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Exploring the dynamics of compliance with community penalties

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Abstract

In this paper, we examine how compliance with community penalties has been theorized hitherto and seek to develop a new dynamic model of compliance with community penalties. This new model is developed by exploring some of the interfaces between existing criminological and socio-legal work on compliance. The first part of the paper examines the possible *definitions and dimensions* of compliance with community supervision. Secondly, we examine existing work on *explanations* of compliance with community penalties, supplementing this by drawing on recent socio-legal scholarship on private individuals' compliance with tax regimes. In the third part of the paper, we propose a *dynamic* model of compliance, based on the integration of these two related analyses. Finally, we consider some of the implications of our model for policy and practice concerning community penalties, suggesting the need to move beyond approaches which, we argue, suffer from compliance myopia; that is, a short-sighted and narrowly focused view of the issues.

Key Words: community penalties compliance enforcement probation, responsive regulation.

Introduction

Writing in this journal, John Braithwaite (2003) has recently argued convincingly that because punishment is essentially a particular mode of regulation, the sociology of punishment needs to pay much greater heed to the sociology of regulation. Also in this journal and in a similar vein, Crawford (2006) has highlighted the increasing salience of questions of networked and contractual governance (Crawford, 2003) in the regulation of crime and anti-social behaviour. Against this backdrop, questions of compliance with the law and (more narrowly) with regulatory authority are emerging as a key concern of theoretical criminologists and of all of those concerned with understanding and analysing systems and practices of both punishment and regulation.

Though broad questions about compliance and regulation obviously reach across diverse academic disciplines, subject interests and jurisdictions, our interest is in elaborating the concept of compliance in one specific context: that of community sanctions or penalties. We consider this to be a particularly important site for studying compliance because those who wish to promote community-based penalties as credible 'alternatives to custody' in any jurisdiction must face the fact that such penalties rely to a far greater extent than custodial establishments upon the co-operation or 'compliance' of offenders to make them 'work' (though see Sparks et al., 1996). As Bottoms has recently observed, 'effectiveness and compliance are, in the field of community penalties, topics that are inextricably linked' (2001: 89). It is therefore remarkable that, despite a burgeoning literature on the effectiveness of community penalties—and a common finding of significant problems of attrition in respect of a variety of community-based penalties and specialist programmes (e.g. Farrall, 2002; Hough et al., 2003; Raynor, 2004; Roberts, 2004)—the topic of offenders' compliance with such penalties has attracted relatively little in the way of empirical or theoretical attention.

In this paper we aim to go some way towards remedying the theoretical lacuna in respect of offenders' compliance with community penalties. In doing so, we seek to bring together criminological and socio-legal perspectives, drawing in particular on a key theoretical contribution from Tony Bottoms (2001), as well as some recent scholarship on tax regime compliance (e.g. Braithwaite, 2003; McBarnet, 2003). The paper comprises four main parts. In the first part of the paper we consider the possible definitions and dimensions of compliance with community supervision and, drawing on Bottoms' (2001) key paper, propose a threefold conceptual framework for thinking about compliance in this context. Secondly, we review Bottoms' framework for explaining compliance with

community penalties and supplement this with reference to recent socio-legal scholarship about private individuals' compliance with tax regimes. We then go on, in the third part of the paper, to propose a *dynamic* model of compliance, based on the integration of these two related analyses of compliance. In the final part of the paper we consider some of the implications of our analysis for the policies and practices of individuals and agencies responsible for the supervision of community penalties. Since questions of compliance and enforcement necessarily play out in specific ways in and through different regulatory contexts, cultures and practices, we have chosen to reflect for illustrative purposes on contemporary policy and practice around compliance with community penalties in England & Wales. We characterize such policies as 'myopic' and argue that they do little to engage or develop the mechanisms which underlie compliance, and may even inhibit offenders' progression through the stages of compliance we identify.

Definitions and dimensions of compliance

In a key contribution to the scant literature on compliance with community penalties, Bottoms (2001) distinguishes two principal types of compliance. The first of these, 'short-term requirement compliance', refers to compliance with the specific legal requirements of the community penalty. Short-term legal compliance is illustrated by Bottoms with reference to an offender who:

completes [a community sentence] with no breach of the formal requirements of the order: for example, an offender given community service attends regularly at community service work sessions, and works hard and diligently during those sessions.

(Bottoms, 2001: 88)

The second type of compliance Bottoms describes as 'longer-term legal compliance'. This, he explains, is a broader category which refers to the 'more fundamental issue' of the offender's compliance with the criminal law (2001: 89). Longer-term compliance, then, implies no further reoffending within a specified time frame.

This we think is a very useful starting point for thinking about dimensions of compliance with community penalties, and we agree with Bottoms that individuals and organizations supervising offenders subject to community penalties ought to be involved in trying to maximize both. However, in our view, short-term requirement compliance is rather more complex than Bottoms suggests. For one thing, it is worth noting that just what constitutes *the specific legal requirements of the community penalty* is necessarily context-specific. For example, if we take a cross-jurisdictional comparison of 'probation' in England & Wales and Scotland, we find a key contrast in the treatment of reoffending, which constitutes evidence of noncompliance in Scotland but not, since the Criminal Justice Act 1991, in England & Wales.

