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RESPONSE

THE SIGNALING MODEL OF SOCIAL NORMS: FURTHER THOUGHTS

*Eric A. Posner**

I. INTRODUCTION

One of the most notable trends in legal scholarship is the explosion of writing on social norms. Just a few years ago one might have argued that the scholarship was marginal, of interest to only a handful of law professors, but expressions of skepticism about the value of this scholarship have become rare. At the same time, it would be wrong to say that “law and social norms” (“LSN”) is a movement or school within legal scholarship: the writings about this topic are too diverse, and there is little of that sense of forward movement that is characteristic of more established schools such as law and economics. The problem is a lack so far of coherent organizing principles for mastering and rendering usable a highly fragmented body of writings. If such principles are not developed, one fears that the literature will eventually collapse under its own weight, leaving scattered insights but no real wisdom.

In my view the best hope for avoiding this outcome lies in the absorption of LSN research into law and economics, and, further, in the emergence of a consensus within law and economics on the appropriate method for modeling or thinking about social norms.

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For support for this claim one need look no farther than recent intellectual history. As critics do not tire of reminding us, legal scholars had heard of social norms, and written about them, long ago. Stewart Macaulay's 1963 article on norms governing commercial relationships launched an early boom of academic writing on social norms.¹ That boom turned into a bust, however, and persists in the form of interesting but static and marginal Law and Society empirical scholarship on commercial behavior. The current enthusiasm for LSN derives from Robert Ellickson's 1991 book,² which was written in the spirit of economics though he also criticizes aspects of the discipline, and, I think, from conference papers on "Law, Economics, & Norms" that appeared in the University of Pennsylvania Law Review in 1996.³ It was the infusion of economics into a moribund subject that created the current enthusiasm for law and social norms.

Ellickson's book, as I mentioned, expresses some ambivalence about whether economics possesses the tools necessary for explaining social norms. On the one hand, in explaining how social norms operate, and in justifying his thesis that close-knit social norms are welfare-maximizing, he appeals to repeated game stories of cooperation. On the other hand, he also suggests that cognitive biases might play a role. But the latter idea has had little influence. The source of the book's influence is, I think, the connecting up of the problem of social norms—how they work, whether they influence behavior, whether they are good or bad—and concerns that were central to, and had been highlighted by, law and economics, such as whether legal rules influence the efficiency of behavior (the Coase idea), and whether people obey the law or even know about it. The empirical work of the book also explains some of its influence but empirical work on the relationship between law and social norms was not new; what was new was the use of empirical data to test an idea about social norms within an economic framework.

Since Ellickson wrote his book, authors writing from the economic perspective have proposed a number of approaches to LSN.

1. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

2. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

3. Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996).

Some of these authors, like Ellickson, treat social norms as descriptions of behavioral regularities that exist in an equilibrium in which people pursue their rational self-interest. Others treat social norms as though they were preferences held by individuals. I prefer the former approach, and in my book I argued that the most useful model of social norms is the signaling model—or, more precisely, the cluster of models that analyze behavior when individuals have private information.⁴ The goal is to be able to explain ordinary social behavior that is said to be driven by a desire to comply with social norms, to predict the effect of legal changes on this behavior, and to justify particular legal reforms in light of these predictions. The most interesting question, in my view, is whether laws that have straightforward justifications from a traditional economic perspective might turn out to have perverse or surprising effects once social norms are taken into account. This question connects to many other debates about the relationship between law, legalism, rights, and the state, on the one hand, and community, social capital, and private initiative, on the other.

I should make clear something that has escaped some critics, which is that I have never argued that signaling is the sole explanation for social norms. It is simply a hypothesis, for which there is some suggestive evidence, but in any event it is not likely to explain all social norms.⁵ The question is whether it explains enough of such behavior that proposals of legal reform where social norms matter should involve consideration of problems of asymmetric information.⁶

Now let me turn to the comments.

II. MALLEABILITY OF THE THEORY

Kahan and Mahoney fear that the signaling theory explains too much, and cannot be falsified. Kahan argues that if any action, whether cheap or costly, can be a signal, then “the signaling

4. I have also come to think that herd behavior models might be useful.

5. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* ch. 3 (2000).

6. I thank several readers who pointed out a mix-up in the use of the words “high” and “low” to refer to discount rates on pages 29, 34, 36, and 37 of the hardcover edition of *Law and Social Norms*. These errors have been corrected in the paperback edition.

model can be used to tell whatever story the modeler wants.”⁷ Mahoney expresses a similar worry about the claim that different groups—in his example, bankers and protestors—use different signals.⁸ A simpler theory, in which only costly actions served as signals and everyone cared about the views of everyone else, would be less subject to manipulation.

