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Procedural Justice Principles into Justice Policy

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# Does Legitimacy Necessarily Tame Power?

## Some Ethical Issues in Translating Procedural Justice Principles into Justice Policy

Mike Hough, Ben Bradford, Jonathan Jackson  
& Paul Quinton\*

**Abstract:** This article examines some of the ethical dilemmas associated with research on procedural justice. Most of this research has involved surveys of the public, involving attitude measurement amongst random samples of adults. These tend not to give rise to the more common ethical dilemmas that criminological researchers encounter, to do with coerced consent and the preservation of anonymity and confidentiality. However, there are significant ethical issues in the application of this research to policy and practice. They relate largely to the risks in providing utilitarian justifications for the adoption of values, and in the use of low-visibility behavioural techniques to nudge people into compliance with the law. These ethical dilemmas offer ‘knowledge tools’ that could be misused in the pursuit of consent to authority – even if individual research subjects are not exposed to any harm in the research process. These – resolvable – dilemmas need to be surfaced and discussed.

**Keywords:** policing, procedural justice, ethics, compliance, nudges

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## INTRODUCTION

This article reflects on some of the ethical dilemmas that we have encountered during our experience of translating research for policy makers. As researchers we have long been interested in the notion of procedural justice, particularly its importance for police-community relations, and we have conducted a lot of research into the issue. Most of our research has involved random sample surveys of the general public, which involve attitude measurement amongst adults whose consent is freely given and whose anonymity is guaranteed. As such, we have not encountered any of the more common ethical dilemmas that criminological researchers encounter, to do with coerced consent and the preservation of anonymity and confidentiality<sup>1</sup>, and we have rarely encountered any challenges to our work from university research ethics committees. Yet, a number of thorny ethical issues have emerged in the course of our efforts to translate our findings for policy makers. They relate largely to the risks in providing *utilitarian* justifications for the *adoption of values*, and in the use of low-visibility behavioural techniques to nudge people into compliance with the law. These ethical (or perhaps, political) dilemmas are of a different order to those conventionally considered in discussions of research ethics, as the research in question potentially offers ‘knowledge tools’ that could be misused in the pursuit of consent to authority – even if individual research subjects are not exposed to any harm in the research process.

## PROCEDURAL JUSTICE THEORY

Research into the sources of legitimacy in the justice system has increased exponentially since the turn of the century, and procedural justice theory is now the best known analytic framework for understanding institutional legitimacy<sup>2</sup>.

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<sup>1</sup> However, issues of consent tend to be dealt with fairly cursorily in randomised controlled trials on the issue, where it tends to be assumed that participating police officers are required as employees to take part, and that there is no need whatsoever to secure consent from participating members of the public.

<sup>2</sup> See, e.g., Sunshine, J., & Tyler, T.R. (2003) The role of procedural justice and legitimacy in shaping public support for policing, *Law and Society Review* 37: 513-548; Tyler, T. R. (2003) Procedural justice, legitimacy, and the effective rule of law, in M. Tonry (Ed.), *Crime and justice: A review of research* (vol. 30, pp. 431–505) (Chicago: University of Chicago Press); Tyler, T. R. & Fagan, J. (2008) Why do people cooperate with the police?, *Ohio State Journal of Criminal Law* 6: 231-275; Tyler, T. R., Schulhofer, S. J., & Huq, A. Z. (2010) Legitimacy and deterrence effects in counter-terrorism policing: A study of Muslim Americans, *Law and Society Review* 44: 365–401; Tyler, T. R. (2011) Trust and legitimacy: Policing in the USA and Europe, *European Journal of Criminology* 8(4): 254-266; Schulhofer, S. J., Tyler, T. R., & Huq, A. Z. (2011) American policing at a crossroads: Unsustainable policies and the procedural justice alternative, *The Journal of Criminal Law and Criminology* 335-374; Papachristos, A. V., Meares, T. L., & Fagan, J. (2012) Why do criminals obey the law? The influence of legitimacy and social networks on active gun offenders, *The Journal of Criminal Law and Criminology* 102(2): 397-440; Huq, A. Z., Tyler, T. R., & Schulhofer, S. J. (2011) Mechanisms for eliciting cooperation in counterterrorism policing: Evidence from the United

Procedural justice theory is sometime misunderstood to be solely about officials' compliance with rules and regulations and with their observance of due process. Of course procedural justice is intimately linked with legality and procedural compliance, but most variants of the theory are concerned with fairness first, and with legality second: they are more concerned with people's perceptions of the treatment they receive, and whether they feel this to be fair and respectful, than with the actual or perceived legality of officials' behaviour. The central claims of procedural justice theory – or, sometimes, procedural fairness theory – are that:

- in their contact with police and other justice officials, people value fair treatment and fair decision-making more than outcomes that benefit them personally;
- procedural fairness – and especially the quality of treatment they receive – is more important to them in the course of contacts with justice officials than securing an outcome that is to their advantage; and
- procedural fairness builds legitimacy, and thus secures both compliance with the law and cooperation with justice officials.

