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PREDICTING DEFECTION

*Elmer J. Schaefer**

I. INTRODUCTION

Eric Posner's cooperation theory of social norms develops from rational choice theory an austere and powerful explanation of why people comply with social norms.¹ He illustrates his theory with subtle analysis of a number of legal issues. The book will help anyone influenced by law and economics to incorporate into her thinking the work in sociology, psychology, and ethics that bears on human behavior. Most readers will find applications for Posner's theory.

In Posner's cooperation theory, people play a number of prisoner's dilemmas in which a player receives a greater reward if she can obtain cooperation from the other player by avoiding defection. There is a striking analogy to the piceoeconomic² analysis of an individual's decisions when faced with a conflict between a larger long-run and a smaller short-run reward. That individual can be regarded as playing a number prisoner's dilemmas with a future self, who can defect from a decision to pursue the long-run reward by switching to the smaller short-run reward.³ In Posner's theory a player defects from a joint activity because she applies a high discount rate to future rewards.⁴ Piceoeconomic analysis, in

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

2. "Piceoeconomics" is a word coined to refer to micro-micro-economics. GEORGE AINSLIE, PICEOECONOMICS xiii (1992).

3. Cf. GEORGE AINSLIE, BREAKDOWN OF WILL 93-94 (2001) (pointing to a close similarity between a contest among "successive motivational states within a person" and a repeated prisoner's dilemma).

4. POSNER, *supra* note 1, at 17. "Discount rate" refers to the present value an individual assigns to future rewards. For example, someone who "discounts" a future yield of one hundred by assigning a present value of seventy has a higher discount rate than another person who values the same right today at ninety. *See id.* at 17-19.

contrast, highlights the fact that typically someone who defects originally valued the future reward from cooperation sufficiently highly to agree to participate in the joint activity.⁵ Unless she is a con artist, with no original intention to cooperate, the defector must have changed her mind. She now prefers to yield to the temptation to defect; whether she does so may depend on devices she can use to resist temptation. Understanding those devices may help predict whether someone will defect.

II. POSNER'S COOPERATION THEORY OF SOCIAL NORMS

Posner bases his theory of social norms on the prisoner's dilemma model of failure to cooperate.⁶ Players would gain by working together, but each player is better off defecting herself, no matter what the other player does. If the other player cooperates, then the first player gets the benefit of that performance, but is spared her own cost of cooperating; she can "free ride." If the other player defects, the first player continues to be better off not having cooperated herself. The second player will reason in the same way. Therefore, in a one-shot game, defection is the dominant strategy for both players.⁷

Defection, however, need not be dominant in a repeated prisoner's dilemma. If a prisoner's dilemma is to be played many times, then a player has an additional incentive to cooperate in early games; cooperation might lead to cooperation by the other player in later games.⁸ By a suitable strategy, each player, for example, can convey a message that: "If you cooperate, I will cooperate, and we'll be better off; if you defect, I will also defect, and we will both be worse off. What's of special interest to you, my fellow player, is that if you defect, you will be worse off than if you cooperate."⁹

In Posner's cooperation theory, repeated games with various players are linked by the players' reputations, which reflect their

5. See generally AINSLIE, PICOECONOMICS, *supra* note 2; AINSLIE, BREAKDOWN OF WILL, *supra* note 3.

6. POSNER, *supra* note 1, at 12-15.

7. *Id.*

8. *Id.* at 15.

9. This is the tit-for-tat strategy, explored in ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

history of defection or cooperation.¹⁰ Players, especially new ones, can improve their reputations by sending signals that they are “good types” who are unlikely to defect in a cooperative enterprise.¹¹ They signal by complying with social norms.¹² Such good types are more willing to incur the cost of giving up a reward in the short run for the greater reward that comes in the future to someone with a reputation as a cooperator.¹³ Other players (“bad types”) reason that compliance is costly; it would be easier not to comply. Someone with a high discount rate will be less likely to incur the cost of complying with a social norm.¹⁴ Thus, noncompliance signals that someone has a high discount rate and would not be a trustworthy potential partner.

For example, a person can signal by charitable giving that she is a good type.¹⁵

Donations to charity show people that one is wealthy and generous, and that one has a low discount rate. Bad types do not want friends as much as good types do, because friendship requires immediate and significant investment in return for an uncertain long-term gain. So giving away money in return for nothing is a way of distinguishing oneself from the bad type. But it is important that people be able to observe one when one makes contributions.¹⁶

Posner emphasizes an austere version of the cooperation theory. Consistently, players draw the same inference from noncompliance with any social norm, without regard to the content or significance of the norm: the offender is a “bad type,” in the sense of having a high discount rate.¹⁷

What is [so] powerful about the signaling theory is that it shows why schoolchildren and the rest of us devote so much energy and worry to what always seem in the grand scheme of things to be trivial—clothes, hygiene, appearance, manners, forms of speech, and all

10. POSNER, *supra* note 1, at 12–13.

11. *Id.* at 20.

