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# TRUST IN JUSTICE

## THINKING ABOUT LEGITIMACY

This article discusses two large-scale research projects focused on trust in justice. Both were funded by the European Commission under the Seventh Framework Programme. Euro-Justis, co-ordinated by the first author, ran from 2008 until 2011; FIDUCIA, coordinated by the second author, started last year and will finish in 2015. Both projects have drawn heavily on procedural justice theory, and particularly on the work of Tom Tyler.

### THEORIES OF NORMATIVE COMPLIANCE

The question which has dominated as well as defined criminology is, 'Why do people break the law?' Procedural justice theory in general, and our two projects in particular, invert this question to discover reasons for *compliance* with the law. This focuses attention on a different set of explanations. When we ask why we *ourselves* observe the criminal law most of the time, we immediately look to answers that are couched in terms of normative compliance. When people ask why *others* break the law, explanations tend to be in terms of instrumental factors, such as insufficient deterrence or insufficient responsiveness to deterrence.

The distinction between instrumental and normative compliance is a concept central to the work done here. Instrumental compliance occurs when an individual or an institution offers a reward to encourage others to do (or not to do) something, or threatens punishment to those who do (or fail to do) something. Instrumental strategies are a routine feature of everyday life. Rewards and punishment are widely used in schools to secure compliance; the workplace operates—at least on the face of it—as a reward-based system in which desired activities result in pay, promotion, and status. And of course the criminal justice system—again on the face of it—is essentially a system of deterrent threat, whereby the state promises to punish those who break the law.

Normative compliance, by contrast, is socially motivated behaviour, where people do what they are required or expected to do because they think it is the 'right thing,' and not simply in their own best interests. Normative compliance flows from internalised social norms. A moment's thought will tell us that most of

us obey the criminal law most of the time, and very rarely if ever contemplate shoplifting or burgling our neighbours' houses. This reflects the fact that we have well-engrained habits of compliance with the law that originate from a sense that law-breaking is morally wrong.

There is a wide range of theories for explaining what creates, sustains or weakens the impact of social norms on behaviour. Some are concerned with the relationship between crime and 'political economy' (cf. Reiner 2007; Cavadino and Dignan 2013), which has traced the connections between the social distribution of wealth and attachment to—or detachment from—social norms. Theories of institutional anomie (cf. Messner and Rosenfeld 2001, 2010) serve as good examples of this line of thought; they find linkages between macro-social factors and conformity to social norms. Other compliance theories are concerned with the effect on societal norms of the institutions of formal social control. For example Robinson and Darley argue that if the law's potential for building a moral consensus is to be exploited, judicial outcomes, and especially court sentences, must be aligned at least to some degree with public sentiments (Robinson and Darley 2007; Robinson 2012).

Procedural justice theory is a similar micro- or meso-level theory about institutional legitimacy, but it focuses more explicitly on the *processes* involved in the exercise of power and the transformation of power into legitimate authority in a way that generates normative compliance. The intellectual origins of procedural justice theory can be traced back to Durkheimian and especially Weberian thinking about the roots of social order. However, Tyler and colleagues (e.g. Tyler et al. 2007; Tyler 2011) have developed a set of consequentialist arguments, based on the role of *procedural* rather than outcome justice in shaping institutional legitimacy. This body of work emphasises the need for institutions of justice to pursue fair and respectful *processes*—in contrast to *outcomes*—as the surest strategies for building trust in justice, and thus institutional legitimacy and compliance with the law. This is the central hypothesis in procedural justice theory.

## THE EBB AND FLOW OF PROCEDURAL JUSTICE THEORY

Procedural justice theories rely heavily on the traditional notion from political philosophy that proposes that winning ‘hearts and minds’ is central to the effective use of authority. This precept has enjoyed political currency, with varying degrees of saliency, in the past. UK policing, for example, was founded on principles of policing by consent. However, throughout the 1990s and into the new century, ideas of legitimacy and consent became increasingly submerged. In the United Kingdom for sure, but also in other European countries, politicians have used the no-nonsense “get tough” language of crack-downs on crime, appealing to ideas about a partnership between the police and ‘the law abiding majority’ which would yield public cooperation in the ‘fight against crime.’ Many commentators have referred to a ‘punitive turn’ in European politics that has left little room in political discourse for ideas of any complexity or subtlety. The reasons for this have been located in the interactions between politicians’ relations with the media, new forms of ‘new public management’ governance that rely on target setting and a growing public distrust of technocratic experts.

