, 2008b)

The primacy of public protection as a guiding principle was supported, with concerns instead centring around the failure of the government to target the 'right people':

> It makes no more sense for overloaded assessment and interventions resources in prisons to be wasted on the wrong people...Risk to the public of course is paramount and so a very sound principle to underpin any new and probably essential sentencing Act would be for resources to follow the risk, proportionately. This plainly is not happening sufficiently now (Memorandum submitted by the Prison Governors Association, Justice Committee, 2008b).[165]

[165] The PGA went further in 2010, calling for the immediate release of the 2,500 post-tariff IPP prisoners, describing the situation as a 'blatant injustice' (Travis, 2010).

Parliamentarians

The IPP sentence was never a major issue in Parliament, if measured by the number of peers and MPs pursuing the issue actively. Nonetheless, a small but persistent number of parliamentarians did become aware of the IPP sentence and its effects. As one peer recalled, for him 'the real over-riding concern was the ever-increasing prison population. It was just entirely unsustainable.' The growth of the IPP prison population, was therefore seen as part of this wider issue. Lord Ramsbotham surveyed the scene thus:

> All our worst fears have come to pass: not only are the prisons choked with people; the Prison Service simply does not have the resources, people, programmes or anything else that is needed to do what needs to be done with and for these people.[166]

Other peers were motivated primarily by the view that, 'it's wrong in principle to give sentences greater than the statutory limit. What makes it worse is the inability of IPP prisoners to go through everything they need to do to obtain release' (peer, research interview). In addition, some MPs, including Andrew Stunell, had become concerned about the IPP sentence due to learning of the difficulties experienced by particular constituents.[167]

However, some peers, most prominently Lord Kingsland, then Conservative shadow Justice Minister,[168] strongly supported the principle of the IPP sentence, berating the government for failing adequately to resource this public protection measure and condemning the possibility of placing limits on the scope of the sentence.[169] This position was supported by Nick Herbert, then Shadow Justice Secretary:

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[166] Lord Ramsbotham, HL Deb, 26 February 2008, Col 614.

[167] Andrew Stunell, HC Deb, 9 December 2008, Col 400. He notes being 'in correspondence with...Ministers in the Department since October of last year about my constituent, Mr. W, who is in prison serving such a sentence.'

[168] Lord Kingsland, Christopher Prout, died on 12 July 2009.

[169] Lord Kingsland, HL Deb, 26 February 2008, Col 618; see also Edward Garnier, HC Deb, 9 Jan 2008, Col 370.

> The issue which I believe we need to address in relation to IPPs is not the principle, but the procedures for rehabilitation and the failure of the Government to ensure that offenders can get on the courses necessary for them to be released (Herbert, 2007).

Therefore what we see is a great deal of consensus in terms of the concerns of pressure participants, though equally important differences. All pressure participants were concerned primarily with the systemic problems posed by the IPP sentence. For some, this was due to disquiet at the suffering of IPP prisoners and in-principle disquiet with such sentences. Others were primarily concerned with the effect the sentence was having, and likely to continue to have, on those working within the penal system. Further, for some, the IPP sentence was the correct response to a serious issue, with the solution not that the sentence should be restricted but that the government should better manage the penal system, thus making the sentence in its original form viable.

Before moving on to consider the strategies adopted by these pressure participants, we can usefully summarize the desired goals arising from the above-mentioned concerns. Not necessarily in harmony with one another, these were, in rough descending order of the consensus around them: first, the proper resourcing of the prison service, treatment programmes and so on relating to the IPP system; second, the proper resourcing of the Parole Board to deal with IPP prisoners; third, a substantial reduction of the scope of the IPP sentence; fourth, the abolition of the IPP sentence; and fifth, an amendment of the release test for existing IPP prisoners (placing the burden of proof on the Secretary of State to demonstrate that the prisoner remained dangerous).[170]

[170] Indeed, though introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, this last suggestion was barely raised in the period leading up to the 2008 amendments.

Contestation Strategies

The strategies adopted by the relevant actors discussed herein can be distinguished both in terms of their target audience and the nature of the effort. While the goal was to have the multiple failings of the IPP sentence and the IPP system addressed, with senior ministers (and to a lesser extent senior officials) at the Ministry of Justice therefore the ultimate target, a particular effort may have been directed at ministers, officials, Parliamentarians, or the media. As an interest group representative put it,

> we would go for the politicians directly and the third strand [in addition to targeting civil servants]...was also to go for the media... You'd be trying every single route you could think of to make people sit up and listen to the fact that certain things weren't right.

The efforts themselves involved:

- Chronicling the problems caused by the sentence, either to one's own organization or to others (prisoners, prisoners' families, prison officers and so on)
- Critiquing, perhaps very harshly, the sentence and its operation
- Being constructive; proposing reforms
- Collaborating with others; building momentum and consensus
- 'Niggling'; consistently applying background pressure

As we will see, penal reform groups and Parliamentarians adopted most, if not all, of these tactics. Other groups limited themselves to a more narrow range of devices, largely due to the perceived boundaries of their legitimate activity.

Policy Participants

Given its position as a key institution within the Ministry of Justice, the Prison Service, both in the form of senior actors such as its Director General and via the National Offender

Management Service (NOMS),[171] was well-placed to impress upon the Secretary of State and senior Ministry of Justice officials the seriousness of its predicament:

> Certainly by the time it began to impact, [the IPP] was part of the regular conversation between the Director General of NOMS and ministers. They were keeping a note of numbers, they were being passed directly to ministers (HMIPP representative).[172]

The 'Lockyer Review' (Ministry of Justice, 2007b)[173] constituted a response to these concerns by NOMS and another means by which the Prison Service could press for steps to be taken to resolve the systemic problems they faced. Similar messages, regarding the 'abject failure' of efforts 'to assimilate IPP lifers into the existing life sentence system' were also coming through from practitioners such as well-respected lawyer Simon Creighton (Justice Committee, 2008b: Ev28).

The Parole Board made continual pleas during this period, both publicly and more privately, for assistance:

> We are looking for some practical help: either a change in the policy, which would restore some increased discretion to the judiciary to interpret the sentence, or some urgent and financed steps to steer these offenders quickly from their holding prison to programmes, and to training prisons. We know that NOMS are looking at this (Sir Duncan Nichol, Chair of the Parole Board, speech to the All-Party Parliament Penal Affairs Group (APPPAG), Prison Reform Trust, 2007b: 57).[174]

In addition, the Parole Board made strenuous efforts in relation to the judicial review cases, discussed in Chapter 6, both to explain the reasons for the delays in IPP parole

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[171] On the history of NOMS, see Gibson (2007: chapter 3).

[172] At this time, there was a Director General of HM Prison Service (Phil Wheatley), and a Chief Executive of NOMS (Helen Edwards). The position 'Director General of NOMS' did not exist at that time.

[173] See Chapter 7 for full discussion.

[174] See also evidence given by Christine Glenn, Chief Executive of the Parole Board, to the 'Towards Effective Sentencing' inquiry (Justice Committee, 2008b: Ev35-36).

hearings and to emphasize that steps were being taken to address these issues.[175] Having been 'rather shocked when we heard that it was coming in' (Parole Board representative), the interventions in the judicial review cases were in part defensive efforts to emphasize publicly that they had been placed in an impossible situation not of their own making, and to encourage the courts to avoid a judgment which would make it harder for the Parole Board to address the issues. For example, the Parole Board's Head of Casework, in his witness statement in *Wells*,[176] having set out the standard Parole Board hearing referral process, noted that:

> In IPP cases, we receive referrals on a piecemeal basis. The length of time before the end of the tariff period [when a case is referred] can vary significantly, and on some occasions we have received references after the end of the tariff expiry.

The judicial review cases also constituted another means by which the Parole Board could press for additional resources:

> Interviewer: It strikes me that perhaps all these cases around the IPP, especially when it goes all the way up to the House of Lords, are very useful for the Parole Board? They would seem to be the thing that really kick-started the government actually putting resources in, administrative changes in place, all of this.
>
> Parole Board representative: Is a judicial review always a bad thing? You're right, it's not... They are very, very useful at times, judicial reviews.

The legal judgments and the Lockyer review (Ministry of Justice, 2007b) were particularly helpful for the Parole Board in obtaining additional resources. For, as the then-Chief Executive complained in 2007, the Parole Board were 'treated still rather as a troublesome child' by the Home Office (Glenn, 2007: 232). As a Parole Board representative noted, the government's

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[175] The Parole Board was the defendant in the case of *Wells* in the High Court, and was admitted as an intervening party when the cases progressed to the Court of Appeal and House of Lords.

[176] *Wells* (fn161)

> main problems [at the time] were not the Parole Board, their main issue was prison overcrowding. We're not a very big fish in terms of resources and in governmental circles.

Any kind of dominant voice speaking up for probation, in relation to the IPP sentence, was notable by its absence.[177] In this context, it was largely HMIPP which spoke up on probation matters, in addition to noting the pressures placed on the prison service (see Nash, 2001: 71). The issue was pressed in annual reports (HM Chief Inspector of Probation, 2006: 67; HM Chief Inspector of Prisons, 2006: 8; 2007: 6; 2008), in evidence and lectures to, for example, the Justice Committee (Justice Committee, 2008b: Ev65) and All-Party Parliamentary Penal Affairs Group (Prison Reform Trust, 2007b), and direct discussions with ministers:

> We'd been talking to ministers ever since it came in. Ever since the sentence was passed...prisons ministers change with horrible regularity, but it was one of the routine items on our agenda..."this is dreadful" (Member, HMIPP).

A potentially strong advocate for the probation service, Napo, seemed to adopt a tactic of blunt, persistent, though often well-informed, public criticism of the government, as evidenced perhaps most clearly by the July 2007 press release, 'Home Office Failings and its Offspring the Justice Ministry's, 1997-2007'. In a thirty-strong list, the IPP was listed at number 2:

> **Indeterminate Public Protection Sentences** – introduced under the Criminal Justice Act 2003. The number of orders made so far is 2 to 3 times expectations. As a consequence men are being warehoused in local jails, unable to access relevant programmes. The system is not geared up for them and unless they do relevant programmes they don't come out of prison. The projection is that the Prison Service will be overwhelmed by these indeterminate sentences over the next few years. (Napo, 2007)

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[177] For discussion of the structural changes buffeting probation at this time, see Mair and Burke (2012: chapter 8).

It is most likely, however, that Napo's efforts constitute a demonstration of Scott's (2001) assertion that very public efforts can be a sign not of a group's strength, but of their weakness. It suggests an inability to have an effect on insider, behind-closed-doors discussions.

Pressure Groups

If we return to the typology set out above, the first strategy which served as the basis for all others was chronicling the problems caused by the IPP sentence. As was recalled,

> We meet regularly with officials in the Ministry of Justice, [our head] meets with ministers fairly regularly, we become sensitive to opportunities and we could see that there were some concerns but nobody had properly stood back and looked at it, so we decided to do that and to do it fairly quickly. (Representative, penal reform group)

Both the Howard League and PRT's 2007 reports (Howard League for Penal Reform, 2007; Prison Reform Trust, 2007c) reflected such an aim, with neither shying away from strident criticism of government:

> The government has played gesture politics while neglecting its management responsibilities to the prison system (Prison Reform Trust, 2007c: 1).

Such efforts constituted attempts to speak up for prisoners and their families. In addition, such reports repeated the widely-held, though mistaken, view that the use of the IPP sentence had far outstripped official projections. The PRT, for example, stated that, 'The government's estimate [of 900] was out by an order of magnitude' (Prison Reform Trust, 2007c: 2). The claim that the IPP population stood at approximately three times that projected after only two years clearly carries great rhetorical force.[178] It will be argued below that the way in which this criticism avoided conflict with the official narrative of the amendments

[178] The PRT cite then-prisons minister Gerry Sutcliffe's Parliamentary answer of 26 April 2007, which gave the IPP prison population as 2,547 on 20 April 2007. HC written answers, 26 April 2007 (Prison Reform Trust, 2007c: 2).

(seen in Chapter 7), speaks to the need to act as a 'responsible' pressure participant, advancing concerns in a 'legitimate' manner.

Groups recognised that promoting change required more than critique: 'the point about a voluntary organization is to offer some solutions' (representative, penal reform group). Thus, many groups adopted a dual strategy of arguing for abolition of the IPP sentence, while nonetheless proposing positive changes if the case for abolition was not accepted:

> CCJS takes the view that the IPP sentence is flawed and should be withdrawn. The government should at least amend the law so that the use of indefinite sentences is left to courts' discretion unconstrained by presumptions of dangerousness (Memorandum submitted by the Centre for Crime and Justice Studies to Justice Committee, 2008b: Ev18).

> In relation to the dangerous offenders provisions, we believe that if the sentence of imprisonment for public protection is retained, the second offence presumption in s229(3) Criminal Justice Act 2003 should be abolished...Further, consideration should be given to imposing a threshold, whereby if in the absence of the dangerous offender provisions the appropriate sentence would be less than, say, five years' imprisonment, then IPP cannot be used (Memorandum submitted by JUSTICE, Justice Committee, 2008b: Ev75).

> If the IPP is not abandoned as ultimately unprincipled and unworkable, then the Howard League for Penal Reform believes that, at the very least, an overhaul of the sentence structure is required (Howard League for Penal Reform, 2007: 25).[179]

Collaboration, the generating of consensus, was recognised as crucial by most penal reform groups and welcomed by other concerned organizations. As Grant (2000) has noted, 'pressure groups spend a lot of time talking to other pressure groups...to try and build a coalition on a particular issue and thus strengthen a particular case being put to government' (Grant, 2000: 60). The clearest example of this was SCMH's organization of an 'IPP Expert Forum':

[179] See also Prison Reform Trust (2007c: 11) and Sainsbury Centre for Mental Health (2008).

> A round-table discussion, bringing together key policy-makers, sentencers, criminal justice professionals, academics, and clinicians (Sainsbury for Centre Mental Health, invitation letter to Expert Forum).

As an individual involved recalled, it was motivated by a view that said

> "We know you all know about each other's work, but we also know that you don't all get round a table and have a Chatham House rules conversation, share your views, listen to each other", that doesn't happen as often as it should. We wanted to create a safe space for those conversations (penal reform group representative).[180]

A similar effort was seen in the 'How to Reduce Prison Overcrowding – Some practical solutions' event, held during October 2007 and attended by representatives of penal reform groups, Ministry of Justice officials, the senior judiciary, the Prison Service, Probation and others. A senior representative of NOMS in attendance recognised the collaborative nature of the event when stating the hope, 'that you're about to resolve all of [the problems] for me with the feedback from your [Working] Groups, or at least that we can have a very constructive debate.' It is notable that the relevant 'Working Group'[181] reported back that the consensus view regarding the IPP sentence was that it should be amended such that it could only be imposed 'if the tariff was more than four years'.

In addition to these efforts aimed predominantly at those within government, there was also a certain amount of collaboration in terms of efforts targeted at the media. For example,

> the Prison Reform Trust made it very clear that they would like to do a publicity initiative based on the publication of our [2008 Thematic] report, and that's what they did, which was fine, you know, they're perfectly entitled to do that. (representative, HMIPP)

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[180] The Criminal Justice Alliance (CJA, formerly Penal Affairs Consortium), potentially a central conduit for collaboration and campaigning, was near-dormant during this period. It became more active from Spring 2008, though focussing more on collaboration as opposed to its prominent campaigning role of the mid-1990s (Wilson, 2001: 137).

[181] The 'Working Groups' were comprised of those attending the conference and were tasked with discussing pressing issues and proposing specific solutions.

A common narrative of collective concern was seen to be very beneficial in arguing for change. Hence, the PRT noted repeatedly in its public statements that:

> Criticism...is coming from all quarters including, on public record, from the Chairman of the Parole Board and from the Lord Chief Justice (Memorandum from Prison Reform Trust, Justice Committee, 2008b: Ev110).

Particular events – legal judgments, publications of reports – were promoted as spurs for action. For example,

> JUSTICE, the all-party law reform and human rights organisation, today called for fundamental reform of the system of indeterminate sentencing for public protection ('IPPs'), which has recently been thrown into turmoil by the High Court's judgments in the cases of *Wells and Walker* and *James* (JUSTICE, 2007).

Such interventions are, of course, not neutral observations but efforts at promoting a particular narrative. Thus, for example, interpreting the *Wells*[182] judgment as 'spell[ing] the end of these unfair and unnecessary sentences' (Prison Reform Trust, 2008) was in itself an effort to ensure that the foreseen result came to pass. For, as Grant (2000: 125) notes, 'An important part of the political process is getting an issue on the political agenda and defining it in a way which is helpful to your particular point of view.'

Penal reform groups' actions thus reflected Grant's (2000) observation that,

> Sophisticated groups realise that using the media is one part of an overall strategy of exerting influence. The media may be particularly important in getting an issue established on the public agenda. However...different strategies and tactics may [then] be necessary as the group encounters the forces which produce inertia and continuity in political decision making (Grant, 2000: 138-139).

These different strategies included, primarily, niggling ministers and official by applying constant pressure, both directly and via Parliamentarians:

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[182] *Wells* (fn161)

> Interviewer: I don't know how much access [you] are able to have with, are there many opportunities to have a word in the ear of a Minister? Around this time, were there opportunities to say, you know, "what's going on"?
>
> Representative, Penal Reform Group: Yes, we meet, we bump into each other where there are various meetings and we have a sort of shopping list, so it rather depends what we're meeting about or where we are and things, but the IPP is certainly something we've made a fuss about both in informal discussions with civil servants, with policy makers, Members of Parliament, both Houses, with Ministers, we've done publicity on it as well.

The manner in which concerns were presented was also recognised as important, not least in relation to ministers:

> They're all constituency MPs. So they're very receptive to individual concerns...we can bring a small set of concerns directly from families of prisoners, directly to a minister. And because they're used to that way of being approached, by their constituents, they're much more receptive than if you just bring a set of ideas (Penal reform group representative).[183]

Another means of access was making use of receptive parliamentarians:

> Every now and again we got an MP to ask how many had gone in, how many have come out [and so on]...we have a range of people from various parties who will table questions, sometimes it's quite helpful that [the government] know it comes from me...because, you know, [it says] I'm on your case, wagging my finger (Representative, penal reform group).[184]

Select Committees were recognised as being particularly valuable, given that '[m]any of the recommendations made in committee reports concern the details of policy, rather than the principle, and the details of policy are what many outside organizations are interested in influencing' (Rush, 1990: 148). Many penal reform groups submitted evidence to the Justice Committee in relation to the IPP sentence for its 'Towards Effective Sentencing' inquiry

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[183] As Donmoyer (2012) has argued in relation to American policymakers,

> Policymakers may value statistical data and analysis in their public discourse; in private, however, if you want to convince them of something, tell them a good story! (Donmoyer, 2012: 805)

[184] On the utility of members of the House of Lords to pressure groups, see Baldwin (1990).

(Justice Committee, 2008a). Juliet Lyon (Director, PRT) and Paul Cavadino (Chief Executive, Nacro), along with others such as Anne Owers (Chief Inspector of Prisons), Paul Tidball (PGA) and Colin Moses (POA) were invited to give evidence in person.

Pursuing multiple lines of attack, the PRT were successful in convincing the Joint Committee on Human Rights, with the IPP sentence clearly in mind, that

> [the PRT's] evidence indicates that, because of a failure to provide for their needs, people with learning disabilities may serve longer custodial sentences than others convicted of comparable crimes. This clearly engages Article 5 ECHR (right to liberty) and Article 14 (enjoyment of ECHR rights without discrimination). It is also an area that falls within the Prison Service's responsibilities under the Disability Equality Duty (Joint Committee on Human Rights, 2008: 76).[185]

In addition, as regards influencing Parliamentarians, it was recognised that:

> A well-placed letter in The Times before a debate can be very helpful, because the Lords and MPs all pick up the paper (representative, penal reform group).[186]

Finally, sometimes inaction was recognised as the best course of action. In other words, it was recognised that the likely impact of a report (or other effort) was heavily context-dependent. In Jessop's terms, actions were subject to both 'structural constraints and conjectural opportunities' (Jessop, 1996: 125). A clear example is the PRT's decision to delay the research leading to the report 'Unjust Deserts' (Jacobson and Hough, 2010) until after the 2008 amendments had taken effect, when 'the timing was right, because the [recently-elected coalition] government wanted to do something about it' (representative, penal reform group).

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[185] The Joint Committee on Human Rights was set up in January 2001 and, comprising members of the House of Commons and Lords, considers and reports on matters relating to human rights in the United Kingdom (Blackburn and Kennon, 2003: 614).

[186] See Grant (2000: 129).

Parliamentarians

Though never an issue which attracted sustained and widespread interest within the Houses of Parliament,[187] the amendments to the IPP sentence as part of the Criminal Justice and Immigration bill followed the pattern identified by Crewe (2005), attracting

> a small group of determined Crossbenchers working through the detail of legislation on their specialist topic, and lobbying ministers and other peers, with considerable conscientiousness (Crewe, 2005: 135).

Crossbench peers such as Lord Lloyd of Berwick, Lord Ramsbotham and Lord Elystan-Morgan, and MPs such as Douglas Hogg, Edward Garnier and Andrew Stunell intervened on the issue of IPPs in debates in the Houses of Parliament, in discussions with ministers and in settings such as meetings of the All-Party Parliamentary Penal Affairs Group (APPPAG) and Justice Committee. These efforts will be explored in approximate chronological order.

The Home Affairs Committee began its inquiry 'Towards Effective Sentencing' on 6 February 2007.[188] The inquiry was continued by the Justice Committee, when committee responsibilities altered to reflect the creation of the Ministry of Justice (Justice Committee, 2008a: 6).[189] The IPP sentence was of particular concern and the Committee pressed ministers on this matter, including Justice Secretary Jack Straw on 9 October 2007 and 17 December 2007 (Justice Committee, 2008b: Ev75, Ev81-83). Grant (2000: 156) quotes Peter Riddell as arguing that committee hearings are more important than the reports, because it is the (poor) performances of ministers which garner media coverage. However, the numerous

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[187] *cf.* extreme pornography and 28-day recalls as regards the Criminal Justice and Immigration Act 2008 and trial without jury and admissions of bad character as regards the Criminal Justice Act 2003.

[188] Select committees' functions are '[to] hear evidence from outsiders, [to] deliberate informally and [to] draw up conclusions' (Blackburn and Kennon, 2003: 398).

[189] The committee considered the issue of 'fundamental problems with both prisons and sentencing policy...to be so serious that we continued with the inquiry' (Justice Committee, 2008a: 5-6).

references to the Justice Committee in this chapter and in Chapter 7 suggest that the hearings are crucial not so much for this reason, but because they constitute a means by which Parliamentarians can place sustained pressure on ministers and officials to have specific concerns addressed. As Blackburn and Kennon (2003) suggest, the very fact 'that a committee has chosen a subject for an inquiry brings that subject to the attention of ministers' (Blackburn and Kennon, 2003: 601).

The APPPAG was another route by which concerned MPs and peers could remain informed and apply pressure to ministers both directly and indirectly. All-Party Parliamentary Groups 'have a liaison function with ministers and can exert pressure to modify policy proposals or influence legislation. They are part of the consultation process which seeks view[s] from both inside and outside of Parliament' (Maloney and Jordan, 1998: 14; quoted in Grant, 2000: 152; Jones, 1990). The issue of IPPs was raised by peers on 28 March 2006, 3 July 2007, 16 October 2007 and 5 February 2008. The speakers at these meetings were, respectively, the Lord Chief Justice Lord Phillips of Worth Matravers; Sir Duncan Nichol, Chairman of the Parole Board; Justice Secretary Jack Straw; and Chief Inspector of Prisons Anne Owers (Prison Reform Trust, 2007b).[190]

As regards Parliamentary debate, the government received regular reminders of the need to address the deficiencies in the IPP system, through interventions in debates and Questions for Written Answer[191] from MPs including Alan Beith,[192] Andrew Stunell[193] and Jeremy Wright.[194] The IPP sentence was debated the same day the proposed amendments

[190] Each APPPAG event comprises a keynote speech, followed by questions and discussion.

[191] Questions for written answer 'are a major means of seeking and extracting information from the government, often information that would not otherwise be published' (Rush and Giddings, 2011: 90; Blackburn and Kennon, 2003: 526) and were used in this case to obtain information about the rising IPP prison population.

[192] HC Deb, 8 October 2007, Col 65. Alan Beith was Chair of the Constitutional Affairs (then Justice) Committee from 2003-2010.

[193] HC Deb, 14 June 2007, Col 1255W.

[194] HC Deb, 28 November 2007, Col 364.

were introduced by the government, 9 January 2008. This was at the Second Reading stage of the Criminal Justice and Immigration Bill, in the House of Commons. The strongest challenge in relation to the IPPs came from the Conservative shadow Prisons Minister Edward Garnier, which he sought 'to use as a symbolic issue on which to divide the House.'[195] The shadow minister lambasted the government for its failures which had led to post-tariff IPP prisoners being placed in such an iniquitous position. Nonetheless, he argued against the introduction of a minimum tariff, suggesting that this would be a retrograde step for public protection. Douglas Hogg, a barrister, former Home Office junior minister and regular speaker on criminal justice matters, was the only other MP to refer to the IPP sentence, arguing that they were 'inherently unjust, because they do not give any kind of certainty about the term the person should serve.'[196] David Heath, Liberal Democrat shadow Justice Secretary, limited himself to the 'tenor of the new clauses and amendments' as a whole, criticising the government's efforts to 'paper over the cracks' of a 'dysfunctional system.'[197]

The lack of discussion of the IPP amendments in any detail was due to the time constraints imposed by the government, creating a situation in which,

> [We are] contemplating such a raft of changes on Report [stage], without proper discussion, without a Committee stage and without external consultation.[198,199]

At Committee Stage in the House of Lords, Lord Kingsland, the Conservative speaker on Justice and Legal Affairs, pursued the same line of attack as Edward Garnier.[200] Lord

[195] HC Deb, 9 January 2008, Col 370.

[196] HC Deb, 9 January 2008, Col 377.

[197] HC Deb, 9 January 2008, Col 374.

[198] Douglas Hogg MP, HC Deb, 9 January 2008, Col 374.

[199] The Committee stage precedes Report stage and the proceedings in committee 'are, in some ways, the most important part of the House's consideration of bills...[because] Committees go through bills clause by clause, and schedule by schedule' (Blackburn and Kennon, 2003: 325), subjecting the bill to detailed scrutiny.

Lloyd of Berwick, supported by Lord Ramsbotham, put strong pressure on the government to take decisive action: [201]

> It cannot be solved by tinkering with timing. It must be looked at so that it affects only those whose dangerousness is such that the indeterminateness is linked to public protection...it should be seen as an exercise in sensible sentencing.[202]

> Surely it is now up to the main political parties to put aside their fears of being thought soft on crime and to think instead of the injustice being done to those serving indeterminate sentences for minor crimes without any certainty of being able to put their case before the Parole Board and who are now, therefore, without any hope of early release.[203]

At that stage the matter was not put to a vote. As Lord Kingsland put it, 'I think the Minister has got the point that I am trying to make.'[204] For, as a peer interviewed explained, 'You're not always wanting to push it to a vote. It's often a case of niggling ministers, keeping at them about an issue' (peer, House of Lords).

> Ministers here knew that...if the Tories and the Lib Dems got cross with [them] at the same time [they] were dead meat, so the ministers here have to answer with much more care all the substantial points made in debates on amendments...[They try] to persuade [critics] to wait until the next stage of the bill because, "we've heard what you've said and we'll go away and think about it and see what we can do." (peer, House of Lords)[205]

At Report stage, Lord Lloyd of Berwick made a sustained effort to promote an amendment which would increase the government's proposed minimum tariff from two years

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[200] Lord Kingsland, HL Deb, 26 February 2008, Col 618.

[201] The House of Lords differs to the Commons in that it 'is usual for public bills to be considered in committee of the whole House, rather than in standing committees as in the Commons' (Blackburn and Kennon, 2003: 723).

[202] Lord Ramsbotham, HL Deb, 28 February 2008, Col 615.

[203] Lord Lloyd of Berwick, HL Deb, 28 February 2008, Col 614.

[204] Lord Kingsland, HL Deb, 26 February 2008, Col 618.

[205] As Blackburn and Kennon (2003) note, compromise proposals are often 'worked out in private between the department, the interests concerned, and the Lords who have spoken on the point' (Blackburn and Kennon, 2003: 715). See also Grant (2000: 158).

(four year determinate equivalent) to four years (eight year determinate equivalent).[206] This came after meetings with Jack Straw, in which Lord Lloyd had sought to press the point.[207] The following comment by Lord Elystan-Morgan, in support of Lord Lloyd's proposed amendment, demonstrates the respectful tone which characterizes the Second Chamber:[208]

> The Government are to be congratulated on their attitude to the relevant provisions of the Act of 2003. It is very proper that the matter should be left to general judicial discretion rather than be made mandatory. On the other hand, I say with the greatest respect that the Government are failing to be loyal to their own logic in setting a threshold that is much too low.[209]

Taking a similar tone, Lord Hunt of Kings Heath responded for the government, stating that

> I listened with great care to the speech the noble and learned Lord, Lord Lloyd, made on his amendment. He welcomed the changes that the Government have put down, but would prefer to go further in the way that his amendment suggests...He met my right honourable friend the Lord Chancellor [Jack Straw] to discuss this, which was very helpful, but after careful consideration we think that the minimum two years in custody is the most appropriate threshold because it equates to a headline sentence of four years.[210]
>
> I understand that a number of noble Lords feel that we have not gone far enough. The noble Lord, Lord Kingsland, feels we have gone too far. I happily put the proposition that maybe we have the balance right. I hope that if he is determined to press his amendment to the vote, it will not receive the support of the House.[211]

The government avoided defeat.