12. *Id.* at 37.

13. *Id.* at 19.

14. *Id.* at 17.

15. *Id.* at 65.

16. *Id.*

17. *Id.* at 36. Posner points out that people signal other characteristics, such as cultural competence or intelligence. “Such signaling may give rise to norms. But a complete analysis of these phenomena would be overwhelmingly complex.” *Id.* at 225 n.3.

the other attributes which, because of their salience, present opportunities for others to discriminate against us.¹⁸

In this austere version, the sanction for violating a social norm is automatic and severe: the violator is shunned.¹⁹ The cooperation theory also explains why people will incur the cost of sanctioning non-compliance with norms,²⁰ even though imposing a sanction is a collective good. Sanctioning a non-complier will itself become a norm. Shunning a violator of a social norm, one signals that one is a good type; failure to shun a violator signals that one is a bad type.²¹

III. TYPES OF "BAD TYPES": CHARACTERIZING DEFECTORS

In Posner's theory, the partners that people want to avoid are the bad types with high discount rates.²² A bad type is considered less likely than a good type to cooperate in a repeated prisoner's dilemma, because the bad type cares less about the future payoffs that are lost through defection.²³ But people with high discount rates can be classified into three categories, only two of which pose the danger of entering into a joint venture with someone who later defects.

The first category of people with a high discount rate, the refusers, will reject the venture in question, because it requires the sacrifice of a present reward in exchange for a future reward that is not great enough. But a refuser is of no concern to someone worried about defection, because a refuser will not enter into an agreement in the first place.

But a would-be venturer should worry about a member of the second category, the con artists, who promise to cooperate while having a present intention to defect later. Con artists, are guilty

18. *Id.* at 25.

19. *See, e.g., id.* at 27. If someone "defects or fails to send the appropriate signal, observers will infer that he belongs to the bad type." *Id.* at 34. A violator may simply "have a tin ear for social norms," but "he is, in a way, demonstrating that he is a bad type since he shows that he has not invested in cultural competence." *Id.* at 27.

20. *Id.* at 25.

21. *Id.*

22. *Id.* at 18-19.

23. *Id.* at 18.

of promissory fraud. This particular bad type may send false signals of being cooperative, provided the signals are not too costly.

Someone in the third category, a switcher, initially wishes to cooperate but changes her mind and defects when given an opportunity to seize a smaller, short-term reward.²⁴ At some point, the preference of the switcher must have changed. When she wanted to cooperate, she must have preferred the larger, later reward. When she defected, she must have preferred the smaller, earlier reward. Con artists aside, a defector must be someone who yields to a switch in preferences.²⁵

IV. ASSESSING SELF-CONTROL MAY BE MORE USEFUL THAN ASSESSING A DISCOUNT RATE

Entering a venture typically entails undertaking future obligations in exchange for greater rewards. Almost any signal, not just compliance with a social norm, is some evidence of willingness to bear an early cost, because the cost of the signal precedes the reward from the response to the signal.²⁶ Investment in education, for example, demonstrates willingness to defer gratification. Con artists and their special talents aside, someone demonstrates an intention to defer gratification by the very act of joining a venture that imposes early costs in exchange for later, bigger rewards.

Rather than evidence of a future partner's willingness to try to defer gratification, a prospective long-term co-venturer would probably want evidence of self-control in the face of a major temptation to defect. To see what that evidence might be, it helps to consider the tactics that people can use to resist temporary switches in preference.

Those tactics are analyzed in piceconomics, which studies the "bargaining within the self" that arises when someone anticipates that her preferences will switch as the moment of incurring op-

24. This short-term reward will be smaller than the gain from cooperation because the defector will suffer reputational losses.

25. Posner does not put much emphasis on yet another type of defector, someone who defects because changed circumstances imply that defection would yield greater community surplus. This is analyzed extensively by writers on "efficient breach" in contract law. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 119 (4th ed. 1992).

26. See POSNER, *supra* note 1, at 24 ("[A]ny costly action can be a signal, that is, a mechanism for establishing or preserving one's reputation.").

portunity costs approaches. The switch in preferences is explained as the result of hyperbolic discounting;²⁷ there is considerable evidence that most people follow that pattern of discounting.²⁸ Picoeconomics analyzes the strategies that a rational person might use to eliminate defection and get a later, larger reward. From this point of view, someone who will not defect has won a repeated prisoner's dilemma "inside herself." Often a non-defector behaves as though she maintains a reliably low discount rate because she is good at exercising self-control.²⁹

