From the Editor

Why do people accept as lawmakers those who prevail in elections by even the slimmest of margins? Why do people accept as law what a legislature enacts or a court decrees? Why do people obey nettlesome laws when the police are not looking over their shoulders? Why do people comply with court judgments in advance of execution?

An adequate explanation of these and similar tendencies would be multifaceted. Fear, economic self-interest, and habit might all play a role. Some factors might figure in the explanations for some of the behaviors inquired about but not for others. But one factor would, for most social scientists, figure prominently in the explanation of each: *legitimacy*. Perhaps because the idea is so firmly entrenched in Weber, it is almost a truism within law and social science that the apparently large measure of voluntary compliance with the commands of legal authority can be explained by legitimacy. Indeed, some scholars, like Balbus (1973) and Thompson (1975), have gone further and suggested that the desire to maintain the benefits of legitimacy is an important reason why groups that control the state choose to confront petty rebellion through legal forms rather than by some extra-legal expression of power.

Legitimacy has both a macro and a micro aspect. At the macro level legitimacy relates to the acceptance of systems of government and the tendency to regard duly promulgated law as binding. Macro-legitimacy, for example, might explain why losing candidates tend to lose their influence after elections and winning candidates are generally accepted as properly in office. At the micro level legitimacy refers to reactions of individuals to their encounters with the legal system. Micro-legitimacy might explain, for example, why a speeder pulls over when motioned by a cop or why a losing litigant pays what is decreed without any further official action.

Recently, the utility of the concept of legitimacy has been powerfully questioned by Alan Hyde (1983). From Professor Hyde's perspective, legitimacy is seldom, if ever, necessary to explain behavior. My opening questions can be answered without resort to this concept. Winning candidates are accepted because there is an institutional place for them which

LAW & SOCIETY REVIEW, Volume 18, Number 1 (1984)

https://doi.org/10.1017/S0023921600017497 Published online by Cambridge University Press

gives them real power, and their opponents are better served by coming to terms with this fact than by trying to make the case that those elected lack some deeper claim to their authority. Speeders pull over when cops motion them to do so because they fear they will be pursued successfully and perhaps shot if they don't. Those who lack such fears or who have special reasons for fearing a traffic stop do not pull over. Losing litigants pay up because they realize that the state has ways of enforcing judgments that will yield the same results at greater costs to them in the long run. Where, as in some small claims courts, enforcement is unlikely or litigants think it is, the failure to pay judgments is common.

While I find Professor Hyde's analysis more provocative than persuasive, I think he is correct in suggesting that theories of legitimacy are too readily invoked to explain behavior and insufficiently supported by empirical research. To my mind, two problems are especially important. The first is that legitimacy as it is used in law and social science is often a residual category. The second is that relatively little research into the authoritative power of government or the effectiveness of legal action has rigorously tied attitudes that might constitute the granting of legitimacy to processes that engender them or the law-abiding behavior that is their presumed consequence.

The points are obviously related. Legitimacy is a residual category because it is used to explain law-respecting or law-abiding behavior that cannot be explained by more obvious mechanisms such as self-interest. To the extent that research into the effectiveness of laws tends to focus on aspects of the situation studied that are easier to measure or otherwise more accessible than legitimacy, the concept of legitimacy quite naturally takes on the role of a catch-all variable that accounts for the allegiance or compliance that cannot be explained by the aspects of the situation directly under study. In principle, there is nothing wrong with this. Subatomic particles are known only by their traces, and people generally acknowledge the wisdom of Sherlock Holmes' dictum that when obvious causes are ruled out, the less obvious must be accepted. Nevertheless, the indirect approach to the study of legitimacy is troublesome. If what must be explained by the residual varies from study to study, the shape and nature of the phenomenon labeled legitimacy must in some if not all studies be confounded by other factors. Furthermore, to the extent that legitimacy is either assumed or exists only as a residual of

https://doi.org/10.1017/S0023921600017497 Published online by Cambridge University Press

research directed primarily toward other issues, we are unlikely to understand the conditions under which legitimacy is accorded or appreciate the ways in which the implications of according legitimacy are contingent upon the states of other variables.

The first two articles in this issue, "Mediation in Small Claims Court: Achieving Compliance Through Consent" by Craig McEwen and Richard Maiman and "The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience" by Tom Tyler, deal with issues of micro-legitimacy. The two articles nicely complement each other, and taken together they complement the laboratory research of Thibaut and Walker (1975), which suggests that ways of case processing are crucial to the extension of legitimacy.

McEwen and Maiman look at the behavior of litigants involved in small claims disputes in Maine. They find that a litigant induced by mediation to consent to a solution that is then embodied in a court judgment is more likely to comply with the court's edict than one whose case has been adjudicated. It appears that this is because certain types of outcomes, which are disproportionately likely to result from consensual procedures, and outcomes that are consented to rather than imposed, whatever their characteristics, are particularly likely to be regarded as legitimate. How do we know? We know because compliance follows.

