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CRIMINOLOGY

BEYOND PROCEDURAL JUSTICE: A DIALOGIC APPROACH TO LEGITIMACY IN CRIMINAL JUSTICE[*]

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The question of legitimacy has become an increasingly important topic in criminological analysis in recent years, especially in relation to policing and to prisons. There is substantial empirical evidence to show the importance of legitimacy in achieving law-abiding behavior and cooperation from citizens and prisoners, especially through what has been described as procedural justice *(that is, quality of decisionmaking procedures and fairness in the way citizens are personally treated by law enforcement officials). Yet the dual and interactive character of legitimacy, which necessarily involves both power-holders and audiences, has been largely neglected. This situation has arisen because criminologists have not fully explored the political science literature on legitimacy; hence adequate theorization has lagged behind empirical evidence. The principal aim of this Article is therefore theoretical: we aim to advance the conceptual understanding of legitimacy in the contexts of policing and prisons, drawing on insights from wider social science literatures, but applying them to criminal justice contexts. A central contention is that*

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legitimacy is dialogic*, involving claims to legitimacy by power-holders and responses by audiences.   We conclude by exploring some broad implications of our analysis for future empirical studies of legitimacy in criminal justice contexts.*

I. INTRODUCTION

The topic of legitimacy is of great theoretical and practical importance within the field of criminal justice, but it remains under-studied by criminologists and socio-legal scholars.   Unquestionably the dominant theoretical approach to legitimacy within these disciplines is that of "procedural justice," based especially on the work of Tom Tyler. At the time when he wrote his path-breaking book *Why People Obey the Law*, Tyler regarded himself as a psychologist, not a criminologist.[1] Nevertheless, the book has in significant ways transformed criminology, and for that the discipline owes him a huge debt of gratitude.[2]

Tyler began his seminal work by contrasting *instrumental* and *normative* modes of obedience to law, and he then subdivided the normative mode into "personal morality" (that is, people's general set of beliefs as to how they should act) and "legitimacy" (that is, people's perception as to whether law enforcement officials rightly have authority over them). Surveys were conducted of the general population, asking questions about their recent contacts with the police or the courts, their reaction to such contacts, and their subsequent behavior. To quote the jacket of his book, Tyler's principal conclusion was that "people comply with the law not so much because they fear punishment as because they feel that legal authorities are legitimate and that their actions are generally fair."[3]   Thus, his empirical results led Tyler to prioritize normative compliance over instrumental compliance, and, within normative compliance, to emphasize legitimacy. The final phrase of the jacket summary (above) also captured a further important dimension of the results: it was the *perceived procedural fairness* of law enforcement authorities, rather than the *favorability* or the *perceived fairness of the outcome* of the citizen's encounter with them, that was particularly important in shaping

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[1] TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

[2] There were important references to legitimacy in some criminological studies before 1990. *See, e.g.*, ROBERT REINER, THE POLITICS OF THE POLICE pt. 1 (1st ed. 1985) (recounting the history of policing in Britain); BERT USEEM & PETER KIMBALL, STATES OF SIEGE: U.S. PRISON RIOTS 1971–1986, at 218–31 (1989) (analyzing prison riots in the United States). But legitimacy was not the central focus of these studies, and they did not have the impact on the discipline as a whole that Tyler's text achieved.

[3] TYLER, *supra* note 1, back cover.

respondents' subsequent compliance.

Tom Tyler has followed up this initial research with an impressive series of further survey-based studies, including some that have used a panel design rather than a cross-sectional approach. These studies have amplified but also confirmed the original results.[4] Together, this corpus of work is rightly regarded as the most important criminological scholarship on legitimacy currently available. Tyler has summarized his main theses in a useful diagram, reproduced here as Figure 1.[5] In this diagram, the concept of procedural justice is divided into two components. These are, first, whether citizens are treated fairly when law enforcement authorities make decisions about them (for example, by being allowed to have their say, without interruption or harassment, prior to a decision being made: "quality of decisionmaking"); and secondly, whether law enforcement officers treat citizens with proper respect as human beings, each with his or her own needs for dignity, privacy, and so on ("quality of treatment"). Tyler contends that procedural fairness, if present, is more likely to lead to (1) immediate decision acceptance, and (2) an initial ascription of legitimacy to the law enforcement authority. In the longer term, he further argues that "to the degree that people do regard the police and courts as legitimate, they are more willing to accept the directives and decisions of the police and courts, and the likelihood of defiance, hostility, and resistance is diminished."[6]

Most of the empirical work of Tyler and his colleagues has been focused on the police and the courts, and it uses survey-based methodology. A second strand of criminological research into legitimacy has, by contrast, focused on the everyday internal life of prisons. This strand began with Sparks, Bottoms, and Hay's *Prisons and the Problem of Order*, a primarily ethnographic study of two English maximum security prisons with radically contrasting regimes. The authors deployed legitimacy as a central conceptual tool in analyzing what they describe as "the *perennial problem* of securing and maintaining order in prisons, rather than the *special problem* of the occasional complete or near-complete breakdown of order."[7]

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[4] *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

[5] Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

[6] *Id.* at 286.

[7] RICHARD SPARKS ET AL., PRISONS AND THE PROBLEM OF ORDER 2 (1996); *see also* Richard Sparks & Anthony Bottoms, *Legitimacy and Imprisonment Revisited: Some Notes on the Problem of Order Ten Years After*, *in* THE CULTURE OF PRISON VIOLENCE 91 (James

Figure 1
Tyler's Model of "Process-Based Regulation"
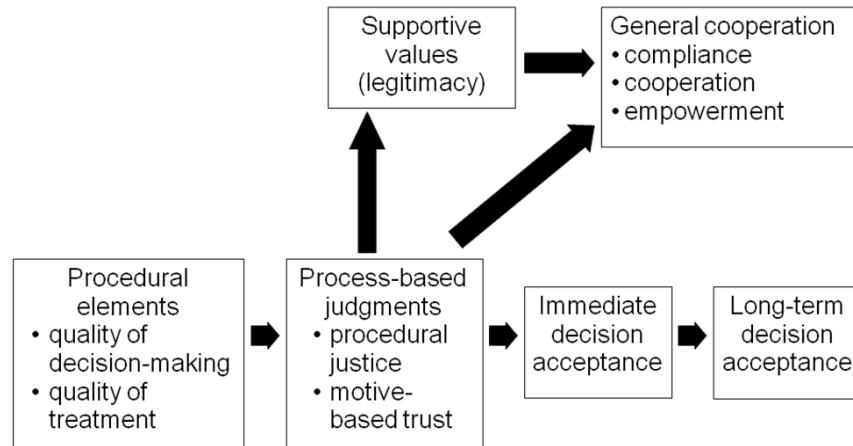
The key elements of the model are shown in the above figure. The focus is on two consequences of public feelings about law and legal authorities: variations in willingness to accept decisions and differences in the level of general cooperation. Each is linked to process-based judgments of procedural justice and motive-based trust. Those process-based judgments, in turn, flow from antecedent assessments of two procedural elements: quality of decisionmaking and the quality of treatment.[8]

Subsequent studies, which have significantly advanced our understanding of legitimacy in the prisons context, have been conducted by Alison Liebling and her colleagues in the Prisons Research Unit at Cambridge University, using a mixture of prison-based surveys and ethnography.[9] Despite the different methodological approach, these various studies have confirmed the importance of procedural justice as described by Tyler. They have also, however, introduced to the discussion some fresh elements, of which two are of special importance in the present context.

First, it has been shown that legal officials sometimes have to consider their legitimacy in relation to more than one audience and that these

M. Byrne et al. eds., 2008).

[8] TYLER, *supra* note 5, at 283–85.

[9] *See* ALISON LIEBLING, PRISONS AND THEIR MORAL PERFORMANCE (2004); BEN CREWE, THE PRISONER SOCIETY (2009).

audiences might have significantly different priorities.[10]   In the case of prisons, that is of course particularly true regarding the differing priorities of prisoners and the general public; but analogous problems arise for the police in the policing of any neighborhood where different groups have conflicting interests.

Secondly, prison researchers have also shown that, within the enclosed context of a custodial institution, perceived outcome fairness as well as procedural fairness can be of great importance to the achievement of staff legitimacy in the eyes of prisoners.[11]   This result arises especially because the outcomes of most incidents are widely known throughout the prison, a situation that is frequently not replicated in neighborhood community contexts.

Prison-based research on legitimacy has therefore begun to open up some aspects of legitimacy and criminal justice that go beyond the parameters of the work on procedural justice.   A similar widening of the terms of the debate may be found in the Russell Sage Foundation volume entitled *Legitimacy and Criminal Justice*, edited by Tom Tyler—although curiously, that volume is almost wholly silent about legitimacy in prisons.[12] Conceptually speaking, the most important essay in that volume is that of David Smith, in which a central argument is that "procedural justice [research] work, although powerful, is limited in scope," and that it is therefore necessary to take "a wider view of the issues."[13]

In our judgment, Smith is right to seek to broaden the debate in this way.   Yet it has to be said that neither the Russell Sage Foundation volume, nor the existing literature on legitimacy in prisons, takes full account of the rich tradition of theoretical discussions of legitimacy within the social sciences, especially in political science.   The most important purpose of this Article is therefore to offer a fuller account of how the concept of legitimacy might optimally be theorized within a criminal justice context, using these broader social science resources.

In pursuing this agenda, we take as our starting point the introductory chapter by Tyler and colleagues in the Russell Sage Foundation volume.[14]

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[10] Alison Liebling, *A 'Liberal Regime Within a Secure Perimeter'?: Dispersal Prisons and Penal Practice in the Late Twentieth Century*, *in* IDEOLOGY, CRIME AND CRIMINAL JUSTICE 97, 121–28 (Anthony Bottoms & Michael Tonry eds., 2002).

[11] SPARKS ET AL., *supra* note 7, at 303–11.

[12] LEGITIMACY AND CRIMINAL JUSTICE (Tom R. Tyler ed., 2007).

[13] David J. Smith, *The Foundations of Legitimacy*, *in* LEGITIMACY AND CRIMINAL JUSTICE, *supra* note 12, at 30, 31.

[14] Tom R. Tyler et al., *Legitimacy and Criminal Justice: International Perspectives*, *in* LEGITIMACY AND CRIMINAL JUSTICE, *supra* note 12, at 9.

That chapter begins by posing what are rightly described as some "larger conceptual questions" within which empirical studies of legitimacy must be conducted. The three larger questions identified are: (1) "the definition of legitimacy," (2) "the reasons legitimacy is important within a social system," and (3) "what factors create and sustain legitimacy, that is, what forms of social organization or what dynamics of authority are viewed by the members of particular social groups as being appropriate and hence legitimate the exercise of authority."[15]

In the Russell Sage Foundation symposium, these three vital questions are used to delineate and differentiate the principal sections of the book; we have chosen to follow a similar approach by adopting them as the titles of three of the sections of this Article. We also, however, include two other sections. One focuses on Max Weber's discussion of legitimacy, since this remains central to the field, although as will be seen we do not recommend a wholesale adoption of Weber's approach. In the concluding section, we shall consider—in a broad-brush manner—some implications of our theoretical analysis for future empirical studies of legitimacy in the field of criminal justice. We regard this as an important part of the Article, and it serves to emphasize that we are concerned not simply with conceptual clarification, but also with the further advancement of empirical research in the field of legitimacy and criminal justice.

II. DEFINING LEGITIMACY

Tyler et al. follow Zelditch in characterizing authority as legitimate when people "believe that the decisions made and rules enacted by that authority or institution are in some way 'right' or 'proper' and ought to be followed."[16]   This definition assumes that the concept of legitimacy principally focuses upon the reactions by citizens to the decisions and rules made by an authority. Other social scientists, however, have approached the issue in a slightly different way and have focused on the "right to rule," seen from the standpoint of both citizens and power-holders.[17]   These scholars therefore ask what is ultimately a more fundamental question: whether a power-holder is *justified in claiming the right to hold power* over other citizens (and thus to issue decisions and rules that are binding on

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[15] *Id.* at 10.

[16] *Id.*; Morris Zelditch, *Process of Legitimation: Recent Developments and New Directions*, 64 SOC. PSYCHOL. Q. 4 (2001); *see also* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

[17] LESLIE HOLMES, THE END OF COMMUNIST POWER 39 (1993); Joseph Rothschild, *Observations on Legitimacy in Contemporary Europe*, 92 POL. SCI. Q. 487, 491 (1977).

them). We believe that focusing on this more fundamental question is the right approach.

Among formal definitions of legitimacy within the right to rule tradition, the following concise statement by Jean-Marc Coicaud has, in our view, much to commend it: "Legitimacy is the recognition of the right to govern. In this regard, it tries to offer a solution to a fundamental political problem, which consists in justifying simultaneously political power and obedience."[18]   This definition has three important features.   First, it emphasizes the normative character of legitimacy; that is, legitimacy is to be found where there is a positive *recognition* by citizens of the power-holder's *moral right* to exercise that power.   Secondly, the definition explicitly incorporates the view that discussions of legitimacy must embrace both those who exercise political power and those who are expected to obey. Thus, legitimacy is seen as the "recognition of the right to govern" within a structured bilateral (or multilateral) relationship, and if successfully established it simultaneously justifies the actions of both the power-holder and the obedient subject.   Thirdly, and by implication, legitimacy within this definition is seen as necessarily *conditional* or *defeasible.*   For example, in a given context most citizens might at first gladly recognize a power-holder as having the right to rule. However, if in time it becomes clear that the power-holder is routinely using power to engage in corrupt practices, it is very likely that the public's recognition of his or her right to rule will be gradually withdrawn.