V. AN INTRODUCTION TO PICOECONOMICS: HOW DEFECTION OCCURS AND HOW IT IS RESISTED

Picoeconomics analyzes an individual's struggles with shifts in her preferences as she gets closer in time to a choice between an earlier, small reward and a later, large reward. Whereas Posner's theory deals with the role of norms in signaling willingness to cooperate in repeated prisoner's dilemmas,³⁰ picoeconomics deals with the strategies used by an individual in a series of internal prisoner's dilemmas in which she is tempted to defect by choosing smaller, short-run rewards over larger, long-run rewards.³¹

A. *Preferences Shift When an Opportunity to Choose Becomes Imminent*

Picoeconomic analysis asserts that people often experience a shift in preferences as they approach a decision between a smaller, early reward and a larger, later reward, even though the larger reward was previously preferred. This is the finding of a number of experiments,³² including the following informal one:

27. The hyperbolic discounting theory emphasizes the importance of the time delay between decision and reward. See AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 28–35.

28. *Id.*

29. *Cf.* POSNER, *supra* note 1, at 192 (suggesting that a claim to be mature or to have self-discipline is a claim about discount rate); *id.* at 191–93 (suggesting that a person might signal that she has a low discount rate by claiming that she is influenced by guilt, one particular self-control device).

30. POSNER, *supra* note 1, at 18–19.

31. See generally AINSLIE, *PICOECONOMICS*, *supra* note 2; AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3.

32. AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 28–35.

If I ask a roomful of people to imagine that they've won a contest and can choose between a certified check for \$100 that they can cash immediately and a postdated certified check for \$200 that they can't cash for three years, more than half of the people usually say they would rather have the \$100 now. If I then ask what about \$100 in six years versus \$200 in nine years, virtually everyone picks the \$200. But this is the same choice seen at six years' greater distance.³³

Preferences will shift as the moment of choice approaches if the rates at which people discount future rewards fit hyperbolic curves rather than exponential ones. There is evidence that people's discounting behavior follows a hyperbolic pattern.³⁴ Moreover, hyperbolic discounting is consistent with Herrnstein's matching law, which summarizes much empirical evidence from behavioral psychology research with animals as well as with humans.³⁵ Thus, piceoeconomic analysis of the shifting preferences that lead to defection from a plan to defer gratification draws support from a large body of empirical research.

B. *Tactics for Resisting an Anticipated Shift in Preferences*

1. Social Side Bets

Social side bets,³⁶ which resemble privatized social norms, can be placed by declaring to others, whose opinions matter, that the declarant will resist an impulse or carry through a plan. For example, the four students who first "sat-in" at the Woolworth's lunch counter in Greensboro believed their mutual discussions concerning the evils of discrimination committed them to accept the risks.³⁷ This resembles a social side bet rather than a social norm, because the declarations occurred in a small group.

A social side bet can be customized by the person who wishes to be bound, and in this respect differs from a social norm. However, a social side bet resembles a social norm in that reputational ef-

33. *Id.* at 33.

34. *See, e.g., id.* at 44; Kris N. Kirby & R. J. Herrnstein, *Preference Reversals Due to Myopic Discounting of Delayed Reward*, 6 *PSYCHOL. SCI.* 83, 85 (1995); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 *Q. J. ECON.* 443, 450-51 (1997).

35. *See* AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 34-35.

36. *See id.* at 75.

37. *See* DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 61, 133 (1991).

fects are crucial.³⁸ In fact, someone could comply with a social norm as a means of self-control. While social side bets may not be as effective when the conduct to be regulated is private,³⁹ to someone worried about a hard-to-detect defection, willingness to comply with a social norm in public would be less reassuring than a signal that someone would comply with a private side bet.⁴⁰

2. Private Rules and Other Tactics

Tactics for self-control include making early legal or physical commitments (e.g., joining a Christmas Club for saving, not having ice cream in the refrigerator, etc.),⁴¹ diverting attention,⁴² regulating emotions,⁴³ and adopting private rules that bundle desires at different times into categories governed as an entirety by the rule.

For example, someone who wants to lose weight might decide to eat less each day. When it comes time to eat her daily meals, however, she may encounter a shift in her preferences; the food looks attractive, and a small reduction in calories seems unlikely to make much difference in her final weight. She may therefore defect from her plan to consume fewer calories and similar defections may well occur in the future. Suppose that she then adopts a private rule not to eat dessert until she loses the desired weight. Now she can compare the loss of all desserts to the anticipated later reward, loss of weight. By hypothesis, she will make her original choice, to prefer the later reward.

38. See AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 75.

39. *Id.*

40. See POSNER, *supra* note 1, at 24 (explaining that social norms are about observed, not concealed, behavior); cf. DAVID RIESMAN ET. AL., *THE LONELY CROWD* 25–26 (1950) (analyzing the difference between “inner-directed” and “other-directed” people).

