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Procedural justice, trust and institutional legitimacy

Article (Accepted version)
(Refereed)

Original citation:

Hough, Mike and Jackson, Jonathan and Bradford, Ben and Myhill, Andy and Quinton, Paul (2010) *Procedural justice, trust and institutional legitimacy*. [Policing: a journal of policy and practice](#), 4 (3). pp. 203-210.

DOI: [10.1093/police/paq027](https://doi.org/10.1093/police/paq027)

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Available in LSE Research Online: September 2012

This is a pre-copy-editing, author-produced PDF of an article accepted for publication in *Policing: a journal of policy and practice* following peer review. The definitive publisher-authenticated version Hough, Mike and Jackson, Jonathan and Bradford, Ben and Myhill, Andy and Quinton, Paul (2010) *Procedural justice, trust and institutional legitimacy*. *Policing: a journal of policy and practice*, 4 (3). pp. 203-210 is available online at: <http://dx.doi.org/10.1093/police/paq027>.

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Title: Procedural Justice, Trust and Institutional Legitimacy

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Running Head: Procedural Justice, Trust and Institutional Legitimacy

In press at: *Policing: A Journal of Policy and Practice*

Procedural Justice, Trust and Institutional Legitimacy

Abstract

This paper summarising ‘procedural justice’ approaches to policing, contrasting these to the more politically dominant discourse about policing as crime control. It argues that public trust in policing is needed partly because this may result in public cooperation with justice, but more importantly because public trust in justice builds institutional legitimacy and thus public compliance with the law, and commitment to, the rule of law. Some recent survey findings are presented in support of this perspective.

Key words: procedural justice; police legitimacy; compliance; trust in justice

Ideas ebb and flow. In the 1970s and 1980s, both police leaders and academics routinely appealed to concepts of policing by consent and police legitimacy (cf Reiner, 1990). In the Britain of the 1990s these ideas were submerged under a wave of crude managerialism from which we are only now emerging (Hough, 2007). The last five years have seen a resurgence of interest in ensuring that the public find the police trustworthy and that police authority and institutional legitimacy is strengthened as a result.

This paper analyses key concepts in ‘procedural justice theory,’ which we hope will prove useful in thinking about stimulating public commitment to the rule of law. We have included some preliminary analysis of a survey conducted for the National Policing Improvement Agency, which provides empirical support in a UK setting for the ideas that we present.

Procedural justice theory

Penal and criminal policy has always reflected tensions between simple – or even simplistic – models of crime control and ones that have more texture and depth. The key features of the simple ‘crime control’ models are that:

- people are rational-economic calculators in deciding whether to break the law;
- deterrent threat is the main weapon in the armoury of criminal justice;
- offenders – and thus crime rates – are responsive primarily to the risk of punishment, which can vary on dimensions of certainty, severity and celerity;
- increasing the severity of sentencing, and extending the reach of enforcement strategies, are therefore seen as sensible responses to crime; and,
- offender rights tend to be seen as a constraint on effective crime control.

More subtle models of crime control recognise that formal criminal justice is only one of many systems of social control, most of which have a significant normative dimension. Criminology has given insufficient attention to questions about why people comply with the law, and too much attention to questions about why people break the law (cf Bottoms, 2002). The imbalance is important, because questions about reasons for law-breaking tend – not inevitably but because of the political climate in which policy is developed – to yield answers framed within the boundaries of simple crime control models. They tend to imply approaches to crime control that are designed to secure *instrumental compliance* – that is, where people’s reason for law-breaking are based on self-interested calculation.

Questions about compliance, by contrast, yield answers that recognise the interplay between formal and informal systems of social control, and in particular the normative dimensions in people’s orientation to the law. Normative compliance with the law occurs when people feel a moral or ethical obligation or commitment to do so.

Concerned with people’s compliance with institutional authority, procedural justice theories propose specific relationships between:

- the treatment people receive at the hand of the police and justice officials;
- the resultant trust that people have in institutions of justice;
- the legitimacy people confer, as a consequence of this trust, on institutions of justice;
- the authority that these institutions can then command when they are regarded as legitimate; and,
- people’s consequent preparedness to obey the police, comply with the law and cooperate with justice.

