

## **PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS**

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Tom. R. Tyler

### **Abstract**

In this lecture I argue for the benefits of placing the design of legal institutions on a firm psychological footing by paying attention to the results of social science research. I illustrate the perils of ignoring psychological knowledge and the benefits of considering it through an examination of human motivation. I suggest that serious problems in the legal system have developed because law has had an overly restricted model of human motivation, focusing only on shaping behavior by threatening punishment for wrongdoing. A broader view of the forces shaping people's behavior, which includes the important influence of legitimacy and morality, can be the basis for a more efficient and effective legal system. Implications are drawn for three areas of law: compliance; rehabilitation; and corporate governance.

### *Introduction*

It is a great honor for me to be asked to deliver the baron de Montesquieu lecture at Tilburg University. As I am sure you are aware, Montesquieu is probably the most frequently quoted authority on government and politics in the pre-revolutionary period in the United States and had a great influence upon the fathers of our Constitutional system, in particular James Madison. I say this not to excessively venerate the particular form of the American Constitutional system, which has had its share of critics, but out of respect for the tremendous influence that Montesquieu's ideas have had upon the structure of America government.

Americans associate Montesquieu with the development of the idea of having three distinct administrative branches of government: the executive, the legislative, and the judicial. He advocated the creation of these three branches to achieve the objective of creating a balance of power in which no single branch would be able to exceed the authority of the others. As I am sure you are aware the Federalist papers contain lengthy discussions about human nature and early American political leaders were taken by the idea that, human nature being what they believed it to be, government should be designed so as to limit the ability of any particular person or group to gain too much power. These early Americans accepted the idea that "power corrupts, and absolute power corrupts absolutely (Historian Lord Acton)" and sought to create a government that checked these human tendencies.

I am not going to speak to you today about something as grand in vision as a new conception of government or law. Rather I want to talk about the role that our assumptions about human nature play in our design of the law. Like Montesquieu and the founders of American government, legal scholars too are influenced in their efforts to design legal institutions by their beliefs about the nature of human nature. However, we have an advantage that was not afforded to these early proponents of natural rights and natural law. We have more systematic social science methods for testing our intuitions about human nature, so we have more rigorous ways to determine the basis of human behavior. In fact, we have entire fields of scientific study – psychology and the other social sciences — that seek to provide those in the fields of law, political science, management and public policy with insights about the psychology of the person and the social environment.

The relationship between social science and law is one that has traditionally been dominated by the law. Legal authorities and law professors have identified behavioral issues relevant to the design of the law and the practices of legal institutions, and social scientists have addressed those issues and concerns, often competing in the public arena with lay conceptions of the perceived “self-evident” nature of human nature. Often legal authorities have designed legal institutions and procedures without consultation with social scientists, social scientists who have then been placed in the role of criticizing law for misunderstanding, and even misrepresenting social science evidence. On other occasions law and social science have worked together. From my own perspective the most desirable approach is for law and social science to consult with one another when designing laws and legal procedures. It is for this reason that I am pleased to have the opportunity to speak with you today.

### *Human motivation*

The psychology of the person is a broad topic, which impacts on many aspects of law and the legal system. I want to speak to you today about only one aspect of this large issue; the nature of human motivation. This issue has been the focus on my own work and is a topic where social science has a great deal to tell legal authorities and legal scholars, much of which is not represented in current legal thinking, at least within the American context.

One of the main functions of the law is to regulate the behavior of the citizenry by maximizing the likelihood that people will comply with normative standards of conduct, i.e. with socially shared definitions of acceptable conduct as they are enshrined in rules, norms, and laws. If the law is to be effective in fulfilling its regulatory role, most citizens must obey most laws most of the time (Easton, 1965, 1975; Tyler, 2006a, 2006b). The need for legal authorities to secure compliance has been widely noted by legal scholars and social scientists. Fuller (1971), for instance, observed that: “The lawgiver must be able to anticipate that the citizenry as a whole will . . . generally observe the body of rules he has promulgated” (p. 201). Decisions made by police officers and judges mean little if people fail to take them seriously, and laws lack importance if they do not affect public behavior (Tyler, 2006a; Tyler and Huo, 2002).

Although widespread behavioral compliance is necessary to the effective functioning of society, obtaining compliance cannot be taken for granted (e.g., Sherman, 1993). Because many laws restrict the ability of individual citizens to behave as they wish, people sometimes resist them. Mastrofski, Snipes, and Supina (1996) note that: “Although deference to legal authorities is the norm, disobedience occurs with sufficient frequency that skill in handling the rebellious, the disgruntled, and the hard to manage—or those potentially so—has become the street officer’s performance litmus test (p. 272).” Their observational study of police encounters with the public in Richmond, Virginia provides useful evidence concerning the frequency of noncompliance. Mastrofski et al. estimated an overall noncompliance rate of 22%. Citizens failed to comply with police requests 18% of the time when they were told to cease illegal behavior, 19% of the time when they were told to leave another person alone, and 33% of the time when they were instructed to stop some form of disorder. Similar results were obtained in a replication by McCluskey, Mastrofski, and Parks (1998) in Indianapolis and St. Petersburg. The overall noncompliance rate was 20%. Citizens resisted 14% of the time when asked to leave another person alone, 21% of the time when ordered to cease illegal behavior, and 25% of the time when told to stop engaging in disorder.

These studies investigated short-term compliance—that is, whether the person behaved as instructed—and not whether people willingly accepted the decisions made by the authorities, bought into their resolution of a problem, or believed that the restrictions on their behavior were

reasonable or appropriate. However, as Mastrofski et al. (1996) note, “citizens who acquiesce at the scene can renege” (p. 283). If citizens fail to fully agree with legal restrictions, further police intervention will eventually be required. Hence, the legal system needs to be concerned with its ability to gain the active support of the community, not just immediate compliance.

An important contribution of psychological jurisprudence is to shed light on the question of how to best motivate public rule-following behavior, both in general and with respect to specific encounters with authorities (Darley, Tyler, and Bilz, 2003; Tyler, 2006a, 2006b). The legal system depends on obedience the law and police officers and judges generally expect public deference. The power of the legal system to gain cooperation is substantially increased when strategies for obtaining deference are based on an accurate and relatively complete model of human motivation.