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[206] Lord Lloyd of Berwick, HL Deb, 2 April 2008, Col 1101.

[207] The meeting was mentioned by Lord Hunt of Kings Heath, HL Deb, 2 April 2008, Col 1104. Another prominent peer was less active in the chamber as regards the IPP because first, there was a degree of strategic cooperation between certain peers involved in the informal crossbench 'Penal and Social Reform Group' and second,

> I was working more closely with people like the Prison Reform Trust and others and they were using my name...we were trying to aggregate the efforts (Peer, House of Lords).

[208] For a fascinating ethnographic exploration of the House of Lords, see Crewe (2005).

[209] Lord Elystan-Morgan, HL Deb, 2 April 2008, Col 1102.

[210] Lord Hunt of Kings Heath, HL Deb, 2 April 2008, Col 1104

[211] Lord Hunt of Kings Heath, HL Deb, 2 April 2008, Col 1105

Outcomes, Legitimate Concerns and 'Acceptable' Groups

> The reforms were helpful but they weren't as helpful as intended and all the problems that existed before remain. Clearly we [still] have a sentence that I think is an abomination actually (Penal reform representative).

> As you saw in the 2008 Act we crept up in terms of [the minimum tariff]. But nothing like we should have done, we should have attacked it with far more force (Peer, House of Lords).

At this point it is helpful to recall the goals of the actors discussed in this chapter. These were, put simply: administrative changes, notably the proper resourcing of the IPP system and the way in which IPP prisoners are processed through the penal system; and second, legislative changes, comprising prospective changes to the IPP sentence and also retrospective changes, affecting those already serving an IPP sentence.

All actors recognised the powerful role of electoral cycles and the resulting imperatives in a first-past-the-post political system (Lacey, 2008). Pressure groups, Parliamentarians and other policy participants realised that they operated 'in a political system in which they are checked by other political forces' (Grant, 2000: 220).

As illustrated by the following quotes, expectations as to what the efforts at contestation could realistically achieve were therefore heavily attenuated:

> We said, you know, time after time, "this IPP has got to stop. I mean, it's just ludicrous with the numbers that are going in" and he took this. But the trouble was that...[then Parliamentary Under-Secretary of State for Justice] Lord Hunt was convinced by the argument, but he was having to follow a party line (Peer, House of Lords).

> It was absolutely clear that the driver for policy was Number 10 and that Ministers really had very little influence over what was going on...it was a highly centralised policy system...it all came from the politburo (representative, pressure group).

While often seen as rather frustrating, it is important to note that this situation was accepted as being entirely legitimate within the terms of the Westminster tradition discussed in Chapters 1 and 4. Pressure groups accepted that, 'There's a limit to what we can do, because we don't have any real power' (representative, pressure group). As Blackburn puts it, 'Taken in isolation, politicians can ignore the criticisms of Members [of Parliament]. They cannot, however, ignore the voters in elections.' (Blackburn and Kennon, 2003: 18) And indeed, to 'Members' we could add pressure groups and academics.

For both pressure groups and parliamentarians,[212] the aim was to drive the government to compromise, while respecting the government's right to legislate and the legitimate role of ministers as the democratically elected decision-makers:

> Pushing them to respond to concerns with compromise amendments. This means that you must be realistic about what you want, but also what you are realistically likely to get (representative, penal reform group, notes from unrecorded interview).[213]

With this in mind, we see in Chapter 7 that the government did implement a four-year minimum tariff, as proposed by pressure groups and others at the 'How to Reduce Prison Overcrowding' event in October 2007, albeit the lesser form of a possible four-year tariff (a two year tariff, in other words four-year determinate equivalent, rather than an eight-year determinate equivalent). This demonstrates a certain degree of success, albeit limited, for many of the concerned actors.

The way in which Lord Hunt of Kings Heath explicitly cast the government amendments as a 'balance', between demands by Lord Lloyd of Berwick for a 'genuine' four-year minimum tariff and the Conservative opposition's resistance to any such

[212] As the Hansard Society have noted, Parliamentarians take up the causes of pressure groups in a way which means that 'it can be difficult to evaluate where the influence of one ends and the other begins' (Hansard Society, 2008).

[213] For a detailed, pragmatic account of the challenges to successful lobbying, see John (2002).

limitation,[214] should be seen as more than a rhetorical flourish. Parliamentarians' reactions, actual and anticipated (Judge, 1990: 39), to such measures were taken very seriously by the government. Indeed, it must be kept in mind that while pressure groups' aims as regards the IPP were attenuated, we cannot rule out similar accommodations on the part of the Justice Secretary.

Further, as has been noted above, pressure groups (and others) were aware that in contesting such developments, they were engaged in a long-term, Sisyphean struggle:

> We had no illusion that we were going to change legislation just on [one] publication, but we knew that it would be taken notice of and we've got a whole raft of [efforts]...you know, there's momentum going and people won't let it drop now (Representative, pressure group).

Notable by their absence from this account are academics.[215] This perhaps speaks to changes within academia, there being, as one interviewee put it, 'no-one quite like Anthony Bottoms or Roger Hood writing on a range of penological issues',[216] but also changes in the perceived relevance of academics to public debate and penal policymaking (Loader and Sparks, 2010). The overriding attitude from senior officials interviewed was that while 'useful' academics were welcome, problem-raising academics were not:

> Senior official: We take academic views where we think they might be helpful: academics who know a lot, particularly about other systems...So, yes we consult academics and we're interested in their views. But, that will contribute to officials' thinking and ministerial consideration of things, it won't trump other concerns.
>
> Interviewer: And the, the other concerns there are again mainly those, the big pressures whatever they are of the day?

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[214] Lord Hunt of Kings Heath, HL Deb, 2 April 2008, Col 1105

[215] This is not to say that academics were entirely absent from the debate. The Howard League's IPP report (2007) was written by a former researcher at the Centre for Criminology, Oxford. More recently, see Jacobson and Hough (2010) and the various contributions to Dennis and Sullivan (2012).

[216] One could respond to this quote by noting that academics including Mike Hough, Andrew Ashworth, Alison Liebling, Julian Roberts, Martin Wasik and Michael Tonry have demonstrated a sustained commitment to constructive engagement in relevant crime and sentencing policy debates in England.

> Senior official: Politics and money.

As another official noted, the challenge for critical academics is that,

> What you can be doing if you're not careful, is produce a lot of evidence, so you come along and say, "the IPP is creating these problems." [And the response is] "Yes, I know, but so what?" If you're not careful.

The challenge faced by academics speaks to the more general challenge for pressure participants: the need to be critical, to forcefully press one's concerns and proposed solutions, but to promote a reputation as responsible and legitimate, thus ensuring that such criticisms and solutions were taken seriously by their intended ultimate audience, the Ministry of Justice. A common distinction made in the pressure group literature is between insider and outsider groups, where:

> Insider groups are regarded as legitimate by government and are consulted on a regular basis. Outsider groups either do not wish to become enmeshed in a consultative relationship with officials, or are unable to gain recognition' (Grant, 2000: 19).

The Prison Service, both individually and via NOMS, were well-placed, as insiders, to put pressure on Ministry of Justice politicians and senior officials in order to have their concerns addressed. We see in Chapter 7 that additional resources were supplied, as well as administrative changes intended to ease the logjams in the system. Though by no means resolving all issues (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2010), a stoic Prison Service seemed, at least publicly, to be relatively content with the changes made.[217] Similarly the Parole Board seemed to have been reassured by the reviews

[217] It is surprising that apart from one brief mention, the IPP sentence did not feature in the Prison Service's Annual Report for 2007-2008 (HM Prison Service, 2008a).

commissioned by the Home Office (2006a) and then Ministry of Justice (2007b) as regards the IPP regime.[218]

The Prison Service, the Probation Service and NOMS, were in some ways limited by their position as part of the establishment and as organizations which, particularly since the advent of NOMS, saw their primary goal as meeting agreed targets (see, for example, National Offender Management Service, 2010). They tended, at least in the case of the Prison Service, to take the view that 'whatever it is you throw at us we'll have to cope with it' (representative, HMIPP). In this context, strident public criticism from any of these groups would be seen as highly unusual, and likely would have damaged their day-to-day relations with the Ministry of Justice.

The HMIPP, though being very well-connected and their reports taken seriously by the Ministry of Justice, were similarly limited by their 'insider' status. In this case, this was the result of the characteristic which was also their fundamental strength: their statutory independence. Thus, their actions were underpinned by a view that

> we have to stay independent and statutory, we won't comment on whether a policy's a good idea or not but rather we'll comment on how well it's working (Representative, HMIPP).

In terms of strategy, this presented a challenge but also was seen as beneficial:

> Part of the difficulty for the Inspectorate is that it's got to be, and got to be perceived to be, independent from everybody. So...we all knew what [various pressure groups] were doing. But there wasn't any sort of formal strategy or co-operation. [But] I think there's some advantage to attacking something from three completely different angles, without it being part of a co-ordinated campaign (Representative, HMIPP).

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[218] Chief Executive Christine Glenn, for example, described the reviews as 'welcome' (Glenn, 2007: 236), while the Annual Report 2007-2008 gives the impression of continued improvements in the Parole Board's ability to cope with IPP prisoners (Parole Board of England and Wales, 2008).

The insider/outsider distinction speaks to the (perceived) identity of these groups, but is, of course, affected heavily by the strategic choices taken by these groups. In terms of both these activities and the need to be perceived as legitimate, we can see parallels with the exploration of legitimation work discussed in Chapter 4. Certainly, in this case groups recognised the 'need to build a reputation of providing information that is accurate, well researched and not exaggerated which decision makers can rely on with confidence' (Grant, 2000: 20). As a penal reform representative noted, officials 'welcome having evidence that helps them shift something. [Therefore, evidence-based reports are] a perfect tool for policy leverage' (member, penal reform group).[219] Given this, groups were keen to emphasize that:

> Our recommendations are based on advice and discussions with key experts and senior policy makers and they may help to ease some of the systemic problems that IPP sentences have created for the criminal justice system and improve the lives of prisoners (Sainsbury Centre for Mental Health, 2008: 6).[220]

Similarly, as regards the House of Lords, the 'presence among its membership of numerous "experts" and independent members' is an important characteristic on which the chambers' legitimacy is predicated (Russell, 2010: 882). As we have seen above, these expert members are treated by the government in a manner which, while full of ritual (Crewe, 2005), demonstrates respect for these peers *as experts in their field*.

The insider/outsider distinction is demonstrated most clearly by the contrast between the ways in which the POA on the one hand, and the PRT and SCMH on the other, were perceived. A representative of the POA, reflecting on their lack of involvement with the amendments to the IPP sentence, complained that

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[219] However, for a dispiriting study of the use, misuse and non-use of empirical research by Home Office officials, see Stevens (2011).

[220] See similar statements in Prison Reform Trust (2007c), Howard League for Penal Reform (2007) and HMIPP (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008).

> if you've got a suit and a degree, then you're taken seriously by the government and by the media. If you're wearing the Queen's uniform, then you're ignored (representative, POA).[221]

Other groups fostered a role as 'critical friend' to government:

> Government do listen to us. It depends how you approach it. We don't go around punching and kicking people. We're a critical friend (Pressure group representative).

This quote echoes Ryan's discussion of the Howard League's emphasis on 'civility' in the 1970s. As Ryan (1978: 76) put it, 'it is not possible to both abuse the prison service and then be invited to reform it.' These groups saw it as necessary to negate the standard Ministry of Justice ministers' and officials' view of penal reform groups as 'ideological' and therefore less legitimate; a view that, 'well, they would say that anyway' (Sentencing official).[222] These responsible groups sought:

> Coverage in the quality press about the group's activities and the needs of its clients...[and] a reasoned presentation of the group's case. It did not involve attacks on the character and motives of ministers and officials (Whiteley and Winyard, 1987: 120; quoted in Grant, 2000: 136).

This can be seen in the way that even the PRT's most forceful criticisms of government (Prison Reform Trust, 2007c: 1), though extremely robust, were not personal attacks but rather reflected a belief that the government was abdicating its responsibility to the country and to the potentially very vulnerable IPP prisoners – an eminently 'responsible' concern.

In addition, we have seen above that the PRT, for example, expressly yoked their criticisms to those of establishment figures such as the Chair of the Parole Board and the

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[221] Relations between the Ministry of Justice and the POA were very poor at that time, the disquiet erupting into strike action being taken in August 2007 (Campbell, 2007).

[222] A Home Office official interviewed praised the Sainsbury Centre for being 'challenging but objective', tellingly complaining that 'they have no particular axe to grind, which makes it very difficult to ignore what they are saying.'

Lord Chief Justice (Memorandum from Prison Reform Trust, Justice Committee, 2008b: 110). Further, it can be suggested that the widespread reliance on the '900 myth', the belief that the government only ever expected there to be 900 IPP prisoners, which was noted above, also speaks to the need for groups, if to be successful in influencing government, to be deemed 'acceptable' (Ryan, 1978). Though certainly a genuinely-held belief for some, this interpretation of history, supporting as it does the official narrative (see Chapter 7), facilitated the government's efforts to find a 'way out' of the political bind in which they had found themselves. We can speculate that pressure groups may have regarded, to varying extents, the government's 'more or less subtle reinterpretation of the past' (Hood, 2011: 51) as a small price to pay for the rectification of the problems relating to the IPP sentence.

Nonetheless, and recalling Ryan's (1978) *The Acceptable Pressure Group*, even the most 'responsible' group faced an uphill task in attempting to influence policymaking, given the predominant views among political actors:

> [Jack Straw] felt that there was almost a snobbishness, a disdain for people who believed that criminals should be locked up if they're doing really bad things [by penal reform groups]...he felt they'd lost touch (political adviser).

> There's not much crime in four-beds in Hampstead are there? (political adviser)

The Howard League constituted an interesting case, having had some success in pressing the government on the IPP sentence, despite being viewed with suspicion by some, perhaps due to their often strident and uncompromising tone which conflicted with the 'language of the British civil service...a language of veiled understatement' (Grant, 2000: 20). As a peer involved in these matters noted,

> I'm always slightly suspicious of the Howard League...I'm never very certain whether they're doing things for the greater good of the

> Howard League as opposed to the greater good [of society]. (Peer, House of Lords)[223]

This discussion suggests that despite the plurality of pressure participants now engaged in efforts relating to crime and justice policy and practice (Ryan et al., 2001), Ryan's (1978) observation remains strikingly pertinent:

> Liberals may claim that at least western democracies 'define out' ...minority groups far less ruthlessly than totalitarian regimes. This may be so, but the ideological limits of that tolerance should not be obscured. (Ryan, 1978: 157)

Conclusion

In this chapter we have seen the concerns held by relevant pressure participants (Jordan et al., 2004: 207): namely, concerns at systemic failings; concerns at the suffering of IPP prisoners and their families; and in-principle opposition to indeterminate sentences. We saw the variety of efforts adopted by different groups in attempting to have an effect on the course of the IPP story, including the ways in which recourse was made to multiple audiences – including Parliament, the media, officials, and ministers – in the hope of applying sufficient pressure. We saw how these pressure participants recognised that the government, and therefore the likelihood of their efforts being successful, was heavily constrained by electoral considerations. A further challenge was their need to be, and be regarded by ministers and senior officials as, 'responsible', 'legitimate' actors, while pressing their pleas for change. These constraints, as we have seen, attenuated not only the challenges made by these groups but also their stated goals.

[223] This reputation amongst some of those interviewed can be seen, perhaps, as an effect of the League's long-held 'main function...to goad and to criticise, to demand that reforms should come faster and go further' (Ryan, 1978: 151).

CHAPTER 6

REINING IN: THE SENIOR JUDICIARY, LIBERAL CONCERNS AND PRECAUTIONARY CREEP

> Neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions (Griffith, 1997: 292-293).

This chapter charts the various ways in which the senior judiciary attempted to challenge (and thus alter) the nature and effects of the IPP sentence. It traces the efforts of the Court of Appeal to limit the use of the IPP sentence[224] and the series of judicial review cases, culminating in *James, Lee and Wells*[225] in the House of Lords which addressed the lawfulness of the post-tariff detention of IPP prisoners in a context where the IPP system was suffering from severe under-resourcing. We see that the judiciary expressed, in public and in private, deep and sustained disquiet as regards the IPP sentence. We see that these concerns emanated primarily from liberal concerns regarding the fairness of the sentence – its breaching of the retributive sentencing philosophy in which the senior judiciary had been schooled.

As we see below, the Court of Appeal in *Lang*,[226] and the High Court, in *Wells*,[227] delivered strident judgments which bore out these concerns. However, the conservative nature of the Court of Appeal and House of Lords' judgments suggests that the senior

[224] The leading case is *R v Lang et al* [2005] EWCA Crim 2864 ; [2006] 1 WLR 2509

[225] *R. (James) v Secretary of State for Justice (Parole Board intervening); R. (Lee) v Same (Same intervening); R. (Wells) v Same (Same intervening)* [2009] UKHL 22; [2009] 2 WLR 1149.

[226] *Lang et al.* (fn224)

[227] *R. (Wells) v Parole Board; R. (Walker) v Secretary of State for the Home Department* [2007] EWHC 1835; [2008] 1 All ER 138

judiciary are not immune from the purported encroachment of a risk-oriented, precautionary, mentality into the English criminal justice system discussed in Chapter 1.

I will suggest that the judgments can be explained first by reference to the judicial distinction between the mitigation of 'bad law' (a legitimate, indeed necessary practice) and the encroachment on the policymaking arena (an illegitimate practice). Second, it can be explained by the inherent conservatism of the senior judiciary, an equation of stability with the public interest. Third, we can better understand the judicial actions by reference to the judicial desire to be, and to be regarded as, a robust and *responsible* part of the machinery of the democratic state. We see, therefore, that the IPP judgments were not only a response to the precautionary logic embodied by the sentence, but were informed by, and constituted efforts to influence, the political context and concerns of the time.

Judicial Concerns

In April 2005, members of the senior judiciary took what *The Guardian* described as the 'rare' step of granting interviews in order to make clear their concerns at the 2003 Criminal Justice Act, whose 'Dangerous Offender' provisions were brought into law that same month:

> The judges, speaking to the Guardian on condition of anonymity, fear the Criminal Justice Act 2003 could lead to an explosion in the prison population and that mandatory measures could force them to impose sentences which are unfair in all the circumstances of the case (Dyer, 2005).

This quote accurately summarizes the primary judicial concerns regarding the IPP sentence: first, and felt most acutely, that the IPP sentence's restrictive wording – interpreted by many as an essentially mandatory sentence where the basic requirements were satisfied – was, in line with other government measures, restricting judicial discretion in a way which may well lead to injustice in individual cases. As one senior judge stated:

> I have no objection in principle to the idea that people who are demonstrably seriously dangerous should not be at large. The route to that is another question. I, naturally, would say the most reliable and sensible route is judicial discretion. Give the judges discretion and rely on their common sense (Senior judge, research interview).[228]

This judicial concern could be read, in part, as anxiety about a diminution of their standing and role as part of the machinery of a democratic state. In addition to this, their concerns regarding the limiting of judicial discretion related to unease with the philosophy which the sentence embodied:

> Taken at its face, the assumptions of 'dangerousness' contained within the Act as originally passed made it difficult for a judge – seeking honestly to construe the legislation – to avoid making the presumption in cases where an indeterminate sentence would never have been considered. And this caused us a real problem, because there is a dichotomy between the principles of punishment – on the one hand a retributive view which could be interpreted as Nigel Walker, Professor of the Institute of Criminology, would have interpreted it as 'distributive retributivism'.[229] No more than an eye for an eye, and no more than a tooth for a tooth, [and this was] giving way to a utilitarian view of punishment, that the greater good of society was served by ensuring that those whom society deemed dangerous were locked up until they weren't dangerous. Almost irrespective of what they'd done (Senior judge).

Finally, there was also anxiety about what these sentencing changes would mean for the prison population. For example, the potential 'impact of [the IPP sentencing] process on prison occupancy'[230] was identified in *Lang*[231] as of some concern.[232]

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[228] As Freiberg (2000) noted, 'Judicial discretion, with its concomitant principle of judicial independence, is central to the self-concept of the judiciary' (Freiberg, 2000: 62).

[229] Nigel Walker served as Wolfson Professor of Criminology at the Institute of Criminology, University of Cambridge, from 1973 to 1984. See Walker (1969; 1991: chapter 11). For further elaboration, see also Hart (1968) and Lacey (1988: chapter 2).

[230] *Lang et al.* (fn224), para16 per Rose LJ

[231] *Lang et al.* (fn224)

[232] These concerns were already being raised by those involved with the Judicial Studies Board (JSB)'s judicial training in relation to the Criminal Justice Act 2003, delivered January-March 2005. As one interviewee recalled, 'every judge who attended those [JSB] lectures was made well-aware of the IPP and the legislation and the problems that it would create.'

Lang[233]

The *Lang*[234] judgment constituted the Court of Appeal's first opportunity to provide guidance to courts on the 'dangerous offender' provisions contained in the Criminal Justice Act 2003. The judgment, heard on 3 November 2005, brought together 13 separate cases, where, in all but one, sentences of life imprisonment; imprisonment or detention for public protection;[235] or extended sentences, had been imposed.[236]

Lord Justice Rose delivered the judgment of the court, which he described as 'merely an attempt to summarise the approach to sentencing which the Act requires and to give guidance as to its meaning.'[237] He 'talked down' the use of the IPP sentence, advancing a limited interpretation of the provisions which arguably constituted an attempt to rebut the fundamental premise of the IPP sentence and to reshape it accordingly. For example, Lord Justice Rose emphasized that 'significant' should be taken to mean 'of considerable amount...or importance'[238], while it was also asserted, as regards the 'serious' and 'specified' offences listed in Schedule 15 that:

> Sentencers must...guard against assuming there is a significant risk of serious harm merely because the foreseen [i.e. anticipated future] specified offence is serious.[239]

Similarly, in a case where the anticipated future offence is not serious, 'there will be comparatively few cases in which a risk of serious harm will properly be regarded as

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[233] *Lang et al.* (fn224)

[234] *Lang et al.* (fn224)

[235] It will be recalled that a sentence of 'detention for public protection' was created for those under 18 years of age by s226 Criminal Justice Act 2003.

[236] The thirteenth case involved a suspended sentence of detention in a young offender institution.

[237] *Lang et al.* (fn224), para 4 per Rose LJ

[238] *Lang et al.* (fn224), para 17 per Rose LJ

[239] *Lang et al.* (fn224), para 17(iii) per Rose LJ

significant.'[240] As regards young offenders, Lord Justice Rose again encouraged a minimalist reading of the IPP (or, as regards young offenders, detention for public protection) sentence when he made clear that it is necessary 'when sentencing young offenders, to bear in mind that, within a shorter time than adults, they may change and develop.'[241]

A key feature of the judgment was the stressing of the importance of judicial discretion, notwithstanding the apparently restrictive wording of the IPP sentence. Casting the exercise of judicial discretion as 'historically, at the very heart of judicial sentencing', Lord Justice Rose stated that 'the language of the statute indicates that judges are expected, albeit starting from the [rebuttable] assumption [of dangerousness], to exercise their ability to reach a reasonable conclusion in the light of the information before them.'[242] Therefore, it was emphasized that:

> In our judgment, when sections 229 and 224 of the [2003 Criminal Justice] Act are read together, unless the information about offences, pattern of behaviour and the offender (to which regard must be paid under section 229(3) of the Act) show a significant risk of serious harm (defined by section 224 of the Act as death or serious injury) from further offences, *it will usually be unreasonable to conclude that the assumption applies*.[243]

The response to the judgment was generally favourable among the judicial and sentencing community. Renowned sentencing academic David Thomas[244] described it as an 'important judgment' and a 'welcome indication that sentencers should take a restrained and careful approach to making the finding of a significant risk of serious harm' (Thomas, 2006a: 179). A senior judge recalled that, while Lord Justice Rose was somewhat 'pushing the envelope in *Lang'*, it was a positive development because

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[240] *Lang et al.* (fn224), para 17(iv) per Rose LJ

[241] *Lang et al.* (fn224), para 17(vi) per Rose LJ

[242] *Lang et al.* (fn224), para 17(v) per Rose LJ

[243] *Lang et al.* (fn224), para 15 per Rose LJ, emphasis added.

[244] One minister interviewed described David Thomas as being 'seen by the judiciary as the guru.' His note on the 'Dangerous Offender' provisions (Thomas, 2006a) was expressly drawn upon by Rose LJ in *Lang*.

> what *Lang* did was provide judges with an additional element of discretion, to seek to filter out those cases which truly did not justify the very, very serious sanction that IPP constitutes. Because what a number of us – I'm sure all judges – readily appreciated, was that Imprisonment for Public Protection was as near to a life sentence as it is possible to get (Senior judge, research interview).

As another senior judge interviewed approvingly recalled,

> to some extent, the Vice President Lord Justice Rose was...pushing out the boundaries within which the exercise of discretion was appropriate by saying that 'exceptional' actually meant…'if it didn't dot every "i" and cross every "t" then it could be exceptional'. Whereas you and I could discuss what that word means as a matter of English and reach a different conclusion. So, had it not been for *Lang* I have absolutely no doubt that many more sentences of Imprisonment for Public Protection would have been passed.

Subsequent to *Lang*, the Court of Appeal, in judgments such as *Johnson*[245] and *Isa*,[246] re-iterated the restrictive interpretation of the IPP sentence. *Johnson* was 'intended to amplify and clarify the guidance given in Lang, rather than to qualify it' (Thomas, 2007: 180), while *Isa* was an illustration of 'the application of the restricted interpretation of s229 of the Criminal Justice Act 2003 adopted in *Lang'* (Thomas, 2006b: 359).

As a senior judge explained,

> [we] took it further in a series of cases where we refined *Lang* in a sense, and made it plain, you know, that there is a purpose behind this legislation and if this particular case or the person in front of you doesn't really fall into the category of those for whom Parliament must have intended this you don't, you don't say he's dangerous, or you try and avoid saying he's dangerous.

Amidst continuing concern that the trial judiciary and criminal lawyers were tending to misinterpret, and over-utilize, the 'Dangerous Offender' provisions (and primarily the IPP sentence), the Sentencing Guidelines Council published *Dangerous Offenders: A Guide for*

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[245] *R. v Johnson (Paul Anthony)* [2006] EWCA Crim 2486; [2007] 1 W.L.R. 585 (CA (Crim Div))

[246] *R. v Isa (Mustapha Abdi)* [2005] EWCA Crim 3330; [2006] 2 Cr. App. R. (S.) 29 (CA (Crim Div))

Sentencers and Practitioners in September 2007 (Sentencing Guidelines Council, 2007).[247] Intended to summarize the relevant case law and thus provide guidance in the use of the sentence, a second *Guide* was published in July 2008 (Sentencing Guidelines Council, 2008).[248] Despite these parsimony-encouraging efforts, the IPP population continued to grow.

Presaging the issues addressed in *Wells*,[249] *Walker and James*[250] and *James*, *Lee and Wells*[251] the Court of Appeal in *Johnson*[252] was invited to address concerns surrounding the likely situation that a proper assessment of the risk posed by the prisoner would not be made before the expiry of the tariff period and therefore the prisoner would remain in custody beyond their tariff, potentially without justification by reference to their dangerousness. Lord Judge, however, declined to consider this issue, stating that if such an eventually were to arise, it would be a matter for the administrative court.[253]

Wells[254] (High Court)

Delivered on 31 July 2007, this application for judicial review concerned the lawfulness of the continued detention of IPP prisoners after the expiry of their tariff period, in a situation

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[247] As one official involved with sentencing matters recalled,

> it became clear over time that despite what the Court of Appeal had done, there were still judges up and down the country who weren't either fully understanding or even aware of the judgments the Court of Appeal had given.

[248] The potential for guidance on the 'Dangerous Offender' provisions of the CJA 2003 was discussed by members of the Sentencing Guidelines Council and Home Office officials in December 2004. However, an official recalled that 'it was decided that it would be inappropriate to have a guideline as such' (see Prison Reform Trust, 2007b: 8). Some material was prepared in anticipation of the creation of such a guideline and this fed into the Judicial Studies Board's training materials. Several days' training in relation to the Criminal Justice Act 2003 was provided to members of the judiciary from January to March 2005, with the 'Dangerous Offender' provisions discussed by Dr David Thomas QC and Nicola Padfield.

[249] *Wells* (fn227)

[250] *R. (Walker) v Secretary of State for Justice (Parole Board intervening); R. (James) v Same (Same intervening)* [2008] EWCA Civ 30; [2008] 1 WLR 1977

[251] *James, Lee and Wells* (fn225).

