

**Title:** Receiving an on the spot penalty: A Tale of Morality, Common-sense and Law-abidance

**Key Words:** Common-sense, Legal psychology, Law-Abidance, on the spot penalties, Motoring

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### Abstract

This article examines citizens' reactions to being issued with an on the spot penalty and the consequences this has for holding a law-abiding identity. Using mundane examples of statutory requirements regulating everyday life (motoring), it is found that people use common-sense purposive reasoning in their interpretation of law which does not match the actual black letter law application of the specific statutes. The lack of congruence between the purposive understandings of legal requirements and the black letter application of enforcement agencies allows citizens to maintain a moral position that is aligned with the aims of the law but not its actual requirements. This process reaffirms a belief in law-abidance even where the citizen has been found to break the law.

### Introduction

If the average individual encounters authority as a wrongdoer they are more than likely to receive an on the spot penalty notice (hereafter OTSP) as a result. Many jurisdictions use the OTSP,

including common law systems such as Australia, the USA and Canada, and civil law systems such as Germany, France and Italy. This paper examines the perspectives of OTSP recipients in England and Wales, their experience of receiving such penalty and the impact this has on citizens' claims to be "law-abiding".

OTSPs are a ubiquitous penalty for offending at the lower end of seriousness, particularly for motoring offending. The procedures and legal foundations may differ depending on jurisdiction, and penalty type, but the underlying principle is the same: they are a mechanism for imposing a financial penalty for legal contravention without the need to go to court. An officer (police or other enforcement agent) issues a charge (from £30 upwards) which requires the recipient to pay the penalty within a specified period. If the penalty is paid then the matter is not referred to the courts. If the penalty remains unpaid then the traditional enforcement route takes over (either through the criminal courts, or via debt collection in the case of most unpaid parking tickets).

OTSPs are used to punish problematic (and mundane) everyday activities such as driving, or parking, a motorcar or dealing with one's rubbish. In terms of criminal law OTSPs, the number issued each calendar year is largely unknown due to the diffusion of enforcement amongst an array of agencies and the lack of centralised statistical collation. Table 1.1 gives a small sample of behaviours that can attract an OTSP and an indication of the number of OTSPs issued in the latest year for which statistics are available.

Table 1.1 The number of OTSPs issued for a cross section of offences

| Description   | Legislation                              | Enforcement Agency              | Number of OTSPs Issued (Year Ending March) |
|---|--|---------------------------------|--|
| Truancy   | Education Act 1996                       | Head Teacher / Deputy Head      | 151,125 (DFE, 2015)                        |
| Obtaining a free prescription without a valid exemption certificate | National Health Services Act 2006        | NHS Business Services Authority | 430,971 (Hansard, 2015a)                   |
| Penalty Notices for Disorder  | Criminal Justice and Police Act 2001     | Police (and accredited persons) | 43,373 (MOJ, 2016)                         |
| Moving Traffic Violations (Speeding, Red Light etc.)                | Road Traffic Act 1988                    | Police                          | 1,022,352 (Home Office, 2016)              |
| Late Licensing Penalty (Untaxed Vehicles without SORN)              | Vehicle Excise and Registration Act 1994 | DVLA                            | 480,790 (Hansard, 2015b)                   |
| Litter, Graffiti, Dog fouling Waste                                 | Environmental Protection Act 1990        | Local Authorities               | 72,136 (Appleton, 2012) <sup>1</sup>       |
|   | <b>Sub-Total</b>                         |                                 | <b>2,200,747</b>                           |
| Local Authority Penalty Charge Notices (Parking Tickets)            | Associated Road Traffic Regulations      | Local Authorities               | 8,010,194 (TPT & London Councils, 2015)    |
| Local Authority Bus Lane and Box Junction Enforcement               | Road Traffic Regulation Act 1984         | Local Authorities               | 2,711,595 (TPT & London Councils, 2015)    |
| <b>Total</b>  |  |                                 | <b>12,922,536</b>                          |

This wide array of agencies enforce, through the OTSP, over 250 criminal offences and civil breaches. Not all of these 250 offences/breaches are automatically enforced through the OTSP. For instance, the much publicised ban on smoking in vehicles with a child passenger has only

<sup>1</sup> The Coalition government stopped collecting centralised local government fixed penalty notices post 2010 (Ostensibly for reasons of “transparency” (Pickles, 2010)). The figures reported here are taken from a series of Freedom of Information requests by the Manifesto Club in their report ‘Pavement Injustice’ (Appleton, 2012).

resulted in one OTSP being issued (Smith & Lancefield, 2016). Instead the creation of an opportunity to issue an OTSP, if not the actual issuing, seems to be the reflex reaction of the criminal justice system to minor offending (Morgan, 2011).

As Table 1.1 demonstrates, OTSPs represent a significant proportion of justice encounters in England and Wales. Ignoring parking violations for the moment, the total figure for OTSPs issued (2,200,747) is close to the number of all other actions in the criminal justice system for 2016 (arrest, caution, community resolution, prosecution) (2,664,347 (Home Office, 2016)). If one includes awareness courses, offered as an alternative to an OTSP<sup>2</sup>, then the number of disposals is more than all other formal criminal justice actions (1,403,555 motoring awareness courses were attended in 2015 (NDORS, n.d.)).

