

2002

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Recommended Citation

Tracey L. Meares, *Signaling, Legitimacy, and Compliance: A Comment on Posner's Law and Social Norms and Criminal Law Policy*, 36 U. Rich. L. Rev. 407 (2002).

Available at: <http://scholarship.richmond.edu/lawreview/vol36/iss2/5>

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SIGNALING, LEGITIMACY, AND COMPLIANCE: A
COMMENT ON POSNER'S *LAW AND SOCIAL NORMS*
AND CRIMINAL LAW POLICY

Tracey L. Meares*

I. INTRODUCTION

Although criminal law can be justified with respect to non-utilitarian goals such as retribution, no one can deny that one way to justify criminal law is with respect to the instrumental ends of deterrence. So, one question of interest to scholars in the field has been how to think about the kinds of criminal law policy that encourage compliance. My own work has focused on this important question. Specifically, I have been concerned with the ways in which different kinds of criminal proscriptions, along with certain methods of law enforcement, could affect crime rates in disadvantaged, urban neighborhoods.¹ In undertaking such analyses, I have emphasized classical sociological theory and social psychology, often for the purpose of criticizing economic approaches to crime control, which have been interpreted to emphasize higher levels of severe punishments for conduct such as drug offenses.²

Thus, as a student of criminology and psychology, and a sometime critic of economic approaches to criminal law policy, I ini-

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1. See generally Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000) [hereinafter Meares, *Norms*]; Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998) [hereinafter Meares, *Place and Crime*]; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

2. See generally Meares, *Norms*, *supra* note 1; Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998).

tially imagined that this commentary would be a sharp critique of Eric Posner's *Law and Social Norms*³ as it applies to topics I have mined in past work. In his book, Posner attempts to boil down a wide variety of human actions to their bare essentials.⁴ The engine of the book is a general model of nonlegal cooperation, which Posner describes as a signaling game.⁵ Because people desire to cooperate with one another, they engage in regular but costly sorts of behaviors in order to communicate to each other that they are good partners for cooperation.⁶ Posner calls these behavioral regularities "norms,"⁷ and he uses this general model to comment on everything from family law to voting to criminal law.⁸ Thus, Posner explains that observance of criminal law—which could be costly to compliant individuals—is a function of the fact that people "are likely to obtain future returns when others see them obeying a legitimate law."⁹

Compliance, then, can be explained by the signaling model, and it is this spare explanation that I originally sought to resist. Certainly, I am not alone.¹⁰ After all, Posner claims at the outset of his book that a recurrent objection to the theory is that "signaling 'can't be all that there is.'"¹¹ While Posner admits that other disciplines might have something to say about the subjects he canvasses in his book, he nonetheless concludes that a fuller examination of such contributions "would muddy the exposition of the argument without providing any offsetting benefits."¹²

In this short essay, my goal is to make a few mud pies. But they likely will be smaller than I originally had imagined. As will soon be obvious, Posner's work and that of social psychologists can be integrated fairly easily. I will first lay out the normative theory of compliance with the law and compare it to Posner's approach. I will then review some of the themes concerning pun-

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

4. *See id.* at 7–8.

5. *See id.* at 18–27.

6. *See id.* at 5, 111.

7. *Id.* at 5.

8. *See id.* at 68–87 (discussing family law); *id.* at 112–32 (discussing voting and other political participation); *id.* at 88–111 (discussing criminal law).

9. *Id.* at 111.

10. *See, e.g.,* Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 *YALE L.J.* 625 (2001) (reviewing POSNER, *supra* note 3).

11. POSNER, *supra* note 3, at 46.

12. *Id.*

ishment that Posner covers in chapter six. This review will reveal the affinity between the signaling model and normative theories of compliance. It will also demonstrate, however, that in certain circumstances the signaling theory is incomplete. Where the theory is incomplete, I will argue, it is necessary to resort to other disciplines for a more satisfactory explanation of behavior and for the purpose of engineering good policy.