Nevertheless, procedural justice thinking is fast gaining traction in many countries. In the United States in particular, the sheer cost of strategies of mass incarceration is attracting criticism from the Republican right ([www.rightoncrime.com](http://www.rightoncrime.com)),<sup>1</sup> opening up opportunities for alternative ways of thinking about social regulation. Added to this, many industrialised countries have seen declines in crime since the 1980s (e.g. the United States) and 1990s (e.g. the United Kingdom and Australia), which may have served to cool down the overheated politics of justice. This has created political space for more constructive crime control strategies. Whatever the case may be, the last 5 years has certainly seen what Tankebe (2013) has dubbed a legitimacy turn, at least in professional and academic discussions of crime policy.

## EURO-JUSTIS AND OUR WORK WITH THE EUROPEAN SOCIAL SURVEY

In 2008, we and several colleagues at seven other universities and research centres secured a significant Framework 7 grant from the European Commission to develop survey-based measures of trust in justice. Euro-justis ([www.eurojustis.eu](http://www.eurojustis.eu)) involved both conceptual and empirical work on the concepts of trust in justice, and legitimacy and compliance. A sub-group of the Euro-

justis consortium led by LSE used this work to make a successful bid for space in the questionnaire of the fifth European Social Survey (ESS) ([www.europeansocialsurvey.org](http://www.europeansocialsurvey.org)).

The ESS was established in 2001 and fieldwork for the fifth sweep was conducted in late 2010. A central coordinating team funded by the European Commission runs the survey, and each participating country covers its own fieldwork costs. The survey is recognised currently to be one of the highest quality cross-European surveys. The questionnaire comprises an invariant core of questions asked of all respondents in each round, and a series of rotating modules which are included in only some rounds. Academics are invited to bid for space on the questionnaire in each round, and the suite of questions that the sub-group proposed was derived largely from our Euro-justis work.

## DEFINING INSTITUTIONAL LEGITIMACY

Legitimacy is a ‘slippery’ concept. We defined it in our ESS module as the right to rule and the recognition by the ruled of that right. Hinsch (2008, 2010) has distinguished usefully between normative (or objective) legitimacy and empirical (or subjective) legitimacy. On the one hand, legitimacy is a normatively laden term used by political philosophers to describe whether states (or state institutions) meet certain desirable standards. On the other hand, the term is also used in a less value-laden way, to describe whether those who are subject to authority actually confer legitimacy on that authority—regardless of its objective success in meeting accepted standards of legitimacy.

Our ESS work was concerned solely with questions of *empirical legitimacy* and its drivers. We conceptualised empirical legitimacy as having three sub-components—obligation to obey, legality, and moral alignment—and we constructed scales to measure each of these three components. We proposed a broader definition than that used by Tyler, at least in his early work, which tended to equate perceived legitimacy with deference to authority. Our definition follows David Beetham (1991) in arguing that an authority has legitimacy when three preconditions are met:

1 For a detailed discussion of this development, see the article by Susanne Karstedt in the previous edition of the Newsletter: Susanne Karstedt: Never Waste a Good Crisis. *Criminology in Europe*, 2013. 1. p. 5-10.

1. The 'governed' offer their willing consent to defer to the authority,
2. This consent is grounded, first, on the authority's conformity to standards of legality (acting according to the law),
3. And, second, on a degree of 'moral alignment' between the power-holder and the governed, reflected in shared moral values.

According to this definition, legitimacy is not simply signified by a positive duty to obey authority and a perception of that authority's entitlement to command. The second and third pre-conditions of empirical legitimacy—legality and moral alignment—ensure that the obligation to obey is grounded in a sense that the institutions of justice act morally and with legality.

We derived scales to measure the three dimensions of (empirical) legitimacy; we also operationalised measures, covering the work of the police and the courts, of:

- Trust in procedural fairness,
- Trust in outcome fairness,
- Trust in competence,

- Risks of sanction of law-breaking,
- Preparedness to cooperate with the police and the courts, and
- Self-reported offending.