Problematic motoring, by ostensibly law-abiding citizens, is the main driver of OTSP enforcement. On average 9 million parking penalties<sup>3</sup> are issued each year and represent the most common punishment (and OTSP) by a factor of 5. When the number of Penalty Charge Notices (hereafter PCNs) issued each year are included, which but for a series of road traffic acts would constitute a criminal offence, the number of OTSPs issued exceeds 12 million each year. This represents a major means through which regulatory and criminal justice is experienced. If local authority PCNs are included then the OTSP displaces courts as the main location of punishment in the justice system, justice is now delivered on the street and through the post.

With most OTSP offences the criminal law aspect of the “offence” is straightforward; it refers to specific conduct criminalised by statute. However, with parking enforcement, “offence” is a

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<sup>2</sup> Such courses are offered as alternative to the OTSP and are generally a cheaper option but with the requirement to attend. Courses are available as alternatives for speeding, red light, mobile phone use, etc.

<sup>3</sup> This does not include penalties issued by private companies for parking on private land for which there are no reliable statistics.

problematic term. Originally parking transgressions were enforced through the criminal law but were “decriminalised” for London authorities under the Road Traffic Act 1991. Instead of prosecution for the underlying offence the “penalty charge” was recovered in the civil courts if it remained unpaid. This was subsequently extended by the Traffic Management Act 2004 to all local authorities who adopted the provisions<sup>4</sup>.

This “decriminalisation” process has been described by White as a ‘pernicious hypocrisy’ (2009:112). White (2011), using Thornton’s analysis of penal provisions (1996), argues that parking OTSPs are criminal provisions that the state has artificially labelled as a civil sanction. Accordingly, we should consider such penalties as part of the criminal law, even if the process differs from criminal justice OTSPs, because the state is still exercising its legal powers to regulate/control individuals through punishment<sup>5</sup>.

### Why OTSPs?

It may be asked why seemingly obvious offences/breaches, such as illegal parking, speeding or running a red light, require an examination of the mind-set of offenders. As shall be demonstrated, the obviousness of the law is frequently lost in translation from statute book to the streets. As Woolgar and Neyland (2013) state, governance of simple activities (like local authority waste collection) is ‘characterized by messiness and indeterminacy’ (2013:71). For enforcement professionals this messiness is easily rectified through black-letter interpretation of legal provisions. In black-letter law the question of offending is dichotomous, either one broke the law or one did not, (one was exceeding the speed limit or one was not, for example) however, as

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<sup>4</sup> Although some local authorities still resort to the criminal law to enforce parking offences under the Road Traffic Regulation Act 1984. As of writing approximately 330 local authorities have adopted Decriminalised Parking Enforcement (DPE). (August, 2017)

<sup>5</sup> Though sometimes indirectly through contracted-out private sector enforcement

Finkel states, 'citizens see greater nuance and gradations to culpability, and make finer distinctions, than black-letter law either sees or sanctions.' (1996:15)

Cressey (1953) and Sykes and Matza (1957) have helped shape our understanding of individual responses to deviance (as offenders). Furthermore, there is extensive research which seeks to make sense of "justifications" for delinquent behaviour (Maruna & Copes, 2005). Sykes and Matza's five techniques can be seen in minor offending (Minor, 1981) and they reflect an attempt, on the behalf of the offender, to change 'the subject of the conversation in the dialogue between his own deviant impulses and the reactions of others.' (Sykes and Matza, 1957:668). By changing the subject of the dialogue 'the wrongfulness of his own behavior is more easily repressed or lost to view.' (ibid: 668).

Darley et al examine the problem of understanding crime from a different direction, examining the 'ex-ante function of the criminal law' (2001: 165). They do so in order 'to determine whether people are aware of the lines drawn by legal codes' (ibid: 166). Darley et al would argue that changing of the "dialogue" is not necessarily a means of 'drift' (Matza, 1964) or justification (Scott and Lyman, 1968) but a genuine perplexity at having found themselves on the wrong side of the law. This perplexity is hardly surprising given the growth of regulation (Stuntz, 2001) particularly at the minor end of criminality (Morgan, 2011). Ignorance is no defence in law, but one dare say it is a sociological fact, as the statistics above (table 1.1) suggest.

Kahan & Nussbaum (1996) make a convincing philosophical argument that moral reasoning should play a higher part in our understanding of law, rather than adherence to the perfect strictures of the law. Indeed, Jackson et al (2012) demonstrate that moral alignment with the law is a good predictor of compliance, and particularly with traffic law (Bradford et al 2015). From an empirical perspective, such moral reasoning is the primary way whereby citizens understand their

legal obligations. As Darley et al note 'people often generate their perceptions of what the law of the state must be from what they think is the morally appropriate form for that law to take' (2001:183). As demonstrated below this moral debate revolves around notions of common-sense, and common-sense interpretations of legal codes.

### **The Mind-set of Offenders**

A significant portion of offences/breaches that attract an OTSP are strict liability, particularly traffic violations (Fox, 1995). The move towards strict liability with regulatory fines is consistent with a focus on risk as the main driver of legality (Feeley and Simon, 1992; Kemshall 2003, O'Malley, 2010). Strict liability regulations are those that require no mental element (*mens rea*) in the definition of wrongdoing; and as Wells states 'issues such as intent, culpability and mitigation become irrelevant' (Wells, 2012: 262). The minor nature of the offending, and the embedding of these laws in mundane everyday life, mean that 'law-abiding individuals who never intended to break laws can nonetheless be punished as law-breakers.' (Wells, 2007:2).