II. WHY DO PEOPLE OBEY THE LAW?

The standard economic explanation of why people obey the law focuses on deterrence. People will shape their behavior, the argument goes, in response to the likelihood that they will be subject to the formal sanctions that flow from violations of the law.¹³ This theory illustrates the view of compliance as instrumental.¹⁴ That is, compliance is based on the assumption that people obey the law because they fear the consequences of failing to do so.¹⁵

In contrast, social psychologists have connected voluntary compliance with the law to the fact that individuals believe the law is "just," or because they believe that the authority enforcing the law has the right to do so.¹⁶ Psychologists designate these reasons for compliance as normative as opposed to instrumental.¹⁷ Normative factors cause individuals to respond differently than they would respond to rewards and punishments.¹⁸ While some individuals comply with the law in response to externally imposed punishments, individuals who comply for normative reasons do so because they feel an internal obligation to do so.¹⁹ Hence, "the suggestion that citizens will voluntarily act against their self-interest is the key to the social value of normative influences."²⁰

13. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) (providing the classic explanation of the relationship between morals and the law); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

14. See Meares, *Norms*, *supra* note 1, at 398.

15. See *id.*

16. See POSNER, *supra* note 3, at 110–11; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (1990).

17. Meares, *Norms*, *supra* note 1, at 398–99.

18. *Id.* at 398.

19. See POSNER, *supra* note 3, at 111; Meares, *Norms*, *supra* note 1, at 398.

20. TYLER, *supra* note 16, at 24.

Compliance may derive either from a belief that a law is just, or from a belief that the governing body has the authority to make law. In either case, compliance is normative.²¹ Psychologist Tom Tyler refers to the former type of compliance as morality-based, and the latter type as legitimacy-based.²² Research shows that morality-based compliance is more powerful than legitimacy-based compliance.²³ While legitimacy may be less important to compliance than morality, empirical work has shown that legitimacy is more important than instrumental factors such as formal sanctions imposed on law-breakers.²⁴

For example, Tyler has studied compliance using regression analyses.²⁵ Measuring the relative importance of factors such as legitimacy, public deterrence, peer disapproval, and personal morality, Tyler concludes that the regression estimate for legitimacy was five times higher than the estimate for deterrence.²⁶ There have been other studies exploring the relationship between legitimacy and compliance. Those researchers have found that legitimacy strongly impacts acceptance of arbitration awards,²⁷ the acceptance of business decisions, and compliance with rules in business settings.²⁸ These results do not suggest that instrumental factors are irrelevant to compliance. Rather, in each of these

21. *Id.* at 3–4. For a similar discussion of the following material regarding compliance, see generally Meares, *Norms*, *supra* note 1.

22. TYLER, *supra* note 16, at 3–4.

23. *Id.* at 57–64. Regression analyses indicate that between deterrence, peer disapproval, personal morality, and legitimacy, personal morality is most strongly correlated with compliance. *Id.* at 59.

24. *See id.* at 57–60.

25. *See id.* at 57–64.

26. The study found the regression estimates to be 0.11 for legitimacy and 0.02 (not significant) for deterrence. *Id.* at 59 tbl.5.1. Both of these estimates were adjusted with a beta constant for reliability. *Id.* To put these estimates in perspective, note that the estimates for the impact of age and sex on compliance are 0.24 and 0.26, respectively. *Id.*

27. *See* E. ALLAN LIND ET AL., OUTCOME AND PROCESS CONCERNS IN ORGANIZATIONAL DISPUTE RESOLUTION 22, 29 (Am. Bar Found., Working Paper No. 9109, 1991) (concluding that the decisions of parties to accept or reject arbitration awards were more closely related to process concerns than to outcome concerns); ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM 60–62 (1988) (finding that the probability of litigants in cases involving automobile claims in New Jersey courts accepting arbitrators' awards correlated with legitimacy and outcome favorability).

28. *See* Tom R. Tyler & R. Schuller, A Relational Model of Authority in Work Organizations: The Psychology of Procedural Justice (1990) (unpublished manuscript) (on file with author) (stating that procedural justice was the most consistent predictor of decision acceptance, rule following, turnover intention and grievance filing).

studies, factors such as deterrence and outcome-based judgment influenced compliance in some way. Research indicates that legitimacy is equally or more important to compliance than are instrumental factors.