### *The Deterrence Model*

In recent decades the exercise of legal authority has become primarily associated with the use of threat and punishment aimed at deterring people from engaging in criminal behavior (e.g., Kahan, 1999; Nagin, 1998). From this perspective, the focus is (and should be) on the power of legal authorities and institutions to shape behavior by threatening to deliver (or by actually delivering) negative sanctions for rule-breaking. Within legal circles, this way of viewing the relationship between legal authorities and citizens is referred to as the “deterrence” or “social control” model, and it is this model of human behavior that—for better or worse—currently dominates law and public policy.

To implement deterrence strategies police officers carry guns and clubs, and they are empowered to threaten citizens with physical injury and incapacitation, among other penalties. The goal is to establish legal authority and, as Reiss (1971) points out, “The uniform, badge, truncheon, and arms all may play a role in asserting authority” in the effort to “gain control of the situation” (p. 46). The police thereby seek to gain control over the individual’s behavior “by manipulating an individual’s calculus regarding whether ‘crime pays’ in any particular instance” (Meares, 2000, p. 396).

More generally, agents of the legal system who are charged with producing compliant behavior concern themselves with shaping environmental contingencies in such a way that citizens will be faced with the prospect of heavy losses (e.g., incarceration) that are intended to outweigh the anticipated gains of engaging in criminal behavior. Judges, for example, attempt to influence people’s acceptance of their decisions by threatening fines or jail time for failure to comply. The deterrence model dictates that the responsibility of lawmakers is to decide which acts should be prevented, and then to specify sufficiently strict penalties—generally fines or prison terms—so that the prohibited behavior is rarely enacted.

The notion that people’s behavior with respect to the law is shaped by calculations of expected gains and losses is a core premise of rational choice theory, which is derived from neoclassical economics (Blumstein, Cohen, and Nagin, 1978; Nagin, 1998). It is assumed that most people will calculate expected utilities by multiplying the probability of an outcome (e.g., getting caught for armed robbery or drunk driving) by its valence (very, very bad). If the laws are well-calibrated, people will arrive at the desired conclusion that they should follow the law. Thus, rational self-interest is the motivational engine of the deterrence/social control model. To regulate behavior, this model suggests that decision-makers should adjust criminal sanctions to the needed level so that the expected losses associated with law-breaking will minimize the likelihood that people will break the law.

Research supports the notion that variations in the perceived certainty and severity of

punishment do affect people's compliance with the law, at least to some degree. In particular, people's behavior is often, though not always, shaped by their estimate of the likelihood that, if they disobey the law, they will be caught and punished (see Nagin and Paternoster, 1991; Paternoster, 1987, 1989; Paternoster and Iovanni, 1986; Paternoster, Saltzman, Waldo, Chiricos, 1983). At the same time, however, perceptions of the likelihood of being caught and punished seem to have a relatively minor influence on people's behavior, as we will see (MacCoun, 1993; Robinson and Darley, 1995, 1997; Ross, 1982). Consequently, social control strategies based exclusively on a deterrence model of human behavior have had at best limited success (see also Tyler, 1997a, 1997b, 1997c; 1998).

#### *An Alternative Model Based on Legitimacy and Morality*

Most legal scholarship addresses issues of motivation and rule-following in the context of deterrence and social control, that is, by imposing external constraints on people largely through the threat of punishment. Social psychologists can contribute to a broader understanding of compliance. Specifically, a good deal of research indicates that self-regulatory motivations are activated when people believe that the law reflects their views about right and wrong and that it is therefore a moral responsibility and even an obligation to conform to the law. Consequently, people who identify with legal authorities and imbue the legal system with legitimacy will voluntarily abide by laws and defer to authorities (Darley, Tyler, Bilz, 2003; Jost & Major, 2001; Tyler, 2006a; Tyler & Blader, 2000). I will develop this position in more detail in the remainder of this presentation.

Ever since Kurt Lewin's (1936) field theory, social psychologists have assumed that behavior is determined by two main forces. The first is the pressure of the situation or the environment, and the second includes the motives and perceptions that the person brings to the situation. In Lewin's famous equation, behavior is understood to be a function of the person and the environment:  $B = f(P, E)$ . An expanded conception of the person term includes the set of social and moral values that shape the individual's thoughts and feelings about what is ethical or normatively appropriate to do. I will focus on two such values: (a) the conviction that following the rules of the community is (in most cases) the morally appropriate thing to do, and (b) commitment to the notion that if the rules are fair and legitimate, then they ought to be obeyed.

From a social psychological perspective, the first step is to recognize that the legal system depends at least in part on the willingness of citizens to consent to the operation of legal authorities and to actively cooperate with them. Second, willing acceptance comes most quickly and completely to the extent that people view the law as (a) legitimate and (b) consistent with cherished moral values.

These notions are congruent with the proposals of Ayres and Braithwaite (1992), who suggest that legal authorities should approach citizens by appealing to their social values. The idea is that if authorities are successful in joining legal rules and value-based motivations, it will be much easier to isolate the relatively small number of citizens who do not share the values of the community. This is a kind of social self-regulation that enhances the effectiveness of legal authorities by freeing them to pay attention to those problems or people that, for various reasons, are not amenable to self-regulation (Ayres and Braithwaite, 1992). Self-regulation can occur based upon legitimacy, morality, and/or both.

*The concept of legitimacy.* Modern discussions of legitimacy are usually traced to the writings of Weber (1968) on authority and the social dynamics of authority (e.g., Zelditch, 2001). Weber, like Machiavelli and others before him, argued that successful leaders and institutions use more than brute force to execute their will. More specifically, they strive to win the consent of the governed so that their commands will be voluntarily obeyed (Tyler, 2006a). As Kelman (1969)

puts it: "It is essential to the effective functioning of the nation-state that the basic tenets of its ideology be widely accepted within the population . . . . This means that the average citizen is prepared to meet the expectations of the citizen role and to comply with the demands that the state makes upon him, even when this requires considerable personal sacrifice" (p. 278). Widespread voluntary cooperation with the state and the social system allows authorities to concentrate their resources most effectively on pursuing the long term goals of society. The authorities do not need to provide incentives or sanctions to all citizens to get them to support every rule or policy they enact.