Neither of the concerns raised by Kahan and Mahoney render the signaling theory malleable or non-falsifiable, though they do render it complex. The actions to which Kahan refers are cheap only in the intrinsic sense, but are costly in the model because they provoke sanctions from others. Thus, in testing an argument about a relatively cheap signal (like wearing a tie on a hot day), we need to specify the conditions under which this action is likely to provoke sanctions (an employee whose boss cares about dress) or not (a person who is out touring). As to Mahoney’s concern, in testing the signaling theory one needs to keep track of the type of person with whom the subject can earn returns from a cooperative relationship. Bankers do not cooperate with globalization protestors; they do cooperate with each other.

Indeed, as Kahan points out, and as I pointed out in the article, Kahan purports to critique,⁹ the signaling story does have trouble with tax compliance behavior in the United States because the reputational sanction is bounded by restrictions on public release of tax compliance information. Kahan cannot at the same time say that the signaling story is non-falsifiable and that it is falsified.

The signaling idea does not deviate from the premises of rational choice; and while it does introduce some indeterminacy, the indeterminacy can be cabined through careful empirical study, as I have explained. By contrast, Kahan’s reciprocation idea faces more formidable hurdles. Kahan does not explain how reciprocation would work: for example, whether a taxpayer conceives of himself reciprocating the behavior of all other taxpayers, or only those in his community or state; whether (and why) a taxpayer

7. Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner’s Law and Social Norms*, 36 U. RICH. L. REV. 367, 373 (2002).

8. Paul G. Mahoney, *Norms and Signals: Some Skeptical Observations*, 36 U. RICH. L. REV. 387, 393–94 (2002).

9. Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1807 (2000).

reciprocates the tax compliance of others by paying taxes himself rather than doing something else like making charitable contributions or volunteering for public service; and whether (and why) a person when deciding to reciprocate by paying taxes would not look at all other taxpaying behavior or all other behavior period, including, say, the extent to which other people refrain from littering or volunteer for charitable activities.

The problem is that Kahan provides no theory that explains the reference group to whom one reciprocates. Any effort to do so would be open to accusations of manipulation, as when he suggests that Minnesota taxpayers only reciprocate along the dimension of tax compliance, and only with respect to other Minnesota residents, rather than along other dimensions, and with respect to a larger or smaller group, in which case the normative implications of the case study become obscure.¹⁰

In sum, Kahan's reciprocity theory seems, as far as I can tell, to rely on an implicit rational actor model with the reciprocity urge or preference tacked on. By contrast, the signaling theory relies only on the rational actor model. The extra degree of freedom in Kahan's theory makes it more malleable, not less. Still, my point here is not to criticize Kahan's theory for being too malleable; it is to criticize his and Mahoney's assumption that only the very simplest theories can be tested. As Schaefer points out, simplicity is not the only criterion for a good theory, and indeed he criticizes the signaling theory for being too simple, not too complex!¹¹

III. SCOPE OF THE THEORY

Schaefer correctly points out that people send signals to reveal information about other characteristics aside from discount rate.¹² Although my book acknowledges this possibility in a footnote,¹³ it was not sufficiently emphasized, and Schaefer's discussion is a useful corrective. He also makes interesting points about the problem of insincerity: if people attend church in order to signal their type, then others might suspect them of insincerity.¹⁴ Al-

10. Kahan, *supra* note 7, at 380.

11. Elmer J. Schaefer, *Predicting Defection*, 36 U. RICH. L. REV. 443, 461 (2002).

12. *Id.* at 445-46.

13. POSNER, *supra* note 5, at 225 n.3.

14. Schaefer, *supra* note 11, at 454.

though Schaefer might mean this argument as a critique, I think it captures an essential characteristic of social norms, namely, that obedience to social norms involves a kind of hypocrisy.

Law professors find this idea shocking—they prefer to take people very seriously and earnestly credit the commonplace view that social norms are an integral part of human identity. Perhaps so, but there is a contrary intellectual tradition that sees the comedy in human behavior, and, in particular, in the contrast between human motives and the arbitrary social norms that people purport to respect, but in fact obey only when it serves their self-interest.¹⁵ Although this tradition tends to assume that ordinary people are fooled by their own narratives—and that only artists, academics, and swindlers have a clear view of the conflict between human motives and the stories people tell—I want to avoid these complicated psychological questions and merely observe that the signaling idea fits into this tradition and introduces a useful perspective on it.

