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# BUILDING A LAW-ABIDING SOCIETY: TAKING PUBLIC VIEWS ABOUT MORALITY AND THE LEGITIMACY OF LEGAL AUTHORITIES INTO ACCOUNT WHEN FORMULATING SUBSTANTIVE LAW

*Tom R. Tyler\* and John M. Darley\*\**

## I. INTRODUCTION

This Article argues that psychologists can make an important and fundamental contribution to the law by articulating the possibility of a law-abiding society, and by showing how such a society can be created and maintained. Such a contribution involves the application of psychological models of social values to our conceptions of how to effectively maintain the rule of law.

The effective rule of law requires that citizens comply with the regulatory rules enshrined in the law and enforced by legal authorities. Most recent discussions of such compliance rest upon the idea that law-breaking behavior is deterred by the risk of being caught and punished for wrongdoing. A law-abiding society is one in which people are motivated not by such fears, but rather by a desire to act in socially appropriate and ethical ways. Such a society is self-regulatory, since citizens within it take onto themselves the responsibility to follow the law. In a society in which people act on their social values, citizens are motivated to voluntarily defer to law and to legal authorities because they think: (1) that the behaviors prohibited by law are also immoral (morality) and/or (2) that legal authorities are entitled to be obeyed (the legitimacy of legal authorities).

In this analysis, the similarities and differences associated with the exercise of legal authority are examined based on: (1) deterrence; (2)

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morality; and (3) legitimacy. This Article first contrasts deterrence to strategies linked to citizens' social values (morality and legitimacy). The exercise of legal authority via (1) morality and (2) legitimacy are then compared.

The Articles in this symposium focus on the legal and policy-related issues raised in Paul Robinson and John Darley's recent book *Justice, Liability, and Blame: Community Views and the Criminal Law*<sup>1</sup> and in the review of that book by Christopher Slobogin.<sup>2</sup> This Article's goal is to articulate a larger conceptual framework within which the concerns addressed in the Robinson and Darley book can best be understood, as well as to present other research in the rapidly emerging area of "psychological jurisprudence."<sup>3</sup>

The central argument this Article makes is that focusing upon the social values held by the public is one key component of an effort to create and sustain a legal order, the effectiveness of which is linked to the consent and cooperation of citizens. Such a legal order is referred to as a "law-abiding" society because it is rooted in the willingness of citizens to voluntarily defer to legal authorities.

A society that is law-abiding, in which most citizens follow the law and obey legal authorities voluntarily because they essentially consent to legal regulation and are motivated to cooperate with legal authorities, is superior to one in which legal authorities must compel obedience through the threat or use of force. To have a law-abiding society, we must have a polity in which citizens have social values that lead them to feel responsible for following rules, irrespective of the likelihood of being caught and punished for rule breaking.

This Article's focus is on two central social values that might serve as the basis for a law-abiding society: The belief that laws describe morally appropriate behavior, and the belief that legal authorities are legitimate authorities whose directives ought to be obeyed. Either or both of these social values might potentially serve as the basis for a law-abiding society, and the value of each is considered here, as well as the interplay between these two types of social values.

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1. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

2. See Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315 (1996) (reviewing PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995)).

3. See John Darley et al., Paper Prepared for the American Psychology-Law Society Conference on Taking Psychology and Law into the 21st Century, *Psychological Jurisprudence* (Sept. 2, 1999) (on file with the *Hofstra Law Review*).

## II. LAW AND LAW-ABIDINGNESS

The function of the law, of legal institutions, and of legal authorities, is to regulate the behavior of citizens. If the law is to be effective in fulfilling its regulatory role, most citizens must obey most laws most of the time.<sup>4</sup> Although it is necessary to the effective functioning of society, obtaining such compliance can by no means be taken for granted. Laws and the directives of legal authorities restrict the ability of citizens to behave as they wish. Consequently, people resist them, and the acceptance of the dictates of the law is always problematic.

A central contribution that psychology can make to the field of law, which seeks to understand ways in which the rule of law can be effectively maintained, is that it can help to clarify how public compliance with the law can be facilitated. Psychologists can do so by expanding the understanding of the motivations for human behavior that informs the thinking of legal authorities. The effort to do so reflects one aspect of psychological jurisprudence—the application of psychological knowledge to a core issue within the law.

This Article posits that a better understanding of the psychology of human motivation is of great interest to legal authorities, members of the legal profession, and to those working within legal institutions such as the courts, the police, and prisons. During the last several years, all of these legal actors have expressed concern about their inability to effectively secure citizen compliance with the law.

Examples of the policy problems arising out of difficulties with securing public compliance with the law abound. One set of problems relates to the difficulty of securing the acceptance of judicial decisions in matters as diverse as child support payments and the dispute resolution decisions made in small-claims courts.

Another set of problems involves the difficulties of gaining public compliance with laws ranging in scope from drug laws to income tax rules. Legal authorities depend heavily on the willingness of citizens to obey everyday laws without requiring the presence of police officers or the threat of sanctions by the courts. Increasingly in recent years, however, there have been suggestions that the public ignores laws as simple as stopping at red lights and as key to society as paying taxes.

Other problems stem from the inability to effectively change the future behavior of those who come before the law because of past illegal actions (to “reform” criminals). Central to many traditional views about securing compliance is the belief that people who do wrong can be re-

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4. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19 (1990).

habilitated into citizens who will comply with the law in the future. This rehabilitative ideal has declined, leading to questions regarding how to respond to those who break social rules.

The problems involved with implementing laws have led to widespread calls from legal authorities and law scholars for social science help in understanding how to secure the effective rule of law.<sup>5</sup>

This call from legal authorities for social science input is an important opportunity for psychologists to put forward a new psychological perspective on people's relationships to society and to social rules—a psychological jurisprudence model. The concerns being expressed by legal authorities suggest that current models of the motivations that shape people's behavior are not providing them with an adequate basis for effective social regulation. This Article's call for increased attention to psychological jurisprudence is linked to a more complete model of human motivation that is based upon a broader psychology of the person. This Article's efforts to develop such a model build upon the prior efforts of psychologists and other social scientists to speak to this same question of human motivation.<sup>6</sup>

The idea of a psychological jurisprudence model has been recognized by a variety of psychologists in the law and psychology community.<sup>7</sup> Potentially, this psychological jurisprudence model can have many facets. Some are linked to an understanding of human motivation, others to an understanding of human cognition and decision-making. The comments here focus on issues of human motivation. However, the same core concept of psychological jurisprudence that is being applied to motivation in this analysis has implications for many other areas of law and psychology. In each area, the law benefits from being guided by a complete and accurate model of the psychology of the person. Psycho-

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5. See, e.g., Sharon D. Herzberger, *Social Science Contributions to the Law: Understanding and Predicting Behavior*, 25 CONN. L. REV. 1067, 1067 (1993) (demonstrating that the overlap of the interests of social scientists and legal professionals can be useful to secure the effective rule of law).

6. See ELLEN S. COHN & SUSAN O. WHITE, *LEGAL SOCIALIZATION: A STUDY OF NORMS AND RULES* 7 (1990); Richard Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, in COMPLIANCE AND THE LAW: A MULTI-DISCIPLINARY APPROACH 67, 67 (Samuel Krislov et al. eds., 1972); Paul E. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 10, 10 (June Louin Tapp & Felice J. Levine eds., 1977); Gary B. Melton & Michael J. Saks, *The Law as an Instrument of Socialization and Social Structure*, in NEBRASKA SYMPOSIUM ON MOTIVATION 1985: THE LAW AS A BEHAVIORAL INSTRUMENT 235, 235-36 (Richard A. Dienstbier & Gary B. Melton eds., 1986).

7. See Darley et al., *supra* note 3, at 4.

logical jurisprudence is the application of such models to important areas of the law.

### III. MOTIVATIONS FOR BEHAVIOR

When we consider possible motivations for people's law-related behavior, whether public or private, we can draw upon the extensive social psychological literature on the motivations that shape people's social behavior. Social psychologists usually think of social behavior as developing from two core motivations: Environmental forces and social values.<sup>8</sup> These two forces form the core of Kurt Lewin's famous formula that behavior is a function of the person, the individual's attitudes and social values, and of the environment, incentives and risks within the social environment.<sup>9</sup>

#### A. *Deterrence: Incentive and Sanction-Based Models of Human Motivation*

The first important force shaping people's behavior is the influence of the contingencies in an environment on the behavior of the people within that environment. The influence of external contingencies can include an impact of anticipated gains and/or anticipated losses. Calculation of each factor involves an assessment of the likelihood of potential gains and losses, as well as an evaluation of their expected magnitude. Taken together, these calculations combine to tell people whether engaging in some action is likely to be beneficial to their personal self-interest.

The influence of environmental contingencies is combined with the already noted influence of attitudes and social values. These two basic factors shape what a person does within any given situation. This Article explores the influence of social values in a later section.