Legitimacy, according to this general view, is a quality that is possessed by an authority, a law, or an institution that leads others to feel obligated to accept its directives. It is, in other words, "a quality attributed to a regime by a population" (Merelman, 1966, p. 548). When people ascribe legitimacy to the system that governs them, they become willing subjects whose behavior is strongly influenced by official (and unofficial) doctrine. They also internalize a set of moral values that is consonant with the aims of the system, and—for better or for worse—they take on the ideological task of justifying the system and its particulars (see also Jost & Major, 2001).

Although the concept of legitimacy has not featured prominently in recent discussions of social regulation with respect to law-abiding behavior, there is a strong intellectual tradition that emphasizes the significance of developing and maintaining positive social values toward cultural, political, and legal authorities (Easton, 1965, 1975; Krislov et al., 1966; Melton, 1985; Parsons, 1967; Tapp and Levine, 1977). This work builds on the sociological tradition associated with Weber and others. According to theories such as these, the smooth functioning of society depends on the existence of supportive attitudes and values among members of the population in general. Presumably, attitudes and values that support the social system begin to develop during childhood and adolescence as part of the process of political (and legal) socialization (e.g., Cohn and White, 1990; Niemi, 1973).

The value of cultivating system legitimacy consists in its enabling the effective exercise of social authority. While authorities can exercise power directly through the promise of rewards or the threat of punishment, such approaches to deterrence are expensive, inefficient, and psychologically naive. They may be especially problematic during times of instability or crisis, when authorities need the support of the people at a time in which they lack control over resources. An organization or society whose governance is motivated only by incentives and sanctions is at risk of disintegrating during times of trouble or change. In contrast, if a system enjoys widespread legitimacy, authorities can appeal to members based upon their shared purposes and values, providing the system with much-needed stability. From this perspective, legitimacy is a highly desirable feature of social systems (see also Tyler, 2006a; Tyler and Huo, 2002).

Underlying this generally positive view of the role of legitimacy and social values in motivating cooperation with the social system is the belief that there is a mutual benefit that comes from voluntarily accepting societal norms. According to this view, the rulers and the ruled alike gain from having "a stable social and political order" that is helped by widespread shared beliefs that the system is legitimate and consistent with people's moral values (Sears, 2003, p. 322). Clearly, legitimacy and stability facilitate regulation—the process whereby authorities seek to bring the behavior of individuals into line with system rules.

The police and courts, as an example, depend very heavily upon the widespread voluntary compliance of most of the citizens most of the time (Tyler, 2006a). This compliance presumably allows authorities to focus their attention upon those individuals and groups whose behavior seems to be responsive only to threats of punishment. The legal system would be

overwhelmed immediately if it were required to regulate the behavior of the majority citizens solely through sanctioning or the threat of sanctioning.

Legitimacy has many appealing features as a possible basis for the rule of law. On its face it appears to be an all-purpose mechanism of social coordination, insofar as people feel obligated to obey whatever laws or decisions authorities make, within some realm of legitimacy. Much as studies of confidence and trust in government focus on people's overall evaluations of the government, its institutions, and its authorities (Citrin & Muste, 1999), studies of "legal consciousness" focus on whether people have "trust and confidence" in the legal system, whether they think that the law works to help everyone, and how and when people have duties and obligations to legal institutions and authorities (Ewick and Silbey, 1988; Finkel, 1995; Flanagan and Longmire, 1996; Hamilton and Sanders, 1992; Merry, 1990).

Research by Tyler (2006a) demonstrates that perceptions of system legitimacy do shape everyday compliance with the law, which is a conclusion that is also supported by more recent studies (Sunshine & Tyler, 2003a; Tyler & Huo, 2002). Furthermore, perceived legitimacy seems to have more influence on compliance than do subjective assessments of the likely risk of punishment. When people perceive the system as legitimate, they feel an intrinsic moral obligation to comply with its demands.

A second type of self-regulation is based upon appeals to people's moral values, i.e. their motivation to do what they feel is right in a given situation. Moral values are influential because they are based on internalized feelings of responsibility to follow certain principles (see Robinson & Darley, 1995; Tyler & Darley, 2000). A key feature of moral values is that people feel personally obligated to adhere to them, and they feel guilty when they fail to do so. Hence, moral values—once they exist—are self-regulatory in nature; people who possess them are strongly motivated to bring their conduct into line with normative standards.

The internalized sense of morality is central to the work of, among others, Freud, Weber, and Durkheim (e.g., see Sunshine & Tyler, 2003b). Hoffman (1977) writes:

The legacy of both Sigmund Freud and Emile Durkheim is the agreement among social scientists that most people do not go through life viewing society's moral norms as external, coercively imposed pressures to which they must submit. Though the norms are initially external to the individual and often in conflict with [a person's] desires, the norms eventually become part of [a person's] internal motive system and guide [a person's] behavior even in the absence of external authority. Control by others is thus replaced by self control [through a process labeled internalization] (p. 85).

The idea is that internalized values become self-regulating, so that people accept and act on the basis of values that produce respect for societal institutions, authorities, and rules. Public standards are taken on as private values that are associated with a moral responsibility to act in accordance with ethical judgments about what is right and wrong. Presumably, this occurs during childhood as part of the socialization process (Cohn and White, 1990; Greenstein, 1965; Hess and Torney, 1967; Hyman, 1959; Merelman, 1966; Niemi, 1973). Robinson and Darley (1995) conclude that people's moral values form during childhood socialization, and are not easy to change later in their lives.

The significance of morality is illustrated by research on punishment. Studies demonstrate that people's views about appropriate sentencing decisions in criminal cases are driven by moral judgments about deservingness rather than by instrumental judgments concerning how to deter future criminal conduct (Carlsmith, Darley, and Robinson, 2002; Darley, Carlsmith, and Robinson, 2000). People accept that a punishment is appropriate when it accords

with their moral sense of what is appropriate given the level and type of wrong committed. More generally, research shows that people are more willing to comply with the law to the extent that they view it as consistent with their moral values (e.g., Robinson and Darley, 1995; Tyler, 2006a). As a consequence, an important question for the law is the degree to which it is congruent with public moral values. If people correctly understand the law, and if the law truly reflects moral standards of the community, then the internalized sense of morality acts as a force for law-abidingness.

