

GOVERNMENT, SIGNALING, AND SOCIAL NORMS

BOOK REVIEW: *Law and Social Norms* by Eric A. Posner (2000)

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I. INTRODUCTION

Legal scholars (and particularly law and economics scholars) have historically concentrated on analyzing the role of the law in influencing behavior, and have paid much less attention to other, more informal systems of control. In the past decade, however, the focus of legal scholars has broadened to include extralegal influences on behavior, such as social norms. One of the earlier works in this area was Robert C. Ellickson's 1991 book, *Order Without Law*, which examined how ranchers resolved problems related to wandering cattle without resorting to formal legal mechanisms.¹ In the 1990s, a number of scholars examined extralegal controls more closely, including Richard McAdams, Cass Sunstein, and Richard Posner.² Other scholars, such as Lisa Bernstein, have devoted considerable attention to the roles that norms play in specific settings, such as commercial interactions.³ One of the most prolific legal scholars in the area of social norms has been Eric Posner.

Eric Posner's recent book, *Law and Social Norms*, draws on his previous work examining the role that social norms, or more broadly "nonlegal mechanisms of cooperation," play in both life and the law.⁴

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

2. E.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

3. E.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

4. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 1-8 (2000) [hereinafter POSNER]. Posner's previous articles related to the issues of norms and extralegal enforcement mechanisms include: Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567

Posner offers a model in which people act in certain ways in order to signal to others that they have low discount rates. People with low discount rates ("good types") value the future highly relative to the present, and are willing to wait for future payoffs. People with high discount rates ("bad types") are more likely to seek payoffs today, even if it means sacrificing future payoffs. People with low discount rates are less likely to "cheat" in cooperative relationships; because they value future payoffs highly, they are less likely to abandon a relationship in search of more immediate rewards.

If a behavior is one in which good types would choose to engage, but bad types would not, then it can serve as a signal. People are willing to engage in costly signaling efforts (in terms of money, time, or effort) when they value sufficiently highly their future interactions with those to whom they send the signals. The lower the rate at which one discounts the future, the more valuable future gains from cooperation, and therefore the more willing one will be to spend money or effort on signaling. Posner defines a social norm as a behavioral regularity that results from people's signaling behavior.⁵ In other words, a social norm is simply an aggregation of discount rate signals.

Posner applies his signaling theory in a variety of contexts. So, for example, he argues that rather than giving gifts for altruistic reasons, people give gifts as a signaling device: by giving gifts, and especially by investing considerable time and effort in selecting gifts that suit recipients' tastes, gift givers can signal their commitment to a relationship.⁶ Or people may try to signal that they are good types by "shaming" those who have violated the law (or social norms), such as clients of prostitutes.⁷ Undertaking the relatively costly step of displaying a flag assures others that one is a good type, and so does taking the costly step of burning a flag.⁸ Signaling might also occur in the context of racial discrimination; someone might attempt to demonstrate a low discount rate to someone of his or her own race by discriminating against someone of another race.⁹

By applying signaling theory to a variety of situations, Posner achieves several of the goals he lays out in his introduction. In a manner

(1997); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101 (1997); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998).

5. POSNER, *supra* note 4, at 34.

6. *Id.* at 49-67.

7. *Id.* at 88-111.

8. *Id.* at 115-19.

9. *Id.* at 133-47. Posner also uses ideas about signaling to explore much broader themes. He considers the efficiency of social norms, explores the concept of incommensurability (the idea that money cannot always be used as a metric), and discusses the relationships among signaling and autonomy, privacy, and community. This review, however, will focus on his discussions of signaling and its relationship to social norms and the law.

accessible to noneconomists, he demonstrates the value of game theory, in particular signaling theory, in providing insight into the law and numerous social issues. He identifies a number of circumstances in which signaling theories explain behavior better than other types of theories; for example, a signaling theory of discrimination better explains the increase in discriminatory behavior during times of insecurity than does a simple "taste" for discrimination (because the need for cooperation is stronger during times of economic or political instability).¹⁰ A signaling theory also explains better than a taste theory why people might vote even when they see no difference between candidates (because the act of voting itself is the signal).¹¹

While Posner's application of signaling theory to such a wide variety of contexts is illuminating, his largest contributions to the study of social norms lie elsewhere. First, the book effectively marries a traditional law and economics approach to modeling behavior with an analysis of human interactions in the form of social norms. Second, the book significantly advances analysis of the interaction between law and social norms. Some early analyses of social norms treated them as alternatives to formal legal systems, without fully exploring the relationship *between* legal and non-legal systems. In particular, our knowledge of the mechanisms by which laws affect social norms is limited. Taking on this challenge, Posner poses the question "[c]an legal intervention eliminate stigmas, change customs and social norms, transform the meaning of symbols—or are these social facts unyielding in the face of self-conscious attempts at reform?"¹² He then provides a preliminary answer to this question.