Procedural justice theory is often contrasted with conventional deterrence theory<sup>3</sup>, the claim being that securing compliance with the law by deploying normative strategies such as those derived from procedural justice theory is less costly, less intrusive and more effective than instrumental or coercive ones based on deterrence. The insights of procedural justice are usually seen as benign: 'legitimacy tames power', in the words of<sup>4</sup>, because power-holders need to act fairly in the eyes of citizens if they are to be seen as legitimate by those citizens. And indeed it would be hard to find people who would prefer their police to be impolite, to ignore what citizens told them, and to refuse to account for their actions. It is probably for this reason that the ethical dilemmas sometimes fall out of sight in discussion of procedural justice theory.

The evidence to support the procedural justice perspective is substantial – but not totally clinching<sup>5</sup>. A large amount of research has established the existence

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Kingdom, *Journal of Empirical Legal Studies* 8(4): 728-761; Huq, A. Z., Tyler, T. R., & Schulhofer, S. J. (2011) Why does the public cooperate with law enforcement? The influence of the purposes and targets of policing, *Psychology, Public Policy, and Law* 17(3): 419; Tyler, T. R., & Jackson, J. (2014) Popular legitimacy and the exercise of legal authority: Motivating compliance, cooperation, and engagement, *Psychology, Public Policy, and Law* 20(1): 78-95; Tyler, T. R., Jackson, J., & Mentovich, A. (2015) The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact, *Journal of Empirical Legal Studies* 12(4): 602-636.

<sup>3</sup> E.g., Tyler, T. R. (2006) *Why People Obey the Law* (Princeton: Princeton University Press).

<sup>4</sup> Coicaud, J.-M. (2013) Crime, justice and legitimacy: A brief theoretical inquiry, in J. Tankebe, & A. Liebling (Eds.) *Legitimacy and criminal justice: An international exploration* (pp. 37-59, 40) (Oxford: Oxford University Press).

<sup>5</sup> E.g., sources cited in footnote 2; Hough, M., Jackson, J. & Bradford, B. (2013). Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey, in Tankebe, J. & Liebling, A. (Eds.) *Legitimacy and Criminal Justice: An International Exploration* (pp. 326-352) (Oxford: Oxford University Press).

of strong relationships between different types of fairness, perceptions of legitimacy, preparedness to comply with the law, and preparedness to cooperate with law officers. However, most of the research has involved cross-sectional surveys that cannot address issues of causality, and there has been very little qualitative research that examines the micro-dynamics of contacts with the police<sup>6</sup>. There may be any number of confounders lurking out of sight, and there is the question of the direction of causality: does trust engender legitimacy and thus compliance, or do people confer legitimacy on those who enjoy power, and as a by-product trust the power-holders?

There are a growing number of randomised controlled trials (and related quasi-experimental evaluations), some of which offer good support for the effectiveness of interventions grounded in procedural justice theory<sup>7</sup>. However, these test the delivery mechanism and the quality of its implementation, as much as the underlying theory that explicitly or implicitly underpins the initiative. In short, they tell us what interventions are effective in encouraging those in authority to be procedurally fair, or the public to change their perceptions. Even if the intervention proves ineffective, this does not necessarily disconfirm the underlying theory<sup>8</sup>. There are issues to contend with here not simply with theory failure but equally with implementation failure and evaluation failure.

Nor should the explanatory reach of procedural justice theory be overstated. Whilst we can readily accept that most people are guided most of the time by some normative principles, we really are rational calculators of costs and benefits – the *homo economicus* of classic economic theory – in some aspects of our lives. Regulatory offences such as exceeding vehicle speed limits provide us with an obvious example of deterrence theory in action, with probability of sanction being self-evidently important and legitimacy serving only as a marginal shaping consideration<sup>9</sup>. And often, the most parsimonious – and much ignored – explanation for compliance is simply habit<sup>10</sup>.

<sup>6</sup> Harkin D. (2015) Police Legitimacy, Ideology and Qualitative Methods: A Critique of Procedural Justice Theory, *Criminology and Criminal Justice* 15(5): 594-612.

<sup>7</sup> E.g., Mazerolle, L., Antrobus, E., Bennett, S., & Tyler, T. (2013) Shaping citizen perceptions of police legitimacy: a randomised field trial of procedural justice, *Criminology* 51(1): 33-63.

<sup>8</sup> The SCOTCET replication of the Australian QCET evaluation is a case in point (cf MacQueen, S. & Bradford, B. (2015) Enhancing public trust and police legitimacy during road traffic encounters: results from a randomized controlled trial in Scotland, *Journal of Experimental Criminology* 11(3): 419-443). The failure to replicate the positive findings of the Australian study (Mazerolle et al (2013), supra n 7) about the pay-offs from treating drivers with courtesy can easily be explained as implementation failure: the Scottish police argued (persuasively) that their normal practice in stopping drivers left less headroom for improvement than in Queensland, where stops were typically curt and cursory; and if anything the intervention decreased the quality of the relevant encounters for the experimental group, in part because officer felt constrained by the script they had to follow.

<sup>9</sup> But see Bradford B., Hohl, K., Jackson J., & MacQueen, S. (2015) Obeying the rules of the road, *Journal of Contemporary Criminal Justice* 31(2): 171-191.