A value-based model of motivation to obey the law is also consistent with the argument that people, as a general rule, desire justice; that is, they are motivated by fairness concerns. In summarizing decades of research, Lerner (1980, 2003) refers to this as the “justice motive,” and he suggests that it cannot be reduced to considerations of self-interest. There is indeed evidence that people experience unfair advantages (as well as disadvantages) to be psychologically aversive and that they are happier when justice is served (Loewenstein, Thompson, & Bazerman, 1989; Walster, Walster, & Berscheid, 1978). This work provides a reasonably strong basis for assuming that people *want* to follow the law and that they want others to follow the law—*provided that they also believe that the law is fair and just*. To draw on the justice motive as a source of legal obedience, therefore, authorities must pursue policies that are generally consistent with people’s sense of right and wrong (Sunshine and Tyler, 2003b).

In recent decades social psychologists have distinguished among three forms of justice: distributive justice, procedural justice, and retributive justice. In each case people have been found to respond to issues of justice and injustice (Tyler, 2000). This is true of procedural justice; distributive justice; and retributive justice. Our concern will focus particularly upon procedural justice, and that concern will be elaborated later in this talk.

#### *Summary*

A value-based perspective on human motivation suggests the importance of developing and sustaining a civic culture in which people abide by the law because they feel that it is morally appropriate/just and that legal authorities are legitimate and ought to be obeyed. For this model to work, society must create and maintain public values that are conducive to following justice norms. Political scientists refer to this set of values as a “reservoir of support” for government and society (Dahl, 1956). Although it may not always be easy for authorities to maintain high reservoir levels, a value-based model is consistent with a social psychological understanding of how authorities can effectively regulate citizen behavior, maintain social order, and promote an effective, well-functioning society by developing and maintaining a culture of supportive social values that will be internalized by the citizenry.

The value-based model outlined in this section avoids many of the pitfalls of the deterrence model. Specifically, it does not require extensive surveillance efforts, is more sophisticated concerning the genuine causes of human behavior, engages intrinsic (and not just extrinsic) motivation, and fosters a positive social climate based on a shared commitment to moral values rather than a negative social climate based on suspicion and distrust. But there is yet another important advantage of our value-based model to which I have only alluded thus far. To the extent that people are in fact internalizing appropriate moral values, deferring to legal authorities who implement fair procedures, and obeying laws that are truly just, then the model of human behavior sketched will lead not only to an efficient and well-ordered society but also to one that has a profoundly legitimate basis for regulating the behavior of its citizenry.

#### *Procedural Fairness as the Basis of Legitimacy*

A second key argument is that legitimacy can be built upon procedural fairness. Authorities can gain a great deal in terms of legitimacy when they follow clear norms of

procedural justice, including impartiality, transparency, and respect for human dignity (Tyler, 2001b). Thus, implementing fair procedures as well as outcomes can provide a solid basis for establishing system legitimacy.

The legitimacy of authorities is an especially promising basis for the rule of law because research suggests that it is not yoked to agreement with the decisions rendered by legal authorities. If people view as legitimate only those authorities who make decisions with which they agree, it would be difficult for legal authorities to maintain their legitimacy, insofar as they are required to make unpopular decisions and to deliver unfavorable outcomes. Fortunately, from the perspective of legal authorities, studies suggest that ascriptions of legitimacy are tied to the perceived fairness of the procedures used by authorities to make decisions rather than to the favorability of outcomes *per se* (Lind and Tyler, 1988; Thibaut and Walker, 1975; Tyler, 2006a, Tyler, Boeckmann, Smith, and Huo, 1997; Tyler and Smith, 1997). These results suggest that legal authorities may be able to maintain their legitimacy in the long term by making decisions in an ethically defensible manner.

People are more likely to regard the police as legitimate if they believe that the police exercise their authority through fair and impartial means (Sunshine & Tyler, 2003a; Tyler, 2001a). Indeed, the evidence suggests that procedural justice judgments are more central to judgments of legitimacy than are such factors as the perceived effectiveness of the police in combating crime. To the extent that people perceive law enforcement officials as legitimate, they are significantly more willing to defer to individual authorities (Tyler & Huo, 2002), and they are also more likely to be in compliance with the law in general (Sunshine & Tyler, 2003a; Tyler, 1990). These observations hold true when people are reporting on their own personal experiences with legal authorities (Tyler, 2006a; Tyler, Casper, Fisher, 1989) and also when they are evaluating system-level authorities such as the Supreme Court (Tyler, 1994; Tyler and Mitchell, 1994).

Perhaps most importantly, from the perspective of the legal system, a number of recent studies link judgments about procedural fairness to the willingness to both accept particular legal decisions (Kitzman and Emery, 1993; Lind, Kulik, Ambrose, de Vera Park, 1993; Wissler, 1995) and to generally follow laws and legal rules (Kim and Mauborgne, 1993; Sparks, Bottoms, Hay, 1996; Tyler, 2006a). Procedural justice cues play an especially important role in securing compliance over time (Paternoster, Brame, Bachman, and Sherman, 1997; Pruitt, Peirce, McGillicuddy, Welton, and Castrianno, 1993). It is by now very clear that people's reactions to law and legal authorities are heavily influenced by their assessments of the fairness of legal procedures.

The procedural basis of legitimacy is especially strong with respect to public opinion concerning political and legal institutions. Studies of the Presidency (Tyler, Rasinski, and McGraw, 1985), the legislature (Hibbing and Theiss-Morse, 1995, 2002), and the Supreme Court (Tyler and Mitchell, 1994) all suggest that when citizens are evaluating government institutions they focus primarily on the fairness of the procedures by which the institutions makes policies and implements its decisions. Research on work organizations also suggests that perceived legitimacy has a strong procedural basis (Elsbach, 2001; Tyler and Blader, 2000, 2005).

The procedural basis of legitimacy on an institutional level is consistent with the argument that support for the rules of governance (i.e., procedures and institutions) is theoretically and empirically distinguishable from support for particular individuals or their policies. Studies suggest that reactions to individual leaders and policies are more strongly linked to outcome desirability than are reactions to institutions (Rasinski, Tyler, Fridkin, 1985). In general, however, it is support for the rules of governmental operation—what Easton (1965, p. 444) refers to as “diffuse system support”—that is seen as crucial to long-term governmental stability.