A further, and more important, issue for us, however, is that it is possible to think about *degrees* or *dimensions* of short-term requirement compliance. Let us return to Bottoms' example of the offender subject to a community service order. It is clear from this example that to complete the order the offender must attend his work sessions and complete the work assigned. But is it necessary—in terms of short-term requirement compliance—that he 'works hard and diligently' at the assigned task? The offender Bottoms presents is arguably an ideal type: someone who is engaging with the task assigned as opposed to one who is simply 'going through

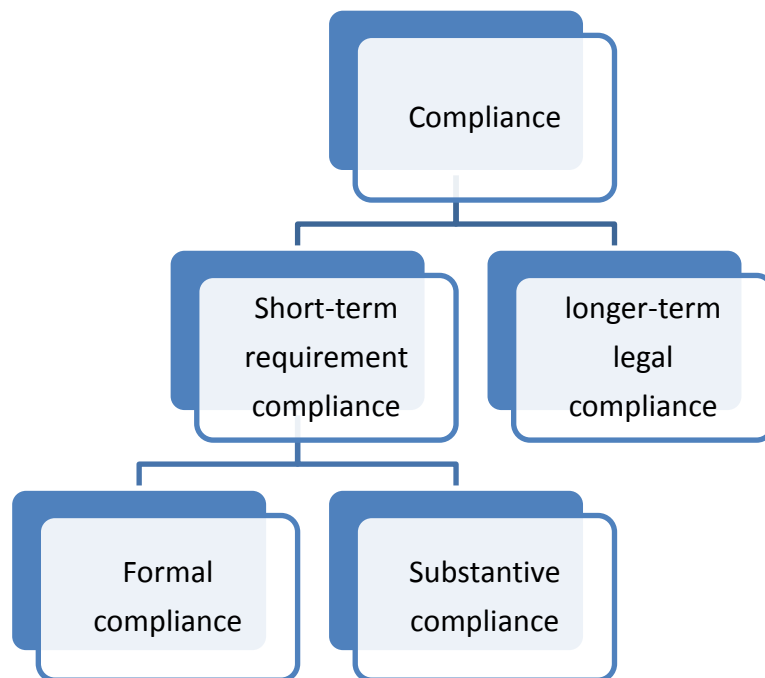


Figure 1 A typology of compliance

the motions', or meeting the minimum requirements in order to avoid breach. However, we believe that it is possible for an offender to *technically* meet the requirements of an order without necessarily engaging seriously or meaningfully with it.

For this reason we propose, within Bottoms' category of short-term requirement (i.e. within order) compliance, a distinction between what we call *formal* and *substantive* compliance (see Figure 1).

Formal compliance denotes behaviour which technically meets the minimum specified requirements of the order and is a necessary component of short-term requirement compliance. The most obvious example of formal compliance is attending appointments (or work placements) at designated times. *Substantive compliance*, on the other hand, implies the active engagement and co-operation of the offender with the requirements of his or her order. It is achieved when (for example) the offender subject to community service works hard and diligently; or when the offender on probation shows a genuine desire to tackle his or her problems. This distinction reflects Parker's (2002: 27) differentiation, in the context of corporate compliance systems, between 'legalistic/rule compliance' and 'goal-oriented/substantive' compliance. In this context, she argues, substantive compliance denotes a company's engagement with its legal, social, environmental and ethical responsibilities (e.g. creating a more healthy environment, a safer or more equitable workplace), whilst rule compliance implies 'simplistic obedience to rules' (2002: 27).

A key distinction between formal and substantive dimensions of compliance is that they are sensitive to different methods of measurement. Whilst the former is measurable in quantitative terms (e.g. proportion of appointments attended; number of work placements completed), the latter is more appropriately measured in qualitative terms, since it denotes the quality (as opposed to the quantity) of engagement. Importantly, it follows that formal compliance is straightforwardly *auditable*, whilst substantive compliance is not.

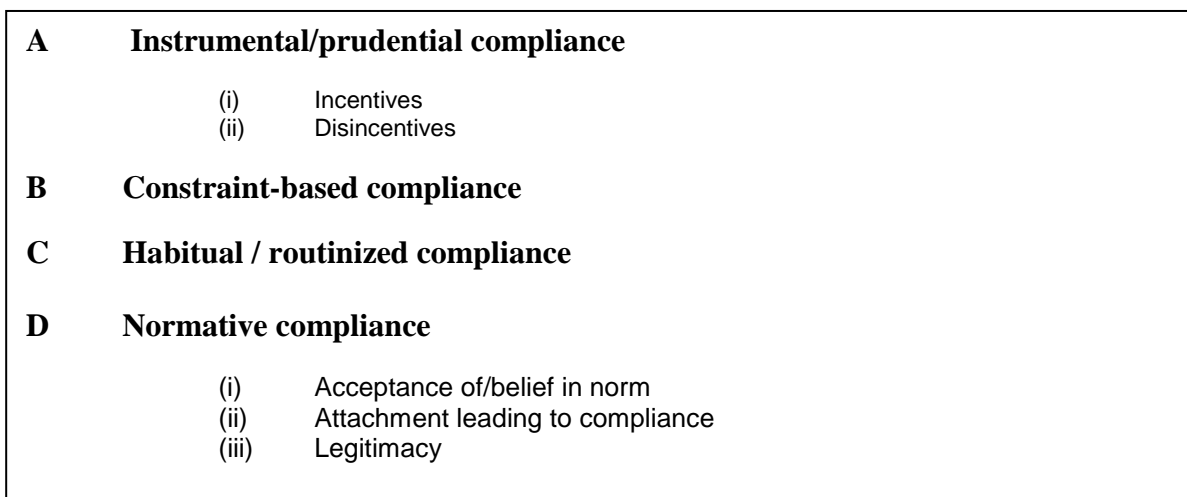


Figure 2 Bottoms' fourfold explanatory framework (adapted from Bottoms, 2001: Figure 1)