O'Malley further claims that OTSPs, and fines, are reflective of a consumer society (2009). Thus, breaking the law and receiving an OTSP should, for O'Malley, be experienced as an 'occasion lacking moral opprobrium' (*ibid*,108). Despite the claim of lacking moralisation, the activities regularly undertaken by ostensibly "law-abiding" citizens may still technically be a crime and require criminological and socio-legal investigation (Ross, 1960; Woolgar & Neyland, 2013). Furthermore, as Wells notes individuals caught breaking the law (speeding) make a distinction 'between the type of law-abiding offenders created by risk assessments and strict liability legal practices, and genuinely intentionally criminal individuals' (2007:6). Moreover, even in risk based regimes (such as speeding or parking) there are still moral judgements being made, by both the

law and society, about the individual in question 'given that they relate to judgements about desirable and undesirable outcomes' (ibid, 2007:3).

The law-abiding/intentionally criminal distinction is an important dimension of understanding the response of citizens to being labelled a problem by the law. This is particularly so if we want to understand the complex claims being made when a citizen asserts that they are law-abiding. This article builds on these claims of moral judgement by asking recipients of OTSPs directly about their experiences and notes the ways in which responses draw on moral arguments and perspectives.

### **Mundanity and Anomie**

Woolgar and Lezuan, in their investigation of kerbside recycling, find that the mundane governance of simple items, like the "bin bag", are open to an array of ontologies that create moral dilemmas. Characterising the object as mundane, they argue, serves to typify the regulatory issues that flow from the object as moral issues. Thus, authorities that enforce waste legislation can be viewed as "jobsworths" or "crazy" due to the complexity of the regulation considering the objects mundanity.

The mundanity of the bin bag – what every reasonable (normal) person knows about the nature and purpose of bin bags – reinforces [a] moral contrast ... what the thing is, what it is for, what should be in it and what is (in)appropriate behaviour towards it are all tied to (and exemplify) the structure of the moral order. (Woolgar and Lezaun, 2013: 332)

Similar claims can be made about the OTSP. In many respects it is a small financial penalty that most can afford to pay<sup>6</sup> and should not excite much interest from those who receive them, those

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<sup>6</sup> This is not to denigrate the hardship caused to some through the issuing of an OTSP, where the decision may very well be between food, rent or a financial penalty



who issue them or academics interested in punishment. However, the potential moral dimensions that the OTSP creates are ripe for criminological and socio-legal investigation. The legal definitions of problematic behaviour that the penalty implies are interesting since, as Karstedt and Farrall claim, 'crimes of the everyday... are indicative of the moral state of society' (2006: 1012). Thus moral intuitions about law, and the objects' that represent legal punishment, not only tell us something interesting about the sociological function of law but also about the criminological significance of law abidance where the law is frequently flouted.

Karstedt and Farrall (2006) explain non-law-abidance through the 'syndrome of market anomie' (2006: 1017) which drives people to a position of 'distrust, insecurity and specifically anomic attitudes toward legal rules' (ibid). They argue that "shady" and immoral practices in the markets transfer onto consumers who then also engage in morally and legally dubious behaviour. It is worth recalling O'Malley's claim here that OTSPs operate according to consumer rationales, and thus perceived immoral practices and distrust by those who govern us may lead to a form of market anomie in our relations vis-a-vis public enforced regulations. Indeed, one could note the oft repeated argument that OTSPs represent "revenue raising" as evidence of institutionalised market anomie (Rosenfeld and Messner, 1995; Karstedt and Farrall, 2006)) in which the organs of the state commodify the action of punishment (Rusche & Kirkheimer, 2003; O'Malley, 2009).

How then are we to make sense of citizens' perceptions of themselves as law abiders whilst they simultaneously break the law? Arguably such perceptions are far from the state of normlessness envisaged by anomie theory. OTSP recipients instead engage in moral reasoning that is coherent, at times persuasive, and accords with the purposes of legislative provisions, if not the black-letter requirements. Here it is not the syndrome of market anomie that motivates moral reasoning but "commonsense justice" (Finkel, 1995) and telos (Sandel, 2009) that operate as moral heuristics (Sunstein, 2005) for the question of whether a citizen is law-abiding.

Many will have reservations about the claim that morality plays an important part in law, and indeed it is not my intention to re-argue the Fuller-Hart debate (see Lacey, 2008). Instead what is argued is, much like Darley et al (2001), morality has a socio-legal significance. Put simply, citizens use moral reasoning to interpret legislation, and use it to interpret the law in a manner that maintains the perpetrator was complying (or certainly was complying with the kind of “law” that is meant when people use the term “law-abiding”). To paraphrase from Kahan and Nussbaum, these citizens are arguing that ‘ignorance of the law is a defence but only for the virtuous.’ (Kahan & Nussbaum, 1997: 127). Such virtue is determined through a process of moral reasoning that is sensitive to the purposes for which the law is intended.

#### **Methods:**

The focus on understanding, experience and the discussion, as well as contestation, of law-abidance called for a qualitative inquiry. As Gerson and Horowitz (2002) point out ‘people experience their lives not as a set of variables, but rather as the unfolding events, perceptions and feelings over time’ (2002: 208). The unfolding of one’s identity is a lifelong process (Erikson, 1980) and thus to capture identities, and identity construction, one needs to capture the experiential happenings that give meaning to that identity.