<sup>10</sup> Cf Bottoms, A. (2002) Compliance and Community Penalties, in Bottoms, A., Gelsthorpe, L., & Rex, S., *Community Penalties: Change and Challenges* (pp. 87-116) (Cullompton: Willan); Kahneman, D. (2011) *Thinking, Fast and Slow* (Basingstoke: Macmillan); Wikström, P. O., Oberwittler, D., Treiber, K. & Hardie,

There is certainly scope for more conceptual and empirical work both in the definition of legitimacy and in the identification of the key ‘drivers’ of legitimacy. The boundaries between concepts of trust, legitimacy and the morally-grounded sense of obligation to obey authority are fuzzy, and drawn in different ways by different scholars. And whilst it is fairly clear that trust in fairness is a precondition for citizens to confer legitimacy on an authority, the boundaries between different types of fairness are also contestable. (Arguably procedural justice theory has paid far too little attention to distributive fairness, given how endemic across cultures are the tensions between the police and marginalised minority groups.) Does procedural justice imply distributive fairness? And does procedural fairness necessarily underwrite outcome fairness? Furthermore, the role of other preconditions for an authority to acquire legitimacy has been somewhat marginalised in procedural justice research – notably the level of competence displayed by the authority in doing its job. Whilst trust in fairness emerges consistently in developed Western democracies as a powerful predictor of public ratings of legitimacy, trust in competence sometimes appears to be equally or more important in developing countries.

System justification theory also provides a significant elaboration of, or qualification to, procedural justice theory. Political psychologists<sup>11</sup> have proposed that people feel under pressure to justify the social order of which they are part, and that this process affects not only those who are the greatest beneficiaries of the status quo, but also, paradoxically, those who are treated least fairly. The argument is that people are motivated to believe that the social system that regulates their lives is appropriate and proper; that to do so satisfies basic needs of an epistemic nature (for explanation and for attainment of knowledge and certainty) of an existential nature (for existential security) and of a relational nature (for solidarity and connections to others); and that people who feel threatened by crime and are therefore dependent on the police are especially motivated to legitimate the police as a way of reducing threat and dissonance. System justification theory represents a challenge to procedural justice theory’s central claim that power holders need to *earn* their legitimacy, because people confer legitimacy on that system at least in part *because* it can exercise authority over them<sup>12</sup>. We shall return to system justification theory later in the paper, because it is also relevant to the argument that procedural justice approaches can provide a palliative to the experience of unjust authority.

We would argue that these are issues about the fine-tuning of the procedural justice perspective, rather than fundamental flaws in the approach. Any account of the processes by which people do (or do not) comply with social norms almost

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B. (2012) *Breaking Rules: The Social and Situational Dynamics of Young People's Urban Crime* (Oxford: Oxford University Press).

<sup>11</sup> E.g., Jost, J.T., Liviatan, I., van der Toorn, J., Ledgerwood, A., Mandisodza, A., & Nosek, B.A. (2010) System justification: How do we know it's motivated?, in R. Bobocel et al. (Eds.) *The psychology of justice and legitimacy: The Ontario symposium* (vol. 11, pp. 173-203) (Hillsdale, NJ: Erlbaum).

<sup>12</sup> Ibid; see also Lukes S. (2005) *Power: A Radical View* (London: Palgrave Macmillan).

by definition needs to consider the role of fairness, as a basic and universal human expectation. We see procedural justice perspectives as being of central importance in sustaining relations between police and policed – and especially in repairing relations between police and public when these have become seriously fractured. Nevertheless we think it important to recognise that procedural justice tactics may not necessarily help to guarantee legality and fair treatment against *objective* criteria of fairness. On the contrary, when power holders treat people politely, listen to them and explain the reasons for their actions, this may under some circumstances be construed as a form of manipulation. This is most obviously the case when social skills are deployed as a palliative or mask for sub-standard treatment, or actually persuade people that unlawful actions are acceptable<sup>13</sup>. Critical legal theorists would extend this argument further, to claim that systems of justice can serve to justify and perpetuate economic and social inequality<sup>14</sup>.

This paper explores these alternative perspectives. To anticipate our conclusions, procedural justice theory narrowly interpreted does indeed provide a set of behavioural techniques that *could* be deployed to secure tolerance of illegal practices or compliance with illegitimate regimes (or judicial systems or police forces or other authorities). However, we argue that a coherent procedural justice approach needs to specify where the boundaries fall between behaviour which is courteous and respectful, on the one hand, and that which is manipulative, on the other. (Put simply, procedural justice approaches must respect the boundaries between charm and deviousness.) We also suggest that there is a good case for articulating whatever linkages exist between decent and respectful treatment of the ‘policed’ and adherence to more fundamental principles of human rights that apply to policing.

### **PROCEDURAL JUSTICE THEORY IN CONTEXT: A NON-INSTRUMENTAL APPROACH TO SECURING COMPLIANCE**

In examining these critiques of the procedural justice approach, it is useful to make some connections between procedural justice strategies and tactics and various other ‘non-instrumental’ approaches – including social marketing approaches, nudges, and situational crime prevention. Political scientists have used

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<sup>13</sup> Cf Harkin (2015), supra n 6; Meares, T. L. (2012) Good Cop: Knowing the Difference between Lawful or Effective Policing and Rightful Policing - And Why It Matters, *William and Mary Law Review* 54(1865): 1871-75.

