

Legitimacy and the maintenance of public order

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Presentation at the SELA meeting. Mexico City. June 7-10, 2012.

The topic of violence, legitimacy, and public order is very timely given the struggles over legitimacy and government that we see occurring all over the world today and the electoral processes which are occurring around us in Mexico as we meet. Coming from a country with a relatively long history of stable government it is easy to forget that over half of the Constitutions societies create do not last 20 years (Elkins, Ginsburg & Melton, 2009). And even within the United States stability cannot be taken for granted as is shown by recent national controversies ranging from contentious issues like gay marriage and the debt ceiling. Around the world we see continual examples of violence and the collapse and rebirth of states.

And, of course, our attitude about stability and the maintenance of social order is not constant. Some regard societal authorities as benefiting the members of all social groups, although not necessarily equally, and as a result, think of legitimacy as a feature of societies that was desirable and beneficial. This view emerges from the consensus theories of legitimacy developed by social scientists like Talcott Parsons and Seymour Martin Lipset. They emphasize the voluntary acceptance of the existing social order based on norms and values shared by rulers and ruled alike. This consensus promotes legitimacy and, as a result, a stable social and political order (Sears, 2003, p. 322). Other writings such as those rooted in Marxism view legitimacy more negatively and welcome instability if it leads to change.

In this analysis I want to argue for the value of legitimacy as a desirable feature of government and focus on why it is often undermined and, conversely, how it can be more effectively maintained. The question I will address is why, if legitimacy has advantages, it is difficult to create and maintain legitimacy based systems of law and social order. I think that legitimacy is difficult to maintain because the approaches to governing and exercising legal and

political authority that most effectively build legitimacy run counter to the intuitions and preferences of many people in positions of authority.

*Is legitimacy a desirable framework for law?*

If we accept that legitimacy is a more desirable approach and procedural justice leads to legitimacy, then why is it hard to get this approach in place and keep it there? In particular, why do societies keep moving toward the use or threat of using force, particularly during times of crisis? The United States will serve as a good example. Why did the United States respond to the events of September 11, 2001 with widespread repressive policies toward suspect groups, in particular the members of the American Muslim community? And, why did the British respond in similar ways to the same problem in the United Kingdom? I think there are several reasons.

What is legitimacy? Throughout the history of social thought it has been recognized that people can exercise influence over others by possessing power. Power is the ability to shape the gains and losses of others either by threatening or using coercion to deter undesired behavior or by promising rewards to promote desired behavior. A core aspect of social dynamics, therefore, is that power provides a means to shape behavior with the consequence that “The strong do what they will, the weak endure what they must (Thucydides, 1982, page 351)”. The argument that behavior in social settings is linked to the ability to reward and punish is not only central to psychological theories, but is also influential in political science, sociology, and economics, as well as in law, public policy and management.

It is therefore important that under some circumstances people are also influenced by others because they believe that the decisions made and rules enacted by others are in some way “right” or “proper” and ought to be followed. In other words, people also “relate to the powerful as moral agents as well as self-interested actors; they are cooperative and obedient on grounds of

legitimacy as well as reasons of prudence and advantage (Beetham, 1991, p. 27)". Legitimacy is the belief among people in a society that those in power deserve to rule and make decisions influencing the lives of everyone (Kelman & Hamilton, 1989). Legitimacy is the perception that one "ought to obey" another (Hurd, 1999).

Let me first acknowledge that it may not be necessary for authorities to have legitimacy to rule. While some argue that it is impossible to rule using only power and others suggest that it is possible, but more difficult, it is widely agreed that authorities benefit from having legitimacy, and find governance easier and more effective when a feeling that they are entitled to rule is widespread within the population. This is the case because seeking to gain influence over others based solely on the possession of power is costly and inefficient. The use of power, particularly coercive power, requires a large expenditure of resources to obtain modest and limited amounts of influence over others.

Why is legitimacy important? As noted, seeking to rule based upon the possession of power alone first requires enormous expenditures of resources to create a credible system of surveillance through which to monitor public behavior to punishing rule violators. In addition, resources must be available to provide incentives for desired behavior, rewarding people for acting in ways that benefit the group. Recent empirical research suggests that these strategies of governance can be successful. For example, recent research suggests that deterrence strategies can shape crime related behavior (Nagin, 1998), but that when there are deterrence effects the magnitude of those influences is usually found to be small.

In a review of the literature on American drug use a study of existing research found that only approximately five percent of the variance in citizen drug use can be explained by citizen judgments of the likelihood of being caught and punished by the police and courts (MacCoun,

1993). This conclusion is typical of the findings of studies of compliance with the law — deterrence is found to have, at best, a small influence on people's behavior. More general reviews of deterrence research conclude that the relationship between risk judgments and crime was “modest to negligible” (Pratt, Cullen, Blevens, Daigle & Madensen, 2008) and that the “perceived certainty [of punishment] plays virtually no role in explaining deviant/criminal conduct (Paternoster, 1987), while studies of the effect of the death penalty suggest that the argument that capital punishment deters crime “still lacks clear proof” (Weisberg, 2005).

Similarly, studies of punishment suggest that it is ineffective in deterring the future criminal conduct of those being punished. The widespread punishment for minor crimes does not generally lower the rate of subsequent criminal behavior, as would be predicted by models of specific deterrence (Harcourt, 2001; Harcourt & Ludwig, 2006). Studies of more severe punishment for example imprisonment find that more severe punishments are not related to lower rates of later criminality (Lipsey & Cullen, 2007). In fact, studies of juveniles suggest that incarceration increases the likelihood of later criminality (McCord, Widom & Crowell, 2001).

The same research shows that such instrumental influences come at high material costs. This leaves societies vulnerable, since disruptions in the control of resources brought on by periods of scarcity or conflict quickly lead to the collapse of effective social order when it is only based upon power. When the public views government as legitimate it has an alternative basis for support during difficult times. It is precisely at times of war or economic crisis that the government both most needs the public's support and is least able to either provide incentives or effectively enforce sanctions.