Explaining compliance with community penalties

Drawing on theories of social order, Bottoms (2001) presents an outline of what are, in his view, the principal mechanisms underlying compliant behaviour (see Figure 2).

Instrumental or prudential compliance is easily understood as arising from rational calculations about the consequences (for the individual) of compliant or non-compliant behaviour. The offender who complies for instrumental/prudential reasons is the 'amoral calculator' described by Kagan and Scholz (1984). For offenders on community supervision, the principal instrumental mechanism at work is the threat of adverse consequences arising from the prosecution of breaches of supervision orders (as in the case of community penalties) or from recall to prison (as in the case of post-release supervision). However, Bottoms (2001) points out that positive incentives can also be deployed—most commonly in the promise of early discharge of supervision requirements as a result of sustained progress and good conduct.

Bottoms identifies three sub-types of *constraint-based compliance*. Firstly, there are certain physical characteristics and limitations of the human body that impose 'natural' constraints on our conduct (for example, we can't burgle a house whilst asleep). However, offenders can also have additional physical restrictions placed upon them; most obviously when they are sent to prison, but also, for example, when they are required to attend (or avoid) certain places at certain times or to abstain from certain behaviours (like drug use). Though these kinds of physical restrictions have not traditionally been a major feature of community penalties—or more accurately of the mechanisms through which such penalties have sought to change and control behaviour—the advent of new technologies such as electronic monitoring and drug testing has very significantly altered the vista of possibilities for community-based constraint (see Hucklesby, 2006; Nellis, 2004).

The other two sub-types of constraint-based compliance arise as a result of restriction on an offender's access to a possible target of non-compliance (as reflected in the tactics and strategies of situational crime prevention) or as a result of what Bottoms calls 'structural constraint'. This arises where someone is 'cowed into submission by the coercion inherent in a powerbased relationship' (2001: 93); here compliance is not properly conceived as being instrumental since no calculation of the consequences is involved.

The absence of rational calculation is also a feature of *habitual or routinized compliance*. However, Bottoms (2001) carefully distinguishes between these two mechanisms. *Routine* produces compliance through patterns of being and living that might once have arisen out of rational calculation or normative commitment but which have long since become ingrained into everyday life. Bottoms provides the example of sending children to school out of routine compliance with the relevant law.

However, individuals also develop *dispositions* or '*habits of mind*' that are related to 'settled inclinations to comply with certain laws' (2001: 94). Bottoms suggests that cognitive-behavioural programmes which aim to produce altered ways of thinking are seeking to produce new dispositions (or habits) in offenders that, in turn, will be linked to altered behavioural routines. Significantly, he notes that the production of altered dispositions is likely to be central to the production of longer-term compliance.

Finally, we turn to Bottoms' discussion of *normative compliance*. Here, Bottoms distinguishes between three sub-types. The first relates to conscious belief or acceptance of a set of norms that, called to mind and actively reflected upon, lead us to behave in a particular way.² This is the kind of moral commitment to which a probation officer seeks to appeal when she tries to persuade an offender that he ought not to offend because of the hurt that he will cause a victim. The second sub-type of normative compliance relates not to attachments to particular beliefs but to particular people; as, for example, where an offender decides to give up offending because of the recognition that it is hurting his partner or his children. As Bottoms (2001) notes, this is the type of motivation to comply that is referred to in accounts of desistance that stress the significance of 'social bonds' (Hirschi, 1969). The third sub-type of normative compliance—legitimacy—draws explicitly on the theoretical work of British political theorist David Beetham (1991) as well as empirical work on procedural justice by American psychologist Tom Tyler (1990; see also Tyler, 2003; Tyler and Huo, 2002). For Bottoms, 'legitimacy' is, in common with the second subtype of normative compliance, fundamentally 'relational', but it is distinct by virtue of its concern with the proper exercise of *formal authority*. Here the probation officer might exercise an influence over the offender's behaviour in and through the recognition that her authority is legitimate and moreover that its exercise is fair and reasonable. Of course, it is possible (indeed perhaps desirable) that these three sub-types might interact, so that a degree of attachment might form between offenders and their supervisors, further underwriting the legitimacy of any attempt to influence offenders'