The idea that people's behavior with respect to the law is shaped by calculations of expected gain and loss is the core premise of rational choice theory.<sup>10</sup> At this time, this economic model of the person domi-

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8. See KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 170-71 (Dorwin Cartwright ed., 1951); N. Dickon Reppucci, *Context, but Not Development: Comments on Fagot's 'Context and Culpability in Adolescent Crime,'* 6 VA. J. SOC. POL'Y & L. 599, 599-600 (1999) (citing KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 170-71 (Dorwin Cartwright ed., 1951)).

9. See LEWIN, *supra* note 8, at 170-71; Reppucci, *supra* note 8, at 599-600 (citing KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 170-71 (Dorwin Cartwright ed., 1951)).

10. See DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL

nates law and public policy. In the case of the regulation of people's behavior, the rational choice model focuses upon the ability of expected losses associated with law-breaking to lessen the likelihood that people will break the law.<sup>11</sup> In the context of law, this model is referred to as the social control model of law-related behavior, or as the influence of deterrence factors on behavior.<sup>12</sup>

The social control model is the primary model of human motivation that has guided the recent efforts of the American legal system to manage society.<sup>13</sup> The application of this model of human motivation to the issue of social control has had dramatic effects on the nature of American society. Consider the case of the American prison population.<sup>14</sup> Because of the belief that crime is deterred by the threat and/or experience of punishment, a large number of American citizens have been convicted and sentenced to spend time in American prisons.<sup>15</sup> Today the United States is a world leader in the percentage of its citizens it holds in prison.<sup>16</sup>

Does a social control model work? Some research supports the suggestion that variations in the perceived certainty and severity of punishment do shape people's compliance with the law.<sup>17</sup> In particular,

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SANCTIONS ON CRIME RATES 16 (Alfred Blumstein et al. eds., 1978); Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 L. & SOC'Y REV. 7, 10 (1989).

11. See Daniel S. Nagin & Raymond Paternoster, *The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Conception of Deterrence*, 29 CRIMINOLOGY 561, 580-81 (1991); Paternoster, *supra* note 10, at 10-12, 37.

12. See Paternoster, *supra* note 10, at 37.

13. See Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, FED. SENTENCING REP., July-Aug. 1994, at 122 (citing MICHAEL MCCONVILLE & CHESTER MIRSKY, *GUILTY PLEA COURTS: A SOCIAL DISCIPLINARY MODEL OF CRIMINAL JUSTICE* 51 (1994)); see also Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 676 (1985) (discussing the functions of law in the social control model). In addition, the social control model has been examined and applied in other contexts. See, e.g., Llewellyn J. Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 518-19 (1997) (describing the role of the social control model in governing cyberspace); Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 400 (1996) (examining the role of the social control model in regulating drinking and smoking).

14. See Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 709 (1998).

15. See *id.* at app. fig.A1.

16. See *id.*

17. See, e.g., Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 L. & SOC'Y REV. 837, 838-40, 857 (1990) (discussing studies demonstrating a correlation between legal sanctions and the commission of crimes); Paternoster, *supra* note 10, at 37 (classifying the certainty and the severity of punishment as two of several factors that contribute to an individual's decision regarding whether

people's behavior is often, although not always, found to be shaped by their estimate of the likelihood that, if they disobey the law, they will be caught and punished.<sup>18</sup>

Although research supports the basic premise of the deterrence model, it also suggests that estimates of the likelihood of being caught and punished have, at best, a minor influence on people's law-related behavior. Some studies suggest that such estimates do not independently influence behavior when the influence of other factors is considered.<sup>19</sup> Other studies find an independent influence, but it is typically small in magnitude.<sup>20</sup> For example, Robert MacCoun estimates that about five percent of the variance in people's use of illegal drugs is explained by their estimates of the likelihood of being caught and punished for rule breaking.<sup>21</sup> Given the large number of societal resources that have been devoted to changing drug-related behaviors, this minor deterrence effect is striking.

In other words, research findings suggest that people's compliance with the law is, at best, weakly linked to the risks associated with law-breaking behavior.<sup>22</sup> As a result, social control strategies based primarily on a deterrence model of human behavior have, at best, had limited success.<sup>23</sup>

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to commit a crime).

18. See Nagin & Paternoster, *supra* note 11, at 574-75, 580-81; Paternoster, *supra* note 10, at 37; Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 JUST. Q. 173, 174, 211 (1987) [hereinafter Paternoster, *The Deterrent Effect*]; Raymond Paternoster & LeeAnn Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 769-70 (1986) [hereinafter Paternoster & Iovanni, *The Deterrent Effect: A Reexamination*]; Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 L. & SOC'Y REV. 457, 457 (1983).

19. See, e.g., Paternoster & Iovanni, *The Deterrent Effect: A Reexamination*, *supra* note 18, at 768-69 (discussing numerous other factors, besides the likelihood of being caught and punished, which contribute to the deterrence of crime).

20. See, e.g., Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501 (1993) (discussing the small influence that fear of punishment has in decisions to use illegal drugs); Nagin & Paternoster, *supra* note 11, at 580-81 (discussing several studies indicating that "sanction threats and perceived informal costs have independent crime-inhibiting effects"); Paternoster, *The Deterrent Effect*, *supra* note 18, at 211 ("It seems more likely that perceptions of the certainty of punishment and the perceived social/material costs of punishment are *independent* influences on behavior.").

21. See MacCoun, *supra* note 20, at 501.

22. See Paternoster & Iovanni, *The Deterrent Effect: A Reexamination*, *supra* note 18, at 769.

23. See H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER* 107-09, 111 (1982); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456, 458 (1997); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 873 (1997) [hereinafter Tyler, *Citizen Discontent*]; Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J.



*B. The Role of Morality and Legitimacy in  
Producing Law-Abiding Behavior*

The limits of the social control model suggest the importance of developing a broader model of motivation.<sup>24</sup> A psychological jurisprudence approach can expand the scope of our conception of possible motivating factors to be more consistent with current social psychological models of the person.

This expanded model of the person leads to an examination of a second type of factor that social psychologists view as central to the determination of people's behavior—the set of internal values that shape people's feelings about what is ethical or appropriate to do.<sup>25</sup> As previously noted, two types of internal motivations might potentially be important: attitudes and values. Of these, attitudes are most important when the issue involved is encouraging desired behavior, such as extra effort at work. If people want their organization to do well, they voluntarily work harder.<sup>26</sup>

In the case of rule following, the relevant internal motivation is the feeling of obligation or responsibility to act appropriately. This discussion focuses on two such social values: (1) the belief that following the rules is the morally appropriate thing to do; and (2) the belief that rules are legitimate and ought to be obeyed.

This Article's argument is that the influence of these values on citizen behavior provides an alternative model upon which an effective legal system can be created and maintained. Further, this Article argues that this model is a uniquely social psychological model. It builds upon the recognition by social psychologists that people develop internal values. This Article refers to a society based upon this model of human motivation as a law-abiding society.

These social values are distinct from contemporaneous judgments of self-interest. Further, they exercise an important independent influence on people's behavior. Social values represent people's sense of what is ethically and morally appropriate behavior.

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INT'L L. & POL. 219, 220-22 (1996-97) [hereinafter Tyler, *Compliance with Intellectual Property Laws*]; Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 SWISS J. ECON. & STAT. 219, 219-40 (1997) [hereinafter Tyler, *Procedural Fairness*].

24. See Paternoster, *supra* note 10, at 37-38.

25. See Grasmick & Bursik, *supra* note 17, at 839-40.

26. See TOM R. TYLER & STEVEN BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (forthcoming 2000) (On file with authors).

The concept of social values is nicely captured in Martin Hoffman's comment on the development of moral values.<sup>27</sup> He suggests:

The legacy of both Sigmund Freud and Emile Durkheim is the agreement among social scientists that most people do not go through life viewing society's moral norms as external, coercively imposed pressures to which they must submit. Though the norms are initially external to the individual and often in conflict with his desires, the norms eventually become part of his internal motive system and guide his behavior even in the absence of external authority. Control by others is thus replaced by self-control.<sup>28</sup>

This quote articulates a central feature of social values—their influence on people's behavior separates from the influence of factors in the external environment. Values become a part of the person and lead them to exercise self-regulation over their behavior so that their behavior is consistent with the internal principles and values that define their sense of themselves. In such a situation, people do not so much comply with the law as they accept and consent to it, deferring to law and legal authority because they feel it is the right thing to do.

When people have internal values that influence their behavior, it is not necessary to shape their behavior by threatening them with punishment for wrongdoing. People take the responsibility for following rules upon themselves. They do so if they feel that the law is reasonable and fair, so that they feel that it makes sense to them to be involved with legal authorities, to "sign on" to participation in society, and to voluntarily accept its rules. They then become willing to be governed by law and take on the responsibility for following laws and obeying the directives of legal authorities.