Further, when government can call upon the values of the population to encourage desired behavior society has more flexibility about how it deploys its resources. In particular, it

is better able to use collective resources to benefit the long-term interests of the group since they are not required for the immediate need to ensure public order. While it may be necessary to have a police force or an army, societal viability is enhanced when those resources can be diverted into economic and social development. So, to the degree that public order flows from a shared commitment to the law and the legitimacy of legal authorities, society is better off.

The root of the value of legitimacy beyond saving public resources lies in its ability to transform the relationship between people and authorities. When I wrote *Why People Obey the Law* in the 1980s the ideal of a good citizen was very reactive. A good citizen complied with the law. Today we have a much more active role in mind for citizens. First, we want them to not just comply with the law but to be motivated by internal values to willingly obey the law. To the degree that people do this, the costs of surveillance and punishment diminish.

In terms of the influence of law on people's everyday lives, there is evidence that, across a broad range of behaviors ranging from paying income tax to stopping at red lights people do not always pay attention to the law. The problems involved in obtaining compliance with the law in everyday life are illustrated through compliance issues involving a wide variety of behaviors, ranging from traffic laws to drug laws, illegal immigration and the payment of taxes. In each case, while most people comply with the law most of the time, legal authorities are confronted with sufficient noncompliance to be challenging to the resources normally devoted to social control. And, in situations such as the illegal downloading of music; the illegal copying of movies, the recreational use of drugs; and underage drinking levels of noncompliance are so high as to make effective regulation very difficult (Schultz, 2006). The magnitude of these compliance problems should not be exaggerated, but the attention of legal authorities has been increasingly directed to the need for a better understanding of why people obey the law.

We also want people to refrain from extralegal acts of violence and vengeance, as well as from collective actions such as riots. There have been extralegal acts of violence in Mexico in the last few years, but there have also been riots in London and the United States has a long history of riots inspired by racially tinged police actions. No society is immune from the risks of people going outside the law. Legitimacy diminishes those risks.

Further, one of the key functions of legal authorities is to enforce legal rules. Judges settle disputes according to the law, while the police enforce rules on the street. And these functions are always to some extent problematic. While it is true that Americans are generally law-abiding people, and that they are usually willing to comply with the decisions of police officers and judges, compliance with the law cannot be taken for granted even when the authorities do possess power. American legal authorities have always struggled to promote the public's adherence to the law, and there are many suggestions that this struggle may be growing more difficult. In their dealings with particular citizens, U.S. police officers report increasing difficulty gaining public compliance, while judges report that it is harder to enforce judicial judgments and to bring citizen behavior into line with court orders.

Studies of personal encounters with the police demonstrate that people often resist, and even defy legal and judicial orders (Mastrofski, Snipes & Supina, 1996), and compliance can never be assumed. The ability to manage encounters with members of the public without provoking conflict and resistance is considered to be a core competency issue for police officers. As a consequence “Although deference to police authority 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” (Maskrofski, Snipes & Supina, 1996, p. 272). Based upon observational data, these authors

estimate that the general noncompliance rate for the police is around 22%.

The willingness of litigants to accept the decisions made by judges is also a long-standing issue in the courts. One major motivation for the alternative dispute resolution movement which uses non-adjudicative forums such as mediation instead of traditional adjudication is to find a way to increase the willingness of involved parties to accept the decisions made by third-party authorities. Alternative procedures do so by replacing judges with mediators and adjudication with a more informal and cooperative problem solving procedure (Tyler, 1989). Within all types of adjudicative settings, judges have struggled to find ways to make decisions that are acceptable to the parties who bring cases into court. An illustration of the type of cases that are particularly likely to raise acceptance issues are decisions about child custody and child support (Bryan, 2006). With such cases, it is important to make decisions that will be willingly followed by both fathers and mothers and that will, to the degree possible, create positive post-separation dynamics in which both parents take responsibility for supporting their children financial and emotionally. Hence, family law cases involving child custody and child support have been a particular focus of efforts to find ways to create acceptable agreements.

With both police officers and judges legitimacy facilitates desirable behaviors, including following the law and accepting decisions. Further, it has been increasingly recognized that the focus of concerns needs to be broadened to include not just compliance – motivated by concerns about costs and gains – but willing deference to the law and the decisions of legal authorities. The legal system benefits when people voluntarily defer to decisions and continue to defer over time. In the context of personal experiences with police officers or judges, the legal system is more effective if people voluntarily accept the decisions made by legal authorities. Absent such acceptance, legal authorities must engage in a continuing effort to create a credible threat of



punishment to assure long-term rule-following/decision acceptance.

These types of voluntary deference are not effectively motivated by the risk of punishment because while threats can sometimes compel obedience they do not motivate voluntary deference. Hence, a force based strategy creates long term problems because “citizens who acquiesce at the scene can renege” (Mastrofski, Snipes & Supina, 1996, p. 283). If citizens fail to fully agree with legal restrictions, further police intervention will eventually be required. Hence, the legal system is also concerned with its ability to gain long-term compliance, not just immediate compliance. Willing deference leads to long-term acceptance, rather than short terms compliance.

Of course the police are not only the enforcers of laws. They also provide services and help people solve problems. The American police have developed a central service role via 911 call lines through which people register a wide variety of concerns and ask for many types of help. By relying upon responses to calls the police are assured that at least one person at any problem they deal with wants them to be there, lessening the sense of intrusion into communities. However, the police still have the difficult of performance promises, especially during times of declining budgets. For many chiefs of police one response to declining budgets is to withdraw police from middle class communities and retain policing in high crime lower class neighborhoods. But, this response requires a way to manage expectations for service in areas where speeding may be the primary citizen grievance and assistance in handling everyday problems the primary way people personally deal with the police.