The data below was drawn from a larger study conducted between 2012 and 2014, which examined the meaning, use and experience of OTSPs. The study used a variety of qualitative methods including focus groups and interviews of OTSP recipients.

Focus groups were used to see whether participants made a distinction between their offending and the potentially more serious (or at least “different”) offending of another participant. In that regard participants were grouped together based on the nature of their transgression. Thus, speeders and those who ran red lights were paired with parking over-stayers as well as those

who obstructed the highway. In effect those who had breached safety related regulations were paired with those who breached traffic management related ones (the former potentially being perceived as more serious).

There are ethical sensitivities when asking participants about their offending behaviour in a group setting and this was closely monitored. Prior to participation all participants were asked, separately, if they consented to taking part knowing that they would be discussing their behaviour with others who might object to such "criminality". No participant objected and all signed consent forms.

Following the focus groups a series of qualitative interviews were conducted with different participants to examine, in greater depth, emerging themes of identity, fairness and law abidance raised in focus groups. These interviews sought to capture 'how large scale social transformations are experienced, interpreted and ultimately shaped by the responses of strategic social actors' (Gerson and Horowitz, 2002: 201). At the start of the interview each participant was asked about their previous interactions, for problematic behaviour, with enforcement agencies. No participants had previous interactions other than for OTSP traffic related offending (both parking and moving traffic).

The strategic social actors (in both focus groups and interviews) here were those who could be characterised as the 'problematic citizen'. Those who, to quote Karstedt and Farrall (2006),

'think of themselves as respectable citizens, and who would definitely reject the labels of 'criminals' and 'crime' for themselves and their actions. Politicians refer to them as the 'law abiding majority in this country', ignoring the fact that the majority does not abide by the law, or at least is highly selective in when to comply and when not to' (2006: 1011)

The idea of being a law-abiding citizen was of more evidential value than traditional notions of identity such as race, class, age or gender. It was important to examine how those who felt they were part of the “law-abiding majority” responded to an OTSP and how they related this to the idea of being law-abiding. Asking about previous experiences of punishment isn’t a proxy for “law abidingness” in an objective sense, in that all could have led criminal lifestyles without being caught, in subjective terms it alluded to idea that leading a life free from “trouble”, or official notice of an enforcement agency, leads one to believe that one is “law-abiding”.

To analyse the meaning recipients attributed to receiving the OTSP (in both focus groups and interviews) a narrative method was used. Narrative’s importance lies in its embeddedness in ordinary life (Langellier, 2001). The narratives people tell ‘respond [...] to the disintegration of master narratives as people make sense of experience, claim identities, and ‘get a life’ by telling and writing their stories’ (Ibid:700). The master narrative of law-abidance emerged from the focus groups and is a challenge to recipients who, from a black-letter interpretation, are clearly not law-abiding. To capture the meaning of law abidance for those who have been confronted by authority when not abiding by the law, narrative can help make sense of recipients’ claims.

Polkinghorne states that “truths” sought by narrative researchers are “narrative truths,” not “historical truths” (2007: 479), meaning the sense in which the narrative is truthful does not depend on the facts of the story, but on the place of the story in exemplifying theoretical constructs. Thus, the claim to be law-abiding is not taken at face value, almost all of the recipients freely admitted that they had “technically” done what was claimed, but had justifications ready for maintaining a “law-abiding” identity.

### Obtaining Participants

Given the breadth of behaviour that can attract an OTSP the participant call was wide and asked for participation based on experience of receiving any OTSP. Several routes for study

advertisement were followed; advertisements on social media and various forums including motoring, football and student forums were used as well as a network of acquaintances and snowballed contacts. The overall experience of recruiting recipients of OTSPs was difficult and frustrating, much like Fox found in his 2003 study of infringement notices (an OTSP) in Victoria, Australia; several recipients simply failed to show after initially expressing a desire to be involved, and subsequently ignored further contact. In total 20 recipients took part in five focus groups ranging from three to five participants in each group. A further 10 in-depth interviews were arranged with different recipients to explore themes that had arisen as part of the focus groups. 18 males, and 12 females took part, only one interview was from a BAME (Black and Ethnic Minority) background. Tables 1.2 and 1.3 list the number of participants in each method and the OTSP(s) they had received.

*Table 2.2 Recipient Interviews*

| <b>Penalty Notice</b>                           | <b>Number of Interviews</b> |
|---|-----------------------------|
| Penalty Notice for Disorder (hereafter PND)     | 3 (Male)                    |
| PCN   | 3 (2 male, 1 female)        |
| Fixed Penalty Notice (motoring) (hereafter FPN) | 4 (2 male, 2 female)        |

*Table 1.3 Focus Group Participants*

| <b>Focus Group Number</b> | <b>Number of Participants</b> | <b>OTSPs</b>              |
|---------------------------|-------------------------------|---------------------------|
| 1                         | 4 (3 female, 1 male)          | 2 x PCN, 2 x FPN          |
| 2                         | 3 (3 female)                  | 2 x PCN, 1 x FPN Motoring |
| 3                         | 6 (6 male)                    | 6 x FPN Motoring, 2 x PCN |
| 4                         | 3 (2 male, 1 female)          | 2 x FPN Motoring, 1 x PCN |
| 5                         | 4 (2 male, 2 female)          | 3 x FPN Motoring, 1 x PCN |

In reporting the quotes below each participant is identified with a pseudonym, approximate age and the method used to obtain the data.