Recognition of the role of internal values in shaping law-related behavior suggests the possibility of a value-based perspective on people's behavior. That perspective emphasizes the importance of developing and sustaining a value climate, a "legal" or "civic" culture, in which people abide by the law because they feel it is the right thing to do. Such a perspective represents an important perspective for legal psychologists to articulate and advocate within the legal community. It is based upon a key contribution that social psychologists can make to our understanding of how society can effectively regulate citizen behavior, maintain social order, and promote an effective and efficient society, through de-

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27. See Martin L. Hoffman, *Moral Internalization: Current Theory and Research*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 85, 85-86 (Leonard Berkowitz ed., 1977).

28. *Id.*

veloping and maintaining a culture of supportive social values among the citizens within society.<sup>29</sup>

As previously noted, there are two key social values that are potentially central to a law-abidingness perspective. The first is the belief that it is morally right to follow the law.<sup>30</sup> This judgment is linked to people's assessment that the behaviors prohibited by law are contrary to their moral values. For example, murder is not simply an illegal action. Most people also believe that murder is morally wrong. Even if murder were suddenly made legal, most people would not commit murders because murdering someone would still be contrary to their own sense of what is right and wrong. Further, they would feel the need to punish others who murdered. In fact, in earlier societies, private groups of people, often united by kinship, frequently banded together to seek revenge following a murder.<sup>31</sup> They did so because their sense of morality led them to feel that justice must be restored in the aftermath of immorality.

The second key value is the belief that it is part of a person's duty as a citizen to accept legal rules and to obey the directives of legal authorities.<sup>32</sup> If citizens believe that legal authorities are legitimate, they regard them as entitled to be obeyed.<sup>33</sup> In such a situation, they obey laws because they regard deferring to social authorities as part of the obligations associated with citizenship. As with morality, they view following rules issued by legitimate authorities as the appropriate social behavior within a particular social situation. If, for example, a police officer tells a citizen to do something, such as to pull to the side of the road or stop his car, the citizen typically accepts this directive. Citizens regard it as appropriate for police officers to direct citizen behavior, and they follow these directives without requiring explanation or justification. Further, they follow these directives without thinking about whether they will be punished for failure to comply. Although the threat of punishment is always in the background when dealing with legal

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29. See Tyler, *Citizen Discontent*, *supra* note 23, at 885; Tyler, *Compliance with Intellectual Property Laws*, *supra* note 23, at 224-25; Tyler, *Procedural Fairness*, *supra* note 23, at 222; Tom R. Tyler, *The Psychology of Public Dissatisfaction with Government*, in PUBLIC ORIENTATIONS TOWARD GOVERNMENT IN THE UNITED STATES (John R. Hibbing & Elizabeth Theiss-Morse eds., forthcoming 2000) (manuscript at 6, on file with authors).

30. See ROBINSON & DARLEY, *supra* note 1, at 201.

31. See Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 197-98 (1986) (noting that in some earlier societies, members of such kinship groups felt morally obligated to exact blood revenge when a member of the group had been wronged by acts such as homicide and adultery).

32. See TYLER, *supra* note 4, at 3.

33. See *id.* at 4.

authorities, most people accept authorities' decisions, not simply because they fear them, but also because most people view them as legitimate authorities who ought to be obeyed.

Do people's social values matter? This Article examines this issue by testing the role of social values in shaping citizen compliance with the law. Professor Tyler has done this in a study of citizens' everyday acceptance of the law, which found that both morality and legitimacy have an effect on compliance that is: (1) separate from the influence of risk assessments; and (2) stronger than the impact of risk assessments.<sup>34</sup> Other studies support this finding by demonstrating the important role of both moral values<sup>35</sup> and beliefs about the legitimacy of legal authorities<sup>36</sup> on reactions to law and legal authorities. These studies provide preliminary evidence that a law-abidingness model can lead to a viable legal order.

#### IV. DEVELOPING AND MAINTAINING A CULTURE THAT SUSTAINS LAW-ABIDINGNESS

The law-abidingness perspective directs our attention to two key issues: the socialization of social values during childhood and the problem of sustaining a legal culture among adults.

A law-abiding approach would not be possible with citizens who lack social values, since they do not have the internal moral values or feelings of obligation that lead to law-abidingness. Hence, the law-abiding society depends upon the successful socialization of most citizens into its legal culture. If this is accomplished, then legal authorities can then depend upon the voluntary deference of most citizens, most of the time. Such behavior allows society to function efficiently, with legal authorities directing their coercive resources at the small minority of citizens lacking in social values. If, however, that group becomes too large, it would rapidly overwhelm the ability of legal authorities to effectively implement social regulations.

While childhood socialization is key to the initial establishment of supportive social values, people are also influenced by their adult expe-

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34. See *id.* at 58-60.

35. See Grasmick & Bursik, *supra* note 17, at 853-54; see also Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980) (stating that certain variables, such as "moral commitment, perceived threat of legal punishment and threat of social disapproval" act as factors inhibiting illegal behavior).

36. See DAVID BEETHAM, *THE LEGITIMATION OF POWER* 4-5 (1991); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 579 & n.2 (1995).

rience with legal authorities.<sup>37</sup> This influence can be personal, developing out of the experiences that citizens have with police officers and judges. It also can result from the reports about those authorities that citizens experience through friends, family, coworkers, or via the mass media. Irrespective of how people acquire information, the point is that citizens' views regarding authorities are not frozen during adulthood; they are responsive to information that citizens acquire during their everyday lives.

### A. *The Morality of the Law*

#### 1. The Importance of Moral Socialization

Developmental psychologists link the development of social values to the socialization experiences of the child.<sup>38</sup> Most children's basic orientations toward society and social institutions are shaped most profoundly during the early years of their lives, through their experiences with their families and school. Moral values develop early in life.

The study of moral value socialization suggests that a central factor shaping whether children take on key moral values is their relationship with their parents.<sup>39</sup> Through mechanisms of identification and internalization, children develop a personal commitment to following moral rules, and link that commitment to their sense of themselves and their estimates of their self-worth.<sup>40</sup> Thereafter, the failure to follow moral rules leads to feelings of guilt, a negative emotional state that reflects a person's feeling that they have failed to act as they should.<sup>41</sup> Of course, the form and strength of moral values changes over time, and people can change their views about morality over their lifetimes. Nonetheless, childhood socialization is the period during which people's basic orientation toward moral rules is formed.

It is also clear that it is not necessarily the case that children will learn social values. This is illustrated most clearly by the literature on moral socialization. That literature suggests that at least some children are socialized in ways that minimize the development of moral values;

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37. See TYLER, *supra* note 4, at 94.

38. See, e.g., Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. 509, 534 (1996) (stating that if children lack the requisite level of real-world experience, they may be unable to acquire proper values, beliefs, concepts, attitudes, and basic socialization patterns).

39. See ROBERT D. HESS & JUDITH V. TORNEY, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* 95-96 (1967).

40. See Hoffman, *supra* note 27, at 85-87.

41. See *id.* at 90-91.

their socialization is characterized by inconsistent physical discipline.<sup>42</sup> Such socialization leads to a personality that is not guided by moral concerns, and to behavior that flows from instrumental judgments about the potential gains and costs associated with rule following and rule breaking.<sup>43</sup> A small proportion of adults becomes career criminals, acting without the type of internal restraints that shape the behavior of most citizens.

## 2. Sustaining a Legal Culture: Adult Judgments about the Morality of Law-Breaking

Irrespective of how they emerge from childhood, citizens live long adult lives. During adulthood their social values continue to be shaped by the events of their society, as well as by their own personal experiences with the law.

To sustain its moral authority, the law must be experienced as consistent with people's sense of morality. If not, people's desire to do what is morally right will not lead them to support legal authorities and obey the law. The laws must reflect the moral sensibilities of the citizenry. However, Robinson and Darley demonstrate that there are many areas of law in which differences exist between law and public morality.<sup>44</sup> These discrepancies suggest a potential problem for a law-abidingness approach. They indicate areas in which law-abidingness cannot be enhanced by appealing to moral values, since the law does not accord with people's sense of right and wrong.

Typically, people are less willing to follow legal rules when those legal rules are not supported by their moral values.<sup>45</sup> Consider an example of a recent area of law that has struggled with problems of the inconsistency of law with people's moral values: American drug policy. Although drug use is illegal, many citizens do not view the use of drugs as immoral. Consequently, there is no moral force leading those citizens to abide by the law. This presents difficulties, difficulties similar to those seen in the prohibition era of earlier days. When the behavior in

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42. See, e.g., Emily Campbell, Comment, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?*, 69 NEB. L. REV. 190, 212-13 (1990) (noting the negative effects of inconsistent discipline); Lee N. Robins, *What Determines Rates of Homicide over Time and Place: Can We Find Out?*, 69 U. COLO. L. REV. 1009, 1020 (1998) (noting that children born into households that foster criminality often experience harsh and inconsistent discipline).