<sup>14</sup> McBarnet, Doreen (1981) *Conviction: The Law, the State and the Construction of Justice* (New York: Springer); Norrie A. (2001) *Crime, Reason and History* (London: Butterworths); Ramsay, P. (2006) The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State, *Modern Law Review* 69(1): 29-58.

a variety of labels to describe this mode of governance, including ‘non intrusive’ approaches and ‘persuasion’<sup>15</sup>. As Mols and colleagues put it,

What makes [‘persuasion’] a distinct mode of governance is that it targets not the incentive structure, but people’s beliefs about the social world, thereby modifying their understanding of what represents their (personal and/or collective) best interests<sup>16</sup>.

Non-instrumental approaches for securing compliance are defined by negation - achieving their impact through means that are distinctively different to strategies that *directly* adjust the balance of costs and benefits that attach to any given course of action. In securing compliance with the criminal law, the state applies strategies that are designed almost entirely to increase the costs of non-compliance, rather than the benefits of compliance. Non-instrumental approaches leave the costs and benefits of non-compliance unchanged, but adjust the ‘choice architecture’, to borrow a term from behavioural economics, that people encounter in calculating these costs and benefits.

#### PROCEDURAL JUSTICE APPROACHES AS NON-INSTRUMENTAL STRATEGIES

Procedural justice approaches secure compliance not by increasing the probability of punishment but by conveying to citizens that the criminal law, and its agents, wield authority that is legitimate and thus is *worthy of compliance*. As such, it is a non-instrumental approach that operates at a *normative* level, by creating or reinforcing a sense of moral obligation to obey the law. The mechanisms through which procedural justice approaches may foster public trust in justice and thus build a public sense of the legitimacy of justice are complex and we have suggested that social identity theory is helpful in illuminating these links, in that procedural justice values – showing respect, treating people with dignity, allowing them voice and explaining decisions – convey to citizens that their values are aligned with those *of* the justice system, and that they are belong to a community of interest served *by* the justice system<sup>17</sup>.

Of course, procedural justice approaches are by no means the only route to building institutional legitimacy. As discussed above, trust in distributive justice, trust in outcome justice and trust in competence may all have a place in fostering legitimacy. In addition to how power is exercised (i.e. whether officers follow fair procedures) other important factors may be the nature of the powers that police

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<sup>15</sup> Mols, F., Haslam, S.A., Jetten, J., & Steffens, N.K. (2015) Why a nudge is not enough: A social identity critique of governance by stealth, *European Journal of Political Research* 54: 81-98.

<sup>16</sup> Ibid, p 81.

<sup>17</sup> E.g., Bradford, B., Murphy, K., & Jackson, J. (2014) Officers as Mirrors: Policing, Procedural Justice and the (Re)production of Social Identity, *British Journal of Criminology* 54(4): 527-550; Bradford et al (2015), *supra* n 9; Bradford, B. (2014) Policing and social identity: Procedural justice, inclusion, and cooperation between police and public, *Policing and Society* 24(1): 22-43.



hold, where they exercise them and when<sup>18</sup>. And this list by no means exhausts the range of approaches by which normative compliance with the law can be secured. (A classic Weberian analysis would also point to pre-secular forms of authority that can be *traditional* or *charismatic*, though this paper is concerned exclusively with the processes by which *rational* authority are legitimated.)

## SOCIAL MARKETING APPROACHES

There has been a long tradition of harnessing the concepts and techniques of marketing to social policy, and to *persuade* rather than *incentivize* citizens to behave in particular ways. Governments – and interest groups – have been applying advertising and marketing methods since the start of the last century, if not before, especially during the two World Wars.<sup>19</sup>

Social marketing approaches can appeal to self-interest, or can apply various forms of normative leverage, to persuade people to conform. These latter approaches are usually called *social norms approaches*. They may appeal to the need to conform to perceived norms (descriptive norms), or to moral principles (injunctive norms). Those social marketing approaches that simply alert people to descriptive norms can be effective (for example that most people pay various forms of taxes), presumably because most people are comfortable with conformity. More often, however, advertising may exploit the existence of injunctive norms. This can be highly effective in getting across messages on a range of social issues, a good example being a very long-running series of UK advertisements to reduce young people’s levels of drunk driving – by stressing the potential harm caused to others, rather than the risks the driver runs of punishment.

## NUDGES

Nudge theory can be regarded as a ‘close relative’ of social norms marketing approaches, adopting some of their tenets and assumptions, and adding others. It achieved prominence with the publication of Thaler and Sunstein’s (2008) book *Nudge: Improving Decisions about Health, Wealth and Happiness*. ‘Nudging’ the public has become part of the repertoire of social policy implementation in the US, the UK, Australia and elsewhere. For example, the UK government set up a special unit, the Behavioural Insights Team, to develop nudge techniques to persuade people to adopt healthy behaviour, ‘green’ behaviour, charitable giving and

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<sup>18</sup> Huq, A., Jackson, J. & Trinkner, R. (2016) Legitimizing Practices: Revisiting the Predicates of Police Legitimacy, *British Journal of Criminology*, doi: 10.1093/bjc/azw037.