As well as formally defining legitimacy, we need to contrast it with some other cognate conditions. Joseph Raz has drawn attention to the fact that, when we use the concept of "legitimate authority," there is an intermingling of the notions of both "power" and "right."[19] In a compressed discussion which we shall slightly elaborate, Raz goes on to suggest that we can usefully distinguish three kinds of persons or bodies that hold effective power over others and issue orders to them: these are (1) "people or groups who exert naked power," (2) "de facto authorities," and (3) "legitimate authorities."[20]   According to Raz, the first group (exemplified by those cynically "terrorizing a population," or on a smaller scale by hostage-takers) do not claim any kind of *right* to rule, nor do they suggest to those under their power that they have any *moral obligation* to obey; rather, the power-holders simply hope and expect that they will secure an obedience

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[18] JEAN-MARC COICAUD, LEGITIMACY AND POLITICS 10 (David Ames Curtis trans., 2002) (citation omitted).

[19] JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 128 (2009).

[20] *Id.*

based on a combination of physical coercion (e.g., locking people up), fear, or a self-interested calculation of the consequences of resistance.[21] In short, this is a power relationship, pure and simple, with no element of right. The second group, those exercising de facto authority, are, according to Raz, very different. Those in this group are akin to the first group in being able to exercise effective power over citizens, but they differ in that, unlike the first group, they always *claim* legitimacy (in the sense of a right to rule). In Raz's account, it is precisely the fact that power-holders in this second group make *claims to legitimacy* that justifies us in describing them as *authorities* (that is, as those who are attempting to introduce some element of rightness in their exercise of power). They are, however, only de facto authorities, not legitimate authorities, because they have not secured from their audience a recognition of their right to rule. Finally, Raz's third group consists of legitimate authorities, who, like de facto authorities, claim legitimacy. The difference is that their claim is accepted, so they fulfill Coicaud's requirement of "a recognition of the right to govern."[22]

Of course, empirically speaking, this threefold typology will not always be easy to operationalize in any given setting, because the boundaries between the three groups will be, in real life, inevitably imprecise. Nevertheless, in our judgment the typology offers a very useful conceptual starting point for a social scientific analysis of legitimacy. We shall, however, later suggest that the typology requires some elaboration, because the category of de facto authority needs to be broken into two sub-groups.

III. MAX WEBER ON LEGITIMACY

The theorization of Max Weber has been and remains a central point of reference in the study of legitimacy.[23] However, since Weber's approach has both strengths and weaknesses, it is important to review his contribution carefully, highlighting in particular those features of his analysis that remain valuable for contemporary social scientists.

Weber famously argued that within the modern state (which he described as "a compulsory organization with a territorial basis") "the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it." Indeed, he went on, this claim "is as essential to [the state] as its character of compulsory jurisdiction and of continuous

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[21] *Id.*

[22] COICAUD, *supra* note 18.

[23] MAX WEBER, ECONOMY AND SOCIETY (1978).

operation."[24]   These bold observations remain valid today,[25] although of course in some empirical contexts a given state may have difficulty in making its claim credible.

Political scientists have sometimes failed to notice the full implications of these comments by Weber. This is because, naturally enough, when political scientists have studied legitimacy their work has focused principally upon those holding high-level political power. Yet, except in situations where it is thought necessary to deploy the army, the day-to-day use of legitimate force within any given state is normally reserved to law enforcement officials (the police, immigration officers, prison officials, etc.). Given this fact, and Weber's analysis, it follows that the study of the legitimacy of the work of law enforcement officials is of vital significance not only in a strictly criminal justice context, but also in a wider political context.

It is perhaps fair to say that Weber's principal concern, in his writings on legitimacy, is to explore the differences between the three different "pure types of legitimate domination" that he identified, namely those based on traditional, charismatic, and legal-rational grounds.[26] In this Article, we are not concerned with the details of Weber's threefold typology, but since this typology is focused on the concept of legitimate domination, it is important to clarify what he means by this term. "Domination" ("*Herrschaft*")[27] is

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[24] *Id.* at 56.

[25] It might be argued that this claim has now been falsified by two more recent social developments. First, in many countries certain law enforcement functions, such as the management of some prisons, have now been delegated to private companies. However, Weber's claim was not, as Smith asserts, that the state "has a monopoly of the legitimate use of force," Smith, *supra* note 13, at 36; rather, Weber stated that force is legitimate only if it is *permitted* or *prescribed* by the state. When the running of a prison is contracted out to a private company, the state continues to claim the right to determine under what circumstances the employees of that company may use legitimate force, just as the state has always claimed the right to decide when private citizens may use legitimate force (for example, in self-defense). Secondly, in many countries (most obviously in Europe, given the existence of the European Union and the European Convention of Human Rights), states have now, through treaties, granted some law-making powers to international organizations. This is of course a limitation on state powers, but states have incurred these obligations only because they chose to do so, and (in principle at least) withdrawal from the obligation always remains an option for an individual territorial state.

[26] WEBER, *supra* note 23, at 215.

[27] "*Herrschaft*" is a central concept in Weber's political thought. Lassman points out that this term defies easy translation into English, and in discussions of Weber's work it has variously been translated as "domination," "rule," "authority," "leadership," and even as "imperative coordination." Peter Lassman, *The Rule of Man over Man: Politics, Power and Legitimation*, *in* THE CAMBRIDGE COMPANION TO WEBER 83, 86 (Stephen Turner ed., 2000). Lassman himself prefers "rule," *id.* at 89, but we have followed the lead of the translators of

defined by Weber as "the probability that a command with a given specific content will be obeyed by a given group of persons."[28] Thus, the empirical fact of *obedience* is fundamental to his analysis. But, from the point of view of the person or body issuing the command, how is such obedience to be secured? In a passage of great significance, Weber comments as follows:

> Experience shows that in no instance does domination voluntarily limit itself to the appeal to [citizens'] material or affectual or ideal motives as a basis for its continuance. In addition every such system *attempts to establish and to cultivate the belief in its legitimacy*.[29]

The first sentence of this quotation perhaps requires further explanation. What Weber is saying is that, as a matter of empirical observation, those in a position to issue commands (power-holders) do not simply anticipate that citizens will obey them—whether that obedience stems from (1) "material motives" (i.e., self-interest), (2) an emotional ("affectual") affinity with the power-holder, or (3) "ideal motives" (i.e., philosophical or religious beliefs according to which citizens consider that it is their duty to obey). Citizens may be motivated to obey by one or more of these considerations, but, according to Weber, in addition to any such matters, in seeking to secure continuing obedience a power-holder *always* "attempts to establish and to cultivate the belief in [his or her] legitimacy."[30] In other words, for Weber, *claims to legitimacy* by political power-holders are empirically universal, and they are also ongoing (power-holders attempt "to establish *and to cultivate*" legitimacy on a continuing basis).

Interestingly, the analysis of Joseph Raz, discussed above, is highly congruent with that of Weber. Raz is a moral and legal philosopher, and for that reason he appears to be unaware of Weber's sociological work.[31] Nevertheless, it will be observed that his threefold classification of power-holding (discussed in the previous section) asserts that only those exercising "naked power" make no attempt to claim legitimate authority; and, of course, hardly any (if any) *political* regimes would wish to describe themselves as exercising naked power.

The Weber–Raz view that virtually all political regimes *claim to be legitimate*, and Weber's further emphasis on the *cultivation* of legitimacy,

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Economy and Society in using "domination." *See* WEBER, *supra* note 23.

[28] WEBER, *supra* note 23, at 53; *see id.* at 946.

[29] *Id.* at 213 (emphasis added).

[30] *Id.*

[31] Weber is not cited anywhere in either of Raz's principal works on political authority. *See* RAZ, *supra* note 19, ch. 5; JOSEPH RAZ, THE MORALITY OF FREEDOM pt. I (1986).

are of very great—and insufficiently appreciated—significance for the social scientific analysis of legitimacy.[32] Why is this so? Essentially, because the language of "claim" implies that power-holders are addressing *one or more audience(s)*, and the language of "cultivation" implies that there is some kind of *continuing relationship* between the power-holder and the audience(s). Neither Weber nor Raz develops these insights, but to us the consequences seem clear: legitimacy needs to be perceived as always *dialogic* and *relational* in character. That is to say, those in power (or seeking power) in a given context make a claim to be the legitimate ruler(s); then members of the audience respond to this claim; the power-holder might adjust the nature of the claim in light of the audience's response; and this process repeats itself. It follows that legitimacy should not be viewed as a single transaction; it is more like a perpetual discussion, in which the content of power-holders' later claims will be affected by the nature of the audience response. In what follows, we shall often return to this iterative process of claim and response.

Weber formally defines *legitimacy* as "the probability that to a relevant degree the appropriate attitudes [i.e., acceptance of the validity of the power-holder's claim to be a valid authority] will exist, and the corresponding practical conduct [i.e., obedience] ensue."[33] He adds that in contemporary societies, where the legal-rational type of legitimate domination normally holds sway, "the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."[34] He insists that "the merely external fact of the order being obeyed is not sufficient to signify [legitimate] domination in our sense," because it is also essential that "*the command is accepted as a 'valid' norm*."[35] But, more surprisingly, in Weber's analysis the concept of legitimate domination does *not* require that citizens' acceptance of the validity of the power-holder's claims to legitimacy, nor any subsequent acts of obedience, must be

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[32] Kenneth Himma argues against what he takes to be Raz's view that "a claim to authority is a *conceptually necessary* condition for a legal system to exist," although he notes it is "empirically improbable" that many legal systems will fail to make such claims. Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, *in* HART'S POSTSCRIPT 271, 300 (Jules Coleman ed., 2001) (emphasis added). From the point of view of a social scientific analysis, it is not necessary to debate this issue; it makes little difference to such an analysis whether claims to legitimacy by political power-holders are universal or nearly universal.

[33] WEBER, *supra* note 23, at 214.

[34] *Id.* at 37.

[35] *Id.* at 946 (emphasis added).

"*primarily (or even at all) oriented to* [*the belief in legitimacy*]."[36] Within his definition of legitimacy, he is, therefore, willing to accept that some citizens might have accepted the power-holder's claims to validity, and then obeyed the law, for a variety of non-normative reasons, such as "material self-interest" or "weakness and helplessness because there is no acceptable alternative."[37]

Given the above, it has been truly said that for Weber legitimate domination in modern societies is, ultimately, "simply . . . a successful claim [by a ruler], in a world of permanent political 'struggle.' [It] is, in effect, defined in terms of legality, with the proviso that the laws must in fact usually be obeyed."[38] In other words, legitimate domination is, for Weber, simply "obeyed legality" (where "legality" includes acceptance of the power-holder's claim to be a valid authority). It follows that, in the language of Raz's threefold typology, the existence of de facto authority is for Weber a sufficient ground to speak of a political regime as exercising legitimate domination, provided that the citizens regard the ruler's commands as minimally "valid."

This approach is, in our view, very unsatisfactory, because it leaves the social scientist without any adequate means of distinguishing between obeyed legality and truly normative legitimate authority. We shall develop this point later.[39]

Despite this serious analytic limitation, Weber's claim/response/cultivation conception of legitimacy is, in our view, of decisive significance for contemporary social scientific analyses. It is unfortunate that Weber did not fully develop the necessarily interactive dimensions of this approach, but his framework provides contemporary social scientists, including criminologists, with a most valuable conceptual tool.

We cannot leave Weber's work without some discussion of the importance, within his work, of the so-called fact–value distinction. In common with many other social scientists, both in his day and now, Weber insisted that scholars must sharply differentiate between statements that purport to describe or explain some aspect of the world (often described as "is statements" or "facts") and statements that in one way or another address questions of the kind "How shall I live my life?" and "What is justice?" (described as "ought statements" or "values" because they focus

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[36] *Id.* at 214 (emphasis added).

[37] *Id.*

[38] Lassman, *supra* note 27, at 88.

[39] *See infra* Part IV.A.5.

on how individuals, institutions, or governments *ought to behave*). But where do the values in ought statements come from? According to Weber's methodological writings, we simply *invent* them. Thus, as Kronman has explained, for Weber "the legitimacy of every binding norm, [can be traced] back to its deliberate enactment—its imposition, by human beings, on an otherwise morally neutral world."[40] If one adheres to this radically contingent view of ethics and political values, two implications follow. First, "there are no matters of fact in the world to which [ethical] statements . . . correspond,"[41] and therefore humans can "invent" any kind of ethics or political system that they wish. Second, there are no rational grounds for preferring one form of authority (say, democracy) to another (say, dictatorship)—or indeed one way of life to another. (Philosophically, these positions are known respectively as "subjectivism" and "relativism.") In the early twentieth century, Weber was by no means alone in holding such views,[42] and indeed they continued to hold sway in one form or another for many decades. For example, Mary Warnock has recalled that, in British philosophical teaching in the late 1950s and early 1960s, there was "an endless attempt to avoid . . . the [so-called] Naturalistic Fallacy," that is, the alleged fallacy of "*deriving* evaluations from descriptions" or value statements from factual statements.[43] Indeed, Warnock continues, such emphasis was placed on this issue that students "must sometimes have come to believe that [the Naturalistic Fallacy] was the only serious issue in moral philosophy."[44]

The fact–value distinction is directly related to some modern scholarship in the field of legitimacy. In particular, Wilfried Hinsch has recently emphasized the importance of distinguishing "clearly between two different concepts of legitimacy: the empirical concept of the social sciences and the normative concept of political philosophy"; he further claims that "[p]olitical commentators are prone to vacillate" between the two.[45] For Hinsch, the theoretical basis of the empirical concept—which derives ultimately from Weber—is that "a norm or an institutional arrangement is legitimate if, *as a matter of fact*, it finds the approval of

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[40] ANTHONY T. KRONMAN, MAX WEBER 53 (1983).

[41] ROBERT KANE, ETHICS AND THE QUEST FOR WISDOM 65 (2010).

[42] *See, e.g.*, ALFRED J. AYER, LANGUAGE, TRUTH AND LOGIC (1936).

[43] Mary Warnock, *The Resurrection of Ethics*, *in* WOMEN OF IDEAS 9, 26 (Anita Avramides ed., 1995).