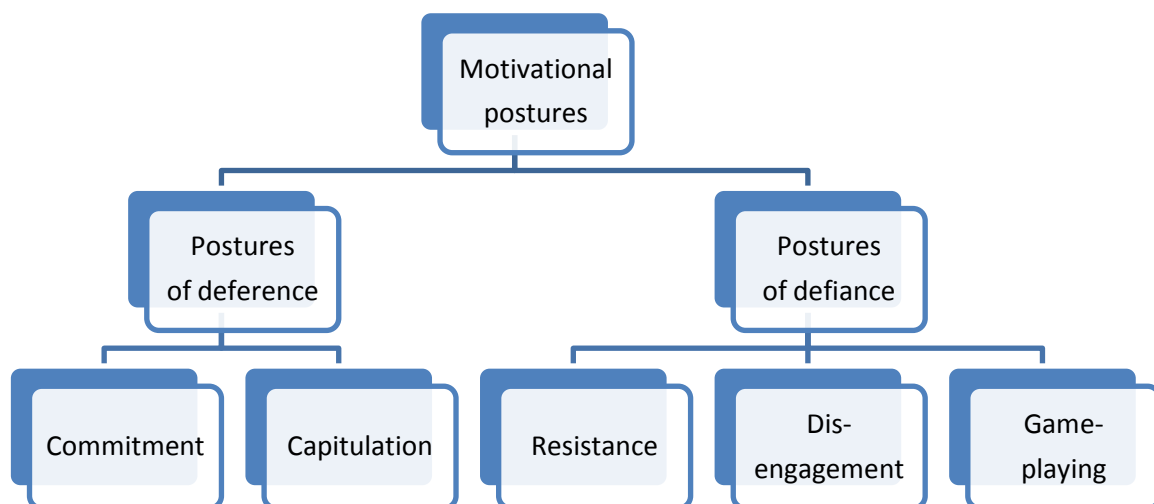


Figure 3 Motivational postures of tax payers (Braithwaite, 2003)

beliefs and thus persuading them to desist and to comply with the law (see McNeill, 2006; Rex, 1999).

Bottoms' notion of normative compliance is, we think, a particularly interesting one, and the attention paid to offenders' perceptions of the *legitimacy* of the institutions and individuals responsible for community supervision chimes with recent socio-legal research on the attitudes and behaviours of

tax-payers (e.g. Braithwaite, 2003; McBarnet, 2003). The ways in which perceptions of legitimacy impact on tax regime compliance is a central concern in a recent paper by Valerie Braithwaite (2003). Braithwaite notes that although authorities may have *legal* legitimacy, this does not guarantee them *psychological* legitimacy in the eyes of regulatees. As regulatees experience, review and evaluate the practices of those regulators to whom they are exposed they develop positions in relation to regulators, their authority and their legitimacy (cf. Tyler, 1990). Braithwaite describes five 'motivational postures' (meaning interconnected sets of beliefs and attitudes that are consciously held and openly shared with others) that characterize the ways that taxpayers position themselves in relation to regulators. These divide essentially into postures of *deference* and postures of *defiance* (see Figure 3).

Postures of deference include *commitment* and *capitulation* (see also McBarnet, 2003). The difference between these two postures relates principally to the degree of willingness that rests behind acceptance of the regulator's authority and the decision to comply with its requests; capitulation implies an unwilling acceptance of the regulator's authority. In contrast, Braithwaite outlines three postures of defiance: *resistance*, *disengagement* and *game-playing*. Resistance reflects doubts about the regulator's intention to act co-operatively or benignly; this doubt drives vigilance of and resistance to the regulator in the enactment of its functions. Disengagement occurs where similar doubts about the regulator have produced more widespread disenchantment and with it a sense that there is no point in challenging regulatory authority. Finally, game-playing casts the law as 'something to be moulded to suit one's purposes rather than as something to be respected as defining the limits of acceptable activity' (Braithwaite, 2003: 19). Braithwaite's 'game-playing' posture is much like McBarnet's notion of 'creative compliance', which arises where regulatees (or more usually their lawyers) set to work 'on the legal form of their activities to package or repackage them in ways they can claim fall beyond the ambit of *disadvantageous*, or within the ambit of *advantageous*, law' (McBarnet, 2003: 229, emphasis in original).

Braithwaite (2003) goes on to explore, in an empirical study of tax compliance, the extent to which particular motivational postures are associated with particular forms of compliant and non-compliant behaviour. Unsurprisingly perhaps, the relationships between postures (attitudes) and compliance (behaviours) turn out to be complex; thus, for example, people may dislike and resist authority but still obey it. Braithwaite argues that regulators often make the mistake of expecting consistency between attitudes and behaviour; leading them to confuse non-compliant behaviour with postures of defiance and thus developing an oppositional stance towards defaulting regulatees. She argues that heavy-handed enforcement strategies run the risk of adversely affecting regulatees' attitudes and of turning those who are essentially reasonably well inclined towards the tax system (but have been non-compliant in some respect) into more active (or perhaps committed) resisters. She argues that the withdrawal of consent to the regulator's authority that is provoked by oppressive enforcement critically damages the legitimacy of that authority. This leads her to call for more *responsive regulation* which works to bring more co-operative motivational postures to the fore (Ayres and Braithwaite, 1992). Importantly, responsive regulation works principally through persuasion, but it always holds punishment in reserve for those who will not or cannot be persuaded.