<sup>19</sup> One of the most famous (or infamous) examples of early social marketing is the poster first published in 1914, in which Lord Kitchener, a war hero and Secretary of State for War, told potential volunteers for the British army that “Your country needs you” (or “Lord Kitchener wants you” in some versions). Though iconic and much imitated, it did not prevent the need to introduce conscription two years later.

compliance with a range of regulations. A similar team has been established in Australia. In the US, Sunstein was appointed as a government advisor, and Michelle Obama is associated with nudge-based techniques to combat child obesity<sup>20</sup>.

According to Thaler and Sunstein,

A Nudge... is any aspect of the choice architecture that alters people's behaviour in a predictable way, without forbidding any options or significantly changing *their economic incentives*. To count as a mere nudge, the intervention must be easy and cheap to avoid.<sup>21</sup>

There are many examples of nudges, some of which are clearly in the social marketing tradition described in the previous section, whilst others emerge more directly from 'dual process' behavioural economics research into decision-making, relying on insights about characteristics of *automatic* or *System 1* thinking. Examples of successful nudges include<sup>22</sup>:

- 'Defaults': establishing opt-out rather than opt-in procedures for healthcare or organ donation;
- 'Descriptive norms': about the high levels of compliance with tax regulations to non-compliers;
- 'Personalised reminders': when demanding payment of vehicle tax, including a personalised image of the car in question, showing its number-plate;
- 'Physical design': etching a fly into the urinal bowls at Schiphol Airport toilets, exploiting men's desire to urinate on an object – improving their 'aim', and reducing cleaning costs.

Arguably, procedural justice strategies meet the definition of a 'nudge' – although we have never seen anyone make this connection. Civil and polite treatment by the police certainly leaves unchanged the economic or instrumental incentives to comply with (or ignore) their instructions. And civility is cheap, and easy for recipients to discount, even if they cannot actually avoid it.

Clearly nudge theory raises some fundamental questions about our aspirations to rationality and autonomy – and this is not the place to attempt comprehensive answers. What remains unclear is the durability of various nudge

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<sup>20</sup> Basham, P. (2010) Are Nudging & Shoving Good for Public Health? Democracy Institute, available at <http://www.democracyinstitute.org/announcements/patrick-bashams-new-report-on-david-camerons-nudge-themed-public-health-agenda> (last accessed on 23 May 2016).

<sup>21</sup> Thaler, R. H. & Sunstein, C. R. (2008) *Nudge: Improving Decisions about Health, Wealth and Happiness* 6 (Boston: Yale University Press) (italics added).

<sup>22</sup> See Yeung, K. (2012) Nudge as Fudge, *Modern Law Review* 75(1): 122-148, for categorisation of various 'nudges' proposed by Thaler & Sunstein (2008), supra n 21.

strategies. Some behavioural tricks, such as including a personalised Post-it note on a letter of request, may have a limited half-life, if people adapt to changes in the choice architecture that confronts them; their effectiveness depends on their novelty. Others, especially those that make the ‘right’ choice easier to select, may be more enduring.

## SITUATIONAL CRIME PREVENTION

One final non-coercive approach needs some discussion, and that is situational crime prevention (SCP). If nudge theory advocates the *subtle* adjustment of choice architecture, SCP involves *shoves*, intended to ‘design out’ opportunities for crime. SCP has none of nudge theory’s diffidence about paternalism. The reasons are clear: nudge theory has a focus – though not an exclusive one – on changing behaviour that is socially undesirable, without being either immoral or illegal<sup>23</sup>, whilst SCP is concerned exclusively with the prevention of crime<sup>24</sup>. And indeed it would be quixotic to argue that opportunities for crime should be left open, rather than closed off, simply to preserve our freedom of choice to behave well or badly. Setting this issue to one side, SCP is quite obviously concerned with manipulation of ‘choice architecture’, through such design and management strategies as:

- ‘Target-hardening’, by making objects harder to steal or to vandalize;
- Reducing the usability and thus value of goods when they are stolen;
- More effective management of settings where physical violence is frequent, including ‘access control’ that separates groups that are likely to engage in violence ;
- Restricting potential offenders’ accessibility to settings which are target-rich;
- Improving surveillance of areas that are target-rich.

Some SCP strategies are designed to increase offenders’ perceptions of risk of detection, and as such are simply a way of amplifying deterrent threat. But many SCP measures clearly alter choice architecture that surrounds the decision to

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<sup>23</sup> For example, obesity, excessive alcohol consumption and nicotine addiction are not (generally) regarded as immoral, and they certainly are not in themselves illegal, but they carry significant social costs, that governments want to minimize. There are of course plenty of nudges designed to increase legal compliance.