[44] *Id.*

[45] Wilfried Hinsch, *Justice, Legitimacy, and Constitutional Rights*, 13 CRITICAL REV. OF INT'L SOC. & POL. PHIL. 39, 40 (2010).

those who are supposed to live in this group."[46] It therefore follows that it is possible for a given political or criminal justice institution to be simultaneously legitimate yet also, in the eyes of a given observer, highly unjust.[47]   By contrast, Hinsch identifies two central features of the normative concept of legitimacy: it "involves 'objective' [normative] criteria of legitimacy that are alien to Weber's empirical concept" (and to his subjectivist and relativist understanding of normative discourse); and, in consequence, anyone who claims that a given set of power arrangements is normatively legitimate necessarily commits herself to the view that the regime has a degree of "moral standing."[48]

We shall return in Part V.A to the question whether "objective" normative criteria can be identified. For the most part, however, in this Article we will work with the empirical concept of legitimacy, while recognizing that what Hinsch describes as the normative concept cannot be left aside.

IV. What Factors Create and Sustain Legitimacy?

We turn now to another of the conceptual questions raised by Tyler et al. in their introduction to the Russell Sage Foundation volume, namely, "what creates, sustains, or undermines legitimacy?"[49] This is perhaps the most searching of the three questions posed by these authors, and we shall devote considerable space to it.

Tyler and his colleagues answer the question by reference only to studies of what might be described as "audience legitimacy"; but, in view of the preceding analysis, it seems essential that the perspectives of both the audience(s) and the power-holder are considered. We shall discuss these separately, whilst always also bearing in mind that they function within an ongoing dialogic relationship.

A. AUDIENCE LEGITIMACY

It is a remarkable fact that two of the leading social science writers on legitimacy, David Beetham and Jean-Marc Coicaud, each independently developed the same threefold conceptualization of the central components of legitimacy from the perspective of audiences.[50] For both these authors,

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[46] *Id.*

[47] *Id.* at 41.

[48] *Id.* at 41–42.

[49] Tyler et al., *supra* note 14, at 11.

[50] David Beetham, The Legitimation of Power (1991); Coicaud, *supra* note 18. Beetham's analysis was published first, in 1991. Coicaud's treatise was originally written

analyses of the dimensions of legality, shared values, and consent are crucial to the study of legitimacy; Beetham's helpful diagrammatic representation of these three elements is shown in Figure 2. Beetham explicitly argues that this conceptual framework captures "an underlying structure of [audience] legitimacy common to all societies, however much its content will vary from one to the other."[51] The boldness of this claim is worth attention. What is being asserted is that societies as different from one another as, say, Brazil, Japan, Nigeria, Russia, Saudi Arabia, and the United States all share the same underlying structure of legitimacy, despite their obvious social-structural and cultural differences.

Figure 2
Beetham's Three Dimensions of Legitimacy[52]

Criteria of legitimacy	**Corresponding form of non-legitimate power**
1. Conformity to Rules (legal validity)	1. Illegitimacy (breach of rules)
2. Justifiability of rules in terms of shared beliefs	2. Legitimacy deficit (discrepancy between rules and supporting shared beliefs, absence of shared beliefs)
3. Legitimation through expressed consent	3. Delegitimation (withdrawal of consent)

We shall utilize the Beetham–Coicaud conceptual scheme as the framework for our discussion, examining issues relating to the three components, with special reference to criminal justice. Throughout, we shall for simplicity use the generic term "audience legitimacy," but it must be borne in mind (see earlier discussion) that very often a power-holder must, in the quest for legitimacy, simultaneously address two or more

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and published in French in 1997; at the time, he was unaware of Beetham's work.

[51] BEETHAM, *supra* note 50, at 22.

[52] *Id.* at 20.

audiences.[53]

1. Consent

As Figure 2 shows, "consent" is the third of the three elements of audience legitimacy as described by Beetham. However, like Coicaud, we have chosen to consider it first, because—as we hope will become clear—it is in some ways foundational.[54] Our account of consent will draw on elements from the work of Joseph Raz, as well as that of Beetham and Coicaud.[55]

For Coicaud, consent is constitutive of legitimate authority: "[t]he identification of power with right endures [only] so long as [true normative] consent exists. If consent be withdrawn, that is the sign of a lack of political legitimacy."[56] In the same passage, Coicaud also quotes Hannah Arendt's interesting view on the use of force by power-holders: "Authority precludes the use of external means of coercion; where force is used, authority itself has failed . . . . The authoritarian relation between the one who commands and the one who obeys rests . . . on . . . the hierarchy itself, whose rightness and legitimacy both recognise."[57]

Many police officers and prison officers will immediately recognize the existential truth of the remark that "where force is used, authority itself has failed." Although they all do sometimes use force (and the rightness of such actions is usually accepted by most citizens), most of them would prefer to carry out their duties without force. Consequently, in many police services, the desirability of what is interestingly called "policing by consent" has become a standard part of the vocabulary.[58] It is precisely this point that Coicaud is addressing in insisting that consent is constitutive of legitimacy. The point carries within it, however, an interesting apparent paradox. In Weber's analysis, the state claims a monopoly in prescribing or permitting the legitimate use of force; and force, where it is legitimately used, will often be exercised by criminal justice officials.[59] Yet wise states do not encourage the use of force by their officials. Instead, they insist that force be used sparingly and minimally by these officials, recognizing that where force is used, consensual authority has failed.

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[53] *See supra* note 10 and accompanying text.

[54] COICAUD, *supra* note 18.

[55] *See* RAZ, THE MORALITY OF FREEDOM, *supra* note 31.

[56] COICAUD, *supra* note 18, at 14.

[57] *Id.* at 13 (quoting HANNAH ARENDT, BETWEEN PAST AND FUTURE 93 (4th ed.1983)).

[58] ROBERT REINER, THE POLITICS OF THE POLICE 68–71 (4th ed. 2010).

[59] *See supra* note 24 and accompanying text.

Raz's complex account of justified political authority includes two observations about consent that in our view are of special importance.[60] First, he claims that where true normative consent is given by a citizen to the legitimacy of a reasonably just state, that action is *preemptive*. That is to say, by giving consent, the citizen (in the normal case) agrees in advance to treat the appropriately enacted laws and the appropriately formulated orders of that state as superseding and replacing one's own judgment.[61] This topic raises difficult philosophical issues that are outside the scope of this Article. However, from a social scientific viewpoint, the observation is important because it accurately describes the way in which some citizens regard authority in their society. Empirically, however, there is a difficulty—to which we will return—in ascertaining whether the consent is true normative consent or something less than that (for example, strategic or pragmatic consent by people with little power).

Raz's second significant observation is that, in appropriate social circumstances, any act of true consent (including consent in non-governmental contexts, such as consenting to a surgical procedure) *itself purports to change the normative situation* between the parties.[62] Moreover, and specifically with respect to consent to the authority of the state, Raz states that such consent, being preemptive but also normative, cannot be regarded as a "one-off act of identification." Rather, "[s]ince it gives one an additional reason to respect authoritative directives it affects all one's encounters with authority . . . [including] one's reasons and the significance of one's actions." Indeed, "[i]nasmuch as they are motivated by one's consent [actions] become, in a small undramatic way, an expression of one's attitude to one's society."[63] Raz, therefore, rightly locates consent within the ongoing flow of social relationships, including relationships with authorities. Furthermore, by implication he makes clear that there is no sharp divide between the cognitive and the action dimensions of consent; the two are intimately interconnected.

In contrast with Raz's analysis, Beetham's account of consent within processes of legitimation tends to overstate the distinction between belief and action.[64] Despite this, Beetham's comments on the importance of actions within processes of legitimation are particularly illuminating. For him:

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[60] *See* RAZ, *supra* note 19; RAZ, THE MORALITY OF FREEDOM, *supra* note 31.

[61] RAZ, THE MORALITY OF FREEDOM, *supra* note 31, at 57–62, 93.

[62] *See* RAZ, *supra* note 19, at 84.

[63] *Id.* at 94.

[64] BEETHAM, *supra* note 50, at 91.

what is important for legitimacy is evidence of consent expressed through *actions* which are understood as demonstrating consent within the conventions of the particular society, such as: concluding an agreement or entering into a contract with a superior party; swearing an oath of allegiance; joining in acclamation; voting in an election or plebiscite; and so on.[65]

This point can usefully be elaborated using Beetham's example of voting. Suppose that M lives in a town that has for the last half-century elected to the national legislature a candidate of Party X. M supports Party Y, the other principal party active in that state. She considers it extremely unlikely that the town will stop supporting Party X this year, and the local opinion polls support her in this belief. Nevertheless, M goes to vote for the candidate of Party Y, who duly loses. Has M wasted her time? On Beetham's analysis, the answer is emphatically "no," because regardless of the result, M's action has affirmed the importance, within a democracy, of the elective process. M has, therefore, by her action in voting, helped to legitimate elective democracy within her state.

One can usefully develop this point theoretically in terms of the reproduction of social structures—as exemplified, for instance, in Giddens's "structuration theory."[66] Giddens conceives of structures as rules and resources, which serve as "both means and outcome—*means* in the sense that the subject uses rules and resources in order to act and interact; *outcome* in the sense that it is via their use/instantiation that structures are reproduced."[67] Thus, actions expressive of consent serve to reproduce and reinforce the legitimacy of a given set of social arrangements. In the context of criminal justice, citizens' active engagement with the local police—for example, by offering information in relation to a specific case, or in participating in a consultation on local policing priorities—can be seen to function in a similar way. Indeed, the idea that active engagement with criminal justice systems reproduces or affirms the legitimacy of those systems is a central feature of Ellmann's analysis of the use of the courts by black Africans under the apartheid regime in South Africa.[68] His analysis shows that many black Africans resorted to the courts to make claims for their civil liberties, even when the state attempted to deny such rights entitlements. Ellmann concludes that the recurrent recourse to judicial settlement of disputes inevitably lent to the courts "a measure of legitimacy," even though the broader system of apartheid within which the

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[65] *Id.* at 12.

[66] ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY (1984).

[67] NICOS MOUZELIS, MODERN AND POSTMODERN SOCIAL THEORY 116 (2008).

[68] Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 LAW & SOC. INQUIRY 407 (1995).

courts were operating was naturally viewed as deeply immoral by the black Africans who used the courts.[69]

2. Legality

We turn now to the other two main elements within the Beetham–Coicaud analysis of audience legitimacy, namely legality and shared values. Neither of these is constitutive of legitimacy in the way that consent is, but both are of considerable importance as independent variables seemingly influencing audience legitimacy. Indeed, it has been noted that both legality and shared values are "[t]wo fundamental concepts [that] figure prominently and persistently in the history of the problem of political legitimacy."[70]

Beetham asserts that "[p]ower can be said to be legitimate in the first instance if it is acquired and exercised in accordance with established rules."[71] These rules may be formal legal enactments or decisions, or established unwritten conventions. Similar comments have been made in criminal justice contexts; for example, David Dixon has emphasized that "a central tenet of the police claim to legitimacy is their subordination to law."[72] Thus, police claims to legitimacy are intimately linked to "the rule of law," which is of course a key concept within democratic theory.[73]

Dixon's comment uses the language of the power-holder side of the claim–response dialogue, but he is primarily concerned with the importance of issues of legality or illegality to the perceptions of police legitimacy by citizens. In this latter connection, it is important to note the contrast, within Beetham's conceptual scheme (Figure 2), between what he calls the "criteria of legitimacy" and the "forms of non-legitimate power."[74] This contrast calls to mind Aristotle's comment, in the *Nicomachean Ethics*, that "[o]ften one of a pair of contrary states is recognized from the other contrary"; hence, for example, we can learn a good deal about justice from studying instances of injustice, and vice-versa.[75] Pursuing this idea of studying opposites, one can argue that, in assessing the legitimacy of a given police or prison service, one can quickly appreciate the importance of

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[69] *Id.* at 409–10.

[70] Inis L. Claude, Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367, 368 (1966).

[71] BEETHAM, *supra* note 50, at 16 (emphasis added).

[72] DAVID DIXON, LAW IN POLICING 1–2 (1997) (emphasis added).

[73] *Id.* at 2; *see also* BRIAN Z. TAMANAHA, ON THE RULE OF LAW (2004).

[74] BEETHAM, *supra* note 50, at 20.

[75] ARISTOTLE, NICOMACHEAN ETHICS 116–17 (Terence Irwin trans., 1985); *see also* J. R. LUCAS, ON JUSTICE 4 (1980).

legality by considering how blatant illegality can diminish perceived legitimacy. Examples of this include overt police corruption in everyday dealings with citizens (for example, demanding payment from motorists to proceed after a road block), or cases such as those of Rodney King and Malice Green, where police officers were shown to have repeatedly kicked and punched citizens.[76] Not surprisingly, survey-based studies have shown that such obvious illegalities seriously undermine the legitimacy of the police among citizens.[77] In a not dissimilar way, in his influential research study in a Norwegian prison, Thomas Mathiesen showed that one way in which seemingly powerless prisoners attempted to assert themselves against the prison authorities was to criticize them for not following the prison rules.[78] By doing this, they, in effect, accused the authorities of betraying the principles on which their authority was supposed to rest.

These observations link with some comments about consent in the previous subsection. There, it was noted that true consent to a legal system amounts to "advance self-preemption" by the citizen. If this is an accurate characterization, it is easy to see that citizens who have deliberately chosen the path of obedience might well be resentful if and when they observe a blatant lack of obedience to law, or an absence of self-restraint, on the part of those who have claimed legitimate authority.

Despite these clear links between illegality and lack of legitimacy, it is paradoxically the case—as both police and prison studies show—that the full enforcement of the law, or the prison rules, can sometimes fail to enhance legitimacy; indeed, it can even lead to a degree of delegitimation. Thirty years ago, this point was shrewdly noted by a senior English judge, Lord Scarman, in an official report on urban disorders in Brixton, an area of London with a significant ethnic minority population.[79] In that instance, an intensive police "stop and search" operation (Operation Swamp '81), mounted because of an increase in street crime in the neighborhood, was in practice targeted disproportionately at young black males, a fact that caused

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[76] Lee Sigelman et al., *Police Brutality and Public Perceptions of Racial Discrimination: A Tale of Two Beatings*, 50 POL. RES. Q. 777, 777–78 (1997).