A dynamic model of compliance

One of the insights of Braithwaite's work on 'motivational postures' is that regulatees' attitudes towards compliance—and in turn their 'compliance behaviour'—will not necessarily remain static over time. In particular, these attitudes and behaviours are likely to change or develop in the context of significant interactions between regulatee and regulator (cf. Tyler, 1990; Tyler and Huo, 2002). If this work is transferable to the community penalties context—and we hypothesize that it is—then it suggests that both the practices of individual probation officers/social workers and the enforcement policies of 'offender management' or 'correctional' agencies are likely to impact significantly on the 'motivational postures' of offenders, for better or worse. In

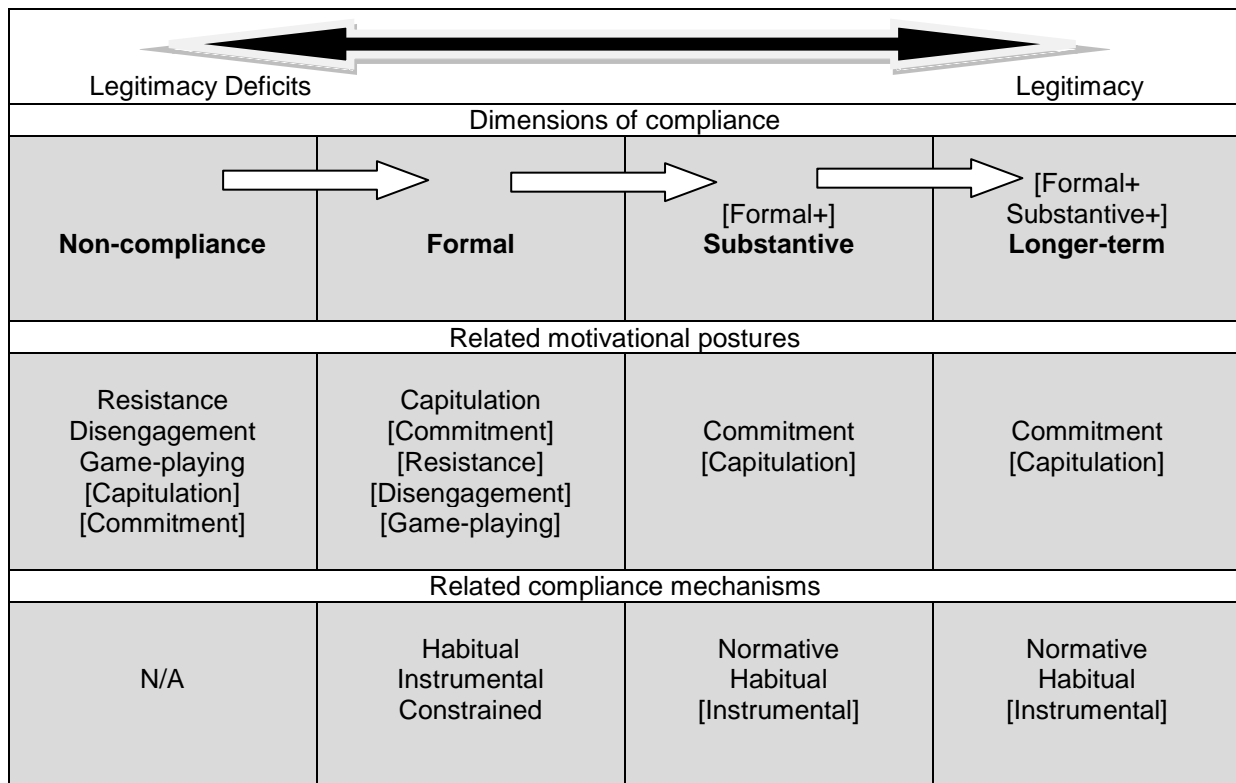


Figure 4 A dynamic model of compliance with community supervision

a similar vein, Bottoms' explanatory framework helps us to understand why offenders' compliance behaviour may fluctuate over a period of supervision, thanks to shifts in or changing combinations of 'compliance mechanisms'.

In seeking to understand compliance more fully, then, we think it is necessary not merely to distinguish between formal, substantive and longer-term compliance, but also to explore the likely mechanisms underpinning these levels or dimensions of compliance, as well as the sorts of processes and interactions likely to bring about significant movement between them. The dynamic model of compliance outlined in Figure 4 aims to capture the ways in which forms of compliance and their underlying mechanisms might develop in the course of a period of supervision.

This model sets out the dimensions of compliance—formal, substantive and longer-term—we identified earlier, and, for completeness, adds noncompliance (see Figure 1). It further suggests that offenders may progress from one dimension of compliance to another, with the arrows indicating the desired progression. We do not, however, mean to imply that all offenders will commence supervision at the same point in relation to the development of compliance, nor that they will progress in a linear manner. Thus, for example, we accept that some offenders might begin an order already committed to longer-term compliance (desistance), whilst others might begin determined to give it their best shot (substantive compliance) but uncertain about their longer-term prospects. However, to the extent that supervision is primarily concerned with reducing reoffending, where (as perhaps in many cases) an offender begins an order concerned only at best to comply formally, then the task for their supervisor is presumably not just to establish formal compliance but to move beyond it into substantive and (then) longer-term compliance. This task—of moving an offender from merely formal to more substantive compliance with the order—will of course be more challenging where, from the offender's point of view, the order lacks legitimacy. There are many circumstances where such legitimacy deficits might need to be addressed, for example: where orders are imposed irrespective of consent; where the offender regards the community penalty as unduly harsh; where they feel that they have been somehow mistreated or misrepresented at the pre-sentence or sentencing stages of the criminal process; or where they have previous adverse experience of the allocated supervisor or of the agency.