Beyond deference, legal authorities are increasingly focusing upon the benefits of active public cooperation with the police, the courts and the law (Sampson, Raudenbush & Earls, 1997). The legal system – and particularly the police – needs voluntary help from the public

(Tyler & Fagan, 2008). Studies of crime and policing make clear that the police benefit when members of the community voluntarily work with them to manage social order in their community. First, the police need community members who are familiar with the neighborhood and its residents to report crime and criminals to the police. Second, the police need community residents to join them in town meetings and neighborhood watch organizations to identify and deal with community problems.

The shift from compliance to cooperation first requires us to expand the scope of our instrumental model – a model that can potentially involve both costs and benefits. While the legal system is based upon highlighting the cost of rule-breaking, law and legal authorities also offer benefits that can strengthen social capital. For example, Tyler and Huo (2002) found that the primary reason for people having contact with the police and courts is having gone to them for help. Legal authorities can create benefits by their performance in resolving disputes and maintaining social order. Unlike the relationship of the police to regulation, in which they are primarily the dispensers of punishment, when we consider cooperation we can also see the police as a group able to provide people with desirable outcomes, by helping them to solve problems and address problems in their communities. The police can provide desirable rewards such as high performance in solving crime, maintaining order, or addressing public problems. Members of the public can – and should – have an active interest in police success that does not rest on sanctions directed at them.

Across the social sciences, there has been a widespread recognition that it is important to understand how to motivate cooperation on the part of people within group settings. This is the case irrespective of whether those settings are small groups, organizations or communities (Tyler, 2011). Studies in management show that work organizations benefit when their members

actively work for company success. Within law, research shows that crime and problems of community disorder are difficult to solve without the active involvement of community residents. Political scientists recognize the importance of public involvement in building both viable communities and strong societies. And those in public policy have identified the value of cooperation in the process of policy making – for example, in stakeholder policy making groups. Hence it is important to ask whether the actions of legal authorities can aid in the production of social capital that might more generally engage cooperation.

Recent discussions of legal authority focus on a broader conception of the relationship between community residents and legal authorities. This broader framework suggests a new and broader conception of citizenship. Rather than concerning simply deferring to authorities, citizenship is increasingly seen as connected to the willing and active cooperation with authorities in creating and maintaining order in the community. For example, Tyler & Fagan (2008) identify two distinct forms of cooperation that benefit the police. The first is cooperation in solving particular crimes, for instance by reporting crime in the community.

The second is cooperation in co-policing the community, by working with the police in discussions about community issues and problems and through general willingness to work with the police, for example by joining neighborhood watch and helping to patrol areas in one's neighborhood. Tyler, Schulhofer & Huq (2010) make a similar distinction in their study of anti-terror policing in the Muslim American community. They note that the same two types of cooperation are valued by legal authorities: reporting potentially dangerous actions and generally working with the police to help police the community against terror threats.

Both of these forms of cooperation are essentially voluntary. Non-cooperation risks little or no sanction. In particular, *not* reporting threats to the community is something that is virtually

undetectable. People's willingness to do so is therefore linked to a broader loyalty or sense of duty to the community and its authorities. Such cooperative behaviors are therefore general civic activities akin to the more traditionally studied forms of political participation. The issue that is being raised in respect to crime, in other words, is the same type of issue raised with regard to any matter affecting a community. How can citizens be motivated to become involved in deciding how to manage their community and in engage in behaviors oriented toward doing so?

The value of cultivating legitimacy lies in the fact that it enables 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 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. 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.

*The difficulty of maintaining social order based upon legitimacy*

Legitimacy is thus a highly desirable feature of social systems (see also Tyler, 2006a, 2006b; Tyler and Huo, 2002). It has many appealing features as a possible basis for the rule of law. If so, why is it difficult to create and maintain legal system based upon legitimacy and why do so many courts and police forces use instrumental approaches based upon utilitarian models?

I believe that one reason is that people in power overestimate the effectiveness of this form of governance. They believe that threat deters immediate behavior; and that punishment deters future behavior. One reason that they believe this is that they see it in front of their very

eyes. People faced with authorities comply in the immediate moment. Then later they renege. As a consequence, those in positions of authority have the continually experience of seeing power work. People in power think that the threat and use of force is a more viable and effective strategy than it actually is. I will refer to this as the “myth of self-interest”. Studies show that people expect others to be more strongly influenced by rewards and punishments than they actually are (Miller and Ratner, 1996, 1998).

In reality, as I have detailed above reviews of the literature consistently show how ineffective the threat and use of force actually is. Variations in the likelihood of being caught and punished have at best a minor impact on criminal behavior. Whether people are punished is not reliably related to lower levels of future criminal conduct. More severe punishment is not linked to less criminality in the future. When this widespread lack of empirical support for forced based approaches is compared to the general belief in the effectiveness of such models the question is why this general (but mistaken) belief persists.

To some extent this continuation in a flawed belief reflects the self-fulfilling nature of theories and models. Ferraro, Pfeffer & Sutton (2005) discuss the dominant role of economic models in organizational theory and the similar lack of strong empirical support for such models that those organizations. They argue that a key for a theory is to appear self-evident, something more about cultural myths than supportive evidence. This leads to the question why people find it so compelling to think of people as utilitarians. Does this in some way comport with our understanding of everyday experience.

Once people have such a conception of themselves and others it is difficult to let go of those beliefs even when the evidence for them is discredited. As Baron (2000, p. 195) says “We tend to hold to our beliefs without sufficient regard to the evidence against them or the lack of

evidence in their favor”. Instead people engage in psychological strategies to blunt the impact of discordant information upon their beliefs.

One approach that people use is to look for confirming information that allows them to maintain their beliefs. For example, people shape the way they frame their study of problems in ways that support their prior views. An example of this approach is the general tendency to frame deterrence studies as questions of whether deterrence works, in the sense that its effects can be shown to be significantly different from zero (Ziliak & McCloskey, 2008). Against this relatively low standard deterrence effects are often found, i.e. deterrence is shown to work.