In *Law and Social Norms*, Posner attempts to reconcile the economic, social, and psychological models of compliance. Noting that the normative view of compliance holds that individuals obey a law even when they disagree with it—suggesting that under a rational choice model their utility would be greater if they broke the law—Posner claims that signaling easily brings the two approaches together.²⁹ Recall that people signal to each other by engaging in costly actions.³⁰ Since the normative model implies that people obey the law even when they do not want to, then obedience can be an important signal to others that one cares about delaying instant gratification and thus communicating one's "low discount rate."³¹ According to Posner, this will only be true if most people agree that the law to be obeyed has legitimacy.³² Therefore, if a law has legitimacy, people will obey it because they are likely to obtain future returns when others see them obeying that law.³³

While the definition of legitimacy to which Posner has subscribed in making this statement is not entirely clear, his account does have some affinity with the social psychology that underlies normative theories of compliance.³⁴ For example, one model of social psychology measures legitimacy as a function of maximizing self-interest.³⁵ The theory suggests that individuals regard the law as legitimate only when it serves their interests.³⁶ Some psychologists have criticized the self-interest model because it fails to account for legitimacy which persists despite repeated negative

29. POSNER, *supra* note 3, at 111.

30. *Id.* at 26.

31. *Id.* at 18. Posner defines people with low discount rates as those who value cooperation with others and the future payoffs that such relationships bring. *Id.* Those with high discount rates are opportunistic, impulsive, and care little about future returns. *Id.*

32. *Id.* at 111.

33. *Id.*

34. For a more detailed explanation of the normative theory of compliance from the social psychology perspective, see Meares, *Norms*, *supra* note 1, at 402–04.

35. *Id.* at 402. For a more thorough discussion of measuring legitimacy by maximizing self-interest, see generally JOHN W. THIBAUT & HAROLD H. KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* (1959).

36. Meares, *Norms*, *supra* note 1, at 402.

outcomes under the law.³⁷ Further, the model does not allow for individuals who are very concerned about the fairness of the legal process without regard to the results in any particular case.³⁸ These critiques of the self-interest model suggest that a theory based on norms rather than outcomes can account for more and varied sources of legitimacy.³⁹

To respond to the problems with the self-interest model, psychologists Allan Lind and Tom Tyler have developed the "group value model."⁴⁰ They argue that the legal process, in both its formal and informal aspects, signals to members of a social group how their group is perceived by governmental authorities.⁴¹ One strength of the group value model is that it defines legitimacy with respect to stable procedures—rather than more variable outcomes—which have greater potential to reinforce social order.⁴² The theory, then, acknowledges that, while the optimal outcome of any particular case may not be clear, the applicable procedures should be apparent and, when uniformly applied, will foster greater legitimacy.⁴³

Under the group value model, individuals may gauge how they are perceived and treated by their government by three factors: standing, neutrality, and trust.⁴⁴ "Standing" refers to an individual's membership in a social group.⁴⁵ If the group is treated with dignity and respect, the individuals are likely to conclude that the authority recognizes their membership and status within the group.⁴⁶ "Neutrality" refers to the absence of bias or discrimination against the group and suggests that different groups will be

37. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 228 (1988).

38. *Id.* at 229–30.

39. Meares, *Norms*, *supra* note 1, at 402.

40. LIND & TYLER, *supra* note 37, at 230–31.

41. *Id.* at 231.

42. Joel Brockner & Phyllis Siegel, *Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* 390, 404 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

43. Meares, *Norms*, *supra* note 1, at 403.

44. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115, 140 (Mark P. Zanna ed., 1992).

45. *Id.* at 153; see Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103, 129 (1988) (discussing the importance of "benevolence" and "sincerity" of leaders).

46. Tyler & Lind, *supra* note 44, at 153.

treated alike.⁴⁷ “Trust” is the individual’s belief that the authority will act not only fairly but also predictably in the future.⁴⁸ While the researchers have identified these three factors as separate elements of group value, they do not suggest that individuals do the same.⁴⁹ Rather, “most people simply lump all of these concerns together as they assess the *overall quality* of their relationship with an authority.”⁵⁰

A legitimacy-based law enforcement policy, then, should include both those who abide by the law and those who break the law.⁵¹ The focus of such a policy is persuasion, more so than punishment.⁵² To implement such a policy, the authority must first establish trust among the governed, which the group value model suggests cannot be achieved by focusing on punishment.⁵³ Compliance created by threats of punishment is fundamentally inconsistent with a relationship of trust and results in a rift, rather than a bond, between the authority and the governed.⁵⁴

Because the group value theory of procedural justice that lies at the heart of the normative view of compliance is driven by the human desire to connect with others, the normative approach is clearly congenial to Posner’s signaling model. Both models critique the standard economic explanation of compliance with criminal law dictates. The normative view criticizes the economic view for overemphasizing individual predilections to respond to punishment rather than focusing on the message conveyed to the punished person through the method of penalty imposition about how she is perceived by government authorities.⁵⁵ Posner complains that the standard economic approach is an impoverished account of human behavior because it simply states that people will be persuaded to refrain from lawbreaking if penalties are high enough, and certain enough, without explaining how punishments persuade beyond the obvious point of the wealth reduc-

47. *Id.* at 157–58.

