

2002

Norms and Signals: Some Skeptical Observations

Paul G. Mahoney

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Paul G. Mahoney, *Norms and Signals: Some Skeptical Observations*, 36 U. Rich. L. Rev. 387 (2002).

Available at: <http://scholarship.richmond.edu/lawreview/vol36/iss2/4>

This Comment is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

NORMS AND SIGNALS: SOME SKEPTICAL OBSERVATIONS

*Paul G. Mahoney**

I. INTRODUCTION

Law and Social Norms is just what the growing field of norms scholarship needed. Legal scholars have generated an impressive body of observations about the myriad situations in which individuals pressure one another to act civilly.¹ Eric Posner's book provides a simple, elegant model with very few working parts and promises to go a long way toward connecting these observations to form a coherent whole.

Posner's thesis is that individuals conform to norms in order to signal that they have a low discount rate and are therefore reliable partners in cooperative settings.² As I discuss in more detail below, these signals are believable when they are cost-effective only for people who in fact have low discount rates. Thus, they permit cooperative types to identify themselves.

Two features of the theory are particularly attractive. First, it focuses attention on an underappreciated part of the human makeup. Instinctively, we recognize that human beings vary substantially in their ability or willingness to defer gratification. We can call this quality "patience," "self-control," or "low discount rate," but the practices these terms imply are obvious—doing homework rather than going out to play, staying in school rather

* Brokaw Professor of Corporate Law and Albert C. BeVier Research Professor, University of Virginia School of Law. I am grateful to Anne Coughlin, Julia Mahoney, and Chris Sanchirico for their comments and discussions.

1. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

2. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 5–6, 25–26 (2000).

than dropping out, investing rather than consuming.³ Moreover, those practices, and therefore the trait that produces them, are associated with economic success. It is not far-fetched to hypothesize that the ability to defer gratification is at least as important in explaining differences in income and wealth as more easily observed, and thoroughly studied, characteristics such as intelligence, education, and so on.⁴ Certainly, Posner has selected an important trait as the centerpiece of his theory.

Second, Posner's theory and applications illustrate clearly and persuasively that the puzzle of collective action extends beyond the overtly political activities that occupy most of the attention of the economics and law-and-economics literature. Thanks to Mancur Olson, it is recognized that phenomena such as voting, contributing money or effort to a candidate, or lobbying a legislator, require a subtle explanation.⁵ These are typically negative-value activities. An individual vote has approximately a zero probability of influencing the outcome, and voting is costly.⁶ Even when an individual effort can influence the outcome, as in the case of a large campaign contribution, the rational decision is typically not to contribute. If I prefer candidate A, I would be better off free-riding on others' campaign contributions than contributing myself. I would then get an equal share of the benefit, but bear none of the cost.

But the same analysis holds for myriad other collective activities outside the usual concerns of public choice theory. Why would a rational, self-interested person have joined the democracy protesters in Tianamen Square or at the Berlin Wall in 1989, or in Moscow during the 1991 coup? In each case, the rational strategy is to free-ride—to root for the crowd from the safety of one's home. One can solve all these problems with the same simple answer—"they do it because they enjoy it." Given the answer's circularity, however, Posner is clearly right to view it as a last resort.

The signaling theory, then, tries to tie together these two elements—discount rates and the ubiquity of the problem of collec-

3. *See id.* at 36–37.

4. For present purposes, the question of whether these other attributes are causally connected to the discount rate and, if so, in which direction the causation runs, shall be put aside.

5. *See* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 163–65 (1965).

6. *Id.* at 164 n.102.

tive action.⁷ This essay will question whether the two are really that closely related. Posner does not argue simply that discount rates are important, but that many apparently irrational behaviors are actually (rational) attempts to signal that the actor has a low discount rate.⁸ In order for that explanation to hold, a number of factors have to line up just right, and they probably do so less frequently than Posner contends.

The intended scope of the signaling theory is audacious; the book ranges over a large and diverse set of behaviors from gift-giving to witch hunts.⁹ Consequently, each discussion necessarily takes place at a high level of generality. To succeed, the signaling approach must stand up well against competing explanations in more detailed analyses of particular interactions. This essay offers a few examples of the types of hurdles the theory must overcome, starting with some general observations and then turning to one of Posner's specific examples, that of public criminal punishments.