41. This tactic was used by Ulysses, who ordered his crew to put wax in their ears, so they would not hear the song of the sirens, luring sailors to their deaths. Ulysses wanted to hear the sirens, so he did without the wax and had his crew tie him to the mast of his ship, so that he was unable to respond to the fatal temptation. This illustration was first used in Robert H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 *REV. ECON. STUDIES* 165, 173 (1956) and is featured in JON ELSTER, *ULYSSES AND THE SIRENS* 36–37 (1979). Some pigeons have learned to peck a key that removes the temptation of an early, small reward that eliminates an opportunity to get a bigger reward. See AINSLIE, *PICOECONOMICS*, *supra* note 2, at 131–32. Professor Tribe pointed out the analogy of using a written constitution to restrain “impulsive” violations of fundamental principles of government. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 (1978).

42. See AINSLIE, *PICOECONOMICS*, *supra* note 2, at 133–35.

43. See *id.* at 135–42.

To guard against a short-run reward that someone finds very tempting, a private rule should be a bright line. This makes it difficult to evade or adjust the rule under the pressure of the temptation. Thus, the dieter with the no-dessert private rule might be tempted to create an exception when eating with a friend or by eating a “low-fat” dessert. Alternately, if the rule had permitted one cookie, one could imagine an incentive to seek out giant cookies.⁴⁴

VI. TOWARD A LESS AUSTERE MODEL: COMPLIANCE WITH A SOCIAL NORM MAY SIGNAL MORE THAN WILLINGNESS TO BEAR A SHORT-RUN COST IN ORDER TO OBTAIN A LONG-RUN GAIN; IT MAY NOT BE A SIGNAL AT ALL

A. *A Person May Not Have the Same Discount Rate in All Contexts*

In the austere version of Posner’s theory, compliance with a social norm has one interpretation: it signals that the complier has a low discount rate.⁴⁵ Russell Hardin says that the central claim of Posner’s theory is “that we generalize across context to judge someone’s cooperativeness.”⁴⁶

Economists usually assume that a person has a single discount rate for comparing present and future goods. In large part this assumption is supported by the fact that through markets and money, a variety of goods in an earlier time can be exchanged for a variety of goods at a later time. But many of the things one might swap between now and later are not readily available in any market. Thus, the problem of switching preferences can be strongly affected by the type of goods offered by the earlier, tempting choice, and the later, more rewarding one.

44. Alcoholics Anonymous recommends a zero rule for people with difficulty controlling their drinking. A zero rule seems to be less malleable than some others. Ainslie suggests that this may explain why problem drinkers seem to have more success in controlling drinking than problem eaters have in controlling eating. See AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 97.

45. POSNER, *supra* note 1, at 18–19.

46. Russell Hardin, *Law and Social Norms in the Large*, 86 VA. L. REV. 1821, 1824 (2000).

The austere theory might fit two particular types of people: the elite group with a rigid code of conduct and the small group of merchants who deal mainly with each other. But these are special cases, marked by frequent social interchange. The generalization claim is much less likely to hold in other situations.

A person's tactics for self-control often resemble Freud's "defense mechanisms."⁴⁷ Someone who relies heavily on one tactic might end up with a similar discount rate for most goods. However, a rule-bound person foregoes potential benefits; compulsiveness can be dysfunctional.⁴⁸ Using a variety of techniques to control impulses may well be more efficient than reliance on a single technique.⁴⁹

B. Compliance with a Social Norm Might Not Be a Signal but Instead Reflect a Preference for Engaging in That Conduct

Compliance with a social norm only counts as a signal if the compliance is costly rather than done for its own sake.⁵⁰ Posner gives the example of a monk with ascetic tastes for whom taking a vow of poverty involves no sacrifice.⁵¹ He points out that the possibility that an instance of compliance with a social norm is costless makes it harder to determine whether the compliance is a signal. The possibility also makes it harder to test his signaling theory of norms.⁵²

There are reasons to expect that people sometimes will want to comply with a social norm because they like that kind of behavior. Social norms may reflect and be supported by underlying beliefs. In such cases, someone with those beliefs may find compliance costless.

Moreover, a social norm may be internalized, so that people want to comply. For such a person, compliance is costless. Posner acknowledges that internalization of norms seems reasonable,

47. See George Ainslie, *A Behavioral Economic Approach to the Defense Mechanisms: Freud's Energy Theory Revisited*, 21 SOC. SCI. INFO. 735, 735 (1982).

48. See AINSLIE, *PICOECONOMICS*, *supra* note 2, at 226-27.

49. *Id.* at 174.

50. See POSNER, *supra* note 1, at 37.

51. *Id.*

52. *Id.*

but asserts that even if it occurs it has few testable implications.⁵³ The possibility that norms are internalized, however, presents another source of difficulty in distinguishing between costly compliance, which sends a signal, and costless compliance, which does not.