Law and Social Norms makes considerable progress in developing our understanding of signaling and social norms, primarily through a modeling effort examined in more detail in part II of this review. But the book still leaves much to be explored. As part III explains, it is doubtful that the book's discount-rate model of signaling is sufficiently rich to be an adequate model of real-life behavior. The behaviors portrayed in the book's examples convey more information than just a person's discount rate, and in fact are likely chosen on the basis of their communicative capacity. As suggested in part IV, the need for signals to communicate more than just discount rates may be one reason why "norm entrepreneurs" play such an important role in establishing social norms. While this book does not devote much attention to the mechanics of norm entrepreneurship, an understanding of the process is an important prerequisite for the development of appropriate responses to socially destructive norms. Part V reviews the book's discussion of possible interventions in the signaling process, and suggests additional steps governments or others might take in their efforts to alter social norms. Part

10. *Id.* at 133–40.

11. *Id.* at 122–25.

12. *Id.* at 2.

VI considers how conclusions drawn from a signaling-based analysis of social norms might change as the future unfolds.

II. POSNER'S CONTRIBUTION: A RATIONALITY-BASED CONCEPTION OF NORM CREATION

Traditional law and economics scholarship has at its core the assumption that human beings act rationally. It generally proceeds by examining the payoffs that individual actors receive—monetary or otherwise—when they engage in various types of behavior. It then asserts that actors will choose the behavior that generates the highest payoff. For example, in a contractual context, a law and economics analysis suggests that a seller will breach a contract when its cost of performance is higher than the damages it expects to pay in the event of breach. The seller's expectation about the actions of the court will therefore affect the seller's decision to breach. In a criminal context, a law and economics analysis suggests that a potential wrongdoer will weigh the expected benefits of a crime against the expected punishment for the crime, adjusting for the probability the wrongdoer does not get caught. The potential wrongdoer's expectation about the actions of the court will therefore affect the potential wrongdoer's decision about whether to commit the crime. In each case, a law and economics analysis assumes that individuals will act rationally in response to a given set of payoffs, and then evaluates the effects of different payoff levels.¹³

Many analyses of social norms highlight the roles that they play in society, and explain how they (or the people who enforce them) can serve as extralegal mechanisms for influencing behavior. The social norm simply exists, and individually rational choices are determined with respect to the norm. So, for example, Richard Posner and Eric Rasmusen define a norm as a "social rule that does not depend on government for either promulgation or enforcement," and go on to explain the sanctions for violations of norms.¹⁴ The most common class of models of social norms in the legal literature is perhaps best summed up by Cass Sunstein: "Individual rationality is a function of social norms. The costs and benefits of action, from the standpoint of individual agents, include the consequences of acting inconsistently with social norms."¹⁵ In this literature, then, a social norm is much like the damage award for breach of contract, or the prison sentence for a crime. It can be reduced to a payoff to which individuals respond.

13. For a recent exploration of rational choice theory and the interaction between law and social norms, see Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1606 n.8 (2000).

14. Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 369 (1999). For a discussion of the legal literature's treatment of social norms as exogenous, see POSNER, *supra* note 4, at 227 n.5.

15. Sunstein, *supra* note 2, at 909.

This is not to say that authors have not contemplated the forces giving rise to social norms. They have.¹⁶ Many just tend to be agnostic about the actual mechanics of norm creation.¹⁷ Posner tries to rise to the challenge of demystifying the norm-creation process and is at least partially successful. He pushes the individual incentive-based law and economics modeling concept further than many other authors, by arguing that social norms are created through the aggregation of the actions of individuals. This is a fairly obvious point, given that an action becomes a "norm" when individuals "normally" do it (or refrain from doing it). But there must exist a force or mechanism that drives norms to *become* norms, and Posner suggests one. In Posner's model, an individual considers whether to engage in a particular type of behavior, recognizing that by behaving in a particular way, he or she communicates information about him or herself. By engaging in an action that is more costly for people with high discount rates than for people with low discount rates, a person can signal that he or she has a low discount rate and thus will be a good cooperater. As more people send a particular signal, it becomes a social norm. Thus, in the model, individual rationality is the basis not only for an individual's response to a norm, but also for the creation of the norm itself.¹⁸