[252] *Johnson (Paul Anthony)* (fn245)

[253] *Johnson (Paul Anthony)* (fn245), para 12 per Judge LJ. Lord Judge subsequently sat in the House of Lords to give judgment on this very issue.

[254] *Wells* (fn227)

where the combination of an underfunded Parole Board and a Prison Service swamped by 'short-term lifers' meant that for many of those serving IPPs, their ability to progress through the lifer system,[255] to undertake the training courses seen as vital to their 'reduction of risk' and to obtain a timely hearing before a Parole Board panel was severely hampered. The case was brought by two IPP prisoners, one held beyond tariff and one approaching that point in time. As seen in Chapter 5, concern at the problems facing IPP prisoners had been growing for some time (Howard League for Penal Reform, 2007; Prison Reform Trust, 2007c).

Three legal arguments were put forward before Lord Justice Laws and Justice Mitting[256] in the High Court. The first was based on the common law concept of 'irrationality', or '*Wednesbury* unreasonableness'[257]: that the Secretary of State's failure to properly resource the system for IPP prisoners constituted 'a course of action so unreasonable that the court should condemn it as unlawful.'[258] This lack of adequate resourcing (and resultant difficulties in the obtaining of timely Parole Board hearings) was also argued to result in the breach of the claimants' Article 5(1) and 5(4) European Convention of Human Rights (ECHR) rights. These state, respectively, that:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law – a) The lawful detention of a person after conviction by a competent court... (Art 5(1))

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. (Art 5(4))

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[255] See 'Lifer Manual', PSO 4700, reproduced in *Wells* (fn227), paras 20-21

[256] Laws LJ gave the only reasoned judgment

[257] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223

[258] *Wells* (fn227), para 38, per Laws LJ

A finding of a breach of Article 5 would have signalled the unlawfulness of the claimant prisoners' detention. A claimant is entitled to compensation if found to have been detained in breach of Article 5.[259] More pragmatically, as seen in Chapter 7, a senior Ministry of Justice official recognised that a finding against the government on Article 5(1) 'would effectively have struck down the sentence and that would...probably have brought down the Secretary of State'.

Lord Justice Laws recognised a clear difficulty for the claimants, namely that 'it is well settled that the courts are generally in no position to make judgments upon competing claims for the allocation of scarce public resources, and will decline to do so.'[260] However, he argued that the 'correct outcome of these proceedings...lies in deeper considerations.'[261] For while

> both elements – the whole sentence – are formally justified by the order of the sentencing court...the justification that is required for [the prisoner's] detention after the tariff's expiry, as the preventive element begins and continues, is of an altogether different character. This further detention is not at all justified by or at the time of sentence, for the very reason that the extent to which, or the time for which, the prisoner will remain a danger is unknown at the time of sentence. It can only be ascertained on a continuing basis, by periodic assessment.[262]

For Lord Justice Laws,

> the point [was] one of principle. It has nothing to do with the wisdom or practicality of this or that use of scarce resources...It does not touch the court's proper reluctance to tread ground which is the constitutional territory of the executive. It is a straightforward point of law...Without current and periodic means of assessing the prisoner's risk the regime cannot work as Parliament intended, and the only possible justification for the prisoner's further detention is

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[259] For discussion of Article 5 ECHR and its effects, see Harris *et al.* (2009: chapter 5) and Ovey, White and Jacobs (2006: chapter 7).

[260] *Wells* (fn227), para 39, per Laws LJ

[261] *Wells* (fn227), para 44, per Laws LJ

[262] *Wells* (fn227), para 45-46, per Laws LJ

> altogether absent. In that case the detention is arbitrary and unreasonable on first principles, and therefore unlawful.[263]

The philosophy underpinning this judgment, primarily the reliance upon the liberal, retributive philosophy, ‘the imperative that treats imprisonment strictly and always as a last resort’,[264] will be discussed below.

In a subsequent claim for judicial review by an IPP prisoner held beyond tariff heard on 20 August 2007,[265] Justice Collins followed Lord Justice Laws’ reasoning, directing the claimant prisoner’s immediate release. However, the prisoner’s release was stayed, pending a combined appeal to the Court of Appeal. In a passage which could not avoid causing alarm to the Ministry of Justice, Justice Collins mused that:

> The difficulty as I see it is that if the failures are, as the Divisional Court indicated, such as to be unlawful then it must be recognised that the consequences are truly, in one sense, disastrous, because I think it is inevitable logic following from what Laws LJ has indicated that a prisoner such as the claimant...will have to be released whether or not he remains a risk to the public.[266]

The *James* judgment caught the attention of the national news media, being reported in *The Sun* with the headline ‘Danger lags “set for early release”’ (White, 2007). Whether due to the chorus of criticisms, or governmental concern at the prospect of *Wells* being upheld by the Court of Appeal, it was made known that the government was formulating amendments to the IPP. These were said to involve the introduction of a minimum tariff, an increase in judicial discretion, and the provision of additional resources for prisoner training courses.

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[263] *Wells* (fn227), para 48, per Laws LJ

[264] *Wells* (fn227), para 49, per Laws LJ

[265] *R. (James) v Secretary of State for Justice* [2007] EWHC 2027 (Admin)

[266] *James* (fn265), para 10 per Collins J

Walker and James[267] (Court of Appeal)

The Court of Appeal heard the joint appeal from the two High Court cases in November 2007, delivering judgment on 1 February 2008. Lord Phillips of Worth Matravers delivered the judgment. Surveying 'an unhappy state of affairs',[268] the court upheld Lord Justice Laws' finding that the Secretary of State's failure to resource properly the Prison Service and Parole Board so as to enable the Dangerous Offender provision of the CJA 2003 to operate as intended was unlawful. Lord Justice Phillips stated that:

> We are satisfied that [the Secretary of State's] conduct has been in breach of his public law duty because its direct and natural consequence is to make it likely that a proportion of IPP prisoners will, avoidably, be kept in prison for longer than necessary either for punishment or for protection of the public, contrary to the intention of Parliament (and the objective of article 5 [European Convention on Human Rights] to which Parliament must have been mindful).[269]

In a point to which we will return below, the judgment was predicated on the view that the government's failure as regards resourcing meant that IPP prisoners were not being provided with a '*fair chance* of ceasing to be, and showing that they had ceased to be, dangerous.'[270]

However, Lord Phillips concluded that, given the legislation in place (in particular s28 Crime (Sentences) Act 1997 concerning prisoner release), it was not possible to subscribe to Lord Justice Laws' view of post-tariff IPP prisoners in the present situation as being 'unlawfully detained' and accordingly ruled that the order for release in *James* should be set

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[267] *Walker and James* (fn250)

[268] *Walker and James* (fn250), para 72, per Phillips LJ

[269] *Walker and James* (fn250), para 40, per Phillips LJ

[270] *Walker and James* (fn250), para 41, per Phillips LJ, emphasis added

aside.[271] The appropriate remedy in these circumstances was therefore seen as limited to declaratory relief.[272]

From a government perspective the more apocalyptic potential outcomes, were thus avoided (see Chapter 7). However, pressure was maintained by Lord Phillips' observation that if the present situation continued, with many parole board hearings effectively constituting 'an empty exercise', a breach of Article 5(4) ECHR would likely be found.[273] Further, it was suggested that while this stage had not yet been reached, the more devastating finding of a government breach of Article 5(1) ECHR may occur

> when the stage is reached that it is no longer necessary for the protection of the public that they should be confined or if so long elapses without a meaningful review of this question that their detention becomes disproportionate or arbitrary.[274]

In a passage which made for uncomfortable reading for the Ministry of Justice, Lord Justice Phillips suggested that, in such a case:

> We are not persuaded that it might not be open to the court to grant more effective relief [to affected prisoners]. There are circumstances in which the Secretary of State can release prisoners before they have served a minimum custodial term...It might be argued that one or other of these powers can and should properly be stretched so as to enable and require the Secretary of State to release a prisoner if his continued detention will infringe article 5(1).[275]

While leaving 'that question...for another day',[276] this was a clear signal to the government that a failure to address the problems of the IPP sentence was unlikely to be tolerated by the senior judiciary. In that regard, Lord Phillips noted the government's recently proposed amendments, which were at the time of the judgment being moved through

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[271] *Walker and James* (fn250), paras 47 & 70, per Phillips LJ

[272] *Walker and James* (fn250), para 72, per Phillips LJ

[273] *Walker and James* (fn250), para 67, per Phillips LJ

[274] *Walker and James* (fn250), para 69, per Phillips LJ

[275] *Walker and James* (fn250), para 72, per Phillips LJ

[276] *Walker and James* (fn250), para 72, per Phillips LJ

Parliament as part of the Criminal Justice and Immigration Act 2008, making clear that 'this judgment deals with the position within the law as it currently stands.'[277] Application for leave to appeal to the House of Lords was made by two of the claimant prisoners, and leave granted by the House of Lords on 15 January 2009.

James, Lee and Wells[278] (House of Lords)

By the time of the House of Lords' judgment on 6 May 2009, the amendments of the IPP sentence contained within the Criminal Justice and Immigration Act 2008 had been brought into law. Despite these amendments there remained, as noted by Lord Phillips in a speech to the Prisoners Education Trust on 14 October 2008,

> a substantial number of IPP prisoners sentenced under the old regime, who have served their tariffs but who are faced with difficulty in satisfying the Parole Board that they no longer constitute a risk to the public. (Phillips of Worth Matravers, 2008)

It was in this context that the House of Lords considered the same issues as first set out in *Wells*:[279] namely, whether the Secretary of State's failure to adequately resource the Prison Service and Parole Board in relation to IPP prisoners was unlawful under the common law. Second, whether articles 5(1) or 5(4) ECHR were infringed by the Secretary of State's (in)action. Further, if found unlawful on one of these grounds, what nature the relief available to the claimant prisoners should properly take. The Parole Board was given leave to intervene in the case as an interested party.

Their Lordships followed the Court of Appeal in upholding the declaration that 'the Secretary of State failed deplorably in the public law duty that he must be taken to have accepted when he persuaded Parliament to introduce indeterminate sentences for public

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[277] *Walker and James* (fn250), para 73, per Phillips LJ

[278] *James, Lee and Wells* (fn225)

[279] *Wells* (fn227)

protection ('IPPs') by s225 of the Criminal Justice Act 2003'.[280] This had, by the time of the judgment, been expressly accepted by the Secretary of State.[281] It ruled, however, that Article 5(1) ECHR was not breached by the Secretary of State's failure to make adequate provision of training courses, to enable progression through the system and properly resource the Parole Board. However, it was recognised that a 'prolonged failure' to enable a prisoner to demonstrate that he was safe for release may breach Article 5(1), as the following quote demonstrates:

> Like Lord Brown, I should not exclude the possibility of an article 5(1) challenge in the case of a prisoner sentenced to IPP and allowed to languish in prison for years without receiving any of the attention which both the policy and the relevant rules, and ultimately common humanity, require.[282]

As regards Article 5(4), it was held that this was concerned with procedure rather than substance. The Parole Board was required by statute to release a prisoner serving an IPP only when satisfied that it was no longer necessary for the protection of the public that he should be so confined, and it was open to them to decide what, and how much, information is needed to make a decision on a prisoner's suitability for release. Therefore, notwithstanding the argument that for many IPP prisoners Parole Board hearings constituted an empty exercise, Article 5(4) was not breached.

The result, therefore, was a finding that the Secretary of State had acted unlawfully, but only on the common law ground of 'irrationality'; the article 5(1) and 5(4) claims were not upheld. The appropriate remedy was therefore seen as limited to 'declamatory relief'. In other words, the claimants would not receive compensation, nor have

[280] *James, Lee and Wells* (fn225), para 3 per Lord Hope of Craigshead

[281] *James, Lee and Wells* (fn225), para 28 per Lord Brown of Eaton-under-Heywood

[282] *James, Lee and Wells* (fn225), para 128 per Lord Judge CJ

their release directed by the appellate court.[283] Rather, the possibility of future successful Article 5(1) and 5(4) claims, and the potentially substantial political damage which such a finding would likely cause, was left hanging over the Secretary of State.

The judgment presented a straightforward legal argument: the legislation and case law in place made it impossible to regard post-tariff IPP prisoners as 'unlawfully detained' and compelled a restrictive interpretation of the obligations of the Secretary of State, the Prison Service and the Parole Board as regards IPP prisoners.[284] Not least amongst these was the recognition that s142(2)(c) Criminal Justice Act 2003 expressly disapplied s142(1) to the 'Dangerous Offender' provisions of the 2003 Act – a fact which the High Court and Court of Appeal were noted to have, apparently, overlooked.[285] In other words, the intention of government that 'the first and obvious purpose of these provisions is the protection of the public from the risks posed by dangerous offenders' could not have been clearer.[286]

Further, the House of Lords judgment appeared to be heavily influenced by a view that the problems surrounding the IPP sentence were predominantly historical and largely resolved. In addition to talking in the past tense about the failures of the Secretary of State in relation to the IPP system,[287] it was stated, for example, that the

> deficiencies are, at last, being made good. Speaking very generally, courses and training are available and offenders may take advantage of them. The information being made available to the Parole Board when considering whether the offenders should remain in custody is

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[283] We must add the caveat that compensation was a possibility for two claimants to whom the Secretary of State had, wrongly in the House of Lords' view, admitted a breach of 5(4) ECHR. Due to the Minister's prior concession, assessment for damages under these claims was remitted to the Administrative Court: *James* (fn2), para 63 per Lord Brown of Eaton-under-Heywood

[284] *James, Lee and Wells* (fn225), paras 5-6, 21, 36-37, 51, 61-62, 123, 126

[285] *James, Lee and Wells* (fn225), para 48, per Lord Brown of Eaton-under-Heywood. Section 142(1) listed the five specific purposes of sentencing: punishment of offenders; the reduction of crime; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences.

[286] *James, Lee and Wells* (fn225), para 100, per Lord Judge CJ

[287] *James, Lee and Wells* (fn225), para 122

> more extensive and evidence-based, and it can make better informed decisions.[288]

Having set out the judgments, I will now consider how we make sense of this moment – contestation – in the IPP story. It will be argued that the complex mix of liberal resistance and precautionary logic displayed by the judgements can better be understood by taking into account broader developments of the time. While deeply concerned about the logic and effects of the IPP sentence, the judgements represented the senior judiciary's desire to act legitimately: to be, and to be seen as, a robust and *responsible* part of the machinery of the democratic state (Griffith, 1997).

Liberal Resistance and Precautionary Creep

> Because at the base of what we're doing, is a wish fundamentally to be concerned about the interests of justice (Senior judge).

As seen above, the judiciary were extremely concerned about both the logic and effects of the IPP sentence. They evinced traditional liberal concerns, echoing Zedner and Ashworth's (2008) resistance to the 'pre-emptive turn in criminal justice' (Zedner, 2009). Borne out is Freiberg's (2000) argument that, 'Consciously or unconsciously, Anglo-Australian judges have been steeped in the principles of classical jurisprudence' (Freiberg, 2000: 58). For example, one senior judge recalled that underpinning judicial unease with the IPP sentence was

> the old concept of retribution...there's got to be a degree of fairness, of proportionality in Human Rights Act terms between the sentence which is passed and what has been done.

[288] *James, Lee and Wells* (fn225), para 121 per Lord Judge CJ. Research conducted by Jacobson and Hough (2010) and joint thematic reports by HM Chief Inspectors Prisons and Probation (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008; 2010) suggests that this depiction constituted an over-optimistic reading of the situation facing IPP prisoners in early 2009.

Although, within this, there was a recognition that prevention was not necessarily an illegitimate sentencing goal:

> Of course, if all the evidence cumulatively shows that although what has been done is comparatively trivial, it is evidence of a much bigger future danger and risk, well then it's entirely appropriate to take that into account. *But, fairness is what judging is about* (Senior judge, emphasis added).

Reflecting on the judiciary's concern with justice in the individual case, another senior judge reflected that

> I think that was a sort of cultural thing in a sort of way, I don't think we have ever felt very comfortable with the idea that you're punishing somebody for what they might do, as opposed to what they have done. We were all brought up so to speak in the 'just deserts' sort of school of punishment. You only reserve a sentence which is there for protection of the public for those who've done something really serious. Which, in other words, justifies the life sentences. And I think we all felt more comfortable with that sort of regime than we did in the first instance being made to impose an IPP (Senior judge).

As noted above, for the judiciary, the overriding view was that it was the restriction of judicial discretion by sentences such as the IPP which were of as much, if not more, concern than the nature of the sentences themselves. In other words, judicial discretion was seen as the essential means by which the potential injustices brought about by the IPP sentence would be obviated. As one senior judge put it,

> it's a question of where you draw the line. I have no difficulty with the principle [of prevention]. If there is developing knowledge – I'm always...[sceptical] about psychiatrists and psychologists, that's inbuilt, part of my DNA – but I'm perfectly happy to accept that if there is sensible research that shows, for want of a better phrase, that it's possible to predict with a reasonable degree of accuracy that Joe Bloggs, at any rate for the next ten years, is likely to be causing problems, well, then fine. The judges ought to be able to have access to that material and use those tools. *But at the end of the day, what I do resist is judges being put in straitjackets which produces injustice in particular cases* (Senior judge, emphasis added).[289]

[289] An official interviewed, who had experience of the senior judiciary recalled that,

This liberal resistance was most clearly instantiated in the *Lang*[290] and *Wells*[291] judgments discussed above. A sentencing academic with close links to the senior judiciary summarized the prevailing view by describing *Lang* as

> not so much an act of interpretation as an attack on the legislation with a blunt instrument. I don't think you can justify the restrictive interpretation that [Lord Justice] Rose put on the Act by, shall we say, standard approaches to statutory interpretation...That judgment was very much, and characteristic of Rose, an attempt to cut off the wilder excesses of what the Act would lead to, stretching the principles of statutory interpretation to the limit.

In the context of the post-tariff detention of IPP prisoners, Lord Justice Laws, in *Wells*, emphasized 'the imperative that treats imprisonment strictly and always as a last resort.'[292] This meshes with Lord Justice Rose's efforts to minimize the use of the sentence, which was underpinned by the view that:

> It cannot have been Parliament's intention, in a statute dealing with the liberty of the subject, to require the imposition of indeterminate sentences for the commission of relatively minor offences. On the contrary, Parliament's repeatedly expressed intention is to protect the public from serious harm.[293]

We can see *Lang* as an attempt at the 'retributivization of risk': an effort to draw such preventive sentences back towards, if not fully within, classic retributive boundaries with which the senior judiciary were more comfortable. *Lang* reflected a belief, in other words, that this emphatically future-facing sentence has, nonetheless, in its DNA, an irreducible

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> judges always have this affection for judicial discretion. And I kept telling them that discretion is a means to an end, not an end in itself. But as with most things, if it comes under attack then you become more defensive.

[290] *Lang et al*. (fn224).

[291] *Wells* (fn227)

[292] *Wells* (fn227), para 49 per Laws LJ

[293] *R v Lang et al.* (fn224), para 17(viii) per Rose LJ

retributive core.[294] Further, this argument was delivered on terms acceptable to the dominant Westminster tradition and the Separation of Powers doctrine.

The concept of fairness has appeared several times in the chapter, and was a recurrent theme of research interviews and the judgments themselves. These liberal concerns, and the concern with the potential unfairness of the sentence, were seen perhaps most clearly in Lord Justice Laws' judgment in the High Court.[295] Lord Justice Laws emphasized that:

> It has long been understood that government would provide offending behaviour courses and the like so as to enable lifers to be released *at or as soon as possible after tariff expiry* where the risk they posed at that stage could be shown to be low enough for that to be justified.[296]

His concern was cast in emphatically liberal terms, when he spoke of a situation where

> the prison population is swollen by persons whose incarceration retributive justice does not require and whose release executive management does not allow.[297]

Lord Justice Laws has garnered a reputation for 'judicial evangelism' (Griffith, 1997: 333), having argued, for example, that 'the individual's autonomy is a function of man's moral nature' (Laws, 1996: 624-625) and that embedded in Britain's constitution are 'the imperative of democracy itself and those [fundamental] rights...which cannot be denied save by a plea of guilty to totalitarianism' (Laws, 1995: 92). This belief in fundamental principles is clearly reflected in the language used in *Wells*, seen most clearly in the assertion not only

[294] This view is of course paradoxical, given that such risk-oriented sentences are expressly focused on future risk and have, in principle, no interest in the offender's current offence except insofar as it provides evidence of this future risk. Indeed, it is this underlying logic which drives a great deal of the scholarly concern with such indeterminate and preventive sentences (McSherry and Keyzer, 2009; Zedner, 2009).

[295] *Wells* (fn227)

[296] *Wells* (fn227), para 24 (emphasis added)

[297] *Wells* (fn227), para 31

that the continued detention of post-tariff IPP prisoners was, in the context, 'unlawful on first principles,'[298] but further that:

> Whether or not the prisoner ceases to present a danger cannot be a neutral consideration, in statute or policy. If it were, we would forego any claim to a rational and humane (and efficient) prison regime.[299]

Such concern with the need for a humane penal system echoes the desires expressed by the liberal voices within the Home Office of the middle decades of the 20th century who believed that the approach taken to criminal justice 'was a test of a civilized society and it involved tricky choices but you, you needed to be decent to people' (Loader, 2006: 565).[300]

Another example of these liberal concerns was the emphasis by Lord Justice Laws, and Lord Phillips in the Court of Appeal, on the IPP's putative rehabilitative function. Notwithstanding s142(1)(c) CJA 2003 (see above), rehabilitation & the facilitation of such efforts was argued by both to be a 'premise of the legislation.'[301] On this basis, Lord Justice Phillips deplored the

> systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions to function as intended.[302,303]

The judgments in relation to the post-tariff detention of IPP prisoners can be read as putting strong pressure on the government to ameliorate the issues of concern without which

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[298] *Wells* (fn227), para 48, per Laws LJ

[299] *Wells* (fn227), para 49, per Laws LJ (emphasis added)

[300] Loader (2006) is here quoting a retired Home Office civil servant.

[301] *Wells* (fn227), para 26; quoted with approval by Lord Phillips in *Walker and James* (fn250) at para 40.

[302] *Walker and James* (fn250), para 72

[303] We could go further and suggest that not only were the senior judiciary demonstrating resistance to the IPP sentence on the basis of liberal concerns, but that the judgments were underpinned by Christian notions of redemption. See, for example, Lord Phillips' speech to the Howard League on 15 November 2007 (Phillips of Worth Matravers, 2007) and the discussion of Lord Judge CJ's statements on the importance of the Christian notions of justice and mercy in the *Daily Telegraph*, 10 July 2008. On the role of Christian notions in thinking on punishment, see Duce (2003) and Young (1992: 431).

the subsequent amendments and administrative changes may not have occurred. An alternative reading is that the judgments, in both the way in which the IPP sentence was discussed and the failure to provide greater assistance to the affected prisoners, display a startling lack of concern with this instance of 'precautionary logic' in the criminal justice sphere (Hebenton and Seddon, 2009).

This can be seen most clearly in the dominant response of the House of Lords to the question of the processes and standards which IPP prisoners can rightly expect. Noting that the failure to adequately resource the IPP system had caused problems for many prisoners, Lord Hope nonetheless stated that

> the failures for which the Secretary of State accepts responsibility, while highly regrettable, cannot be said to have created a breakdown of [an] extreme kind...The causal link with the objectives of the sentencing court has not been broken.[304]

On the same point, Lord Brown built upon Lord Hope's formalistic reading of the relevant law by suggesting that:

> To my mind, however, before the causal link could be adjudged broken, the Parole Board would have to have been unable to form any view of dangerousness for a period of years rather than months. It should not, after all, be forgotten that the Act itself provides for two-year intervals between references to the Parole Board.[305]

These judgments display an approach which is some distance from Lord Justice Laws' activist position, instead echoing Lord Diplock's statement in *Duport Steels Ltd v Sirs*[306] that

> [it] is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves

[304] *James, Lee and Wells* (fn225), para 15, per Lord Hope

[305] *James, Lee and Wells* (fn225), para 51, per Lord Brown.

[306] *Duport Steels Ltd v Sirs* [1980] JCR 161

> consider that the consequences of doing so would be inexpedient, or even unjust or immoral.[307]

Such statements suggest that these Law Lords were not disturbed by the prospect of IPP prisoners, in many cases, having no option but to wait for a Parole Board hearing for a period far longer than their tariff period.[308] This also runs counter to the concerns expressed by members of the senior judiciary in judgments, speeches and in private noted above.[309] These quotations, and the substantive rulings of the Court of Appeal and House of Lords, while critical of the government's actions, lend support to Griffith's (1997: 303) assertion that judges, 'when faced with the realities of a genuine political conflict, [have] retreated hastily behind the barricades of legal and constitutional formalism.' We are thus presented with something of a paradox: that the senior judiciary's deep unease and strident criticism of the IPP nonetheless resulted in what are in many ways conservative judgments.[310]

A Responsible Judiciary

Two potential challenges to the interpretation I provide below must first be confronted. First, we might suggest that the judiciary were simply applying the law – there is nothing more to say. Second, those judges making public speeches and willing to be interviewed for this research were not a representative sample of the senior judiciary, or those involved in these specific judgments. They constitute, rather, a prominent minority. The latter challenge cannot

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[307] *Duport Steels Ltd v Sirs* (fn306), per Lord Diplock. See also Lord Steyn's discussion of these matters, specifically as regards interpretation of the ECHR (Steyn, 2005: 358).

[308] Of those sentenced to an IPP between April 2005 and June 2008, 34% had a tariff of less than two years, while a further 55% were given a tariff of between two and five years (Jacobson and Hough, 2010: 12).

[309] Further, Lord Brown's observation also appears to run counter to Strasbourg jurisprudence, which has tended to accept that delays of more than one year between reviews breach Article 5(4) (Harris et al., 2009: 188).

[310] Some interest group interviewees recalled that they had expected legal challenges to be far more effective:

> The thing that really puzzles me, actually, is why, given that one, nobody likes [the IPP] and two, most people think of it as draconian and unfair, that the legal challenges haven't been more effective. I really don't understand that. Because our observation is normally that when lawyers get their teeth into something [they are successful] (Representative, penal reform group).

be entirely ruled out, but appears to be unlikely given the total absence of any evidence supporting this reading.[311] As regards the former challenge, we can refer to Tata's (2007) discussion of judging as craft, where rules and discretion are seen not as distinct, but as 'exercised simultaneously' (Tata, 2007: 429; see also Fielding, 2011). Put simply, the decision to adopt a strict interpretation of the law *is itself a discretionary choice*. If this argument is accepted, the idea that the judiciary do not possess a creative function, that they merely 'apply the law as made by Parliament' becomes a rather unhelpful 'fairy tale' (Griffith, 1997: 281).

I will, rather, suggest that the judicial response can be explained first, by reference to the judicial distinction between the mitigation of 'bad law' (seen as a legitimate, necessary practice) and the encroachment on the policymaking arena (an illegitimate practice). Second, it can be explained by the judiciary's inherent conservatism, its equation of the maintenance of the *status quo* with the public interest. Third, we can better understand the judicial actions by reference to the judicial desire to be, and to be regarded as, a responsible part of the machinery of the democratic state.

In research exploring judicial views in the UK and the United States, Fielding (2011) found that the judges interviewed, while bearing highly conventional attitudes, 'nevertheless testified to activist perspectives that they squarely attributed to feeling obliged to resist a succession of "bad" governments that had legislated "bad law"' (Fielding, 2011: 99). Fielding described this as 'conservative activism', an effort to resist the outside influences of

[311] This is not to argue that the senior judiciary hold identical views on issues which they are asked to consider, and identical understandings of the key principles drawn on in such cases. There is undoubtedly variation, though senior judges appear to have a tendency to discuss cases and issues with one another. See Robertson (1998), who makes similar arguments, based on a detailed analysis of judgments by the House of Lords. As Lord Steyn has put it in the particular context of the relation between the principles of the Rule of Law and the Separation of Powers, 'even in the Law Lords Corridor, there are opposing philosophies on the subject of deference' (Steyn, 2005: 352). For further discussion of methodological issues, see Appendix I.

governments and a public 'convinced the judiciary generally gets sentences wrong' (Fielding, 2011: 114).

The judicial efforts as regards the IPP sentence seem to have been motivated, in a similar vein, by a view of the IPP as 'bad law'. As we have seen, they were regarded as poorly drafted provisions which *Lang* had served importantly to restrictively interpret. An Appeal court judge quoted in *The Guardian* presciently suggested, in April 2005, that

> I think it's dreadful that politicians should be involved in this sort of thing, that we should have our hands tied. One does have a bit of wriggle room, and I suspect what's going to happen is the judges are going to interpret the wriggle room a bit more widely than the government would like (Dyer, 2005).

Bearing this out, a senior judge interviewed for the present research argued that:

> The bottom line is judgment, but all sorts of things feed into one's mind-set when you're exercising your judgment in relation to interpreting [legislation]. Not in an attempt to defeat the legislation, but if the legislation allows one result which is draconian, will fill the prisons for no good reason and another interpretation, perfectly legitimately, produces a less draconian result but nonetheless provides protection for the public in the most serious cases, then the judges are entitled to follow that course. And, over a period of time, if Parliament don't like what's happened then they can do something about it.