[77] *See generally* Theodore P. Gerber & Sarah E. Mendelson, *Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?*, 42 LAW & SOC'Y REV. 1 (2008); Justice Tankebe, *Public Confidence in the Police: Testing the Effects of Public Experiences of Police Corruption in Ghana*, 50 BRIT. J. CRIMINOLOGY 296–319 (2010).

[78] THOMAS MATHIESEN, THE DEFENCES OF THE WEAK 23 (1965).

[79] LORD SCARMAN, THE BRIXTON DISORDERS 10–12 APRIL 1981, CMND. 8427, paras. 1.1–1.7 (reprt. 1986).

widespread anger among the black community.[80] It is clear that the police's motive in intensifying the stop and search operation was to reduce crime. Nevertheless, against a background of suspicion between the police and the black community, Operation Swamp was seen as manifestly partial and unjust, a fact that destabilized local order.[81] Scarman was led to comment that:

> Law enforcement, involving as it must, the possibility that force may have to be used, can cause acute friction and division in a community— particularly if the community is tense and the cause of the law-breaker not without support. '*Fiat justitia, ruat caelum*'[82] may be apt for a Judge: but it can lead a policeman into tactics disruptive of the very fabric of society . . . . The successful solution of the conflict [between law enforcement and public tranquility] lies first in the priority to be given in the last resort to the maintenance of public order, and secondly in the constant and common-sense exercise of police discretion.[83]

Criminal justice professionals and politicians often use, without much thought, the generic phrase "law and order." But in the above passage, Scarman explicitly *separates* "law" from "order," and points to the truth that the full enforcement of the law can in some circumstances lead to *disorder*, especially where "the community is tense and the cause of the law-breaker not without support."[84] Thus, in the situation Scarman was commissioned to examine, resentment and defiance had quickly escalated.[85] Scarman claims, rightly in our view, that in circumstances where, within a given community, one has to choose between law enforcement and the maintenance of public order, the latter must usually be the correct normative choice.[86] That is because, in such circumstances, assertive enforcement of the letter of the law would lead to a significant degree of police delegitimation. Hence, before long the police would not be regarded as holding the right to govern.

The above comments, however, are subject to an important caveat, which arises from experience in certain prisons. It is undoubtedly the case that a Scarman-style analysis is often valid in the prisons context; indeed, one of the classic texts of prison sociology proffered an argument very

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[80] *Id.* paras. 4.37–4.40.

[81] *Id.* paras. 4.47–4.49.

[82] "Let justice be done, even if the sky collapses in consequence."

[83] SCARMAN, *supra* note 79, paras. 4.57–4.58.

[84] *Id.*

[85] *Id.*, pt. III; *see also* Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445 (1993) (noting that defiance presupposes a legitimacy deficit).

[86] SCARMAN, *supra* note 79, paras. 4.57–4.58.

similar to Scarman's half a century ago.[87] But experience has shown that there are also conditions where other considerations apply. Particularly in high security prisons, prison officers are sometimes required to guard sophisticated and well-disciplined groups (such as professional criminals or members of a paramilitary organization) who are able to organize concerted campaigns to try to obtain concessions in the enforcement of rules. If, in such situations, the officers were to follow Scarman's advice in always prioritizing "order" in preference to rule-enforcement, they would find themselves in a process of continual retreat, always backing down in the face of organized prisoner demands. Clearly, this is not an appropriate way to manage a prison,[88] a fact that has led prison scholars to draw an important distinction between *good* officer–prisoner relationships (based simply on superficially friendly day-to-day contact) and *right* relationships (where relationships are good, but also based on appropriate rule enforcement).[89] We shall return to the significance of this distinction in Part V.A.

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[87] Gresham Sykes argues that the prison is inherently an "authoritarian community" and that in extreme situations (riots, etc.), ultimate victory will always go to the prison administration, backed if necessary by the police and armed forces. GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 81, 113 (1958). On a day-to-day basis, however, staff are outnumbered by inmates, and they need to accomplish various daily "housekeeping" tasks, such as getting prisoners to workshops, keeping the wing clean, etc. *Id.* at 25–30. Hence, in practice, staff negotiate a series of accommodations with prisoners in order to maintain a reasonable and functioning social order. *Id.* at 54–58. In consequence, although prison officers are by law granted massive powers over the inmates, in practice they usually make no attempt to enforce all the rules and focus on maintaining good order rather than on the letter of the law. *Id.*

[88] Precisely this process occurred in the 1980s and 1990s in The Maze prison in Northern Ireland, as Republican paramilitary prisoners successfully made demand after demand for alterations to the regime in pursuit of their aim to secure recognition of the fact (as they saw it) that they were "prisoners of war" and entitled to the sort of conditions accorded to prisoners of war under the Geneva Conventions—including having each living unit under the command of one of their own officers. Prison officials made extensive concessions to the prisoners in part because of broader political developments in the wider society, and in part because of continual pressurization of staff by prisoners. KIERAN MCEVOY, PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND (2001). A recent official report explained the latter point: "The Inquiry heard of many examples of different types of pressure on staff which resulted in their being conditioned. On the occasions that staff went onto the wings they were often seen surrounded by prisoners. In such circumstances prisoners might make oblique or even direct references to an officer's family or domestic situation." LORD MACLEAN, THE BILLY WRIGHT INQUIRY para. 7.221 (2010). Prisoners obtained such information from paramilitary colleagues outside the prison and sometimes made implied threats of action against the officers' families. Personal conversation with officers in The Maze.

[89] *See* ALISON LIEBLING ET AL., THE PRISON OFFICER 92 (2d ed. 2011).

Overall, the analysis in this Section has shown that legality is an important component of audience legitimacy. However, law always operates in a social context, so it must always be considered in relation to community values—a subject to which we must now turn.

3. Shared Beliefs and Values: General Values

The Beetham–Coicaud legitimacy structure suggests that, to be legitimate, power-holders must derive their authority from and act within the shared beliefs and values of a given society. For the purpose of our discussion, "values" may be defined simply as "those moral beliefs to which people [appeal] for the ultimate rationales of action."[90] As Coicaud points out, values become institutionalized within what Talcott Parsons called "action systems,"[91] and, while only a small portion of the culture and action system of a given society is decisive for its core identity, "this fraction relates to essential values and basic institutions, which are the object of a consensus that lies beyond discussion and that has a type of validity that is foundational."[92] Such "core values" are central to an understanding of this third element of audience legitimacy.

A useful way in which to approach the topic of shared values is through Beetham's critique of Weber. Weber's analysis includes, as one of its constituent features, the view that power relationships are legitimate if people *believe in* them as being valid.[93] But Beetham objects to such an approach because it

> leaves the social scientist with no adequate means of explaining why people acknowledge the legitimacy of power at one time or place and not another. The social scientist, it seems, is someone who must always be taken by surprise when people stop treating power as legitimate and take to the streets in protest.[94]

Thus, for Beetham, a power-holder is not legitimate in the eyes of an audience simply because the audience "believes in" the power-holder's legitimacy. Rather, "power is legitimate to the extent that the rules of power can be *justified in terms of beliefs shared by both dominant and subordinate*."[95] Thus, for Beetham, and later for Coicaud, shared values do

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[90] James L. Spates, *The Sociology of Values*, 9 ANN. REV. SOC. 27, 28 (1983).

[91] TALCOTT PARSONS, THE SOCIAL SYSTEM ch. I (1951).

[92] COICAUD, *supra* note 18, at 16.

[93] *See supra* Part III.

[94] BEETHAM, *supra* note 50, at 10.

[95] *Id.* at 17 (emphasis added). For Beetham, the identification of legality as one of the three components of audience legitimacy also provides a further argument against Weber's equation of legitimacy with "belief in legitimacy," since "whether power is or is not acquired and exercised within the law is a question quite independent of people's beliefs." *Id.* at 12.

indeed, like legality, constitute one of the core "factors that create and sustain legitimacy."[96] In more detail, it can be argued that, to be fully legitimate according to the test of shared values, three separate tests must be passed: (1) any given exercise of power must be derived from a valid *source* of legitimate authority within that society, (2) the power should be exercised in a *manner* that is considered justified in the context of that society, and (3) the exercise of the power must be seen to serve a recognizable general interest, rather than simply the interests of the power-holder.[97] Shared values therefore *set limits* that define the conditions within which legitimate power may be exercised (negative effects), as well as furnishing those who govern with *rules and resources* within which they can seek to realize certain societal objectives (positive effects). Where an authority figure fails to act in accordance with shared values, he or she may be justly singled out for censure.[98]

The concept of shared values does, however, have its considerable complexities. Three relevant difficulties of different types will be briefly noted here. First, suppose that a given society has a set of strongly and consensually held values, but that because of political disturbances or economic crises in nearby countries, it experiences a relatively sudden influx of several separate sets of migrants, each with core values different from one another and from the host country. What is now a "shared value" within that society? Issues of this kind can present real dilemmas for law enforcement agencies, as Thorsten Sellin's "culture conflict" thesis[99] demonstrated in the United States before the Second World War and as is ever more evident in the contemporary era of globalization. This topic would merit a full paper to itself, but briefly, we think that a very useful resource in this type of situation is Michael Walzer's distinction between

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[96] Tyler et al., *supra* note 14, at 10.

[97] Adapted from BEETHAM, *supra* note 50, at 16–18.

[98] MATHIESEN, *supra* note 78, at 12. In his Norwegian prison study, Mathiesen developed the concept of "censoriousness" to refer to prisoners' frequent criticisms of their captivity conditions. *Id.* Interestingly, Mathiesen distinguished two subtypes of censoriousness—one based on legality (the prison staff were not following their own rules) and one based on fairness (the prison staff were acting unfairly, according to the accepted standards of Norwegian society). *Id.* at 13–14. The parallel with the "legality" and "shared values" components of the Beetham–Coicaud legitimacy structure is, clearly, very close. There is also more ancient authority: according to Aristotle, the "just will be both what is lawful and what is fair, and [the] unjust will be both what is lawless and what is unfair." ARISTOTLE, *supra* note 75, at 117.

[99] Thorsten Sellin, *Culture Conflict and Crime*, 44 AM. J. SOC. 97, 97–98 (1938).

"thick" and "thin" moralities.[100]   According to Walzer, a thick moral argument is something that communities adopt as "a way of talking among ourselves, here at home, about the thickness of our own history and culture"—including the unique folk memories and the special (perhaps idiosyncratic) ways of "going on" that have been adopted within that particular ethnic, religious, or cultural group.[101] It would of course be quite unreasonable to expect a nation-state in the contemporary, globalized world to operate fully in accordance with the thick norms of each and every cultural group within its boundaries. But most thick communities also possess, according to Walzer, "a way of talking to people abroad, across different cultures, about the thinner life [different groups] have in common" and, crucially, he believes that "there are the makings of a thin *and universalist* morality inside every thick and particularist morality."[102] If he is right, then within the dialogic process that legitimation requires, part of the skill of power-holders in an increasingly globalized world must be to help to identify and articulate that shared thin morality, and to negotiate its acceptance among a number of communities who espouse different thick moralities.

Secondly, the "shared values" analysis in texts on legitimacy tends to assume that a society's laws arise naturally out of the shared norms of the society—an assumption described by Brian Tamanaha as the "mirror thesis" (because the law mirrors the values).[103] Certainly, the mirror thesis is very often correct—for example, the fact that adultery is defined as a criminal act in Saudi Arabia obviously reflects the very strong shared commitment to Islamic values in that country.[104] But, as Tamanaha has correctly argued, the relationship between laws and values is by no means always so straightforward. In his own study of Micronesia, for example, Tamanaha noted that the official law in that country had been transplanted in its entirety from the United States, with the consequence that the customs and values of the Micronesian people were in many respects radically different from those of the official legal system.[105] Tamanaha's original

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[100] MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD, at xi (1994).

[101] *Id.*

[102] *Id.* (emphasis added).

[103] BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 1–3 (2001).

[104] Of course other jurisdictions have also criminalized adultery for reasons other than Islamic values. *See* Joanne Belknap, *"Offending Women": A Double Entendre*, 100 J. CRIM. L. & CRIMINOLOGY 1061, 1068–70 (2010).

[105] BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA 2, 55 (1993). By way of example, there existed a "thriving caste system, yet the law prohibited discrimination." Or if

assumption was that the Micronesian situation was very abnormal, but he subsequently concluded that it was "not that unusual after all," since "legal transplantation, either through colonial imposition or through voluntary borrowing, is a widespread phenomenon."[106]   Clearly, in such contexts, "shared values" might be in short supply, and, as in the first example, skillful negotiation by power-holders might be required if the legitimacy of the official law is to be fostered.

Thirdly, we have so far assumed that "the law" and "law enforcement" are homogeneous concepts and therefore that all those involved in law enforcement within a given state are implementing practices based on a single set of values. Empirically speaking, that might be the case, but it is by no means necessarily so. For example, in his essay on police legitimacy discussed earlier, David Smith refers to a detailed empirical research study that he led in London in the early 1980s. Smith's research revealed that certain "'working rules' of police officers—the guiding principles of their conduct—although influenced by the [formal] law, could often diverge from it."[107]   This divergence was then covered up by the police, who developed certain "presentational rules," which existed "to give an acceptable appearance" to the divergence between the formal law and local practice. When we reflect on this example, it seems reasonable to speculate that, however well these tactics worked in disguising the true state of affairs from, say, the courts or the media, they almost certainly did not deceive those local citizens who had dealings with the police ("norm-users," in MacCormick's helpful phrase[108]). If this is correct, then for norm-users in such a context, one would need to construct two descriptions of legitimacy—one concerning the legitimacy of the official legal system (the "law in the books") and one concerning the legitimacy of the "law in practice" (namely, the local police's actual behavior and their attempts to give such behavior a presentationally acceptable appearance).