<sup>24</sup> E.g., Clarke, R. V. (1995) Situational crime prevention: achievements and challenges, in Tonry, M. & Farrington, D. (Eds.) *Building a Safer Society: Strategic Approaches to Crime Prevention*, *Crime and Justice: A Review of Research* (vol. 19) (Chicago: University of Chicago Press); Clarke, R. V. (2012) Opportunity makes the thief. So What?, *Crime Science* 1, 1-3.  
<http://www.crimesciencejournal.com/content/1/1/3> (accessed 21 Sept 2014); Hough, J.M., Clarke, R.V.G & Mayhew, P.M. (1980) Introduction, in Clarke, R.V.G & Mayhew, P.M. (Eds.) *Designing out Crime* (London: HMSO).

commit a crime, in ways that are unrelated to conventional enforcement, and as such it may be considered a non-instrumental approach to controlling behaviour.

### ETHICAL ISSUES FOR NON-INSTRUMENTAL APPROACHES TO COMPLIANCE

Libertarians (whether left libertarians or libertarian conservatives) tend to bridle at strategies that invisibly or non-intrusively regulate behaviour. Preferring the clarity of instrumental or coercive strategies, which fully confer agency on citizens in choosing between compliance and non-compliance, they see non-coercive approaches as patronising, diminishing or infantilizing of citizens. These approaches share – potentially – a number of ethical dilemmas:

- Reducing the autonomy of citizens as decision-makers by *covertly* reframing decisions about legal compliance;
- Potentially requiring *insincerity* of those exercising authority;
- *Misleading* citizens about the motives of power holders.

Non-instrumental approaches, and nudges in particular, have been widely and enthusiastically adopted – but they have also been criticised for being manipulative, a violation of human autonomy, an ‘elitist choice-limiting technique’<sup>25</sup>, and over-extending the reach of government into everyday decision-making. Thaler and Sunstein (2008) clearly anticipated this, and from the outset branded their nudges as a form of ‘libertarian paternalism’. They argued that a nudge must not deny people the option of making the ‘wrong’ choice, and the wrong choice must be easy to make. Advocates would argue that nudges simply alter the choice architecture available to people, to stack the odds slightly more in favour of the desired decision. Situational crime prevention was subject to very similar criticisms when it was first propounded in the 1970s and 1980s. The first significant publication on SCP, *Crime as Opportunity*<sup>26</sup>, attracted much criticism for being demeaning and manipulative.

There is nothing especially new about these concerns about the erosion by government of citizens’ agency. The dystopian novels of Aldous Huxley (*Brave New World*, published in 1932) and George Orwell (*1984*, published in 1949) dealt with the risks of psychological manipulation in autocracies. However, the urgency of their warnings appears to have been lost with the passage of time and repetition – and perhaps, too, as the techniques that Huxley and Orwell railed against have become so incorporated into everyday life as to become commonplace. Here we

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<sup>25</sup> Mols et al. (2015), *supra* n 15, p 87.

<sup>26</sup> Mayhew, P., Clarke, R. V., Sturman, A., & Hough, J. M. (1976) *Crime as Opportunity*, Home Office Research Study No. 34 (London, Home Office).

do not propose to examine *in general* the ethical and political issues that attach to persuasion and nudgery – except to suggest that despite some risks, low visibility measures can provide sensible, practical and cheap solutions to problems of compliance. Our focus is narrow, and specific to the ethical issues that arise from procedural justice approaches – and their resolution.

## ARE THESE CONCERNS OF RELEVANCE TO PROCEDURAL JUSTICE APPROACHES?

We wish to suggest that the ethical and political concerns about non-instrumental approaches to behaviour management can also apply to procedural justice strategies, and in so doing, take particular forms. Analysis of them can be provided either at the individual or personal level, in which case the issues that arise are clearly ethical ones, or at the institutional or societal level, in which case the issues are as much political as ethical.

### ETHICAL ISSUES AT AN INDIVIDUAL LEVEL

There are genuine issues to do with sincerity and honesty when police officers and other legal authorities deploy procedural justice tactics to secure compliance, though these should not be overstated. It is a commonplace in discussion of the craft of policing that demeanour is central to managing difficult situations. The idea is laughable that officers should avoid using their social skills to nudge fractious citizens into compliance. However, there is a boundary between behaviour that is civil and courteous, and that which is manipulative. We do not attempt to outline where this boundary falls, but it clearly falls *somewhere*, with gross insincerity and deception falling the wrong side of the line.

There are related issues to do with what supervisors can reasonably demand of their staff. Any employer can require their staff to treat their publics with courtesy and respect – which involve the *performance* of particular social skills – but it is more problematic to expect staff to *feel* respect for those they are serving. Employers may want their staff to internalise a set of values that will guide the treatment meted out to their publics, but this must necessarily be more of a hope or aspiration than a requirement or condition of contract.

The key to resolving these issues is to clarify the motives that underlie procedural justice tactics. If the tactics are seen first and foremost as instruments for securing compliance, then it is likely that the ethical issues surrounding insincerity and deception will rapidly emerge. If however the *primary* justification for the tactics is that they are supported by a set of ethical standards in enforcement, this probably provides a way of resolving the ethical dilemmas relating to instrumental justifications for procedural justice tactics, and ensuring

that the pursuit of compliance does not displace the values that underpin procedural justice tactics. We shall return to this at the end of the paper.