However, while the judiciary see it as their role to mitigate 'bad law', they are generally regarded as being loathe to enter the realm of policy and certainly wary of breaching the doctrine of Parliamentary Sovereignty (Ewing, 2009; Jowell, 2007). As one senior judge interviewed put it,

> there are discussions between senior judges, the senior criminal judicial teams and the Ministry [of Justice]. But the judiciary will not advise the government on policy. Because that just ain't our job.[312]

Another senior judge stated that

[312] We can recall that, until the Constitutional Reform Act 2005, the Law Lords, in addition to sitting in the highest appeal court, also sat in the second chamber of Parliament (Ewing, 2009: 271-273).

> [judges] keep out of the political arena...If Parliament says that everyone must have, say, a funny hat on when they go out on Sundays, they won't like the law but they won't publicly object to it.[313]

Similarly, as seen above Lord Justice Laws noted in *Wells* that 'the courts are generally in no position to make judgments upon competing claims for the allocation of scarce public resources, and will decline to do so.'[314]

Lord Woolf's efforts to challenge increasingly restrictive legislation during his time as Master of the Rolls were seen by one judge interviewed as 'setting the ball rolling' on increased judicial activism against such bad laws. Lord Woolf, in 1995, described his outlook thus:

> It is one of the strengths of the common law that it enables the courts to vary the extent of their intervention to reflect current needs, and by this means it helps to maintain the delicate balance of a democratic society (Woolf, 1995: 58).

This 'balance' metaphor can be seen as central to the senior judiciary's actions in *Walker and James*[315] and *James, Lee and Wells.*[316] The judgments can be seen as representing efforts at putting the IPP system 'back on track' but to avoid further steps into the territory marked 'policy'.[317] In order to make sense of the increasingly conservative nature of the

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[313] A further example of such comments as regards the IPP is seen in Sir Igor Judge's evidence to the Justice Select Committee in July 2007:

> By the year 2012 the Home Office statistics estimate we will have 25,000 of these prisoners. We think—and we are only guessing—that for the judges to be available to consider the parole reports on these 25,000 people, the Parole Board will need some 100 extra judges. Where will they come from? Where will these 25,000 be kept in custody? What effect will this have on the prison population? *It is for Parliament to say. I am merely pointing out that the IPP has already had and will continue to have an extraordinary effect on prison populations* (Justice Committee, 2008b: Q198, emphasis added).

[314] *Wells* (fn227), para 39, per Laws LJ

[315] *Walker and James* (fn250)

[316] *James, Lee and Wells* (fn250)

[317] In this regard, I find convincing Robertson's (1998) argument that 'lawyers do see law as a separate and self-contained thought system' (Robertson, 1998: 385). In other words, they are not being duplicitous when

judgments as the case travelled towards the House of Lords, we must further take into account the nature of the English court structure. Its hierarchical nature, meaning that the judge is fully aware that the (generally more conservative) higher court can – and, if the judgment is too 'adventurous', probably will – overrule his decision on appeal may have led Lord Justice Laws to be more, rather than less, strident in *Wells*.[318]

If we further accept Griffith's argument that judicial review is less a case of the 'delicate balancing' of competing interests in a democratic society, and more a case of affecting the political climate at that time on that particular issue (Griffith, 1997: 332),[319] then Lord Justice Laws' judgment takes on a slightly different complexion. Are we to believe that he expected the long-term outcome of his judgment to be the release of hundreds of 'dangerous' prisoners, as made explicit by Justice Collins in *James*?[320] Far more likely is that the strong conclusion to his judgment was designed to compel the government to give effect to the system of rehabilitation held to be an implicit premise of the legislation.

We can further make sense of the judiciary's actions as regards the IPP sentence by building on Griffith's (1997) central argument, that the judiciary because of their upbringing, professional experiences and positions held as part of the establishment, see the public interest as, above all, requiring stability (Griffith, 1997: 336-339). An implication of Griffith's argument is, further, that the senior judiciary wish to act, and be seen to act, as 'an essential part of the democratic machinery of administration' (Griffith, 1997: 291).

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judgments with clear policy consequences are cast as merely (re)stating the existing law, so much as operating by a particular and potentially highly-constraining set of rules and principles – albeit of their own making.

[318] *Wells* (fn227)

[319] Griffith (1997:352) argues that findings against the government in judicial review may force it temporarily to alter its course, or lower it in public esteem, but because a government can almost always find a way around the practical consequences of the finding such judgments 'resemble political comment in the press or on television. It is part of the political context in which government works.'

[320] *James* (fn265)

The independence crucial to the role of the judiciary as protectors of individual liberties and impartial arbiters of the law (Laws, 1996; Phillips of Worth Matravers, 2008; Woolf, 1995; 2004) was seen to be under threat from increasingly constraining sentencing legislation, proposed changes to the role of the Lord Chancellor, the formation of the Ministry of Justice, and the creation of the Supreme Court (Kettle, 2007; Malleson, 2007; Rozenberg, 2007a; 2007b). Speaking in relation to challenges faced in the 1980s and 1990s, Griffith (1997) argued that 'part of the reason for [the judiciary's increasing] robustness is to be found in their attempt to regain what status they have lost' (Griffith, 1997: 335). This interpretation is equally valid in relation to the present case.[321] Griffith argues that 'they show themselves alert to protect the social order from threats to its stability' (Griffith, 1997: 335) as part of this effort to regain status.

It is certainly possible to view the House of Lords judgment in these terms. In engaging in what we might refer to as expert judicial 'craftwork' (Tata, 2007:441),[322] their Lordships strongly condemned the Secretary of State's failure to pre-empt or rectify the systemic problems encountered by the IPP legislation in practice. And they did this *precisely because of the risk of long-term damage it posed to the existing system*. Further, they strongly supported the existing bodies charged with the management of 'dangerous offenders' and their protection of the public from this risk. In doing so, they showed themselves to be a force to be reckoned with, one that will challenge government (in)action that harms the rights of individuals or the proper working of the criminal justice system, but will nonetheless remain a *responsible* organ of the democratic machinery. In other words, not one of the judgments challenged the broader project which the IPP exemplifies, nor queried the ability of the

[321] Recalling the proposals to alter the office of Lord Chancellor in 2007, Jack Straw perceived the senior judiciary to be 'extremely sensitive to the need to preserve both the constitutional principle of judicial independence *and their own status*' (Straw, 2012: 501, emphasis added).

[322] 'In their ability to mollify conflicting audiences, to be read at a number of different levels and to hold at bay a variety of potentially critical voices, might there be believed to be by internal clientele audiences an 'internal aesthetic' in sentencing judgecraft?' (Tata, 2007: 441)

relevant organizations – the courts, Prison Service and Parole Board – to fulfil the roles and duties assigned to them by the relevant provisions of the CJA 2003.

This is emphasized by the relation between *Walker and James*[323] and the case of *Brooke*.[324] Heard at the same time as *Walker and James*,[325] the Court of Appeal ruled that the Parole Board's links with the Ministry of Justice were so great that it could not be said to constitute an 'independent tribunal' for the purposes of Article 5(1) ECHR.[326] In so doing, the crucial role of the Parole Board in the British penal system was emphasized. An upholding of Lord Justice Laws' conclusion by the Court of Appeal in *Walker and James*[327] would therefore have been contradictory, if not close to absurd. Lord Phillips would, on the one hand, have proclaimed the importance of the Parole Board and its independence for the penal system and the protection of the public, while on the other hand agreeing that in the case of post-tariff IPP prisoners, the Parole Board and the Parole system must be bypassed in the name of justice. It would, in other words, have run directly counter to the (conservative) desire for stability and for responsible judicial action, which both Fielding (2011) and Griffith (1997), in different ways, suggest are central to the mentality of the senior judiciary.

Garland's observation that the way 'responsibility for risk management is parcelled out among individuals, corporations, and government agencies...[is] a rough indicator of the political and economic structure of the society in question' (Garland, 2003b: 10) is helpful in this context. It is not surprising that the House of Lords, as part of the establishment, believed that the established structures and systems in place were best equipped to protect the public from, and make safe, these dangerous offenders. In other words, because of the judiciary's

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[323] *Walker and James* (fn250)

[324] *R. (Brooke and another) v Parole Board and another; R. (O'Connell) v Same; R. (Murphy) v Same* [2008] EWCA Civ 29; [2008] 1 WLR 1950

[325] *Walker and James* (fn250)

[326] *Brooke* (fn324)

[327] *Walker and James* (fn250)

'strikingly homogenous collection of attitudes, beliefs and principles' (Griffith, 1997: 295) to which I have referred above, it would be seen as unconscionable for them not to reinforce this system for the protection of the public from such risks. As one senior judge explained:

> You've got to maintain public confidence in the judiciary and in the rule of law...I think your "middle England" person, one likes to believe that judges don't go ape in contrast to politicians, they exercise accumulated wisdom, they sit in the Court of Appeal with three of them, the House of Lords five of them, and what they produce hopefully, at the end of the day, commands respect.

We should note, in addition, that the Court of Appeal and House of Lords' reluctance to interpret 'imaginatively' the relevant law in order better to remedy the problems caused by the IPP sentence and to compensate more appropriately the claimant prisoners, matches the general approach of the higher courts to such matters. This is especially the case as regards the judiciary's interpretation of the ECHR and the Human Rights Act. For example, Ewing (2009) has noted the:

> Contradictory position adopted by judges who claim or assert power...[while being] simultaneously reluctant to use the powers they already have. A great deal of restraint is to be seen in the approach of the courts to the Human Rights Act (Ewing, 2009: 268).

In a similar, though more critical, vein the judiciary's generally conservative approach led Tomkins (2007) to argue that 'despite the notoriety of one or two apparently progressive decisions under the Human Rights Act...a close examination of the case law reveals that little has been achieved by way of increased judicial protection of civil liberties' (Tomkins, 2007: 290).

Conclusion

We have seen that the senior judiciary were publicly and privately very critical of the IPP sentence and concerned about its effects, most clearly borne out by the *Lang* judgment as regards the interpretation of the 'Dangerous Offender' provisions of the CJA 2003 and the

Wells judgment regarding the post-tariff detention of IPP prisoners. However, the judgments as regards post-tariff detention became increasingly conservative as they moved up the court hierarchy. Because of the senior judiciary's desire to maintain stability in the name of the public interest, their desire to mitigate 'bad law' but wariness of breaching the Separation of Powers doctrine, the judgments of the Court of Appeal and House of Lords failed to resist the 'precautionary creep' which appeared, in speeches, interviews and comments in the judgments themselves, to cause them such concern.

However, we should not entirely discount the more positive reading of the judgments noted above. We can reasonably suggest that the judgments would have been substantially different but for Jack Straw's appointment as Justice Secretary and the judiciary's view that he was not only working to resolve the problems with the IPP sentence, but also that they were afforded, by him, the respect and recognition which had not been forthcoming from David Blunkett and subsequent Home Secretaries. In a different context, the senior judiciary might well have felt that more strident efforts were required in order to restore 'the delicate balance of a democratic society' (Woolf, 1995: 58). Further, we will see in Chapter 7 that these judgments, and in particular the prospect for the government of a defeat in the Court of Appeal on Article 5(1) ECHR, were strong influences on governmental action in relation to the IPP sentence. It can therefore be argued that without these judgments, the sentence and its effects would not have been mitigated, to the same extent, by the Labour government.

CHAPTER 7

RESCUING THE IPP: NEGOTIATING SYSTEMIC AND POLITICAL RISK

This chapter traces the process of the amendment of the IPP sentence in 2007-2008, culminating in the Criminal Justice and Immigration Act (CJIA) 2008. It explores the efforts made to steer a course between the twin dangers of a systemic crisis and a political crisis. Indeed we see that the systemic and political pressures were not separate: they intertwined. The systemic pressures generated novel and increased existing political pressures, while the political context – the 'penal arms race' – of the time strongly limited the possible actions open to the key actors.

The legislative conclusion to the following tale can be summarized briefly. Section 13 of the CJIA 2008 altered section 225(3) CJA 2003, expressly providing judicial discretion, with the court retaining the power – but no longer a duty – to impose a sentence of IPP in appropriate circumstances. Further, a new schedule of qualifying offences was introduced by Schedule 15A, which replaced the widely criticized Schedule 15. Finally, a two-year minimum tariff was introduced. Whereas previously a short sentence (in other words, conviction for a relatively minor offence) was no bar to the imposition of an IPP sentence, the CJIA 2008 introduced a stipulation that, unless the offender had previously committed a very serious offence, an IPP sentence could only be imposed if the present offence merited a four-year determinate sentence. In addition, various administrative steps were taken in order to ease the strain placed on the prison (and particular lifer) system and the Parole system by IPP prisoners.

This chapter will trace the process by which these amendments came about, drawing on Hood's (2011) typology of blame avoidance techniques in order to explore this – largely successful – navigation through a climate of extraordinary political risk. Following Hood (2011), these are separated into narrative, agency and policy strategies of anticipative blame avoidance. I then consider what lessons we can draw from these events and the beliefs and efforts underpinning them. In so doing, I suggest that there is great value in the study of the 'non-scandal'; that while it is important to trace 'events and processes that escape the control of the key actors' (Sparks, 2000b: 130), studies of successful crisis avoidance – of scandals which never were – have the potential to be equally instructive.

We see that Lacey's (2008) argument as regards the centrality of political structures and electoral systems in conditioning the nature of penal politics is, on the face of it, borne out by the present case. Certainly, the pressure of the anticipated election limited the perceived room for manoeuvre of many of the key actors. In addition, the vulnerability of the key actors, the impotent desire of many to foster a meaningful public debate in relation to law and order and the use of prison, is made clear.

In conclusion, it is argued that this moment in penal politics illustrates the importance of individual efforts and beliefs on the course of penal history and the central role of contingency in such events, while equally reminding us of the severe constraints imposed by the extraordinarily narrow political space perceived as being available in relation to penal politics at that time. Thus, that there was any amendment at all may come to seem rather remarkable.

Confronting Systemic Risk

It was crisis management (Political adviser).

Gordon Brown became Prime Minister on 26 June 2007, replacing Tony Blair. The following day, he appointed Jack Straw as Secretary of State for Justice, replacing Lord Falconer. Having been appointed to head the Ministry of Justice (MoJ), Straw's first task was to understand the demands upon the department and to assess its priorities accordingly. As a political adviser recalled,

> the Ministry of Justice was about eight weeks old when Jack arrived there. So there was a whole sense of taking stock of how the landscape had changed since he'd left the Home Office in 2001, to what he then inherited in 2007.

It quickly became apparent that the condition of the prison estate, both in terms of sheer numbers of prisoners and the difficulties of managing this population was a grave problem and was a nettle which had not been grasped by Straw's predecessors (Cavadino and Dignan, 2007: chapter 1).

At the same time, Jack Straw's appointment as Justice Secretary was not 'year zero', not 'the moment when everyone suddenly realised that the IPP was a big problem...That's not how things work. It was known that there was a problem there. Things are much more gradual' (MoJ official).

Nonetheless, the newly-installed Justice Secretary found himself,

> In the midst of a really serious prison crisis in terms of numbers...capacity was such that there was little headroom...a real, desperate, critical need to do everything possible to manage that (Political adviser).[328]

It was during this period that the End of Custody Licence (ECL) scheme was introduced, which provided for certain prisoners to be released from prison (on licence) up to

[328] In his autobiography, Straw (2012: 503) describes the prison population as a 'mounting crisis'; it was 'top of my "immediate" pile.'

18 days before the half-way point of their sentence.[329] Its hasty introduction reflected the fear within the Ministry of Justice about the unremitting influx of prisoners into the prison system and the very serious, unpredictable, consequences which may stem from this situation. The prison population had reached 79,730 by 30th June 2007 (Ministry of Justice, 2007a: 2), an increase of almost 15,000 since the 2001 general election. Most troublingly for ministers and officials, its upward trajectory showed no signs of slowing. The *Prison Population Projections 2007-2014* (Ministry of Justice, 2007a) stated that the prison population would on current trends rise to between 88,800 and 101,900 prisoners by 2014. It would be hard to overstate the level of concern within the Ministry of Justice at this state of affairs. As a senior civil servant recalled,

> the Home Office and the Ministry of Justice were...urgently needing to find ways of controlling the phenomenal increase that was going on.

If we utilize Rosenthal *et al*'s (1989) definition of a crisis as a situation where stakeholders perceive 'a serious threat to the basic structures or the fundamental values and norms of a system, which under time pressure and highly uncertain circumstances necessitates making vital decisions' (1989: 5), then this situation clearly constituted a crisis for those involved.[330]

I will now discuss the ways in which the IPP, as a sentence and in practice, was considered to be problematic and in need of legislative and administrative attention. We will see that the primary concerns were the growth of the IPP population (and its predicted exponential continued expansion) and its contribution to the sclerosis of the prison system

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[329] The ECL scheme was available for prisoners serving a prison term of between four weeks and four years. Sex offenders subject to registration, serious violent offenders and foreign national prisoners were excluded. The scheme was instigated by Lord Falconer, then Justice Secretary, but commenced several days after Jack Straw's arrival at the Ministry of Justice. See further House of Commons Library (2010).

[330] Boin *et al*'s (2005: 2) reference to 'a phase of disorder in the seemingly normal development of a system' is similarly helpful.

and the Parole system, in the context of existing and anticipated legal judgments. Further, lesser but nonetheless consequential concerns included 'in principle' disquiet with the IPP sentence; and the sustained efforts by penal reform groups, the Prisons Inspectorate, and others, to have these issues addressed.

The IPP and the need for reform was seen primarily through the lens of the ongoing concern at the rising prison population described above. IPPs were seen as 'one part of a whole portfolio of things that you were looking at to try to see whether there was a way through' (political adviser). As part of this, various reviews and reports were commissioned to consider the issue. These included the *Service Review – Indeterminate Sentence Prisoners (ISPs): Final Report* (Ministry of Justice, 2007b),[331] which constituted a detailed review of the problems posed by indeterminate sentences and proposals for ways forward. An earlier report, *A Review of Policy and Practice for the Release of Prisoners from Indeterminate Sentences*, had been commissioned during John Reid's time as Home Secretary (Home Office, 2006a), and this also informed the subsequent research and proposals made.[332]

As a political adviser during John Reid's tenure at the Home Office recalled,[333]

> the problem of the IPP sentence and IPP-sentenced prisoners was recognised. There was a growing bubble of cost there and potential for a very difficult management issue.

However, it was perceived as an issue which was on the horizon, one which did not yet justify the time and energy of senior ministers when both immigration and terrorism were

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[331] The review was chaired by then-NOMS Regional Offender Manager, South West England, Kevin Lockyer and thus generally referred to as the 'Lockyer review'.

[332] This work was described as having been

> overtaken by a wide-ranging NOMS review looking at the impact of indeterminate sentence prisoners across the whole of the prison system, probation service and Parole Board. (Parole Board of England and Wales, 2007: 20)

[333] John Reid was Home Secretary from 5th May 2006 to 27th June 2007.

seen as the overriding issues. Thus, as one Home Office official lamented, reflecting on repeated efforts to draw attention to the IPP situation, it was

> one thing to be a Jeremiah, to say "the world's falling in" and another thing to experience it.

The Lockyer review was thus instigated in April 2007, 'amidst increasing concern over the growing IPP population, prison overcrowding, increasing probation workloads and recent Judicial Review challenges around the management of IPPs in custody' (Ministry of Justice, 2007b: 5).

Alarm was being raised from all quarters, with managers, practitioners, members of the judiciary, the Parole Board, penal reform groups and others being greatly concerned by these issues:

> Every time [Jack Straw] met the Prison Reform Trust or the Howard League or anyone like that, IPPs were very much on the agenda and very much a headline issue for them' (Political adviser).

At a Constitutional Affairs Select Committee hearing on 9th October 2007, Jack Straw confirmed that there were, at that point, over 3,000 IPP prisoners in the prison system. Of those, 392 were beyond tariff (and were thus eligible for a Parole Board hearing), with 11 having been released.[334] In the context of a prison population of nearly 80,000 prisoners, we may expect these figures to have seemed rather trivial to those within the Ministry of Justice. However, as a senior official explained:

> Okay, the numbers weren't huge in terms of sentence but they were significant. Not least because for every one you counted, they were going to be in for a very long time.

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[334] Jack Straw, Minutes of Evidence, Constitutional Affairs Committee, 9 October 2007

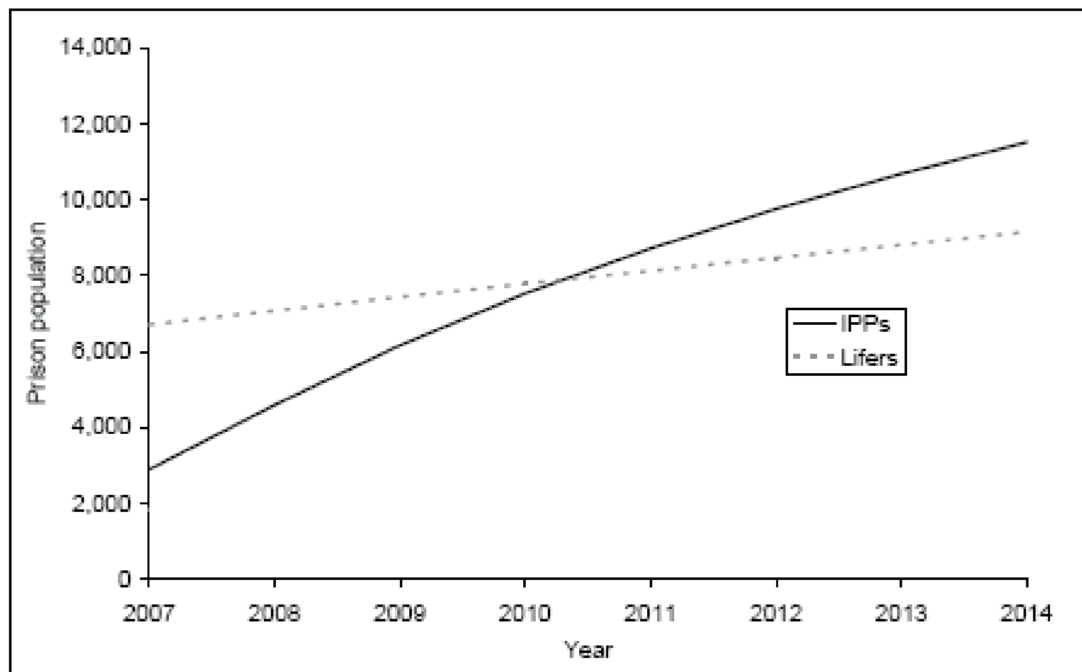
Perhaps most troubling was the prediction, contained in the *Prison Population Projections 2007-2014* (Ministry of Justice, 2007a), that the IPP prison population would on current trends quadruple to 12,000 by 2014 (see figure 3).

It is instructive at this point to recall the warning provided to David Blunkett at the time of the IPP's creation by Home Office researchers:

> What particularly drives the prison population is an increase in long sentences. A lot of short sentences create a lot of churn, but you get a disproportionate effect when you start increasing the long sentences. So sentences like that were going to have a disproportionate driver effect on the prison population. And that driver effect would increase over time (Senior sentencing official).

It was this driver effect which was now coming into view. The *2007-2014 Projections* made the role of the IPP in the prisons crisis emphatically clear, stating that 'much of the underlying growth in the High, Medium and Low [prison population] scenarios can therefore be attributed to the use of IPP sentences' (Ministry of Justice, 2007a: 8).

Figure 3: Projected IPP and Lifer prison population, 2007-2014



Source: Adapted from *Prison Population Projections 2007-2014 England and Wales* (Ministry of Justice, 2007a: 8)

The concern was not only at the numbers of IPP prisoners currently in the system and expected in the coming months and years, but also in relation to the penal system's inability to cope with this influx of indeterminately-sentenced offenders. As the Lockyer report starkly put it, the situation faced in mid-2007 was:

> IPPs stuck in local [prisons], receiving no interventions, increasing by 150+ per month (Ministry of Justice, 2007c: 5).

In a situation in 2002-2003 where 'the systems surrounding their implementation and operation were not given enough thought or resources' (Justice Committee, 2008a), it was becoming increasingly clear that the existing lifer system simply could not cope with the need to progress offenders, often with short tariffs, through a system designed for lifers who would generally be expected to spend over a decade in prison. In his evidence to the Constitutional Affairs Select Committee in October 2007, Jack Straw recognised the 'wider concern about the availability of IPP for shorter tariff prisoners because of the difficulty of getting courses for them.'[335]

An earlier internal report, *A Review of Policy and Practice for the Release of Prisoners from Indeterminate Sentences* (Home Office, 2006a), depicted the system for indeterminate prisoners as facing

> unprecedented pressure from the impact of the new IPP sentence. [Going forwards,] this sentence will increase the throughput of cases at least four-fold, and it will place strains on the traditional approaches to risk management and assessment because of the large number of cases with very short tariffs. Because the impact of the IPP sentence comes on top of the impact of the requirement for oral hearings, the [lifer] system as a whole is moving into uncharted territory. It is clear is that the resource demands will increase sizeably and rapidly.

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[335] Jack Straw MP, uncorrected evidence, Constitutional Affairs (now Justice) Select Committee, 9 October 2007, Q64

As a result of these pressures, by late 2007 the Parole Board was becoming a 'disaster area' (Parole Board member), with the number of hearings for IPP prisoners steadily increasing but the Parole Board's ability to cope steadily decreasing.[336] In addition to being extremely resource consuming, a senior official recalled that a widespread concern was the likely resulting 'problems with prison management. Because it's very hard to work with people when they don't know if they're going to get out.'

In addition to these systemic concerns, the legal judgments discussed in Chapter 6 were a cause of acute concern for ministers and officials alike. The Lockyer review, reflecting a broad consensus among NOMS and Parole Board representatives, stated that:

> The risks of not implementing the recommendations appear unacceptable, especially in the light of current judicial reviews (Ministry of Justice, 2007b: 4).

Similarly, for a senior Ministry of Justice official, the reasons for the IPP's amendment were clear and singular: 'we were in danger of judicial review.' For

> if we lost on [Article] 5(1) [in the then-upcoming Judicial Review hearing in the Court of Appeal] that would have put the government in crisis because it would effectively have struck down the sentence and that would, the political explosion that would have created, I mean, I don't know. I'm not saying it would have brought down the government, but it would probably have brought down the Secretary of State.

This provides the clearest example of the way in which the systemic risks posed by the IPP sentence in turn generated substantial political risk.

Though less pervasive, many policymakers harboured 'in principle' concerns with the IPP sentence. First, it was recognised that there was an 'apparent paradox between a very short tariff, along with a declaration by virtue of the sentence, that these people represent a

[336] Hints of such concern are apparent in Padfield (2007). See also the National Audit Office's report *Protecting the Public: The work of the Parole Board* (2008).

longer-term threat.'[337] This echoes the view which I described in Chapter 6 as the 'retributivization of risk' – a belief that it is not only practically difficult, but somehow logically impossible, for a sentence oriented towards future risk to be applicable to those who have committed relatively minor offences.

In addition, there was some concern with the inequitable position in which IPP prisoners found themselves, given the 'Kafkaesque' system that they faced (Jacobson and Hough, 2010). This concern, at least at the level of ministers, only extended to short-tariff IPP prisoners who found themselves unable to obtain the accredited training programmes which were widely perceived to be crucial to their future release, or equally to obtain a timely Parole Board hearing. For example, Jack Straw made clear that, in his view, 'it is not right to have people incarcerated if there is no necessity for them to be there.'[338]

In summary then, the primary factors driving concern with the IPP sentence was that

> the prison population was rising and...we were in danger of judicial review (Home Office civil servant).

The concern was not only about these systemic problems as issues in themselves. High in ministers, advisers and senior officials' minds was the potential for substantial political harm generated by such systemic issues. This was seen most clearly in relation to a possible defeat in the upcoming case of *Walker and James*[339] and the concern that the courts or the pressures of prison overcrowding would compel the government to release prisoners who had been labelled, as a direct result of the government's own legislation, as 'dangerous'. Jack Straw's observation that '[this] is not a situation which anybody in my position would

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[337] Jack Straw MP, uncorrected evidence, Constitutional Affairs (now Justice) Select Committee, 9 October 2007, Q64

[338] Jack Straw MP, uncorrected evidence, Constitutional Affairs (now Justice) Select Committee, 9 October 2007, Q69

[339] *R. (Walker) v Secretary of State for Justice (Parole Board intervening); R. (James) v Same (Same intervening)* [2008] EWCA Civ 30; [2008] 1 WLR 1977

have wished on their worst enemies, still less on themselves'[340] speaks to the relationship between systemic and political risk: the former contains the latter. As one civil servant put it,

> the government [had created] a rod for its own back, where any changes lead to accusations that it is letting out 'dangerous offenders' onto the streets.

While these systemic concerns compelled action, the extant political climate, the penal arms race, importantly circumscribed the possible actions open to the key actors. It is this political climate to which we now turn.