Legitimacy is a central concept in procedural justice theory. There are two uses of the term. Political philosophers often talk of political systems as achieving legitimacy when they meet various agreed objective criteria. Think, for example, of the presence of a democratic system of election, adherence by both rulers and the governed to the rule of law and the absence of

endemic corruption. Experts can, for instance, judge the Zimbabwean justice system to lack legitimacy, since by any objective standard it is corrupt and lacks public accountability. Assessments of this sort also involve subjective judgements, of course, about the nature of the ‘good or just society.’

But there is a separate set of questions about the ability of a criminal justice system to command legitimacy in the eyes of the public - whether the *policed* see the *police* as legitimate. These questions are open and empirical. Leaving aside whether that system actually meets any given set of objective (or ethical/normative) criteria, they turn our attention to surveys and qualitative methods of research, which give us insight into public attitudes, values, behaviours and beliefs.

Perceived legitimacy exists when the policed regard the authorities as having earned an entitlement to command, creating in themselves an obligation to obey. If people willingly offer their obedience to systems of authority that command legitimacy, questions about the ‘drivers’ of legitimacy become of central policy importance. Intriguingly, it is possible to have a system of governance that commands high levels of perceived legitimacy from the governed whilst also, paradoxically, failing to meet the criteria of legitimacy that political philosophers would generally accept. Examples are to be found in many totalitarian and revolutionary regimes in their early phases.

There is a growing body of – largely North American – research evidence in support of procedural justice theories (cf Tyler and Huo, 2002; Tyler, 2003; Tyler, 2007).). Contrasting instrumental and normative models of compliance, Tyler argues that normative compliance is economically more viable, and is more stable over time, than instrumental compliance, which – in the US context at least – carries a growingly unaffordable social and fiscal cost. (The case for such an approach will be strengthened, of course, as the need to reduce public expenditure becomes more pressing over the years ahead.)

On the basis of various surveys of the public, Tyler has demonstrated that public perceptions of the *fairness* of the justice system in the United States are more significant in shaping its legitimacy than perceptions that it is *effective*. An important distinction here is between a sense of justice based on process and one based on outcome. Tyler’s findings suggest that procedural justice – that is, fair and respectful treatment that ‘follows the rules’ – is more important to people than obtaining outcomes that they regard either as fair or favourable to themselves. In other words, in encounters with the police it is the quality of treatment received that is more important than the objective outcome.

Tyler’s main focus has been on the interactions between officials and the public, and the ways that the behaviour of officials builds or erode institutional legitimacy. But there are other, more complex, dimensions to legitimacy. As Beetham (1991) has argued, people confer legitimacy on institutions not simply because the latter adhere to standards of good behaviour, but because they regard the institutions as representing particular normative and ethical frameworks. Conferring legitimacy on an institution is also therefore an act based on the expression of shared values, or of ‘moral alignment.’ Institutional legitimacy flows not simply from factors such as its procedural fairness but is also based in public perceptions that police and policed share broadly similar moral positions.

This is not to say that to be considered legitimate police must enforce laws that all citizens agree with. Rather, police must demonstrate ‘moral authority,’ embodying a shared sense of right and wrong. (This does not require them to be moralists, or to demonstrate moral superiority, but it requires them to negotiate order in a way that maximises consent.) To Beetham, this sense of moral alignment is central – a necessary component of legitimate authority. By extension, according to the procedural justice model the sense of a shared moral

position is communicated to citizens by the police through the quality of their behaviour in specific interactions, and in particular through their procedural fairness – or lack of it.