It is at least arguable, though, that at the policy level procedural justice has been promoted in a rather instrumental way. HMIC's PEEL inspections, the top-down single confidence target and ('PSA23') and the Policing Pledge are the most obvious examples of policy developments that tended to prioritise what was in it for the police, rather than what was in it for the policed. The extent to which this comprised an over-selling of the 'ends' of procedural justice in terms of crime reduction awaits the results of future research. However there seems little doubt that one motivation for emphasising the extent to which procedural justice secures deference, cooperation and compliance was that this was, and probably still is, considered to be the best way to 'sell' the idea to otherwise sceptical police officers. This create an obvious hostage to fortune – if it turns out that the links between perceptions and experiences of police and future law-related behaviours are weaker than commonly assumed, does this mean that police do not need to worry about behaving in a fair way. Equally and relatedly, though, it risks undermining ethical take-up of the core idea by reducing it to the level of cost-benefit calculus.

#### **ETHICAL AND POLITICAL ISSUES AT AN INSTITUTIONAL AND SOCIETAL LEVEL**

Procedural justice researchers in the US have already examined the risks that procedural justice strategies should be used to legitimate styles of control that are illegal, unethical or undesirable. To use the distinction made by Hinsch (2008, 2010<sup>27</sup>), legal authorities may exploit their empirical legitimacy (or subjective legitimacy in the eyes of the policed) to justify or render acceptable forms of behaviour that lack normative legitimacy (or legitimacy assessed against agreed objective norms). The obvious examples is the undue restriction of liberty through stop-and-frisk (or stop-and-search in the UK), made palatable by the style in which searches are executed. It is also possible that in heterogeneous societies, the majority of the public may be easily led to support overbearing treatment of minority groups, so long as they themselves are treated relatively well by police.

Marxist theory and the tradition of legal realism offer recognisably similar arguments, but ones that are framed at the societal level. The Marxist version of the argument is that a particular narrative about legal institutions can provide an 'ideological cloak' which hides existence of the material inequalities of capitalism from both the beneficiaries and the victims of the system. Thus the principle of equality before the law guarantees at a formal level – but not at a substantive one – equal treatment of rich and poor, powerful and weak. This appearance of fairness justifies the – less than fair – economic or material conditions of capitalism. The argument is basically one about 'false consciousness', on the same lines as Marx's

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<sup>27</sup> Hinsch, W. (2008) Legitimacy and justice, in *Political Legitimization without Morality?* (pp. 39-52) (Springer Netherlands); Hinsch, W. (2010) Justice, legitimacy, and constitutional rights, *Critical Review of International Social and Political Philosophy* 13(1): 39-54.

much quoted phrase that religion is the opium of the masses<sup>28</sup>, whereby forms of ideology serve to secure popular acceptance of – or at least resignation to – social arrangements that are less than fair.

The tradition of legal realism, or critical legal theory, is associated with similar arguments, without necessarily being aligned closely with the Marxist perspective of historical materialism. The basic orientation of legal realism, in contrast to legal positivism or formalism, is that judicial outcomes are necessarily shaped by factors outside of the formal law – whether these are the values of the judiciary, or the broader world view of social elites or other powerful interest groups. And whatever these external factors might be, the way that they operate to serve particular interests may be cloaked by ideological narratives about equality before the law and about the impartiality and fairness of officers of the law.

Of course the importance of securing consent to the rule of law was recognised from the start of Anglo-American policing. The nine Peelian principles that Rowan and Mayne set out in 1829<sup>29</sup> in their *Instructions* for the Metropolitan Police in London could almost inserted without change into a modern procedural justice training manual. Take the fifth principle, for example:

To seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour, and by ready offering of individual sacrifice in protecting and preserving life.

One can only guess about the extent to which the architects of the new police consciously recognized that they were in the business of appearance management (or ideology construction)<sup>30</sup>. The 1829 Metropolitan Police Act was introduced against a background of economic crisis and frequent riots. The threat posed by the ‘dangerous classes’ and the fear of revolution were ever-present for the ruling elite in the first half of the nineteenth century. It would be surprising indeed if it never occurred to Peel and his two Commissioners that a civilian, civil, respectful, impartial police offered a better chance of securing public order than naked force.

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<sup>28</sup> For evidence that that religion can serve as a palliative to social conditions, see Jost, J.T., Hawkins, C.B., Nosek, B.A., Hennes, E.P., Stern, C., Gosling, S.D. & Graham, J. (2014) Belief in a just god (and a just society): A system justification perspective on religious ideology, *Journal of Theoretical and Philosophical Psychology* 34: 56-81.

<sup>29</sup> Lentz, S. A. & Chaires, R. H. (2007) The invention of Peel's principles: A study of policing ‘textbook’ history, *Journal of Criminal Justice* 35(1): 69–79.

<sup>30</sup> It should also be stressed that our knowledge of the Peelian principles is refracted through, and possibly distorted by, the accounts of mid-20th Century historians whose primary sources are not readily available. See Lentz and Chaires (2007), *supra* n 29, for a discussion.