II. WHEN IS SIGNALING IMPORTANT AND WHAT ARE THE AVAILABLE SIGNALS?

One practical problem is the precise specification of a signal for a particular application. For the most part, Posner relies on a set of all-purpose signals—saluting the flag, giving gifts, and wearing the right clothes.¹⁰ Signals, however, work only if their costs bear just the right relation to the payoffs in the particular game being played.¹¹ In practice, then, finding an appropriate signal is difficult because the signal must cost neither too much nor too little. When signals cost too little, both bad and good types can afford to send them, and they accordingly lose their meaning. When signals cost too much, sending a signal consumes the entire gain from cooperation, and therefore no one does so.

A simple example will suffice to make the point. Imagine that two individuals play an indefinitely repeated prisoner's dilemma in which the joint cooperation payoff is \$30, the joint defection

7. POSNER, *supra* note 2, at 17.

8. *See id.* at 17, 19.

9. *Id.* at 22, 50–52.

10. *Id.* at 28.

11. *See id.* at 19.

payoff is \$0, the “meanie” payoff (the payoff a non-cooperator gets when the opponent cooperates) is \$70, and the “sucker” payoff (the payoff a cooperator gets when the opponent defects) is -\$20. For the sake of simplicity, assume that either player may be a “good type” or a “bad type.” A good type is indifferent between a payoff of 90 cents in round t and a payoff of \$1 in round $t+1$ —in other words, her discount factor is 0.9. A bad type is indifferent between a payoff of 50 cents in round t and a payoff of \$1 in round $t+1$ —his discount factor is .5, corresponding to a higher discount rate in comparison to a good type. For the moment let us assume that only two repeated game strategies are available—“tit-for-tat” or “always defect.”

The bad type’s discount rate is sufficiently high to assure that he will always defect, even if he expects the other player to play tit-for-tat. The bad type values a perpetual series of cooperative payoffs at \$60, which is less than the \$70 he can obtain from a one-time defection. By contrast, the good type values a perpetual series of cooperative payoffs at \$300. She would prefer perpetual cooperation, if it can be sustained, over a one-time meanie payoff followed by perpetual defection.

Finally, assume that, in the absence of a credible signal, neither player knows whether the other is a good type or a bad type. They do know, however, that good types prefer cooperation and bad types prefer defection. Thus, were it possible to distinguish, either player would defect in the first round if matched with a bad type, but a good type would cooperate in the first round if matched with another good type. Fortunately, any signal that costs more than \$70 credibly will distinguish a player as a good type. This is because, in the absence of a signal, the opponent will defect and both players end up with \$0. In the presence of a credible signal, the opponent will cooperate in the first round. A bad type’s best response to first-round cooperation is defection, which is worth \$70. A good type’s best response to first-round cooperation is tit-for-tat, worth \$300. Therefore, it is worth it to a good type, but not a bad type, to send a signal that costs \$71. If a bad type tricks his opponent by sending an “I’m a good type” signal at a cost of \$71, the signal will be self-defeating because it costs more than the benefit it conveys. To a good type, however, sending the same signal at the same cost is a profitable investment. Of course, if the signal costs more than \$300, it is self-defeating even for a good type. The bottom line, then, is that only

the universe of actions that cost more than \$70 and less than \$300 are available as signals.

The same qualitative results hold if we consider all possible strategies, although the quantitative results differ.¹² For example, given the payoffs I have set out, perpetual mutual cooperation (in which the players' payoffs sum to \$60 per round) is better than alternating meanie and sucker payoffs (in which the payoffs sum to \$50 per round). Therefore, for a patient player, tit-for-tat is a better response to itself than defecting in the first round, and then playing tit-for-tat (which I'll call the "echo" strategy). An impatient player, however, would prefer the echo strategy (which gives a payoff of \$80, given his discount factor) to tit-for-tat (which gives a payoff of \$60). Knowing this, an opponent matched with an impatient player would defect, resulting in payoffs of \$0. Hence, it would take at least an \$81 signal to distinguish a patient player if the echo strategy is permitted. The more constrained analysis above is a "best case" for the norms approach in that the range of values of potential signals is the largest possible.

As we try to apply the lesson of this simple example to real life, we face a number of complications. First is the nature of repeat play and, in particular, the assumed frequency with which we interact with any given player. Many of the real-life examples that Posner uses to illustrate signaling—including patriotic demonstrations, charivaris, and public punishments, etc.—draw together a community that is neither very small nor very large.¹³ This is an important point, as will be obvious when we think about signaling within very small or very large groups.

Extremely small communities—families, for example—engage in persistent repeat play, but movement into or out of the group is rare enough that signals are relatively unimportant. Our reputations within our families are not based on the signals we send today; rather, it is based on the entire history of past play. If I have demonstrated in the past that I cannot be counted on to assist a family member in need, no amount of hand-shaking or gift-giving

12. If the players are sufficiently patient (that is, the discount factor is sufficiently close to 1), any amount of cooperation can be sustained in the infinitely repeated game with no restriction on the strategies that players may consider. See DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 150–52 (1991).