An alternative approach is to ask how much of the variance in behavior a model explains. As an example, MacCoun (1993) reviewed the literature on deterrence in the case of drug use and suggested that only about 5% of the variance in drug use was explained by variations in the certainty and severity of punishment.

This can be extended into studies that compare deterrence effects to the influence of other factors. Tyler (2006b) did this in a study of Chicago residents and showed that risk was relatively unimportant in shaping compliance. Jackson, et al (2012) did so in a study of the UK. They found that the coefficient for risk estimates was 0.04, in comparison to 0.20 for legitimacy; 0.23 for the belief that legal authorities shared moral values; and 0.22 for personal morality. In other words, risk explained 0-1% of the variance in rule following, while legitimacy explained 16-19% depending upon how it was conceptualized. Experimental studies of tax compliance conducted in the 1960s similarly showed that appeals to values were more effective than were threats of punishment in motivating compliance (Schwartz & Orleans, 1967).

The perceived dominance of deterrence is aided by the tendency to collect data based upon the framework of existing theory. In America national surveys collect information on

crime rates; arrest rates; and sentencing. These can be linked to statistics on the certainty and severity of punishment, as well as the length of sentences. However, it is not possible to compare influences to those of legitimacy in most cases because legitimacy is never assessed.

### *The mystique of utilitarianism*

The motivation to govern instrumentally is not just the result of an unwillingness to let go of an unsupported theory. It is also psychologically attractive to people in authority to adopt utilitarian models. Such models support illusions of competence; good character; and security.

Psychological studies support the argument that people generally exaggerate their own competence and ability both relative to task difficulty and to the competence of others (Alicke & Govorum, 2006; Leary, 2007). Such illusions are psychologically satisfying and are associated with high levels of self-esteem (Taylor & Brown, 1988). Given their high levels of perceived self-competence, leaders naturally want to control decisions and concentrating resources in their hands to facilitate that goal makes sense. If someone is more competence than others, it makes sense for them to be the person who decides what will happen and utilitarian models maximize leader perceived control in that leaders engage in top down management through a model in which they direct the deployment of incentives and sanctions. There never seems to be a shortage of authorities with confidence in their unique skills and insights into problems.

An extension of this argument is the belief that a decisive leader is better able to govern than a group, leading to support for the idea that what is needed are “a few strong leaders, not a lot of laws and talk”. Studies show that it is actually deliberative and participatory processes that are central to the rule of law and the creation of legitimacy. As noted, this approach to social order has a number of clear advantages for societies. Nonetheless, there has and continues to be a “romance of leadership” in which the leader’s ability to shape outcomes is exaggerated (Meindl,

Ehrich & Dukerich, 1985) both by followers and by leaders themselves. While such an exaggerated belief in competence may be beneficial in that leaders need to have self-confidence if it leads them to be dismissive of others and unwilling to work collaboratively then it undermines legitimacy.

Exaggerated confidence leads people to take on tasks that are more complex or risky than they can actually manage. As a result, leaders step confidently into situations they cannot handle well. The management literature shows that once people embark upon a course of action they cannot handle they tend not to question their competence but, rather to throw more and more resources into that course of action (Brockner & Rubin, 1985). They do not reexamine their sense of their competence.

A second illusion is the illusion of good character. People view others as less motivated to act upon values, i.e. to behave in a just and moral way, than they are (Messick, Bloom, Boldizar & Samuelson, 1985). As a consequence they view themselves as appropriate decision makers because their decisions are more likely to be linked to what is right and proper, rather than to their own self-interest. Also, since other people are viewed as acting based upon self-interest, appeals to their values are likely to be ineffective, leaving utilitarianism as the only viable basis for influencing their behavior (Tyler & Rankin, 2012).

As an example, consider negotiations. People must make inferences about other people's actions and what they say about their character. In studying negotiation researchers find that the Chinese are often better than Americans. Why? They are less likely to view others as acting out of poor motives (of being self-interested and trying to win). Instead, they view the other parties' actions as flowing from their situation. Because they make situational attributions they are less likely to interpret the actions of others as reflecting untrustworthy or self-interested character and



they are more able to successfully negotiate (Morris & Peng, 1994).

Finally, because the authorities have control over resources and power they feel secure and protected. It is psychologically reassuring to feel that you possess superior force capability. The police as an example seek to project force and dominate situations using their possession of a variety of types of weapons: guns, clubs, tasers, mace, etc. Ironically this creates a problem for the police because it leads to anger and resistance. Relationships are defined in terms of dominance and subordination as defined by the use of power.

Is there evidence addressing this concern in the context of immediate resistance?

McCluskey (2003) uses evidence collected in observer-based studies of police-citizen encounters in Indiana and Florida to explore the role of police coercion in motivating citizen compliance. According to a force based model the police should be able to increase citizen compliance by projecting authority. McCluskey (2003, 145) tests this argument using observer ratings of police behavior. He focuses upon police requests for citizen self-control and finds that for initial requests by the police for compliance “[s]urprisingly the coercive power that police bring to bear on a citizen in the form of commanding, handcuffing, arresting and so on, has a minimal impact on citizen’s compliance decision” (p.100). At later points in the interaction, McCluskey similarly finds that “the higher the level of coercive power displayed by police, the less likely targets are to comply. . . . For every one unit increase the index of coercion citizens are about twice as likely to rebel against the self-control request” (108). This leads him to conclude that “[t]hough coercion may be a central component of the police role, it appears to serve little to enhance compliance when first asked or when requests are repeated by the police” (McCluskey, p.173). McCluskey notes that when the police mention the possibility of arrest, compliance goes up. However, he views this effect as due not to coercion but to the greater legitimacy that the

police have when their actions are seen as consistent with the law. As a consequence, police scholars generally argue that “[t]he best officers are those who use less, not more force” (Terrill 2001, 232; see also Belvedere, Worrell and Tibbetts (2005). This issue is related to police safety because it is efforts to coerce compliance that lead to defiance and hostility, escalating conflict and injuring both civilians and officers.