### **Moral Reasoning and OTSPs**

During the focus groups all participants, rather than accusing others of falling short of acceptable behaviour, were united in seeing their behaviour as barely problematic and certainly not as problematic as the behaviour of the agency issuing the penalty. In both the focus groups and interviews there emerged a largely cohesive sense of injustice about the process regardless of the “seriousness” of the transgression. Similarly across the interviews participants subscribed to the idea that, although their behaviour may have breached the law, it was a “technicality” which didn’t impact on their identity as law-abiding.

It was only 35 and in my mind whether I was right or wrong, in my mind I didn’t deserve that punishment. (‘Jenny’, Late 30s. Focus Group)

I don’t think mine was fair, I think it could have been handled differently (‘Dave’, Early 40s, Focus Group)

There is this sense there that this enforcement is going on is very unfair (‘Parker’, Early 20s, Focus Group)

A frequent refrain of recipients, regarding this unfairness, was that the enforcing body lacked “common-sense”.

I don’t trust them [wardens] to exercise any discretion or common-sense, or whatever else, or any kind of civil behaviour. (‘Peter’, Early 40s, Interview)

Some police officers do abuse them (OTSPs), rather than using common sense... I don’t think there was any common sense, I think the coppers were just bored (‘John’, Mid 20s, Interview)

Common-sense reasoning is a heuristic process (Perlin, 1990) and one that can lead us all into error (Tversky & Kahneman, 1986; Lilienfeld, 2010). Nevertheless, it has a power to explain our

behaviour and understanding of legal problems (Finkel, 1995) and for Peter and John it was a concept that clearly had explanatory potential.

Finkel argues for a dual conception of law, between the black-letter law that 'law students study, judges interpret, and jurists analyze' (1995:2) - and what he calls "commonsense justice", which 'reflects what ordinary people think is just and fair... It is what ordinary people think the law ought to be.' (ibid: 2). Finkel argues that the "black-letter" approach is unduly restrictive and does not accord with common notions of justice.

'The law [black-letter] seems to freeze the frame at the moment of the act and then zoom in on a specific set of determinative variables, the commonsense context, like a motion picture, conveys action before, during, and even after the moment of the act. (Ibid: 319)

The idea that the law acts as a freeze-frame is interesting in the OTSP system where many of the breaches are strict liability. The facts of the case, generally objective facts about appearance or presence, are suitable for a freeze-frame legal approach. Capturing a car driving through a prohibited area or driving at excess speed are the determinative variables that can be captured in freeze frame instances. Furthermore technology, specifically cameras, in motoring enforcement prove the case without need to consider the motion picture aspects of that activity (what happened next, intentions, purposes etc.).

A simple Google search of press reports relating to bus-lane enforcement captures examples of freeze-frame legality operated by enforcement agencies. These cases involve cars moving into bus lanes to make way for emergency vehicles, only to find an OTSP arrive a few days later (see Parry, 2015). The camera freezes the instant transgression, based on the determinative variable 'presence of a vehicle in a bus lane, not being a bus', without considering important countervailing aspects of the case. The common-sense justice approach advocated by Finkel, would require,

at least, an appreciation of the surrounding circumstances for presence in the bus lane. Such an approach reflects an Aristotelian approach to justice; one that is concerned with “telos” (‘defining rights requires us to figure out the telos (the purpose, end, or essential nature) of the social practice in question’) (Sandel, 2009:186). Thus, in bus lane cases it would require a teleological appreciation of the practice of driving (i.e. moving aside to let emergency vehicles pass) and “the bus lane”, the purpose of the bus lane and the circumstances under which it is necessary to invoke the idea of the bus lane which is not compatible with automated enforcement.

### **Teleological Parking**

Recipients of OTSPs wanted to explain the set of circumstances that led to the “instant” of transgression. However, they feel that authorities are not interested in what they have to say because of the regulation’s “black and white” nature:

I do remember talking to the chap about this, he said ‘look the bottom line is you can’t be parked on double yellow lines, ... any time you try and fudge it a bit that is opening the door for all’ so I figured yes that is a very straightforward way of looking at it, either it is against the rules or it isn’t. (‘Jivan’, Early 20s, Interview)

In this instant, we can see that automatic black-letter law enforcement of parking is not limited to camera related cases. Officers themselves operate according to a black-letter interpretation, forgoing their discretion in favour of certainty.

The recipient was fortunate in that he saw the Civilian Enforcement Officer issuing the notice and discussed his case. Many recipients will have no human interaction whatsoever. However what Jivan gets in response is a black-letter approach (“the bottom line”), which excludes discussion of the common-sense interpretation of the problem (“either it is against the rules or it isn’t.”)



[It] didn't make sense and that ticket was in the same vein, because there was just such a negligible margin between me getting a ticket and not getting a ticket, especially when over 90% of the vehicle [was] fine [i.e. not on the double yellow lines.] ('Jivan', Early 20s, Interview)

The idea "that ...didn't make sense" reinforces the notion of a perceived gulf in common-sense understanding between enforcement agencies and recipients. Recipients may believe that laws are passed with a purpose and that they are enforced with that purpose in mind. However, as they find out, by receiving an OTSP, the purposes of the law do not always apply to their situation.