This enabled us to use multivariate statistics on a database covering 27 countries and 52,000 respondents, to see if the predicted associations between trust and legitimacy existed, and whether these were consistent across participating countries. We do not propose to describe findings in any detail here.<sup>2</sup> The two charts below give a flavour of variations between countries in trust in police procedural fairness (Figure 1) and perceived police legitimacy, measured by an item on whether people felt a sense of obligation to obey the police (Figure 2).

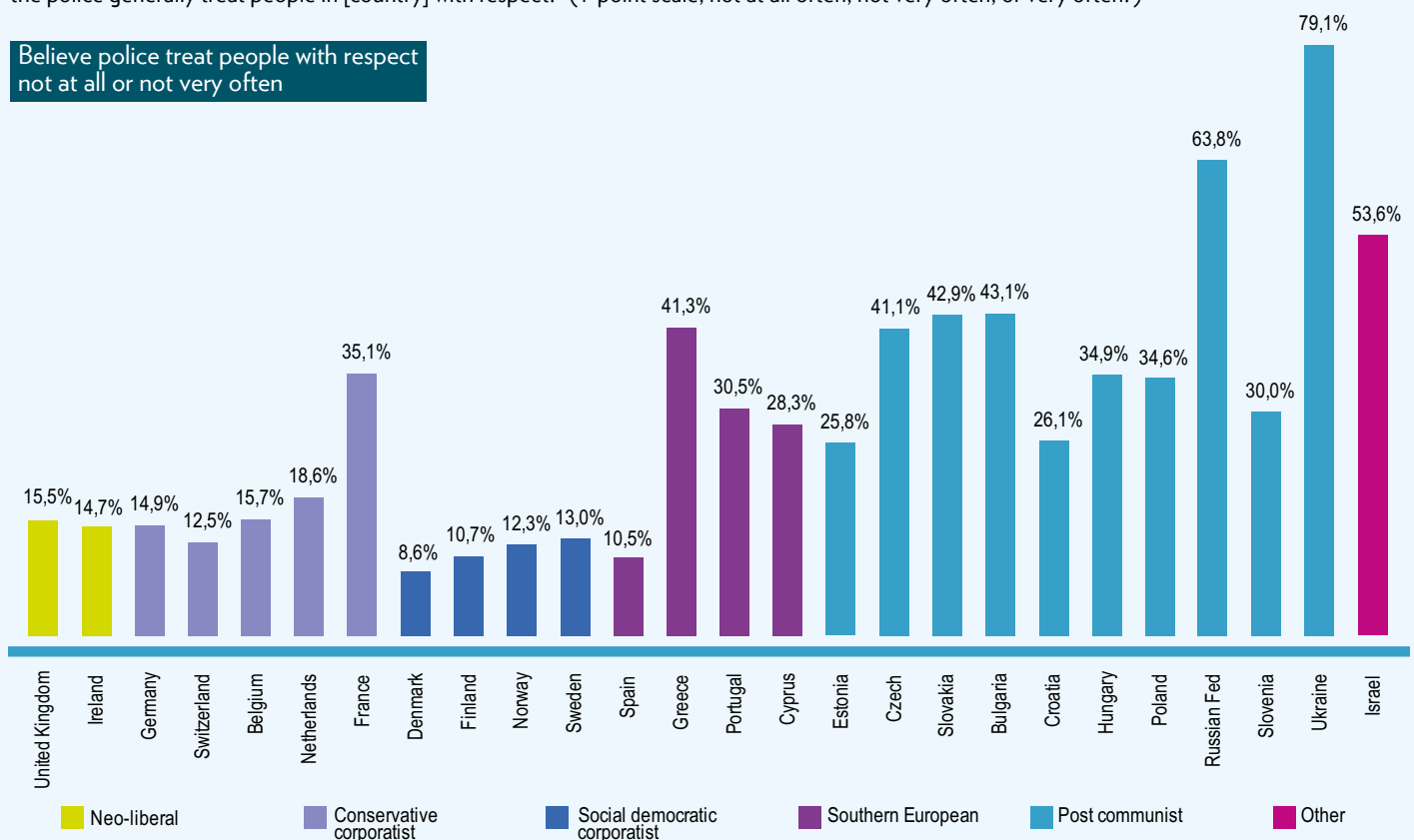
Whilst these 'league tables' are intrinsically intriguing, the theoretically more interesting issues are the relationships between concepts. Procedural justice theories

2 For detailed findings, see European Social Survey 2011, 2012; Hough et al. 2013a, 2013b; Jackson et al. 2012.

## Figure 1. Trust in police fairness

Question: "Based on what you have heard or your own experience how often would you say the police generally treat people in [country] with respect? (4-point scale; not at all often, not very often, or very often?)