Because they have these illusions authorities are motivated to govern instrumentally. First, since they are the most competent, they believe they should control resources and their deployment. Since they are the most moral, they believe it is appropriate for them to make decisions for others, and since they are in possession of power, they believe they are secure. Hence there are a variety of reasons that authorities fall easily into a utilitarian approach, managing social order by the threat or use of force and deploying community resources to address the problems and concerns that they feel are of importance.

Of course, not everything about power is motivated by psychology. In many societies people rule via the possession and use of power because they are trying to protect privilege, and support structural unfairness. In those societies leaders are forced into such a strategy because it is difficult to be legitimate if you are protecting unjust privilege. While it has been recognized that people do not always label policies that on objective grounds can be seen as unjust to be unjust, and hence there is an element of “false consciousness” that can support autocratic authorities, it is more difficult to create legitimacy under such conditions.

#### *The benefits of utilitarianism*

The benefit of utilitarianism is that it allows quick changes in the deployment of resources. It is easier to change the allocation of instrumental resources than it is to create values. Creating values is always a long-term project. Hence, instrumental approaches are most

likely to be adopted when people do not plan ahead and are managing reactively once problems develop; when people are responding to emergencies (terrorism; a crime wave); and when people are operating within a short-term framework. For example, police departments respond to homicides by hot spot policing strategies in which they flood an area with police officers. Crime goes down. But departments can seldom maintain the high levels of patrol needed to maintain this effect so eventually the officers are transferred out as the threat diminishes and crime rates increase. When businesses need to achieve short-term quarterly profits or political leaders must produce rapid gains prior to an election instrumental approaches are attractive. The problem with utilitarianism is that over time it undermines the relationship between authorities and populations and therefore is difficult to sustain in the long run. So it is personally satisfying to authorities and may yield short term successes, but it fails in the long-term.

Several of the papers at this conference address these dynamics of power, using Mexico's war on drugs as their example. Perez Correa points to the heightened violence associated with military policing and argues that it undermines the relationship between law enforcement officials and the public. Madrazo discusses the undermining effect to talking about drug crimes as a "war" and excluding criminals from society. This exclusion led to them being treated as outside the scope of law. Consequently, the commitment of outlaws to society was undermined and they became more willing to engage in violence.

What are the problems created by an instrumental approach? The first problem is that they create an undifferentiated social reality. The key to effective interactions is to distinguish among people by identifying those who can respond to values and differentiating them from people who must be dealt with instrumentally (Kelley & Stahelski, 1970). However, when people are approached from an instrumental perspective they respond instrumentally, so

authorities create a situation in which they deal with everyone instrumentally, irrespective of whether those people can respond to them based upon values. They do not in other words, motivate anyone to obey the law because of legitimacy, since they threaten all the members of the community with fines, arrest, or imprisonment for noncompliance. This is an inefficient strategy for creating cooperation (Axelrod, 1984) and one that is not optimal for the authorities.

An example of the application of this approach is the pyramid of regulation (Ayres and Braithwaite, 1992). These authors argue that everyone should initially be approached through appeals to values. Most will respond. Those few who do not can then be treated as subject to punishment. In this manner resources can be directed toward the small group that needs surveillance and sanctioning, but the majority who can respond to values are dealt with in terms of appeals to values.

In addition, surveillance is an issue because it is a self-perpetuating strategy. When managers adopt a strategy of closely monitoring employee performance they do not create a basis for trusting employees to work when they are not being monitored (Kruglanski, 1970; Strickland, 1958). As a consequence, managers need to continue to monitor those employees. Similarly, if the police encourage law abidingness through the threat of punishment, they can never be sure whether people would obey the law if they were not watching. Hence, they need to continue to create a credible threat of punishment in the future.

Finally, and ironically, this continued surveillance in the long term turns out to be needed since a focus on instrumental factors “crowds out” the role of other motivations in shaping rule related behavior (Frey, 1994). If people are initially motivated to comply with the law both due to concerns about being caught and punished and for value based reasons – e.g. legitimacy, morality, peer opinion – a focus by authorities on deterrence defines the relationship that people

have to the law as one of risk, i.e. it becomes instrumental. Over time this leads the influence of value based reasons to become less important. Eventually people are primarily complying or not complying based upon levels of fear of punishment.

As an example, consider the well-known study “A fine is a price” (Gneezy & Rustichini, 2000). A school had problems with parents picking their children up on time. They appealed to people’s norm of responsibility and later introduced a fine. The reaction to the fine was that parents treated it as the price of being late and their sense of responsibility to be on time became less central to picking up their children. In other words, introducing a fine turned what was a value based obligation into an economic transaction. If parents paid the fine they did not feel they had failed in a social obligation by being late.

For these three reasons despite short-term attractions a utilitarian strategy undermines itself in the long-term. Because of the general ineffectiveness of social control it underperforms relative to expectations. In particular, these approaches end up costing more than anticipated, so the availability of resources limits the degree to which they can be implemented. The massive growth in prison costs is an example. This growth in costs flows from the use of a deterrence approach, combined with the resultant pressure for longer sentences. During a period of economic downturn these costs have proved unsustainable.

Such failures cast doubts upon the competence of leaders. However, having framed issues instrumentally it is difficult for authorities to go back and appeal to values. Trying to change strategy presents both psychological and political problems. First, it requires acknowledging failure, and threatens illusions of competence. Second, the position of leader requires success and acknowledging failure is often not an option. Hence, authorities often perceive little choice but to push for more severe punishments, even though research makes clear

that it is certainty of punishment, not severity that matters. Similarly, there is ongoing pressure to devote greater resources to surveillance. The police and courts have no mechanism but threat, no recourse but massive incarceration. And society is stuck with a costly and minimally functional system of law and law enforcement.