43. See Hoffman, *supra* note 27, at 86.

44. See ROBINSON & DARLEY, *supra* note 1, at xv, 2.

45. See TYLER, *supra* note 4, at 57, 64-66, 68.

question is not viewed as morally wrong, people's obedience will be more strongly linked to estimates of risk.

This model suggests the value of using an approach such as that of Robinson and Darley to identify areas in which the rule of law may be problematic.<sup>46</sup> These areas are likely to be those in which the public views law as divergent from their sense of moral correctness.<sup>47</sup> A famous example of such a perceived divergence is the public's general belief that the courts are too easy on criminals. In other words, the public believes that people do not receive the morally appropriate punishment for many crimes. Instead, they receive too little punishment. So, legal code violations are punished in a way that citizens think is not appropriate. As Robinson and Darley note: "[I]f a rule derived by desert theorists is judged overwhelmingly by the community to be unjust, such disagreement may cast some doubt upon the accuracy of the rule in assessing a person's moral blameworthiness, at least suggesting that closer scrutiny of the reasoning behind the rule is required."<sup>48</sup> This Article argues that this disagreement suggests that people are less likely to accept the law, since it will not correspond to their own sense of what is right and wrong.

More generally, a psychological jurisprudence model suggests an agenda item for law and psychology research on morality; that is the study of people's conceptions of morality in law-related areas. As noted previously, one such effort is that of Robinson and Darley.<sup>49</sup> Another is the work of Norman Finkel, who examines "commonsense" notions of law and justice among members of the public.<sup>50</sup> These efforts are consistent with the more general recent trend within law and social science to examine the "legal consciousness" of people within American society.<sup>51</sup>

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46. See ROBINSON & DARLEY, *supra* note 1, at xv, 2 (describing the 18 original studies on which the authors relied to identify areas of the law and specific examples of laws that are in tension with the collective morals of the community).

47. See *id.* at 2.

48. *Id.* at 6.

49. See *id.* at 2-3.

50. See NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* (1995).

51. For examples of studies exploring the American legal consciousness, see PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 17 (1998) (using the stories of ordinary people to "trace the ways in which commonplace transactions and relationships come to assume (or not assume) a legal character"); V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES* 3 (1992) (utilizing individuals' reactions to stories of wrongdoing "to suggest a social structural basis for how individuals or nations may come to differ in their judgments of wrongdoing"); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 1 (1990) (analyzing the legal consciousness of people that leads them to bring their personal problems to court); Timothy J. Flanagan, *Reform or Punish:*

Further, such everyday notions of justice and morality need to be compared to both the actual law “on the books” and to the law that the public believes exists “on the books.”<sup>52</sup> This approach is used extensively by Robinson and Darley, who systematically explore the relationship between public views and the formal law across a wide range of legal issues.<sup>53</sup> The issue of the law as the public imagines it, in comparison to the actual law, is the topic of the most studied public view that the courts are too lenient on criminals.<sup>54</sup> This view is based upon evidence demonstrating that the public believes that the punishments that people should receive for their crimes often depart from the actual punishments given by the courts.<sup>55</sup>

### B. *The Legitimacy of Legal Authorities: Political Socialization*

The study of the development of views about the legitimacy of authorities leads to a focus on political socialization. Like the literature on moral socialization, the literature on political socialization suggests that basic orientations toward law and legal authorities develop early in life.<sup>56</sup> Children learn a sense of civic responsibility which includes a duty to obey rules and to accept the directives of legal authorities, authorities that they learn to regard themselves as being obligated to obey.<sup>57</sup> As with their moral values, people’s feelings about obligation

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*Americans’ Views of the Correctional System*, in AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 75, 75-92 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (detailing a study on people’s opinions of the correctional system in the United States).

52. See PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 207 (1997).

53. See ROBINSON & DARLEY, *supra* note 1, at 2.

54. See Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 854-55 (1998).

55. See ROBINSON & DARLEY, *supra* note 1, at 202 (stating that legal codes and public views frequently differ).

56. See FRED I. GREENSTEIN, CHILDREN AND POLITICS 1, 44 (rev. ed. 1969) (noting that many of the political orientations that guide adult voters are acquired between the fourth and the eighth grades); HESS & TORNEY, *supra* note 39, at 7, 26 (explaining that there is strong evidence of continuity between childhood and adult political attitudes, and that many of these attitudes are formed in elementary school, particularly between the fourth and fifth grades); HERBERT H. HYMAN, POLITICAL SOCIALIZATION: A STUDY IN THE PSYCHOLOGY OF POLITICAL BEHAVIOR 53, 59 (1959) (explaining that children’s interest in politics is considerable by age 13, and that by the first year of high school political orientation has developed substantially); Richard G. Niemi, *Political Socialization*, in HANDBOOK OF POLITICAL PSYCHOLOGY 117, 118 (Jeanne N. Knutson ed., 1973) (noting that political learning is deeply rooted in childhood, and that this early learning has long-lasting effects).

57. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703,



evolve throughout life;<sup>58</sup> however, the basic development of feelings of obligation to law and to civic authorities is rooted in childhood socialization.<sup>59</sup>

The key to the success of a strategy of social regulation based upon law-abidingness is the appropriate socialization of children. The childhood socialization process is the time during which basic social values develop and take on an independent role in shaping children's behavior. That role is evident as early as the teenage years, during which law-abidingness is found to be linked to both moral values<sup>60</sup> and to feelings of obligation toward legal authorities.<sup>61</sup>

Similarly, children may not learn to respect and trust legal authorities. They may learn to fear those authorities and to regard them as adversaries and agents of external control. If they do, then their behavior will be limited to their estimate of risk, not to social values.

#### V. SUSTAINING A LEGAL CULTURE: MAINTAINING THE PUBLIC'S VIEW THAT LEGAL AUTHORITIES ARE LEGITIMATE AND OUGHT TO BE OBEYED

Sometimes legal authorities cannot rely upon or create a moral consensus behind the law. In such situations, they rely upon the public view that they are legitimate authorities and, as such, ought to be obeyed.<sup>62</sup> For example, when the Supreme Court declared abortion to be a legal right,<sup>63</sup> it made a decision that many citizens thought was morally wrong. Yet, most citizens deferred to the decision. Why? Because they view the Supreme Court as a legitimate social institution whose decisions ought to be obeyed.

The belief that legal authorities are legitimate and entitled to be obeyed provides an alternative basis for the viability of law. As citizens, the people within a society learn that they should obey legal and political authorities. They defer to those authorities because the authorities

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743 (1994) ("[C]onsiderable feelings of obligation to abide by the dictates of this system of government develop.").

58. See June Louin Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 89, 104 (June Louin Tapp & Felice J. Levine eds., 1977).

59. See Tyler & Mitchell, *supra* note 57, at 743.

60. See Augusto Blasi, *Bridging Moral Cognition and Moral Action: A Critical Review of the Literature*, 88 *PSYCHOL. BULL.* 1, 12 (1980) ("[T]hat delinquent individuals tend to use developmentally lower modes of moral reasoning than do . . . nondelinquents.").

61. See TYLER, *supra* note 4, at 31.

62. See *id.* at 170.

63. See *Roe v. Wade*, 410 U.S. 113, 153, 164-65 (1973).

are entitled to make decisions about the appropriateness of behavior in particular situations.<sup>64</sup> For example, army officers are entitled to order soldiers into combat, just as political officials are entitled to direct citizens to join the army and to pay taxes, etc. Studies show that those citizens who view authorities as legitimate are more willing to defer to the decisions of these authorities.<sup>65</sup>

Legitimacy provides greater and more reliable authority to legal officials than does morality, since legal officials have discretionary authority to decide what is appropriate. Within the scope of their prescribed roles, the police and courts make decisions, and citizens believe that they ought to obey those decisions. Because legitimacy invests authorities with discretionary authority, it is a more flexible form of social value upon which to base the operation of the legal system. With morality, the discretion rests with citizens, who decide whether or not the law corresponds to their moral values.

The legitimacy of authorities is an especially promising basis for the rule of law, because research suggests that it is not linked to agreement with the decisions made by legal authorities.<sup>66</sup> If people viewed as legitimate only those authorities who make decisions with which they agree, it would be difficult for legal authorities to maintain their legitimacy, since they are required to make unpopular decisions, which may deliver unfavorable outcomes.