Believe police treat people with respect  
not at all or not very often



maintain that trust in institutions—and particularly trust in their fairness—is predictive of the legitimacy granted to them by those they govern. The final graphic (Figure 3) shows correlations between public trust in police effectiveness, procedural fairness, and distributive fairness, on the one hand, and the most important components of police legitimacy (according to our analysis)—felt obligation to obey.

The graphic shows that trust in police procedural justice is the strongest and most consistent predictor of the felt obligation to obey. This association was positive and statistically significant in all 26 countries included in the analysis. Trust in police effectiveness and in distributive fairness were much less consistent predictors of the felt obligation to obey. Although, in some countries—notably the UK—there were significant and substantively large associations between trust in effectiveness and the felt sense of obligation to obey, this was in direct contrast to previous studies in the UK which found only weak correlations between trust in police effectiveness and legitimacy.

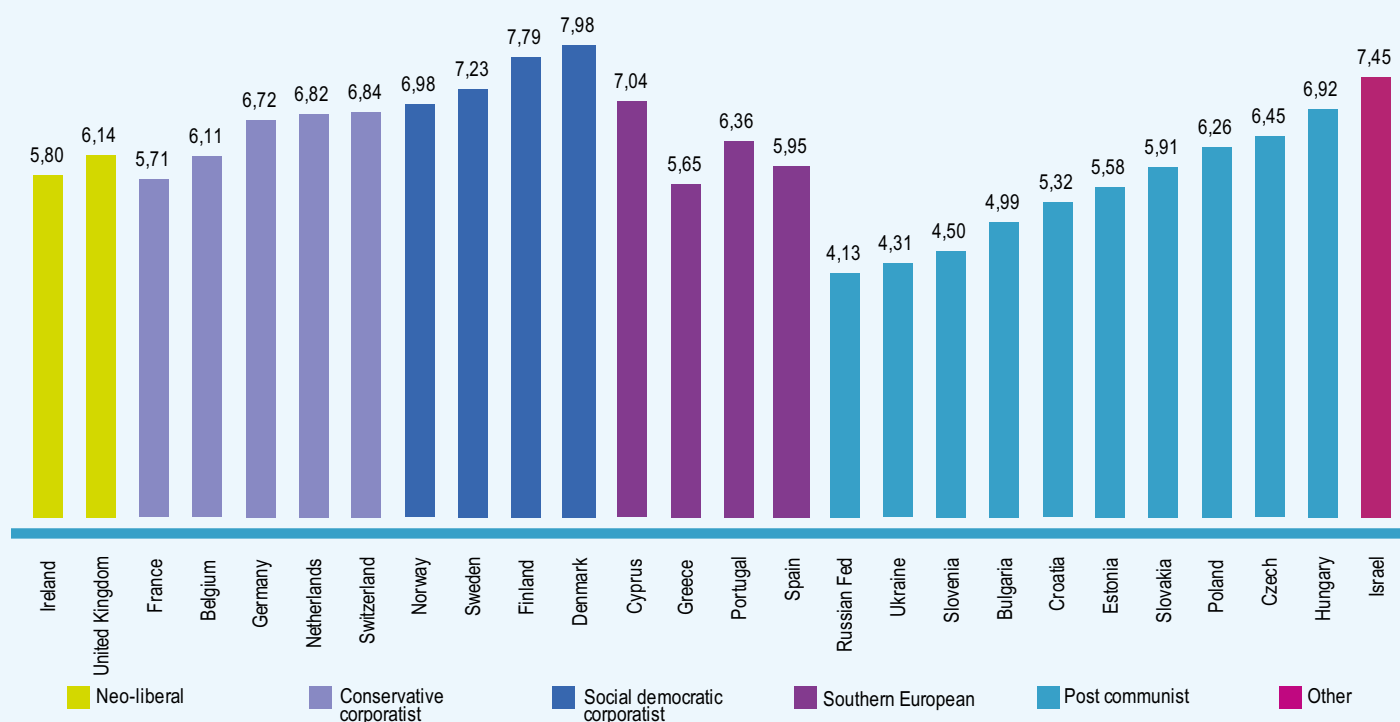
We have not yet completed a full analysis across all ESS countries pertaining to the relationships between empirical legitimacy on the one hand, and compliance with the law and cooperation with justice on the other. Analysis in progress shows that moral alignment is a strong predictor of cooperation with justice across all countries, whilst perceived obligation to obey is predictive in only some. Analysis of the links between empirical legitimacy and compliance with the law has been complicated by weak measures of self-reported offending, and is ongoing, but we have conducted analysis of the UK dataset, examining compliance and cooperation respectively (see European Social Survey 2012 for more details, and Hough et al. 2013b).