4. Shared Beliefs and Values: Specific Values

As well as considering the general importance of shared values within the analysis of audience legitimacy, we think it is important to comment on some specific values. Given limitations of space, we shall focus on only

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a criminal offense was committed, in Micronesian custom this "required a response by the community itself," yet the state insisted that any community reaction constituted "illegal vigilantism." TAMANAHA, *supra* note 103, at xi.

[106] TAMANAHA, *supra* note 103, at xii.

[107] Smith, *supra* note 13, at 43 (referring to the study of London in DAVID J. SMITH & JEREMY GRAY, POLICE AND PEOPLE IN LONDON (1985)).

[108] NEIL MACCORMICK, INSTITUTIONS OF LAW 2 (2007).

two such values: procedural justice and effectiveness.

As previously noted, Beetham claimed that his conceptual framework (see Figure 2) is common to all societies.[109] Yet the framework does not mention procedural justice, the dominant tradition within studies of legitimacy in criminal justice. Does that mean that Beetham's thesis is falsified? Beetham, we think, would rightly deny this; viewed from his perspective, the empirical importance of procedural justice arises because of the existence, in all social contexts so far examined, of strong shared values about the importance of justice, especially procedural justice, in the actions of law enforcement officials.

As previously noted, the broad concept of procedural justice turns out, on closer analysis, to encompass two rather different values,[110] which tend to have rather different emotional connotations. "Quality of decisionmaking" embraces a range of concerns that lawyers would place together under a general heading such as "the principles of natural justice."[111] This will include matters such as people being allowed to have their say before a decision that affects them is made;[112] the independence and neutrality of the decisionmaker, as well as his or her technical competence; consistency of decisionmaking in similar cases; and so on.[113] The second value embraced within procedural justice is more personal. Described as "quality of treatment," it focuses on whether the decisionmaker treats the subject in a true sense as a human being, with needs for dignity, privacy, respect for his or her moments of weakness, and so on.[114]   Research has shown that the absence of either quality of decisionmaking or quality of treatment can be powerfully delegitimating.

In the introduction to this Article, we mentioned David Smith's words of caution about the procedural justice literature.[115] His reservations are primarily empirical,[116] and two are worth highlighting here. First, Smith points out that "the causes or explanations of legitimacy may not be the

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[109] BEETHAM, *supra* note 50, at 22.

[110] *See* Tyler, *supra* note 5, at 285.

[111] H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW pt. VI (10th ed. 2009).

[112] This is important not only in formal decisionmaking contexts, but also in more informal encounters with authority. Most people have at some time experienced an encounter with a local power-holder (such as a teacher or an airport official) where the power-holder insists on a particular outcome and refuses to listen to an explanation as to why that outcome seems wrong to the citizen. The result is, invariably, frustration.

[113] Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163 (1997).

[114] Tyler, *supra* note 5, at 329.

[115] Smith, *supra* note 13.

[116] *Id.* at 32–33.

same at the individual and collective levels; consequently the explanations for secular change in police legitimacy in a society from one epoch to another may be different from the explanations for intra-individual change in legitimacy beliefs."[117]   Secondly, after a detailed argument Smith suggests that the existing research leaves open the possibility that "prior beliefs in police legitimacy (or illegitimacy) are the powerful factor, whereas particular experiences of the police are shaped by those beliefs, or interpreted and perceived to fit with them."[118]   These are clearly important points that need to be addressed as the research agenda on legitimacy in criminal justice moves forward.

Smith's overall conclusion is that, at this stage in the development of research on legitimacy, care is needed not to infer "that procedural fairness is the sole or central foundation of legitimacy in all societies at all stages of development."[119]   Clearly, a similar conclusion is reached if one views audience legitimacy from the Beetham–Coicaud perspective (which is not discussed by Smith).

The second specific value that we wish to consider in this Section is

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[117] *Id.* at 32.

[118] *Id.* at 33. Although he does not mention this, Smith's comments resurrect a debate from two decades earlier between Gibson and Tyler & Rasinski. *See* James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC'Y REV. 631 (1991); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV 621 (1991). Gibson tested data from a national survey in the United States and found that procedural justice did not explain citizens' compliance with decisions of the Supreme Court. Reanalyzing the same dataset, Tyler & Rasinski argued that the relationship is indirect: procedural justice shapes legitimacy, which in turn, influences compliance. Gibson conceded that the Tyler–Rasinski hypothesis is plausible, but only in situations where people have had prior experiences with legal authorities. (A later panel study of New York residents by Tyler & Fagan confirmed this hypothesis: Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008)). Gibson, however, argues that general assessments of institutional legitimacy are more likely to reflect childhood socialization experiences, which may then influence people's views on procedural justice. To our knowledge, the only attempt specifically to test the question of causality experimentally is a 1993 study by Mondak. He suggested that Gibson's hypothesis might be "the viable explanation" for the association between procedural justice and legitimacy and found no support for the Tyler–Rasinski hypothesis, leading him to the perhaps over-hasty conclusion that this should be either "reformulated or discarded."   Jeffrey J. Mondak, *Institutional Legitimacy and Procedural Justice: Re-examining the Question of Causality*, 27 LAW & SOC'Y REV. 599, 608 (1993).

[119] Smith, *supra* note 13, at 31–32.

effectiveness. It is sometimes suggested that effectiveness is a purely utilitarian concept and therefore has little to do with the normative notion of legitimacy. However, as Beetham has argued, political legitimacy "requires both a morally authoritative source for government, and an ability to satisfy the ends which justify its enormous concentration of power."[120] Some political scientists have nevertheless seen legitimacy as merely a function of effectiveness, an approach that has been described as "eudaemonic legitimation" (EL).[121] According to the EL thesis, it is effectiveness in providing material benefits or prestige to citizens that generates legitimacy; hence, citizens will give attributions of legitimacy if and only if it is in their self-interest to do so.[122] In the context of policing, a police force attempting to operate with this mode of legitimacy would therefore simply seek to demonstrate and appeal to its effectiveness.[123] A better view, which unlike EL maintains legitimacy as a normative concept (and a potential mode of normative compliance among citizens), is that effectiveness and legitimacy are *interdependent* and *organically interactive*. On this view, effectiveness is a necessary but not a sufficient condition of legitimacy.[124]

5. Audience Legitimacy: Concluding Comments

The Beetham–Coicaud conceptual framework is clearly a powerful analytic tool in the study of audience legitimacy, and in our view it covers most of the ground in answering Tyler et al.'s important question about what factors create and sustain audience legitimacy.[125] But is the framework exhaustive—or, otherwise stated, does it cover all possible components of audience legitimacy? Work in political philosophy by Raz suggests that the answer to this question is in the negative, but space precludes full discussion of this issue.[126]

One important point in Raz's discussion does, however, need to be highlighted, and this concerns so-called coordination issues. Particularly in modern societies, one important function of laws is to promote the effective

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[120] BEETHAM, *supra* note 50, at 137; *see also* JOHN DUNN, SETTING THE PEOPLE FREE (2005).

[121] *See* HOLMES, *supra* note 17, at xii–xiv; Feng Chen, *The Dilemma of Eudaemonic Legitimacy in Post-Mao China*, 29 POLITY 421 (1997).

[122] Rothschild, *supra* note 17.

[123] *See* Justice Tankebe, *Police Effectiveness and Police Trustworthiness in Ghana: An Empirical Appraisal*, 8 CRIMINOLOGY & CRIM. JUST. 185 (2008).

[124] Rothschild, *supra* note 17, at 488.

[125] Tyler et al., *supra* note 14.

[126] *See* COLIN BIRD, AN INTRODUCTION TO POLITICAL PHILOSOPHY 166–75 (2006); RAZ, *supra* note 19, ch. 2–4.

coordination of thousands of citizens, each pursuing his or her own reasonable purposes, the most obvious example being rules of the road. At the most basic level, in any given territory there needs to be a rule stating whether motorists are to drive on the right or the left; but which side is chosen is simply a matter of convenience and is therefore hardly a shared value in Coicaud's sense of having "a type of validity that is foundational."[127] Yet what we may call the "coordination requirements" in any given society do usually carry a high degree of audience legitimacy. To mis-paraphrase *Hamlet*, there is therefore more to audience legitimacy than is dreamt of in the philosophy of Beetham and Coicaud, even though these scholars have greatly advanced our understanding of this topic.

As a final point in the discussion of audience legitimacy, we think it is important to return to the distinction between legitimate authority and de facto authority. Combining the insights of Weber and Raz, we can discern that the category of de facto authority actually contains two subtypes. First, there are situations where a power-holder is in secure and effective command of a territory and claims authority over it, but this claim is completely rejected by the audience. (Many examples of this type of situation can be found in the history of colonial rule.)

There is also a second kind of de facto authority where the ruler's claims to legitimacy are accepted by the public as technically "valid" in Weber's terms, yet this acceptance is not, in the words of Coicaud's definition, a true "recognition of the right to govern."[128] Instead, as Weber recognized, such acceptance might be based on, for example, "weakness and helplessness because there is no acceptable alternative."[129] This second type of de facto authority is, empirically speaking, very important because it is frequently found in contexts (such as prisons and, in the community, in certain kinds of regimes such as military dictatorships) where there is a radical power differential between rulers and the ruled. In such situations, the powerless typically have mixed emotions: they feel that someone has to hold power; that the current authorities do hold effective de facto power and are therefore useful in ensuring a basic flow of essential services; that in consequence the power-holders are, in Weber's terms, a minimally valid authority; that powerless people have no way of challenging this de facto power anyway; and yet that it is impossible to accord to the power-holders any genuine normative authority or true respect. One striking phrase that has been used to express this second kind of de facto authority is "dull

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[127] COICAUD, *supra* note 18, at 16; *see supra* Part IV.A.3.

[128] COICAUD, *supra* note 18, at 10.

[129] WEBER, *supra* note 23, at 214.

compulsion."[130]   In the prison literature, it is well recognized that dull compulsion frequently exists, and some hold that prisoners' acquiescence to prison authorities is almost always of this type.[131]   On the evidence, however, a better view is that a recognition of true audience legitimacy is sometimes accorded by prisoners to certain prison regimes and to individual prison officers who carry out their duties in certain ways.[132]

The distinction between true legitimacy and dull compulsion is, conceptually, of great importance in criminal justice contexts, and it can also have significant practical consequences.   To give just one example from the policing context, if true legitimacy is present, citizens will almost certainly be much more willing to provide the police with a good flow of information about specific incidents and general matters relevant to social order.   Methodologically speaking, the difference between the two situations is sometimes hard to establish empirically, but this is a challenge that criminological researchers must take seriously.   We return to this issue in our final Section.

B. POWER-HOLDER LEGITIMACY

Six years ago, Steve Herbert published a paper on police legitimacy; the paper is unorthodox (in the sense that it sits somewhat outside the main literature on legitimacy in criminal justice) but nevertheless important.[133]   A main thesis of the paper is that, given the complexity of and tensions between the functions of the police in a liberal-democratic society, "no simple solutions exist for enhancing police legitimacy."[134]   Instead, Herbert understands legitimacy as embracing elements of three different requirements for the police service.   The first is a necessary *subservience* to public needs within an elective democracy.   Second, Herbert argues that a legitimate police service requires a degree of *separation* from the public, for two reasons: to uphold, when occasion demands, the liberal values of the liberal-democratic state (even when these are not currently favored by the democratic majority in a particular society);[135] and to maintain police *esprit de corps*, thereby enhancing effective performance.   Finally, there is a

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[130] EAMONN CARRABINE, POWER, RESISTANCE AND DISCOURSE 38 (2004).

[131] *Id.*

[132] *See* LIEBLING, *supra* note 9; SPARKS ET AL., *supra* note 7; Crewe, *supra* note 9; Sparks & Bottoms, *supra* note 7.

[133] Steve Herbert, *Tangled Up in Blue: Conflicting Paths to Police Legitimacy*, 10 THEORETICAL CRIMINOLOGY 481 (2006).

[134] *Id.* at 500.

[135] Although, as Herbert recognizes, sometimes a commitment to the norms of police culture can in fact override the commitment to liberal values.

suggested requirement of *generativity*; Herbert argues that, to be fully legitimate, the police sometimes need to go beyond a reactive stance and become proactive, taking the initiative in generating (or constructively promoting) appropriate kinds of local social order.[136]

In discussions with senior police officers about legitimacy, we have found that they warm to Herbert's threefold typology. A major reason for this, we believe, is that for Herbert the touchstone of legitimate law enforcement is not simply—as the Beetham–Coicaud analysis might suggest—a matter of the public reception of police activities (that is, in Herbert's language, *subservience*). Rather, in appropriate circumstances there are actions that the police can and should take that will enhance their legitimacy.[137] Herbert does not describe these actions in the language of "power-holder legitimacy" (as is used in political science), but in fact his dimensions of separation and generativity do fit naturally within that conceptual framework, and he is almost alone among criminological writers in referring to these matters.

What, then, is power-holder legitimacy? Recall that in Coicaud's definition, legitimacy is described as "justifying simultaneously political power and obedience."[138] It would seem that Coicaud himself might have meant by this phrase something like "justifying, in the eyes of those without power, both the authority of the power-holder and the obedience of the citizen." But the actual definition given is also open to a more radical interpretation. On this alternative view, "justifying political power" refers to the self-belief that rulers have in their moral right to govern—a self-belief that then underpins the claims to legitimacy that, in the Weber–Raz analysis, power-holders virtually always make and then attempt to sustain.[139] As Barker pointed out, such self-belief is frequently also made manifest in the actions of power-holders (such as "speech, writing, ritual, [or] display"), whereby they "justify to themselves or others the actions they are taking and the identities they are expressing or claiming."[140] In the field of criminal justice, the wearing of uniforms clearly fulfills an expressive self-legitimating function of this kind, as well as the more utilitarian function of easy identification by colleagues and citizens.

Discussions of the power-holder dimension of legitimacy stretch back

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[136] Herbert, *supra* note 133, at 489–91.

[137] *Id.*

[138] *See supra* text accompanying note 18.