As we have mentioned, empirical research has demonstrated that at an individual level procedural justice tactics can render extra-legal police behaviour tolerable to the public. People will accept police practices that are not legal, provided that they see these practices as fair, and do not expect officers to be punished for such behaviour<sup>31</sup>. Clearly this represents an undesirable outcome for procedural justice theorists. It is harder to evaluate claims that at a societal level, the police, or more broadly the institutions of justice, can provide an ideological cloak to protect unfair social structures from challenge. These arguments lie close to the boundary between empirically testable propositions and sociological interpretation. Much of the sociological writing on the topic is clearly interpretative, offering a cogent narrative rather than verifiable evidence. However, political psychologists have more recently offered some empirical support, by demonstrating that the demographic correlates of ‘status quo bias’ are consistent with system justification theory<sup>32</sup>.

For our purposes it is enough to accept the possibility that styles of authority can *potentially* serve as an ideological cloak that masks the true nature of the social and economic arrangements of the day. It is perfectly conceivable that the way in which the ‘modern police’ were introduced in the nineteenth century formed part of the ideological apparatus that tamed the dangerous classes. It is equally conceivable that some in some modern-day jurisdictions, authorities use procedural justice approaches to shield illegal or unfair practices from challenge. The more important question to ask is how these risks, whether at the individual or societal level, can be effectively mitigated.

Relevant also may be that the unit of analysis in procedural justice research has tended to be individual people (which is hardly surprising given the psychological roots of the theory). It is possible this has inhibited researchers from considering the institutional level and, in particular, the potentially problematic interaction between the ways individual police officers treat people on a one-to-one basis and the ways particular groups or communities are policed by the organization as a whole. For example, a force could embrace procedural justice in uniformed policing – not least as a claim to their own legitimacy – yet authorise unethical covert surveillance and undercover operations (they may even do the former to offset the latter). The same citizens could find themselves on the receiving end of both modes of policing, with quite predictable outcomes. This problem is sometimes made explicit in critiques of public order policing, where police liaison officers work in what is effectively a procedural justice mode in order to build links with protestors or football fans, yet also work alongside forward intelligence and evidence gathering teams who use other tactics. The work of the former is intended to offset the tension between the latter and those being policed, yet both the work of both types of officers can feed directly into aggressive or oppressive modes of policing.

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<sup>31</sup> Meares et al. (2012), *supra* n 13.

<sup>32</sup> See Jost et al. (2010), *supra* n 11, for a review.



## RESOLVING THE ETHICAL DILEMMAS OF PROCEDURAL JUSTICE

Consistent themes have run through our discussion of the ethical and political dilemmas raised by procedural justice approaches. Procedural justice approaches raise in a particular form the ethical and political problems that generally are created by low-visibility non-instrumental approaches to social control. The strategies and tactics of procedural justice may be used as a means to ends which are inconsistent with principles that accord respect and fair treatment to citizens. And for this to be done successfully, power-holders need to disguise the ends that they are actually pursuing.

It is fairly clear what should be done to mitigate the risks posed by individual officers who use procedural justice tactics in ways that are clearly manipulative. At the simplest level, training and professional development needs not only to equip officers with the social skills needed to deploy procedural justice tactics effectively, but to ensure that they appreciate that there is a boundary between courteous sincerity and manipulation which should not be crossed. Probably the most persuasive way of getting this message across to the workforce is to show that the costs of insincerity, once identified, are high: people are sensitive to attempts at manipulation, which can often evoke a hostile reaction. This is, of course, an instrumental argument that appeals to officers' self-interest, along the same lines as the argument that procedural justice tactics make officers safer. It is a fine judgement whether this approach amounts to getting people to do the right things for the wrong reason. There is obviously a place for pragmatism of this sort: this is a preferable outcome when compared to people doing the *wrong* thing for the wrong reason. However, it is probably better – but harder – to ensure that instrumental justifications of this sort are accompanied by normative ones that make the connections between procedural justice tactics and underlying principles about good policing.

There are two sorts of response to the criticisms that at an institution or societal level, procedural justice strategies serve as an ideological cloak that masks social injustice and seduce citizens into consent. The first is to recognise that that the institutions of justice *can* function in this way, but when they do, the remedies do not lie within criminal justice<sup>33</sup>. The second, and more ambitious, response is to try to ensure that the institutions of justice are built upon principles of democracy and human rights that are consistent with social justice. Such institutions would appear better placed to inculcate in their members a sense that treating those they serve with openness, dignity and respect is the right thing, in and of itself, to do<sup>34</sup>.

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<sup>33</sup> This is a version of the dilemma facing any reform-minded criminologist who sees connections between crime and social injustice.

<sup>34</sup> Bradford, B. & Quinton, P. (2014) Self-legitimacy, police culture and support for democratic policing in an English Constabulary, *British Journal of Criminology* 54(6): 1023-1046.

The counter-argument of critics would be that this is merely to reinforce the fabric of the ideological cloak, however. The principles of justice institutions and their members may count for little if the wider system they serve is marked by inequity.

Making convincing connections between procedural justice approaches and underlying principles would need to appeal to conceptions of citizenship which privilege autonomy and agency, and make some reference to human rights. In other words, it would involve recognition of the fact that procedural justice theory may provide a powerful descriptive account of the processes that secure compliance with authority, but that it cannot by itself form a prescriptive theory about good policing.