



Procedurally just cooperation: Explaining support for due process reforms in policing



Justin T. Pickett ^{a,*}, Stephanie Bontrager Ryon ^b

^a School of Criminal Justice, University at Albany, SUNY, 135 Western Avenue, Albany, NY, 12222, United States

^b School of Public Affairs, University of Colorado, Colorado Springs, United States

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ABSTRACT

Purpose: We explore criminal justice workers' (CJW) support for due process reforms in policing. We build on and integrate four related literatures—scholarship analyzing 1) process-based regulation, 2) the generality of procedural justice, 3) the bilateral and dialogical nature of legitimacy, and 4) the tensions between the due process versus crime control models of criminal justice. We hypothesize that when citizens exercise procedural justice in their decisions about how to respond to legal authorities' inquiries and directives it enhances "rights legitimacy" and increases CJW's support for the due process model of criminal justice.

Methods: We analyze data from a nationwide sample ($N = 579$) of CJW. We examine whether CJW's perceptions that citizens are fair and respectful toward police are associated with their support for due process reforms.

Results: Procedurally just cooperation predicts support for due process reforms among police officers and other CJW, both before and after a highly publicized negative police-citizen encounter (the police killing of Michael Brown), and regardless of respondents' race, gender or career length.

Conclusions: The findings support the generality of the process-based model and the bilateral and dialogical nature of legitimacy.

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Just as with achieving compliance by the public, so with the police: we need to change what they want to do.—Schulhofer et al. (2011, p. 357).

Policing in America is at a crossroads (Schulhofer et al., 2011; Weitzer, 2015). Recent years have borne witness to an intense and ongoing debate about the appropriate level of police power and discretion, as well as criticism of questionable police policies and practices (Silver & Pickett, 2015). Citizens, pundits and scholars have voiced concerns about racial/ethnic bias resulting both from stop and frisk policies (Meares, 2014) and police enforcement of immigration law through Section 287(g) "Memorandum of Understanding" agreements, the Secure Communities program, and the "papers, please" provision in Arizona's SB 1070 (Pickett, 2016). Against this backdrop, several highly publicized incidents of police use of deadly force against citizens have fostered an unprecedented level of popular outrage and a deepening division between police officers and members of the public (Weitzer, 2015). There is a growing demand for meaningful reforms designed to reduce police bias and misconduct and, more broadly, to improve police-citizen relations (Schulhofer et al., 2011).

A number of potentially promising policing reforms have been identified, including civilian review boards, early intervention systems, sensitivity training and racial diversification (President's Task Force on 21st Century Policing, 2015). The principal barrier to successfully implementing and sustaining such reforms, however, is resistance and resentment among police officers and other criminal justice workers (CJW) (Armocost, 2004; Chanin, 2015). Police officers are "skeptical about programs invented by civilians ... [and] are particularly hostile to programs that threaten to involve civilians in defining their work or evaluating their performance" (Skogan, 2008, p. 26). Likewise, police officers view any effort to impose stricter limits on the use of force or implement early intervention systems for detecting misconduct as "an intrusion on their discretion" and an attempt simply "to catch and discipline officers" (Walker, 2012, pp. 82–3). Perhaps most importantly, even when such policies are fully implemented, their capacity to prevent police misconduct solely through the deterrent effect of sanction threats is limited (Bayley, 1995; Schulhofer et al., 2011; Tyler, Callahan, & Frost, 2007).

The requisite for any successful reform of American policing, then, is positive motivation on the part of the police to change (Schulhofer et al., 2011; Tyler, 2011). This also includes other CJW who might report, investigate, charge, or try in court police officers who engage in misconduct, or who may exert an influence on legal or police culture. This positive motivation is not spontaneous, however, because accountability

* Corresponding author at: School of Criminal Justice, University at Albany, SUNY, 135 Western Avenue, Albany, NY 12222, United States.
E-mail address: jpickett@albany.edu (J.T. Pickett).

and misconduct reforms all entail further expanding what Packer (1968) terms the “due process model” over against the “crime control model” of criminal justice. Police officers, and other CJW, tend to be strong proponents of the crime control model (Armacost, 2004; Skolnick, 2011). They signed up as public servants tasked with fighting crime, and they want to do that job (Skogan, 2008). The due process model often seems foreign and dubious to them (Bayley, 1995; Goldschmidt, 2008; Skolnick & Fyfe, 1993), because it consists of a set of externally imposed obstacles to efficient crime control (Schulhofer et al., 2011; Skolnick, 2011). An important question for reformers, then, is how to increase the legitimacy of the due process model in the eyes of the police and other CJW?

The contribution of the current paper is to analyze one potentially vital but overlooked source of legitimation for the due process model: fair and respectful treatment of police (and other CJW) by citizens. Prior research on process-based regulation (Tyler, 1990, 2011) has shown that when authorities exercise their authority using procedurally just actions it increases their “audience legitimacy,” and thus their ability to motivate subordinates’ compliance and willing cooperation (Mazerolle, Antrobus, Bennett, & Tyler, 2013; Sunshine & Tyler, 2003; Tyler & Jackson, 2014). A handful of recent studies have also found that when authorities experience fair treatment by their supervisors, it increases their own perceived “power-holder legitimacy,” and improves their attitudes and behaviors toward citizens (Bradford & Quinton, 2014; Haas, Van Craen, Skogan, & Fleitas, 2015; Tankebe, 2014; Wolfe & Piquero, 2011). The explanation for these findings is that decision-making based on a “joint commitment to using fair procedures” (Tyler, 2011, p. 1) positively impacts individuals’ group identification, sense of social inclusion, values and attitudes (Bradford, Murphy & Jackson, 2014; Tyler & Jackson, 2014). Importantly, the positive effects of procedural justice are neither limited to legal settings, nor to decision-making by authorities (Lind, Tyler, & Huo, 1997; Trinkner & Cohn, 2014). Rather, they reflect a “general human response to social decision-making procedures” (Lind & Tyler, 1988, p.129).