The emerging headline story is that trust in procedural justice is the strongest predictor of perceived legitimacy. However, other factors such as trust in outcome fairness, trust in competence, and assessments of the risk of punishment play a subsidiary, but statistically significant, role. Whilst hedging any claims that we make with cautious statements about ongoing research, we can say that the

## Figure 2. Felt obligation to obey the police, by country

Question: “To what extent is it your duty to do what the police tell you even if you don’t understand or agree with the reasons?” (11-point scale, running from ‘not at all’ to ‘completely.’)

Believe they have a duty to do what the police tell them to do



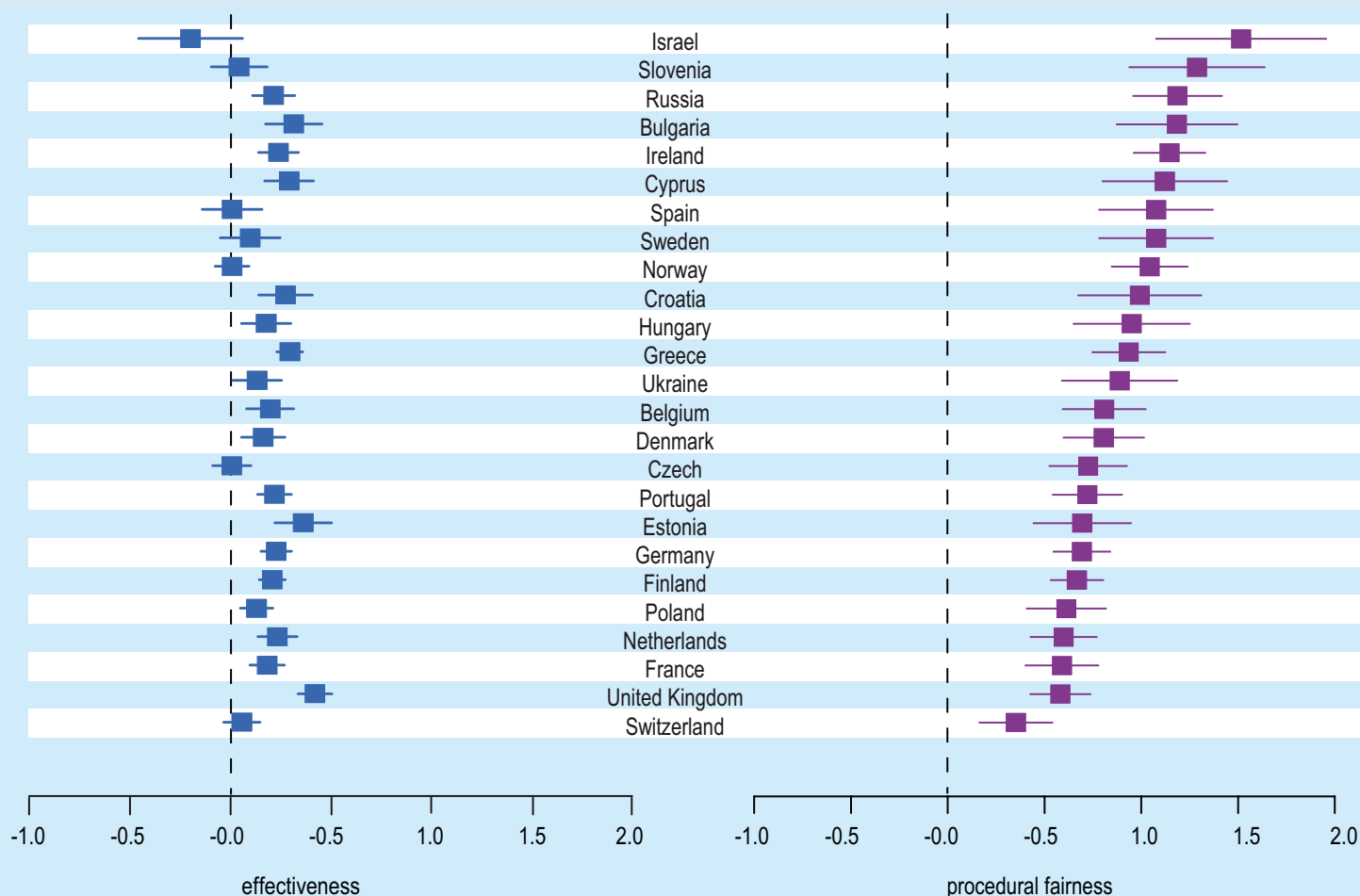
ESS provides strong evidence that public trust in procedural fairness by the police and courts is an important driver of public perceptions of the institutions of justice.