Let me illustrate with an example of recent importance in the United States: coercion and torture. The recent salience of terrorism and torture has brought to the fore a long-running debate in social psychology about the effectiveness of force in eliciting information from those motivated to conceal it. A review of that literature is beyond the scope of this paper (see Mayer, 2008, for a review of recent debates; and Kleinman, 2006b, for a historical analysis).

Our concern here is not with the use of coercion as a social control strategy (i.e. torturing some people to frighten and thereby deter others) but with the fairly widespread belief that physical force is an effective mechanism for educating information from reluctant people. That issue parallels our prior discussion concerning physical force and conforming behavior, with the important difference: physical force is typically effective in gaining immediate compliance when an authority is present, but while torture may appear to lead to the desired confessions of secret information, it is unclear whether such confessions are actually reliable, and thus unclear if torture achieves its stated short-term goal.

However, consistent with the evidence summarized above, the data suggest the instrumentalism that underlies torture does not work (Intelligence Science Board, 2006). One core problem with the use of coercion to elicit information is that interrogators are unable to detect when someone is lying (Hazlett, 2006; Vrig, 2000). While a wide variety of mechanical techniques for detecting lying exist, a review of such physiological or neurological methods, ranging from lie detectors to brain scans, indicates that “none of these mechanical devices has

been scientifically shown to be capable of accurately and reliably detecting deception (Heckman & Happel, 2006, p. 83). For interrogations to be effective, those being interrogated thus need to be motivated to tell the truth, not simply forced to divulge information in response to physical coercion, since the veracity of such coerced statements is dubious.

A review of interrogation research suggests that techniques involving “hostility and the employment of force: be it physical or psychological” are counterproductive (Kleinman, 2006a, p. 95). So what does work? Kleinman argues that successful interrogations are typically linked to the development of a human connection between the interrogator and the person being interrogated: the two players must build a social bond. He therefore suggests that interrogators focus on creating a cooperative relationship with their subjects, based on sensitivity to the persons needs and concerns. Toward that goal, “coercive approaches are rightfully rejected” (p. 123).

While discussions of interrogations of terrorists do not focus on engaging legitimacy or moral values, studies of criminal confessions show that the most effective interrogation technique for eliciting confessions is to appeal to the suspect’s conscience: that is, his or her moral values (Neuman & Salinas-Serrano, 2006, p. 172, drawing on evidence from a major study by Leo, 1996). Strategies designed to build rapport and encourage suspects voluntarily to confess information include “treat[ing] the suspect with decency and respect,” “not handcuff[ing] or shackl[ing] the suspect” and “recogniz[ing] that in everyone there is some good, however slight it might be” (p. 186). A recurring theme in the interrogation literature is that people are more likely to involve themselves in a positive relationship and to engage their values and voluntarily cooperate when they anticipate respect and decent treatment from their captors.<sup>12</sup> Interrogation is thus similar to policing in general: the most effective method for achieving the

desired behavior is ensuring that the individual is voluntarily motivated to comply. In short, just as the police need willing cooperation, so do interrogators.

As we have noted, that basic approach does not work: coercion does not elicit the desired truthful information from reluctant and hostile prisoners. However, once authorities have embarked upon this course of interrogation, they typically are pushed to ever greater levels of extreme violence and coercion by the very failure of this approach to elicit information. Mayer (2008) documents discussions in recent years about how to respond to the failure of violent interrogation techniques. She notes that there is a constant pressure to achieve results by escalating to more extreme methods of coercion when milder forms have proved ineffective, as they typically do.

With both deterrence and coercion, the core problem is similar. By embarking on a force-based strategy, authorities undermine their rapport with the people involved, who come to mistrust and even hate the authorities, to develop oppositional consciousness, and to resist and undermine those authorities. Any hope for cooperation or collaboration is undermined by feelings of distrust and anger and by motives of concealment and misdirection. Further, once the ineffectiveness of a force-based strategy becomes apparent, there is no going back. Any later efforts to appeal to people's values or build rapport are tainted and unlikely to be successful (even when they would have been the superior strategy if pursued from the outset). Lacking alternative courses of action and late in the game, the authorities implement the only strategy they see as possible—an even more severe force-based approach. As a result, the opportunity for a value-based strategy is diminished and eventually destroyed.

As I have noted mass incarceration is another example. To make deterrence work there needs to be punishment. Since incarceration increases the risk of recidivism a group of long-



term criminals is being created, with resulting repeat incarcerations. And, there is political pressure for more severe punishments, based upon the failure of less severe punishments to work.

Authorities are constantly found to be in a situation of declining effectiveness. But it is hard to convert a utilitarian strategy to a legitimacy strategy. Further, since values have been crowded out, if surveillance is lifted there are often problems. The end of an autocratic regime is often associated with increases in crime, even if the new regime is democratic. Populations used to obeying out of fear do not associate law abidingness with values, and suddenly find the risk of punishment to be lower. For example, crime rates have increased in South Africa during its democratic transition (Louw, 1997).

This discussion makes clear the importance of examining force-based approaches in advance of policy formation and implementation. The time to capitalize on people's commitment to values and their prior belief that authorities are legitimate and their values moral is beforehand, since time is needed to create or strengthen values and to engage existing values through participatory and deliberative procedures, through which people come to trust their leaders and view them as legitimate.

#### *Strategies for promoting social order through legitimacy*

What is to be done? I will discuss three approaches. One involves focusing on the value of the rule of law. A second is linked to providing better evidence of the problems of utilitarian models. And finally rule through legitimacy can be encouraged by combating the motivational power of the psychological illusions that support instrumentalism.

*Rule of law.* The relationship between the rule of law, legitimacy and political violence is a theme of several of the papers at this conference. The rule of law is central to building

legitimacy. What is the rule of law? The idea of the “rule of law” has a long history within philosophies of governance and jurisprudence (Shapiro, 1994), is central to early discussions about American law, and is now widely articulated as an important goal for reform in law throughout the world. As would be expected, such a basic concept is explained in a variety of ways by differing authors. This discussion will focus on three core ideas often associated with that idea. It is important to acknowledge that the ideas underlying the rule of law are broad and only some are considered here. For example, the idea of democratically elected leaders is an assumed element in American society, and underlies the legitimacy of the legal and political systems. Similarly, checks and balances among the branches of government are important.