My thesis is that the most reliable way of attaining real as well as ostensible legitimacy and maintaining diffuse system support for legal institutions and authorities is by establishing and protecting procedural safeguards. Indeed, the need for procedural safeguards is one of the strongest arguments for the Constitutional separation of executive, representative, and judicial branches of government. To the extent that procedures for insuring genuine fairness are compromised, the system will begin to lose legitimacy and—over time—fail to inspire the kind of cooperation and deference that is often taken for granted during periods of stability.

Interestingly, recent studies suggest that it is not only legitimacy that is enhanced by procedural fairness (Tyler and Blader, 2005). When people believe that authority is being exercised via fair procedures, they are more likely to view the policies of the group as being consistent with their moral values. Hence, both of the social values described are encouraged by the use of fair procedures.

### *Implications*

Now that I have laid out the basic tenets of a value-based model of legitimacy and morality, which emphasizes (a) system legitimacy/moral value congruence as the basis of social influence and motivation to comply with the law and (b) procedural fairness as the basis of system legitimacy, we are in a position to consider some further legal implications of the model. I will focus on three areas of application in particular: compliance; reactions to rule-breaking/restorative justice, and corporate wrongdoing. In each of these cases, my model makes different recommendations from those that are commonly derived from the deterrence model, which currently dominates scholarly and professional thinking about both criminal justice and business ethics.

#### *Compliance: Problems with the Deterrence Model*

The deterrence model, with all of its motivational assumptions, has had dramatic effects on the nature of American society. Consider the case of the American prison population (Haney and Zimbardo, 1998). Because of the widespread belief that crime is deterred by the threat of punishment and/or the experience of punishment, a massive number of American citizens have been convicted and sentenced to serve time in American prisons. Today, the U.S. is a world leader in the proportion of citizens it holds in prison. In the year 2000 there were over 2 million Americans in jail or prison (United States Department of Justice, 2001), far surpassing incarceration rates in Europe and elsewhere (Garland, 2001). Given the heavy costs of imprisonment to individuals and communities (especially members of racial and ethnic minority groups, which are overrepresented in the prison system), it is crucial to ask whether the deterrence model is based on sound psychological principles.

Assuming unlimited resources on the part of law enforcement officials, there is probably nothing inherently untenable (from a purely pragmatic point of view) about controlling people's behavior through threats of punishment. One of the key problems with sanctioning systems, however, is that they require near-constant surveillance of individual behavior. For obvious reasons, people are strongly motivated to hide their behavior from authorities to avoid punishment; authorities must therefore develop surveillance systems for detecting rule-breaking behavior. Sometimes surveillance is easy, because the structure of the situation makes it easy. For example, wage earner's incomes are easy for the government to monitor, because businesses withhold percentages from each paycheck and send the withheld amount to the government. This makes tax violations among this group relatively easy to prosecute. In other cases, however, surveillance can be quite difficult. The police, for example, have tremendous difficulty monitoring public behavior in order to identify people who are using illegal drugs, just as

tax authorities have trouble monitoring the incomes of street vendors, waiters and waitresses, and small businesspeople.

For all of these reasons, as Meares (2000) notes, the effectiveness of “instrumental means of producing compliance always depend[s] on resource limits” (p. 401). The relevant questions are how much in terms of financial and other benefits and burdens authorities are willing to expend in order to control crime, and how much power to intrude into citizens’ lives people are willing to allow the authorities to have?

Furthermore, resources must be deployed in strategic and cost-effective ways. Sherman (1998), for example, notes that within the United States policing services are typically used more in response to political pressures than to actual crime threat levels. As a result, police officers do not most heavily patrol the highest crime areas, so the ability of the police to deter crime is typically suboptimal. Sherman suggests that a greater effort is needed to put surveillance where the crime problem lies. Current deployments reflect the reality that public resources are allocated in ways that respond to political pressures, and the effective implementation of social control strategies often conflicts with those pressures.

The deterrence model probably works best in the case of crimes that are committed for instrumental reasons. For example, car theft, burglary, and crimes of this type are at least to some extent motivated by calculations about the costs and benefits expected from law-breaking behavior. Thus, deterrence approaches work best in affecting the occurrence of instrumentally motivated crimes. They are significantly less effective in controlling criminal behavior that is motivated by factors other than economic gain.

Ross (1982) focuses on the problem of drunk-driving to outline some of the problems associated with using deterrence to shape law-related behavior. He suggests that raising risk estimates to a level that is high enough to lower the rate of law-breaking behavior, while not necessarily impossible, involves prohibitively high costs in terms of police manpower and citizen willingness to accept state intrusions into their personal lives. Interestingly, Ross finds that changes in laws can lead to short-term declines in law breaking because the high level of media exposure to police activities leads people to temporarily overestimate the risks of being caught and punished for law-breaking behavior. Ross further points out that even the intensive efforts of Scandinavian authorities to create high estimates of risk using random road blocks and other similarly expensive and intrusive law enforcement measures are insufficient to create and maintain subjective risk estimates that are high enough to deter drunk-driving over the long-term.

As I have noted, many of the problems associated with deterrence-based strategies identified by Ross (1982) and others are structural in nature and involve variations in the degree to which the police are able to monitor citizens’ behavior. This suggests that there should be situations in which deterrence strategies will be more or less effective in deterring law-breaking behavior. From a deterrence approach, the two key variables determining the extent to which such strategies will be effective are: (a) the ease of behavioral surveillance and (b) the level of resources that society is willing to devote to the task of surveillance.

Deterrence works reasonably well in at least some cases, for example murder, mainly because society has devoted considerable resources to preventing murder and enforcing penalties for it. The objective risk of being caught and punished for murder is relatively high: approximately 45% (Robinson and Darley, 1997). The likelihood of being caught for committing a murder is high enough for deterrence to be effective in lowering the murder rate. Even in this case, however, criminals are not as sensitive to the magnitude of the penalty as they are to the estimated probability of being apprehended. As a result, capital punishment does not serve to deter murder more effectively than does life imprisonment (Ellsworth & Mauro, 1998).