Confronting Political Risk

> So from where I sit, there are a range of interlocking issues. We are in a very, very difficult position with the prison population. The pressures on the system are acute. The pressures on our politicians are acute. (Senior official, Chatham House Rules conference, 2007)

As we have seen, the lifer system, as a direct result of the IPP sentence, was reaching breaking point (Home Office, 2006a), while the prison system as a whole was facing the prospect of levels of overcrowding with the concomitant potential for control issues, including prison riots, not seen since the late 1980s and early 1990s (Newburn, 2003: 29-38; Sparks, 2000b). However, as much work on blame and crisis management has made clear, such crises are rarely of concern only as problems in themselves. Generally, it is the potential for the issue – and the attempts to deal with it – to cause severe political harm which is of equal, if not greater, import (Boin, 2005; Hood, 2002; 2011).

The politics of the time, with Gordon Brown recently installed as Prime Minister and leader of a divided Labour Party (Seldon and Lodge, 2010), importantly conditioned the actions taken in relation to the IPP sentence. As one political adviser recalled in relation to the general prison pressures at that time:

[340] Jack Straw MP, uncorrected evidence, Constitutional Affairs (now Justice) Select Committee, 9 October 2007, Q70

> This was a big, big political issue. If Prime Minister Brown was being told we'd have to let out thousands of prisoners [having] come in following Blair – 'tough on crime, tough on the causes of crime' – the last thing you're going to be is weak.

The macho rhetoric of 'toughness' was a recurring theme of both statements of the time and interviewees' reflections. While Brown saw spending on prisons as 'dead money' (Home Office civil servant) and 'wanted to appear to be different to the Tony Blair regime and he listened a lot more to voices within the party who were very critical of Labour's prison policy' (political adviser), equally he was very fearful of the political consequences of moving away from the well-established centre right consensus (Downes and Morgan, 2002). The prospective electoral campaign was always on the horizon, and the role which crime might play in this, against a resurgent Conservative Party under David Cameron, was never far from Labour Party ministers, advisers and party officials' minds.[341] Given this, the room for manoeuvre for officials in developing amendments to the IPP sentence was perceived as being severely limited. As an adviser put it, there was

> a huge amount of pressure not to show weakness. What people would say is, "Brown U-turn on the flagship New Labour tough crime policy." And I have absolutely no doubt that Brown would have said no to [proposals for the abolition of the IPP sentence].

Further, informed accounts of the time make clear that Jack Straw was seriously considering a leadership bid during Brown's troubled premiership from the summer of 2007 onwards (Seldon and Lodge, 2010: 122-6). Therefore, a failure to rescue the IPP sentence would likely cause deep harm to the government as a whole and harm to Brown and Straw in particular.

As one closely involved observer noted, it was always perceived internally as 'a sort of damage limitation exercise', with the government 'desperate to avoid being seen to do a U-

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[341] The general election was eventually held on 6th May 2010, though the Prime Minister came extremely close to calling an early election in the Autumn of 2007 (Seldon and Lodge, 2010: chapter 4).

turn' on this sentence which 'they had trumpeted as a great measure for public protection' (MoJ official).[342] For, to borrow from Sparks (2000a), it was believed that:

> The state cannot any longer simply perform punishment as a matter of sovereign right. It must also thereby promise something. And increasingly what [was promised was] protection (Sparks, 2000a: 136).[343]

Consistent pressure was applied by the Opposition party. Conservative MP Nick Herbert, then shadow Justice Secretary, attacked the government's neglect of public protection in favour of attempting 'to reduce the prison population by any means it can get away with' (Wilson, 2007). These challenges recall Hebenton and Thomas' (1996) argument that measures promising risk reduction and containment inevitably come to be 'drenched in' impassioned and emotive rhetoric.

As Boin *et al.* (2005) have argued, crises 'fix the spotlight on those who govern' (2005: ix), with citizens and journalists alike expecting 'governments and public agencies to do their utmost to keep them out of harm's way' and for those in charge 'to make critical decisions and provide direction even in the most difficult circumstances' (2005: 7). With these expectations comes a great deal of political risk, or what Hood (2011: 5) denotes as 'blame risk'.

In the present situation, Straw and his colleagues' efforts at blame avoidance were anticipative, involving 'efforts to "stop blame before it starts"' (Hood, 2011: 7). Straw's recent appointment to the Ministry of Justice, itself a very recent creation, meant that the problematic situation described above was not attributed to him personally, nor, to some extent, to the newly-established department. However, it was clear that any perceived mis-

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[342] This echoes Douglas' (1992: 39) insight that '"risk" does not signify an all-round assessment of probable outcomes but becomes a stick for beating authority.'

[343] Indeed, the Ministry of Justice's 'Response to the Justice Select Committee's Report: Towards Effective Sentencing' (2008) states that 'the first duty of any Government is to keep the public safe' (2008: para 13).

step would have severe consequences for the political actors involved. In other words, the challenge for the Justice Secretary and his departmental advisers and officials – fascinating for the observer though excruciating for many of those involved – was to reduce the scope and impact of the IPP sentence and thus avoid the crisis of an adverse judicial review on article 5(1) ECHR or the breaking down of the lifer system, while acting in such a way as to avoid the political damage and electoral harm which could result from a perceived 'softening' of this vital defence against 'dangerous offenders'.

I will now outline Hood's (2011) typology of blame avoidance techniques, arguing that this provides us with a useful heuristic device by which to reconstruct and interpret the efforts made – by Jack Straw, his advisers, Ministry of Justice officials, and others – to amend the IPP sentence in a way which successfully addresses the twin pressures of systemic and political risk. Having done so, I will explore the different aspects of the key actors' endeavours, before asking how we might make sense of this event in penal politics. These blame avoidance techniques are termed presentational, agency and policy. Presentational strategies can involve searching 'for plausible excuses to mitigate blame on the part of particular officeholders, at the point where loss perception and agency meet' (2011: 17), or indeed efforts at winning 'any argument over culpability in its own terms' – that the accusations made against them are either untrue, or their actions justifiable (2011: 50). Agency strategies denote decisions whether, for example, to direct actions or delegate to others; efforts, in other words, to 'delegate activities that will attract blame while retaining in their own hands the activities that will earn credit' (2011: 19). Finally, policy strategies 'aim to work on the agency dimension and the time element [of blame] by choosing policies or procedures that expose themselves to the least possible risk of blame' (2011: 20).

Different efforts at blame avoidance strategies often are interwoven with one another. In the present case, various efforts were made including, most notably, the building of a

narrative in relation to the IPP sentence and its amendment; the instigation of the Carter review (subsequently published as Securing the Future, 2007) and the decision to publish the proposals for the IPP's amendment in this report; and efforts to alter the administration of IPP-sentenced prisoners, in addition to the legislative amendments made. Drawing clear demarcation lines in relation to these efforts – for example, defining the Carter review as solely a narrative strategy, an agential strategy, or policy strategy is not only difficult but unhelpful, given that it formed part of each strategy. Nonetheless, considering the strategies in turn allows us to pause and investigate each one in some detail. It is thus to the building of a narrative which I first turn.

Presentation – Building a Narrative

Narratives are often a crucial part of any successful negotiation of political risk. This fact, recognised by Hood (2011) and other scholars, was equally well-appreciated by the minister and his advisers in the present case. It was not enough to work-up a policy; it was crucial to 'put a wrap' around it in a way which made it not only convincing, but capable of withstanding potentially sustained media and political criticism (political adviser). As this adviser explained, in the context of the clear need to rebalance the (increasing) numbers of individuals going into prisons with (insufficient) capacity, the aim was

> protecting the politicians, doing something which was subtle, which wouldn't be written about by the newspapers, which didn't pose a significant risk to the public and which would get past. I mean, think about it, we were just desperate not to have people in prison. Because we'd failed to build enough to meet demand...Imagine the Home Secretary or the Justice Secretary's position, of having to admit they'd let people out. The worst political nightmare.

The nature and tone of the narrative put forward by the Ministry of Justice can be characterized as what Hood (2011: 50) describes as an effort to 'win the argument':

> to win any argument over culpability in its own terms...some sort of reasoned account offered by the potential blame taker to the potential blame maker, to avoid or limit blame (Hood, 2011: 50).

The narrative contained four key points. First, that the existing situation with IPP prisoners – with approximately 300 post-tariff prisoners unable to make meaningful efforts towards satisfying the Parole Board that 'it is no longer necessary for the protection of the public that the prisoner should be confined'[344] – was unsatisfactory and being taken very seriously. Second, that the situation was both unforeseen and unintended by those involved with the creation of the sentence. Third, that the efforts being made in relation to the sentence were merely technical adjustments – the sentence was not being weakened, but was being recalibrated to meet its original aims. Finally, that the government was not 'going soft' – public protection remained a central aim of government and the IPP remained a 'major plank' of these efforts.[345]

As regards the first aspect of the narrative, in one of several evidence sessions with the Constitutional Affairs Select Committee[346] Straw made clear his recognition of the importance of these issues and his determination to address them:

> What I do accept is that we have to take some pretty urgent action to get these people through the system. It is not right to have people incarcerated if there is no necessity for them to be there.[347]

This effectively drew a line under the past, acting in accord with Hood's (2011) depiction of an officeholder who chooses:

> To apologize early in a blame sequences [to] present themselves as honest and sincere, acknowledging their mistakes and drawing a line

[344] Section 28(6)(b), Crime (Sentences) Act 1997

[345] David Hanson MP, HC Deb 9 Jan 2008, col 364

[346] The Committee was subsequently re-titled the Justice Select Committee, which published the report *Towards Effective Sentencing (2008a)*, which was informed by these evidence sessions.

[347] Jack Straw MP, Evidence to Constitutional Affairs Select Committee, 9 October 2007, Q69

> under them before moving on purposefully to repair the damage and face new challenges (Hood, 2011: 54).

The narrative of surprise, of the present situation as the result of unintended and unexpected consequences, was made clear in the following news article. On 22 August 2007, *The Guardian* reported that 'Straw admits surprise in sentencing controversy' (Press Association, 2007), with it stated that Straw had told Channel 4 News the previous day that

> one of the surprises in the use of this sentence is that, in many more cases than was anticipated, the actual tariff - the minimum to be served - is shorter than [had been] anticipated.

We have seen in Chapter 4 that the projections and research in 2002-2003 suggested that the IPP prison population would likely increase by 950 prisoners per year and that such indeterminate-sentenced prisoners would be far more resource-intensive than determinate-sentenced prisoners, but that these projections were apparently ignored.[348] Several closely-involved officials viewed the government's reading of history as, though not necessarily outright deceptive, particularly convenient:

> They were desperate to avoid being seen to do a U-turn. And the way they got round it was by saying, "well, we never expected this many IPPs, we never expected this many to be short-term." I'm not entirely sure what the basis of that is (MoJ civil servant).[349]

Whether ministers and officials were being deliberately deceptive, or were merely declining to interrogate an advantageous historical interpretation,[350] it is certainly clear that a

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[348] The House of Lords noted that the 'foundations for this belief are unclear and, given the express and clear legislative provisions, somewhat mysterious': *R. (James) v Secretary of State for Justice (Parole Board intervening); R. (Lee) v Same (Same intervening); R. (Wells) v Same (Same intervening)* [2009] UKHL 22; [2009] 2 WLR 1149; para115, per Lord Judge CJ

[349] Nonetheless, discussion of the working-up of a narrative should not be taken to automatically imply deception. In response to this issue, a former political adviser argued that

> there's always a danger when people think that things are said on purpose to get [a future outcome]... In some senses there has been a narrative built up [in relation to the IPP sentence], but it's not completely cynical.

[350] The majority of the senior ministers, advisers and officials were not at the Home Office at the time of the creation of the IPP sentence and thus were largely relying on second-hand knowledge.

'more or less subtle reinterpretation[s] of the past' was, in this case, an important aspect of the dominant narrative (Hood, 2011: 51).

Speaking to the third and fourth aspects of the government narrative, that the amendments were merely 'technical adjustments' and therefore the government was not 'going soft', the following section of Prisons Minister David Hanson MP's speech to the House of Commons is instructive:

> I hope that I can assure the House that [IPP] sentences remain a major plank of the Government's public protection policy. However, while those sentences have met their objectives, they have given rise to a number of issues... [IPP] Sentences with such short tariffs are very difficult for the Prison Service to manage. They often put an unprecedented strain on the service, and on the Parole Board, and its workload.[351]

The effort was, in other words, to make the sentence more 'effective' (Ministry of Justice, 2008: para 13); a managerial effort at best targeting limited resources. Similarly, in the House of Lords, Lord Hunt of Kings Heath for the government stated that:

> The question is whether the balance is right, and in the light of experience we think that we have not got it right. It had not been envisaged that the sentences would be used so widely for less serious offenders.[352]

Emphasizing the government's oft-stated commitment to public protection, Lord Hunt explained that

> as a safeguard, we have included in the threshold legislation exceptions for those offenders who have shown themselves to be very dangerous by committing a particularly serious offence. When an offender has committed one of the offences set out in new

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[351] David Hanson MP, HC Deb 9 Jan 2008, col 364. It is interesting to note that the minister's speaking notes referred to 'unforeseen effects', rather than the milder 'number of issues'. One can only speculate as regards the reasons for this change of words and how telling this might be.

[352] Lord Hunt of Kings Heath, HL Deb 28 February 2008, col 616. Lord Hunt of Kings Heath was Parliamentary Under-Secretary of State and Government Spokesman for the Ministry of Justice 2007-2008.

> Schedule 15A to the 2003 Act, the threshold need not apply to him if he commits future sexual and violent offences.[353]

The Carter review, noted above, was asked 'to consider options for improving the balance between the supply of prison places and demand for them and to make recommendations on how this could be achieved' (Lord Carter of Coles, 2007: foreword). The Carter review team comprised several officials seconded from the Treasury, in addition to the 'seconding [of] two OMS (Offender Management Service) Analytical Services staff to provide advice and evidence for Lord Carter's demand workstream' (Ministry of Justice, 2008: para 4).

Commenced by Jack Straw's predecessor, Lord Falconer in June 2007 (Lord Carter of Coles, 2007),[354] the review was already in progress when Jack Straw arrived at the Ministry of Justice. The purported independence of Carter from government is made clear by the following exchange:

> Q62 Robert Neill: From what you say, the Carter findings cannot sensibly be incorporated by amendments to the current Bill, or do you think that is possible?
>
> Mr Straw: The answer is that they may be. I have not had any submission or suggestions emerging from Lord Carter's review which could translate into amendments to the current Bill, but I do not rule it out.
>
> Q63 Robert Neill: You are open-minded on the point?
>
> Mr Straw: Yes. If there are suggestions that can make a difference and represent significant improvements in the sentencing regime and we can sensibly get them into the Bill I will do it.[355]

[353] Lord Hunt of Kings Heath, HL Deb 28 February 2008, col 616

[354] Jack Straw MP, HC Deb 5 Dec 2007 : Column 827

[355] Evidence to Constitutional Affairs Select Committee, 9 October 2007

Agency – Shielding the Government and Building Relations

Hood (2011) notes that 'one central strain' in agency strategies involves 'efforts by officeholders to delegate activities that will attract blame' (2011: 19); in other words, to use others as what we might term lightning rods. We might perceive the Carter review to have been intended as such a lightning rod. However, the research interviews made clear that, for those involved, Carter was not so much a lightning rod as a shield.[356] He was trusted by Gordon Brown and Jack Straw as a robust, effective, political operator whose review could provide a safe space for the development of proposals, removed from the day-to-day media and political glare. A member of the review team recalled that it was 'very significant who [the 2007 Carter report] was addressed to' – namely, the Prime Minister, Chancellor of the Exchequer and the Secretary of State for Justice:

> The Prime Minister said, "well, let's find someone who we trust. Who at least can tell me whether [the officials' assessment of the current and future predicament] is right." How do you protect your back politically? That was the job (Carter review team member).

A key goal of the Carter review was to address tensions internal to the government. As one official involved with the Carter review put it,

> what we had was, actually, [MoJ] officials not particularly trusted. But having the knowledge...The Treasury didn't trust the department, because it always asked for money. The department thought the Treasury was wrong, but couldn't convince them.

In this regard, the Carter review's goal was first, to challenge the projections and suggestions made by MoJ officials and then second, to use these robust projections - and Carter's reputation with the Treasury – to ensure that additional funding was obtained for the prison-building seen as essential to the avoidance of a severely damaging prisons crisis. The

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[356] While both involve protection of relevant politicians, the term shield is preferred because politicians' intentions were not to scapegoat Lord Carter; in any case, Carter was willing and able to 'take the heat' which might have come his way.

way in which the review would be utilized by the Justice Secretary was recognized by a member of the Carter team:

> The process would be, in government...the Chancellor would say there's no money because he always does. The Justice Secretary would say, "I need the money." And the Chancellor would say, "you can't have it." So then the Justice Secretary will go to the Prime Minister and say, "Prime Minister, this is addressed to you. This is overwhelmingly politically important. This is a political judgment. Do you want prisoners on the streets, or do you want to find the money?" So the money gets found. That's how it works.

A key agency strategy for the avoidance of actual or potential blame is scapegoating (Hood, 2011: 67). And in this case, there were many potential candidates: the Prison Service and Home Office officials could have been publicly castigated by the Justice Secretary for failing to appreciate the implications of the IPP sentence; the trial judiciary could have been blamed for over-using and misinterpreting the sentence; and the Parole Board could have been criticized for its failure to avoid a substantial backlog of IPP prisoners building up. However, Jack Straw took precisely the opposite approach.

Relations within the Ministry of Justice improved for civil servants from the days of David Blunkett and John Reid at the Home Office. Straw fostered 'very good working relations' (Home Office official), encouraging 'debate and discussion and didn't mind argument' (closely involved observer). Indicative of the productive relations is the freedom which officials were afforded to work-up amendments to the IPP sentence, within broad boundaries provided by the Minister. Such ministerial decisiveness, coupled with intellectual freedom for officials, was very much appreciated, as was Straw's ability to be 'effective in public, effective in Parliament and effective in Cabinet' (political adviser).

Similarly, concerted efforts were made to improve relations between the government and the judiciary. It was recognised that

> you can't have those sorts of poor relationships between politicians and the judiciary. Both have their spheres of responsibility and each has to have their independence respected...a lot of energy went into rebuilding mutual respect and trust. And Jack Straw was certainly very influential in that (senior MoJ official).[357]

While this was clearly recognised as a good in itself, the impending Court of Appeal judgment certainly provided added impetus for these efforts.

Equally, a great deal of resources and support were provided to the Parole Board, in order to ensure that they were able to cope with the challenge posed by the IPP sentence and the substantial change, over time, in the nature of its workload (Parole Board of England and Wales, 2008). As a senior Parole Board member recalled, the level of support was

> perhaps not surprising because Jack Straw, I think, felt embarrassed by the fact that it was their failure, you know, his predecessor's failure to work through the consequences of IPPs on the Parole Board which had produced the problem.

Further, his general stance was greatly appreciated by those at the Parole Board:

> [Straw was] giving us space and not, apparently, being trigger-happy about critics, critical comments when things didn't go right (Parole Board member)

In addition to the avoidance of seeking scapegoats, concerted efforts were made to improve the relationships with penal reform groups, parliamentarians and other interested observers. An important example of this was the instigation of, and involvement in, the event 'How to Reduce Prison Overcrowding – some practical solutions', discussed in Chapter 5. In relation to the IPP sentence, the consensus was clear: IPP sentences should only be imposed where the offence is 'worth' a four year determinate sentence or longer; in other words, a two-year tariff minimum should be introduced. The hope that Carter would help to 'bring

[357] In his autobiography, Straw (2012: 502-503) recalls that 'I needed to work hard to rebuild trust with the judiciary.' Highlighting the social connections between and within such elite actors, Straw notes that 'fortunately I knew a few of the senior judges anyway': the Lord Chief Justice, Nicholas Phillips, had attended his fiftieth and sixtieth birthday parties, while he had met the Senior Presiding Judge, Brian Leveson, 'some years ago on holiday. And I quickly developed a good friendship with Igor Judge' (Straw, 2012: 502-503).

people together' and 'move forward together' on issues such as the IPP sentence was made clear at the aforementioned event by a senior Ministry of Justice official:

> Patrick Carter is not a magician, and is not likely to come up with things that we wouldn't have been able to on our own, but... I do hope [he]can help us to build a greater understanding of how we can move forwards together on some of these things.

However, the nature of the Carter review, widely criticized as extremely rushed, far from inclusive, and an extremely shallow effort in response to deeply complex issues presents us with a certain irony (Hough et al., 2008).[358] With the Justice Select Committee 'unconvinced that [Carter's] conclusions were informed by sufficient levels of consultation' (2008a: 28), the lofty hopes of some within the Ministry of Justice were clearly not met by the Carter review process.

Policy

Policy strategies are described by Hood (2011: 91) as comprising 'the various attempts by officeholders or institutions to avoid or limit blame by what they do or how they do it', working on both dimensions of blame perception – agency and harm perception. We will see that the nature of, and division of labour between, legislative and administrative efforts, is clearly influenced by concerns regarding blame avoidance, in addition to reflecting ministers' and civil servants' beliefs and goals.

The Carter report (2007) was published on 5 December 2007. It recommended that the government

> immediately implement a package of measures that could moderate the demand for custody by between 3,500-4,500 places by 2014 in accordance with the government's strategy to reserve custody for the

[358] See, for example, the evidence provided by then Chief Inspector of Prisons Anne Owers, and Director of the Prison Reform Trust, Juliet Lyon, to the Constitutional Affairs (subsequently Justice) Committee (Justice Committee, 2008a: Ev63).

> most serious and dangerous offenders (Lord Carter of Coles, 2007: 3).

Buried in 'Annex E' of the report, reform of the IPP sentence is included as one of several recommended 'Demand side measures'. The proposals are not set out in detail. Rather, it is stated that

> the Review and NOMS have jointly developed proposals that will mean that the trigger offence must reach a reasonable seriousness threshold. They will allow sentencers much greater discretion about when to give an IPP; those who do merit an IPP will continue to get one (Lord Carter of Coles, 2007: 50).

The legislative proposals subsequently introduced to Parliament on 9 January 2008 altered the IPP sentence in a number of ways. Most significantly, the mandatory requirement to impose an IPP sentence where a serious offence had been committed and the offender was considered 'dangerous' was removed.[359] Instead, as Sikand *et al* (2009) concisely explain, 'where an offender is to be sentenced for a serious specified offence,[360] but a sentence of life imprisonment is not deemed justified, the court retains a power – but no longer has a duty – to impose a sentence of IPP' (2009: para 2.13). The amendment of section 225(3) CJA 2003, by section 13(1) CJIA 2008, provided that an IPP sentence could be imposed only if the court was of the opinion that the offender posed 'a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences'[361] and one of two further conditions was met:

First, that the present offence merited at least a four-year determinate sentence.[362] In other words, a two-year minimum tariff was introduced.[363] Second, that at the time the

[359] Section 225(3) Criminal Justice Act 2003

[360] Section 225(4) CJA 2003

[361] Section 225(1)(b) CJA 2003

[362] Section 225(3B), inserted by CJIA 2008, s13(1)

[363] The two-year minimum tariff reflects the fact that determinate sentenced prisoners are released at the half-way point of their sentence. In the language of the 2008 Act, the 'notional minimum tariff'

present offence was committed the offender had been previously convicted of an offence specified in Schedule 15A. In other words, in this situation, the minimum two-year tariff did not apply. This was a more limited list of 22 very serious offences[364], replacing the original and much-maligned Schedule 15. These amendments were not retroactive and thus did not affect the situation of those already sentenced to IPP.

Various administrative changes were also made, in an attempt to improve the system by which current (and future) IPP prisoners were managed and progressed through the penal system. In February 2008, 'Prison Service Instruction 07/2008' set out these changes in relation to male IPP prisoners (HM Prison Service, 2008b). The categorisation process was amended, so that IPP prisoners with a tariff of less than three years were to receive a C categorisation and thus move directly into a training prison, while those with longer tariffs would continue to enter category B conditions. However, at the same time the decision was made to treat IPP prisoners as determinate prisoners, rather than 'lifers'. This meant that in principle at least, all IPP prisoners would find it easier to progress towards their eventual release (Jacobson and Hough, 2010: 69-70).

In addition, resources were

> directed towards early assessment and prioritisation of places on offending behaviour programmes. In addition, further funding of £3m was made available in 2007/08 specifically for the management of indeterminate sentence prisoners, including interventions, and a further £3m has been allocated in 2008/09 (Ministry of Justice, 2008: para 15).

> is the part of the sentence that the court would specify under section 82A(2) of the Sentencing Act (determination of tariff) if it imposed a sentence of imprisonment for public protection but was required to disregard the matter mentioned in section 82A(3)(b) of that Act (crediting periods of remand) (s225(3C) CJA 2003, inserted by CJIA 2008, s13(1))

[364] Schedule 15A(23) made clear that attempts, conspiracy, or incitement of the aforementioned offences, and the aiding, abetting, counselling or procuring of those offences would also leave an offender vulnerable to the imposition of an IPP sentence.

The legislative proposals, though introduced as late amendments to the Bill, had been worked on for some time within the department. As a sentencing official recalled, 'we were already thinking of [those amendments], and the Carter team were saying "what ideas have you got?"' In terms of ensuring that such proposals were ready for inclusion in the Bill, and in keeping with a dominant theme of Labour's penal policymaking (Justice Committee, 2008a), the drafting of the provisions was conducted under 'a lot of time pressure' (Parliamentary Counsel) and rushed through Parliament without time for proper consultation (Justice Committee, 2008a: 11).

In recalling the decision to set the minimum tariff at the equivalent of a four-year determinate sentence, a sentencing official explained that:

> It's just a historic figure. Four years determinate has for quite some years been regarded, if you want to have a cut-off between more serious and less serious, that's where it's been. And that's how we alighted upon that. There's nothing desperately scientific in it. We did however look at the figures and what that would produce, and it fitted reasonably well.

If we return to Hood's (2011) discussion of policy strategies in the 'blame game', the divisions between the high-profile legislative efforts, and the less apparent administrative efforts are striking. While diminishing the use of the sentence, the legislative amendments made clear that the sentence is still available for very serious offenders irrespective of whether their current offence meets the minimum tariff requirement – this measure was expressly referred to by one of those involved with its development as a 'mitigator on the change', included with Parliamentary challenges in mind. Indeed, the minimum tariff itself is cast as an effort to ensure that the sentence meets the original intentions of the sentence. Further, by introducing prospective measures, the government did not lay itself open to charges that it was unleashing 'dangerous' prisoners on an unsuspecting public. In contrast,

efforts made at speeding up the progression of IPP prisoners through the penal system were entirely administrative.

Equally notable are the measures which the government did not implement. Decision on the release of IPP prisoners remained with the Parole Board; no effort at executive release was made. In addition, the release criteria contained in s28 Crime (Sentences) Act 1997[365] was not amended, for example by placing the onus on the state to evidence the prisoner's continued 'dangerousness'.

These decisions reflect Straw's view that, despite the problems the IPP sentence had caused, 'he was always very clear that he believed and agreed with the principle' of the IPP sentence (political adviser). Nonetheless, blame avoidance played a role in the amendment of the sentence. For, while it was clearly recognised that the IPP sentence at that point was 'pretty disastrous' (MoJ official) and changes had to be made, 'the legislative framework was not changed and I think that was a function largely of the politics of the time.' (MoJ civil servant).[366]

Making Sense of Successful Blame Avoidance

It will be argued that this moment in the IPP story constitutes, on the government's own terms, a broadly successful effort at crisis management and blame avoidance. However, before we can make sense of this development, this claim must be substantiated. In relation to the systemic problems posed by the IPP sentence, primarily, the sclerosis into which the lifer system had descended (Ministry of Justice, 2007b), the dominant consensus was that these issues had been eased by the administrative measures taken (Jacobson and Hough, 2010: 69). The legislative amendments were welcomed by the Justice Committee as a:

[365] This criteria is applied to IPP prisoners by s225(4) CJA 2003

[366] A political adviser recalled that, 'the wider debate about IPPs, whether it was the right sort of approach, in a sense we didn't have the luxury of being able to have that debate.'

> Crucial – and overdue – step towards targeting Imprisonment for Public Protection sentences at a much smaller group of offenders posing a very serious threat to the public (Justice Committee, 2008a: 26).

However, Jacobson and Hough (2010) argued that:

> Notwithstanding the legislative amendments and the changes to the management of IPP prisoners, the problems that emerged in the first two to three years of the sentence have not been satisfactorily resolved (Jacobson and Hough, 2010: 10).

Therefore, we might best regard the government's efforts as constituting a 'holding exercise' – a staving off, but not a resolution, of the systemic risks.

Nonetheless, the key actors from the government's perspective – primarily, given the then-upcoming Court of Appeal judgment in *Walker and James*,[367] the senior judiciary – viewed the efforts in a positive light. This is made clear in the subsequent House of Lords judgment, where for example Lord Judge states that,

> The deficiencies are, at last, being made good. Speaking very generally, courses and training are available and offenders may take advantage of them...In addition, the statute has been amended by the 2008 Act.[368]

As important as the systemic concerns in themselves were for the government, of equal importance was dealing with the sense of crisis which had threatened to engulf the Ministry of Justice. The issues around the IPP sentence were not fully resolved, but returned to the status of a 'creeping crisis' (Boin, 2005: 3).[369] The narrative of positive resolution had largely succeeded and this was crucial given that, as Coombs (2007: 3) has noted, crises are 'perceptual', in the sense that 'if stakeholders believe an organization is in crisis, a crisis does

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[367] *Walker and James* (fn339)

[368] *James, Lee and Wells* (fn348), per Lord Judge CJ, para 121

[369] This term is used to refer to issues such as climate change or future pension deficits: 'Serious threats that do not pose immediate problems...do not induce a widespread sense of crisis' (Boin, 2005: 3).

exist, and stakeholders will react to the organization as if it is in crisis.' In this case, the potential downward spiral into crisis and chaos was forestalled.