[139] *See supra* notes 20–22, 29–30 and accompanying text.

[140] Rodney Barker, *Legitimacy, Legitimation, and the European Union: What Crisis?*, *in* LAW AND ADMINISTRATION IN EUROPE 157, 163–64 (Paul Craig & Richard Rawlings eds., 2003).

to the work of Max Weber. As Kronman observes, Weber considered that people with power or privilege do not only seek to legitimate their status to those lacking it; they must also "persuade *themselves* that their fates are deserved and therefore rightful."[141] Weber himself elaborated this point:

> The fortunate is seldom satisfied with the fact of being fortunate. Beyond this, he needs to know that he has a *right* to his good fortune. He wants to be convinced that he 'deserves' it, and above all, that he deserves it in comparison with others. He wishes to be allowed the belief that the less fortunate also merely experiences his due. Good fortune thus wants to be 'legitimate' fortune.[142]

Furthermore, Weber saw power-holder legitimacy as a necessary precondition for successful audience legitimation. As Kronman puts it, in Weber's eyes "to the extent that he anticipates and understands the criticism of those who are less fortunate, the man of good fortune must already be a critic himself."[143] Following Weber's lead, a number of political scientists have subsequently emphasized the fundamental importance of this dimension of legitimacy and have warned that legitimacy is in danger of becoming a meaningless and irrelevant concept if the power-holder dimension is ignored or underplayed.[144]

Although Weber considered the power-holder dimension to be foundational, he did not develop his analysis of it as fully as he did with the audience dimension. There must therefore be some doubt about the grounds upon which, according to Weber, power-holders would seek to justify the rightness of their power to themselves. However, given the privileged position Weber assigns to formal legality within "legitimate domination" in modern societies,[145] it is not unreasonable to speculate that legality would play an important part in his analysis. That is to say that power-holders will believe in their own legitimacy if and only if they ensure that the positions they occupy, the powers they wield, and the manner in which such powers are exercised on a day-to-day basis are formally and legally correct. We would argue, however, that this is only a necessary condition, and not a sufficient one; as with audience legitimacy, power-holders must also cultivate their self-legitimacy with reference to the beliefs shared by them and their audience. As Wrong put it, given that power-holders have "a need to believe that the power they possess is morally justified," they tend also to believe that "they are servants of a

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[141] KRONMAN, *supra* note 40, at 41.

[142] MAX WEBER, FROM MAX WEBER 271 (H. H. Gerth & C. Wright Mills eds., 2009).

[143] KRONMAN, *supra* note 40, at 41.

[144] *See* Rothschild, *supra* note 17.

[145] *See supra* notes 26–27, 37–39 and accompanying text.

larger collective goal or system of values surpassing mere determination to perpetuate themselves in power, [and] that their exercise of power is not inescapably at odds with hallowed standards of morality."[146]

Of course, in a democracy, power-holders' self-belief in their legitimacy cannot be the ultimate test of whether they are acting legitimately.[147] Nevertheless, power-holder legitimacy remains important for several reasons. First, power-holders cannot and should not be expected to carry out their daily work with reference only to current public opinion; and in any case, some aspects of that work—certainly in the case of the police and prison staff—are necessarily secret, so they cannot be subject to immediate public scrutiny. In other words, as Herbert argued, a degree of *self-separation* by power-holders is often both appropriate and necessary in exercising authority responsibly.[148] Second, power-holder legitimacy may be important for the stability and effectiveness of authority. Unless those who exercise power are convinced that there is an adequate moral justification for their continuation in office, they are unlikely to be effective. As Boulding put it, often a loss of what he called "internal legitimacy" can lead to "disorganization of behavior and an inability to perform an assigned role."[149] Third, as previously suggested, power-holder legitimacy can be regarded as a precondition for successful audience legitimacy; that is, it is necessary for power-holders to cultivate belief in the moral rightness of their own legitimacy before making claims to others to be their legitimate rulers.[150] Fourth, within what we have described as the dialogic framework necessarily flowing from Weber's claim–response conceptual scheme, a vital element of analyses of legitimacy within real-life criminal justice contexts must be the careful examination of the responses by power-holders to audiences' perceptions of legitimacy deficits.[151] Within the dialogic framework, legitimacy is constantly in flux; it is a significant test for power-holders when it becomes clear that a relevant audience has rejected one or more aspects of their initial claim to legitimacy. In such circumstances, the power-holder must put forward a revised claim to legitimacy, which in turn might well require adjustments in their own understanding of their right to rule.

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[146] DENNIS H. WRONG, POWER: ITS FORMS, BASES, AND USES 103 (1995).

[147] *See* DAVID BEETHAM & CHRISTOPHER LORD, LEGITIMACY AND THE EUROPEAN UNION 10 (1998).

[148] Herbert, *supra* note 133.

[149] Kenneth Boulding, *The Legitimacy of Economics*, 5 W. ECON. J. 299, 299 (1967).

[150] *See id.*; RODNEY BARKER, LEGITIMATING IDENTITIES 67–68 (2001).

[151] *See supra* Figure 2.

Because analyses of power-holder legitimacy have been conducted almost exclusively by political scientists, the existing literature in this field has tended to focus predominantly on the ruling elite, thereby potentially missing the significant role in social order played by more junior power-holders (such as front-line police and prison officers) who are in direct contact with citizens and often exercise a significant degree of local power on a daily basis.[152] Nonetheless, "as dominated dominators or, more precisely, as dominated parties within the field of power," such junior power-holders can be regarded as a special group.[153] Thus, for example, police officers on patrol are "the state made flesh . . . . [T]hey are the most direct representatives of the state for citizens given their visible, uniformed, 24-hour presence on the streets and their crucial involvement in social intervention and law enforcement."[154] Yet simultaneously they are also the least powerful group within what is often a large criminal justice bureaucracy. Therefore, the decisions of police managers undoubtedly set limits for ordinary officers; but equally, the outcome of a single disastrous high-profile police–public interaction on the street, or a mistake by a prison officer leading to an escape, might have major repercussions for their whole organization. This complex dual role underscores the importance of ordinary officers' cultivation of appropriate (and not excessive) self-confidence in their moral right to exercise the enormous powers vested in them.

Rodney Barker suggests that power-holder legitimation (or what he calls "endogenous legitimation") can be conceptualized as occurring in a series of concentric circles, with rulers at the center, followed by their staff, then "mighty citizens," and finally ordinary citizens at the periphery.[155] He further contends that "at each stage out from the centre [endogenous legitimation] is likely to be carried out with less time, attention, energy, and intensity."[156] Although empirically speaking this is an untested issue, we suspect that in the sphere of criminal justice this hypothesis might not survive the detailed and "severe" testing that Popper recommends.[157] That

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[152] *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY (1980).

[153] John Frow, *Economies of Value*, *in* RECEPTION STUDY 294, 313 (James L. Machor & Philip Goldstein eds., 2001) (quoting Pierre Bourdieu, *The Corporatism of the Universal: The Role of Intellectuals in the Modern World*, 81 TELOS 99, 106 (Carolyn Betensky trans., 1989)).

[154] Maurice Punch, *Police Corruption and Its Prevention*, 8 EUR. J. CRIM. POL'Y & RES. 301, 322 (2000).

[155] BARKER, *supra* note 150, at 70.

[156] *Id.* at 71.

[157] KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY, 265–69 (rev. ed. 1968).

is because, in this context, it is disproportionately the front-line police officers and prison officers, rather than their managers, who have direct and recurrent encounters with citizens and prisoners, and therefore experience their authority being contested on a day-to-day basis. Consequently, it seems likely that front-line officers might invest a good deal of energy, time, and attention in cultivating and confirming to themselves the moral validity of their positions and authority.

A difficult conceptual problem for power-holder legitimacy concerns the "disconnected" power-holder who has lost touch with the public he serves. Such power-holders might reasonably be described as narcissistic, a condition that can involve self-absorption and an inflated self-image, or an attitude of indifference to the plight of others.[158] Unfortunately, under certain circumstances, members of both police and prison services can very easily slide into this kind of attitude. In the policing context, this can be seen in the practice of so-called noble cause corruption, where officers subscribe to the view that it is appropriate to manufacture evidence against a suspect because "he is clearly guilty anyway."[159] Similarly, in the aftermath of prison riots and disturbances, it is well known that officers may take it upon themselves to inflict what they regard as "justified punishment" to the surrendering prisoners, although they know that the state formally forbids such actions on their part. When officers act in such a fashion, they are implicitly making claims to possession of a higher normative validity than that which the state represents; adherence to the norms they espouse is, in their view, a necessity for a decent society to survive. By contrast to such ideologies, a healthier view of power-holder legitimacy asserts that "means and ends are not separate; the things we care about profoundly affect *how* we honour [them]."[160] In a criminal justice context, the development of power-holder legitimacy is therefore best understood as the cultivation of self-confidence in the moral rightness of power-holders' authority, within a framework of both official laws and regulations, and societal normative expectations.

V. WHY IS LEGITIMACY IMPORTANT WITHIN A SOCIAL SYSTEM?

We turn now to the last of the three searching questions posed by Tyler

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[158] *See* ERICH FROMM, THE HEART OF MAN 73 (1964); Leonidas K. Cheliotis, *Narcissism, Humanism and the Revolutionary Character in Erich Fromm's Work*, *in* ROOTS, RITES AND SITES OF RESISTANCE 36, 40–41 (Leonidas K. Cheliotis ed., 2010) (discussing narcissism within criminal justice contexts).

[159] *See, e.g.*, Jona Goldschmidt, *The Necessity of Dishonesty: Police Deviance, "Making the Case," and the Public Good*, 18 POLICING & SOC'Y 113 (2008).

[160] MARGARET S. ARCHER, BEING HUMAN: THE PROBLEM OF AGENCY 84 (2000).

et al. in their introductory chapter in the Russell Sage Foundation volume: Why is legitimacy important within a social system—or, we may add, a criminal justice system?[161] For most criminologists who have considered the concept of legitimacy, including Tyler and his colleagues, the answer to this question has focused on improvements in legal compliance by citizens, a better flow of intelligence on local social order (for example, in a neighborhood or within a prison), and a greater willingness on the part of the public to empower criminal justice agencies. Such claims are not in dispute here, not least because there is substantial empirical evidence in support of them. For example, Paternoster and his colleagues found that arrestees for spousal assault who thought the police had treated them fairly (i.e., legitimately) were less likely to reoffend.[162] Or again, in New York, Sunshine and Tyler reported that perceptions of police legitimacy explained people's compliance with the law and cooperation with legal authorities.[163] And using data from a nationwide telephone survey in the United States, Reisig and his colleagues found that legitimacy shaped both compliance and cooperation.[164]

Notwithstanding the considerable importance of this body of literature, it can be criticized as offering an insufficient answer to the question of why legitimacy matters within a social system and a criminal justice system. There are two reasons for this view. First, there is at least tentative evidence in the context of imprisonment that non-legitimate practices (especially those failing to respect a prisoner's human needs and dignity, i.e., a failure in Tyler's "quality of treatment" from Figure 1) can lead to significant personal distress and an enhanced risk of attempted suicide.[165] Secondly and more broadly, one can reasonably argue, in light of Coicaud's definition of legitimacy, that issues such as the improvement of legal compliance, boosting the flow of intelligence to criminal justice agencies, and so on—while certainly important—do not go to the heart of legitimacy's central focus, namely the recognition of the right to govern.[166] In this Section, we shall accordingly focus on two matters that are more central to that core issue.

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[161] Tyler et al., *supra* note 14, at 10.

[162] Paternoster et al., *supra* note 113, at 184.

[163] Sunshine & Tyler, *supra* note 4, at 526.

[164] Michael D. Reisig et al., *The Construct Validity and Refinement of Process-Based Policing Measures*, 34 CRIM. JUST. & BEHAV. 1005, 1021 (2007).

[165] Alison Liebling et al., *Revisiting Prison Suicide: The Role of Fairness and Distress*, *in* THE EFFECTS OF IMPRISONMENT 209, 220–22 (Alison Liebling & Shadd Maruna eds., 2005).

[166] COICAUD, *supra* note 18, at 10.

A. LEGITIMACY AS MORAL RECOGNITION

Richard Sparks and his colleagues, at the end of their book on order and legitimacy in maximum security prisons, report a challenging discussion with a prison governor, who asked a pointed question: "Does all this mean that legitimacy is just about pleasing the prisoners?"[167] A core element of the authors' response concerns the degree to which prisoners' demands or complaints had any "basis of moral support in [the wider] society."[168] The distinction between "good" and "right" relationships in prison, noted earlier, rests on the same basis. Right relationships are those that do indeed respect the prisoner as a human being, take account of his welfare needs, and so on, yet at the same time uphold and maintain the societal norms under which it was deemed necessary to require the individual to serve a prison sentence. Right relationships between prison staff and prisoners are therefore those that can be morally supported within the norms of society at large, and not simply those demanded by those with a particular stake in the matter (in this instance, prisoners).

But what happens if the moral standards of a given society allow a type of behavior that seems to outside observers to be questionable, or even evil? Here, we return to the strong fact–value distinction that is so important within Weber's thought and to Hinsch's distinction between empirical and normative concepts of legitimacy.[169] If legitimacy depends simply on the moral standards of a given society, and if societies can "invent" for themselves any kind of moral basis for the authority of a particular regime,[170] then, as David Smith points out, it follows that "the authorities are legitimate if people generally believe that they ought to be obeyed"[171] and "a political system . . . though clearly evil, can still be legitimate."[172] To give a concrete but hypothetical example: if in a given state there is an ethnic minority population constituting 1% of the population, and the parliament of that state passes (with massive and enthusiastic support from the majority population) a statute saying that the minority is to be eliminated in death camps, then it would seem that, according to the law and the shared values of that society, this enactment

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[167] SPARKS ET AL., *supra* note 7, at 329.

[168] *Id.* at 330. For example, Sparks et al. argue that requests for civilized conditions for family visits would carry moral support in the wider society, but a claim that prison officers should not patrol an exercise yard because such patrols would breach prisoners' right to privacy would not.