13. See POSNER *supra* note 2, at 76–77.

will suddenly convince my siblings that they have been mistaken about me all along. When a new member (a potential spouse of a family member) seeks admittance, existing members may rely on signals when deciding whether to enter into the relationship. In a short time, however, reputation again becomes based on past play rather than on current signals. Thus, in very small groups, signaling is not important.

What about large groups? In a very large community, the chance that someone will encounter a given person again is not great enough to make it worth storing information about the signals that person sends. Saluting the flag in Times Square on New Year's Eve is not a signal. It may be a habit formed because of its symbolic content in other situations. It is not, however, an attempt by a woman from Iowa to signal to an adjacent woman from Texas that she can be trusted in a cooperative relationship. The chance that they will have the opportunity to enter into a cooperative relationship is effectively zero. At most, the parties can signal to one another that neither is a purse-snatcher. But that takes us out of the realm of repeated games and into a one-shot game in which future cooperation is not a motivating factor. The parties then read clues from dress and action, not as costly signals that could be sent only by good types, but as information that permits them to update a prior probability about the proportion of good types within the population.

The signaling explanation is interesting, then, in "medium-sized" communities in which a particular person does not have extensive personal experience with most potential cooperative partners, but in which it is plausible that there will be repeated interactions with a given signaler. In such situations, signals are important because one will often lack experience with a particular player, but the chances of repeated interaction are large enough to make it worth learning something about that player's reliability.

A second complication has to do with the assumed payoffs of the repeated game. In a modeling context, those payoffs typically remain the same in each round. In real life, by contrast, payoffs can vary substantially from one interaction to the next. Imagine that I have just sat down on a bench in a downtown plaza to enjoy a cup of coffee and newspaper before work, when I realize that I left my car lights on in the parking lot three blocks away. I would like to ask one of the people sitting nearby to watch my coffee and

newspaper while I run unencumbered to my car to switch off the lights. Their dress and activities send a variety of signals about their reliability, and, accordingly, I select what I believe to be a “good type” before heading off to my car. If I am mistaken about that person’s type and he fails to cooperate, the most I have lost (and the other player has gained) is the coffee and newspaper. Thus, a very inexpensive signal (wearing clean clothes) would suffice. On the other hand, if I wish to leave my six-month-old child in a stroller, I would require considerably greater assurance that I am dealing with a good type. Only a relatively expensive signal would do the trick.

III. FITTING THE THEORY TO THE FACTS: SOME ANECDOTES

Let us turn from these abstract issues to more concrete objections. I will confess that these objections rely only on casual empiricism, but the same is true of most of Posner’s examples.¹⁴ Perhaps the biggest puzzle the signaling theory must explain to be persuasive is this: in Posner’s view, many (most?) apparently negative-value collective activities are designed to signal that the participant has a low discount rate and is therefore a desirable partner in joint projects.¹⁵ Yet, it seems undeniable that the most enthusiastic participants in many standard collective activities—the people most likely to pay close attention to popular fashion, display hostility to “outsider” groups, care deeply about conformity to established gender roles, and participate in street demonstrations—have higher than average discount rates. They are likely to be younger, less educated, employed (if at all) in less prestigious jobs, and generally fit the profile of someone with a lower than average ability to defer gratification.

Consider a couple of obvious examples. The discount-rate-signaling story would be much more compelling had the “globalization” protesters stayed home while the G7 central bankers and trade ministers demonstrated in the streets of Seattle and Genoa. Without question, the protesters have higher discount rates than the bureaucrats. Similarly, it is hard to imagine that the Palestinian youths participating in the *intifada* are trying to distin-

14. *See id.* at 19–21, 26–27.

15. *See id.* at 19, 21.

guish themselves from some other group with an even higher discount rate. The theory must either tell us convincingly that these two examples are not about signaling or explain why the apparently impatient folks are signaling rather than the patient ones.

As to the first, it is not immediately obvious how my examples differ from charivaris or other public displays that Posner uses to illustrate the signaling theory. As to the second, Posner anticipates the objection by introducing the notion of sub-populations in close contact with each other, but each recognizing different signals.¹⁶ But resorting to this device too frequently risks a lapse into circularity, thus destroying the signaling theory's principal advantage over attributing apparently negative-value behaviors to "tastes." We can also argue that an Atticus Finch—a low-discount-rate person who refuses to follow the crowd and engage in discrimination—is a "norm entrepreneur" who seeks to change the signal.¹⁷ But we again run into the circularity problem if we define anyone who has a high discount rate and defies a norm as a "bad type" and anyone who has a low discount rate and defies a norm as a "norm entrepreneur."