The avoidance of the self-fulfilling prophesy which Coombs' (2007) position implies meant that the government did not suffer lasting damage on the issue of IPP prisoners. Penal reform groups and others recognised that the government had been pushed as far as they were likely to go on this issue, while defeat in the courts was avoided. A political adviser concisely summed up what, for them, constituted success in relation to the IPP sentence: 'We didn't lose the election on crime.'

Several points can be made about these events – both in terms of the extent of the government's aims and the way in which they were, for the government, successfully achieved. First, Lacey's (2008) argument in relation to the inevitable ratcheting-up of penal rhetoric and populist policymaking in a first-past-the-post electoral system seems to be borne out. She argues that even liberal, progressive politicians have found themselves 'catapulted by the imperatives of electoral competition towards ever tougher policies of deterrence and incapacitation' (Lacey, 2008: 199).

Many of the interviewees explicitly recognised the limitations which the electoral cycle placed on the extent to which the government would be willing to amend such measures:

> The Tories were watching them like hawks, waiting for weakness (Penal reform group representative).

More bleakly, a political adviser lamented the

> lack of a rational debate about law and order, penal policy. It's desperate really. You worry about whether you'll ever end up with a different situation because of the nature of the [system]… I mean, unless a party wins a massive landslide and decides to introduce rational policy no matter what anyone will say.

The following plea for assistance in facilitating a meaningful public debate around penal policymaking is telling:

> How do we engage people in this topic? Because as we all know, a lot of the rhetoric around offenders, around law and order, gets very shrill, at least at the headline level. Once you get below that you can start to have a more considered debate – because many of us have done that – and discover that the public isn't as intolerant as the media might have us believe. But goodness me, isn't it difficult to get below those headlines and don't they hurt, and don't our politicians find it difficult. That's the climate that we are in (Senior official, Chatham House rules event, Autumn 2007).

In essence, widespread was the view that the space for considered debate was, if it existed at all, extraordinarily limited. For officials, this directly influenced their advice to ministers. Describing the idea of proposing the abolition of the IPP sentence as 'suicidal', one official explained that

> it's right that we have to give the best advice, but we have to be conscious of public perceptions of it (MoJ sentencing official).

Similarly lamenting the pressures imposed by electoral competition, in the context of a 24/7 news media, a senior official argued that if

> you want to get something changed, you have to go right out front, straight away, and say, "this is what we're going to do." If you stand up and say, "I'm thinking I might, perhaps, maybe, do this", you will get shredded.

While political actors clearly felt themselves to be severely constrained by the political context, a view of an alternate future is provided by the draft Criminal Justice and Immigration Bill as originally presented to Parliament on 26 June 2007. Lord Falconer, one of the political architects of the IPP sentence, was Secretary of State for the newly-formed Ministry of Justice. In the bill, Clause 12 provided that a trial judge, if certain broad requirements were met, could decide, instead of reducing the 'notional determinate term' by one half, to 'reduce it by such lesser amount (including nil) as the court may consider

appropriate according to the seriousness of the offence.'[370] No efforts at limiting the sentence were made. In other words, the issues surrounding short-tariff IPP prisoners would solely have been met through an invitation to the judiciary to increase the length of tariffs being imposed – thus raising the average tariff period and thereby reducing the number of short-tariff IPP prisoners and the associated systemic issues.[371]

Compared to this proposal, the amendments – and concerted efforts to respond to the prison service, Parole Board, senior judiciary and penal reform groups' concerns for those already sentenced to IPP – which came to pass take on a different, more positive light. And for the officials involved, the reason was clear:

> Remember the history of this. Blunkett was the Home Secretary who introduced them, but the junior minister was Charlie Falconer... Falconer was our first Justice Secretary. And he wouldn't have done it [amending the sentence] because it was his own policy. So yes, simply on the facts Jack Straw's arrival did allow us to do something (MoJ civil servant).

And in Straw, officials were working for 'someone who had been Home Secretary and a lawyer, who knew something about sentencing' (MoJ official). In addition, his heading of the Ministry of *Justice* was seen by many officials as an important development. No longer a Home Secretary turning his attention

> to criminal justice, prisons and probation, as an afterthought. It's almost a kind of, "oh well, what's happening over there?" With the Ministry of Justice, you've got a minister who gives a lot of attention to these matters (MoJ civil servant). [372]

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[370] Criminal Justice and Immigration bill as introduced 26th June 2007, clause 12(3C)(a). See also 'Rebalancing the Criminal Justice System in Favour of the Law-abiding Majority' (Home Office, 2006c: para 2.25) and 'Making Sentences Clearer' (Home Office, 2006b: chapter 3).

[371] Discussions of the clause in Public Bill Committee between Prisons Minister David Hanson, Director of Law and Sentencing Policy Christine Stewart, and Edward Garnier MP, made clear that a primary concern was public perceptions of 'soft' sentencing driven by particular cases where a serious offence had been committed, an IPP imposed, but with a relatively short tariff period: Public Bill Committee, 16 October 2007, Col 17.

[372] Other interviewees were keen, however, not to over-emphasize the importance of Jack Straw's role in these events. Reflecting the view of several officials, one described the pressures as so acute that

We can therefore justifiably argue that Straw's appointment as Justice Secretary, itself a result of Gordon Brown's ousting of Tony Blair as Prime Minister, [373] had an important effect on the course of the IPP story.

Conclusion

This tracing of the amendment of the IPP sentence has shown that the systemic risks faced at that time compelled government action. This need to act was driven as much, if not more, by the political risks inherent in failing to successfully maintain the government's claims to be 'tough on crime' and capable of protecting the public from dangerous offenders. In this sense, due to the failure to think through the implications of the IPP sentence and the consequent under-resourcing of the system, the IPP had gone from being seen as a political asset to being a political liability.

The systemic concerns drove the relevant politicians to act, but the political context demonstrably circumscribed the art of the possible. We thus see the sheer vulnerability of the actors involved and their inability, their impotent desire, to foster any sort of nuanced public debate on penal issues. As we have seen, the pressures of electoral competition made the IPP's amendment even more difficult.

The actions taken by the government constituted, to a great extent, a 'holding exercise' rather than a full and final resolving of the issues resulting from the creation and functioning of the IPP sentence. Nonetheless, given the constraints discussed above, the legislative and administrative actions taken were, as we have seen, at the outer limits of what

> they might have done something with other sentences for all we know, to free up space or change the delivery of certain sentences. But I think, in the end, something would have had to have been done with IPPs regardless. (senior civil servant)

[373] Jack Straw, having been seen as a loyal Blairite, was described by Labour MP Chris Mullin (2010: 88) as having 'managed to slide from one camp to the other without creating so much as a ripple on the surface of the pond.'

was perceived as possible. This is emphasized by contrasting the government's initial efforts in the draft Bill in relation to the IPP sentence to the CJIA 2008 as brought into law. In this way we see, contrary to strongly deterministic explanations of change, that key actors can and do importantly influence such developments in penal politics.

Finally, Sparks (2000b) has argued that there is great value in studying scandals, in tracing 'events and processes that escape the control of the key actors' (Sparks, 2000b: 130). Drawing on Hood's (2011) argument in relation to blame avoidance, we have seen that 'non-scandals', or successful efforts at blame avoidance, can be equally instructive. Both Hood (2011) and Sparks (2000b) draw on the work of Mary Douglas, and as she has argued (Douglas, 1990), distinct world views contain within them different ways of handling and attributing blame. In other words,

> Who you blame for what is a central marker of your culture and attitudes. (Douglas, 1990: 7)

Thus, exploring the relative success of the government's blame avoidance strategy in the present case, and equally the beliefs underpinning the creation and subsequent contestation of the IPP sentence and the reaction to these events, provides us with a 'way in' to making sense of the political context of the time. I now turn, therefore, to consider in the final chapter how we might make sense of these moments in penal politics – the creation, contestation and amendment of the IPP sentence. Building on the detailed analysis contained in the preceding chapters – the aims of the key actors, the conflicts between them and the impact of contingent events – I consider what overarching lessons we might draw.

CHAPTER 8

THE BANALITY OF PUNITIVENESS, AND THE END OF THE IPP?

This chapter notes recent developments in relation to the IPP sentence since its amendment in 2008. Reviewing the events depicted in Chapters 3-7, I argue that the ideas of risk and 'the public' were central influences on the IPP story. Further, I argue that these ideas interwove with the extant political beliefs and political traditions of the time – primarily the Third Way and Westminster model, respectively. While I have sought to demonstrate that the developments seen were not inevitable, the IPP story is argued to embody a certain pervasive tendency:[374] that of the 'banality of punitiveness'. Proposals to improve the quality of penal politics are canvassed, with their likely impact on 'dangerous offenders' politics discussed. Finally, Kelman and Hamilton's (1989) argument for the destabilisation of 'binding forces' is argued to constitute a lode star by which penal political reformers may guide their efforts.

The End of the IPP?

Following the amendment of the IPP sentence in May 2008, those whom I have called pressure participants continued to seek to have their concerns addressed. Notably, HMIPP published a second report in March 2010 which sought to consider how probation staff were coping in their role with IPP prisoners and their release into the community (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2010). The challenge they faced in conducting the research neatly demonstrated the situation regarding IPP prisoners:

[374] The use of the term 'pervasive tendency' is intended to recall Hay's discussion of particular tendencies 'to which *counter-tendencies* may be mobilised' (Hay, 2002: 255, emphasis in original).

> because so few of these prisoners have been released to date there is little for us to report on such [post-imprisonment] work (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2010: 2).

Describing the situation as 'unsustainable', they argued for 'a major policy review at Ministerial level' (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2010: 2). A similar argument was made by the Prison Reform Trust's 'Unjust Deserts' (Jacobson and Hough, 2010) which, having surveyed the 'flaws inherent in the design of the sentence and the injustices arising from its implementation' (Jacobson and Hough, 2010: 71), saw 'an urgent need for government to review the sentence, and examine the available policy options' (Jacobson and Hough, 2010: 52). Further, internet-based campaigns such as the 'IPP Prisoners Campaign for Release Dates'[375] and 'Justice for Joe'[376] have become increasingly prominent.

In the political arena, the political appetite for further movement on the IPP sentence noticeably altered following the coming to power of the Conservative-Liberal Democrat coalition in May 2010. The appointment of veteran Conservative politician Kenneth Clarke as Justice Secretary and his early statements raised the prospect of an end to the 'prison works' philosophy promoted by Michael Howard and continued by the Labour government of 1997-2010 (Downes and Morgan, 2012). Clarke spoke of a 'rehabilitation revolution' (Ministry of Justice, 2010), suggesting that a small decrease in the prison population was desirable (Travis and Hirsch, 2010) and describing Labour's effort against dangerous offenders as having 'undoubtedly failed' (Travis and Bowcott, 2011). In December 2010, the Ministry of Justice published the White Paper 'Breaking the Cycle' (Ministry of Justice,

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[375] <http://www.ippprisonerscampaign.com/aboutus.htm> (accessed 17 November 2012)

[376] <http://www.justiceforjoe.org.uk/> (accessed 17 November 2012). Joe Paraskeva's IPP sentence was changed to a hospital order by the Court of Appeal on 12 December 2012: <http://www.guardian.co.uk/society/2012/dec/12/mentally-ill-man-sentence-quashed> (accessed 18 December 2012). Another important online presence has been Sir Brian Barder (<http://www.barder.com/ephems>, accessed 17 Nov 2012).

2010). Following a list of criticisms which directly echoed those in the Prison Reform Trust's 'Unjust Deserts' report (Jacobson and Hough, 2010), it was stated that the IPP sentence would be restricted 'to the exceptionally serious cases for which they were originally intended' (Ministry of Justice, 2010: para 189). The four-year determinate equivalent minimum tariff introduced by the Labour government in the Criminal Justice and Immigration Act (CJIA) 2008 would be raised to ten years.

Proposals regarding the IPP sentence were not contained in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill as introduced on 21 July 2011. However, that same day Prime Minister David Cameron announced that the IPP sentence would be replaced by 'an alternative that is clear, tough and better understood by the public,' following a consultation process (Ministry of Justice, 2011a).

The government announced the conclusion of the IPP consultation process on 26 October 2011, with new clauses and Schedules relating to its abolition introduced by Kenneth Clarke on 1 November 2011, at report stage of the Bill.[377] These comprised the introduction of a 'two strikes' mandatory life sentence; an extension of offences liable to this sentence to include child sex offences and terrorism offences; an Extended Determinate Sentence (EDS) which will provide that 'dangerous criminals' convicted of serious sexual and violent offences will serve at least two thirds of their sentence in prison before release; and extended licence periods for former EDS prisoners (Ministry of Justice, 2011b).[378] Finally, the Bill provided that the Secretary of State for Justice may amend the release test for those serving IPP sentences at a future date.[379] The Bill received Royal Assent on 1 May 2012, with the 'dangerous offender' provisions surviving robust challenges by Labour MPs including Jack

[377] Kenneth Clarke, HC Deb 1 Nov 2011, col 785

[378] Sections 122-128, Chapter 5, Legal Aid, Sentencing and Punishment of Offenders Act 2012

[379] Section 128(3)(a) Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Straw and Shadow Justice Secretary Sadiq Khan, who both argued forcefully in favour of the IPP sentence.[380] All relevant provisions are prospective; they only apply to those who have committed offences after the date these provisions were implemented – 3 December 2012.[381]

Another nail was hammered into the IPP's coffin by the European Court of Human Rights ruling in September 2012, in a case brought by the claimant prisoners who were unsuccessful in their earlier appeal to the House of Lords, seen in Chapter 5.[382] Contrary to the House of Lords, the European Court found that the continued post-tariff detention of the three applicants in the absence of access to training programmes was arbitrary and therefore breached Article 5(1) European Convention on Human Rights.[383] The judgment did not state that the IPP sentence in itself was unlawful; rather, what was unlawful was the failure to adequately resource the rehabilitative measures seen as central to such indeterminate sentences for public protection. The claimants were awarded €3,000, €6,200 and €8,000 for non-pecuniary damages respectively and €12,000 expenses. The impact of the judgment is likely to be limited: while claims for damages from the over 3,000 post-tariff IPP prisoners could eventuate, any damages obtained would likely be relatively small. In terms of political impact, publicly the judgment was not welcomed by the Justice Secretary Chris Grayling:

> I am very disappointed...This is not an area where I welcome the Court seeking to make rulings, and we intend to appeal this morning's decision.[384]

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[380] HC Deb 1 November 2011, col 784-799

[381] Subsection (1) of new section 224A to the Criminal Justice Act 2003, as inserted by section 122, LASPO 2012. <http://www.justice.gov.uk/news/press-releases/moj/new-sentences-and-criminal-offences-come-into-effect> (accessed 7 December 2012)

[382] *R. (James) v Secretary of State for Justice (Parole Board intervening); R. (Lee) v Same (Same intervening); R. (Wells) v Same (Same intervening)* [2009] UKHL 22; [2009] 2 WLR 1149

[383] *James, Wells and Lee v The United Kingdom* (Applications nos. 25119/09, 57715/09 and 57877/09), 18 September 2012.

[384] Chris Grayling, HC Deb, 18 September 2012, col 764. An application by the Ministry of Justice for leave to appeal to the Grand Chamber of the European Court was lodged in late December 2012.

However, less publicly the Ministry of Justice have continued to address the problems faced by IPP prisoners and endeavoured, in particular, to simplify their path towards release.[385]

We are therefore faced with a mixed picture. While recent developments may appear to spell the end of the IPP sentence, the substantial remaining IPP prisoner population and the difficulties they face will remain an issue of concern for some time – potentially decades. Against this backdrop, we can ask: if we reflect on the IPP story chronicled in the preceding chapters, what lessons can we learn? How do we make sense of this chain of events?

The IPP Story and the Banality of Punitiveness

We saw in Chapter 1 that the IPP sentence was, on the face of it, exemplary of trends which have been termed the 'new punitiveness' (Pratt et al., 2005): the rise of risk (in terms of the dominance of risk technologies such as risk assessments and a far 'riskier', more uncertain, political climate) and the rise of the public voice (in terms of the political climate and the nature of penal politics: Ryan, 2005). The detailed historical reconstruction presented in Chapters 3-7 has explored the relevance of these issues to the creation, contestation and amendment of the IPP sentence. In particular, I argued that it was crucial to note that 'risk' and 'the public' were central influences on the course of the IPP story *as ideas*. In other words, while evidence and a nuanced understanding in relation to risk assessment and risk management was generally distant from the policymaking process, the idea of risk, of the apparent preventability of, *and therefore obligation to prevent*, such crimes, was central to the IPP story. Similarly, while the idea of 'the public' and 'public opinion' was central to the course of the IPP story, we saw a situation which amounted to an illusory democratization of

[385] For efforts being taken in relation to remaining IPP prisoners, see Prison Service Instruction PSI 41/2012 and Prisons Minister Jeremy Wright's letter to Juliet Lyon of the Prison Reform Trust of 18th December 2012: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/IPPletter.pdf?dm_i=47L,14YDO,2SQLTB,3NGOA,1> accessed 19 December 2012.

penal policymaking – where the public, though a constant reference point, constituted 'dummy players' in these processes. Further, and well captured by Ramsay in his work on the relation between the dominant New Labour ideologies and developments in penal policy (Ramsay, 2010; 2012), these notions were understood through the lens of the Third Way ideology of the key political actors.

I will now argue that the notion of 'banal punitiveness' is a useful description of the accumulation of actions and attitudes seen in the foregoing historical reconstruction. This term recalls Arendt's concept of the 'banality of evil' (Arendt, 2006 [1965]). Arendt coined this term in an attempt to make sense of the motivations of Adolf Eichmann, a major organizer of the Holocaust. She was struck by the apparent lack of evil intent, seeing Eichmann as neither monstrous, nor demonic (Arendt, 2006 [1965]: 218-219). He was, for Arendt, someone who 'to put the matter colloquially, never realized what he was doing' (Arendt, 2006 [1965]: 287). This challenged the common view of 'evil' acts such as the Holocaust as flowing from distinctly and pathologically wicked individuals (Hayden, 2007: 285).

Arendt developed the notion of 'thoughtlessness' to make sense of this phenomenon which caused her such great concern. This term was intended to refer to 'an uncritical reliance upon conventional attitudes as a shield against reality' (Hayden, 2010: 455), a lack of critical judgment and 'enlarged thought' (Arendt, 1992: 43-44). This stood in contrast to the desired state of: 'independent thinking and judging...to make reasoned judgments which included the standpoint of other persons' (Hayden, 2010: 456). For Arendt (2006 [1965]), such 'remoteness from reality' could 'wreak more havoc than all the evil instincts taken together' (Arendt, 2006 [1965]: 288).[386]

[386] See also Kelman and Hamilton's (1989) discussion of *Crimes of Obedience*.

The IPP sentence is clearly not on any kind of moral par with genocide, and I must emphasize that I am not seeking to draw direct comparisons between the extent, nature and effects of the IPP sentence and acts of genocide. That said, if we speak of 'eliminatory' rather than 'genocidal' projects, then the parallels being drawn between the concerns raised by Arendt in relation to the Holocaust, and the processes which supported the IPP sentence, become clearer (Rutherford, 1997).

Punitiveness, in this context, simply refers to the practice of 'inflicting or intending to inflict punishment' (*Oxford English Dictionary*). The banality of punitiveness speaks, therefore, to the quality of thought and action demonstrated by actors involved with the IPP story. It speaks to the reliance on abstracted stereotypes and cocooning traditions, the failure to 'think through', to imaginatively engage with what was being done in relation to the IPP sentence.[387]

The claim of 'thoughtlessness' can perhaps most straightforwardly be made in relation to the civil servants involved in the development of the IPP sentence. This is because such officials are the exemplar of modern bureaucracy, and its apparently progressive logic of 'the rule of Nobody' (Arendt, 2006 [1965]: 289), which has been targeted so incisively by Arendt (2003) and Bauman (1989). In *Modernity and the Holocaust*, Bauman (1989) argued persuasively that genocides such as the Holocaust did not occur in spite of modernity and its civilizing influence, but rather

> have been conditioned, created and supplied by it. The Holocaust did not just, mysteriously, avoid clash with the social norms and institutions of modernity. It was these norms and institutions that made the Holocaust feasible (Bauman, 1989: 87-88).

[387] The intention here is not to suggest that the policymakers involved in the IPP story were predominantly motivated by a desire to punish, or to inflict harm. As we have seen, many hoped for the incapacitation of dangerous offenders and thus a successful pursuit of the goal of public protection. The term 'banality of punitiveness' is intended, rather, to point to the way in which the sentence was developed by actors who *did not intend*, or consider in detail, the potential impact of the sentence – one which has been experienced by those sentenced to IPP as extremely punitive (Howard League for Penal Reform, 2007; Sainsbury Centre for Mental Health, 2008).

What particularly concerned Bauman was the tendency of modernity to involve the development and legitimization of a 'meticulous functional division of labour...[and] the substitution of technical for a moral responsibility' (Bauman, 1989: 98).[388] Recalling Arendt, this division was seen to result in officials only having 'an abstract, detached awareness' of the effects of their actions (Bauman, 1989: 99), with this form of responsibility being so dangerous because it 'forgets that the action is a means to something other than itself' (Bauman, 1989: 101). There are parallels here with Crawley and Sparks' (2005: 353; Crawley, 2004) description of thoughtlessness, in the context of the treatment of older prisoners, as denoting 'a certain moral and affective flattening, without which it may be difficult to sustain institutional routines.'

If we ask 'why did no-one foresee the likely effects of the IPP sentence?', officials' thoughtlessness provides a persuasive explanation. It must be emphasized that we saw, in Chapters 3 and 4, that several officials *did* raise concerns at the problems inherent in such preventive efforts. In addition, projections were produced which contained within them a fairly accurate estimate of the rate of imposition of the IPP sentence.[389] Nonetheless, many of those involved with the development of the sentence demonstrated an acceptance of their obligations as 'boil[ing] down to the commandment to be a good, efficient and diligent expert and worker' (Bauman, 1989: 102).[390] In other words, the creation of the IPP sentence was seen as just another measure of the time, and thus approached in this default manner.[391] In

[388] See also Weber (1978: chapter 3).

[389] We also saw that the projections of the 'overall impact' of the sentence, a far lower figure, were used by the government in public debate.

[390] 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.

[391] It is relevant to recall here a senior official's recollection of a discussion among colleagues where the general sentiment was that in order to offer sustained resistance,

> "You [would] have to be given an instruction [by a minister] that is immoral as it were, seriously immoral, not just you don't agree with it. [If] you're being told to gas people or something, then yeah of course, your obligation

particular, being an 'efficient worker' in the specific context of that time implied a myopia where the likely implications of the provisions being developed in concrete terms were effectively ignored.[392] Being developed were measures for abstract, distanced 'dangerous offenders', not possible friends, neighbours, siblings or acquaintances 'who are...as most of us, a mixture of good and bad...walking mysteries' (Christie, 2010: 34). In this way, officials' thoughtlessness in this specific case was a demonstration of the general potentiality contained within such bureaucratic institutions, but also influenced by the specific pressures and constraints placed on them at that time by political actors and by the broader political context.

In this regard, the Westminster tradition (and its incorporation of the Armstrong doctrine)[393] can be seen to have operated to legitimize this role as a 'humble', subservient official, cocooning officials from the public blame and difficult moral questions potentially or actually raised by their involvement in the development of such preventive sentences. As seen in Chapter 3, one official 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.

Within the terms of the Westminster tradition with its focus on ministerial responsibility, this is undoubtedly correct. However, Arendt drives home the important moral issue at stake when she argues that 'politics is not like the nursery; in politics obedience and support are the same (Arendt, 2006 [1965]: 279).

> is not [to do it]." But other than that, the whole of the Civil Service is schooled to the idea that ministers get what they want.

We should recall, in addition, that some officials were expressly in favour of the IPP sentence, albeit seeing it as a 'bad attempt at doing a good thing' (Home Office civil servant).

[392] In other words, while in abstract the potential numbers were considered, it appears that officials did not dwell on the substantive impact of the IPP sentence – what the sentence would actually mean for the penal system and potential IPP prisoners.

[393] See discussion in Chapter 3.

We are thus compelled to ask of officials, 'why, if you please, did you become a cog or continue to be a cog under such circumstances?' (Arendt, 2003: 31). It is the very neutrality of the civil service, its operation as subservient to politicians, which, rather than serving as a strong bulwark against populist political action, comes to seem problematic. In other words, officials are, by dint of their role as civil servant, placed in the impossible position of failing against these moral criteria precisely *because* they did their job. From this viewpoint, Tonry's (2004: ix, 146) valorisation of insulated public bureaucrats appears somewhat misplaced. The aim is thus not to criticize officials for failing to act heroically, to escape this institutional thoughtlessness, but rather to point to the dangers of an institutionalised approach to policymaking, legitimated by the Westminster tradition, which could only be overcome by people

> capable of telling right from wrong even when all they have to guide them is their own judgment...completely at odds with what they must regard as the unanimous opinion of all those around them (Arendt, 2006 [1965]: 294-295).

Given the nature of this criticism of some officials involved in the IPP story, we might expect political actors to be valorised for their holding to clear political ideologies, for being the ones who 'make the call' on such difficult issues. Indeed, the aim of this chapter is not to criticize reliance on political ideologies *per se*: first, because such reliance should be recognised as an inevitable feature of political action (Gamble, 2000) and second, because efforts to somehow extricate difficult policy areas from politics are arguably not only dangerous, but likely doomed to fail (see below). Nonetheless, it will be argued that reliance on political ideologies can tend towards the 'thoughtlessness' criticized above.

We have noted above the way in which the dominant political ideologies of the era were central to the nature of the development of the IPP sentence. The important role of political ideologies is emphasized by the developments since 2008 noted above. The relevant

LASPO provisions differ in important ways from New Labour's dangerous offender measures, reflecting the coming together (and indeed contestation between) of certain strands of traditional Conservative thinking on crime, punishment and the role of the state, and liberal concerns regarding the exercise of state power. Those holding the former view tend to desire 'tough' and certain punishments, often predicated on the view of criminals as rational actors (Wilson, 1985: chapter 12). Further, many of a conservative persuasion express 'unease about state expenditure and its effects, and an attendant concern to ensure that taxpayers' money is not needlessly wasted' (Loader, 2009b). Those holding the latter beliefs view the prison as 'a most troubling and worrying institution', predicated as it is on the deprivation of liberty (Young, 1992: 435). These views converged in relation to the IPP sentence on the complaint that:

> The sentences in their present form are unclear, inconsistent and have been used far more than was ever intended...That is unjust to the people in question and completely inconsistent with the policy of punishment, reform and rehabilitation, which has widespread support.[394]

Further, in the same way that the introduction of the IPP sentence fulfilled a political purpose for the Labour government, the nature of its abolition – and the simple, robust measures replacing it – speaks in part to the government's reading of public opinion in relation to law and order, and its appetite (or otherwise) for a move away from the penal arms race of recent years.

It is not political ideologies in themselves which are of concern. Rather, it is their potential

> to ossify into commonly accepted opinions and standards, into conventional categories that are elevated to supreme wisdom and which compromise the ability to think, to explain, to understand, and

[394] Kenneth Clarke, HC Deb 1 Nov 2011, col 785-787. In reflecting on the key driver for the abolition of the IPP sentence, one senior official saw it as central that, 'these ministers come from a very particular place. They come from a place of regarding the deficit as the biggest challenge facing the government.'

> to judge from the perspective of an enlarged mentality (Hayden, 2007: 296).

Recalling Radzinowicz and Hood's (1980) argument that it is 'progressives' who have tended to promote preventive detention, in contrast to those 'who remained true to the liberal tradition of protecting the rights of citizens against extensive and arbitrarily imposed powers of the executive arm of government' (Radzinowicz and Hood, 1980: 1389), the Third Way ideology can be seen to contain its own version of what Bauman terms a 'vision of society-as-garden' (Bauman, 1989: 92). Such visions 'define parts of the social habitat as human weeds', which 'must be segregated, contained, prevented from spreading, removed and kept outside the societal boundaries' (Bauman, 1989: 92). The foregoing historical reconstruction supports Ramsay's (2010) argument that sentences such as the IPP meshed with the dominant political ideology of the time, and thus were motivated by a desire to protect the 'vulnerable autonomy' of British citizens, to 'weed out' these 'dangerous offenders' who have failed to reassure others of their non-harmful intentions (Ramsay, 2010; 2012).