Schaefer revels in the complexity of human behavior, and delights in describing the psychological games that everyone must play with himself. He is right that self-mastery, self-discipline, the ability to defer gratification, far-sightedness, and related concepts have subtle variations in meaning, and call for different psychological and social responses, but, as I noted above, there are methodological returns to stripping down the complexity of the social and psychological worlds to their essentials.

Mahoney argues that signaling theory does not apply to the norms that arise in families.¹⁶ However, we know from empirical work that marriage frequently ends in divorce, and we know from personal experience, literature, and academic studies that marital relationships are pervaded with betrayal, shirking, and unfairness. Courtship rituals and the initial exchange of marriage vows are best understood to be mutual signaling, and the rituals of marital life—exchanges of gifts, for example—are, I think, hard to understand as something different from signaling private information: maybe not discount rate exactly or entirely, but re-

15. See, e.g., PETER L. BERGER, *THE PRECARIOUS VISION: A SOCIOLOGIST LOOKS AT SOCIAL FICTIONS AND CHRISTIAN FAITH* (Greenwood Press 1976) (1961).

16. Mahoney, *supra* note 8, at 391.

lated factors such as the relative attractiveness of outside opportunities.

I also disagree with Mahoney's suggestion that signaling occurs only at the margin.¹⁷ A wealthy person has an incentive to signal as long as he wants to become wealthier, or wants to procure other gains that depend on trust (such as a political career). The only person who would not bother to signal is someone who is so thoroughly despised and degraded that no one would trust him whatever he did; or someone who has so consistently demonstrated his trustworthiness that doubts about his time preferences are extinguished. And I would expect that both types of people would expend a smaller fraction of their resources in signaling than others would. Very wealthy and successful people famously flout social norms; so do the miserably poor. But even these people comply sometimes: the mighty fall, and the fallen are redeemed; and the rest of us, knowing this, are willing to update our beliefs in light of additional information.

Finally, Mahoney seems to think that the existence of gossip—because it is “haphazard and unreliable”—poses an objection to the signaling theory. He says that information is too valuable to be left to such a mechanism of transmission, and indeed we see in the credit market a more systematic effort to collect and transmit information in the form of credit agencies. But I do not understand the force of this example. As he observes, much signaling reveals low-value information (X is a good handyman) and one would not expect sophisticated market mechanisms to be developed to exploit it; gossip is just a word for people exchanging such information informally. But because it is informal, it is often unreliable, though not absolutely worthless. Mahoney says that he would be embarrassed to sell information about a business contact who gives him a thoughtful gift,¹⁸ and this is indeed an interesting phenomenon that I discuss in chapter eleven of the book; but for present purposes it is sufficient to observe that the information is valuable, and another person would benefit from acquiring it, and indeed the business contact would benefit if others acquired it.

17. *Id.* at 394.

18. *Id.* at 395.

IV. SOCIAL NORMS VERSUS COOPERATIVE BEHAVIOR AND COLLECTIVE ACTION

Kahan argues that my “model is inconsistent with a wealth of empirical data on how individuals actually *do* behave in collective action settings.”¹⁹ He refers mainly to experimental studies in which people deviate from Nash equilibrium strategies. Scholars have struggled for many years to find explanations for this behavior—Kahan’s reciprocity norm is but one of many proposals; Schaefer’s essay discusses others.²⁰ I have never denied, however, that people deviate from the rational actor paradigm. My claim is, rather, that discount rate refers to central characteristics about which people have private information of importance to others who want to cooperate with them, and that people will signal in order to reveal this information, resulting in behavior that is described as a social norm. This theory is compatible with emotions and cognitive biases influencing behavior in general; it is in tension only with comprehensive emotion-based or cognitive theories for compliance with social norms.

Kahan misconceives my project if he thinks, as he seems to, that I am trying to explain how groups of people cooperate in order to produce collective goods. The source of his confusion might be Ellickson’s theory, which also conflates two separate phenomena—compliance with social norms (which might or might not contribute to the production of collective goods) and cooperative behavior directly concerned with the production of collective goods.