Road traffic regulation is subject to limitations contained within the Road Traffic Regulation Act (RTRA) 1984. The RTRA permits local authorities to conduct regulation in accordance with specified aims. These are:

- Avoiding danger or risk of danger to persons or traffic
- Prevention of damage to road or building
- Facilitating passage of traffic
- Prohibiting unsuitable vehicles having regard to character
- Preserving character of area for pedestrians or horseback
- Preserving or improving amenities

However, when enforcing the legislation these purposes are unimportant. Authorities are not concerned, at the point of enforcement, with marrying the particularities of the breach with the telos of road traffic regulation. Instead they focus on the literal interpretation of the legal provisions that are created. The purposes are important in creating legal relationships between the authority and the citizen, but once those relationships have been created the introductory purpose loses relevance.

This black-letter approach eschews moral reasoning, the regulation exists and is punished without consideration of the surrounding circumstances.

I did actually display the ticket but the ticket fell off. I did challenge it, they still made me pay ('Milly', Early 20s, Focus Group)

Sometimes I feel like they... it's either black or white, they don't see the shades in between ...they just don't accept any story other than their own. It is like you didn't have a ticket so can't have had a ticket kind of thing ('Mabel', Late 30s, Focus Group)

Milly's claim also alludes to the complex morality and ontology of the mundane parking ticket. As Woolgar & Lezaun (2013) note, mundane objects, such as bin bags (and in Milly's case the parking ticket), provoke a 'struggle over what ... is appropriate and inappropriate behaviour in relation to what the thing actually is and who or what should act in what ways towards it.' (2013: 334) By purchasing the ticket Milly believes she has brought the social act of parking to its conclusion. The ticket's existence represents the completion of the legal relationship between herself and the local authority, and absent any wrongful parking or overstay, she has complied with the law. The authority, conversely, rejects this purposive construction in favour of a stricter interpretation that focuses on the law as written and builds the ontological status of legitimate parking around this. For the authority, the law is not focused on purposes or intentions but on the determinative variable of displaying a ticket. Purchasing the ticket is a separate, though nevertheless important, variable. Unfortunately, for Milly, it is not *the determinative variable*. Thus, for Milly a parking ticket is something to be purchased, for the local authority it is something to be purchased *and displayed* in an appropriate manner.

Milly is experiencing the increasing practice of local authorities focusing on all elements of the regulation, a prototypical black-letter law approach. The black letter interpretation of "pay and

display” is conjunctive: pay **and** display, it is not enough to pay, one must also continuously display. This ontological reading of the parking ticket (as something to be paid for and displayed) engenders a real concern about fairness, as the Traffic Penalty Tribunal have noted: “a real sense of grievance arises where the appellant paid to park, but there is a dispute about the display of the ticket.’ (TPT, 2010:4)

A further example of the black-letter approach arises in “display” cases involving blue badge holders (disability parking concessions). The blue badge entitles holders to park in certain locations otherwise prohibited to general traffic.

I parked where I normally parked overnight, but had taken my badges out because it had been cleaned. I was playing with the kids and forget to put it back in... I got a ticket and I asked them to cancel it but they weren't bothered. They said I had to display it and that was it... ('Malcolm', Early 40s, Interview)

Parking regulations are mala prohibita; they require no proof of harm or intent which allows for the literal approach to interpretation, involving continuous display of the concession/ticket. For the recipient, however, this can seem unjust, since they have the right to park, by having a concession, have not deprived anyone of space to which they were entitled, but merely have not exhibited the correct paperwork. As Malcolm stated:

I hadn't done anything wrong really, just forgot to put the badges back in. (ibid)

For “failure to display” recipients the moral understanding, and ontological existence, of their parking activities relates specifically to a conception of law that is bounded by the telos of the regulatory regime.

In the following examples, the recipients criticise enforcement activity that does not allow for a teleological examination of parking restrictions

Although you're not in the lines, you're not blocking anyone... while doing that, I parked and got ticket. ('Katie', Late 20s, Focus Group)

I was on a kerb and they said I was blocking, obstructing the passage.... As far as I could see you could fit a tank... never mind an ambulance or fire engine...I wasn't convinced by their argument and their reason for putting a ticket on there ('Steven', Late 20s, Focus Group)

Here the "problem" to be enforced, in the recipients' view, is not whether they have technically committed the breach; 'not in the lines' or 'on the curb', but whether they have actually contravened the purpose to which the law is addressed. The reasoning adopted by these recipients is not anomic, in the Karstedt and Farrall sense, they do not claim to be acting from a position of 'distrust, insecurity and specifically anomic attitudes toward legal rules' (2006:1017). They are sensitive to purposive constructions of the law which, recipients think, hold them to higher ideals of law-abidingness than objective abidance with a regulation.

### **Teleological Motoring**

Similarly, in police moving traffic enforcement, claims of lacking common-sense and appeals to teleological reasoning are made:

I wasn't treated with any initiative or common-sense, because there is the letter of the law and... the spirit of the law, [when he received a previous notice from an actual police officer, not camera enforced] that police officer knew the difference, he knew I wasn't a speeder although I had been speeding, he knows that it was a misunderstanding and I probably won't do it again ('Jim', Early 30s, Interview)

In Jim's case it is the technological facilitation of the OTSP that lacks common-sense. As Wells argues 'techno-fix' (speed camera) leaves recipients wanting 'a more contextualised and

inconsistent treatment' (2008:814). Jim is requesting a personal encounter, so that the officer can understand the teleological argument he makes, 'the spirit of the law' rather than 'the letter of the law.'