C. *Noncompliance with a Social Norm May Signal Traits Other than Willingness to Defect*

Violation of a social norm may indicate ignorance (Posner calls this “having a tin ear”) rather than unwillingness to take the trouble to comply with the norm. As Posner points out, a tin ear often reveals unwillingness to expend the effort to pay attention to what others find offensive.⁵⁴ However, indifference to a social nuance might be consistent with steadfast performance of an obligation that does not require social skill.

Scrupulous compliance with some social norms might signal diligence or even rigidity. Someone without those qualities would find it difficult to be so scrupulous. A certain insouciance in complying with norms might signal moderation. An astute violation of fashion norms—a fashion statement—might signal originality.

Such different traits may be desired for different ventures. A potential partner may be interested in a variety of characteristics besides resistance to the temptation to defect.⁵⁵ She might want someone who is diligent or someone who is original. An advertising agency would not want a drab conformist as a copywriter.

D. *The Beliefs Associated with a Norm Matter*

Norms and widely held beliefs are frequently connected. Shared beliefs may generate norms or help to make a practice “focal.” Norms consistent with majority beliefs are more likely to endure. However, an action that signals a low discount rate may not stave off ostracism if it also signals disagreement with majority values.

53. *Id.* at 43–44.

54. *Id.* at 27.

55. *Cf. id.* at 34 (“A cooperative partner is anyone with a sufficiently low discount rate and sufficiently similar interests . . .”).

Posner recognizes this when he observes that burning a flag can signal a low discount rate because it incurs a high cost in the form of the opprobrium of the majority.⁵⁶ He adds, however, that because of this offensiveness, only those who reject majority values would be willing to cooperate with the flag burner. Thus, it is not enough to signal a low discount rate. In order to find partners, it is sometimes necessary to comply with norms that symbolize majority beliefs.⁵⁷

Proclamations of belief can play a role similar to norm compliance in providing assurances of future cooperation. This is illustrated by the case of the sit-in by the four Greensboro students.⁵⁸ That example is also a reminder that the generalization thesis is often invalid. A willingness to cooperate in one context need not carry over to other contexts, if only because individuals use different methods of self-control in different contexts. Their willingness to cooperate in a dangerous action seems to imply that the four young men in Greensboro had a low discount rate, but could they all have been counted on to show up for appointments on time or to save a higher portion of their resources than others do? And note that compliance with many other social norms would not have produced the commitment and the reassurance needed if the sit-in was to succeed.

E . *Costly Signals May Raise Subtle Issues of Insincerity*

If a signal before joining is discovered afterwards to have had a high cost, the signal may seem insincere. This is especially likely if the content of the signal matters so that the signal seems to indicate a trait other than a low discount rate. As an example of a signal-induced distortion of a good type's behavior, Posner states the following:

A non-religious person might claim that he is principled, then provide as evidence the fact that he spends a lot of time at church. If spending long hours at church is sufficiently costly and differentially costly, the person will distinguish himself as a good type by making

56. *Id.* at 116–17.

57. *Id.* at 117. Posner also recognizes the importance of the beliefs symbolized by a norm when he points out that flag waving will be a social norm only so long as it is a reliable signal of patriotism. *Id.*

58. See CHONG, *supra* note 37 and accompanying text.

this claim—but only if his claim can be checked out. If others observe that he does not go to church, he will be exposed as a bad type. The person goes to church, then, as a way of showing that he is principled, not because he seeks religious solace. His investment in this signal enables partners to cooperate with him to a greater extent than with bad types who cannot afford the signal, and in this sense serves to enhance cooperation.⁵⁹

Spending time in church would not signal that one has a low discount rate unless the church attendance is costly. For a devout person, church attendance might be costless. It would only be of interest to someone looking for a partner with religious beliefs, diligence, or some trait other than a low discount rate. For the first two traits, church attendance might be an effective signal; for someone without one or both of those traits, church attendance would be costly. Only for a non-religious person would church attendance signal willingness to bear early costs in order to obtain larger, future payments.

Suppose that the non-religious church attender lets a prospective partner know that he is non-religious. Church attendance is now an effective signal of a low discount rate, but the question of sincerity arises. A person who does something that he does not like shows a willingness to bear costs, but also reveals potentially undesirable qualities, perhaps stupidity or deceptiveness. A sincerity issue may arise whenever someone is willing to comply with a social norm that he finds burdensome, that is, in terms of the cooperation theory, whenever someone signals that he has a low discount rate. And someone who is insincere might be untrustworthy, perhaps even a con artist.

VII. TOWARD A LESS AUSTERE MODEL: SOME NORM VIOLATIONS MAY BE TOLERATED

The most austere version of the cooperation theory assumes zero tolerance for violation of norms. Insight into the effects of zero tolerance can be gained from the piceconomic analysis of the effects of strict “enforcement” of private rules to exercise self-control. Zero tolerance has significant drawbacks, and rational people would probably not adopt it for enforcement of social norms.