One also might argue that the theory only explains phenomena at the margin. The well-educated and wealthy have less need for signals, as their economic and social position are apparent in most interactions. Their very wealth and status adequately reflect their low discount rates. The manual laborer, by contrast, has a particular need to show that she is reliable. If so, however, many of the most compelling examples in the book—those that deal with behavior among potential business partners—lose a lot of their punch.

Another issue the theory must eventually confront is the transmission of signals. Signaling on the scale that Posner describes can only be effective if individuals communicate freely and frequently about the signals they have observed. Otherwise, a potential partner in a cooperative venture would have access only to her own observations. This would, in turn, require that potential cooperators repeat their signals to everyone with whom they wish to interact. Such a requirement would be extremely wasteful. Indeed, there is an informal mechanism for sharing information

16. *Id.* at 28.

17. *Id.* at 29–32.

about the signals others send—gossip. When a person acts inappropriately, she may become the subject of gossip that informs potential business or social partners about the behavior. Gossip, however, seems haphazard and unreliable as a means of transmitting such apparently valuable information.

Again, an example may be useful. Consider a situation that the signaling theory explains extremely well. A young person who has just started her first full-time job and rented her first apartment receives a mailing from a credit card company offering her a credit card with a \$200 credit line. She accepts, receives the card, and, for each of the next few months, charges \$50 to \$100 worth of goods to her card and promptly pays the balance in full. After that few months, her credit line is raised to \$1000.

Why did she not just charge \$200 the first month and ignore all pleas for payment? Surely it is not worth it to the credit card company to pursue her for such an amount. The answer, of course, is simple. Following the age-old advice of books on responsible personal financial management, she deliberately and carefully demonstrated to the credit card issuer that she has a low discount rate. She values access to future credit more than she values \$200 in hand. She is able to forgo instant gratification in order, potentially, to be in a position to purchase a house or a new car.

Note, however, that there is nothing informal or haphazard about the way her signal is communicated to other potential lenders. A credit rating agency keeps detailed records of her monthly charges and payments and sells that information to other financial institutions. A signal that conveys information about a person's discount rate with that much precision is valuable—too valuable to be left to back-fence gossip.

Perhaps the example seems inapt precisely because there are potentially tens or even hundreds of thousands of dollars at stake. Yet the same principle should apply to less costly signals such as giving gifts. Imagine that a business contact gives me a thoughtful and tasteful holiday gift, which we will assume is done to signal that his discount rate is low and that I should be willing to transact with him. The new information about his discount rate is valuable not merely to me, but to any of his other potential transacting parties. Were I acting rationally, I would offer to sell the information to them. Yet my instinctive reaction to the idea is

that I would feel highly embarrassed offering to sell information about my acquaintances' gift-giving, and I likely would not find any buyers. I should not have that reaction, however, if the real purpose of gift giving is to signal discount rates.

IV. A SPECIFIC EXAMPLE: PUBLIC CRIMINAL PUNISHMENTS

Posner illustrates the signaling theory with several chapters giving particular examples.¹⁸ Some of these are quite persuasive. The chapter on signaling and contract, for example, uses the theory to illuminate why parties choose to enter into legally enforceable contracts even though judges may not be very good at determining which party has behaved opportunistically.¹⁹ In the course of the analysis, Posner provides a plausible explanation for the systematic tendency toward under-compensation in the law of contract damages, a phenomenon that is otherwise hard to explain.²⁰ The analysis also reconciles the highly formalistic approach to contract formation with the considerably less formalistic approach to contract interpretation.²¹

Most of the examples, however, are drawn from outside the commercial realm. One focuses on criminal law and, in particular, on shaming as a means of punishment.²² Punishment by shaming is a popular topic in the norms literature. As Posner notes, some scholars argue that social stigma is a more powerful tool than monetary fines, incapacitation, or pain in deterring misconduct.²³ These scholars make the normative claim that "shaming sanctions"—public punishments designed to draw the community's attention to the wrongdoer—may often be more effective than privately administered imprisonment or fines.²⁴ They also make the positive claim that the effectiveness of shaming explains why colonial New England or pre-modern Europe made frequent use of public punishments, including public hangings, whippings, and

18. See, e.g., *id.* at 50 (discussing gifts as signals).

19. See *id.* at 148–66.

20. See *id.* at 163–65.

21. See *id.* at 150–53.

22. See *id.* at 94–106.

23. See *id.* at 88–89.

24. See, e.g., Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999).

confinement in stocks.²⁵ Posner argues that the signaling story fits public punishments in two ways.²⁶ First, shaming destroys the criminal's reputation and makes it impossible for him to engage in future cooperative efforts. Second, the shamers signal to one another that they are good types by their willingness to show up and play their part.

