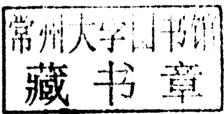# LEGITIMACY AND COMPLIANCE IN CRIMINAL JUSTICE

EDITED BY
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LEGITIMACY AND COMPLIANCE IN CRIMINAL JUSTICE

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CONTENTS

LIST OF ILLUSTRATIONS

Figures

Tables

INTRODUCTION

Compliance and legitimacy in criminal justice

Adam Crawford and Anthea Hucklesby

> Force is a physical power; I do not see how its effects could produce morality.
> To yield to force is an act of necessity, not of will; it is at best an act of prudence.
> In what sense can it be a moral duty? . . . If force compels obedience, there is no
> need to invoke a duty to obey, and if force ceases to compel obedience, there is
> no longer any obligation . . . Surely it must be admitted, then, that might does
> not make right, and that the duty of obedience is owed only to legitimate powers.
>
> (Rousseau 1968: 52–3)

Legitimacy lies at the heart of all forms of government. As Jean-Jacques Rousseau
implied, legitimate authority is different from mere force or coercion. For him
(1968: 49), the 'social contract' itself provides (and was explicitly advanced as
providing) an answer to the fundamental question of how to render legitimate both
power and constraint; the 'chains' that bind 'peoples born free'. At first sight one
might assume, from Rousseau, that criminal justice and policing, as elements in
the coercive arm of the state, demand little further legitimation, as their legitimacy
derives, at least in large part, from the very fact that they act in response to perceived,
actual or anticipated breaches of the social contract. Nevertheless, as both key
elements of state authority and central symbols of sovereign power, institutions of
crime control are fundamentally part of a broader moral enterprise designed to
influence human behaviour through more than compulsion. They constitute
institutions of political authority that seek to govern through broad public consent.
Furthermore, their efficacy and effectiveness demand conferred consent by those
individuals who are subjected to systems of power. Legitimate social arrangements
will generate commitments to compliance, where levels of trust and confidence
exist in both systems of authority and those that operate them. As such, the
legitimacy demands with regard to policing and criminal justice are especially great,
precisely because: first, coercion is evident and, second, the potential consequences

for constraints upon individual liberty are frequently more significant in crime control than other areas of public policy. Like other forms of authority and power, systems of crime control seek to generate commitments to compliance and cooperation. In this, judgements about the legitimacy of legal authorities – people and systems – are crucial to why people obey the law and comply with decisions taken. Tyler (2006) identifies two forms of legitimacy in this context. First, personal legitimacy resides in the competency and honesty of legal authorities. Second, institutional legitimacy exists where the role of legal authorities entitles them to make decisions which ought to be deferred to, complied with and obeyed. According to Tyler and Huo (2002; and Tyler in this volume), the relationship between the legitimacy of legal authorities and personal experiences resides in judgements that the agents of the legal authority have treated them with respect and in a procedurally just manner. Experiencing the law and legal authorities as legitimate has positive implications for compliance.

Whilst criminal justice is ultimately bound up with coercive power, force and compulsion – the policing of, and decisions over, citizens – these rely inherently upon a considerable degree of 'quasi-voluntary compliance' on the part of citizens. As many of the contributions to this collection of essays seek to demonstrate, such consent is not purely self-interested or instrumental but also has a normative base, strongly linked to perceptions of legitimacy. It is important because the coercive powers of criminal justice officials and police officers are themselves limited and only used as an option of last resort. Most human interactions occur in the 'shadow of the law' (Mnookin and Kornhauser 1979) rather than through its machinations. The police invariably rely upon citizens – even as 'potential suspects' – assisting the police with their enquiries, courts' rulings depend upon offenders fulfilling their sentence (be it payment of fines, compensation or community-based penalties) and prisons could not operate if offenders did not conform to the prison regime most of the time. Furthermore, tax authorities rely most of the time on people paying their taxes in conformity with the prevailing rules. It is only if compliance breaks down that there is recourse to coercive legal powers and sanctions. Consequently, criminal justice professionals routinely anticipate and work upon the assumption that the citizenry as a whole will generally observe directions given; they will comply. Police, in particular, depend on the authority that police officers can invoke, rather than the coercive force that they can deploy (if the contingencies demand so doing). Given the limits of coercive power, authorities must depend upon 'consensual' deference to their decisions by most of the people they interact with most of the time. Ultimately, conformity and deference to authority are necessary and prevailing assumptions. As such, legal systems are heavily dependent upon voluntary or quasi-voluntary compliance and cooperation. As Tyler notes:

> Authorities need to have people take the obligation to obey the law onto themselves and act voluntarily on that perceived obligation . . . Hence, efforts to understand the effective exercise of legal authority inevitably lead to a concern with the attitudes towards authorities that exist in the general

population, rather than to an exploration of the coercive resources available to legal authorities.