Rock and Wachter, by contrast, understand this distinction. They recognize that their theory is about the cooperation side of behavior, not the social norm side of behavior.²¹ In my book, I argued that it is useful to divide social interaction into two conceptual stages: the signaling stage and the cooperation stage. It was in the signaling stage that social norms were located: signals, I argued, form social norms. As for the cooperation stage, I argued that the usual repeated game story can explain bilateral or small-

19. Kahan, *supra* note 7, at 375.

20. See generally Schaefer, *supra* note 11.

21. Edward Rock & Michael Wachter, *Meeting by Signals, Playing by Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. RICH. L. REV. 423 (2002).

number cooperation, and it is not useful to think of the equilibrium cooperative behavior as itself conforming with social norms.

The word, “social norm,” is ambiguous, and Rock and Wachter use it more broadly than I do to refer to the behavioral regularities that arise when individuals cooperate.²² Individuals—including employers and employees—have an incentive to try to agree on actions that maximize their joint surplus: Rock and Wachter call those actions “social norms.” They correctly contrast these social norms with the kind of norms that the signaling theory explains. There is no need to get into a semantic debate about whether social norms should be defined broadly or narrowly. But the distinction between the two types of actions—one motivated by a desire to reveal information about oneself, the other by a desire to elicit a cooperative response even in a game of complete information—is important.

V. SOCIAL NORMS VERSUS MARKET OUTCOMES

There is a related point about the difference between social norms as signaling equilibria, and social norms as market outcomes. Hetcher’s comment illustrates this difference.²³

One strand of Hetcher’s analysis—focusing on the “norms” of Web site privacy—is interesting but unremarkable, and has little to do with the kind of social norms at the center of the LSN literature. Hetcher observes that different Web sites have different privacy policies, the result of tremendous experimentation, but that the policies are beginning to converge. What he does not stress, but what is clear from his discussion, is that the firms that operate these Web sites face straightforward, albeit difficult, questions about how to balance the costs and benefits of different privacy policies. Protecting privacy is costly—both because the Web site must be made more complex and must include safeguards, and because the owner of the Web site loses its ability to exploit the economic value of the information. But protecting privacy is necessary to the extent that customers who care about their privacy might go elsewhere. The owners of the Web sites understand that some users care about privacy more than others,

22. *Id.* at 435.

23. Steven A. Hetcher, *Cyberian Signals*, 36 U. RICH. L. REV. 327 (2002).

and so include opt out or opt in mechanisms, but these add complexity, and so might not be worth the cost.

I say that this analysis is unremarkable because similar things can be said about a car manufacturer's evaluation of different vehicle designs or, more apt, a television network's evaluation of a program or series. In both cases, the producer needs to take account of the heterogeneity of demand (different people want the product to have different characteristics) and the costs of meeting this demand. At one extreme, the producer manufactures a standard product, which is cheap but will fail to attract customers with idiosyncratic tastes. At the other extreme, the producer manufactures a product that can be modified to suit the customer's wishes; the product will be expensive but will attract marginal customers. The choice depends on the technology of production, the variation in demand, and so forth. We would expect that as a market develops a producer will experiment with different levels of heterogeneity in its product, in an effort to figure out how much people with outlying preferences are willing to pay for a product that is tailored to their desires. This is what seems to be occurring among Web sites. But I do not see the reason for thinking about this behavior through the lens of LSN; it is simply ordinary market behavior.

The other strand of Hetcher's analysis focuses on a more interesting and difficult question. He points out that Web customers are not just irritated by Web sites that violate their privacy, the way one might be irritated by a car that does not have enough head room or does not come in an attractive color. People are offended when a Web site violates their privacy, and they complain bitterly, and often make an effort, at their own cost, to sanction the Web site's owner.

The existence of offense, and the willingness to incur costs in order to sanction others who offend, is always a sign of a social norm at work, and Hetcher is right to say that there are social norms of privacy that go beyond the characteristic of the Web site "product." It is not clear to me, however, that the social norms of privacy in cyberspace differ interestingly from the social norms of privacy that exist everywhere else. As to those norms, much can be said and I do not have space here to expand on what I say in the book. I do think that privacy norms reflect the basic signaling story. A person can gain—in many ways—by acquiring information about another person's tastes, experiences, and time prefer-

ence. Respect for privacy—the deliberate refusal to acquire such information, or to disseminate information that has been acquired—is a costly signal, and so can distinguish people by type. We respect people who are discreet (even though it annoys us that we cannot obtain information from them) and we do not respect people who are indiscreet (even though we take advantage of their indiscretion), because discretion reflects an aspect of character that we value, namely time preference and similar cooperative virtues.