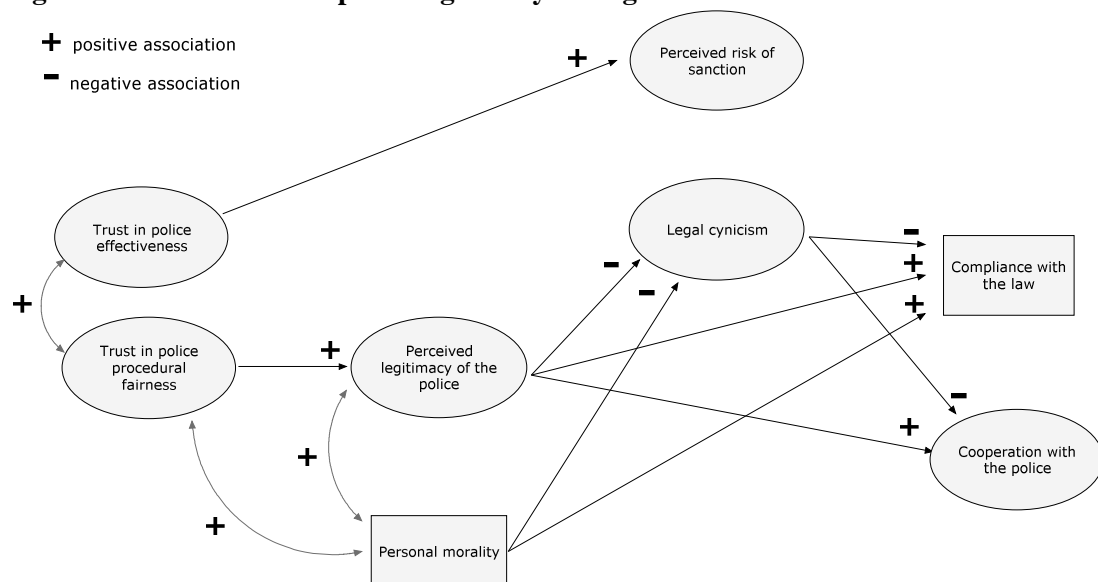
According to Tyler’s process-based policing model (Sunshine & Tyler, 2003), legitimacy then generates compliance with the law, first because people grant society (and its justice system) the right to dictate appropriate ways to behave: while we may disagree with some of these laws, we nevertheless obey them because we think complying with the authority that enacted them is the right thing to do. And second, if individuals see the police as lacking ‘moral fibre’ – most importantly by behaving in manifestly unfair ways – then can make the public cynical about the law. According to Sampson & Bartusch (1998: 786) legal cynicism is the sense that ‘...laws or rules are not considered binding in the existential, present lives of respondents’, and the ‘...ratification of acting in ways that are “outside” of laws and social norms.’

The police are the most visible agent of social control and the most high-profile institution in a justice system that is empowered to define right and wrong behaviour. If the police abuse their powers and wield their authority in unfair ways, this can not only damage people’s sense of obligation to obey their directives (their authority in the normal sense of the word); it can also damage public perceptions of their moral authority and therefore the moral right of the law to dictate appropriate behaviour. Put another way, if the police are seen to act in ways outside of social norms – which dictate that such authorities should treat the people they serve with fairness and dignity – then this generates a powerful cynicism: ‘if the police can behave however they please, and ignore the rules, so can I.’

Testing procedural justice theory in the UK

The National Policing Improvement Agency recently fielded core questions on public trust and police legitimacy in a representative sample-survey of England and Wales. The survey allows us to test what relationships exist between measures of public trust in the police, measures of perceived legitimacy and people’s self-reported compliance with the law and cooperation with the police. Figure 1 summarises emerging findings. (These findings will be reported more fully in due course.)

Figure 1: Public trust and police legitimacy in England and Wales



First, consider the distinction between instrumental and normative compliance. The instrumental route to compliance is where people comply with the law because the police

present a powerful risk of sanction and punishment. By contrast, the normative route is where people comply with the law not out of fear of punishment but because they feel they ought to.

Here, the NPIA data are unequivocal: while trust in police effectiveness is an important predictor of people's sense of the risk of sanction, the perceived risk of sanction is not a significant factor in compliance with the law. Thus the NPIA data do not offer any support for the simple deterrence-based models of crime control outlined above. This suggests that deterrence is not the quickest route to securing compliance.

Second, trust in the police was an extremely powerful predictor of perceived legitimacy. The experience of procedural fairness fosters in people feelings of motive-based trust in (and shared group membership with) the authority concerned – that both it and they are 'on the same side.' The manner in which people – as members of social groups – are treated by those in authority communicates information to them about their status within those groups. When police provide individuals with appropriate status information (through fair procedures), they are more likely to feel a sense of obligation to the police and more likely to feel aligned with the ethical and moral framework they believe the police to embody. That is, they are more likely to perceive the police to be legitimate.

Third, police legitimacy is a powerful predictor of compliance, even holding constant personal morality. Importantly, a good deal of this statistical effect is mediated through legal cynicism. The ways in which the police wield their authority in part generates their perceived legitimacy, and if they treat people unfairly, legitimacy suffers and people become cynical about human nature and legal systems of justice. This then leads them to view certain laws and social norms as not personally binding.