(1998: 272)

Legitimacy, as Weber (1978) noted, constitutes important moral glue that informs people's internal motivational systems and guides their behaviour. Legitimacy speaks to, and derives from, intrinsic motivations which foster self-regulation. It encourages the internalisation of social norms and values. As such, people are not only self-interested but also moral agents, who as active decision-makers are 'co-operative and obedient on grounds of legitimacy as well as reasons of prudence and advantage' (Beetham 1991: 27).

This book arose out of an international colloquium held at the Centre for Criminal Justice Studies in the University of Leeds on 25–26 June 2009 under the title 'Legitimacy and Compliance in Criminal Justice'. It was generously sponsored by the University of Leeds, Law School's strategic development fund. This allowed us to invite an impressive cast of key international scholars to participate in the initial deliberations and for many of them to work up their reflections and thoughts into the current essays in this collection. Early drafts of all the chapters published here were first presented and discussed at the conference. On behalf of all the contributors, we would like to thank all those who attended the colloquium and contributed to the various deliberations and discussions over the two days, in particular: Catherine Appleton, Tony Bottoms, Valerie Braithwaite, Philip Hadfield, Mike Hough, Jon Jackson, Susanne Karstedt, Sam Lewis, Stuart Lister, Doreen McBarnet, Fergus McNeill, Andy Myhill, Mike Nellis, Paul Quinton, Gwen Robinson, Joanna Shapland, Clare Sims, Sonja Snacken, Richard Sparks, Peter Traynor, Tom Tyler, Clive Walker and David Wall. We are grateful to our colleagues at the Centre for Criminal Justice Studies in the Law School at the University of Leeds for their assistance in the organisation and hosting of the initial conference.

The aim of the original symposium and this volume of resultant essays was to explore a number of connected themes relating to compliance, legitimacy and trust in different areas of criminal justice and regulation, and in doing so to draw together contributions from leading scholars in the fields of criminology, psychology and socio-legal studies in an inter-disciplinary dialogue and debate. Collectively, the essays attempt to consider conceptual and normative, as well as descriptive and empirical themes and questions. The prescience and timeliness of such a careful conceptual reflection upon the related themes of compliance and legitimacy, which inform this book, has been heightened by the confluence of a number of wider policy shifts and intellectual debates over recent years. First, the emergent acknowledgement of the limited capacity of the sovereign nation-state to act as the sole guarantor of order and monopoly of coercive force (Garland 2001) and the ineffectiveness of institutions of criminal justice to meet their own explicit aims of rehabilitation, reform and prevention have prompted both legitimacy deficits and the quest for alternative modes of regulation and crime control. Consequently, we have seen a growing interest in plural forms of regulation, both within but also

beyond the role of formal law and the nation-state. Developments in regulation have opened up possibilities for multiple sites and modes of regulation of conduct through non-state, as well as state, auspices, operating through networks and hybrid alliances. These have raised new opportunities for, and questions about, the exercise of power, control and compliance, as well as the legitimacy of the sources of authority. They have also prompted questions about the effectiveness, responsiveness and coherence of diverse systems of regulation. Second, there has been a growing body of research-informed knowledge about alternative, and perhaps more subtle, ways in which governments, public, quasi-public and private authorities can and might influence personal behaviour and the role of technology and design therein. New opportunities for modes of regulation and controls are being fostered by technological advances and novel architectural (in its broadest sense) arrangements. The study of individual behaviour and personal responsibility has been stimulated by considerable theoretical insights from sociology, social psychology and behavioural economics in particular. Third, there has been a growing desire on the part of governments to enhance personal responsibility and individual control, emphasising customer sovereignty and consumer satisfaction (responsiveness) in wide-ranging arenas of public policy reform from healthcare through to criminal justice. Fourth, important conceptual insights have been provided by regulatory scholars in the development of notions of 'responsive regulation' and 'procedural justice' with considerable implications for thinking about legitimacy and compliance in criminal justice and public policy more generally. Fifth, there has been a growing emphasis on enforcement particularly in terms of community sentences and licence conditions which have contributed significantly to growing prison populations around the world. This has provided greater impetus to seek alternative ways to bring about compliance within offender and potential offender populations. Finally, there has been a growing awareness and acknowledgement of the social implications of forms of legitimacy for understanding public attitudes and actions.