Fortunately, from the perspective of legal authorities, studies suggest that legitimacy is linked to the fairness of the procedures used by authorities to make decisions.<sup>67</sup> Consequently, legal authorities can maintain their legitimacy by making decisions ethically. The procedural justice model directs the study of legitimacy and obligation to the feelings, needs, and concerns of the people who deal with legal authorities. If those people believe that the legal authorities are exercising authority in fair ways, they are more likely to defer to those authorities. This is true for reactions to personal experiences with legal authorities.<sup>68</sup> It is

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64. See HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 89 (1989) ("Once a demand is categorized as legitimate, the person to whom it is addressed enters a situation where his personal preferences become more or less irrelevant . . .").

65. See TYLER, *supra* note 4, at 31-32.

66. See *id.* at 172.

67. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 65-83 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67-116 (1975) (discussing, in chapters 8-11, studies linking legitimacy to the fairness of procedures); TYLER, *supra* note 4, at 172.

68. See TYLER, *supra* note 4, at 172; Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 *AM. J. POL.*

also true when people are evaluating national level political and legal authorities like the Supreme Court.<sup>69</sup>

Perhaps most importantly, from the perspective of the legal system, a number of recent studies link judgments about procedural fairness to the willingness both to accept particular legal decisions<sup>70</sup> and to generally follow laws and legal rules.<sup>71</sup> Procedural justice is found to play an especially important role in securing compliance over time.<sup>72</sup> It is clear that people's behavioral reactions to law and legal authorities are heavily influenced by their assessments of the fairness of legal procedures.

## VI. COMPARING POTENTIAL BASES FOR A LAW-ABIDING SOCIETY

The difficulties involved in trying to manage the regulation of citizens using deterrence based approaches have already been outlined. As was noted, legal authorities have a great deal to gain by being able to rely upon the consent and cooperation of citizens. This Article has labeled a society that is linked to such self-regulatory approaches a law-abiding society.

Research suggests that both morality and legitimacy can potentially be the basis for a legal order that rests on the idea of law-abidingness. This creates the possibilities shown in Figure 1. We might have a society based upon shared moral values ("a morally just society"); a society based upon shared views that authorities are legitimate ("a legitimate state"); or a society based upon both sets of internal values ("a dual justification society"). Absent any of these bases for a law-abiding society, we have the social control-based society described by deterrence theory.

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SCI. 629, 630 (1989).

69. See Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC'Y REV. 809, 811-12, 828 (1994); Tyler & Mitchell, *supra* note 57, at 714-24.

70. See LIND & TYLER, *supra* note 67, at 66-70; Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553, 554 (1993); Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 L. & SOC'Y REV. 323, 324 (1995).

71. See RICHARD SPARKS ET AL., PRISONS AND THE PROBLEM OF ORDER 87-89 (1996); TYLER, *supra* note 4, at 82; W. Chan Kim & Renée A. Mauborgne, *Procedural Justice, Attitudes, and Subsidiary Top Management Compliance with Multinationals' Corporate Strategic Decisions*, 36 ACAD. MGMT. J. 502, 503, 506-10 (1993).

72. See Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects*, 66 AM. J. ORTHOPSYCHIATRY 131, 131-32 (1996); Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 L. & SOC'Y REV. 163, 165-66, 192 (1997); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 315-16 (1993).

	<i>Morality</i>		
	<i>Low</i>	<i>High</i>	
	<i>Low</i>	Social control model	Legitimate state
<i>Legitimacy</i>			
	<i>High</i>	Morally just society	Dual justification model

Figure 1. Social Values as a Basis for the Law-Abiding Society

Having identified these two potentially important sources of self-regulatory behavior, this Article next considers how the nature of society is shaped by choices about whether morality or legitimacy will be the basis upon which law-abidingness occurs.

#### A. Comparing Morality and Legitimacy

As noted earlier, morality and legitimacy share the common characteristic of being social values.<sup>73</sup> They represent people's sense of how they ought to act. Consequently, they reflect two types of self-regulatory motivations for personal action. Building a law-abiding society involves using people's feelings of morality and/or legitimacy as a core basis for gaining their deference to the law and to legal authorities.

But which type of social value should be used? It should be emphasized that either form of self-regulation might potentially serve as the basis for a viable society. However, the choice among approaches has important consequences for the nature of the society within which they are used.

##### 1. The Relationship of Morality and Legitimacy in Everyday Life

As previously noted, Professor Tyler has found that, in the case of obeying laws in people's everyday lives, morality and legitimacy reinforce each other.<sup>74</sup> Citizens regard it as both immoral and illegitimate to break the law.<sup>75</sup> In most democratic societies, there is at least some cor-

73. See *supra* notes 24-36 and accompanying text.

74. See TYLER, *supra* note 4, at 6.

75. See *id.* at 44, 46. "Citizens seem to view breaking laws as a violation of their personal

respondence between public morality and the law. This is true because both the political and legal systems reflect the operation of democratic political processes through which the values of the public are translated into public policies.

The general convergence of legitimacy and morality does not mean, of course, that morality and public policy are the same thing. There may be discrepancies between the two, and areas of discrepancy tend to be contentious and controversial areas of high visibility, such as abortion rights. It is easy, therefore, not to focus on the many areas in which law and morality converge.

The point is that morality and legitimacy often compliment each other, creating a dual justification for complying with the law and with legal authorities. In such cases, we would expect people to be especially willing to be law-abiding, voluntarily taking the responsibility to obey the law and accept the decisions of legal authorities. We would expect to find that people follow the law even when the likelihood of being caught and punished for wrongdoing is low.

## 2. Enhancing the Convergence Between Legitimacy and Morality

While legitimacy and morality often converge, in some areas this convergence may be weak. In these areas, it is possible for legal authorities to try to enhance the convergence of law and legitimacy. To do so, they need to follow the lead of the work of Robinson and Darley, and identify areas of discrepancy between people's personal moral values and the law.<sup>76</sup> This involves two potential types of effort: first, an effort to bring the formal law into congruence with public moral values;<sup>77</sup> and second, an educational campaign designed to make the public aware of the true nature of the formal law.<sup>78</sup> If people correctly understand the law, and the law truly reflects public moral values, then the legitimacy of the law and personal morality would converge as forces for law-abidingness.

### a. Using Knowledge of Public Morality to Define the Law

One approach is to bring the law into consistency with public morality. An interesting example of such an effort is the work of Christo-

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morality." *Id.* at 44. "[B]oth personal morality and the legitimacy of legal authorities encourage citizens to be law-abiding." *Id.* at 46.

76. See ROBINSON & DARLEY, *supra* note 1, at 201-15 (discussing the conflicts between community views and criminal laws).

77. See *id.* at 202.

78. See *id.* at 215.

pher Slobogin on the intrusiveness of law enforcement officials into people's lives.<sup>79</sup> Slobogin argues that we might most effectively build the law defining what constitutes a serious intrusion into people's private lives by using public views about the intrusiveness of various types of police intervention into people's lives.<sup>80</sup>

To suggest what the rules governing intrusions into people's lives ought to be, Christopher Slobogin and Joseph E. Schumacher conducted a study in which the members of the public rated the "intrusiveness" of a variety of law enforcement investigative techniques.<sup>81</sup> These techniques range from behaviors that members of the public rate to be highly intrusive, such as a body cavity search at a border or having one's phone monitored, to behaviors that the public rates as generally unobtrusive, such as looking in the foliage in a public park or going through a magnetometer at an airport.<sup>82</sup>

Slobogin argue that the decisions of the Supreme Court defining the formal law of search and seizure should be shaped by these public views, with the Court making the legal requirements for searches higher when those searches are defined by members of the public to be more intrusive.<sup>83</sup> If the Court accepted and followed this principle, it would be acting to bring the formal law into line with people's feelings about what is right or wrong. This Article suggests that such an effort would enhance the public's willingness to accept government searches of private individuals.

There are, of course, problems with any effort to bring law into line with public morality. One key problem is that it raises the question of whose morality should define the law. If there is a consensus about morality, this issue does not arise. However, such a consensus can never be taken for granted. Consider the prior example of searches and seizures. Slobogin and Schumacher did not systematically examine the relationship between citizens' background characteristics and attitudes about intrusiveness.<sup>84</sup> However, we might predict that the disadvantaged minorities, who are the subject of many law enforcement intrusions, might

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79. See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

80. See *id.* at 49-50. "[T]he public is more likely to perceive unnecessary police intrusions as illegitimate when they are significant." *Id.* at 50.

81. See Christopher Slobogin & Joseph E. Schumacher, *Rating the Intrusiveness of Law Enforcement Searches and Seizures*, 17 LAW & HUM. BEHAV. 183 (1993).

82. See *id.* at 186, 188-89 tbl.1.

83. See *id.* at 184, 198-99. Slobogin and Schumacher propose that "some sense of how (innocent) citizens view the intrusiveness of various types of searches and seizures would be relevant to current Fourth Amendment jurisprudence." *Id.* at 184.