The first aspect of the rule of law is rule based decision making. There are four elements to the idea of rule based decision making. First, affected parties can present evidence before decisions are made. Second, decisions are made based upon facts, not personal opinions or biases. Third, rules are consistently applied. Fourth, procedures are transparent so people know why decisions are being made. In describing the rule of law, the United States State Department international information program ([usinfo.state.gov](http://usinfo.state.gov) description of democracy) points to the need for the government to treat all persons equally, making decisions without regard for “race, religion, gender or minority status”. Decisions need to be made based upon clearly defined laws and by people of integrity, acting on legal principles. A similar argument argues that a key element is “reasoned decisions articulated in terms of the governing rules” Jones (1958).

The second aspect of the rule of law is respect for people’s rights and for the principles embodied in the law. Two aspects of respect for rights and for the law will be considered. First, whether the decisions made are consistent with the law or with relevant rules or standards. Second, whether legal authorities act in ways that respect people’s legal right. In describing the

rule of law, the United States state department international information program points to the government being bound to act in accord with the law and not violating the rights of the people. The idea of acting in terms of governing rules has already been noted, while legal rights are a concept central to Western democratic governments (Caenegam, 1995) as has The idea is that laws “enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century” (Carothers, 1998).

The third aspect of the rule of law is respect for persons. A third idea underlying the rule of law is respect for people. Here the focus will be upon the degree to which people are accorded dignity and treated with courtesy and politeness. Here the focus is on respect for people as people, who are entitled to treatment with courtesy and dignity. In describing the rule of law, the United States state department international information program points to the need to recognize every person’s “dignity and humanity”. It has been recognized that adherence to rules is not enough, since rules may themselves be inconsistent with principles of decency and justice. Hence, the content of rules must be evaluated for consistency with ideas of human rights (Kriegel, 1995).

These three ideas underlying the rule of law are similar to core ideas of procedural justice. Hence by upholding the principles of the rule of law legal authorities are creating the conditions of perceived legitimacy, since many studies link legitimacy to the exercise of authority through fair procedures.

The case of Mexico and the Calderon war on drugs is an example of how unfair procedures undermine legitimacy. The paper by Professor Pérez Correa documents how moving security to the Federal level undermined self-governance and citizen participation. Consistent with my line of argument Professor Pérez Correa argues that “the government’s strategy has

destroyed, rather than benefitted, that which makes security possible” because it has undermined pluralism and democracy. Similarly, Professor Madrazo argues that defining the struggle against drugs as a “war” undermines efforts to deal with it because it excludes criminals from the political community, denying them the protections of citizenship and of membership in a political community. As Professor Madrazo says “the enemy does not enjoy the protection of the law, nor is he obligated to comply with it (p.4)”.

On the other hand Professor Lemaitre argues that in Columbia it was the use of inclusive and participatory procedures combined with a continued commitment to the rule of law led to “an institutional transformation with more rights and more democracy [which] did, in fact...allow for a persisting if fragile, stability and growth (p. 30)”. While recognizing the limits of this approach she notes that the 1991 Constitution did bring democracy and human rights to important sectors of the country and led to the manageable levels of violence and continuing success of government institutions. And Professor Prado and colleagues suggest that accountability among the police (“democratic policing”) is central to the rule of law in Latin America. They point to community-based policing, which involves accountability and responsiveness to local communities. In fact they suggest that “active and continuous participation of the community” is a key to the success of community based policing. These papers support both the argument that the absence of fair procedures is undermining and that its presence facilitates the development and maintenance of legitimacy.

These studies suggest that principles of the rule of law, which are about using fair procedures to exercise authority, shape legitimacy. During the last several decades a large body of American research has examined this issue. The findings indicate that the fairness of the procedures used to exercise authority shape legitimacy. Public views about whether the police or

the courts or the government are exercising their authority through fair procedures are consistently found to be more important in shaping legitimacy than the nature of the outcomes government produces (Tyler, 2006b; Tyler & Fagan, 2008).

Experience based procedural justice also shapes legitimacy. Tyler and Fagan used panel data to examine the influence of personal experience on legitimacy controlling for prior differences among respondents both in terms of their demographic characteristics and their antecedent views about the legitimacy of the police. Their findings reaffirm the centrality of procedural justice in personal experiences to people's subsequent evaluations of legitimacy. These results indicate that views about legitimacy change significantly in response to personal experience (Tyler & Fagan, 2008). Tyler and Fagan further demonstrate that both fair and unfair experiences significantly change views about legitimacy, although in different directions. So, the police can both gain legitimacy by being fair and lose it by being unfair. This argument was disputed by Skogan (Skogan, 2006), but has recently received independent confirmation in a study of personal experiences with the police conducted in London, which concluded that "positive contacts do contain the potential to improve aspects of trust and confidence" (Bradford, Jackson & Stanko, 2009).

Recently Mazerolle, Bennett, Antrobus & Tyler (2012) tested the argument that the police can build legitimacy by procedural justice during a personal encounter in which they impose themselves upon members of the public to regulate behavior. They found that when police officers treated people fairly during a stop for a breath test they build legitimacy that extended into broader views about the police (Mazerolle, Bennett, Antrobus & Tyler, 2012).

General evaluations of the procedural justice of the police also influence people's judgments about the legitimacy of the police (Sunshine & Tyler, 2003; Tyler & Fagan, 2008).

Findings indicate that procedural justice is a key antecedent of legitimacy. If the police are evaluated as exercising their authority fairly, they are viewed as more legitimate. When authorities are viewed as procedurally unjust, their legitimacy is undermined, leading to support for disobedience and resistance (Fischer, Harb, Al-Sarraf & Nashabe, 2008).