This example of signaling in action is questionable on a couple of counts. First, Posner does not work through the signaling analysis as carefully as he does in the other examples.²⁷ This is probably because the key feature of shaming sanctions—the imposition of emotional discomfort and reputational harm by being (figuratively or literally) branded a bad person is not an example of signaling. The fact that shaming is costly to *the shamer*, is not the mechanism that reveals the criminal to be a bad type. Instead, the criminal's prior criminal behavior and apprehension by the government identifies him as a bad type. The shaming sanction may help spread the word to the community, but that message is credible because of its source (the government) and the procedure used to identify the criminal as a bad type (a criminal trial). Only Posner's second claim—that members of the crowd signal *one another* that they are good types—fits the signaling model.²⁸

Even if one elides this difficulty and equates shaming with signaling, the theory encounters other problems. It is certainly true that publicizing a bad act is an effective deterrent in some circumstances. Clubs, for example, often post the names of those who have not paid their dues in a conspicuous place. But often, publicity is really more about incapacitation than deterrence—by publicizing a bad act that might recur, the authorities warn the community to be vigilant and thereby make it difficult for the criminal to commit the same bad act again. This is the declared purpose of statutes like Megan's Law.²⁹ Norms scholars, including Posner, have argued that Megan's Law and similar statutes are

25. See, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1904–07 (1991).

26. See POSNER, *supra* note 2, at 90.

27. See, e.g., *id.* at 70–72 (discussing courtship as signaling).

28. See *id.* at 90.

29. See, e.g., VA. CODE ANN. § 19.2-390.1 (Michie 2000) (dictating that “the purpose of the Registry shall be to assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders”).

shame sanctions.³⁰ Yet the proponents of such laws typically do not describe their purpose as encouraging the community to impose informal punishment on the felon—that is how the *opponents* describe the purpose—but instead to give the community the opportunity to take additional precautions against the possibility of further criminal acts. Indeed, it is on the basis that these laws are intended to warn the public, and not to impose additional punishment on the criminal, that they have been upheld against constitutional attack.³¹ If the purpose of these statutes is to warn, we do not need a theory of norms—that is, a theory of how individuals informally overcome a collective action problem—to explain them, because there is no collective action problem. It is individually, not just collectively, rational not to hire a convicted child molester as a babysitter.

Finally, there is the question whether signaling or other theories of social norms provide insight into the historical use of public punishments. Posner, like other norms scholars, describes modern-day shaming punishments as successors to older public punishments like whipping or pillorying. In doing so, he suggests that a norm-based theory can provide a positive historical account of these punishments.³²

The shaming analysis of public punishment generates some potentially testable hypotheses. It first implies that the crowds that gathered at the site of a public punishment were there to express their disapproval of the offender as an untrustworthy person. A second implication is that a felon would, all other things equal, have preferred to receive his punishment in private in order to escape the additional sanction of public shame. A third implication follows from the notion that governments are motivated to punish publicly rather than privately as a means of leveraging the deterrent effect. By adding the public's denunciation to the pain caused by the punishment, the state gets extra deterrent effect for little or no additional cost. One would expect, then, that public punishment would be the tool of a government confident that the public shared its views about the relative gravity of offenses and the appropriate level of deterrence.

30. See Kahan & Posner, *supra* note 24, at 387.

31. See Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 75–77 (1998).

32. POSNER, *supra* note 2, at 88–111.

There is ample historical literature on public punishments, particularly public capital punishment. As a simple but non-rigorous test of the signaling model, I read several major works within that literature—which is outside my usual fields of study—to see if their discussions of public criminal punishments are consistent with the above hypotheses. The literature supports the proposition that some sanctions were designed to, and did, produce shame. On the whole, however, it is remarkable how poorly the shaming story fits the history of public punishment. Indeed, the evidence with respect to the most notorious and common public punishment in England—public hanging—directly contradicts the predictions of the shaming model.