With such initial difficulties in mind, and drawing on Braithwaite's (2003) analysis of motivational postures and Bottoms' (2001) analysis of compliance mechanisms, it seems to us that the hypothesized progression towards longer-term compliance is likely to require and reflect a different mix of postures and mechanisms at different points in the process. Thus, whilst an offender might initially comply formally for instrumental reasons (e.g. because of the threat of breach or recall), or because of perceived constraints linked to electronic monitoring, or (perhaps) out of an unthinking habit of deference to legal authority, these kinds of mechanisms alone or in concert are unlikely to be able to yield substantive compliance with the spirit of the order, let alone the kinds of changes required to generate longer-term compliance with the law. This is partly because such mechanisms are likely to reflect, at best, capitulation to the authority of the order and of the supervisor. As McBarnet (2003) might put it, this is compliance with the *letter* rather than with the *spirit* of the order. Indeed, instrumental and constraint-based mechanisms might, in some contexts (as reflected in square brackets in Figure 4) reflect or signal postures of defiance, yielding a kind of creative compliance or game-playing, where offenders are more preoccupied with *being seen to be* formally compliant—or 'ticking off a set of boxes' (Parker, 2002: 27)—than with complying substantively. Braithwaite's (2003) analysis also suggests the counter-intuitive possibility that non-compliant offenders might, none the less, possess underlying postures of deference (capitulation or commitment), but lack the means to actually behave compliantly.

If Braithwaite's (2003) and McBarnet's (2003) analyses can be read across into this context, then we might expect that enabling offenders to move beyond game-playing and other postures of defiance seems likely to require a much clearer focus on the deployment or activation of normative mechanisms in order to generate *commitment* to comply. As we have argued above, following Bottoms (2001), deploying or activating normative mechanisms is likely to require development of offenders' beliefs and attitudes, the generation of positive attachments (or social ties), or an increase in the perceived legitimacy of the regulatory authority (institution and/or individual supervising officer) in the eyes of the offender. Indeed, it might be argued that in order to try to develop offenders' normative beliefs or to support the development of their attachments, a supervisor would *first* need to establish (to use Valerie Braithwaite's term) 'psychological legitimacy'; that is, the moral right to influence another human subject with their consent (cf. Beetham 1991). As Bottoms (2001) suggests, to the extent that supervisors and the agencies within which they operate are concerned with longer-term compliance (or desistance from crime), their best hope arguably rests in encouraging compliance mechanisms that allow for the internalization of controls implied in commitment (via beliefs, attachments and eventually the development of new habits and routines) rather than the imposition of constraints or appeals to threats or rewards. The problem and the costs of constraint-based and instrumental approaches to compliance relate, of course, to their externality; someone or something else needs to keep on constraining, threatening or rewarding. By contrast, the efficiency and effectiveness of internalized controls rests in their (eventual) self-perpetuation (see also Tyler, 2006).

Discussion: compliance myopia

One of the key points which our analysis has brought to the fore is that of the elasticity of the notion of compliance. Compliance—certainly in the context of community penalties—is not easy to define or pin down in any objective sense: rather, it is negotiated or constructed in the context of the specific legal and policy frameworks created in particular jurisdictions. Compliance, in other words, is a dependent variable, and the same can of course be said for non-compliance.

Policy-makers, therefore, face decisions about how best to frame or define compliance (and, by definition, non-compliance). In the context of community penalties, key questions arise about the relative weight to be accorded to the three dimensions of compliance we have identified: formal, substantive and longer-term. Whilst most would probably agree with Bottoms (2001) that those responsible for managing community penalties ought to be concerned with promoting all of these, it is not entirely surprising that it is the formal dimension of short-term compliance in particular which tends to receive the lion's share of policy attention. This is certainly the case in England & Wales, where the legal requirements of community penalties are set out in legislation and guidance issued by the Home Office in the form of National Standards (currently Home Office, 2005a). What is clear from even the most cursory reading of National Standards is that the focus is on the formal dimension: that is,

frequency of contact between offender and supervisor. So, for example, in respect of the supervision requirement of the community order, 'the offender manager will arrange a minimum of one contact per week for sixteen weeks' (2005a: SS8.2). National Standards are silent on the desired length or quality of that contact.

To an extent, this emphasis on formal compliance makes sense in the community penalties context. For example, it is important that offenders understand what is expected of them, and clear guidelines in respect of frequency of contact are relatively easy to communicate. Secondly, it is theoretically plausible to suggest that a lack of formal compliance may well be a good indicator of a lack of substantive compliance in at least some cases. Thirdly, where community sentences constitute a form of punishment, they are intended to involve a deprivation of liberty, which is not being realized if the offender fails to keep in touch with his supervising officer as instructed. Finally, as we have already noted, formal compliance is, unlike substantive compliance, amenable to measurement and audit. This becomes important in the context of breaching an offender for non-compliant behaviour: a breach must be proven in court and it is a more straightforward matter to evidence a failure to attend an appointment than a lack of co-operation or engagement on the part of the offender. Indeed, in England & Wales it is failure to attend scheduled appointments without a reasonable excuse which is the most common basis for breach action (Ellis et al., 1996).