48. *Id.* at 155.

49. *Id.* at 140 n.14.

50. *Id.* (emphasis added).

51. Meares, *Norms*, *supra* note 1, at 404.

52. *Id.*

53. *Id.*; Tyler & Lind, *supra* note 44, at 155–57.

54. Meares, *Norms*, *supra* note 1, at 404.

55. *See supra* notes 40–41 and accompanying text.

tion potential of fines and imprisonment.⁵⁶ Posner says his signaling model provides an answer: People care about their reputations because reputations enable cooperative relationships.⁵⁷ Obedience enables one to signal his reputation as a "good type."⁵⁸

Because the foundations of the two models for compliance track one another rather closely, one might predict that the models would produce very similar conclusions about the problems of punishment that Posner reviews. The following discussion will demonstrate that the normative view and Posner's approach to compliance do indeed produce similar conclusions with regard to the propriety of shaming penalties and racial disproportion in punishment, although for different reasons. Ultimately, however, the signaling model is not as helpful for conceptualizing the structure of criminal penalties as is the normative model.

III. SHAMING PENALTIES, STIGMA, AND THE ENFORCEMENT OF CRIMINAL LAW

Posner finds currently popular shaming penalties (and, perhaps, imprisonment) problematic because his signaling model suggests that people will have incentives to overinvest in shaming in order to demonstrate their own cooperativeness.⁵⁹ Since joining with the government to enforce shaming penalties can be such an effective signal of one's discount rate in some, but not all, communities, shaming penalties imposed by the government can lead to wildly variable punishments for different people, and, correspondingly, imposition of these penalties can result in wildly variable levels of stigma being attached to different persons who commit similar crimes.⁶⁰ This state of affairs cannot be tolerated in a world in which optimum deterrence is sought. Economic theory as applied to criminal law assumes that optimal sanctions are those that are equal to the expected cost that the offender imposes divided by the probability of detection.⁶¹ If one subscribes to this theory, and if one is convinced that government-supported

56. POSNER, *supra* note 3, at 111.

57. *Id.* at 15.

58. *Id.* at 18-19.

59. *Id.* at 92.

60. *Id.* at 95-96.

61. *See id.* at 92.

shaming penalties provide opportunities for third parties to signal, where the signaling creates arbitrarily severe punishments that the government has no way to control, then one ought to conclude that shaming penalties should not be promoted over imprisonment.⁶²

Note that the previous account is premised upon the notion of optimal deterrence as it applies to criminal law policy. Should we care about optimal deterrence in this arena, as opposed to, for instance, tort law? With respect to underdeterrence, the answer is obviously yes. With respect to overdeterrence, one might conclude that the concern is overwrought—at least according to a non-retributivist account of criminal punishment—since conduct designated as criminal is conduct that we all reasonably can conclude has no social value.⁶³ If there is no social value in criminal conduct, then there is no desirable level of such activity.⁶⁴

Such a conclusion would be too hasty, however, because overdeterrence of one type of criminal conduct may well motivate an offender to substitute a different type of criminal conduct. George Stigler has offered the classic example: if robbery and murder both are punishable by the same ultimate penalty—death—then, even if there are fewer robberies, robbers have little incentive to refrain from killing their victims.⁶⁵ Attention to the deep commitment people have to the formation of group relationships may very well undermine, rather than support, non-incarcerative shaming penalties.⁶⁶

What does the normative view of compliance have to say about shaming penalties? The normative approach focuses on the message conveyed to the individual punished about how he is viewed by the state and the community in which he resides.⁶⁷ According to this view, the actual form of the penalty has some salience, but the process through which the punishment is generated and con-

62. *See id.* at 94–96. Importantly, Posner does not conclude that the case against shaming penalties is clear-cut. He states that their suitability can be assessed only after empirical research. *See id.* at 97–98.

63. *See* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1234–35 (1985); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 526 (1970).

64. *See* Shavell, *supra* note 63, at 1234–35.