Consequently, legitimacy and compliance are both deeply implicated in and interconnected with each other in ways that require close conceptual scrutiny and empirical analysis and demand our attention in thinking about ways of better regulating people's behaviour and fostering conformity with prevailing social norms.

Organisation of the chapters

The focus of the first two chapters is on questions of legitimacy in the context of policing. Both chapters argue that a model of crime control based wholly on deterrence is misguided and connect with procedural justice theory to explore its implications for police work. Tom Tyler's chapter highlights the importance of, and basis for, citizen cooperation in effective crime control. Tyler engages with the paradox that whilst objective measures of police performance and professionalism have improved in the US, the public's support for the police has remained

'moderately positive' and stable over the last thirty years. He uses his procedural justice theory to suggest that public support for the police will improve if they view the police as legitimate, that is, fair, respectful and just. Consequently, the police should not only focus on outcomes such as clear up rates but also the ways in which they interact with the public. He argues that each encounter between police and the public should be viewed as a 'teachable moment' whereby the public learns something about the law and legal authorities. Consequently, the police need to regard public assessment about how the police (and other legal authorities) exercise their authority as crucially important, precisely because public experiences and views shape how they behave in interactions with the police. The chapter concludes with a discussion of the ways in which procedural justice values can be embedded in everyday police work.

In the second chapter, Jon Jackson, Ben Bradford, Mike Hough and Katherine Murray explore and test key concepts in 'procedural justice theory', linking these ideas to the relationship between legitimate policing and public commitments to the rule of law. Their focus is on policing in the UK, which they argue can be distinguished from policing in the US or Europe in a number of respects. They argue that this has implications for the way in which procedural justice theory can be applied in the UK, suggesting that distinctions need to be made between police legitimacy, legal legitimacy and self-reported compliance behaviour. Using empirical data, they suggest that police legitimacy is usually linked with greater compliance whilst also pointing out that there are exceptions to the rule. They concur with Tyler that applying procedural justice approaches to policing is likely to pay dividends in terms of increased compliance. However, they also warn that there may be a significant gap between theory and practice and that procedural justice might act as a veil to hide 'business as usual' for the police.

The first two chapters both suggest that the ideas surveyed therein have implications beyond policing to wider institutions of criminal justice. This is taken up by Sonja Snacken in her discussion on 'legitimacy' in the context of penal policies. In her chapter, Snacken examines the distinction between what she calls 'normative' and 'empirical' legitimacy of penal policies in democratic constitutional states. She discusses the tensions that arise between human rights, the rule of law and democracy. She examines a range of examples including the death penalty and prisoners' and victims' rights to demonstrate that the public is less punitive than is often portrayed. Furthermore, she highlights the importance of procedural justice in the opinions of the public and in the expectations of victims of crime. She concludes that governments and politicians would be able to implement less punitive penal policies without compromising political legitimacy.

The next two chapters examine the legitimacy and compliance issues raised by the banking crisis and payment of tax, respectively. The focus of both chapters is on the distinction between compliance and cooperation. They engage with debates about how businesses and individuals react to, and subvert, the legal constraints and regulatory frameworks placed upon them by the authorities. In the first of the chapters, Doreen McBarnet focuses on the nature of the compliance engaged in

by big business. She suggests that creative compliance is the dominant culture of big business and those that have the resources to utilise the law to suit their own interests. She uses empirical data to support her argument that big business focuses its efforts on frustrating the purpose of the law whilst technically complying with it using a process which she terms 'legal engineering'. She explores the implications of her arguments for the efficiency of the law, the legitimacy of creative compliance strategies and wider moves towards holding business to account.

Valerie Braithwaite in her chapter uses the example of individuals' responses to requests from tax authorities to examine questions of individual compliance and the legitimacy of the whole tax system. She explores some of the strategies which are used to resist the power of authorities using the concept of motivational postures and suggests possible explanations for the actions of tax payers. She uses empirical findings to demonstrate the complexities involved in gaining the cooperation and not just the compliance of tax payers and why a 'one size fits all' regulatory strategy is likely to fail. She demonstrates why regulation is both a costly and a difficult enterprise in the face of forms of defiance in which people seek to protect their freedom. Understanding and appreciating such strategies is therefore pivotal in designing responsive modes of regulation. She concludes by arguing that forms of regulation that provide opportunities for negotiation, the exchange of views and mutual understanding are more likely to overcome problems of non-cooperation. They provide prospects for building cooperation through meaningful dialogue between those who enforce law and those expected to obey its will, and thus offer better platforms for consent, compliance and legitimacy.