84. See *id.* at 186, 188-89 tbl.1.

rate intrusions to be much more “intrusive” than would middle-class whites. If so, then it would be problematic to bring the law into line with the values of one group, as opposed to another.

Another approach is to seek to create a moral consensus in favor of the existing law, in an effort to bring morality into line with law. For example, after early efforts to diminish drug use by threats and long prison terms were largely unsuccessful,<sup>85</sup> greater effort was placed on trying to create a feeling that drug use was morally wrong. Through campaigns such as “just say no to drugs” an effort was made to label drug use as morally wrong. Such beliefs, once developed in children, provide a motivational force against the use of drugs. Children learn that they should not use drugs because it is morally wrong to do so.<sup>86</sup>

#### b. Educating the Public About Misconceptions Regarding the Law

The other possibility for enhancing the convergence of the law and morality is to educate the public about the many areas in which members of the public incorrectly believe that the law is inconsistent with their moral values.<sup>87</sup> Studies suggest that members of the public typically have little knowledge about the courts, and that their knowledge is influenced by mass media accounts that are often inaccurate.<sup>88</sup> As a consequence, people usually overestimate the rate of violent crime and often think that it is rising when it is actually stable or even declining.<sup>89</sup> Further, the public faults the courts for what the public inaccurately perceives as procedural errors that the courts make, including letting too many innocent people go free via the insanity defense<sup>90</sup> and excluding illegally obtained evidence.<sup>91</sup> Finally, although the public generally be-

85. See Tyler, *Citizen Discontent*, *supra* note 23, at 873; Tyler, *Compliance with Intellectual Property Laws*, *supra* note 23, at 220-21.

86. See Tyler & Mitchell, *supra* note 57, at 783.

87. See Tyler, *Compliance with Intellectual Property Laws*, *supra* note 23, at 227 (“[T]he law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality.”).

88. See Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, in 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 99, 103, 109 (Michael Tonry ed., 1992).

89. See *id.* at 109-12 (noting numerous examples of public misperceptions regarding crime statistics).

90. See Tyler, *supra* note 54, at 854-55; see, e.g., Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63, 63, 67 (1994) (detailing the results of an empirical study that examined public perceptions regarding the insanity defense).

91. See, e.g., Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and “Lost Cases:” The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1064 (1991) (discussing and analyzing the results of an empirical study that

believes that the sentences given for crimes are too lenient, studies show that members of the public would give the same sentences as do judicial officers, if they were shown the case facts that are available to judicial officials.<sup>92</sup>

All of these misconceptions suggest a need for public education.<sup>93</sup> The point of each is that the public may actually view the operations of legal authorities as much more consistent with public morality than it believes. If so, it is not necessary to change the law; it is only necessary to educate the public about what the law actually is. This will bring the law into harmony with public views about what is right, without any actual changes in the law.

### B. *The Clash Between Morality and Legitimacy*

Although morality and legitimacy may often reinforce themselves, it is also clear that morality and legitimacy can clash. Robinson and Darley, for example, note many cases in which law and morality are in conflict to at least some degree.<sup>94</sup>

Consider a highly visible case of the clash between legitimacy and morality: the issue of abortion. The legitimacy of the authority of the United States Supreme Court dictates that citizens accept the holding of *Roe v. Wade*<sup>95</sup> and defer to the occurrence of abortions.<sup>96</sup> The Court is empowered by the Constitution to interpret the legal rights of Americans, and most Americans accept the legitimacy of this role for the Court.<sup>97</sup>

However, what if people's moral values lead them to think that abortion is morally wrong—that it is the equivalent of murder? Of

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examined the affects of the exclusionary rule on search warrant cases).

92. See Shari Seidman Diamond, *Revising Images of Public Punitiveness: Sentencing by Lay and Professional English Magistrates*, 15 L. & SOC. INQUIRY 191, 193, 208 (1990).

93. See Gale A. Norton, *Comments on Zimring and Hawkins's Crime Is Not the Problem: Lethal Violence in America*, 69 U. COLO. L. REV. 1163, 1171 n.28 (1998) (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 169 (1997) (citing JOHANNES ANDENAES, *PUNISHMENT AND DETERRENCE* 116 (1974))).

94. See Robinson & Darley, *supra* note 23, at 482-83 (citing murder, abortion, and animal rights as examples of areas in which a conflict exists between the law and morality).

95. 410 U.S. 113, 164 (1973) (holding that a criminal abortion law "that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment").

96. See Tyler & Mitchell, *supra* note 57, at 710, 798 (arguing that the legitimacy of the Supreme Court's decisions is founded on the public's perception that its decisions do not merely reflect shifts in Court personnel, but instead are constrained by rule-of-law values).

97. See *id.* at 716, 723, 797-98.



course, even under the *Roe v. Wade* doctrine,<sup>98</sup> people who think abortion is murder need not have an abortion themselves. They do not have to actively participate in an immoral action. However, they need to acquiesce to allowing others to have abortions. As many opponents of abortion note, this can be viewed as acquiescence to immorality.<sup>99</sup> For example, when soldiers stand by and watch civilians be murdered by other soldiers, we think this is wrong and they should take action to stop it. That is, moral codes often impose a duty on people to resist the immoral actions of others, even if those actions are not directed against them. People often act as groups to enforce morality in a community, for example, chasing and beating up someone who has injured another. It would not, therefore, be surprising to see groups arising to resist what they view as an immoral act like abortion. On the other hand, to act in this way would, in this case, involve a conflict with one's civic duty, which is to defer to the Court.<sup>100</sup>

In a case like abortion, there is an inevitable clash between support for state authority and one's personal morality.<sup>101</sup> The difficulty that such a clash can create for a society is illustrated by the story of a group that calls themselves "the rescuers."<sup>102</sup> This group is one of many within the anti-abortion community.<sup>103</sup> Believing that abortion is murder, this group's members originally organized protests designed to be non-violent, following the model of the civil rights movement.<sup>104</sup> They felt that their principled opposition to abortion would lead society to change its laws.<sup>105</sup> However, they failed to achieve this objective, and eventually began to engage in increasingly violent actions, such as blocking the

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98. See *Roe*, 410 U.S. at 153 (explaining that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

99. See Tyler & Mitchell, *supra* note 57, at 756-58, 759 tbl.1.

100. See J. Daniel Mahoney, *Thoughts on Originalism*, 72 NOTRE DAME L. REV. 1225, 1232 (1997) (discussing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (O'Connor, J., Kennedy, J., and Souter, J., concurring), which deferred to the *Roe* decision, and, in effect, advised anti-abortion groups to "get lost" because their actions had been in conflict with their constitutional and civic duties).

101. See *Book Notes: Women and the Law*, 22 L. & SOC. INQUIRY 531, 533 (1997) (reviewing GAIL KELLOUGH, *ABORTING LAW: AN EXPLORATION OF THE POLITICS OF MOTHERHOOD AND MEDICINE* (1996)).

102. See Regina R. Campbell, Comment, "FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech?, 64 U. CIN. L. REV. 947, 952-53 (1996).

103. See Jennifer Burt, *Constitutional Law—Individual Rights*, 64 GEO. WASH. L. REV. 1004, 1005 (1996).

104. See Campbell, *supra* note 102, at 953-55 (describing Operation Rescue's protest strategies).

105. See Paul R. Davis & William C. Davis, Student Article, *Civil Disobedience and Abortion Protests: The Case for Amending Criminal Trespass Statutes*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 995, 1010 (1991).

entrances to clinics as an act of civil disobedience.<sup>106</sup> These acts were still within the framework of the law, since group members accepted arrest and jail time/fines as a consequence of their actions.<sup>107</sup> As time went by, and abortion laws were not changed, this group increasingly engaged in acts of sabotage against clinics.<sup>108</sup> At first, such acts were carefully timed to avoid harm to people. However, over time, the group's acts escalated into hunting and assassinating doctors who perform abortions.<sup>109</sup> What this shows is how, over time, the group's view that the law and legal authorities were legitimate and trustworthy declined, as did their respect for the rule of law. The driving force for this decline was their inability to change the law to be more consistent with their own moral views.

Such clashes are not unusual. The long history of the conflict between religion and state authority provides many examples of this type of conflict.<sup>110</sup> Historically, the church defined moral rightness through a distinct set of principles, institutions, and authorities and, as such, could often be inconsistent with the morality of law and state authorities.<sup>111</sup> Further, such alternative models of morality were supported by institutions and authorities.<sup>112</sup> This is important since people seldom are found to be willing to take a moral position simply based upon personal beliefs, without any institutional support for their views.<sup>113</sup>

The clash between morality and legitimacy also occurs in many more mundane, but also important, areas of law. An example is pro-

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106. See Campbell, *supra* note 102, at 954-55.

107. See *id.* at 954.

108. See *id.* at 957.

109. See *id.* at 956.

110. See KELMAN & HAMILTON, *supra* note 64, at 65-68 (discussing the history of this ideological conflict through the writings of Church thinkers such as Saint Augustine and Saint Thomas Aquinas).