65. *See* Stigler, *supra* note 63, at 527.

66. *See* POSNER, *supra* note 3, at 98–99.

67. *See supra* text accompanying notes 40–50.

veyed to the defendant also matters a great deal.⁶⁸ From the normative perspective, the primary problem with the kinds of punishments Posner describes—such as newspaper publication of the names of those who seek prostitutes, or posting of signs in one's yard such as "I'm an embezzler,"⁶⁹—is that they might not be imposed with enough indicia of procedural justice for the person subjected to them to conclude that they are legitimate.⁷⁰

Consider the procedural process entailed in a typical restorative justice sentencing circle. Restorative justice emphasizes the relationship between the offender and the victim rather than the relationship between the offender and the state.⁷¹ Scholars of restorative justice innovations typically assert that these innovations provide crime victims with a more prominent role in the justice process than does the traditional justice system.⁷²

Family group conferencing is one common restorative justice approach.⁷³ Typically, a juvenile offender who admits wrongdoing is referred by the court to a mediation process.⁷⁴ The mediator determines whether the offender and the victim are willing to meet face-to-face and, if so, schedules a conference.⁷⁵ The participants in the conference typically include the young offender and his or her family and supporters, the victim and his or her family and supporters, a police officer, and a youth advocate.⁷⁶ Aside from the youth advocate, lawyers are rarely present.⁷⁷ The participants

68. See *supra* text accompanying notes 40–43, 51–53.

69. See POSNER, *supra* note 3, at 88–89.

70. See *id.* at 95–96.

71. See Mark S. Umbreit, *Mediating Conflict Among Victims and Offenders*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 56, 56 (Michael Tonry & Kate Hamilton eds., 1995).

72. *Id.* at 57 (noting that victim-offender mediation programs give the victim a stake in the process); see PETER MARSH & GILL CROW, FAMILY GROUP CONFERENCES IN CHILD WELFARE 42–43 (1998); Jennifer Michelle Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 296–97 (1999); David Moore et al., *A New Approach to Juvenile Justice: An Evaluation of Family Conferencing in Wagga Wagga*, available at <http://www.aic.gov.au/rjustice/fjustice/index.html> (last modified Feb. 22, 2000).

73. See, e.g., Cunha, *supra* note 72, at 286. For a detailed examination of the British model of family group conferencing, see generally MARSH & CROW, *supra* note 72.

74. See Cunha, *supra* note 72, at 300.

75. See Umbreit, *supra* note 71, at 57–58.

76. Cunha, *supra* note 72, at 302. The "youth advocate" may be the court-appointed lawyer for the juvenile. *Id.* at 302 n.87.

77. This is true even though lawyers are not banned from most family group conferences. In New Zealand, where family group conferencing first gained prominence, legisla-

sit in a circle, and the discussion proceeds by hearing first from the offender and then from the victim.⁷⁸ Finally, the group reaches a disposition through consensus.⁷⁹ In contrast to a traditional court-imposed sentence that relies on the threat of coercion to ensure that an offender adheres to a non-incarcerative sentence (revocation of probation, for example), a sentence imposed through the family group conferencing procedure is, by definition, one that the offender has agreed to and presumably believes is fair.⁸⁰ Sentences imposed through family group conferences may include public apologies, which involve some shaming of the offender.⁸¹

Studies of various restorative justice programs reveal many successes.⁸² There are extremely consistent reports of victim satisfaction with restorative justice experiences.⁸³ Offenders respond to restorative justice programs because they perceive them to be just.⁸⁴ Of course, the social psychology reviewed above provides reason to be hopeful that these perceptions will translate into greater voluntary compliance.⁸⁵ A limited number of studies indicate that restorative justice processing is associated with lower reoffending levels, as compared to participants in control groups,⁸⁶ but more work must be done to verify this effect.⁸⁷

What should be obvious here is that restorative justice will not

tion expressly allows lawyers to attend. Children, Young Persons, and Their Families Act, 1989, § 251(1)(g) (N.Z.), available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1989/se/024se251.html> (last visited Apr. 5, 2002).

78. Cunha, *supra* note 72, at 304–05.

79. *Id.* at 307.