Legal authorities in democratic societies are “servants of the people”; they are accountable to the rule of law, which derives its power “from below, not from above” (Skolnick, 2011, p. 18). Further, legitimacy is a property of power arrangements, not just of authority, and is bilateral and dialogical in nature (Bottoms & Tankebe, 2012, 2013). “Legitimacy signifies that rulers and ruled are responsible to each other, before each other”; it necessitates a “relationship of reciprocity” founded on mutually agreed upon values, such as the principle that all persons deserve to be treated fairly and respectfully (Coicaud, 2002, p. 39). Building on this theoretical scholarship and the literature on process-based regulation, we hypothesize that the legitimacy of procedural law – or what we term “rights legitimacy” – will be enhanced when citizens respond to authorities’ inquiries and directives in a procedurally just manner. We test this hypothesis using national survey data that permit us to estimate separate models for police officers and other CJW, while controlling for instrumental concerns and other relevant factors.

1. Competing models of criminal justice and “rights legitimacy”

Legitimacy, Tyler (2011, p. 34) explains, is “a property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority”; it entails the view that a law or power arrangement is “appropriate, proper, and just” (Tyler, 2006, p. 376). Power is seen as legitimate when it is exercised in accordance with normatively valid rules (i.e., rules that conform to collective values), serves a common interest, and is affirmed by the expressed consent of subordinates (Beetham, 2013; Coicaud, 2002). Legitimacy is not rigid, however, and can be lost if power-holders fail to respect the norms and values that validate their power or if they breach the limits placed on them by prevailing rules (Beetham, 2013, pp. 35–36). Legitimacy is thus best conceptualized as a “perpetual discussion” (Bottoms and Tankebe, 2012, p. 129) between authorities and subordinates about whether their

cooperative relationship satisfies the reciprocal expectations set forth by their shared social values (Coicaud, 2002).

In democratic societies, the relationship between legal authorities and citizens is one of mutual subordination (Bayley, 2006). The public, through its legislative and judicial representatives (Shapiro, 2011), decides the law (both substantive and procedural) and represents the source of its authority (Beetham, 2013; Skolnick, 2011).¹ Citizens are subordinates of legal authorities who enforce substantive law; legal authorities are accountable under procedural law, which constrains their exercise of power (Bayley, 2006; Skolnick, 2011). Procedural law, by conferring due process rights, grants suspects the power, should they choose, not just to force the criminal justice process to become an adversarial struggle between independent actors, but also to transform it into one with more evenly matched participants (Packer, 1968).

The extant literature analyzing criminal justice legitimacy has focused on “audience legitimacy” and “power-holder legitimacy” (Bottoms & Tankebe, 2012, 2013). Both pertain primarily to substantive criminal law. Audience legitimacy is the belief among citizens in the moral persuasiveness of substantive law and the right of legal authorities to uphold that law (Tyler, 1990, 2011). Power-holder legitimacy is the belief among legal authorities that their power to enforce substantive law is morally justified (Bottoms & Tankebe, 2012, 2013). In democratic societies, however, there is necessarily a third type of legitimacy that encompasses a belief in the moral rightness of procedural law, and it should directly influence support for the due process versus crime control model of criminal justice.² This “rights legitimacy,” as we term it here, involves the belief that authorities have a moral obligation to voluntarily obey, not just observe, procedural law and to proactively protect, not just take into account, legal subordinates’ due process rights. Stated differently, rights legitimacy entails a belief in the moral rightness of protecting citizens from any unjustified or excessive exercise of legal power by authorities.

Rights legitimacy is important for explaining legal authorities’ orientation toward the due process versus crime control model of criminal justice (Skolnick, 2011). The due process model places greater moral weight on procedural than substantive law. At the heart of the model is a set of *anti*-authoritarian values that prioritize citizens’ rights to liberty, privacy, equality, and fair treatment (Packer, 1968). The model gives foremost importance to controlling the coercive power of the state and protecting the “dignity and inviolability of the individual,” even at a cost to the efficiency of law enforcement (Packer, 1968: 179). When rights legitimacy is high, legal authorities should be more likely to view themselves as representatives of community values (see Jackson & Sunshine, 2007), rather than just crime fighters, and their support for the due process model should be higher (Skolnick, 2011).

The crime control model, by contrast, is underpinned by a value system that gives greater moral weight to substantive than procedural law; it emphasizes that “the repression of criminal conduct is by far the most important function to be performed by the criminal process” (Packer, 1968: 158). As a result, the model stresses the need for efficiency, speed, discretion and informality in police investigations, which it depicts as the most important and reliable stage of the criminal justice process (Packer, 1968). The model’s policy implications for policing are six-fold: 1) criminal justice operations should be based on a presumption of guilt; 2) all forms of electronic surveillance should be permitted; 3) probable cause should not be required for search, seizure, or arrest; 4) interrogations should occur without legal counsel or family members present; 5) no hard rules should be placed on police interrogators’ behaviors; and 6) all evidence should be admissible (Packer, 1968, pp. 160–199).

Rights legitimacy is often low among police officers (Bayley, 1995). They “draw a moral distinction between criminal law and criminal procedure” (Skolnick, 2011, p. 176), such that in their view, “the procedural rule ... [is] not a morally persuasive condition” (p. 204). This, in turn, along with the cultural norms and job pressures associated with policing, fosters a strong preference for the crime control model among

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