59. POSNER, *supra* note 1, at 191.

A. *Using a Bright Line Rule May Be Costly or Infeasible*

Following a strict rule may result in the sacrifice of significantly rewarding opportunities.⁶⁰ Posner agrees, asserting that there are always some tradeoffs that are desirable despite a bright line rule.⁶¹ As an example, consider a bright line social norm against lying. It would have high costs in hurt feelings and painful social relations.⁶²

Additionally, deploying a bright line rule would sometimes yield only trivial rewards. Bright lines facilitate resistance to temptations to rationalize violations of a rule or standard. But many norm violations are not important enough to justify either strict definition or zero tolerance. Discipline might be sufficient without the need to resort to a bright line. Some alcoholics don't need a bright line. Indeed, when we witness someone observing a rigid restraint, one possible inference is that the person is subject to strong temptations. A social drinker may be less likely than a teetotaling alcoholic to get drunk.

Finally, a suitable bright line may not be available. Private rules must be formulated in words; social norms often develop as an equilibrium, and an equilibrium is facilitated by a "focal" bright line. But, in a given context, there may be no line bright enough to be focal,⁶³ and some of the brighter candidates might require an excessive number of suboptimal choices.

B. *Rigid Enforcement of Social Norms Can Lead to an Undesirable Lack of Spontaneity*

At the personal level, excessively rule-bound behavior can not only require bypassing significant opportunities, but can also cast a mechanistic pall over many activities.⁶⁴ Similar bad effects are possible if social norms are rigidly enforced.⁶⁵

60. See, e.g., AINSLIE, *PICOECONOMICS*, *supra* note 2, at 177.

61. See POSNER, *supra* note 1, at 194.

62. See, e.g., SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978); JAMES MORROW, *CITY OF TRUTH* (1990); *LIAR, LIAR* (Universal Pictures 1997).

63. See *supra* note 44. There is no bright line for dieting. AINSLIE, *PICOECONOMICS*, *supra* note 2, at 168.

64. See AINSLIE, *PICOECONOMICS*, *supra* note 2, at 177.

65. Cf. POSNER, *supra* note 1, at 117 (noting that excessive flag waving might come to

Because some slips may be wise or at least tolerable, a zero-tolerance policy may have high costs. This is the experience for many private rules, where minor violations do not threaten significant loss of long-term reward.⁶⁶ Violation of some social norms will be tolerated because perfect compliance is not worth the effort for the violator, perhaps because the slip is inadvertent.⁶⁷ The approach of Captain Corcoran in *H.M.S. Pinafore* is often wise. Challenged (“What, never?”) on a claim that he is never sick at sea, the Captain falls back on “Hardly ever!”⁶⁸

C. *The Discipline of a Bright Line Might Be Damaged by Excessive Application*

Therapists have found that high stakes insistence on perfect compliance with a personal rule may prevent the rule from succeeding.⁶⁹ To avoid this, someone might create an exception to her personal rules, a set of circumstances in which she gives up on self-control (e.g., panicking when giving a speech or binging on doughnuts after eating the first one).⁷⁰ Similar collapses of social norms may be anticipated in a realm of conduct where there has been insistence on norms that are too strict.

D. *Without a Bright Line, Intensifying and Sanctioning Violations of a Social Norm May Be Difficult*

A norm is often not precise enough to rule out the acceptance of excuses for failure to comply. For example, the leader of the group organizing the freedom rides in 1961 missed the early leg of the journey because he was attending his father’s funeral.⁷¹ This ex-

seem a hollow ritual, thereby eroding the norm favoring flag waving).

66. See AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 115 (keeping some resolutions may not matter much or may be too hard to do consistently).

67. Cf. DEBORAH TANNEN, *I ONLY SAY THIS BECAUSE I LOVE YOU* 96, 98, 109 (2001) (stating that some people find that an apology can express a personal connection, help mark an end to a dispute, or make a future error less likely by acknowledging a previous error).

68. W.S. Gilbert & Arthur Sullivan, *H.M.S. Pinafore*, in *THE COMPLETE PLAYS OF GILBERT AND SULLIVAN* 105 (Modern Library 1936) (1878).

69. AINSLIE, *BREAKDOWN OF WILL*, *supra* note 3, at 116.

70. *Id.* at 148–49.

71. CHONG, *supra* note 37, at 56–57.

cuse seems to have been accepted by the group.⁷² However, when it came time for the most dangerous part of the journey, excuses would no longer have been acceptable, and the leader got on the bus.⁷³

Further, when the applicability of a norm is doubtful, sanctioning an alleged violation may not signal that the censor is a good type. Instead, someone who zealously seeks to signal virtue by sanctioning an alleged violation risks being regarded as meddling, excessively censorious, or foolish.