80. *Id.* at 316–17. The procedure in New Zealand is that all parties in the family group conference sentencing circle must agree on the penalty. See JOHN BELGRAVE, NEW ZEALAND MINISTRY OF JUSTICE, RESTORATIVE JUSTICE ch. 3 (1996), at <http://www.justice.govt.nz/pubs/reports/1996/restorative/chapter3.html> (last visited Apr. 5, 2002). If there is no consensus, then the case is referred back to the court. *Id.*

81. See GABRIELLE M. MAXWELL & ALLISON MORRIS, FAMILY, VICTIMS AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND 93 (1993) (noting that penalties imposed by group conferencing may include apologies, community service, victim reparation, work/education programs, counseling, curfew, fines, removal from current residence, or detention in a juvenile facility); see also Cunha, *supra* note 72, at 308.

82. See Cunha, *supra* note 72, at 312–19.

83. See *id.* at 317–19; see also John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 20–26 (1999).

84. Braithwaite, *supra* note 83, at 26–27.

85. See *supra* text accompanying note 80.

86. Cunha, *supra* note 72, at 314–15.

87. See Braithwaite, *supra* note 83, at 27–30.

necessarily produce the kind of punishment typically considered optimal under the standard economic account. The family group conference requires that the offender's family attend and meet with the victim's family.⁸⁸ This means that the offender will not bear his punishment alone. Even while the conference may expose the offender's family to some shame, their presence simultaneously reaffirms the offender's identity as a person with connections to others.⁸⁹ Moreover, to the extent that some punishments, such as public apologies, have public components, third parties may have incentives to engage in further shaming of the defendant, raising the possibility of the arbitrary sentences that Posner fears.⁹⁰ However, the procedural justice approach predicts that people are influenced to a greater extent by the process through which the punishment is imposed than by the actual punishment itself.⁹¹ Therefore, this approach would suggest that we need not concern ourselves so much with the variable severity of shaming punishments.

This argument has limits, of course. The restorative justice approach I have just described, which owes a considerable debt to John Braithwaite's theorizing in his landmark book, *Crime, Shame and Reintegration*,⁹² assumes that the punishment experienced is not so severe or humiliating that the defendant cannot be reintegrated into the relevant community after the punishment because his desire to be reintegrated has evaporated.⁹³ Reintegration requires that the suspect's dignity be respected and that the defendant be otherwise treated in a manner which evidences that he is a member of the group.⁹⁴ Some shaming penalties, such as a public flogging, may be completely inconsistent with these assumptions.

Thus, the normative view of the value of shaming penalties is highly dependent upon an empirical assessment of the context in

88. See Cunha, *supra* note 72, at 302.

89. See Erik Luna, *Restorative Justice: A New Model of Punishment* 12 (Sept. 2000) (unpublished manuscript) (on file with the author) ("The presence of the juvenile's family and supporters gives the process credence while ensuring that his positive identities—as a son, a brother, a soccer player, or a student—are reinforced by the words and presence of those who care most about the young person.").

90. See POSNER, *supra* note 3, at 95.

91. See *supra* text accompanying notes 40–43, 51–53.

92. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

93. See *id.* at 55–57.

94. See *id.*

which they are imposed. While Posner also believes that whether his model supports or rejects shaming penalties ultimately is an empirical question,⁹⁵ the questions he asks are different in an important way from those implied by the normative model.⁹⁶ These differences flow from the fact that Posner's model lies behind standard economic assumptions about optimal penalties.⁹⁷ Thus, the normative model has little disagreement with signaling.⁹⁸ Instead, the normative model resists the focus on the actual penalties imposed on an offender—at least insofar as the penalties ought to relate to the offender's opportunity structure—to the exclusion of the process that produces them.⁹⁹

Process is not all that matters in the normative approach. It would be incoherent if government authorities could impose any penalty on an offender so long as the offender was spoken to politely, provided a good lawyer, and convicted in an obviously impartial tribunal with a jury of the defendant's own selection. For example, it is hard to believe that a universal death penalty for all felony offenses would be accepted as legitimate by both the law breakers and the law abiders in a community just because procedural justice indicia unrelated to the outcome of the process were observed—especially if members of an out-group are disproportionately punished.