Studies consistently find that the most important issue to people who are deciding whether or not to break the law is their estimate of the likelihood of being punished for their actions and not the expected severity of their punishment (e.g., Nagin and Paternoster, 1991). Consequently, societies cannot enforce rules simply by developing more and more draconian punishments. To be effective, authorities must engage in extensive surveillance strategies that increase the likelihood of detection. In other words, they must increase the number of supervisors who are watching employees, or increase the size of the police force that is watching citizens. Effective strategies are, therefore, inevitably costly. There are no deterrence-based quick fixes that can be gained cheaply—despite the frequent suggestion among policy makers that a few instances of dramatically severe punishment will depress crime.

With regard to less serious crimes, the deterrence model is even less effective. Despite the expenditure of significant societal resources in the form of increased police efforts in the “War on Drugs,” deterrence strategies have failed to improve rates of public compliance with drug laws. MacCoun (1993) estimates that only about 5% of the variance in people’s use of illegal drugs is attributable to their perceptions of the likelihood of being caught and punished for rule-breaking. For most people, and especially for addicts, the decision to obtain or consume controlled substances is simply not based on a rational calculation of prospective legal costs.

There are many other crimes that are motivated not by instrumental concerns but by temporary emotional states. For example, crimes such as rape, assault, and many murders occur on the “spur of the moment” and in the “heat of passion.” In such cases, the assumption that rational calculations of costs and benefits enter into the perpetrator’s “decision” about whether or not to commit such crimes is naïve in the extreme. In part, this is because of intrapersonal empathy gaps: the person who is in a hot state cannot access or identify with how he or she will think or feel later upon returning to a cold state. Thus, crimes of passion as well as crimes committed under states of intoxication are relatively unaffected by deterrence strategies, regardless of the actual or even perceived likelihood of being caught and punished for wrongdoing.

The lack of a direct correspondence between objective and subjective risks leads to another problem with the psychology of the deterrence model, namely its failure to take into account “threshold effects.” That is, to influence people’s behavior at all, risk estimates need to be high enough to exceed some threshold of being psychologically meaningful (Ross, 1982; Teevan, 1975). In most situations the objective risk of being caught and punished is quite low. For example, the approximate objective risk of being caught, convicted, and imprisoned for rape is 12%; for robbery it is 4%; and for assault, burglary, larceny, and motor vehicle theft the incarceration rate is approximately 1% (Robinson and Darley, 1997). Of course, psychologists know that subjective estimates of risk are stronger determinants of people’s behavior than are objective risks. However, research suggests that subjective risk estimates for infrequent events are, if anything, even lower than are objective risks (e.g., Bazerman, 1990). Furthermore, it is reasonable to assume that people’s estimates of whether or not they will be apprehended by the police are subject to egocentric biases and the “illusion of invulnerability” (Dunning, 1999; Taylor & Brown, 1988).

There are still other reasons to think that the deterrence model is based on flawed motivational assumptions. For most crimes, the resources devoted to law enforcement are low and the opportunities for cheating are high. This is as true of white collar crime and corporate wrongdoing as it is of other crimes (e.g., Moore & Loewenstein, 2004). In many cases, imposing monetary penalties can paradoxically *decrease* rather than increase rates of compliance, because of the fact that people construe the fine as a price and determine that they are willing to

pay the cost in order to benefit from rule-breaking behavior (Gneezy & Rustichini, 2000; Tenbrunsel & Messick, 1999).

An analysis in terms of general principles of human motivation further suggests that if people comply with the law only in response to coercive power, they will be less likely to obey the law in the future because acting in response to external pressures diminishes internal motivations to engage in a behavior (e.g., Brehm, 1966; French & Raven, 1959; Tyler & Blader, 2000). This follows from the well-known distinction in social psychology between intrinsic and extrinsic motivation. Research on intrinsic motivation shows that when people are motivated solely by the prospect of obtaining external rewards and punishments they become less likely to perform the desired behavior in the absence of such environmental reinforcements (e.g., Deci, 1975). On the other hand, if people are motivated by intrinsic reasons for behaving in a certain way, then their compliance becomes much more reliable and less context-dependent.

Studies of regulatory authorities indeed demonstrate that seeking to regulate behavior through the use of threat serves to undermine people's commitment to rules and authorities, compared to other methods of regulation (Frey, 1994; Frey and Oberholzer-Gee, 1997). From a motivational perspective, instrumental approaches are not self-sustaining and require the maintenance of institutions and authorities that can keep the probability of detection for wrongdoing at a sufficiently high level to constantly motivate the public through external means (i.e., the threat of punishment). Over time it becomes more and more important to have external constraints in place, for whatever intrinsic motivation people originally had is gradually "crowded out" by external concerns.

The use of surveillance systems also has deleterious effects on the social climate of groups. The use of surveillance implies distrust, which decreases people's ability to feel positively about themselves, their groups, and the system itself (e.g., Kramer & Jost, 2002; Kramer & Tyler, 1996). Furthermore, people may experience intrusions into their lives as procedurally unfair, leading to anger and other negative emotions often associated with perceptions of injustice (e.g., Gurr, 1970; Tyler & Smith, 1997). Whether surveillance works or not, then, it is often demotivating and introduces new costs in terms of distrust and perhaps even paranoia in subsequent social interaction. Such costs are borne by groups, organizations, and societies to which people belong, as they lose the gains that occur when people are willing to cooperate with each other. Research suggests that the increasing use of deterrence strategies and social control has exerted precisely this type of negative influence on the American social climate. It has created an adversarial relationship between legal authorities and members of the communities they serve, especially with respect to racial and ethnic minority group members (Tyler and Huo, 2002), leading the public to grow less compliant with the law and less willing to help the police to fight crime (Sunshine and Tyler, 2003a).

The problems inherent in implementing many laws—and the inadequacy of the deterrence model in general—have led to widespread calls from legal authorities and scholars for social science to help in understanding how to secure the effective rule of law. Their concerns suggest that current models of the determinants of human behavior are not providing legal authorities with an adequate basis for effective social regulation. This presents an important opportunity for psychologists to put forward a new and more empirically grounded perspective on the relationship between the individual and society and the following of social rules. Taking psychological jurisprudence seriously means linking our understanding of motivation and social influence in legal contexts to a broader psychological understanding of the person (e.g., see Cohn and White, 1990; Krislov, Boyum, Clark, Shaefer, & White, 1966; Melton, 1985; Tapp and Levine, 1977).