[169] Hinsch, *supra* note 45.

[170] *See supra* notes 40–42 and accompanying text.

[171] Smith, *supra* note 12, at 35.

[172] *Id.*

must—on this kind of analysis—be regarded as entirely legitimate.

This uncomfortable conclusion can only be challenged by contesting aspects of the strong fact–value distinction upon which it rests. This is not the place, nor are we the appropriate authors, to discuss this issue in any detail. But it is relevant to note one main argument that has been deployed in moral philosophy against the so-called Naturalistic Fallacy (that is, the alleged fallacy of deriving evaluative statements from factual statements).[173] This argument has been well summarized by Alasdair MacIntyre, and it concerns "functional concepts," that is, nouns that in themselves embody an understanding of the purposes or functions expected to be fulfilled by a person or thing.[174] To use MacIntyre's own examples, a watch has the purpose or function of telling the time accurately, and an arable farm has the purpose or function of growing crops such as wheat or hay. It follows, says MacIntyre, "that the concept of a watch cannot be defined independently of the concept of a good watch"—obviously, a watch is not a good watch if it does not accurately keep time.[175] In consequence of this, a factual statement (such as: "He gets a better yield per acre for his wheat than most other farmers, and in his farming practices he takes great care to minimize any damage to the natural environment") can *validly* lead to the *evaluative* conclusion that "he is a good farmer." Thus, for functional concepts, the so-called Naturalistic Fallacy does not apply, and the fact–value distinction is breached.

It is not hard to see how this line of argument might be applied to criminal justice contexts. Suppose it is factually true both that "XY is a chief of police" and that "XY regularly accepts secret payments from the mafia." In such circumstances, it would validly follow that "XY is not a good chief of police." Given all this, as MacIntyre points out, it is rather astonishing that most philosophers of the early- and mid-twentieth century apparently "took it for granted that *no* moral arguments involve functional concepts."[176] This is particularly ironic given that "moral arguments within the classical, Aristotelian tradition—whether in its Greek or its medieval versions—involve at least one central functional concept," namely the concept of humankind.[177] That is to say, humans have been understood, within the Aristotelian and Thomist traditions, "as having an essential

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[173] *See supra* notes 43–44 and accompanying text.

[174] ALASDAIR MACINTYRE, AFTER VIRTUE 57–59 (2d ed. 1984).

[175] *Id.* at 58.

[176] *Id.*

[177] *Id.*

nature and an essential purpose or function."[178]   And, we may add, those same Aristotelian philosophers considered that governments and legal authorities also have an essential purpose or function, which includes the dispensing of justice within the community for which they have responsibility.

Consequent upon the work of MacIntyre and others, so-called virtue ethics of an Aristotelian kind, and more recently of other kinds, have in the last thirty years enjoyed a remarkable renaissance.[179]   More generally, within moral philosophy, subjectivist and relativist positions are now much more frequently criticized (though they are still supported by some scholars).[180]   These are very significant developments that have transformed moral philosophy almost beyond recognition in the last half-century.[181]

It is appropriate to note two important consequences of these developments for the social scientific study of legitimacy.   First, when faced with examples such as that of the society wishing to eliminate an ethnic minority, one can no longer so confidently say that there is no objective basis for moral judgments and that any society can therefore invent any kind of political system it wishes, and still call it moral and legitimate.   This consequence is crucially important in the present context, because it begins to provide an epistemological basis for what Hinsch called "'objective' criteria of legitimacy."[182]   Secondly, if indeed descriptive and evaluative statements concerning human beings and governments are more intertwined than social scientists following Weber have traditionally believed, then this has a crucial consequence: the study of the normative can no longer be (as so often in the past) either eliminated from the sphere of social science altogether or restricted to descriptive statements about people's moral beliefs and their consequences.   Taken together, these two points are of the greatest significance.[183]   Among other things, they have the consequence that the literature on legitimacy needs to be connected more firmly to the literature on justice, just as in political science generally, theories of democracy and theories of justice need to be brought more fully

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[178] *Id.*

[179] *See, e.g.*, ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999); CHRISTINE SWANTON, VIRTUE ETHICS (2003).

[180] For differing examples of recent realist texts in moral philosophy, see TERENCE CUNEO, THE NORMATIVE WEB (2007), and KANE, *supra* note 41.   Both books contain extensive discussions of alternative positions.

[181] *See* Warnock, *supra* note 43.

[182] Hinsch, *supra* note 45, at 41.

[183] *See also* COICAUD, *supra* note 18.

together.[184]

Related to this discussion is a recent paper on the development of cross-national European indicators of "trust in justice," in which Jackson et al. attempted to operationalize Hinsch's dual empirical–normative concepts of legitimacy.[185]   This is indeed a novel and interesting development, especially as Hinsch himself has argued that it is possible to "affirm both [concepts] simultaneously."[186]   Jackson et al. measure "empirical legitimacy" using survey responses from individual citizens and normative legitimacy by what they describe as "objective behaviours of criminal justice institutions."[187]   As examples of the latter, the authors refer to the "normative justifiability of power (for example, defined as levels of democratic accountability and transparency)" and to the "legality of action [of criminal justice institutions] (for example, defined as levels of cooperation and abuse)."[188]   These are interesting suggestions, but the approach would seem to require some significant elaboration to be fully convincing, given both the general complexity of establishing objective normative standards and, more particularly, Hinsch's comment that "any particular normative conception of legitimacy . . . has to expound its substantive criteria of legitimacy in a way that explains why meeting these criteria actually confers normative authority on . . . institutions or persons"[189]—a task that Jackson et al. do not attempt.

B. LEGITIMACY AS DIALOGUE

We turn now to a second reason for seeking to transcend issues of compliance in explaining why legitimacy is important within a social system; here we focus especially on the dialogic character of legitimacy. To begin with a cross-sectional analysis, if the two dimensions of power-holder and audience legitimacy are brought together, it is possible to treat them as the *X* and *Y* coordinates in a simple matrix, with the possibility not only of congruence (for example, both the power-holder and the audience regard the power-holder as securely legitimate) but also of incongruence (for example, the power-holder has a secure view of his legitimacy that is not shared by the audience).[190]   Such examples immediately raise questions

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[184]   JUSTICE AND DEMOCRACY (Keith Dowding et al. eds., 2004).

[185]   Jonathan Jackson et al., *Developing European Indicators of Trust in Justice*, 8 EUR. J. OF CRIMINOLOGY 267 (2011).

[186]   Hinsch, *supra* note 45, at 39.

[187]   Jackson et al., *supra* note 185, at 273.

[188]   *Id.*

[189]   Hinsch, *supra* note 45, at 42.

[190]   *See* HOLMES, *supra* note 121, at 39.

of stability and change over time in criminal justice organizations. For example, strain may be generated if, in a given context, there is a significant variation between power-holders and a given group of citizens about what should count as reasonable grounds for (1) the power-holder to make legitimacy claims and (2) the audience to accept the power-holder as a legitimate authority. The result, as the dialogue develops, can be a momentous change in how a criminal justice agency operates and even how it is constituted. An example of this is the aftermath of the 1981 Brixton riots in London, previously discussed.[191] The legitimacy deficit exposed by the riots and Lord Scarman's subsequent official inquiry led, among other things, to significant changes in police recruitment procedures, with much more active attempts to recruit members of ethnic minorities in order to make the police service more representative of the community that it served. Thus, legitimacy (or, in this instance, lack of legitimacy) was seen to be very important to a social system, but its importance went well beyond issues of legal compliance. Rather, the eventual key issue was a debate, within a multi-ethnic society, about the appropriate makeup of the police service if the service's claims to be exercising good governance were to remain credible.

VI. IMPLICATIONS FOR FUTURE EMPIRICAL RESEARCH

As we noted at the outset, the aim of this Article is primarily theoretical. It is, therefore, not our intention to provide detailed guidelines for the measurement and study of the conceptual issues we have raised above. Nevertheless, we consider it to be important, in concluding, to offer some general comments relating to future empirical research on legitimacy in criminological contexts, because we fully recognize that we shall only have achieved our purpose if some of the theoretical propositions that we have advanced are, in the future, developed and tested through empirical research.

For reasons of space, we restrict the discussion in this Section to three principal topics: studying power-holder legitimacy, measuring audience legitimacy, and developing longitudinal research on legitimacy.

A. STUDYING POWER-HOLDER LEGITIMACY

First, we suggest that our analysis highlights an urgent need to develop studies of power-holder legitimacy, given that empirical studies of legitimacy in the field of criminal justice have, up to now, been focused

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[191] *See supra* notes 43–44 and accompanying text.

almost exclusively on audience legitimacy.

In the field of political science, studies of power-holder legitimacy have focused predominantly on high-level political actors. One conclusion to emerge from such studies concerns the importance of the relationship between an executive leader and his or her immediate followers; indeed, in some political systems acceptance of the legitimacy of such a leader by his or her inner circle has been shown to be crucial to the survival of the regime.[192] One can analyze some very complex processes here, as Rodney Barker suggests:

> Rulers are legitimating themselves in their own eyes; at the same time they are legitimating themselves in the sight of their immediate supporters . . . ; the governing community [leader plus immediate supporters] is legitimating itself collectively in its own eyes; and the governing community is legitimating itself in the eyes of ordinary subjects.[193]

A similar analysis could usefully be undertaken within large criminal justice organizations—for example, a state-level prison service or the principal police service in a conurbation.[194] However, criminological researchers cannot realistically restrict the study of power-holder legitimacy to the dimensions articulated by Barker (which, it will be noted, jump straight from the "governing community" to citizens). This is because, as previously noted, within criminal justice systems most front-line staff are themselves significant power-holders. Hence, the full study of power-holder legitimacy in the field of criminal justice necessarily requires attention to be paid, not only to senior but also to junior power-holders and to the interaction between them.

That in turn suggests, secondly, that the study of power-holder legitimacy would, in criminal justice contexts, benefit from adopting a holistic perspective on criminal justice organizations. Interestingly, Tyler and Blader extended the procedural justice research tradition to the study of work organizations with an empirical study of 400 employees making a variety of judgments about cooperation within their respective work organizations.[195] In their final empirical model, incentives and rewards had

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[192] Paul G. Lewis, *Legitimation and Political Crises: East European Developments in the Post-Stalin Period*, *in* EASTERN EUROPE 1 (Paul G. Lewis ed., 1984); Rothschild, *supra* note 17, at 491.

[193] BARKER, *supra* note 150, at 59.

[194] Anecdotal evidence certainly suggests that the relationship between a police or prisons chief executive and his or her immediate work circle is of relevance to issues of legitimacy.

[195] TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS (2000).

no direct influence on any of the indices of cooperation.[196]   Much more powerful were "status judgments," such as pride in group membership and self-identification with the organization (exemplified by questions such as: "When I talk about where I work, I usually say 'we' rather than 'they'").   In turn, these status judgments were strongly influenced by perceptions of procedural justice, as experienced by employees within the organization.[197]

It is important, however, to note that Tyler and Blader's study, and other related studies such as that by Tyler, Callahan, and Frost,[198] focus on judgments that employees make about the procedural justice and legitimacy of their organizations. These studies, therefore, do not cover what might be regarded as a key issue in power-holder legitimacy, namely the degree of self-belief that those employees (e.g., law enforcement officers) have in the moral rightness of their own claims to exercise power. Therefore, it would be interesting and important to test whether, by extension, the experiences of procedural justice within their organizations might also affect the level of confidence that front-line police and prison staff express in their own legitimacy when dealing with citizens or prisoners.   Pursuing these speculations a little further, Jack Barbalet has argued that "feelings of confidence arise from acceptance and recognition in social relationships."[199] Might it be the case, therefore, that peer relationships (with officers of the same rank) are also relevant to officers' confidence in their own legitimacy?[200]   These are all researchable but largely unresearched questions.

Thirdly, focusing on the self-beliefs in legitimacy of front-line criminal justice staff, there is clearly a need to study how such officers reach their self-beliefs, and the content of such beliefs in terms of legality, shared values, and so on. For example, what importance do officers assign to the *manner* in which they exercise their authority, the *ends* that particular practices are designed to achieve and their relationship to *community values*, and so on? Within prison studies, Liebling and colleagues have reported on their use of innovative research techniques, such as asking prison officers "what makes a good prison officer?" and then—following a Danish precedent—inviting them to name an individual whom they

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[196] *Id.* at 196.

[197] *Id.* at 181.

[198] Tom R. Tyler, Patrick E. Callahan & Jeffrey Frost, *Armed, and Dangerous(?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457 (2007).

[199] JACK BARBALET, EMOTIONS, SOCIAL THEORY AND SOCIAL STRUCTURE 87 (2001).

[200] This refers, of course, to appropriate confidence, and not to the overweening, narcissistic approach to power discussed in a previous section.

considered to be a role model for other officers to follow.[201] Clearly, such techniques could be adapted so as to focus more specifically on issues of power-holder legitimacy.   We also need to know more about the *consequences* of officers' self-beliefs. For example, Margaret Archer has argued that people with different identities "will evaluate the same situations quite differently and their responses will vary accordingly."[202] If that is correct, we should expect individual differences in officers' beliefs about self-legitimacy, as well as the social and institutional context, to influence how they perceive, evaluate, and respond to situations.   Thus, properly developed, the exercise of power-holder legitimacy should result in a *critical self-awareness* by police and prison officers of the importance of the ways in which they view themselves and use power. This should in turn help to explain the quality of interactions that officers with differential levels of self-legitimacy might have with citizens, including the tendency to use (deadly) force.[203]

Finally, studies are needed on the consequences of "legitimacy deficits" (see Figure 2) and how criminal justice agencies react to such deficits in terms of their own beliefs and practices. As previously noted, there can often be a significant gap between what criminal justice agencies believe is the legitimacy of their own authority and the assessments of various audiences. Where such a gap exists and is brought to the attention of the agency, research could usefully address the nature of the actions that are taken in response and the success or otherwise of these actions.