Therefore, while the IPP sentence is not simply an instance of incoherent populist policymaking (in the sense that it reflects the relatively coherent ideologies of key political actors: Ramsay, 2010), we can view it as exemplifying the dangers of ossification which Hayden (2007) pointed to above. While indispensable as an interpretive map by which to navigate the world, an obstinate reliance upon an inflexible ideology and concomitant beliefs (regarding the meaning of justice, rights, liberty and so on) risks falling into 'the heedless recklessness or hopeless confusion or complacent repetition of "truths" which have become trivial and empty' (Arendt, 1998: 5). It risks amounting to a failure to 'make reasoned decisions which include the standpoint of other persons' (Hayden, 2010: 456). This

represents exactly the type of 'thoughtlessness' which was of such concern to Arendt and Bauman.

As regards the IPP story, this was demonstrated by the approach taken by Home Secretary David Blunkett to the IPP sentence. Reliance on such ideologies is not in itself problematic. However, we saw that Blunkett was criticized for closing down debate and refusing to engage in nuanced discussions regarding the IPP sentence – instead, he viewed such attempts to alter the sentence as 'silly officials' trying to resist change. In addition, we saw that several political actors were motivated primarily by electoral considerations, putting sustained pressure on Home Office civil servants to supply straightforwardly 'tough' measures because of their assumed electoral potency. These repetitions of simple ideological 'truths', whether genuinely held or cynically promoted,[395] stood on the political ground where an openly-contested, publicly debated and at least somewhat nuanced policy could have been constructed.[396]

We can also note the influence of the Westminster model and its view of dominant, decision-making political actors. Contained within the Westminster tradition, and certainly political actors' understanding of it, is a 'great men' view of history and politicians' influence on change. Commonplace is the Theodore Roosevelt quote regarding the 'man in the arena', which valorises not the critic 'who points out how the strong man stumbles or where the doer of deeds could have done better', but the 'man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly' (quoted in Flinders, 2012: 189).[397] Political actors should indeed be afforded a certain amount of respect for the sacrifices made

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[395] To emphasize, the goal of the reconstruction has been to demonstrate that the IPP story was influenced by those driven by both ideological and cynical, 'anti-political' positions. On 'anti-politics', see Loader (2008: 405).

[396] We saw in Chapter 4 that a limited amount of contestation by liberally-minded officials, ministers and Parliamentarians did occur.

[397] The quote is reproduced in full as the epigraph to Jack Straw's autobiography (Straw, 2012) and indeed could have been expected to feature in any of the recent autobiographies of New Labour politicians.

in the course of their work (Flinders, 2012). However, the danger of such a view is that it results in a 'valorisation of now', absolving ministers of any meaningful attribution of responsibility for the long-term impact of their decisions. The brave decision to 'make the call' (as one minister interviewed put it) is venerated, not least by the political actors themselves, while the actual content of the decision, and the failure to cast one's gaze ahead to the likely repercussions, is justified *on the basis simply that an authoritative decision was made* in this difficult policy area.

If both civil servants and politicians have demonstrated a tendency towards banal punitiveness, then perhaps it is the judiciary and interest groups that stand apart. These organizations, along with particular Parliamentarians, should be praised for their efforts in relation to the IPP sentence. Nonetheless, the increasing conservatism of decisions in the judicial review cases discussed in Chapter 6 demonstrates the strength of the pull by the Westminster tradition even on judicial actors. The argument made in Chapter 6 that the judgments demonstrated how judges, 'when faced with the realities of a genuine political conflict, retreated hastily behind the barricades of legal and constitutional formalism' (Griffith, 1997: 303) can thus be read as another warning of the thoughtlessness to which the (inescapable) reliance on political ideologies and traditions can incline.

We saw in Chapter 5 the challenges faced by pressure participants in trying to challenge the nature and effects of the IPP sentence. Even in a situation where all involved recognised that 'something had to be done' (senior official), positive change proved to be very difficult to achieve. Nonetheless, their Sisyphean struggle has delivered demonstrable change, albeit at a far slower pace than many had hoped.

Further, it is crucial to recognise that the institutional thoughtlessness which has contributed to the creation of the IPP sentence is in danger of repeating itself despite its abolition by the Conservative-Liberal Democrat coalition. There are still over 6,000 IPP

prisoners (31 March 2012), with just 502 IPP prisoners having been released (with over half of all IPP prisoners now post-tariff: Prison Reform Trust, 2012: 21-22), many of whom are struggling to make meaningful progress towards release. The financial cutbacks imposed on the Ministry of Justice by the Treasury make it unlikely that the prospects for these prisoners are particularly good, despite the best efforts of those working within the penal system (Jacobson and Hough, 2010: chapter 5).[398] As noted above, LAPSO provided the Secretary of State with the power to amend the release test for IPP prisoners. However, with Chris Grayling now appointed as Justice Minister – widely interpreted as a 'toughening up' of the Conservative's approach to law and order – the prospects of this occurring seem distant.

Those currently serving an IPP sentence therefore find themselves in a difficult and iniquitous position. With the narrative of the IPP's abolition taking hold, these prisoners and their families face a battle to ensure that their plight is not forgotten. They face the severe challenge of convincing a sceptical public that the continued detention of such state-declared 'dangerous' individuals is a wrong which requires righting. For could the government really have incarcerated over 6,000 of its citizens indefinitely on the basis of their being extremely dangerous, even where the prediction of future risk is far from straightforward? And could it have done so by way of provisions which are widely acknowledged as over-inclusive, over-prescriptive and ignorant of the processes and challenges involved in risk assessment in the courts (Zedner, 2012)? It was, to a certain extent, a situation where 'People refused to believe the facts they stared at...[It] was, purely and simply, unimaginable' (Bauman, 1989: 85). Therefore, while we have seen the demise of 'one of the least carefully planned and implemented pieces of legislation in the history of British sentencing' (Jacobson and Hough, 2010: vii), it leaves in its wake a trail of ongoing systemic and human damage which is in danger of being disregarded.

[398] One positive development is a substantial recruitment drive by the Parole Board, which has led to 40% more lifer and IPP oral hearings than the previous year (Parole Board of England and Wales, 2011).

Beyond the Banality of Punitiveness?

> Human beings are both plural and mortal, and it is these features of the human condition that give politics both its miraculous openness and its desperate contingency (Canovan, 1998: xvii).

It was argued in Chapter 2 that we must avoid overly deterministic accounts of penal politics; the role of contestation and contingency in historical developments must be recognised. The implications of this position are that, in relation to the IPP story, things *could* have been different and things *can* be different. In other words, looking back we should be able to identify points at which the IPP story could plausibly have taken a different course. Looking forwards, we should be able to identify ways in which changes to penal political culture or institutions would likely have had a positive effect on the nature of 'dangerous offender' penal politics. Therefore, in this section I first consider the extent to which the IPP story could have taken a different form, before discussing proposals for the improvement of penal politics and policymaking, and the likely impact of such proposals in relation to the issue of 'dangerous offenders'.

If we focus on the creation of the IPP sentence, we can note certain ways in which things could plausibly have been different. While Blunkett was apparently destined to become Home Secretary, a ministerial scandal or other unforeseen event could potentially have undone this carefully laid plan. Similarly, we can suggest that if either Hilary Benn or Baroness Scotland, two moderating voices, had spent more time at the Home Office, the IPP sentence may have taken a more limited form. We saw that Blunkett's approach to the IPP sentence was importantly informed by the dispute over his right to set minimum tariffs for life sentenced prisoners at that time. Therefore, if this issue had been resolved before the 2001 General Election, the 'dangerous offender' issue may not have been viewed through this lens. Further, it is possible that penal reform groups and concerned Parliamentarians could

have realized that Benn's carefully-crafted Commons statement regarding the 'overall impact' of the IPP sentence masked far more troubling projections, and thus contested the IPP sentence far more vigorously. Finally, we can more speculatively suggest that a variation of the 'phone hacking scandal' could have erupted far earlier than 2011, given the various arrests and court cases, beginning in March 2003, detailed by Davies (2009: chapter 7). A cowed media might have eased the pressure on politicians to be 'tough on crime', providing the space in which 'softer' policies could be developed.

It is therefore possible to identify some ways in which the IPP story, to some extent, may have taken a different course. Nonetheless, while we may live in 'one of many possible worlds' (Tilly, 1991: 86), the context of the time, the nature of penal politics and the political beliefs of the key political actors, makes it difficult to see how the nature and outcome of its development could have been radically different.

The implication of the above argument regarding the 'banality of punitiveness' is that if we are to improve the quality of penal politics, we require substantial change which encourages those involved to 'think what we are doing' (Arendt, 1998: 5), enabling them to overcome the banal punitiveness pervading the IPP story. We require the fostering of a politics where 'judgment, formulating judicious opinions, and making careful discriminations and deliberation' (Bernstein, 2008: 66) are not prevented by a combination of felt vulnerability and reliance on (unnecessarily simplistic) ideological tropes. While a comprehensive answer to this issue goes beyond the scope of this thesis, the main proposals put forward in relation to the improvement of penal politics will be discussed. The likely impact of these two positions on the politics surrounding 'dangerous offenders', if implemented, is then considered.

Arguments in relation to the improvement of penal politics can be separated into two broad positions: for *insulation from politics* and for *engagement with politics*. The insulation

position sees politics itself, especially in the populist form seen over recent years in the UK and elsewhere, as part of the fundamental problem. Lacey (2008), for example, raises concern at 'the relative lack of insulation of criminal policy development from popular electoral discipline in adversarial, majoritarian systems, and the lack of faith in an independent professional bureaucracy' (Lacey, 2008: 181). A 'bipartisan escape route' is advocated, whereby one 'takes the politics out of law and order' (Lacey, 2008: 190). A Royal Commission or similar body is proposed to generate such bipartisan agreement, while a body similar to the Monetary Policy Committee[399] is proposed as a similar mechanism by which the centrality of expertise to penal policymaking could be (re-)established (Lacey, 2008: 191-193).[400]

These proposals have clear parallels with the arguments of Sherman (2009) and others for a National Institute for Criminal Justice Excellence (NICJE), modelled on the National Institute for Health and Clinical Excellence (NICE) (Loader, 2010b). Such 'cooling devices' (Loader and Sparks, 2010: chapter 4) arguably see criminology as 'an agent of scientific enlightenment and liberal constraint – a kind of antidote to politics rather than a participant in it' (Loader and Sparks, 2010: 85). For insulationists, the involvement of the public is regarded as inherently problematic. Lacey (2008: 180), for example, suggests that 'the malleability of "public opinion" makes it an unsound basis for policy development.'

The engagement position, by contrast, tends to proceed from the view that

> we pressingly need to find ways of generating an informed societal debate about how we may live collectively and comfortably with risk without ploughing ever more resources into emotionally compelling but illusory penal solutions to problems of crime. In a post-deferential public culture, *it is also vital that this is a conversation, a matter of ongoing public contestation, rather than the exclusive*

[399] The Monetary Policy Committee of the Bank of England is an independent body, given responsibility for the setting of the official interest rate in the United Kingdom (the Bank of England Base Rate) by the New Labour government in the Bank of England Act 1998.

[400] For a similar proposal, see Pettit (2001).

> *province of scientific experts and policy elites* (Loader, 2010b: 91, emphasis added).

Such a position has been argued specifically in relation to penal politics (Loader, 2010a) and also in relation to politics more generally (Flinders, 2012; Stoker, 2006; Wright, 2009). Engagement-oriented arguments vary between those for more extensive public engagement in the political process (Commission on English Prisons Today, 2010; Luskin et al., 2002; Saward, 2003: chapter 5) and arguments for an improved form of representative democracy (Stoker, 2006; Wright, 2009).

The appeal of the former is that they seek 'to *transform* people's (possibly ill-informed) preferences through open and inclusive discussion, not merely to design electoral processes to *reflect* them' (Saward, 2003: 212; quoted in Stoker, 2006: 156, emphasis in original).[401] As regards the latter, Stoker (2006) argues for movement towards an ideal form of representative democracy where 'decision-making undertaken by those representations that is informed and coherent and yet focused on the concerns of their constituents' (Stoker, 2006: 164).

We can now consider the likely impact that each position would have, if implemented, on the politics and policy debate surrounding 'dangerous offenders'. As regards the insulation position, what difference would the creation of NICJE, a modern iteration of the commissions and committees of the 1970-80s seen in Chapter 1 likely make? Proponents would likely envisage a body including academics, psychiatrists, psychologists, leading practitioners, lawyers, judges and others, which would result in a nuanced, rational 'dangerous offender' policy. On the face of it, this seems desirable and inherently plausible.

However, there are several challenges that can be made. First, it is important to note that experts can, and do, differ substantially in their identification and interpretation of

[401] On deliberative polling, see Luskin (2002: 458-460) and Hough (2002).

problems and the resultant appropriate response. We can thus suggest that attempts to generate a consensus on both the nature of the 'dangerous offender' problem and the appropriate response may be more difficult to achieve than insulation proponents may assume. Nevertheless, we might reasonably suggest that such a body may conclude that given the limited ability of existing risk assessment methods to accurately predict future offending, we should be very wary of relying on such assessments as the basis of the imposition of an (indeterminate) prison sentence, while using them to inform efforts at supporting those who have broken the law to desist from crime (Jacobson and Hough, 2010; Ward and Maruna, 2007; Zedner, 2012).

However, Garside (2007: 41) has convincingly suggested that those arguing for the (re-)insulation of penal politics operate on the false assumption that 'it is possible to mark out a pristine space of rational criminal justice policy making, unaffected by political or other institutional pressures and agendas.' It is clear that many groups – psychiatrists, lawyers, prison governors, to name but three – would likely be extremely resistant to proposals which might remove current areas of competence, or which adopt a definition of the problem which conflicts with the accepted definitions relied on by that profession.[402]

Further, and potentially fatal to the insulation position, Loader (2010b) suggests that it is difficult, under late modern conditions,

> to envisage (unpopular) evidence-based decisions taken by experts doing little other than aggravating distrust among citizens who feel excluded from decision-making over issues about which they care passionately. (Loader, 2010b: 82)

It is easy to envisage efforts to 'do less' in relation to dangerous offenders as being highly unpopular, given that they would likely result in high-profile stories of 'preventable'

[402] See also Tombs (2011: 729), who notes the 'significant processes of translation and transformation involved in the shift from criminological knowledge to policy including simplification...chaos [caused by] competing interests and loss of autonomy in how research findings are used.'

crimes and victims let down by a failing justice system. However, we can suggest that if politicians were willing to withstand the inevitable brickbats, to expend some political capital on this issue, then a good deal of progress could likely be made.

In this regard, Kenneth Clarke's time as Justice Secretary is instructive.[403] His resistance to the tabloid media and to mass-mediated public pressure demonstrates that the pressure brought to bear by the rise of the public voice, as with any structural condition, is not simply 'out there', but nurtured and generated by the key actors' own understandings of their context. However, significant challenges were faced by Clarke in attempting this rather insulated approach. The tabloid media took every opportunity to inflict political damage on this 'out of touch' minister (BBC News, 2011): his sentencing proposals were substantially 'toughened' by Prime Minister David Cameron to head off anticipated political damage (Travis and Wintour, 2011); and he was subsequently replaced as Justice Secretary by Chris Grayling. Despite these developments, it is notable that the government persisted in the abolition of the IPP sentence, despite a forceful campaign from Labour (and some Conservative) politicians and parts of the media. This suggests that insulation approaches can succeed, but that they will tend to cause the kind of aggravation predicted by Loader (2010b: 82) and invite severe and sustained criticism from many quarters. Therefore, let us consider the likely impact of an effort to foster a more expansive, deliberative and inclusive approach to 'dangerous offender' politics.

As regards the engagement position, what effect might such an approach have on dangerous offender politics and policy? Proponents of this view would likely envisage a greater degree of deliberative engagement, involving lengthy and detailed discussions regarding the nature of the dangerous offender problem and desired solutions. Following Loader (2010b), an organization such as NICJE may be used as a means of providing an

[403] Ken Clarke was Secretary of State for Justice from May 2010 to September 2012.

institutional means of focusing the debate.[404] While insulation proponents might expect such efforts to descend into a noisy argument between groups demanding simplistic solutions to complicated problems, more positively we might expect the public, when presented with detailed and contextualized information, to come to a nuanced, considered position (Luskin et al., 2002). Further, the very fact of increased engagement in an inclusive and deliberative democratic process may itself improve citizens' sense of security, better able to judge and to live 'confidently and comfortably with risk and uncertainty' (Loader, 2008: 405; Loader and Walker, 2007: chapters 6-7).

However, various issues arise. These include how we might 'level the playing field' to ensure that 'outsider' groups (Ryan, 1978) have their voices heard. Further, we would need to confront the 'swift and sweeping changes that have swept across the organizational landscape of both criminology and public policy over the past two decades' (Wacquant, 2011: 442), which arguably pose a severe challenge to the development of a more open, deliberative approach to penal politics.[405] How would we ensure that the families of IPP prisoners, given their potentially limited social capital, have their voices heard? And how would we decide how to balance such voices with the potentially competing claims of concerned victims' families? The term 'balance' points to an important concern regarding efforts at the fostering of open, deliberative political debate: that such processes can become 'rigid and deeply constrained and not all that participatory, since only "acceptable" behaviour and "reasonable" demands will be allowed' (Stoker, 2006: 158). Further, while increased political engagement may help citizens to feel more satisfied by the political process and its outcomes, such efforts are exceptionally reliant on the media and the messages which they

[404] Loader suggests the health body NICE, on which the proposed NICJE is modelled, can be seen as 'affording [interested actors] the space to engage in dialogue about how to spend limited health resources in discussions that are always simultaneously clinical and political', and in a way which means that 'its decisions are fair and legitimate' and perceived as such (Loader, 2010b: 88).

[405] Wacquant (2011: 442-4) gives as an example the increasing influence of think tanks and pseudo-experts on penal policy; see further Wacquant (2009).

communicate. Given the nature of the British tabloid press (Davies, 2009: chapter 10; Silverman and Wilson, 2002), this poses a real and, some would suggest, near-insurmountable challenge.

Another danger is that the proponents of such efforts will fail to allow for the possibility that many people simply don't much like, or wish to engage in, politics (Stoker, 2006: 158). If forced on defensive, unwilling citizens, the debate may be liable to collapse 'into aggressive intolerance of other people's legitimate viewpoints' (Stoker, 2006: 13). In this sense, insulation proponents are perhaps right to suggest that politics will always be 'a conversation among elites' (Loader and Sparks, 2010: 113), if by this we mean the politicians and the relatively small number of campaigners, practitioners, academics and others who have the time, means and inclination to engage in national-level, policy-oriented debate and discussion regarding 'dangerous offenders'. A further potential, though by no means inevitable, outcome of an engagement-oriented approach to the dangerous offender problem may be the generation of a policy which is, from the perspective of many experts, misguided. However, we have noted above that this potential outcome is not limited to this position: insulation-oriented approaches, as with present methods of policymaking, are liable not only to involve painful 'political compromises' (Flinders, 2012: 184), but anger by certain groups at a process which arrives at 'wrong' solutions, based on 'false' premises and 'incorrect' definitions of the problem being addressed.[406]

This discussion suggests that each of the position has certain merits, and further that they may not be as mutually exclusive as might first appear to be. While favouring greater public engagement, I equally share Stoker's (2006: 14, 158) scepticism as regards the more strident engagement-oriented positions. We must recognise that 'one person's "big issue"

[406] We only need to recall the 'dangerous debate' of the 1970s-80s discussed in Chapter 1, and the debate surrounding the IPP sentence and its amendment, to recognise that this is an enduring feature of penal policy debate.

can mean nothing to another' (Stoker, 2006: 15) – who are we to complain if many people simply respond that 'yes, dangerous offenders are of concern, but I would rather that someone better qualified decides what to do about it'? Nonetheless, penal politics would benefit greatly from a drive 'to design institutions, structure processes and develop support systems to make it easier for people to engage' (Stoker, 2006: 14), enabling citizens to 'have a say', which for most arguably 'means wanting to *influence*, but not having to *decide'* (Stoker, 2006: 15). In other words, representative democracy is likely here to stay and for good reason. If this is the case, then the communication of the reasons for policy decisions, and the process by which these conclusions were reached, will be crucial. While dangerous offender politics could plausibly take a different form, dramatic and sustained changes not only to penal politics, but politics more generally and the political culture in which it operates, are ultimately required.

In closing, it is tentatively suggested that Kelman and Hamilton's (1989) proposal for the development of systems of shared authority holds real potential as a lode star by which (penal) political reformers might guide their efforts. Kelman and Hamilton (1989) were concerned by the role of 'binding forces' in 'crimes of obedience' such as the Watergate scandal or the My Lai massacre in Vietnam. Their concerns largely parallel those of Arendt and Bauman, discussed above. In order to destabilize such binding forces, Kelman and Hamilton (1989) argued for

> changes in social structures, educational experiences, and group supports that will ensure citizens and subordinates in bureaucratic hierarchies regular access to *multiple perspectives*, external to and independent from the authority (Kelman and Hamilton, 1989: 328, emphasis in original).

Of most interest is their suggestion that, 'We need to invent ways of providing for as many citizens as possible...the opportunity to enact authority roles at some time in their lives, in some areas of their lives' (Kelman and Hamilton, 1989: 323). Kelman and Hamilton

(1989) suggest that such efforts would likely lead to individuals being 'more likely to take an independent stance towards authoritative orders' (Kelman and Hamilton, 1989: 232) and

> less likely to feel overwhelmed and incapacitated in the face of authoritative demands. [Further,] They can imagine themselves in the position of the authority and are thus aware of the ambiguities within which authorities operate and the inevitable fallibility of authoritative decisions (Kelman and Hamilton, 1989: 324).

This solution is appealing for its apparent ability to foster 'judgment, debate, and the type of tangible public freedom that come into existence when human beings act and speak together as equals' (Bernstein, 2008: 66). It is clear that any satisfactory response must meet the crucial, albeit daunting, challenge of providing a means by which political judgment and deliberative politics is nurtured, rather than one which is instinctively and unthinkingly oppositional (Wright, 2009: 322). We require a climate where a constant, constructive struggle can be maintained between different actors making their case: politicians; bureaucrats;[407] practitioners; academic experts; crime victims; prisoners; concerned (and uninterested) citizens; and others.[408] For, as Kelman and Hamilton's (1989) argue:

> Independent judgment requires both being close enough to authority to know what one is judging and removed enough to know that there are alternative bases from which judgments can be made (Kelman and Hamilton, 1989: 328).

Substantial impediments exist to the development of a more inclusive penal politics and the fostering of a society in which interested citizens feel better equipped to understand, discuss and intervene in penal debates. However, the nature of the IPP story seen in the foregoing chapters suggests that such changes are urgently required.

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[407] As regards officials, it is interesting to note the increasing demands placed on senior civil servants by the Public Accounts Committee to account for the actions of themselves and their subordinates in relation to the value for money, or otherwise, of the department's activities. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/role/> accessed 11 December 2012.

[408] This depiction is prompted in part by Christie's (2011: 709, emphasis in original) suggestion that 'our Western societies might be in need of *more* explicated internal conflicts, not less.' See also Arendt (1968: 241-242).

APPENDIX I

ELITE INTERVIEWS AND DOCUMENT ANALYSIS: POWER RELATIONS, ETHICS AND RELIABILITY

In this appendix, I discuss the methods utilized in this project in greater detail. All qualitative research gains 'its legitimacy from its claim to be close to the data' (Greener, 2011: 110), with reflexivity being 'of paramount importance' (Greener, 2011: 106; Guba and Lincoln, 1989). This appendix therefore sets out the methods employed, the data collected, and the ways in which they were analysed. The efforts discussed below resulted in 53 completed interviews and the gathering together of a range of documents including Hansard records, legal judgments, government publications, newspaper articles and a small – though important – selection of government documents not generally available to the public. I note how the data were collected, before discussing how these sources were studied, compared and interpreted.

Documents

Documents analyzed in this research included Hansard records, legal judgments, relevant reports, speeches and newspaper articles. These were gathered in an iterative process, where those initially sourced referenced other documents; while interviewees often mentioned, or sometimes passed on, further documents. Relevant Hansard records were identified by searching the Parliamentary debates in relation to the CJA 2003 and CJIA 2008 for discussion of the IPP sentence. Further relevant debates were sought by searches for 'dangerous offenders', 'imprisonment for public protection' and variations of these terms on

the Parliament website.[409] It became clear that many parliamentarians (and other relevant actors) did not have a clear understanding of the meaning of the term 'IPP'. This presented difficulties in being certain that a conclusive database of relevant debates had been obtained. In this regard, guidance by Parliamentarians interviewed and senior academic colleagues were of great assistance in tracking down elusive debates and additional Parliamentary questions.

In terms of newspaper articles, I initially attempted to gather relevant articles by conducting word searches on LexisNexis and other relevant databases. However, these efforts proved to be of variable worth, largely due to the problem of the generality of the terms ('dangerous'; 'public protection') being searched for and the difficulty of adding precision without excluding relevant articles.[410] Fortunately, I discovered that a prominent penal reform charity held a substantial and near-comprehensive library of newspaper clippings relating to crime, prisons and criminal justice. This was an invaluable resource, covering as it did the temporal scope of the thesis. I worked through these clippings, copying articles relating to the IPP sentence, relevant individuals and other related events (the DSPD proposals, and the legal judgments withdrawing the Home Secretary's right to set life tariffs, for example).[411]

In relation to official publications not publicly available, the Freedom of Information (FoI) mechanism introduced by the Freedom of Information Act 2000 proved to be of some assistance. Several reports, along with internal projections, were obtained in this manner. I was concerned, however, that officials dealing with my FoI requests – who could likely be future interviewees – might react defensively to such requests and perhaps resent this

[409] http://www.parliament.uk/business/publications/hansard/

[410] The enormous number of documents returned by searches for, for example, 'dangerous offenders', in itself was informative, emphasizing the extent to which such issues were prominent in the media during the early years of the twenty-first century.

[411] The very process of immersing myself in this resource was invaluable in developing my sense of the climate of the time, the tone of the news media and the prominent issues of concern.

additional demand on their time. Therefore, I delayed FoI requests until I had conducted a substantial proportion of the interviews and thus felt better able to gauge likely responses to such requests, in addition to being clearer on the documents which I might wish to request and how to maximize the likelihood of a successful request. In addition, some anticipated requests became unnecessary, as some documents were provided by interviewees.

Despite this wealth of data, it is nonetheless the case that if one hopes to reconstruct in detail the processes involved in the critical moments under investigation, substantial challenges remain. Legal restrictions such as the '30 year rule' (Dacre et al., 2009)[412] mean that interviews are indispensible if researchers 'wish to penetrate behind the public façade, and to know who thinks or who said what (often impossible to tell from the press)' (Seldon, 1996: 165). In relation to the present research, I thus regarded conducting interviews with those involved with the IPP story as an important, indeed crucial, part of the research project (Dexter, 2006: 23).

Elite Interviews

Interviews with senior ministers, officials and other 'powerful' individuals are generally termed 'elite interviews.' The term 'elite' can be a loaded one, implying, for example, acceptance of existing power relations or seeing such actors as superior and perhaps thus having unique access to 'truth' (Dexter, 2006: 18). While a variety of definitions exist,[413] I am drawn to Richards' (1996) description of 'elite' individuals:

> A group of individuals, who hold, or have held, a privileged position in society and, as such, as far as a political scientist is concerned, are *likely to have had more influence on political outcomes than general members of the public* (Richards, 1996: 199, emphasis added).

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[412] The Public Records Act 1958 introduced a '50 year rule'. In 1967 this period was reduced to 30 years (Dacre et al., 2009: chapter 2).

[413] See Harvey (2011: 432-433).

The purpose of elite interviews, therefore, is to gain

> an insight into the mind-set of the actor/s who have played a role in shaping the society in which we live and an interviewee's subjective analysis of a particular episode or situation (Richards, 1996: 199-200).

In the present case, I saw elite interviews as being crucial because of their ability to provide: assistance in interpreting documents; help in interpreting the personalities involved in relevant decisions; providing information not recorded elsewhere, or not (yet) publicly available (Richards, 1996: 200). The nature of the research questions meant that interviews presented a valuable opportunity to understand actors' motivations and, crucially, to understand their interpretation of terms such as risk, the public, dangerousness, and to gain a sense of the beliefs and traditions which influenced their aims and actions.

Interviews were arranged and conducted from September 2010 to October 2011. The vast majority were conducted face-to-face, necessitating travel, predominantly, to London. Most were conducted at interviewees' places of work; four were conducted at their home with several others conducted in cafés. Two were conducted via Skype and one by telephone. These efforts resulted in 53 completed interviews, the vast majority of which were recorded. Interviews generally lasted between one and two hours. In addition, ten written responses – letters or emails – were also received. Recorded interviews were then transcribed using NCH Express Scribe software and notes from unrecorded interviews typed up.