However, our 'dynamic' model (see Figure 4) indicates that there are problems with policies which privilege formal compliance. Firstly, as Braithwaite's research has shown, formal compliance can mask postures of defiance and, in probation and social work settings, it cannot be read as an indication of low risk. Thus, for example, in two recent investigations into cases where agencies failed to protect the public, inspectors found that social work staff and police officers mistook (formal) compliance for genuine (or substantive) engagement in change (SWIA, 2005; SWIA/HMIC, 2005), leading them to seriously underestimate risks. Secondly, policies which privilege formal compliance create particular problems for the offender who is genuinely motivated to engage with his or her order (the substantive complier) but struggles to keep appointments. Thirdly, such policies can reinforce an image of community supervision as a superficial exercise which principally involves 'turning up' and 'signing in', rather than a meaningful piece of work undertaken in the context of a relationship between offender and supervising officer. This is a dangerous image to convey to offenders, at least some of whom (most notably the 'game-players') will be looking for easy ways to subvert the system and complete their order with the minimum effort and engagement. It is also a dangerous message to convey to those whose motivational posture reflects 'commitment' and who have achieved, or are on their way to achieving, substantive compliance (Farrall, 2002; Kemshall et al., 2001). Such a message potentially serves to undermine the legitimacy of the supervisory exercise, undo those 'normative' compliance mechanisms that may well be at work, and push the offender towards a less well-disposed motivational posture.

There are also, we think, risks inherent in enforcement policies which are overly focused on the formal dimension of compliance, and which leave little room for practitioners to exercise discretion. This is a situation which certainly characterizes contemporary enforcement policies in England & Wales: their 'toughening' has been one of the most prominent developments in the field of community penalties in this jurisdiction in the last 15 years or so, and one of the key areas in which practitioner discretion has been squeezed (see Hedderman and Hough, 2004 for a review).⁴ Current National Standards (Home Office, 2005a; see also schedule 8 of the 2003 Criminal Justice Act) dictate that a supervising officer must either issue a warning or initiate breach proceedings when dealing with a first failure to comply with a community order requirement (where there is no reasonable excuse), and a second such failure must be dealt with by commencing breach proceedings and returning the offender to court.⁵ This is in contrast to the situation in the mid-1990s, when breach action was not triggered until the offender had three unacceptable absences on his or her record (Home Office, 1992).

On the one hand, it is acknowledged that enforcement policies, and consistent enforcement practices, play an important role in maintaining the legitimacy of community penalties (particularly in the eyes of 'external stakeholders' like sentencers). There is also an argument to be made for the advisability of a 'zero-tolerance' approach to enforcement in respect of those offenders whose motivational postures are characterized by 'resistance', 'disengagement' or 'game-playing'. However, the assumption that swifter and surer enforcement will ultimately drive up rates of compliance (e.g. HMIP, 2007: S3.1) is

arguably misconceived, and is not supported by research conducted to date. Indeed, the opposite appears to be true. For example, in England & Wales, Home Office statistics point to a higher incidence of short-term or within-order non-compliance than a decade ago. Between 1994 and 2004 the proportion of offenders subject to community orders who were breached at court rose from 18 per cent to 37 per cent. For community rehabilitation (formerly probation) orders the rise was even more dramatic: 31 per cent in 2004 compared with 10 per cent a decade earlier (Home Office, 2005b: Table 5.4).⁶ Whilst it is not known whether increasing breach rates reflect increases in non-compliant behaviour or merely a stricter approach to enforcement, what is known is that these changes in breach rates are *not* attributable to a larger proportion of high-risk offenders on probation caseloads: indeed, the opposite trend has been identified (Morgan, 2003; Raynor, 1998). Further, no such increase has been noted in Scotland, where breach rates have remained relatively stable for a number of years (e.g. Scottish Executive, 2007: 14–15).⁷ And in terms of the relationship between enforcement policies and longer-term legal compliance, whilst there is some evidence that taking appropriate enforcement action (as opposed to overlooking non-compliance) *can* increase the likelihood of longer-term legal compliance (i.e. lower the likelihood of reconviction) (May and Wadwell, 2001), there is no evidence to suggest that *tougher* enforcement practices are effective in terms of reducing the likelihood of reconviction (Hearnden and Millie, 2003).

One explanation which has been proffered to explain why it is that increasingly strict enforcement policies have not proved an effective means of encouraging compliance is that offenders are relatively immune to the deterrent effects of punishment, which is often why they are subject to community penalties in the first place (e.g. Hearnden and Millie, 2004; Hedderman and Hough, 2000, 2004). This has led several commentators to argue that those responsible for the community supervision of offenders could be doing more to activate instrumental compliance by deploying carrots rather than sticks: that is, rewards for compliant behaviour. But it could be argued that if offenders are relatively immune to deterrent strategies, then they are also likely to be relatively immune to the attractions of rewards for 'compliant' behaviour. To put this another way, both strategies arguably place too much emphasis on a model of offenders as 'amoral calculators' (Kagan and Scholz, 1984) who act for purely instrumental/prudential reasons.