Jim's claim demonstrates the moral reasoning process when receiving an OTSP. Typically, such penalties are received through the post, or on the vehicle, rather than in person. There is no opportunity to explain the broad contextual circumstances of the situation (and indeed if there was an interaction it is unlikely the officer would engage in such a discussion in any event due to the black-letter nature of the regulations). Jim's reasoning for perceiving the penalty to be unfair relates to his moral standing as not a 'speeder'. The enforcement of speeding should be reserved, Jim suggests, for those who are "speeders" and thus "law-abiding" (purposively constructed) motorists, such as himself, should avoid punishment. A moral heuristic (Sunstein, 2005) has operated for Jim, he has switched the black-letter question from "have you been speeding?" to a moral question of "are you a speeder?" Self-evidently, for Jim, the answer to the latter question is no (although the fact he has been penalised on two occasions for speeding might suggest otherwise), and thus cocoon's him from the 'ontological insecurity' (Giddens, 1991) of being found wanting by the law whilst maintaining a law-abiding identity.

The following driver likewise has difficulty conceptualising his character as non-law-abiding despite readily admitting breaking the law.

I've got fined going through lights... I was changing lanes ...with three lanes and various lights... [I was] right behind a coach that had clearly gone through the lights as it was changing... my view was blocked... [I] really couldn't stop. And of course, it was one of the places with the camera on it so I felt hard done by because I'm a law-abiding driver but I seem to have broken the law ('Noel', Mid 40s, Focus Group)

The foregrounding of the debate by Noel is instructive as it indicates the moral reasoning process. Noel denies personal responsibility, whereby 'forces outside of the individual and beyond his control' (Sykes and Matza, 1957:667) are at fault. For Noel, the fault lies with the law that cannot make sense of his offending (or lack thereof) (e.g. driving through a set of lights with no opportunity to do otherwise). Noel sees, and justifies, his actions because he feels he has not engaged in morally blameworthy activity, i.e. deliberately driving through the lights. Only in the case of deliberate action could Noel see himself as non-law-abiding.

A further complaint that recipients make, in relation to common-sense justice, regards the purposes (and fairness) of enforcement tactics.

...in a 30 (mph zone) for me to have done that so quickly (reduced her speed from the 50-mph zone she had come from) ... I felt I would have caused an accident, because you would literally have to ... slam your brakes down straight away. ('Daisy', Mid 50s, Focus Group)

...it is tucked away [speed camera] and it is all surreptitious and it gives of the sense that somebody is trying to trick you ('Raquel', Late 30s, Interview)

The lack of common-sense judgement here is perceived to involve underhand tactics by the enforcement agency who are deemed to be surreptitiously catching people rather than ensuring road safety. No doubt Sykes and Matza (1957) would characterise this as condemning the condemners, however these recipients are also appealing to a certain telos in road safety enforcement, the concept of harm rather than risk.

Risk is a technique of control that 'instead of seeking to bring individuals closer to an established norm through the application of corrective interventions...alters the physical and social structures within which individuals behave' (O'Malley, 2010: 323). In the motoring context, the telos for

enforcement officers is the punishment of the *risk of harm*, rather than the harm itself. The recipients above are challenging this teleological interpretation, and claiming that the practice of law enforcement is not promoting the telos of motoring legislation, the *actual* reduction of harm. Both Daisy and Raquel feel they have been “caught out”; targeted not because they were causing harm, but because the enforcement agency were purposefully targeting normal drivers in order to lower the overall risk. Authorities may be correct to claim that there are good reasons for this approach in that actual harms may be prevented, however, the consequence is that recipients feel aggrieved about not having aspects of good driving behaviour (i.e. non-harmful driving) taken into consideration.

This form of moral reasoning relates to Sandel’s second conception of the Aristotelian approach: justice as honourific. ‘To reason about the telos of a practice ...is, at least, to reason or argue about what virtues it should honor and reward’ (Sandel, 2009: 186). The recipients below are contending that the OTSP fails to honour important moral dimensions of their status and character.

I said that to the copper..., ‘all the way here I have not seen one of you... you have got idiots on the road there that get away with it and I am a family-man taking my kids to somewhere we have never been before for a good day out and you have just spoilt it.  
(‘Rob’, Early 40s, Focus Group)

Of course I’m peeved. For half a second [he had driven through a red light] and 50 years driving it’s not bad going is it? ...I was peeved and I still am now to be honest... (‘Jeff’, Late 60s, Focus Group)

This motorist suggests a desire to have the virtue of 50 years clean driving experience honoured by the enforcement agency before automatically issuing the OTSP. Likewise, the idea that a

recipient is a respectable member of society, 'a family man', is a request that the law considers this honorific aspect of identity which dissociates him from the "real criminals" who are deserving of this form of treatment.

Thus, moral reasoning and issues of "common-sense justice" dominate citizens thinking about their own non-law-abiding behaviour. This reasoning serves an important purpose in maintaining, and reinforcing, one's identity as law-abiding. Although the recipient may have broken the law they can interpret their actions in such a way that the fault lies with the enforcement agency not enforcing laws in an appropriate manner (or against the appropriate targets), rather than with themselves.