Finally, public cooperation with the police was also strongly predicted by legal cynicism, perceived police legitimacy and personal morality. Such cooperation is for the police just as important an outcome of legitimacy as is the perceived obligation to obey and compliance with the law. Without the cooperation of the public policing in developed democracies would become essentially unworkable. Acts of cooperation may also serve to cement the relationship between police and public and promote the view that addressing crime is a collaborative process, and not just about delivering services.

Procedural justice beyond the English-speaking world

One criticism of procedural justice model is that it has been most often applied in English-speaking countries with common-law legal systems. Will it 'work' in other contexts, such as continental Europe, where legal systems and the position of the police within them, are often very different? Such questions are of particular relevance given the ever-increasing pluralism and mobility of the modern world. Will the methods implied by 'process-based' policing, and the ends they aim for, 'work' across, and within, diverse multi-cultural situations?

To answer these (and other) questions, we are currently mounting an empirical test of our own elaboration of procedural justice theory using the European Social Survey. This will involve interviews with around 40,000 European adults in 30 countries in the Autumn of 2010. We have designed a battery of questions, which will allow us to create scales measuring the various concepts in which we are interested. We shall then be able to assess whether the relationships which we posit between these concepts actually hold up in practice.

Round 5 of the ESS will give us measures of public trust in fairness, effectiveness and shared values for both the police and the courts. We expect these to predict public perceptions of police and court legitimacy to varying degrees. One of our key hypotheses is that across Europe, trust in effectiveness is a less powerful shaper of legitimacy than trust in fairness and shared values. We expect our measures of legitimacy to predict people's stated preparedness to comply with the law, and with their preparedness to cooperate with the police and courts.

Finally, and crucially, we hypothesise that perceived risks of punishment will only weakly predict public compliance and cooperation. As with our analysis of the NPIA data, we shall test the idea that instrumental strategies for securing compliance with the law, working largely through deterrent principles, may be less powerful than those which operate through normative mechanisms.

Variations between countries

Whilst we expect that the broad patterns of relationships between trust, perceived legitimacy and compliance will be consistent across Europe, we think it likely that perceptions of legitimacy will have different drivers (or predictors) in different countries. Without wishing to prejudge outcomes, some of the countries that have recently joined the European Community face serious problems of corruption, which may have highly unpredictable effects on perceptions of legitimacy. It is hard to see how uncontrolled corruption is compatible with legitimate authority – yet contained and low-level corruption that follows well-established informal rules may be tolerated or even appreciated by some sectors of the population (c.f. Tankebe, 2010).

We also expect to find that Nordic countries, with their generally cohesive communities and high levels of trust in political institutions, will also have high levels of trust in institutions of justice; we expect this to be reflected in institutions of justice that command high levels of legitimacy - which would go some way to explaining the relatively low levels of crime in these countries.

We suspect that Britain could prove something of an outlier, given the extent to which the ‘Bobby’ has historically been taken to be a symbol of particularly British values – of decency and of fair play, combined with pragmatism and the spirit of compromise.¹ It could be that the British police are still living off the income from this inherited cultural capital, and that our European neighbours, such as the French, have much lower expectations of those who they regard as state functionaries. On the other hand, our findings may show that the relationships between trust, legitimacy and compliance are actually rather stable across cultures and jurisdictions, at least within Europe and North America.

The quality of evidence from the ESS and similar surveys

Snapshot surveys of the general public can demonstrate the presence or absence of statistical association between different sets of attitudes and beliefs. This is not the same as demonstrating the presence of *causal* relationships. It will always be hard to assemble absolutely clinching evidence that fair and respectful treatment of the public builds legitimacy and thus consent to the rule of law. However, there may be scope for testing a range of procedural justice hypotheses more rigorously (for example see Paternoster *et al.* 1997). In the meantime, we are hopeful that a research study such as ours that can exploit the natural cultural and legal variations across Europe will create genuinely new insights into the different ways in which institutional legitimacy is constructed and maintained (or lost) in industrialised, late-modern countries. Equally, our hypotheses may be proved to be plain wrong.