The form of punishment that the shaming explanation fits best is the pillory or stocks. Confinement in stocks clearly caused the criminal to feel shame. Beattie's book on the history of English criminal administration describes the pillory as a "punishment that sought . . . to stigmatize and dishonor and to mark out an offender as unworthy of trust or respect."³³ But he goes on to note that the punishment was generally reserved for crimes involving fraud or falsity.³⁴ The key to the pillory, in other words, did not lie in its tendency to call forth informal sanctions or the ability it afforded the surrounding crowd to affirm their low discount rates. Instead, the pillory was a form of Megan's Law for a society lacking universal adult literacy. The function of the pillory, Beattie ultimately concludes, was to "make his [the criminal's] identity known so as to forewarn potential victims."³⁵ This, as discussed above, diminishes the attractiveness of a norms-based approach.

When it comes to hanging, the form of public punishment that has received the most scholarly attention, the shaming model almost fails entirely. Indeed, one contemporary observer whose views might command the particular respect of law and economics scholars drew a sharp distinction between the pillory and the gallows. Adam Smith notes:

A brave man is not rendered contemptible by being brought to the scaffold; he is, by being set in the pillory. His behaviour in the one situation may gain him universal esteem and admiration. No behav-

33. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, at 464 (Oxford Univ. Press 1986).

34. *Id.* at 464-65.

35. *Id.*

our in the other can render him agreeable. The sympathy of the spectators supports him in the one case, and saves him from that shame, that consciousness, that his misery is felt by himself only. . . .³⁶

Smith's observation goes to the heart of the problem—the crowd at a hanging was for the most part there to support, not shame, the criminal.³⁷ As the majority of the condemned had committed property crimes, they were not viewed by their neighbors as especially vile.³⁸ Gatrell's lengthy study of executions in England in the late eighteenth and early nineteenth centuries makes this point explicitly. He describes the traditional procession in a cart from prison to execution ground, along which the condemned received the encouragement of the crowd, stopped to drink wine and beer offered him (or her) by supporters, and generally played the role of a hero. When the authorities became tired of these shows of support and ended the practice, Dr. Johnson protested to Boswell that the procession "was most satisfactory to all parties; the publick was gratified by a procession; the criminal was supported by it."³⁹

The support was not always merely moral. The technology of hanging being primitive, the criminal might die a slow and agonizing death. The crowd could prevent some of his suffering by urging the hangman to pull on the convict's legs to hasten his strangulation. If the hangman would not cooperate, the crowd might take matters, literally, into its own hands.⁴⁰ Sometimes, also, the crowd battled with the authorities for possession of the

36. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 82 (Prometheus Books 2000) (1759).

37. A supporter of the shaming theory might argue that I am missing the point by focusing on the late eighteenth century. Perhaps the fact that public execution had ceased by that point to shame the criminal is what accounts for its demise in the nineteenth century.

The actual practice of public execution, however, was inconsistent with shaming over a very long period. Even in the early eighteenth century, Daniel Defoe and Bernard de Mandeville commented on the tendency of the crowd to sympathize with the condemned. See Peter Linebaugh, *The Tyburn Riot Against the Surgeons*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 65, 68 (Allen Lane ed., 1975). Thus, public hanging survived for almost two centuries, at a minimum, after it had ceased to shame.

38. See V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE, 1770-1868* (Oxford Univ. Press 1994).

39. *Id.* at 37 (quoting 4 JAMES BOSWELL, *LIFE OF JOHNSON* 188-89 (G.E. Hill & L.F. Powell eds., Oxford Univ. Press 1934)).

40. See *id.* at 48-50.

felon's corpse so that it could be given a Christian burial rather than be turned over to doctors for use in anatomy lessons.⁴¹ A felon on the brink of execution did not fear being shunned by the crowd, but the danger of being shunned in the next world was a much more significant concern.

Gatrell's conclusion about public and private hanging is unexpected and striking. He argues that the move to execution in private increased, rather than decreased, the suffering of condemned criminals:

[T]he abolition of the procession and the long shift towards the privatization of execution, commonly understood as a progressive and humane movement, was the reverse of that. To kill felons without ceremony and in private was to deny them the only worldly support they could hope for in their last hours.⁴²

Why, then, were governments so enamored of public punishments? The literature provides a variety of claims and lays the groundwork for others. One might start with the most simple. In societies that were not fully literate and in which the press only sporadically penetrated to the lowest socioeconomic class, public punishment communicated the fact that the criminal had been apprehended and sanctioned. The localization of punishment—the fact that it was frequently carried out near the scene of the crime—proclaimed to those most directly affected by a crime that the law had prevailed.