Whilst analysis continues, our work to date has shown that trust in the police is an important factor in shaping people's sense of police legitimacy, and trust in police fairness is a crucial factor across Europe. In one jurisdiction where analysis has been carried out, the hypothesised relationships between empirical legitimacy, compliance and cooperation emerge as strongly significant. We have established that there is strong empirical support for central aspects of 'procedural justice' theory. Of particular importance is the strong relationship between trust in fairness and dimensions of perceived legitimacy. The clear policy lesson here is that any strategies to build a sense of police legitimacy in the eyes of the public need to focus on procedural fairness. Fair and respectful treatment of the public by the police seems likely to be the fastest route to improved legitimacy, which is created by compliance from the policed.

## THE FIDUCIA PROJECT

Our second FP7 project has been running for 15 months and has another 21 months to run. Its main objective is to explore the scope for regulating criminal behaviour through 'trust-based policies'—a shorthand term referring to strategies that rely on normative rather than instrumental levers to alter behaviour. The FIDUCIA project's objective is to produce a model, or set of principles, for the application of trust-based policy to the regulation of new forms of European crimes. The early part of the project involves conceptual analysis designed to assess the best "fit" between informal and formal systems of social control as cross-national and supranational systems of criminal justice become more significant across Europe. As our starting point, we are taking how normative compliance and instrumental compliance have traditionally interacted in European jurisdictions' systems of criminal justice, and assessing the scope for, and desirability of, harmonising formal systems of regulation with informal systems of social control.

▼ Figure 3. Relationships between forms of trust in the police and felt obligation to obey



The key issue here is the extent to which it is possible to intentionally infuse criminal justice systems with a normative element. The goal is for people to comply with the law less because it is in their self-interest and more because they think it is the right thing to do. The conceptual analysis will aim to establish the limits of this trust-based approach to social regulation, with particular reference to emerging forms of European criminality. There are specific questions which need to be addressed about the scope for introducing a normative dimension to the regulation of three emerging forms of crimes that have priority status in EU criminal policy:

- Human trafficking,
- Trafficking in goods, and
- Cybercrime

There are also important topics to be considered about a fourth set of issues, relating to the policing (or over-policing) of migrant and ethnic minority groups, and the impact of this on trust in justice. The criminalisation and decriminalisation of specific crimes will be

studied and addressed by the project, with hopes of determining the best future actions to establish within the harmonised EU criminal system.