Obtaining Interviews

In selecting prospective interviewees, I initially utilized a 'criterion-based', or 'purposive' approach (Ritchie et al., 2003: 79-80), with interviewees chosen

> because they have particular features or characteristics which will enable detailed exploration and understanding of the central themes and puzzles which the researcher wishes to study.' (Ritchie et al., 2003: 78)

In order to draw up this initial list, I relied on government documents, Hansard records, relevant published reports and resources such as the Civil Service Yearbook. This list was then continually revised once the interviews had begun, drawing on the strategy commonly termed 'snowball sampling' (Ritchie et al., 2003: 94-95).[414] In addition, opportunities would unexpectedly be presented for an interview, or brief discussion, with a relevant individual – generally when an interviewee would refer me to a colleague or associate who happened to be in the vicinity.[415]

I conducted several exploratory 'pilot interviews' with sympathetic individuals who seemed well placed to guide the research strategy. These were conducted with two interest group representatives, a senior academic and a Parole Board member. While these helped to build contacts and facilitated further research interviews, to some extent Dexter's (2006) words of warning that helpful early informants' '*unchallenged assumptions may very often be seriously misleading, wasteful, and time-consuming*' (Dexter, 2006: 45, emphasis in original), was borne out.[416]

Nonetheless, my general policy of attempting to move from interest groups, to other relevant bodies (such as the Prisons Inspectorate and Parole Board), to retired officials, to senior officials, judges and finally ministers was beneficial for two reasons. First, it meant that I was well-placed to challenge robustly the most 'high-powered' actors, who in the case of politicians in particular were liable to slip into obfuscatory political rhetoric or unhelpfully generalist musings. Second, these latter interviewees were generally more difficult to contact for clarification or further questions. Therefore, while Richards' (1996: 202) assertion that

[414] In this regard, my experience matched Dexter's (2006: 45) reflection that it 'is very frequent for an interviewee to say, "I think you should see so-and-so, if he'd talk; but I don't think he will." Often, he does.'

[415] This approach is defined by Ritchie *et al.* (2003: 81) as 'opportunistic sampling.'

[416] They key word is 'unchallenged'. Once I had conducted more interviews with individuals bringing with them a range of perspectives, I was better able to challenge all interviewees and thus obtain a more nuanced understanding of the events under consideration.

'the need to be well prepared cannot be over-emphasised' is applicable to all interviews, my knowledge and experience by the time of these final interviews meant that the opportunity could be maximized with the need for subsequent clarification minimized.

Successfully obtaining interviews was of great concern and Richards' (1996) guidance proved to be helpful. Efforts to convey the legitimacy and importance of the research involved first, seeking recommendations and assistance from amenable colleagues and interviewees. Second, to maximize the chances of my initial contact being received, where possible, I ensured that interview requests were sent both by post and email.[417] Both the letter and envelope displayed the University of Oxford logo. Third, the letter, which was never longer than one page, noted my doctoral supervisor's details, emphasized that ethics approval had been obtained and that the research was funded by the Economic and Social Research Council (ESRC). All of this was intended to add credibility to the research in the eyes of the prospective interviewee. Fourth, I endeavoured to succinctly state why it was crucial that I met with that individual *in particular*. In this regard, it was particularly helpful to be able to refer to a previous interviewee (with their consent), stating that 'X suggested that I would benefit particularly from your recollections and insights'. If a response was not received after several weeks, I would endeavour to contact the prospective interviewee by telephone.

Early in the research process, my supervisor's contact with a senior civil service official was met by a stark and rather unsettling response. Interviews with serving officials would likely be impossible, they said, because 'any comment made by [Ministry of Justice] officials will be on the record' and as such the relevant civil service rules stated that:

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[417] The email would contain a brief and professional message, with a pdf of the posted letter attached. I pursued this approach because it became clear that while email was generally an effective means of communication, a good proportion of those interviewed responded because they valued the sending of a physical letter, or because they did not regularly use an email account.

> civil servants must not take part in surveys or research projects that deal with attitudes or opinions on political or policy matters. This applies even if participation cannot be attributed to individuals. The purpose of this rule is to prevent research findings being presented as a Civil Service view on a matter on which only the Government or the devolved Administrations can properly hold a view.

On the face of it, therefore, most of the research interviews I had envisaged – integral to the success of the research project as envisaged – were impossible.[418]

However, I found that this potential roadblock could be circumnavigated by the use of a more individual approach, 'snowballing' from one person to the next. The world of penal politics and policymaking is a small one and suggestions for interviewees and acceptances of requests increased from a very slow trickle during the Autumn of 2010 to, in relative terms, a torrent by Spring 2011. It is very difficult to know what factors (the 'Oxford' name; support of a well-known supervisor; personal recommendation of a possible interviewee by another; identification of myself with penal reform issues; the salience of the IPP sentence; the personal circumstances of the interviewee) helped most in the success of the majority of the interview requests. In reality it is likely a combination of many, if not all, of these factors.

Preparing for and Conducting the Interviews

As Lilleker (2003: 210) rightly makes clear, 'preparation is ultra-important', with a detailed knowledge of the interviewee and the subject matter invaluable (Richards, 1996: 202). Initially I relied upon an in-depth interview schedule, containing three pages of detailed questions. However, I found that in preparing for interviews the pages would become filled with scribbled notes around what increasingly proved to be unhelpfully dense primers. On the basis of this experience, the schedule was continually revised until it was a far shorter, more relaxed and spacious document. This revised schedule contained prompts relating to

[418] If interpreted widely, the response could encompass sentencing officials, other Home Office and Ministry of Justice officials, employees of the Parole Board, Prison Service, Probation Service, potentially practitioners and potentially others including Parliamentary Counsel.

historical or thematic issues I wished to discuss, with a good deal of blank space in which I could note interviewee-specific issues or questions to be raised, or indeed for further questions or notes to be jotted down during the interview itself.[419]

As regards the conduct of the interview, I disagree with Quinlan's (2011: 31) argument that 'an oral history interview's success hinges on questions that are neutrally framed, open-ended, and asked one at a time'. In contrast, I found that in many interviews, it proved beneficial to deliberately introduce a strongly dissenting alternative view, often drawing on past interviews ('another interviewee suggested that...'), in order to provoke a response from the interviewee (Dexter, 2006: 79). In my role as 'understanding stranger' (Dexter, 2006: 41), I could receive their pleas for a better understanding of their actions, or of difficulties which explained (or excused) them. Indeed, we should remember, as Dexter (2006: 79) puts it, that 'most experts are predisposed to argue about professional matters and set people right, and few of them are so malleable as to fall *tout court* for a leading question.' Nonetheless, in light of the need to be courteous and respectful to the interviewee, one had to be wary of overly provocative questioning.

The notion of an 'understanding stranger' speaks to the approach which the interviewer should take in the interview. I attempted to engage in what I would term 'critical empathy'[420] – an effort to take the interviewee seriously, be sympathetic to their views and recollections (while challenging them using the above method) and attempt to 'talk the informant's language' (Dexter, 2006: 33). The word 'critical' is important: unthinking

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[419] In this way, my approach moved to the position advocated by Richards (1996: 203) and away from the position of Lilleker (2003: 210), who appears to advocate a more structured approach.

[420] The term 'critical empathy' draws on the notion of 'empathetic understanding' (Webb and Webb, 1932: 47-49, quoted in Dexter, 2006: 59), an approach which involves an attempt 'to grasp what the other person is experiencing, to feel some of what he feels [*sic*], to share to some extent his view of his experiences.'

sycophancy is not only ethically suspect, it is likely to be counter-productive (Richards, 1996).[421]

Establishing rapport is generally accepted as being a crucial aspect of successful interviewing (Dexter, 2006; King and Horrocks, 2010). The challenge, as Quinlan (2011: 32) puts it, is 'to build a level of trust that will facilitate openness, whether the two players share most personal traits or are distinctly different.'[422] Issues of the interview-as-performance are thus never far from the surface. For example, Richards (1996) speaks of attempting to match his appearance, what we might call his 'outward persona', with the likely expectations of his interviewee. While Richards' (1996) examples are helpful (though the fashion advice a little *passé*), it is important to go beyond this to recognise the inter-subjectivity of self-presentation and its effect on efforts at rapport-building.

Thus, while I consider my self-conception to be relatively stable (and would include terms such as 'middle class', 'white', 'English', 'non-elite', 'southern', 'liberal'), the extent to which interviewees focused on particular aspects of my 'self', often to the exclusion of other characteristics which I saw as not only integral but self-evident, was rather disorienting. Thus, for one member of the House of Lords, a Cambridge graduate, I was an 'Oxford man', presumed to know (and care!) about the intricacies of the Oxford-Cambridge rivalry, the boat race, and the like. For more 'muck and nettles' interviewees, I was a sympathetic ear, a son of a probation officer and thus 'one of them'. For others still, I was assumed to be a committed penal reformer, strongly allied to an interviewee's campaigning goals. These perceptions of myself inevitably influenced the efforts at building rapport and potentially conflicted with the

[421] As Dexter (2006) reminds us, 'it is perfectly possible to be extremely courteous and bland and use the other person's vocabulary while missing entirely the way [the interviewee] looks at things' (Dexter, 2006: 59).

[422] Efforts at building rapport cannot but imply at least a tacit acceptance of the beliefs, traditions and power relations which the interviewee and their environment represents (Fontana and Frey, 2005: 708). This is perhaps one reason why many critical or 'radical' criminologists appear to be more at ease drawing on policy documents, government papers and the like, rather than face-to-face interviews with the objects of their research. We should keep in mind, of course, that issues of access may also be a crucial factor in such cases.

imperatives of being honest and open with one's narrators. As with most challenges posed by elite interviewing, this is not a problem to be 'fixed', but a danger to constantly be kept in check.

Warnings about the slipperiness of elite interviewees are not uncommon in the literature (Harvey, 2011: 438), but I was struck by the candid nature of the vast majority of those I interviewed. While some questions were clearly challenging, or some topics considered taboo (civil servants' extreme wariness of entering 'political' debates is a common example), any unwillingness to answer questions was generally openly acknowledged by the interviewee. This meant that we could swiftly and pleasantly move on to another area of discussion, or, in many cases, that after a laugh at the potential awkwardness or a request for elaboration, the interviewee would decide to speak more candidly to the original question.

As in teaching (Brookfield, 2006: 140), silence, and the interviewer's comfort with it, is an important tool in encouraging reticent interviewees to expand on statements made (Dexter, 2006: 96). It is also crucial to press narrators for detail: to ensure, particularly where historical reconstruction is a key goal, that interviewees are encouraged to move from the general to the particular (Dexter, 2006: 96). Obtaining richer data is not only a good in itself, but also helps the researcher to assess the reliability of the interviewee's responses by being better able to contrast them with other detailed accounts of the same episode.

I avoided, as far as possible, interviewing more than one individual at the same time. These were for the reasons enunciated by Ware and Sánchez-Jankowski (2006: 5), primarily that 'peer groups have a way of inhibiting individuals.' Nonetheless, I did twice interview two people at the same time, at their suggestion. These were broadly positive experiences, but these interviews involved close colleagues who were clearly comfortable in each other's company and, it appeared, used to openly disagreeing with one another.

The Powerless Researcher?

An underlying assumption of much of the elite interviewing literature is that power relations present a substantial challenge to the researcher, with the researcher in a relatively vulnerable position (Neal and McLaughlin, 2009: 695). However, such a conception of elite interviewing did not satisfactorily reflect my experiences. To an extent, relations within the interview did correlate with existing professional or structural power relations. For example, a senior judge interviewed did 'control and dominate the interview' in a manner depicted by Richards (1996), in effect delivering a 50-minute 'lecture' rather than engaging in a traditional interview.[423] Former senior ministers tended, similarly, to dictate the location and nature of the interview. For example, several interviewees' preference for meeting in cafés – a preference which was clearly not open to discussion! – made note-taking difficult, at times precluded closer questioning of the interviewee and made recording of the interview, if not impossible, near-worthless due to background noise.

However, with many interviewees, including those whom we might consider to be far more 'senior' or 'powerful' than a doctoral student, the interviewer-narrator relationship transpired to be far more ambiguous. Or, to use Neal and McLaughlin's (2009: 699) phrasing, 'power ran through our research relation in a much looser, messier and multidirectional way.' This was in part because it became clear that many interviewees perceived *me* as an 'elite actor'. A particularly startling experience was having a very senior judge, suddenly looking concerned, say, 'I hope I'm not taking up too much of your time?' More generally, for some interviewees, discussing the history of the IPP sentence with a researcher who they assumed to be far more expert and knowledgeable than they felt themselves to be was a rather

[423] While the delivery of information was heavily controlled by the interviewee, this is not to say that they were being obtuse or deliberately evasive. Rather, it seemed clear that the judge believed a 'lecture' was the most efficient means of providing a great deal of information to me, after which he was responsive to several follow-up questions.

unsettling experience.[424] They expected me, an 'Oxford man', to be commanding, confident and directive of the interview. This led to some difficult early interviews where I, seeing myself as the 'subservient' individual (inexperienced, lacking insider knowledge, at times intensely nervous) expected the interviewee to take charge of the interview and, to a large extent, to come pre-armed with information they wished to divulge given their acceptance of what I felt had been a clear interview request.[425] However, in time, my understanding of my own perceived 'elite' status was of great assistance in making the most of the research interviews.

Second, it became clear that for many of the interviewees, memories of their involvement with the IPP sentence was not only seen as of historical worth, but also brought up negative emotions including frustration and regret. This openness about personal or collective failings and subsequent regrets was unexpected. For some, this was because of their direct involvement with its creation. For others, it was a regret that they had not 'seen it coming' and done more to avert the human suffering and systemic difficulties caused by the sentence. As well as demonstrating many senior professionals' 'taste for self-analysis' (Dexter, 2006: 41-2), this vulnerability demonstrated the 'unsettled nature of the power dynamic in the "upwards" research encounter' (Neal and McLaughlin, 2009: 703).

Ethical Considerations

Much of the literature on elite interviewing emphasizes the benefits in terms of data collection of affording the interviewee anonymity (Dexter, 2006; Woliver, 2002). Actors such as civil servants tend to consider themselves 'non-political' and 'invisible' and thus tend to be

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[424] As Dexter (2006: 37) reflected, potential interviewees 'may reason that the interviewers are knowledgeable and informed and no doubt, therefore, will ask complicated questions; and elite people (like non-elite people) generally do not like the idea of being embarrassed by being unable to answer.'

[425] I now realise that I should have heeded Dexter's (2006: 50) warning that it 'can never be assumed that the interviewee remembers who you are or what your project is.'

wary of the prospect of providing an interview 'on the record'.[426] While expressly 'political' actors might be more used to being interviewed for radio or television and directly quoted, they are likely nonetheless to be more relaxed with full anonymity assured when discussing potentially sensitive issues. Therefore, in the interview requests sent, I included words to the effect that:

> the anonymity of your comments will be assured and your confidentiality will be assiduously safeguarded.

I was aware that it would not necessarily be straightforward to use interview data, along with other sources, to reconstruct the relevant events while ensuring that those quoted could not be identified (i.e. remain genuinely anonymous, see Neal and McLaughlin, 2009: 694).

I used a combination of techniques to respond to this issue. These included: editing particularly distinctive words or phrases in some quotes in order to minimize the likelihood of identification; using publicly available quotes (in Hansard, newspaper articles, Select Committee reports) which closely echoed sentiments expressed in interviews; preferring the quotation of a close observer of an individual's actions, rather than quoting that individual directly;[427] a blanket policy of anonymity even where interviewees were happy to be directly quoted.[428] Further, I endeavoured to follow Woliver's (2002) approach to revelations regarding personal animosities between those interviewed:

> I do write about factions within the group if it is an important part of the group dynamics. If it is just gossip, I don't use it (Woliver, 2002: 677).

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[426] An additional concern mentioned in some interviews was that, from time to time, academic researchers had been known to pass on 'juicy gossip' to journalists.

[427] In other words, quoting an individual stating that 'X decided to do Y, because he believed Z' better protected the interviewees' anonymity than a similar quote of the individual concerned. It goes without saying that such an approach was only used when such accounts of actions (or beliefs) were in accord.

[428] One exception to this was made. David Blunkett agreed to be directly quoted on a non-contentious reflection on the concerns driving the IPP sentence. I considered that this did not endanger the anonymity of others, was worthwhile given that an alternative source for the information was not available, and that it was impossible to use the quote without the identity of the individual quoted being made obvious.

In terms of the negative emotions discussed above, it is important to note that no interviewee displayed signs of being in genuine distress. Nonetheless, interviews were structured to ensure that they concluded on a neutral topic, with a positive conclusion to the meeting. While I believe these techniques were largely successful, I remained alert to the acute importance of protecting interviewees from political, legal or indeed emotional harm resulting from my research.

In terms of building rapport, there is in my view an important moral distinction between emphasizing genuine interests or experiences which may make the narrator more amenable to the research and more engaged with the interview, and deliberately misleading – by action or omission – the interviewee in a way that will clearly alter the interview relationship. In practice there is no clear dividing line between the former and the latter, but in such contingent and 'intensely interpersonal exchange[s]' (Quinlan, 2011: 24), rules of thumb, personal integrity, and gut instinct – ideally thought-through in detail in advance of the interview – are all that one can rely upon.[429] For, as with all ethical issues, while institutional review boards (in this case the University of Oxford's CUREC system) ensure, at least in theory, that the research has taken into account such important issues, this should be viewed as only the minimum standard by which research can be deemed 'ethical' (Dingwall, 2006). Truly ethical research must go beyond these institutional requirements and grapple with one's own political and moral positions and the ethical commitments flowing from them (Christians, 2005; Josselson, 2007).

[429] I am therefore uneasy with the implications of the suggestion, without further elaboration, that 'researchers need to gauge early the atmosphere of the interview and adjust their behaviour, speaking voice and mannerisms accordingly' (Harvey, 2011: 434).

Making Sense of the Data

Reliability and Validity

As Chan (1992: 19) notes, researchers must 'be on guard constantly against taking accounts at face value'. First, because 'respondents sometimes came up with incorrect information about dates and finer details of events' and second, due to the more general difficulty of judging 'the validity of retrospective accounts' (Chan, 1992: 19). In order to combat this, I utilized the 'well-known method of triangulation,'[430] cross-referencing information provided by interviewees with information obtained from documents.

Desired information, in particular as regards events internal to the relevant departments, was not always contained in available documents. In this case, I pursued the other strategies described by Chan (1992: 19):

> Comparing perspectives from [interviewees holding] different organisational positions...comparing different accounts of the same phenomenon; and direct questioning of respondents about alternative accounts.

This said, as Richards (1996: 200) importantly notes, 'elite interviewing should not be conducted with a view to establishing "the truth", in a crude, positivist manner.' This is because such accounts are inevitably subjective; 'memory is not a passive depository of facts, but an active process of creation of meanings' (Portelli, 2006). Some writers, such as Portelli (1991) and Thompson (2000) have gone further, challenging the perceived uncomplicated superiority of documents over oral history as sources of historical data. As with oral history, the problem of distance from events 'exists for many written documents, which are usually written some time after the event to which they refer, and often by nonparticipants' (Portelli, 1991: 52). Further, we must be careful about the term 'objective'. While official documents

[430] I find Berg's (2007: 5) depiction of triangulation as 'combining several lines of sight' particularly evocative.

may be a reliable source of facts and figures, we must keep in mind that public documents are efforts at meaning-making, intended to have a certain effect on a particular audience (Skinner, 1970).

In addition, 'incorrect' reconstructions of events can be just as informative as those which are 'right' or 'true':

> They allow us to recognize the interests of the tellers, and the dreams and desires beneath them....errors, inventions and myths lead us through and beyond facts to their meanings (Portelli, 1991: 2).

At the time of the research interviews, the IPP sentence was widely believed to have been marked for abolition by the relatively newly-installed Conservative-Liberal Democrat government. This timing was fortuitous. Given its likely abolition, most interviewees, especially those involved with its creation, reflected on these events with greater freedom than might otherwise have been the case. Further, the interviews, and their timing (with the expected abolition of the IPP sentence in the news during much of the research period), exemplified Loader's (2006: 571) argument regarding the value of a 'revealing interplay between memories of the past and the preoccupations of the present.'

Interpretation

> Qualitative data are usually voluminous, messy, unwieldy and discursive – an attractive nuisance (Ritchie and Lewis, 2003: 202).

Data, not least unstructured interviews, do not 'speak for themselves' (Fontana and Frey, 2005: 713). It is important, therefore, to note how the data was interpreted and how I dealt with the inevitable ambiguities, conflicting accounts and the challenge of (re)constructing historical events and the beliefs underpinning them. In large part, I utilized what Peräkylä (2005) describes as an 'informal approach':

> By reading and rereading their empirical materials, they try to pin down [the] key themes and, thereby, to draw a picture of the presuppositions and meanings that constitute the cultural world of which the textural material is a specimen (Peräkylä, 2005: 870).

While 'informal', such an approach should not, and did not, lack rigour. I began with a set of likely key historical moments and themes derived from the literature review underpinning Chapter 1 as 'coding nodes'[431] – risk, public voice, creation, minister-official relations, and so on. I printed and read around eight of the interviews, marking them up and adding additional 'nodes' as necessary. I then repeated the process using the QSR NVivo software, coding the transcripts and using this second reading as a chance to reconsider my first, non-computer-based, interpretation of the texts. I dealt with eight transcripts at a time as this meant that I was better able to hold in my mind, to compare and combine the varying narratives presented. Having coded the transcripts, I drew together my understanding of the historical events and key themes (noting any conflicting narratives), which I had gathered from those transcripts. I repeated this process until I had read, re-read and coded all 53 of the interview transcripts.

At this point, I then returned to the documents obtained, working through them in a similar way. Thus, the 'repeatable regularities' from which theoretical explanations can emerge (Kaplan, 1964) became clearer. I deliberately began with the interviews, before returning to the documents,[432] as an effort at destabilizing the general valorisation of documents to the detriment of oral historical data. In addition, given the Skinnerian approach (Skinner, 1970; 2002) underpinning the research, such a process allowed me to get at the meaning behind the texts; to understand better why a certain publication, a certain speech, was worded in such a way, given the pressures, concerns and goals of that time.

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[431] This term derives from the NVivo qualitative data analysis software.

[432] A detailed reading of the initial documents had already taken place during the early research phase.

However, the interpretation of the data did not end there, with 'writing-up' simply a consolidation of these findings. Rather, in attempting to develop my interpretations into fully-formed chapters, I would often be forced to re-assess my interpretation of the data. Anomalies would appear; an apparently convincing account by an interviewee would increasingly appear unfounded; at-first minor issues would take on greater importance than initially appreciated.[433]

Presentations of draft papers, either at conferences or within the Centre for Criminology, then offered additional opportunities for my interpretations to be challenged or for apparent inconsistencies to be noted. Many academic staff at the Centre had first or second-hand knowledge of the events being discussed and were therefore able to offer helpful corrections or add nuances to my own understanding of events and actions.[434]

Conclusion

I have above discussed the many challenges faced by researchers utilizing oral historical methods. The problems of access, of building rapport, of ascertaining the reliability of the data and of interpreting the data, have been explored and my experiences of such challenges noted. Having done so, I nonetheless believe, influenced by Dexter (2006), Heclo and Wildavsky (1981), Portelli (1991), Seldon (1983) and others, in the value of research underpinned by elite interviewing allied with the analysis of available documents. Of course, in such a situation the proof of the pudding is in the eating. Therefore, I can only hope that by the time this appendix is reached, my efforts at providing a detailed historical reconstruction of the IPP story, in a way which allows us to explore relevant issues pertinent to penal politics and policymaking more broadly, are considered by the reader to be a success.

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[433] On writing as a method of inquiry, see Richardson and St. Pierre (2005).

[434] This is not to say that *all* suggestions as regards interpretation were uncritically accepted.

APPENDIX II

TIMELINE OF RELEVANT EVENTS

23 October 1998	Michael Stone is sentenced to life for the murder of Lin and Megan Russell.
July 1999	*Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development* is published by the Home Office and Department for Health.
16 May 2000	Sir John Halliday is asked to commence a review into the sentencing framework of England and Wales.
December 2000	The 'Birt report', *A New Vision for the Criminal Justice System*, is concluded. The Birt report was never formally published.
8 May 2001	General election is called.
7 June 2001	New Labour wins a 'landslide' victory, holding 413 seats compared to the Conservatives' 166 and the Liberal Democrats' 52.
8 June 2001	David Blunkett is appointed as Home Secretary, replacing Jack Straw.
5 July 2001	The 'Halliday report', *Making Punishments Work*, is published.

12 December 2001	Roy Whiting is sentenced to life imprisonment for the kidnap and murder of Sarah Payne.
May 2002	Lord Falconer is appointed as Minister of State for Criminal Justice, Sentencing and Law Reform; Hilary Benn appointed as Minister for Prisons at the Home Office.
July 2002	The *Justice for All* white paper is published.
21 November 2002	Criminal Justice bill is introduced to Parliament, containing the proposed IPP sentence in Part 12 Chapter 5, 'Dangerous Offenders'.
25 November 2002	The House of Lords rule, in *Anderson*, that the Home Secretary's power to set the minimum tariff imposed on convicted murderers is incompatible with Article 6 of the European Convention on Human Rights.
11 February 2003	Imprisonment for Public Protection sentence is debated in Committee Stage. Prisons Minister, Hilary Benn MP, states that 'we have assumed in our modelling that…there would be an additional 900 in the prison population.'
May 2003	Hilary Benn leaves his post to return to the Department for International Development.
June 2003	Baroness Scotland of Asthal appointed Minister for the Criminal Justice System and Law Reform at the Home

	Office.
20 November 2003	Criminal Justice bill receives Royal Assent.
January-March 2005	Judicial Studies Board conducts training in relation to the sentencing aspects of the Criminal Justice Act 2003. This includes guidance on the IPP sentence.
3 November 2005	Rose LJ, delivering judgment in the Court of Appeal, provides guidance in *Lang et al.*, encouraging restraint in the use of the IPP sentence.
20 October 2006	Court of Appeal uses *Johnson* to emphasize its guidance in *Lang et al*.
6 February 2007	Home Affairs Committee begins its inquiry Towards Effective Sentencing.
9 May 2007	Ministry of Justice is created.
26 June 2007	Criminal Justice and Immigration Bill introduced to Parliament by David Hanson, Minister at Ministry of Justice. Single proposed amendment to the IPP sentence is increased discretion for trial judge to extend the tariff period.
27 June 2007	Gordon Brown becomes Prime Minister, replacing Tony Blair.
28 June 2007	Jack Straw is appointed Secretary of State for Justice, replacing Lord Falconer. Constitutional changes mean that the Ministry of Justice has inherited responsibility

	for prisons and sentencing, among other areas, from the Home Office. John Reid is replaced by Jacqui Smith as Home Secretary.
31 July 2007	Laws LJ, delivering judgment in the High Court, rules in *Wells* that the operation of the IPP sentence has resulted in a 'general and systemic legal failure' and that the continued detention of post-tariff IPP prisoners in the absence of proper resourcing of the system is 'unlawful on first principles'
31 July 2007	Prison Reform Trust publishes 'Indefinitely Maybe', emphasizing the systemic damage and human suffering caused by the IPP sentence.
20 August 2007	Justice Collins delivers judgment in *James*, following Laws LJ's earlier judgment.
21 September 2007	The Howard League for Penal Reform publishes the report, 'Indeterminate Sentences for Public Protection', containing interviews with sentenced IPP prisoners and arguing for policy change.
8 October 2007	Jack Straw introduces the Criminal Justice and Immigration Bill for second reading in the Commons, noting that he is 'concerned' about the IPP situation.
8 October 2007	'How to Reduce Prison Overcrowding – Some practical solutions' event held at Cumberland Lodge, Windsor.

9 October 2007	Justice Minister Jack Straw and Lord Carter are pressed by the Constitutional Affairs Select Committee on the IPP backlog. Jack Straw describes his as not 'a situation anyone in my position would have wished on their worst enemy still less on themselves'.
7 November 2007	Criminal Justice and Immigration bill is formally reintroduced to Parliament by Jack Straw for the 2007-8 session, having been carried over from the previous session. Single proposed amendment to the IPP sentence remains the increased discretion for trial judge to extend the tariff period.
5 December 2007	The 'Carter report', *Securing the Future*, is published. Appendix E sets out proposals for the amendment of the IPP sentence.
9 January 2008	Amendments to the IPP sentence are introduced as government amendments to the bill.
9 January 2008	IPP amendments debated at Second Reading stage in House of Commons.
1 February 2008	The Court of Appeal rules in *Walker and James* that the Secretary of State had breached Article 5(4) of the ECHR by failing to adequately resource the IPP system. However, Article 5(1) was not breached and therefore the continued imprisonment of post-tariff IPP prisoners was ruled to be lawful.

26 February 2008	IPP amendments debated at Committee stage in House of Lords.
2 April 2008	IPP amendments debated at Report stage in House of Lords.
8 May 2008	The Criminal Justice and Immigration bill receives Royal Assent.
7 July 2008	The Sainsbury Centre for Mental Health (SCMH) holds an Expert Forum on the IPP Sentence, sharing initial findings (see below).
14 July 2008	Amendments to the IPP sentence come into force.
18 September 2008	The SCMH publishes 'In the Dark', raising concerns about the mental health impact of the IPP sentence.
15 October 2008	HM Inspectors of Prisons and Probation publish a joint report, 'The Indeterminate Sentence for Public Protection: A thematic review'.
6 May 2009	The House of Lords, in *James, Wells and Lee*, upholds the Court of Appeal's ruling in *Walker and James*, describing the government's legislative amendments and administrative actions as leading to 'undoubted improvements'.

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