More than that, public punishment left no doubt that the king was still in charge. When we think about the times and places in which public punishments were most enthusiastically used, one plausible conclusion is that gruesome public punishments were a sign of the insecurity of monarchies that faced constant challenges.⁴³ It takes a strong stomach to read Michel Foucault's description of the prolonged public torture and killing of a would-be regicide in Paris in 1757, but the date alone is enough to make us recognize that it was the act of a king clinging desperately and precariously to power.⁴⁴ Similarly, the number of executions in

41. See Linebaugh, *supra* note 37, at 83.

42. GATRELL, *supra* note 38, at 37.

43. Foucault's study of punishment argues that punishment is a "political tactic." MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 23 (Alan Sheridan trans., Pantheon Books 1977) (1975).

44. See *id.* at 3–5.

England was relatively high during the reigns of Elizabeth I and William III, both of which were marked by dispute and intrigue over succession.⁴⁵ Today, we certainly associate public executions with despotic regimes under constant fear of popular uprising.

Conversely, the end of public punishments often coincided with a move toward more democratic legitimacy. Some of the principal restrictions on public punishment in England—the end of gibbetting and branding in the 1830s, and the end of public hanging in 1868—followed immediately after the Reform Acts of 1832 and 1867, which broadened democratic participation in English government.⁴⁶ Public execution came to an end in France after the overthrow of the Orleanist monarchy in 1848.⁴⁷

If these observations have any force, they demonstrate that public punishment was not an example of government and populace cooperating to reinforce a social norm. The Crown punished people in public to demonstrate its willingness and ability to suppress actions that threatened it. Public punishment set the Crown in opposition to, not in concert with, the populace.

Another prominent argument is that governments were drawn to public punishments because they were a cheap and popular form of entertainment.⁴⁸ In this view, public punishments were analogous to the Roman practice of sending criminals and (in Nero's time) Christians to engage in unarmed combat with lions or other animals. This practice had the dual purpose of getting rid of undesirables and providing amusement. Thus, the crowd's participation conveyed no useful information about their discount rates or reliability.

Whether or not they would have described it as "entertainment," it seems clear that a substantial portion of the crowd gathered at a hanging was motivated simply by curiosity. It is impossible to talk meaningfully about public executions without recognizing the natural fascination with death and with the behavior of those faced with a certain, imminent, and violent end. Gatrell discusses at length the "unabashed excitement and curi-

45. See Philip Jenkins, *From Gallows to Prison? The Execution Rate in Early Modern England*, 7 CRIM. JUST. HIST. 51 (1986).

46. See GATRELL, *supra* note 38, at 23; FOUCAULT, *supra* note 43, at 10.

47. See FOUCAULT, *supra* note 43, at 10.

48. See Linebaugh, *supra* note 37, at xvii-xviii.

ousity" that drew spectators to the scaffold, and surveys the first-hand accounts of authors like Byron, Dickens, and Hardy, who found it impossible to resist the temptation to watch.⁴⁹

Yet another prominent view is that public punishments were intended as a public lesson, not unlike the king demanding Sunday sermons on a particular topic. Linebaugh's study of the background of condemned criminals in London puts a Marxist spin on this "public lesson" hypothesis.⁵⁰ He argues that public punishments were the means by which new capitalist conceptions of property rights were taught to the growing urban proletariat.⁵¹ Pre-capitalist means of production, the theory goes, involved materials which, by custom, laborers could use for their own benefit as well as that of the master.⁵² In urban factories, by contrast, the owners desired strict and exclusive property rights in all the raw materials, tools, and similar factors of production.⁵³ Workers newly arrived from the countryside needed to learn this lesson, and the gallows, whipping post, and branding iron taught it in a manner that was easy for an uneducated population to follow.⁵⁴

Finally, the shaming theory of public punishment, as a positive historical account, is subject to the more general objection already raised: the individuals punished in public in eighteenth and nineteenth century England were overwhelmingly poor and marginalized.⁵⁵ The whipping post or pillory could barely have reduced their status below its pre-existing level. The idea of shaming middle-class American criminals by publicizing their names and crimes may be a reasonable proposal, but it bears nothing in common with the public punishments typically cited as precedent. As Adam Smith noted, "[t]o scourge a person of quality, or to set him in the pillory, upon account of any crime whatsoever, is a brutality of which no European government, except that of Russia, is capable."⁵⁶

49. See GATRELL, *supra* note 38, at 242-58.

50. See PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* (1992).

51. *Id.* at 403.

52. *Id.* at 404.

53. Linebaugh describes the proceedings of English laborers accused of stealing from the workplace as an indictment of Smith's "fable of capitalist productivity." *Id.* at 402-41.