E. Norm Violations Will Sometimes Be Analyzed Casually and Sometimes Carefully

When consideration of whether to make an exception for variance from a social norm does not seem worth the trouble, a policy of zero tolerance may frequently be followed. However, with an important venture, a prospective partner can invest resources—as with an interview or investigation—to interpret what seems to be a violation of a social norm.

Initial screening of potential employees often takes place with relatively little information about the candidates. In this context, a minor norm violation might cause a candidate to be eliminated from contention at an early stage. One version of affirmative action emphasizes the gathering of that information about candidates who otherwise might receive little consideration.⁷⁴ Posner observes that all parties might gain if an affirmative action policy overcomes reputational concerns that did not coincide with the actual preferences of employers.⁷⁵

72. *Id.*

73. *Id.*

74. See DEBORAH L. RHODE, JUSTICE AND GENDER 184 (1989) (“[I]n its weaker form, [affirmative action] encompasses largely process-oriented requirements, such as revised screening, recruitment, education, and training procedures to expand opportunities for underrepresented groups.”).

75. POSNER, *supra* note 1, at 141.

VIII. TOWARD A LESS AUSTERE MODEL: CERTAIN TYPES OF SIGNALS MAY BE MORE ACCURATE PREDICTIONS OF LOYALTY

A. *Signals Related to Performance Are More Likely to Predict Loyalty than Signals Directed at Obtaining a Partner*

Some signals incur costs that make performance more likely. These are more relevant to detection of a potential defector than signals that seem directed at obtaining entry into a venture. Thus, steps that manifest ability to carry out a contract, such as pre-agreement partial performance⁷⁶ of one's future obligations, would reduce the likelihood of defection after entering a venture. Moreover, an early commitment may be part of a private tactic to resist a temptation to defect. A player who will later defect might adopt a signal that merely makes one seem to offer performance, without actually making performance more likely. Businesses sometimes emphasize getting contracts with customers without regard for their ability to provide the service promised.⁷⁷ Separation of the sales department from the operating department might indicate a lack of sufficient interest in performance.

B. *Specialization of Signals May Help Predict Resistance to Defection*

Signals that are specialized to a particular partner make defection less likely. In contrast, signals that make someone attractive to many partners increase the opportunity costs of remaining loyal. A presentation tailored to a particular prospective partner, especially one that reflects costly research into the prospect's preferences, would be an example of the first type of signal. Mass advertising or a standardized sales pitch might be examples of the second.⁷⁸

76. Signaling by early partial performance has the unfortunate effect of weakening the signaler's bargaining position.

77. See Lori Enos, *Report: E-tailers Winning Customer Service War*, E-COMMERCE TIMES, available at <http://www.ecommercetimes.com/perl/story/5515.html> (Nov. 27, 2000) (quoting Professor Claes Fornell of the University of Michigan Business School as saying, "It is probably fair to suggest that many companies in the e-business have focused more on customer acquisition than on customer retention.").

78. By reflecting on analogues in the world of personal relationships, one might come up with a theory of the economics of jealousy.

C. *Formality in Setting up a Venture May Make Defection Less Likely*

A formality—such as an agreement, consideration, or expression of the understanding in words—often induces more deliberation than a less formal arrangement.⁷⁹ Greater deliberation results in a more serious commitment to performance of the obligations.⁸⁰ Reputational costs of a defection are likely to be greater because breaching a more serious commitment constitutes a more serious defection. Moreover, the sunk costs of deliberation may trigger a private rule that discourages giving up on a project until the sunk costs have been recovered.⁸¹

Agreement to a well-specified contract also discourages defection because rationalization or assertions of fanciful exceptions are less likely. The formal wording of a contract, however, might permit a form of opportunism that takes advantage of contractual language that fails to express adequately the reasonable expectations of the parties.

In this connection, Posner's claim of "radical judicial incompetence" in contract interpretation⁸² threatens a system of social norms that depends on reputational effects. If courts are incompetent to accurately decide whether there has been a defection, it will be even more difficult for assessing the conduct of an alleged defector to do so. Whatever weaknesses courts have, they have subpoena power and other evidence-gathering techniques that onlookers lack. Moreover, courts must devote time to examining the merits of a dispute; onlookers have little incentive to do so. Indeed, if determining the obligations imposed by a contract is impossible for judges, it may even be difficult, especially with the human tendency to rationalize, for the non-performing party to know whether she has defected.

79. Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799–800 (1941).

80. *Id.*

81. For a suggestion that giving weight to sunk costs can help someone make an initial resolution, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavior Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL L. REV. 1051, 1124–25 (2000).