This obviously represents the residual approach to spotting legitimacy—in McEwen and Maiman's study the attitudes of small claims litigants are never examined. Yet the case for treating the tendency toward greater compliance with mediated decisions as a manifestation of the greater legitimacy of procedures and outcomes is a strong one. Within the limits of the available data, the authors rule out other explanations for differential compliance, and it is plausible to expect that those who consent to judgments will be more accepting of their obligation to comply than those who have similar judgments imposed.

Professor Tyler's article is in one way the mirror image of McEwen and Maiman's. They look at behavior and not attitudes; he examines attitudes and not behavior. Tyler finds that the attitudes of petty misdemeanants and traffic offenders toward the courts, judges, and their own outcomes are not largely a function of the verdict reached or of the penalty imposed. Rather, they are directly influenced by the litigants'

https://doi.org/10.1017/S0023921600017497 Published online by Cambridge University Press

perceptions of the justness and impartiality of the procedures used, of the fairness of the outcome reached, and of how similarly situated others are treated. The result is variation in litigants' attitudes toward the court and the legal system that cannot be explained by each litigant's own objective circumstances. It appears reasonable to characterize this variation in attitudes as variation in the degree to which legitimacy is accorded the court and its decisions. Whether this variation has any implications for behavior Tyler cannot tell us. McEwen and Maiman's results, together with common sense, suggest it does. Taken together these two articles, along with Thibaut and Walker's (1975) laboratory research, suggest that those interested in developing a theory of micro-legitimacy should look closely at the ways in which people are treated by legal authorities and at the preconceptions that people bring to such interactions.

The third article in this issue, "The Structure of Discourse in Misdemeanor Plea Bargaining" by Douglas Maynard, offers a rare look into the discourse of plea bargaining. Professor Maynard was allowed to tape record the plea discussions in 52 petty misdemeanor cases, and he brings the ethnomethodological technique of conversational analysis to bear on what he recorded. What is most striking about Maynard's analysis is how little true bargaining—in the sense of mutual movements from initial positions—occurs. Instead, when a settlement is reached in a petty case, it usually reflects the decision of one party to accept the other's proposed solution. This finding supports the view that there are normal reductions for particular crimes, and it is consistent with the suggestion that the discussion that occurs during plea bargaining sessions is often more directly focused on the correct characterization of the criminal behavior than it is on the ultimate disposition. To the extent that Maynard's finding holds across jurisdictions and for felonies as well as misdemeanors, it suggests that the idea that prosecutors and defense counsel learn to plea bargain does not precisely characterize the learning that occurs. The most important learning concerns the price lists for different offenses. Once these are well understood, agreements may be expected in most cases without any bargaining.

The fourth article, "Police Arrests in Domestic Disturbances: A Further Look" by Robert Worden and Allisa Pollitz, replicates and extends an earlier analysis of police interventions in family disputes that Sarah Berk and Donileen Loseke (1980-81) published in the *Review*. Replications that

https://doi.org/10.1017/S0023921600017497 Published online by Cambridge University Press

see print tend to paint a different picture from that indicated by the studies they replicate. It is this that makes them attractive to reviewers, editors, and even the authors themselves, for, it is said, no one is interested in old news. My view is different. I believe that consistent replications are, if anything, more important than inconsistent ones to the scientific advance of a discipline, and I shall be happy to consider brief reports of consistent replications for space in the *Review*. With this introduction, the reader is, no doubt, not surprised to learn that Worden and Pollitz essentially replicate Berk and Loseke's core findings. What makes the replication especially valuable is that differences in the data sets used in the two studies mean that they do not share the same flaws. Thus, objections that might plausibly be made to the conclusions of one or the other study fall before the consistent findings of both. In addition, Worden and Pollitz' data allow them to extend the analysis of police behavior in ways that Berk and Loseke could not.

Jay Casper and David Brereton in their article "Evaluating Criminal Justice Reforms" are concerned with evaluation methodology. The basic lesson of their article is one that has been taught before but bears repeating, namely, that in evaluation research the standards against which we evaluate are problematic. Thus, it is often unclear what it means for a law to achieve its intended purpose because those who enacted the law may have had no clear purpose or different, inconsistent ones. Also it is not clear what counts as a substantial legally-induced change. When researchers start with theories that suggest substantial institutional inertia, they should remember that legally mandated changes that fall short of what the lawmakers intended may nevertheless testify to the power rather than the failure of the legal intervention. Casper and Brereton's paper is rich with examples illustrating these and other points.

Richard Lempert
January 1984

REFERENCES

BALBUS, Isaac D. (1973) *The Dialectics of Legal Repression*. New York: Russell Sage Foundation.

BERK, Sarah Fenstermaker and Donileen R. LOSEKE (1980-81) "'Handling' Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances," 15 *Law & Society Review* 317.

https://doi.org/10.1017/S0023921600017497 Published online by Cambridge University Press

HYDE, Alan (1983) "The Concept of Legitimation in the Sociology of Law," 1983 *Wisconsin Law Review* 379.
THIBAULT, John and Laurens WALKER (1975) *Procedural Justice: A Psychological Analysis.* Hillsdale, NJ: Lawrence Erlbaum Associates.
THOMPSON, Edward P. (1975) *Whigs and Hunters*. New York: Pantheon.

https://doi.org/10.1017/S0023921600017497 Published online by Cambridge University Press