Posner speaks to this problem in his book. Dividing the world into the politically powerful Xs and the poor and weak Ys, Posner warns that criminal punishments imposed on the out-group Ys by the in-group Xs may motivate Ys to engage in even more criminal behavior—especially when the punishment includes public shaming—in order to signal their solidarity with other Ys.¹⁰⁰ Such behavior is not unknown among youthful street gangs.¹⁰¹ Posner concludes that the better approach to punishment of Ys in this context is to impose very quiet penalties but no shaming penalties.¹⁰²

95. Compare POSNER, *supra* note 3, at 106, with *id.* at 108.

96. See *id.* at 110–11.

97. See *id.* at 92.

98. *Id.* at 111.

99. See *id.*

100. See *id.* at 97–99.

101. See *id.* at 99.

102. *Id.*

Posner's discussion of Xs and Ys maps quite easily onto the racial dynamics of criminal punishment in the United States.¹⁰³ In the Chicago study referred to above,¹⁰⁴ psychologist Tom Tyler examined whether judgments of the legitimacy of legal authorities were affected by racial and class differences.¹⁰⁵ He found that among samples of white versus minority, or rich versus poor Chicago residents, all of these groups were equally likely to say that government authorities had the right to dictate proper behavior and that laws ought to be obeyed, even if they disagreed with them.¹⁰⁶ However, when these same groups were asked about their personal experience with legal authorities, minority or poor residents were more likely to report experiencing injustice.¹⁰⁷ The theories of legitimacy canvassed above suggest that people who believe that one ought to obey legal authorities and accept the decisions of authorities about how to resolve problems or how to restrict one's behavior will feel an internalized obligation to comply with the law. Yet, the findings that minorities and poor people often experience injustice would seemingly undercut such compliance effects, perhaps in the way that Posner describes.¹⁰⁸

The studies are not conclusive, but they suggest that when authorities pay attention to procedural justice indicia, they create a "cushion of support" against contrary reactions when unfavorable outcomes are delivered.¹⁰⁹ Distributive justice matters too, which might also undercut Posner's analysis. Posner suggests that the danger of subcommunity defiance militates against public shaming penalties and in support of quieter punishments such as imprisonment.¹¹⁰ Nevertheless, the inescapable problem is that even quiet punishments are known. Whether African-Americans are publicly shamed or quietly warehoused in rural prisons, it is common knowledge that the rates of punishment within the group are quite high.¹¹¹ This knowledge leads to the stigmatization of racial minorities who are neither branded with scarlet let-

103. *See id.* at 98.

104. *See supra* notes 25–26 and accompanying text.

105. *See TYLER, supra* note 16, at 57–65; *see also* TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 144–47 (1997).

106. TYLER ET AL., *supra* note 105, at 145 tbl.6.1, 146 tbl.6.2.

107. *Id.* at 146 tbl.6.2.

108. *See POSNER, supra* note 3, at 100.

109. *See TYLER, supra* note 16, at 107.

110. POSNER, *supra* note 3, at 99.

111. *See, e.g., id.* at 99–100.

ters nor locked behind bars, but, instead, are simply walking down the street.¹¹² While perceptions of distributive justice may have negative consequences for compliance,¹¹³ procedural justice indicia appear to act as a counterbalance. Standard theories of optimal criminal punishments do not reveal these nuances.

IV. CONCLUSION

Eric Posner's *Law and Social Norms* is a valuable contribution to literature for those who think about informal social control. By providing an account of why people engage in some types of nonlegal sanctioning behavior, Posner's work helpfully advances theories of normative compliance with the law. However, because he does not disengage his theory from the standard economic conception of optimal criminal punishment, the theory does not prescribe much helpful criminal law policy where it is most needed—addressing the racial dynamics of criminal punishment and crime reduction in high-crime neighborhoods. In these arenas, the real questions should be whether and how less powerful groups can be punished at all, consistent with the dictates of legitimacy. I have explored the contingencies of this question. Much depends on the extent of the crime problem that the disadvantaged group experiences, which in turn will necessitate some kind of state intervention to help the community deal with the problem. The extent to which the governed group can hold law enforcers accountable to them also matters a great deal; and, the distributional effect that punishment has on the life-chances of those who reside in the community, such that the community's social organizational structure is compromised, is yet another factor. While each one of these factors importantly depends on the cooperative relationships that individuals form with one another, it is not immediately obvious that the signaling model helps to solve the vexing problem of generating justice in the process of criminal punishment among racial minorities in this country.

112. See Meares, *Place and Crime*, *supra* note 1, at 680 (referring to widespread imprisonment of African-Americans as a "race-making" factor).

113. See TYLER, *supra* note 16, at 108.