VI. COGNITIVE BIASES AND OTHER DEVIATIONS FROM RATIONAL CHOICE

Our social norm antennae are activated when we observe people acting in a way that does not seem to be driven by self-interest—throwing out garbage rather than littering, wearing high heels rather than comfortable shoes, paying taxes when cheating is hard to detect. The field of cognitive psychology also takes this domain as its topic, arguing that cognitive biases account for non-self-interested behavior. A question thus arises about the relationship between these phenomena.

One possibility, which I prefer, is that the fields are related but not coextensive. Cognitive biases might explain lots of behavior, or not, but they do not provide a good account for conformity with social norms. For example, a person who fails to purchase insurance because he underestimates low probability events might suffer from a cognitive bias or not, but it would not be useful to describe this behavior as a social norm.²⁴

Schaefer and Kahan take a different tack, arguing that social norms reflect cognitive phenomena. Kahan, as I have argued above, confuses cooperation and norm compliance: even if there is an intrinsic (cognitive or emotional) “preference” to reciprocate, and even if this preference results in cooperation in some domains, it does not follow that this preference results in compliance with a social norm like resting on Sundays. Schaefer’s interesting claims about self-mastery are also, I think, a topic distinct

24. Of course, there can be norms against purchasing insurance. VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985). Her discussion makes clear that the norm against insuring the life of one’s child was due to social, not cognitive, influences. *See id.* at 113–37.

from that of social norms. That is not to say there is no relationship; indeed, a person who exercises self-mastery will want to signal this information, and this might result in behavior consistent with social norms, but for analytic purposes we should distinguish the psychological mechanism that interests Schaefer and the social mechanism described by the signaling theory.

I should observe parenthetically that Schaefer and Kahan are correct to point out that the concept of time preference is complex and that it seems implausible to say that an individual has a single discount rate that applies to all the different kinds of rewards for which he might have a preference. But it is a useful simplification for expository purposes—it is particularly apt when the rewards are monetary—and Kahan goes too far when he claims that the concept of discount rate is not coherent.²⁵ The literature to which he appeals shows, among many other things, that people do not discount at a constant rate and that they do not discount large sums at the same rate that they discount small sums.²⁶ But there is ample evidence that discounting does occur, and that is all that the signaling story requires. When an individual decides whether to cooperate with another person, he must make a judgment about the latter's time preference about the reward that the latter person would obtain through cooperation. As long as the person's time preferences are loosely correlated, the signaling theory makes sense.

Kahan also criticizes what he calls the “correlation of zealotry with materialist values,”²⁷ arguing that “[c]asual observation furnishes little reason to believe that those who submit to virulent frenzies of intolerance end up with the greatest business opportunities.”²⁸ But here Kahan is just indulging in some wishful thinking about the psychology of intolerance. Not all intolerant behavior is “frenzied”; much of it is rational and opportunistic. Although the sadists and the crazies receive the attention of the

25. Kahan, *supra* note 7, at 374.

26. See Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, J. ECON. LITERATURE (forthcoming 2002). I could find no suggestion in this paper that “the degree to which individuals are willing to sacrifice present gains for future ones is governed by social norms.” Kahan, *supra* note 7, at 374. On the contrary, the authors generally explain time preferences by appealing to psychological mechanisms, including sophistication, habit-formation, reliance on reference points, emotion, and mental accounting.

27. Kahan, *supra* note 7, at 373.

28. *Id.*

media, sophisticated observers have always understood that, except in moments of great crisis, the quiet opportunism of ordinary people—the merchants in the Jim Crow South, the civilians in Serbia—create the opportunities for the zealots. Virulent frenzies of intolerance are not instances of rational signaling, and they are not usefully understood as norm-governed behavior. Throughout the book, I put aside emotional behavior because it is not well enough understood to be the basis of a theory of social norms.

Mearns also rejects the rational choice approach, preferring to base criminal law policy on psychological theories of human behavior. I do not know whether the theories she describes are plausible and whether they really justify the dubious-sounding practice of “restorative justice,”²⁹ but I do not see how they could be the basis for a general theory of the relationship between law and social norms. I will have more to say about this point in the next two sections.

VII. CRIMINAL LAW

Mahoney spends the bulk of his comment discussing the history of criminal punishments. I agree with him that this history is subject to multiple interpretations, but I did not find his interpretation compelling.