111. See Raymond C. O'Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMP. POL. & CIV. RTS. L. REV. 429, 437 (1998). Historically, the Church "define[d] . . . the interaction between religion and individual liberty . . . [and] society's morals. [The criticism of s]uch a notion is captured in former vice president Walter F. Mondale's quote: 'God doesn't belong in politics.'" *Id.* (citing Kevin P. Quinn, *Book Review*, AMERICA, Nov. 27, 1993, at 19 (reviewing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993))).

112. See *id.* But see Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69, 126 (1991) (noting that today there are extreme differences of opinion between church and state regarding controversial moral questions such as abortion, affirmative action, and free speech).

113. See KELMAN & HAMILTON, *supra* note 64, at 56-57; Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 271 n.60 (1999).

vided by the role of legal authorities in criminal cases. When a person breaks a criminal, as opposed to a civil, law, they have committed a crime against the state. For example, rape or assault is a crime against the state, not just an action that hurts particular victims. The state takes the matter out of the hands of victims and their families and community, those who might be inclined to pursue private vengeance. The state then disposes of the case in some manner, often through a plea bargain.

A conflict between the victim and the community and the state occurs when the victim and/or the community feel that the sentence given for the crime is not morally correct.<sup>114</sup> In particular, people may feel that either the verdict is unjust (“a guilty person went free”) or that the sentence was inadequate (“too lenient”).<sup>115</sup> In these cases, justice has not been done. People’s moral values are offended by the acts of the legal system, and people feel that the balance of justice has not been restored. Again, this reflects a conflict between public morality and the actions of state authorities.

The examples that have been given are cases in which the state takes action that the public regards as immoral. It is also possible for people to act on their moral values and take actions that the state regards as clashing with the legitimacy of state authorities. An example of this is the history of conscientious objection—in which a person takes an action for moral reasons.<sup>116</sup> In the case of conscientious objection, a person refuses to fight in a legitimate war because they feel that doing so would be immoral.<sup>117</sup> The state, of course, seeks to compel all citizens to acknowledge the legitimacy of state policies—in this case, the state’s right to invoke a citizen’s duty to defend the state. In this situation, the state typically seeks to punish those who act on their moral values.

In situations in which legitimacy and morality clash, is it better to build a society on moral consensus, or on state legitimacy? There is not a clear sense that one approach is better than the other. Each approach has some benefits and some potential dangers and risks.

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114. See *supra* notes 46–48 and accompanying text.

115. See *supra* notes 46–48 and accompanying text.

116. See MARGARET LEVI, CONSENT, DISSENT, AND PATRIOTISM 165 (1997) (“Historically the term referred to opposition to war and conscription on grounds of conscience . . .”).

117. See KELMAN & HAMILTON, *supra* note 64, at 140; Michael Kenneth Isenman, 1990 *Survey of Books Relating to the Law*, 88 MICH. L. REV. 1474, 1479 n.13 (1990) (reviewing HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY (1989)).

### C. *Moral Consensus as the Basis for Law-Abidingness*

#### 1. Building a Society on a Moral Consensus

There are many examples of societies united by a common religious heritage or cultural background.<sup>118</sup> In such societies, most or all citizens share a set of common moral values.<sup>119</sup> Societies of this type often do not even draw a distinction between religion and the state, and religious leaders are often consulted about the appropriate law to govern some area of social conduct.<sup>120</sup>

Saudi Arabia and Israel are examples of societies in which religious leaders have an important voice in articulating what the law should be.<sup>121</sup> They have this voice because it is believed that the law should reflect moral values, and those values are articulated by religious authority.<sup>122</sup> It would, of course, also be possible to accept the principle that morality should define law, but not to link morality to religion.

The advantage of a model of law that links law to moral correctness is that the powerful influence of moral values is directed at law-related behavior.<sup>123</sup> People feel that the law represents morality, and their desire to behave in ethically appropriate ways leads to the effective rule of law. In such a society, people do not experience the psychological conflict that occurs when they must decide between acting as they think morally correct, and following the directives of legitimate authorities.

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118. See Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 605 (1991).

119. See Joanne Yasus, Note, *What's in a Name? Nothing Good If It's Friday: The Seventh Circuit Invalidates Good Friday Public School Holiday*, 29 J. MARSHALL L. REV. 1031, 1061 n.189 (1996).

120. See, e.g., Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383, 387 n.10 (1996) (noting that religious ethics parallel the ethics of care and, therefore, religious leaders are consulted before the commencement of a lawsuit).

121. For a discussion of the relationship between Saudi Arabian law and religion, see Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 607 (1997). For a discussion of the relationship between religion and the law in Israel, see Gerald Gunther, *A Model Judicial Biography*, 97 MICH. L. REV. 2117, 2127 (1999) (reviewing PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY* (1997)).

122. See S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 110, 112 (1997) (explaining that, in Israel and Iran, religious principles have been incorporated into the substantive law).

123. See Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 HOW. L.J. 513, 547 (1997).

## 2. Problems with Building a Legal Order on Moral Consensus

The problem with moral consensus as a basis for the rule of law is that it assumes that it is both desirable and feasible to create and maintain a moral consensus among the members of a society. In a pluralistic society such as the United States, it is more difficult to see how moral consensus could be the basis for law-abidingness. While most citizens share some basic sense of common morality around issues such as murder and incest, there are many other issues in which people do not agree. Abortion represents an obvious case of such disagreement.

One factor that mitigates against finding a moral consensus within a society is the institutional separation of legal, political, and moral authority. Modern political states often define themselves as separate from any particular religious authority or moral code. They view themselves as existing as a separate set of institutions and authorities, functioning based upon distinct social values. At its most extreme, this separation defines the state as clearly distinct from any given religion or moral code (the separation of church and state). This idea is central to American government—with freedom of religion and of thought defined as human rights by our Constitution<sup>124</sup> and Declaration of Independence.<sup>125</sup> According to these principles, there is a distinct private sphere of life within which people are free to hold whatever ideas they deem fit to believe.

A second factor that mitigates against moral consensus is the definition of this private personal sphere of life that is under the control of the individual. This notion is linked to the idea of a value-neutral state, since the state is designed to protect the autonomy of the individual, rather than to impose any particular moral code or set of social values on the members of a society.<sup>126</sup> This type of society is potentially “pluralistic,” with many private moral codes coexisting within a common group.<sup>127</sup>

In a society with private moral values, and with a value-neutral state, it may be difficult or impossible for the state to base the rule of law on the assumption that there will be a set of common moral values. It seems likely that, even in such a society, common moral values will define some acts, such as murder, to be immoral. Those acts are likely to be illegal also. But what about more ambiguous behavior, such as

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124. See U.S. CONST. amend. I.

125. THE DECLARATION OF INDEPENDENCE para. 1, 32 (U.S. 1776).

126. See Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based Regulation of Violent Expression*, 62 ALB. L. REV. 183, 204 (1998).

127. See *id.*

drinking, using drugs, being a homosexual, or having an abortion? Such actions are likely to be viewed as moral by some people, immoral by others.

In a society unwilling to define a common moral code, effective legal regulation may need to be based on the legitimacy of state authorities. Further, it may require that legitimacy itself be based on something besides the values that the authorities use to make their decisions. That is, it requires that people judge authorities based upon how they make decisions, not upon what those decisions are. As already noted, there is considerable evidence that such a society can be viable. People do evaluate authorities in terms of the procedures they use to make decisions.<sup>128</sup>

These arguments suggest that the form of authority that can lead to the effective rule of law may be linked to the nature of the underlying society. In a society such as the United States, it may be difficult to use moral consensus as the basis for an effective society. In a society such as Iran, Israel, or Saudi Arabia, morality may be a more effective basis for viable social regulation. Those societies are more willing to define a common morality.<sup>129</sup>

#### *D. Legitimacy as the Basis for a Law-Abiding Society*

Legitimacy has appealing characteristics as a possible basis for the rule of law. On its face, it appears to be an all purpose mechanism of social coordination, since people feel obligated to obey whatever laws or decisions that legal authorities make, within some scope of action within which the authority has legitimacy to act.<sup>130</sup>

Illustrations of the power of legitimacy to shape behavior abound. Most strikingly, when legitimacy and morality clash, legitimacy often dominates people's behaviors. Legitimacy has the property of "authorizing" people's behavior. That is, people often view their own moral values as irrelevant when a legitimate authority is present.<sup>131</sup> An

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128. See Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869, 902 (1999).

129. See *supra* notes 118-22 and accompanying text; see, e.g., Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1509 (1984) (noting that because a common morality permeates its society, "you're not going to change the morality in Saudi Arabia" (quoting Transcript of telephone conversation between John Richard, NYPIRG, and Dan M. Burt at 5 (Apr. 11, 1984) (on file with Oliver A. Houck))).