54. *Id.*

55. See *id.* at 256-57; GATRELL, *supra* note 38, at 8.

56. SMITH, *supra* note 36, at 82.

Although I have focused on early modern England, it is also common in the norms literature to point to the various shaming sanctions used in colonial Massachusetts. Marks of shame, including the wearing of signs, letters, or brands, were used to maintain social order, and in particular, to enforce sexual morality.

Such an example, however, shows how completely unmoored the discussion of shaming can become from the underlying theory of social norms, which views norms as an organic social order enforced by decentralized sanctions, aided by the light hand of a government that relies heavily on the community to punish. Whatever else one might say about the colonial magistrates' vigorous maintenance of religious and sexual orthodoxy, it looks nothing like that standard description of norms.

The Massachusetts Bay Colony was, in the words of one historian, a "planned society, driven by a dream of righteousness and organized by regulations attributed to the Deity."⁵⁷ Its authorities were ever on the lookout for deviant behavior, and its magistrates were eager to punish such behavior. Note that more recent utopian societies, such as communist and religious fundamentalist states, rely a great deal on public "confessions" and consequent "shaming" by the community. Yet it is commonly recognized that these governments are not enforcing community norms but, instead, acting out of a deep concern that any outbreak of free thought or action threatens the existence of the regime. Within the community, belief in the underlying utopian vision may be considerably less than universal (i.e., present-day Iran) or almost nonexistent (i.e., the Soviet Union). The community plays its part and acts out the "shaming" out of a desire not to anger the regime.⁵⁸ Such regimes also periodically carry out or sponsor purges or other upheavals that get rid of deviants and give the ruthless an opportunity to settle scores. Contemporary descriptions of

57. STANLEY LEBERGOTT, *THE AMERICANS: AN ECONOMIC RECORD* 31 (1984).

58. Posner, the author believes, would agree that the populace often does not share the utopian vision but would argue that they pretend to agree in order to signal one another that they are reliable. See POSNER, *supra* note 2, at 136. It is, of course, a factual question whether fear of the community or fear of the regime prompts individuals to cooperate, but my reading of the facts is that the latter is more important. We have seen in our own time how, as soon as a regime appears to be losing its grip, the populace quite rapidly stops cooperating with its ideological displays.

witch hunts in colonial New England suggest that the analogy is not completely inapt.⁵⁹

I do not know whether the analogy between punishment in colonial New England and in today's authoritarian regimes holds at anything more than a superficial level. At a minimum, however, it would take far more detailed historical research than any norms scholar has undertaken to show that public displays of community disapproval in utopian societies fit the signaling model, or any other model of social norms, in any serious way.

None of this means, of course, that there is no such thing as a shaming sanction. The claims made in the norms literature about shaming, however, have been overly enthusiastic. One is apt to come away from study of the history of criminal punishment with the view that governments punished publicly for their own narrow purposes having little connection to the beliefs and interactions of the subjects who witnessed the spectacle.

V. CONCLUSION

Both the strengths and weaknesses of *Law and Social Norms* stem from its breathtaking scope. Posner persuasively shows that we all make efforts to demonstrate, in subtle and unsubtle ways, that we are patient and therefore trustworthy.⁶⁰ His effort to tie that insight to hundreds of everyday human behaviors is clever and interesting. The breadth of the analysis, however, necessarily comes at the cost of depth.

Interestingly, the book's examples of signaling in action seem most compelling in the commercial arena.⁶¹ Signaling theory provides a reasonable account of the use of contract in a world characterized by judicial error and compensation schemes.⁶² It also seems plausible as an explanation for various business rituals.⁶³ By contrast, signaling seems less convincing as an explanation of

59. See, e.g., *WITCH-HUNTING IN SEVENTEENTH-CENTURY NEW ENGLAND: A DOCUMENTARY HISTORY, 1638-1693* (David D. Hall ed., 2d ed. 1999).

60. See, e.g., POSNER, *supra* note 2, at 53-55 (illustrating this proposition within the context of gift-giving).

61. *Id.* at 148-66.

62. *Id.* at 162-65.

63. *Id.* at 165-66.

racial discrimination,⁶⁴ attendance at a public hanging,⁶⁵ or participation in a demonstration.⁶⁶ Clearly something is happening in those examples to allow individuals to overcome barriers to collective actions, but whether that something is the desire to signal one's cooperativeness remains, in my view, an open question.

64. *Id.* at 133–41.

65. *Id.* at 103–04.

66. Posner examines particularly the signals associated with honoring and desecrating the American flag. *Id.* at 115–19.