Mahoney understands but discounts the focus of my argument about the history of criminal sanctions, namely, that they were often an effort to mobilize the public to sanction criminals when the government did not have sufficient resources to impose intermediate punishments. One implication of this argument, as Mahoney notes, is that the government is more likely to use shame sanctions when the public supports it or shares its views about the guilt of the offender and the appropriate punishment.³⁰ Mahoney is impressed by the persistence of public executions for two centuries despite the existence of much disorder surrounding the executions; whereas I am impressed by its demise in response to these concerns about disorder³¹ rather than humanitarian concerns. Indeed, Gattrell’s fashionable claim that removing execu-

29. Tracey L. Mearns, *Signaling, Legitimacy, and Compliance: A Comment on Posner’s Law and Social Norms and Criminal Law Policy*, 36 U. RICH. L. REV. 407, 416–18 (2002).

30. Mahoney, *supra* note 8, at 399.

31. *See id.* at 400 n.37.

tion from public view increased the suffering of condemned criminals,³² if true, would support the view that the government's concern was the disorder provoked by public executions rather than sympathy for the condemned.

The more general difference between Mahoney and me lies in the assumption about the government. I think governments try to exploit social norms when they can, but they also fail for the reason that social norms are not easily manipulated, and the government often has different interests—sometimes legitimate, sometimes not—from those who are benefited by existing social norms. So the use of shaming punishments is a difficult business—a point also emphasized by Meares³³—and all that history shows is that governments' efforts to use them are understandable—because they are cheap—but far from perfect because of the underlying logic of social norms. And so I have argued that the increased use of “neutral” punishments like imprisonment was a response to the difficulty of exploiting social norms for government ends. Meares's point that imprisonment is not necessarily perceived as neutral is well-taken, but that is what makes the use of expungement laws so interesting.

Meares's endorsement of Braithwaitian “restorative justice” assumes that the government is perceived as legitimate, or could be if it changed its practices, and that its laws are moral. In a world in which the interests of government and citizen were aligned, enforcement of the law would be an easier business, and the government could exploit social norms effectively. I am not sure whether this description applies to the United States in 2002. Maybe it applies to some communities in the United States; maybe it applies to some other countries such as Japan. It surely does not apply to England of past centuries, where the class to which the criminal law was most frequently applied had relatively little influence on the content of the criminal law and the day-to-day operation of the criminal justice system.

32. *Id.* at 401.

33. *See generally* Meares, *supra* note 29.

VIII. NORMATIVE IMPLICATIONS

Meares takes me to task for not “disengag[ing] [my] theory from the standard economic conception of optimal criminal punishment,” with the result that it does not “prescribe much helpful criminal law policy where it is most needed.”³⁴ Although I agree that the theory is too broadly gauged to generate concrete policy prescriptions, but, like most academic theory can at best raise alarms and suggest avenues of exploration, I want to insist that its reliance on economic theory is a virtue, not a vice. By showing that deterrence policies that do not take account of signaling might have perverse effects, the theory lends nuance to the economic view without at the same time throwing out a valuable perspective for understanding criminal law.

By contrast, the psychological arguments endorsed by Meares are hard to reconcile with the deterrence function of criminal law. Even if it is true that people are more likely to comply with the law when they believe that it is moral, or when they believe that the government has the right to enforce the law, it is also true that people are more likely to comply with the law when it is backed up by large sanctions. We need some way to think about the tradeoff between these effects: would, for example, harsher punishments for drug crimes lead to more compliance because of the deterrent effect of the sanctions, or less compliance because of the illegitimacy of the sanctions (if such is the case)? Empirical investigation could, in principle, shed light on these questions, but a coherent theoretical approach—one that combined deterrence and non-deterrence considerations—would be preferable to a collection of ad hoc insights.

Kahan points out correctly that the signaling theory might imply a tax compliance strategy—publicizing the names of delinquents—that could backfire. Although I disagree with Kahan’s reason for thinking it would backfire (he appeals to his reciprocity theory), I do agree that it would not necessarily succeed, albeit for the reasons I give in chapter six of my book: that too much signaling can be as bad as too little signaling. The complexity of the policy implications of the signaling theory are regrettable but unsurprising in a complex world, and calls for careful experi-

34. *Id.* at 421.

mentation by legislators and courts, and adjustment in light of experience. As I noted above, Kahan's theory fares worse on this score. Because his theory has more moving parts, normative implications are more obscure.

Mahoney is off base if he thinks that I subscribe to a supposed "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."³⁵ My view of social norms is more pessimistic than this Hayekian vision, and that is why my chapter on criminal punishments expresses skepticism about shaming penalties rather than endorsing them.³⁶

35. Mahoney, *supra* note 8, at 404.

36. I do endorse them only in the narrowest circumstances and, experimentally, for dealing with corporations and white collar criminals. See 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).