Assuming, optimistically, that we are proved to be more right than wrong, it will always be possible to build alternative explanations for our findings that are outside of the procedural justice framework elaborated in this paper. However, we envisage this research as a process of scientific hypothesis testing and theory building. That is:

- we have elaborated a theory about processes of social control;
- we have derived a set of hypotheses derived from our theory; and,
- we have designed a cross-cultural test of these hypotheses.

¹ We express no opinion as to whether this is, or was, delusional ethnocentrism.

We think that if our hypotheses survive empirical, this process confers more credibility on them than alternative explanations designed after the event to fit the pattern of findings that we observe.

Is this body of work important for policing and penal policy?

The growing visibility of procedural justice theory within criminology strikes us as important, in particular because of its potential impact on policy. It is arguable whether the marked tendency towards penal populism amongst UK and US politicians is part of a universal trend amongst developed countries. The pessimistic view (which we share) is that structural features of late-modernity place many European countries at risk of the same processes as we have seen in this country: the emergence of an increasingly crude discourse about crime control which emphasises:

- ‘common sense’ strategies for securing instrumental (or situational²) compliance from ‘criminals’;
- sharp distinctions between ‘criminals’ and the ‘law abiding majority’
- greater responsiveness to the wishes of the ‘law-abiding majority; and,
- greater responsiveness to the needs of victims.

This discourse tends to characterise rights as a ‘zero sum game’ in which rights of offenders are in tension with those of victims and the ‘law-abiding majority. Being ‘on the side of the victim’ within this discourse equates with a preparedness to shave away the rights of suspects and defendants. Procedural justice theory suggests that this is likely to be counterproductive: if the justice system ignores the rights and entitlements of ‘the policed’, this creates the potential for a growing deficit in legitimacy which shows itself in reduced compliance with the law. The policing of ethnic minority groups in the UK in the 1960s, 70s and 80s may provide one example of how police practice works alongside other social and cultural forces to foster among some people from those communities exactly the sense of legal cynicism outlined above.

In an over-simplified discourse about crime control – as we increasingly see in the UK – the rationale for improving ‘confidence in justice’ is that greater consumer satisfaction on the part of the ‘law-abiding majority’ will secure their cooperation with the authorities – through reporting of crimes, and acting as witnesses etc. – thus enhancing the deterrent effectiveness of the system. A procedural justice perspective would direct attention to ‘confidence building’ amongst those parts of the population whose commitment to the rule of law is more tentative, the primary purpose being to secure compliance first, and cooperation second. It would also allude to the fact that the ‘law-abiding majority’ also commit crime, and that in any case they too care more about fair procedure than effectiveness narrowly defined. All available evidence suggests that fostering trust and legitimacy via fair and decent treatment would pay dividends across the population.

In making this case to senior police officers, we have often received the reaction that these distinctions are of minor importance, in that we are all ‘on the same page’ in wanting to improve the professionalism with which the police handle the public, and that treating people with fairness and respect is a shared goal. However, there is an important difference, which is worth emphasising. The government rationale for improving confidence is based on *reciprocity*, where responsive policing buys public cooperation, but offers no guidance about the treatment of law-breakers and those at risk of law-breaking. The procedural justice rationale by contract focusses attention precisely on these groups whose compliance with the law is problematic, and actually provides a rationale for explaining why the criminal justice

² It makes sense to view incapacitative or preventative sentencing as a way of securing situational rather than instrumental compliance.

system should actually treat *justice* as the central product of the system. It provides a vocabulary for explaining why fairness and rights – for everyone – are important.

We have suggested in this paper that the narrow instrumentalism of ‘crime fighting’ discourse supports and is supported by the managerialism that has characterised the last fifteen years of UK government policy. New Public Management demands simplicity in thinking about policing, and simple thinking about policing makes NPM appear appropriate for policing. Of course, the two may not be so tightly connected as we imagine. It may be that the principles of procedural justice find favour with politicians, but that NPM is still seen as the means of bringing about the necessary changes. Our own view is that NPM is in important ways incompatible with procedural justice approaches to policing that are sensitive to normative and moral issues: to treat people with fairness and respect, police officers need genuinely to value fair treatment and genuinely to respect those who they police. Drilling them to adopt the skin-deep courtesy that is encountered at supermarket checkouts will always be, in our view, a ‘second best’. Of course this raises perennial issues about the balance between leadership and management control in policing, whose resolution lies beyond the scope of this paper.

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