82. See POSNER, *supra* note 1, at 152, 154, 156.

IX. IS A SIMPLE THEORY JUSTIFIED?

For methodological reasons, Posner emphasizes the austere version of his theory, in which the content of norms is irrelevant; all that matters is the signal sent by the cost of compliance. Any violation of a social norm will lead to ostracism: refusal to cooperate with the offender in any venture.

A simple theory can have significant advantages. One classic justification is Milton Friedman's argument that a simple theory may make better predictions than its more complicated rival theories.⁸³ With social norms, empirical testing is just beginning, so it is too early to tell which theories work best in practice.⁸⁴ However, the piceoeconomic theory of self-control has enough empirical support to remain in contention as a useful tool of analysis.

Additionally, Occam's razor⁸⁵ recommends acceptance of the simplest theory that is consistent with the facts to be explained. But this is not equivalent to saying simplicity is the only criterion for choosing a theory.⁸⁶ Occam's razor does not apply when every candidate theory encounters anomalies that are inconsistent with the theory's predictions.⁸⁷

A simplified version of a theory may facilitate an intuitive grasp that permits quick insights.⁸⁸ For example, someone familiar with a simplified version of Newtonian mechanics—one that omits qualifications like the effects of friction—can make quick

83. See MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 10 (1953).

84. But tentative judgments may be possible. See POSNER, *supra* note 1, at 38 (noting that "rational choice theory has some successes," which puts it ahead of its competitors); *id.* at 39 (stating that altruism can be rejected as an explanation for norm-driven behavioral regularities because it is inconsistent with much everyday behavior).

85. Occam's razor is an ancient proposition asserting that the simplest explanation is generally the best. See Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 *CORNELL L. REV.* 280, 283 (2002).

86. That criterion is sometimes advanced. Perhaps it should be called "Occam's meat axe."

87. Posner suggests that the anomalies encountered by rational choice theory may eventually be avoided by identifying the areas of social life where the theory works and the areas where it doesn't. See POSNER, *supra* note 1, at 38.

88. See, e.g., *id.* at 46 ("[Cognition and emotion] are just not well enough understood by psychologists to support a theory of social norms, and repeated but puzzled acknowledgments of their importance would muddy the exposition of the argument without providing any offsetting benefits.").

predictions about the behavior of a physical system. But often the right amount of simplification can only be obtained by exploring several versions of a theory. Both the empirical support for the piceconomic model of switching preferences and the intuitive appeal of the stories it tells suggest that a theory of social norms might well benefit from incorporating the insights of that model.

A simplified theory may also facilitate testing. Posner suggests that introducing qualifications will reduce the purchase of the theory, perhaps by making it consistent with a much wider range of evidence and harder to falsify. However, hard-to-specify but arguably relevant variables haunt the testing of any theory. Omitting arguably relevant variables from a statistical test creates the possibility that the results are undetectably affected by the omitted variables.⁸⁹ Thus, the simplicity of the theory will disappear when a careful empirical test is endeavored.⁹⁰

Finally, restricting oneself to a few assumptions facilitates analysis of the full range of their implications. But that should not preclude theoretical exploration of other assumptions. More theorizing may uncover phenomena that have been neglected.

X. CONCLUSION

Both Posner's cooperation theory of social norms and the piceconomic model of conflicting individual motives address the problem of defection in repeated prisoner's dilemmas. The cooperation theory explores the use of signaling through social norms that one will not defect from a joint venture; piceconomics analyzes the tactics that enable someone to resist the temptation to grab a smaller, short-run reward.

Analyzing the factors that lead someone to defect—even though cooperation would yield a larger, long-term reward—identifies problems with a strategy that links all social norms together and

89. Thus, developing empirical information and understanding of social norms, through exclusive reliance on an economist's tests, with statistical analysis of data collected for other purposes, would encounter serious handicaps. *See* POSNER, *supra* note 1, at 38 (noting that the measurements used by social scientists tend to omit significant subtleties in signaling).

90. *See id.*, at 37 (stating that an empirical test must take account of the possibility that compliance with a social norm reflects a taste for doing so rather than costly signaling).

treats a violation of any norm as a reason to shun the violator. The ability to comply with a norm and the importance of doing so will vary from norm to norm and from situation to situation. Compliance with some social norms will be easy, requiring little self-control. With other norms, there may be exceptions or imprecision, so that interpreting an apparent violation may be difficult. Violation of some norms may be unimportant, so that a violation might signal inattention rather than a propensity to defect. Someone who complies overscrupulously with norms may be revealing a significant fear of temptation or a costly inflexibility. Norms are often not free of content, so a violation may signal more than willingness to disappoint social expectations; it could signal creativity or lack of tact. As Posner recognizes, compliance with public norms is imperfect evidence that someone will withstand a great temptation to defect in secret. A person's values and self-discipline might be better evidence of her ability to withstand significant temptation.