### *Reactions to Rule-Breaking*

In addition to asking how to effectively deter rule breaking, we must ask how society can deal with people who break the rules so that neither they nor others will repeat the offense. A common justification of incarceration as a common method of deterrence is the notion that once in prison people who have broken the law can be rehabilitated into citizens who will comply with the law in the future. Unfortunately, there is little evidence that the legal system stem in its present state effectively changes the future behavior of those who come before the law because of past illegal actions (i.e., to “reform” criminals; see Ellsworth & Mauro, 1998). Much of the fault, no doubt, lies with prison conditions, which are extremely unlikely to create the social and psychological circumstances necessary for learning and self-improvement to occur (e.g., Haney & Zimbardo, 1998).

The work of Darley and colleagues (2000) on rule-breaking suggests that the same social values that can help to motivate rule-following are also useful for understanding reactions to legal transgressions (see also Carlsmith, Darley, & Robinson, 2002). They find that people respond to rule-breaking by seeking to restore a moral balance between the rule-breaker and society. The focus of this work, however, is on how other members of society react to wrongdoing, and not on changes in the rule-breakers themselves. If, as I have suggested, legitimacy and moral values are central to rule-following, then one guiding concern with regard to rehabilitation should be with how to reconnect the offender to their original moral values.

Consider an example from a recent study of citizen-police experiences (Paternoster, Brame, Bachman, and Sherman, 1997). In this study researchers examined what transpired when the police were called to homes to deal with issues of domestic violence. The concern of the study was with subsequent compliance to the law on the part of the abusive men whose behavior led to the initial call. The deterrence model would predict that compliance would be increased by threats and/or punishments meted out by the police. From a social psychological perspective, however, I would argue for the value and effectiveness of more constructive police efforts designed to create and maintain respect for the law on the part of the abuser.

The results of Paternoster et al.’s (1997) study were consistent with our model of legitimacy and motivation. When the police treated abusers in a procedurally fair manner during their encounter, those abusers were more likely to comply with the law afterward. Fair treatment increased feelings of respect for the law and led abusers to be more willing to obey the law in the future. The influence of procedural fairness was greater than that of threatened or enacted punishments.

This study illustrates one the core premises of psychological jurisprudence, as we understand it, that legal authorities should be concerned with fostering the shared commitment of citizens to overarching moral principles. In order to do this, authorities must be aware of citizens’ values, their experiences with the legal system, and their judgments about the practices and policies of legal authorities. From this perspective, the key to successfully implementing the rule of law lies in an understanding of procedural fairness as the basis of legitimacy rather than in efforts to more effectively deploy coercive tactics.

The most comprehensive attempt to reconnect offenders to societal norms and to their own sense of moral values is through *restorative justice* (Braithwaite, 1989; Roberts & Stalans, 2004). During a restorative justice conference the rule-breaking behavior is recognized and punished, but an effort is also made to encourage the rule-breaker to recognize that his or her behavior violates social and moral codes that partially constitute the perpetrator’s own self-image. As a consequence, his or her criminal behavior should be personally upsetting. Thus, an effort is made to use the incident of rule-breaking as a way of encouraging the perpetrator to redouble his

commitment to obeying the rules in the future.

To achieve these goals, the restorative justice movement advocates sentences such as formal acknowledgement of wrongdoing, public apologies, and acts of restitution that connect people with the wrongness of their actions. From a restorative justice perspective, transgressions and disputes arising from them should be resolved through “reintegrative shaming” techniques (Braithwaite, 2002). Reintegrative shaming combines strong moral disapproval of the offense with respect for the person who committed the offense.

The goal is to bring about reconciliation among victims, offenders, and the community at large. With regard to offenders, the primary goal is to encourage feelings of shame regarding one’s crimes, accepting responsibility, and sincerely apologizing for them; this is intended to restore the dignity of offenders. Essential to this process is the social connection that perpetrators feel to their family, friends, and community, so these parties are present at restorative justice hearings, along with the victim and their family and friends. All of those present are involved in reconnecting the offender to a sense of moral responsibility in relation to the community as a whole. This reconnection, it is hoped, will enhance intrinsic motivation to engage in self-regulatory actions that will work against future transgressions of the law. The restorative justice argument mirrors the concern in procedural justice research with developing both formal and informal legal procedures that strengthen the influence of social and moral values on people’s law-related behavior (Tyler & Darley, 2000).

Research results support the facilitative role of restorative justice conferences (Roberts & Stalans, 2004; Sherman, 1999). Studies suggest that, at least with regard to some types of crime, participating in a restorative justice conference leads to greater cooperation with the law in the future (Nugent, Williams, & Umbreit, 2003; Poulson, 2003). Such conferences, it seems, do increase the motivation to accept the law and the decisions of legal authorities and to be a law-abiding citizen. Work on restorative justice and reintegrative shaming provides further evidence that internal moral values play a pivotal role in motivating compliance with the law (Sunshine and Tyler, 2003a; Tyler, 1990; Tyler and Huo, 2002). This work also suggests future directions for the rehabilitation of criminals that is based on sound social psychological principles.

#### *Corporate Wrongdoing and Organizational Legitimacy*

As with regard to criminal conduct in general, the dominant approach to the problem of corporate crime has been to focus on increasing penalties aimed at deterrence (Tyler, 2005, 2005b). These efforts have encountered many of the same problems that deterrence efforts have encountered in other domains, including major difficulties with regard to surveillance and the tendency for corporations to accept possible risks associated with being caught for accounting fraud, environmental abuses, and other crimes as costs of doing business (e.g., Moore & Loewenstein, 2004). Another approach to ethical scandals at Enron, Arthur Andersen, WorldCom, Adelphi, Tyco, and many other corporations has been to blame wrongdoing on a “few bad apples,” when the reality is that much of the fault lies with the barrel itself (e.g., Bazerman & Banaji, 2004; Tenbrunsel & Messick, 2004).

In this section, I focus on two types of values that have ramifications for the problem of business corruption. The first is the conviction by employees that their organization’s rules and authorities are *legitimate*. Legitimacy in this context refers to the view by employees that they are responsible for obeying organizational rules—e.g., that the organization is entitled to have its rules and policies obeyed. Thus, issues of legitimacy apply not only to perceptions of government and law (Tyler, 1999), but also to perceptions of work organizations (Elsbach, 2001; Selznick, 1969; Suchman, 1995; Tyler and Blader, 2005). In work settings, legitimacy refers to the judgment that “the actions of an entity are desirable, proper, or appropriate within some

socially constructed system of norms, values, beliefs, and definitions” (Suchman, 1995, p. 574). If people feel that their organization has legitimacy, then they will be motivated to defer to its rules and policies.