We would extend the critique of excessively strict enforcement policies with reference to the wider research literature on regulatory enforcement, which we referred to earlier in the context of our discussion of Valerie Braithwaite's work. This body of research has shown that sanctions which are perceived to be unfair or unreasonable can lead to active resistance towards authority and can reduce the likelihood of future compliance (e.g. Ayres and Braithwaite, 1992; Kagan and Scholz, 1984; Murphy, 2005; Sherman, 1993; Sherman et al., 2003). In other words, when initial or primary non-compliant behaviour is met with a response which is perceived as unjust, secondary non-compliance may follow. In the context of our model, an inflexible response to formal non-compliance has the potential to jeopardize future substantive compliance. This finding has led to the proposal that if regulators are interested in securing compliance, they should aim to protect their reputation as a legitimate authority (Murphy, 2005; cf. Tyler, 1990).

Policy-makers in the field of community penalties might therefore learn from scholars in a range of regulatory contexts who have argued that enforcement strategies can be more successful at securing future compliance when they are appropriately 'accommodative' or 'responsive' (e.g. Ayres and Braithwaite, 1992; Kagan, 1984). Whilst contemporary enforcement policies (certainly in England & Wales) tend towards what the socio-legal literature characterizes as a 'sanctioning' or 'deterrence' model which is backward-looking and oriented towards censure and deterring future non-compliance (Hawkins, 1984; Reiss, 1984), the core motivations of the 'accommodative' or 'responsive' model 'are not to punish an evil, but to repair the harm done and to secure future compliance' (Murphy, 2005: 565). For example, in his discussion of regulatory inspectorates and police, Kagan argues for a 'flexible enforcement style—demanding penalties and strict compliance when violations present serious risks, dealing more leniently with less serious violations' (1984: 55; see also Black, 2005).

Whilst research conducted in England & Wales has revealed *some* examples of 'responsive regulation' (e.g. Ellis et al., 1996; Hearnden and Millie, 2003, 2004) in respect of 'ordinary' community penalties,⁸ it is perhaps surprising that, in a field otherwise dominated by concern with 'risk thinking' and risk-based calculations (Kemshall, 1998; Robinson, 2002), enforcement policies have tended

towards a 'zero-tolerance' model which leaves little room for the exercise of discretion. We would argue that such discretion could be put to good use in assessing the particular motivational posture underpinning 'non-compliant' behaviour, and weighing up the potential costs and benefits of taking enforcement action against the individual offender on a case-by-case basis.

We do, however, appreciate Crawford's (2006: 469) point that regulatory models developed with commercial businesses (or private taxpayers) in mind do not necessarily transfer unproblematically to criminological contexts, where the typical subjects of regulation tend to be 'undeserving' or vilified social groups, and where there may be organizational imperatives which impact on decisions about regulation: imperatives that have little to do with effective regulation. In the case of probation, 'offender management' or 'correctional' organizations, it may be that the risks associated with *unresponsive* regulation (i.e. driving up official rates of non-compliance) may be trumped by the risks that regulation deemed to be *too responsive* might be seen to pose to such organizations: namely, risks to their legitimacy in the eyes of key external stakeholders (see Power, 2007 for a discussion of 'governing reputations').⁹

None the less, to the extent that our dynamic model of compliance has merit—and to the extent that it may be borne out by further research exploring the links between motivational postures, compliance behaviours and significant interactions between regulators and regulatees—we would argue that those with an interest in enhancing the effectiveness of community supervision (defined as fostering substantive and longer-term compliance) must confront the problems inherent in policies which privilege the formal dimension of compliance. This is likely to mean finding different ways to manage the reputational risks that may be associated with more responsive approaches to regulation.

Notes

1. In England & Wales around 10% of community sentences involving 'plain' supervision are terminated early in the light of positive progress and this figure has remained constant for the past decade (Home Office, 2006a).
2. There is a link here to habitual or routine compliance, where the belief or set of beliefs is implicated in the establishment of dispositions and patterns of behaviour that are no longer the result of active or conscious reflection.
3. The transferability of Braithwaite's typology to offender populations can of course only be established via empirical research.
4. The reasons behind the progressive tightening of enforcement policies in England & Wales in the last decade or so are complex, and a full discussion is beyond the scope of this paper. However, see Robinson and Dignan (2004) for a recent discussion of developments in 'sentence management'; more generally, see Power (2007).
5. Sanctions which can be imposed by the court for breach include the power to amend the terms of a community order with a view to imposing 'more onerous requirements' or to revoke the order and deal with the offender for the original offence (paras 9 and 10 of Schedule 8, CJA 2003).
6. Breach data is not available for 2005 due to Home Office concerns about data quality (Home Office, 2006b: 52).
7. It is estimated that in Scotland one in four probation orders results in a breach application, and a substantial proportion of breaches (41% in 2005–06) are triggered by the offender committing a further offence during the period of the probation order (Scottish Executive, 2007: 15).
8. It should be noted that the Scottish Drug Court model, as implemented in Glasgow and Fife, does appear to have engaged with ideas associated with 'responsive regulation' (McIvor et al., 2006).
9. A recent Home Office consultation paper raises the prospect of introducing a quasi-judicial role for offender managers in dealing with non-compliance (Home Office, 2006b). Whilst the sentencer would set maxima and minima in relation to the requirements of community sentences, the offender manager would have the legal authority to alter the effect of the sentence within this range in response to the offender's behaviour.

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