Whilst Sykes and Matza may see this behaviour as an attempt to minimise the harm of their actions, it is contended that it is an attempt to understand an amoral legal framework in moral terms. The common-sense justice claim is an attempt, morally, to justify why being found breaking the law is not a bar on being law-abiding. The law for these citizens is understood through a reasoning process that attempts to fill the blank of legal knowledge with the more certain foundations of moral reasoning. The distinction between "law-breaker" and "law-abider" is anything but easy and the recipients analysed above are seeking nuance in the interpretation of, and their relationship with, the law. Seen in such a light law-abidance is a subjective experience, one in which internalised norms, influenced by the telos of legislative requirements, act as substitutes for the objective dilemma of non-law-abidance. Thus the "law" in "law-abiding" is not the law of statutes and case law, but an implied law that challenges the "black-letter" interpretation of enforcement authorities. Common-sense law is law that is sensitive to moral rationalisations based on the presumed purposes of the law in question, or the presumed target behind the regulatory intervention.



## **Conclusions**

The forgoing discussion has demonstrated the problematic nature of law-abidance in an area of law that is frequently flouted by a sizeable proportion of society (Corbett, 2003). The foregoing has demonstrated the distinction citizens make between motivations and behaviours. As Braithwaite notes 'compliance related behaviours are different from motivational postures... [and] depart from the expectation of consistency theorists that attitudes and behaviour should be related' (2002:17). In the OTSP system this incongruence is clear. All the above recipients were motivated to comply with the law, providing the law is interpreted in a way that accords with their common-sense notions of what it should be. The problem lies in that behavioural expectations of the law are far removed from the motivational aspirations of citizens.

Studies of procedural justice suggest that fair treatment by enforcement agencies can overcome the negative outcomes of those interactions (Tyler, 2006; Jackson et al, 2012). OTSPs, however, present a twofold problem to procedural justice theory. Firstly, there is the lack of any physical interaction between an enforcement official and the recipient and thus any communication, or "voice" to use the procedural justice nomenclature, is lacking. It seems strange to think of a "letter" or "notice" communicating 'normative aspects of experience including neutrality, lack of bias, honesty, efforts to be fair, politeness and respect for citizens rights' (Tyler, 2006: 7). Secondly, as demonstrated above, the arguments being made are, due to the strict liability of the laws being enforced, immaterial. Arguments about the "common-sense" nature of the law, the social identity of the offender or the minor nature of the transgression are not matters that count in determining the appropriate punishment. The punishment is the same regardless of intention, identity or the myriad of compelling reasons that are offered by the recipients.

Tyler explains 'citizens act as naïve moral philosophers, evaluating authorities and their actions against arbitrary criteria of fairness' (Tyler, 2006: 165). This article shows that such arbitrariness and naivety has a rationality to it; it looks at the purposes/telos of the regulations and judges fairness against that criteria. To provide a procedurally fair enforcement encounter, authorities would need to engage in all manner of discussions that, at present, are immaterial in deciding whether the citizen has abided by the law in question.

For recipients, their understanding of law-abidance is at odds with that of the enforcement agencies. Both may appeal to the principle of law abidance, but both have different conceptions of what that means. From an objective perspective, the black-letter approach creates an incongruence between law-abiding motivations and law-abiding actions. Citizens are seemingly good at the former but poor at the latter. Enforcement authorities using OTSPs expect compliance behaviour, regardless of the motivations of citizens who have transgressed. Such citizens may have intended to comply, accidentally or thoughtlessly breached the requirements of the law or deliberately set out to break it. In the OTSP system each of these underlying attitudes are equally culpable and punished in the same way. The expectation of perfection in relation to complex, often counter-intuitive, changing and badly publicised laws (e.g. parking regulations) certainly sits at odds with the everyday experience of citizens. The witnessing of a violation is stripped of all its contextual circumstances and becomes a 'freeze-frame' (Finkel, 1995:319) of the moment of transgression.

When confronted with their non-law-abidingness it is perhaps unsurprising that recipients reject the idea of being non-law-abiding and seek to differentiate their behaviour from more egregious examples. What the effect of being labelled a problem for the law is, whilst holding positive compliance motivations to the state of law-abidingness, remains unknown and calls for further study.

Quite how “common-sense” enforcement of legal rules would work in practice is problematic. Boeckman and Tyler (1997) sound a note of caution when relying on “common-sense”, they state ‘[a]lthough there are certainly merits to pursuing commonsense justice, history also provides clear examples of injustices’ (1997: 378). Such examples include overt racism, sexism and the denial of procedural protections for marginalised groups (those deemed to be criminals) (ibid: 377-378).

It should be noted that this research is not involved in determining whether common-sense claims are true, or accurate reflections of the researcher’s idea of common-sense. Rather this research examines why such claims are made and what it signifies in the justice experienced by recipients. Common-sense justice is used to highlight how complaints about the OTSP system involve a lack of a meaningful opportunity for recipients to make sense (in justice terms) of the OTSP encounter. Until the claims for common-sense are understood for what they symbolise, rather than for what they are perceived to imply, it is very difficult to move debate forward, as both sides (enforcement and citizen) misunderstand the point the other is making. The recipients discussed above are not, in general arguing special status based on any protected characteristics. Instead they are arguing that their actions have not breached the rationale underlying the reasons for punishment.

This article thus contributes to our understanding of the complex nature of the claim to be law-abiding. Citizens’ use of the term “law-abiding” is far more nuanced than enforcement practice with OTSPs suggests. Law-abidance is not a functional state of complying with all of society’s rules, but a more complex and nuanced issue, involving purposive moral reasoning in making sense of “offending” behaviour. There are clear policy implications arising from this. If a government wants law abidance, then it would do well to reflect on its purposes for introducing legislation in its enforcement of those laws.

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