130. See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1311-12 (1998).

131. See TYLER, *supra* note 4, at 63. Tyler writes:

example is provided by Stanley Milgram's study of obedience to legitimate authorities.<sup>132</sup> In the study, people were directed to engage in behavior that they believed hurt another person.<sup>133</sup> Obedience was widespread.<sup>134</sup> As Herbert Kelman and V. Lee Hamilton note:

It is interesting that, in the postexperimental debriefing, [a participant who shocked the confederate at the maximum level] seems unable to understand a question about whether there are any conditions under which he might have stopped administering shocks to the [confederate]. As far as he is concerned, he *did* stop—and he seems dismayed to learn that some participants did not stop. *He* stopped; it was the [authority] who continued. His hand may have been on the switch, but the decision and the responsibility were clearly the experimenter's.<sup>135</sup>

### 1. The Psychological Dynamics of Legitimacy

For legitimacy to be effective, it is necessary for legitimacy to be based upon something besides agreement with decisions or policies. Procedures are one obvious basis for legitimacy.<sup>136</sup> The research already outlined makes clear that people do, in fact, evaluate the exercise of authority primarily on procedural grounds.<sup>137</sup> The procedural basis of legitimacy suggests a separation of legitimacy from the substance of decisions.<sup>138</sup> This separation means that legitimacy should be an ideal vehicle for the effective regulation of people's behavior.

### 2. Problems with Building a Legal Order on Legitimacy

Despite its seemingly appealing characteristics, legitimacy has elements that make it a problematic basis for an effective legal order. One key element is the ability of legitimacy to separate people from

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Respondents are almost equally likely to comply with the law because they view it as legitimate whether they think the likelihood of their being caught is high or low, whether or not they think their peers would disapprove of law breaking, and whether or not they think law breaking is morally wrong.

*Id.*

132. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974) (discussing various social science experiments that tested individuals' responses to perceived authority figures).

133. See *id.* at 20-21.

134. See *id.* at 35 tbl.2.

135. KELMAN & HAMILTON, *supra* note 64, at 155.

136. See, e.g., *Scagnelli v. Whiting*, 554 F. Supp. 77, 79 (M.D.N.C. 1982) (noting that where there are "published written procedures . . . , the legitimacy of a claim . . . acquired *outside* those procedures is vitiated because there is no basis for" it).

137. See *supra* notes 67-72 and accompanying text.

138. See Tyler & Mitchell, *supra* note 57, at 737-38.

their own personal convictions and moral values.<sup>139</sup> Kelman and Hamilton use the term “authorization” to describe the process by which people come to regard their own moral values as irrelevant to their actions.<sup>140</sup> Through “authorization” people authorize another person to make decisions on their behalf.<sup>141</sup> Studies suggest that people are able to engage in acts of great injury and violence to others when they can justify those acts as being authorized by the legitimate orders of an authority.<sup>142</sup>

Consider the already noted study by Milgram on obedience to authority.<sup>143</sup> Although the participants in Milgram’s study physically administered shocks to another person, the participants seemed psychologically removed from their actions.<sup>144</sup> They did not view themselves as moral actors, who were responsible for their actions.<sup>145</sup> Instead, they viewed themselves as merely acting in response to the directives of an authority.<sup>146</sup>

If a legal order is based upon legitimacy, it has tremendous potential to run amok, committing the types of crimes of obedience discussed by Kelman and Hamilton.<sup>147</sup> When societal authorities make rules or decisions that fly in the face of humanity and morality, there is very little to stop those forces from being enacted.<sup>148</sup> In other words, the moral values of the citizenry stand as an important limiting force on the potentially immoral actions of the state and state authorities.<sup>149</sup> However, to the degree that people view the state as legitimate, they regard their own moral reservations as irrelevant to their decisions about whether or not to “follow orders.”<sup>150</sup> This can potentially lead to widespread acquiescence to behavior that is immoral.<sup>151</sup>

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139. See KELMAN & HAMILTON, *supra* note 64, at 16.

140. See *id.* (“Through authorization, the situation becomes so defined that the individual is absolved of the responsibility to make personal moral choices.”).

141. See *id.* (“[A] different kind of morality, linked to the duty to obey superior orders, tends to take over”).

142. See *id.* at 23-52; MILGRAM, *supra* note 132, at 13-26.

143. See MILGRAM, *supra* note 132 (discussing Milgram’s experiments on obedience).

144. See KELMAN & HAMILTON, *supra* note 64, at 155; MILGRAM, *supra* note 132, at 36, 38.

145. See KELMAN & HAMILTON, *supra* note 64, at 155.

146. See *id.*

147. See *id.*

148. See *id.* at 20.

149. See *id.* at 159.

150. See *id.* at 157 (discussing the influence that sanctions and fear of embarrassment have on the public, causing them to conform with authority regardless of their own moral beliefs).

151. See *id.* at 307. Kelman and Hamilton explain:

The reach of authority in coordinating human action has been extended by the development of modern bureaucracies and nation states. Concomitantly, crimes committed in the name of authority have become larger in their scale and more horrific in their outcome. Crimes of obedience have provided many of the twentieth century’s most terrify-



## VII. CONCLUSION: LAW-ABIDINGNESS AS A MODEL FOR THE RULE OF LAW

The key to understanding a psychological jurisprudence perspective is to recognize that the legal system relies upon the willingness of people to consent to the operation of legal authorities. Psychological jurisprudence emphasizes the importance of the active cooperation and willing acceptance of law and legal authorities by members of the public. That willing acceptance comes because people view the law as consistent with their moral values and/or because they view legal authorities as making decisions justly. For the psychological jurisprudence model to work, society needs to create and maintain supportive public values.

This model reflects an expanded model of human motivation. It recognizes that the roots of the effectiveness of regulatory authorities lie in the willingness of the public to be governed by the rules because they feel that their concerns and needs are being addressed by the law and legal authorities.<sup>152</sup> In a law-abiding society, most people will follow most laws most of the time because they think that this is the appropriate manner in which to behave. This self-regulation enhances the effectiveness of legal authorities by freeing them to pay attention to those problems or people that, for whatever reasons, are less amenable to self-regulation.<sup>153</sup>

Psychological jurisprudence has implications for a wide variety of areas in the law. In each area, legal authorities need to focus on the issue of creating and maintaining supportive public values. Consider an example from a recent study of citizen-police experiences. In this study, researchers examined what transpired when the police were called to homes to deal with issues of domestic violence.<sup>154</sup> The concern of the study was with subsequent compliance to the law on the part of the abusive men whose behavior led to the initial call.<sup>155</sup> From a social control perspective, we would expect compliance to be increased by threats and/or punishments on the part of the police. The psychological jurisprudence perspective suggests that the police can best gain compliance

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*Id.*

152. See Tyler, *Compliance with Intellectual Property Laws*, *supra* note 23, at 232-33.

153. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 106 (1992).

154. See Paternoster et al., *supra* note 72, *passim* (examining the results of the Milwaukee Domestic Violence Experiment).

155. See *id.* at 164.

by socializing the offending spouse about the law and their obligation to obey it. they can do so by treating that person fairly, since the roots of the perceived obligation to obey the law lie in judgments about the fairness of the legal process. The results support the value of a psychological jurisprudence perspective.<sup>156</sup> If the police treat the abuser fairly during their encounter, that abuser is subsequently more likely to comply with the law.<sup>157</sup> Fair treatment increases feelings of respect for the law, and leads abusers to be more willing to obey it in the future. This influence is greater than the impact of threatened or enacted punishments.<sup>158</sup> Similarly, the work of Darley and Robinson illustrates the important role that the study of public morality can have in the process of building and sustaining a law-abiding society. The law can build its authoritativeness as an instrument or effectively regulating social behavior upon people's desire to behave in ways that are morally correct to the extent that the law is consistent with public morality. Where the law is consistent with existing morality, legal authorities can educate the public about the law, correcting the many misconceptions that people have about the law, the courts, and the police. Where the law is inconsistent with existing public morality, authorities need to examine the law and consider the reasons for that discrepancy. That consideration should involve a balancing of the potential gains from the jurisprudential goals of the law against the damage to law-abidingness resulting from public disapproval.

This study illustrates the core premise of the psychological jurisprudence perspective—that legal authorities should be concerned with developing the social values of citizens. This concern leads to a need to focus on the experience of those citizens, and on their judgments about the law and the practices and policies of legal authorities. Thus, psychological jurisprudence is a psychological perspective on the effective rule of law. It views the key to the successful rule of law as lying in an understanding of the social values of the citizenry, not in efforts to more effectively deploy coercive force.

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156. *See id.* at 165.

157. *See id.* at 165-66, 172-74.

158. *See id.* at 166.

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