The second value is the conviction by employees that corporate policies are congruent with their own personal *moral values*. Because of relatively widespread corporate wrongdoing, this congruence is often missing. If an employee believes that personal and corporate value congruence exists, then their own moral values motivate them to follow corporate rules because they see those rules as being consistent with—and developed from—a set of moral values that they have internalized. In legal settings, research shows that an important motivation that encourages people to bring their behavior into line with the law is their belief that many behaviors that are illegal are also immoral (Carlsmith, Darley, & Robinson, 2002; Robinson & Darley, 1995, 1997; Tyler, 2006a). Similar moral values shape cooperation within experimental games (Kerr, 1995; Kerr, Garst, Kiehle and Harris, 1997; Kerr and Kaufman-Gilliland, 1994). When people feel that their organization acts in ways that are consistent with their own social and moral values, then they will be more strongly motivated to support their organization. Serious problems arise when business leaders fail to define illegal activity as morally unacceptable and to foster organizational norms that are consistent with that definition.

Recent calls for greater attention to ethics in business school curricula and for more attention to ethical issues in work cultures follow from the notion that employees’ values can be developed and activated within organizational settings (Bowie, 1999; Schminke, 1998; Trevino and Weaver, 2003; Tyler, 2005; Tyler and Blader, 2005). Because internalized moral values strongly affect employee rule-following, the challenge is to create organizational climates that foster genuinely ethical goals and then harness the motivational power of employees’ values to attain those goals. Fair market ideology and other system-justifying beliefs pose a threat to these efforts to the extent that they minimize ethical scandals, lead to system undercorrection, and rationalize rule-breaking behavior in the name of profit-related goals (Jost, Blount, et al., 2003).

The efficacy of drawing on genuine organizational legitimacy and internalized moral values is suggested by the results of research. While the use of sanctions remains a traditional (but not very effective) management strategy to secure employee compliance with organizational rules and policies, recent studies directly examine whether activating employee’s ethical values can be an effective management strategy for securing compliance. The use of a self-regulatory model such as the one I am proposing was advocated long ago in the context of discussing the legal regulation of business (Selznick, 1969), and it has been advanced with increasing frequency in recent years (Darley, Tyler, & Bilz, 2003; Gunningham & Rees, 1997; King & Lenox, 2000; Rechtschaffen, 1998; Suchman, 1995; Tyler, 2001a; Tyler & Darley, 2000).

Research shows that ethical concerns do indeed motivate self-regulatory behavior in organizational settings (Aalders and Wilthagen, 1997). This includes work focused on legitimacy (Human and Provan, 2000; Suchman, 1995; Tyler, 1990; Tyler and Blader, 2000, 2005; Zimmerman and Zeitz, 2002), on morality (Paternoster and Simpson, 1996; Tyler, 1990; Tyler and Blader, 2000, 2005), and on the general role of fairness in shaping social behavior (Rabin, 1993; Tyler and Blader, 2000; Vandenberg, 2003). Ethical values shape behavior when people believe that the rules of their organization are legitimate, and hence ought to be obeyed, and/or that the values defining the organization are congruent with their own moral values, leading people to feel that they are morally obligated to support the organization.

At the organizational level, studies show that companies are reluctant to use their market power by lowering employee wages during recessions because they believe such an action will be viewed by employees as unfair (Bewley, 1999). In addition, companies often relinquish

opportunities to press their market advantages when dealing with their customers due to concerns that they will be perceived as behaving unfairly (Kahneman, Knetsch, & Thaler, 1986). Ethical concerns also shape wage determination (Rees, 1993) and other parameters of employment relationships (Jolls, 2002). These studies suggest that companies are motivated to respond to serious ethical concerns because they believe that judgments of fairness shape people's reactions and behavior (Estreicher, 2002). Indeed, there is evidence suggesting that companies that are regarded as more ethical by employees, customers, and other constituencies also tend to be more profitable (Huselid, 1995; Margolis and Walsh, 2001) and, conversely, that more profitable companies tend to be perceived as more ethical (Jost, Blount, et al., 2003). Because, as I have suggested with regard to system justification and false consciousness, subjective appraisals of legitimacy can be wrong, the key to developing long-term ethical commitments is to maintain genuine rather than apparent organizational legitimacy that is based on normatively defensible standards of fairness.

#### *Concluding Remarks*

My goal has been to demonstrate several ways in which psychological jurisprudence can inform a set of legal questions, especially those pertaining to the legitimate exercise of legal authority and the motivation of individuals and groups to adhere to the tenets of the legal system. It would be impossible for any review to consider all of the relevant issues in the heterogeneous field of law and psychology, and I have not even tried to do so. Nor would it be possible to handle all of these issues within a single conceptual framework, especially given that the concerns of the legal system are what determine the agenda for the application of psychology to the law (e.g., Carson, 2003). I have opted for a more modest approach. I have considered a specific set of theoretical and empirical developments in social psychology that I think are broadly relevant to several areas of the law. These developments pertain to human motivation, social influence, procedural fairness, and system legitimacy and the relations among these constructs.

More specifically, I have suggested that the deterrence model makes a number of assumptions concerning human motivation to comply with the law and that at least some of these assumptions are untenable. A more realistic model takes as its starting point the notion that people are intrinsically motivated to follow internalized moral values that are supportive of a system that is perceived as legitimate. Because perceptions of legitimacy can be inaccurate due to a number of system-justifying biases, a legal system that delivers substantive justice (and not just the appearance of justice) must be based on something other than consensus. I have suggested that one of the most solid foundations for such a system is a genuine commitment to normative standards of procedural fairness. This formulation suggests a number of consequences for reactions to rule-breakers, restorative sentencing, and corporate malfeasance. Our hope is that by taking seriously both subjective (i.e., social and psychological) and objective (i.e., normative) factors with regard to justice and the law—as well as the relationship between subjective and objective factors—it is possible to develop a more sophisticated understanding of how citizens in a society like ours can be motivated to follow norms for appropriate conduct and, indeed, why they should.



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