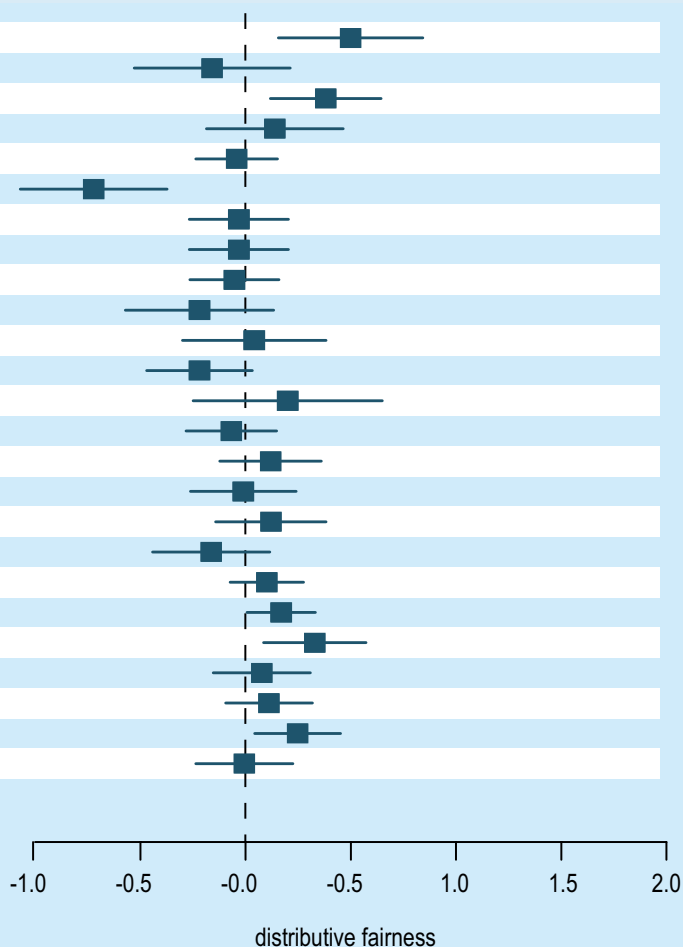
Finally, there are significant issues to be explored about the extent to which normative systems of social control ‘travel’ with people as they move beyond their own countries and cultures. It is important to study the extent to which foreigners generalise from their experiences with their home system of justice to that of other countries. In other words, do perceptions of institutional legitimacy (or lack of legitimacy) spill over from one system, and one country, to another?

This project raises significant policy questions. At one level, it strikes us as totally unproblematic that politicians and policy officials across Europe should pay greater attention to the legitimacy of their justice systems, and that they should do more to ensure that these institutions treat people fairly, respectfully and without bias. We have offered evidence from Euro-justis and the ESS to suggest that fair treatment of this sort is not simply a desirable ‘optional extra’ that supplements effective justice, but is a precondition for effective regulation of behaviour.

This perspective clearly has relevance for the fourth FIDUCIA focus—the policing of ethnic minority groups and migrants. Across Europe there are tendencies for the most socially marginalised groups to get involved in a downward spiral of involvement in crime. This spiral causes marginalised groups to become the focus of police suspicion, which in turn causes them to feel over-policed, and locks the two sides into a system of hostile and adversarial relations. Principles of procedural justice may provide a starting point for a ‘recovery strategy’ to interrupt this downward spiral.

However, there may be significant problems to overcome in finding normative levers that can affect the ‘new’ crimes which we are examining. These are partly practical. It is hard to see how strategies of legitimisation will, in the short term, have an impact on key participants of trafficking in persons, trafficking of goods, and cyber-crime. The more that these participants are ‘career criminals’ whose behaviour is instrumentally motivated, the less plausible it is that they will take any account of the quality of their interaction with the police or the courts.

However, people do withdraw from engagement in crime—even those involved in organised crime—and it is not totally fanciful to think that the treatment they receive from the police and other justice officials may have some impact, at least at the margins. Whatever the case, it is likely that those who buy the services of organ-





ised crime groups might well be responsive to strategies designed to ‘morally tarnish’ these products. We have in mind those ‘viral campaigns’ designed to shift public perceptions of the morality of buying sex or illicit drugs.

There are also more complicated philosophical issues about the role of the law in relation to public morality, and about principles for criminalising—and decriminalising—behaviour that offends, or has in the past offended, against manners and morals. There is an argument to be made that the state should always ensure a reasonable correspondence between *morally corrupt* behaviour and *criminal* behaviour. This can be achieved either by decriminalising offences which become disconnected from any public censure, or by trying to re-infuse these offences with a sense of immorality that generates censure. But there is a clear counter-argument to be made that the state has no role for interfering in ethical or moral territory.

At this point in the FIDUCIA project, we remain agnostic—though tending towards optimism—about the extent to which it is feasible and desirable to replace or supplement traditional instrumental strategies of crime control with ones that rely on more normative levers for dealing with the new crimes that are emerging across Europe. As to the far-reaching question of whether political discourse about crime control should attend more closely to questions of institutional legitimacy, the answer must be a simple ‘yes.’

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