What elements of procedures shape the judgments that people make about their fairness?

Studies suggest that members of the public have complex models of procedural justice, often considering eight or more distinct justice issues when deciding how fair they think a legal procedure is. Four issues are typically found to be important.

First, people want to participate in decisions about the resolution of problems or the application of rules. When dealing with authorities this typically means that people want to have an opportunity to explain their situation or tell their side of the story before decisions are made. This opportunity to make arguments and present evidence should occur before the police or judges make decisions about what to do. People are interested in having an opportunity to tell their story, i.e. they want to have a voice.

Second, people react to evidence that the authorities with whom they are dealing are neutral. This requires an explanation for the process and accountability in terms of the rules used to make decisions. Neutrality involves authorities making decisions based upon consistently applied legal principles and the facts of the case, not personal opinions and biases. Transparency or openness about what the rules and procedures are and how decisions are being made facilitates the belief that decision making procedures are neutral when it reveals that decisions are being made in rule based and unbiased ways. If, for example, the police have a policy of stops to search cars for guns, they explain to the people they stop what that policy is and the

reasons the police have adopted it. When judges apply the law and make decisions, they explain what laws are being used and how they apply.

Third, people want to have their status as human beings and members of the political community acknowledged. Since quality of treatment is a statement about status people are sensitive to whether they are treated with dignity and politeness, and to whether their rights as members of the community are respected. The issue of interpersonal treatment consistently emerges as a key factor in reactions to dealings with legal authorities. People believe that they are entitled to treatment with respect and react very negatively to dismissive or demeaning interpersonal treatment.

Finally, people focus on cues that communicate information about the intentions and character of the legal authorities with whom they are dealing. This involves inferences of integrity, trustworthiness and good faith. People react favorably to the judgment that the authorities with whom they are interacting are benevolent and caring, and are sincerely trying to do what is best for the people with whom they are dealing. Authorities communicate this type of concern when they listen to people's accounts and explain or justify their actions in ways that show an awareness of and sensitivity to people's needs and concerns.

In discussions about whether or not to accept a directive from a legal authority each of these concerns is typically more important in decisions than are assessments of the fairness or favorability of the decision itself. For example, in contrast to the general ineffectiveness of coercion McCluskey finds that when the police use procedures that are fair, compliance increases substantially. He identifies three distinct aspects of procedural justice—ethicality, information seeking, and decision making—and shows that each independently contributes to the general

increase in initial compliance that results from procedural justice. McCluskey (2003) describes people as “seekers of justice” (173).

Of particular importance is the demonstration that these approaches are helpful in dealing with people involved in more serious crimes. It is also important to ask whether “hard core” criminals are sensitive to issues of procedural justice, as well as whether they engage in value-based behaviors. Tyler and Huo (2002) focused upon the respondents within their general population sample that were young, minority males. They then explored the basis of the reactions to personal experiences with legal authorities among the members of this group. Their results indicated that this group was as focused upon issues of procedural justice in making acceptance decisions as was the general minority population and, beyond that, people in general.

Tyler and Casper (Casper, Tyler, and Fisher 1988; Tyler, Casper, and Fisher 1989) analyzed the results of a panel study of defendants arrested for felonies, defendants who were generally young, minority, and male. They found that the evaluations of the procedural justice of the case disposition process made by these defendants had a strong influence upon their satisfaction with their experiences and was the primary factor in shaping their generalization from their personal experience to their overall views about the legitimacy of the law and the legal system.

Other studies similarly suggest that procedural justice plays an important role in shaping the attitudes and behaviors of “criminals.” This includes research showing that the procedural justice of prisons is related to inmate behavior (Bottoms 1999; Gray 2007; Sparks, Bottoms, and Hay 1996), that the justice of criminal procedures influence recidivism (for drug courts see Gottfredson, et al. 2007; McIvor 2009; for post-release meetings with prior offenders, see Papachristos, Meares, and Fagan 2009; Taxman, Soule, and Gelb 1999), that procedural justice



shapes the reactions of domestic violence suspects (Paternoster, et al. 1997), and that issues of quality of treatment by peers and authorities are central to the actions of the members of juveniles and the members of gangs (Bourgois 1996; Crawford 2009; Emler and Reicher 1995; Hinds 2007, 2009).

*Empiricism.* A second approach to changing how authorities operate is more widely disseminating information suggesting that instrumental models do not work well; and evidence that other approaches work more effectively. Such an effort directly addresses the widespread overbelief in the value of instrumental approaches.

An effort of this type is consistent with the general effort in government to emphasize evidence-based policy. Across a wide variety of areas there have been efforts to identify policies and practices that are known to be effective. Any serious effort to base law and legal policies on evidence would lead to less emphasis upon instrumental approaches.

*Minimizing the impact of illusions.* Several approaches can be used in combating the illusions outlined. A general approach is education, since research associates education with tolerance for uncertainty and ambiguity; open-mindedness and the acceptance of deliberation and authority sharing. People higher on tolerance for ambiguity and uncertainty are better able to accept that there may be multiple valid perspectives on problems. Those who accept spreading authority within groups are less likely to feel that one person should control resources and decisions. They are more likely to believe in collective decision making. Higher education is associated with lower levels of authoritarianism, which diminishes the belief that the best way to solve problems is to have “strong leaders”.

People who have democratic experience are also more likely to accept sharing power and deliberating. Hence, the suggestion that local governance may be important in building

legitimacy is supported. Studies show that support for democratic norms is associated with tolerance for diverse opinions and willingness to support free speech and discussion of controversial issues. As an example, people who are more supportive of the norms of democracy support tolerance for political participation by disliked groups (Sullivan, Piereson & Marcus, 1982).

### *Conclusion*

Legitimacy is a desirable basis for the maintenance of social order. However, it is difficult to create and maintain systems of law based upon legitimacy. This review considers why this is true and what can be done to build legitimacy based legal systems.

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