The final four chapters focus on questions of legitimacy and compliance in relation to community sentences and anti-social behaviour interventions. In their chapter, Fergus McNeill and Gwen Robinson note that the role legitimacy plays in community sentences generally and compliance particularly is an important yet neglected aspect of policy and scholarly debates. They suggest that offenders' views of the legitimacy of community sentences are especially important in fostering active engagement with community sentences rather than simply formal compliance. They draw on their dynamic model of compliance (Robinson and McNeill 2008) and introduce the notion of 'liquid legitimacy' to explain how the legitimacy of, and compliance with, community sentences changes over the course of orders and examine how both are built, maintained and eroded during the lifetime of an order. They conclude by suggesting that where sanctions aim to foster change, the skills of practitioners – notably probation officers and social workers – are crucial in bridging the social distance between the 'punished' and those 'punishers'. However, they sound a cautionary note, warning that practitioners' scope for influence is also constrained by the conditions in which they work which can serve to limit the quality and the authenticity of the practitioner's moral performance thus weakening their legitimacy.

Anthea Hucklesby draws on an empirical study of electronically monitored curfew orders to examine offenders' accounts of what influences their decisions to comply and how the working practices of monitoring officers' impact upon

compliance. She highlights the complexities in offenders' decisions to comply with many factors influencing their decisions to comply, not all of which have been recognised sufficiently by existing theoretical approaches. She concludes by suggesting that an equally complex set of initiatives are required to improve compliance rates.

In his chapter, Mike Nellis suggests that questions of legitimacy and compliance raised by the introduction of increasingly sophisticated and new forms of techno-corrections have not been sufficiently elucidated or debated. He examines the potential issues – moral and ethical – raised by the use of implants by drawing on historical and contemporary materials and warns against complacency, urging us to actively debate and engage with the potential implications of the 'science fiction' of the future.

In the final chapter, Adam Crawford explores issues of legitimacy and compliance at the boundaries of criminal justice in the context of anti-social behaviour interventions with young people, where crime control interfaces with wider dynamics of public policy – including housing, education and welfare services – and interacts with civil legal interventions and multiple systems of behavioural regulation. He suggests that the novel technologies and tools of control spawned in the name of regulating anti-social behaviour present critical challenges for legitimacy and embody mixed assumptions about motivation and agency that inform possibilities of compliance. These assumptions he argues are particularly salient, yet often in reality decidedly confused, in relation to children and young people who are subject to diverse and inconsistent messages as to their competencies in their transition to adulthood. In line with the insights offered by all the authors in this collection, the chapter seeks to shed some light on the conceptual parameters and empirical issues that pertain to a more rigorous discussion and analysis of how we might understand and think about legitimacy and compliance in, and around, criminal justice.

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LEGITIMACY AND COMPLIANCE

The virtues of self-regulation

Tom Tyler

My goal in this chapter is to argue for a new approach to policing. I will focus my comments upon the United States, although I believe they apply more broadly. The 2004 National Academy of Science report on policing (Skogan and Frydl, 2004; Skogan and Meares, 2004) argued that in recent decades the objective quality of policing has improved in the United States. The police are more effective in fighting crime; they are less corrupt; and they are less likely to engage in unprofessional acts such as unlawfully shooting civilians. While there are many ongoing issues involving police performance, in particular in terms of the relationship of the police with minority communities, the overall impression given by the report is of increasingly professional and effective police departments and of more and more sophisticated policing practices. There is indeed a new professionalism in policing and it benefits all of those people, White or non-White, who will have contact with the police.

The paradox of policing in America today

Increases in the objective quality of policing notwithstanding, the other consistent finding of studies of the police is that over the last thirty years public support for the police – often indexed as 'trust and confidence' in the police – has been at best moderately positive. In 2009, the percentage of Americans expressing trust and confidence in the police was at 59 per cent (Sourcebook of Criminal Justice Statistics, no date). Second, that level of trust has been more or less unchanged in recent years. Between 1980 and 2009 it has generally ranged between 50 and 60 per cent.[1]

This discrepancy between the improving level of police performance and generally unchanging levels of public support suggests the need for a focus on the factors that shape public views about the legitimacy of the police. If public trust