B. MEASURING AUDIENCE LEGITIMACY

"Measurement, it would seem, first requires some degree of clarity about what is to be measured."[204] When we scrutinize the existing survey research on legitimacy in light of this aphorism, we find that despite the major contributions of this research, there remains some room for improvement. In these studies, audience legitimacy is often measured—as in Tyler's original work—using two principal subscales, namely: perceived obligation to obey the law and expressed allegiance or support for legal

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[201] LIEBLING ET AL, *supra* note 89, at 48–57.

[202] MARGARET S. ARCHER, STRUCTURE, AGENCY AND THE INTERNAL CONVERSATION 139 (2003).

[203] This approach could perhaps be fruitfully related to the Alpert and Dunham's "authority maintenance theory," although that discussion is beyond the scope of the present Article. *See* GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE ch. 8 (2004).

[204] ALVIN GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY 17 (1964).

authorities.[205] Subsequent studies have used, in various combinations, four different subscales, which may on occasion be combined into an overall audience legitimacy scale; these include the two subscales already mentioned, plus cynicism about the law and institutional trust.[206] More recently Tyler et al. have measured legitimacy using questions aimed to establish to what extent subjects "felt an obligation to obey the law and felt trust and confidence in legal authorities."[207]

When we scrutinize the construct validity of these measurements in light of the analysis in this Article, a number of questions arise. The two most important of these concern issues of "trust" and of "perceived obligation to obey the law."

Jack Barbalet, writing about trust, has said that "a confusion of trust with legitimacy . . . can only obstruct a satisfactory account of trust. Explanatory theory is not advanced by making one key concept do the work of many."[208] Trust tends to be future-oriented and may be defined as "a positive feeling of expectation regarding another's future actions."[209] This definition is consistent with Tyler and Huo's concept of motive-based trust, which concerns "inferences about the intentions behind actions, intentions that flow from a person's unobservable motivations and character."[210] It is, they note further, "an estimate of the character and motives of others" and serves as the basis for predicting "whether [they] will act reasonably toward us in the future."[211] Legitimacy, on the other hand, is a concept focused on the present; it is concerned with recognition of the moral rightness of claims to exercise power here and now, rather than in the future. The question of whether and how the two concepts are related is an empirical one that requires careful investigation; conceptually, however, they are not identical.

As an example of the conceptual difference, which also points to the importance of specifying the particularities of trust relationships, consider the case of residents of nationalist West Belfast during the period of "The Troubles" in Northern Ireland in the 1980s and early 1990s. These citizens explicitly rejected the legitimacy of the then-official police service in

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[205] TYLER, *supra* note 1.

[206] *See* TYLER & HUO, *supra* note 4; Reisig et. al., *supra* note 164; Sunshine & Tyler, *supra* note 4.

[207] Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 389 (2010).

[208] Jack Barbalet, *A Characterization of Trust, and its Consequences*, 38 THEORY & SOC'Y 367, 369 (2009).

[209] *Id.* at 375.

[210] TYLER & HUO, *supra* note 4, at 61.

[211] *Id.* at 62.

Northern Ireland, the Royal Ulster Constabulary (RUC), which they regarded as having been originally imposed by a quasi-colonial power (England) and as endemically institutionally biased against their (Catholic and nationalist) community. They, therefore, certainly did not trust the RUC to police their area fairly, and given the level of hostility in the community, the RUC in turn only entered the area in armored cars. Nevertheless, residents of West Belfast frequently reported crimes such as burglary to the RUC for insurance purposes, trusting that the police would deal with the matter professionally, as indeed they did.[212]

The concept of "perceived obligation to obey the law" also cannot be straightforwardly equated to legitimacy. As we have noted in earlier sections, there are several reasons other than true legitimacy why people might express feelings of obligation to obey the law: these include structurally-generated apathy and pragmatic acquiescence (dull compulsion) and instrumental calculations.[213] To measure true legitimacy, these alternative motives need to be disentangled; however, most existing studies have not paid sufficient attention to the need for this disentanglement.

Jackson et al. recently asked people, in a European survey:

To what extent is it your duty to:

do what the police tell you to do, even if you don't like how they treat you?

back the decisions made by the police even when you disagree with them?

do what the police tell you even if you don't understand or agree with the reasons?[214]

One of the anonymous reviewers of the present paper suggested that these formulations avoid the problems described above. It is, however, hard to agree with this view, given that the term "duty" is not further elaborated in the interview schedule. Thus, respondents could reasonably regard "duty" as a legal duty, or a moral duty, or a mixture of the two; it is also conceivable that some respondents, not being conversant with the dictionary definition of "duty," might treat it as being neither. If the duty is primarily legal, then it reflects a situation of de facto authority rather than true legitimacy.[215] If respondents treat "duty" as meaning simply "I have to do this," it could be dull compulsion. Legitimacy researchers will accordingly need some deeper explorations to disentangle the varied

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[212] Jade Moran, Informal Justice in West Belfast: the Local Governance of Anti-Social Behaviour in Republican Communities (Oct. 12, 2010) (unpublished Ph.D. thesis, University of Cambridge) (on file in University of Cambridge library).

[213] DAVID HELD, MODELS OF DEMOCRACY 197 (3d ed. 2006).

[214] Jackson et al., *supra* note 185, at 283.

[215] *See supra* notes 128–32 and accompanying text.

motives that might underpin people's feelings of obligation to obey criminal justice agencies.

Experimentation with fresh ways of measuring legitimacy could also be valuable. Our analysis in this Article shows that central to audience legitimacy are two ultimately interdependent issues: (1) the *legality* of the activities of law enforcement officials, and (2) whether and to what extent the law itself and the manner of its enforcement express the *shared values* of the community within which that law operates. Empirical studies incorporating measures focused on legality and shared values therefore seem likely to offer valuable starting points for improved construct validity in future studies of audience legitimacy.[216] As we indicated previously, however, such an approach will necessarily incorporate rather than supplant Tyler's procedural justice arguments, since its two dimensions—quality of decisionmaking and quality of treatment—are embraced with the notion of shared values. As previously argued in Part IV.A.4, another specific shared value that could be incorporated is effectiveness. Thus, we envisage a multi-dimensional measurement of legitimacy embracing (at least) legality, procedural justice, and effectiveness.

C. DEVELOPING LONGITUDINAL RESEARCH STUDIES ON LEGITIMACY

The dialogic approach to legitimacy that we have outlined in this Article requires, above all, the adoption of longitudinal research strategies, so that the claim–response dialogue, which is necessarily dynamic, can be studied over a reasonable period of time. The kind of questions that might be addressed within such a framework includes the following: *Under what circumstances* and *why* might the audience legitimacy of a criminal justice agency (or a given part of it) increase, decrease, or remain stable?[217] Does the self-belief in legitimacy of front-line officers vary systematically with changes in audience legitimacy? What effects do major incidents in the "life course" of the organization (for example, illegalities such as corruption

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[216] *See* Tankebe, *supra* note 123.

[217] For an innovative attempt to examine stability and change in individuals' perceptions of legitimacy over time, see Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 282, 291 (2005). These authors analyzed data from a juvenile court sample of serious adolescent officers in two U.S. cities over a period of eighteen months, finding a remarkable stability in perceptions of legitimacy. Subgroup analysis also showed that those with the lowest legitimacy scores were those who had the highest number of prior arrests and lock-ups, and consistently scored lowest on procedural justice measures. However, the study does not capture the experiences and views of the adolescents prior to contacts with the criminal justice system, nor possible changes in response to different police tactics. For these purposes, neighborhood-based studies would be needed.

scandals, or major riots in prisons or deprived communities) have on power-holder and audience legitimacy? What sorts of actions by the criminal justice organization work (or do not work) by way of re-legitimation, and in what contexts?

An interesting prototype for the kind of longitudinal analysis that we have in mind may perhaps be found in James Jacobs's classic study of Stateville Prison, Illinois, over a period of half a century (1925–1975).[218] Although Jacobs' work contains no explicit discussion of legitimacy theory, it is not hard to see how the use of such theorization could enrich the analysis. To conclude this Article, therefore, we summarize one decade of the Stateville story, in a narrative that vividly illustrates the dialogic character of legitimacy.

For twenty-five years from 1936 to 1961, Stateville's then-warden, Joseph Ragen, exercised a strongly authoritarian and very personal dominance over both guards and inmates, and he largely insulated the institution from outside influences. In 1961, Ragen left Stateville and was succeeded by his former assistant warden, Frank Pate. But Pate's decade in power (1961–1970) was uncomfortable, and among the many problems that beset him were:

- The state's Department of Public Safety increasingly wished to influence detailed policies in the prison. For example, in 1965 a new and liberal director of the Department decreed that Stateville inmates could, if they wished, take off their uniform caps in the summer months. Ten years later, this decision was still "recalled with emotional anguish by Stateville guards and administrators" in the prison.[219]

- In the context of the emerging civil rights movement, prisoners—especially black prisoners—became increasingly assertive about prison conditions and prisoners' rights.

- The courts abandoned their previous "hands off" doctrines as regards lawsuits relating to prison conditions.

Thus, the power dynamics of running Stateville were changing, but—significantly—Pate's response was anything but flexible. As an incoming senior staff member later put it, management "wouldn't give the inmate anything," preferring to try to maintain the caste-like distance between staff and prisoners that had pertained in the Ragen era.[220] In consequence, the growing demands of an emergent group of Black Muslim prisoners were all

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[218] JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY (1977).

[219] *Id.* at 55.

[220] *Id.* at 255.

routinely denied. Inevitably, the end result was a court case, where Pate's policy stance came under severe strain. In a public arena, the administration seemed to the court and to the public to be "capricious and arbitrary"; they could, for example, "make no rational argument for allowing Christian inmates to read the Bible but for refusing to allow Muslim inmates the Quran."[221] Moreover, "[t]o the inmate population the picture of the [inmate plaintiff] and Pate testifying against one another as equal adversaries did much to increase the Muslims' prestige."[222]

In the terminology utilized in this Article, these events illustrate an inflexible and ultimately failed attempt by the prison's power-holders to make credible claims for their own legitimacy within a context of changing social values and a changed legal framework. Inevitably, this stance adversely affected audience legitimacy, both with prisoners and with the outside community. Indeed James Jacobs's judgment was that, ultimately, the Pate administration's inflexibility in the 1960s "made inevitable the complete collapse of authority [in Stateville] after 1970."[223]

Thus, read through the appropriate theoretical lenses, Jacobs's Stateville research provides an eloquently persuasive (if embryonic) case study of the future potential of longitudinal studies of legitimacy, where legitimacy is itself seen as a dialogic process, and where its focus is upon the recognition of the right to govern, and not simply upon audience compliance.

VII. CONCLUSION

"The problem of order," Dennis Wrong has persuasively argued, is "a genuinely transhistorical problem rooted in inescapable conflict between the interests and desires of individuals and the requirements of society."[224] Therefore, the task that confronts power-holders (including criminal justice agencies) in any society concerns how they can "secure [the] establishment of cooperative social relations making possible the pursuit of collective goals."[225] That will usually require a degree of coercion, but the task will be immensely aided if the power-holders are widely regarded in that society as, in the fullest sense, having the right to rule; that is to say, their authority is regarded as truly legitimate.

However, the concept of legitimacy is elusive and multifaceted. This

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[221] *Id.* at 64.

[222] *Id.* at 64.

[223] *Id.* at 204.

[224] DENNIS H. WRONG, THE PROBLEM OF ORDER 36 (1994).

[225] *Id.*

Article has therefore been written in the hope of developing an improved conceptualization of legitimacy within the sphere of criminal justice, believing as we do that legitimacy in criminal justice plays a key role in the establishment of what Wrong described as "cooperative social relations."

Our Article began with a summary of Tom Tyler's groundbreaking series of studies that have contributed so much to the present understanding of legitimacy in criminal justice research. The Tylerian model holds that judgments about procedural justice—defined as encompassing quality of decisionmaking and quality of interpersonal treatment—shape people's assessments of the legitimacy of legal institutions. Those assessments, in turn, have been shown to explain decision acceptance, support for legal institutions, and legal compliance.

Drawing on the political science and sociology literature, we have argued a case for going beyond—but emphatically not jettisoning—the procedural justice framework. We have accordingly proposed a *dialogic* understanding of legitimacy that necessarily draws attention to, and links, two interrelated dimensions: those of *power-holder legitimacy* and *audience legitimacy*. Contemporary criminal justice research has focused almost exclusively on the latter, but we have sought to argue that power-holder legitimacy can be of equal importance.

Several implications follow from our analysis, and two may be highlighted here. First, the dialogic approach to legitimacy necessarily alters the answer to the pertinent question "why is legitimacy important within a criminal justice system?" Traditionally, answers to this question have focused on legal compliance, but a dialogic approach widens this to include issues such as the justification of the claims to legitimacy made by power-holders, as well as matters of organizational stability and change. This wider focus ultimately requires a linking of legitimacy to questions of justice.

The second implication concerns the measurement of legitimacy within future empirical studies. As we hope we have demonstrated, it is vitally important—particularly in criminal justice contexts, where power imbalances are often found—to frame survey questions so that they do not conflate dull compulsion and true legitimacy. Also, if our analysis is correct, one must in future studies distinguish carefully between legitimacy and trust. More positively, legality and shared values appear to be two conceptually foundational elements of audience legitimacy, and creative reflection on that fact should open up fresh approaches to the measurement of audience legitimacy.

Recently, one of us met a chief police officer from a police service outside our own jurisdiction. He was impressed by the procedural justice

literature, which he had communicated to his officers and which had undoubtedly been valuable in developing operational policing in the area for which he carries executive responsibility. Nevertheless, he commented, the procedural justice literature offered him only limited guidance as to how best to adapt police strategies and training in a fast-changing and increasingly cosmopolitan world, where the legitimacy of his force seemed open to more frequent challenges than in the past. We agree with his assessment, and we hope that this Article might make a contribution to what seems likely to be an increasingly important debate.