Posner does not completely ignore the norm-as-payoff model. He points out that people may engage in cheap actions (ones that will not necessarily separate good types from bad types) to avoid punishment from others who are trying to signal their own types by undertaking the costly step of punishing deviators.¹⁹ Under the signaling conception of norms, however, such enforcement would not seem to be a prerequisite for the survival of a norm. If norms are simply the product of common signaling behaviors, people need not be compelled to comply with norms by the threat of sanctions; they will voluntarily choose to send a signal consistent with a norm. In this sense, Posner's conception of social norms differs substantially from many earlier conceptions, which relied on internalized senses of duty or external social sanctions to maintain social norms.²⁰

As Posner shows in examples throughout the book, the concept of norm as discount rate signal is a powerful one, explaining a variety of behaviors. More importantly, in exposing some of the mechanisms

16. See generally, e.g., McAdams, *supra* note 2, at 354 n.72; Posner & Rasmusen, *supra* note 14.

17. McAdams is one author who builds norms based on individually rational behavior. In his model, individual actors can increase their well-being by engaging in actions that obtain the esteem of others. McAdams, *supra* note 2, at 355.

18. Several economists have developed more formal models of norms based on the concept of signaling. E.g., B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994). For additional citations, see also POSNER, *supra* note 4, at 225-26 n.5.

19. POSNER, *supra* note 4, at 25-26.

20. McAdams, for example, explains that "[r]oughly speaking, by norms this literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both." McAdams, *supra* note 2, at 340.

underlying norm creation, Posner's model gives us a better idea of how to construct beneficial social norms or destroy harmful ones.²¹ But it does not provide a full account of social norm creation. A social norm may be the result of an aggregation of signals, but the term "norm" implies that it is a signal sent by the majority, or at least a significant proportion, of a given social group. When a variety of behaviors can serve as signals, what factors determine people's choices of signals? When will a particular signal become so popular that the underlying behavior becomes a social norm?²² As discussed in the next few sections, Posner's model can provide only limited insight into these larger questions.

III. SIGNALING, TASTES, AND DISCOUNT RATES

The model that Posner presents reduces human behavior to its most basic components. In the signaling model, people choose a costly action that others would not choose, thus revealing that they have a relatively low discount rate. A discount rate, which is a person's willingness to trade off present costs for future gains, is an important determinant of personal behavior. It can affect a whole host of decisions: whether you are willing to go to school now in exchange for a more desirable future career, or diet now in exchange for improved future health, or save now in exchange for future financial returns. And, most importantly for Posner's model, it affects your motivation to "cheat" in a relationship, seeking outside opportunities now, rather than investing in a relationship and waiting for the dividends it brings. People willing to wait for a payoff in the long term are less likely to cheat in the short term, and therefore are more likely to sustain cooperative relationships.²³

21. As Posner convincingly argues in chapter 10, *Efficiency and Distributive Justice*, there is no reason to expect that norms are efficient. POSNER, *supra* note 4, at 171-79.

22. One analyst of social norms has commented that social norms can serve as a foundation of social order, "helping to ensure that people will act in ways considered pro-social by their society, from taking care of their children to paying their taxes." Amitai Etzioni, *Symposium on Norms, Law & Order in the City: Social Norms: Internalization, Persuasion, and History*, 34 *LAW & SOC'Y REV.* 157, 159 (2000). But if social norms are simply the aggregation of signals, and a variety of behaviors can serve as signals, there is no reason to expect that these particular social norms would arise.

23. One study has shown an association between willingness to delay rewards (i.e., discount rates) in preschool years and various social measures taken years later. In the study, preschool-aged children were shown two objects, one more desirable than the other (e.g., two marshmallows and one marshmallow). The researcher told the child that if the child were able to wait until the researcher returned to the room, the child could have the object the child preferred. But if the child rang the bell, the researcher would return immediately and the child would receive the less preferred object. The study found positive, statistically significant correlations between delay time and parental ratings of academic, social, and "coping" competence a decade later. See Walter Mischel et al., *The Nature of Adolescent Competencies Predicted by Preschool Delay of Gratification*, 54 *J. PERSONALITY & SOC. PSYCHOL.* 687, 687-91 (1988). For an exploration of factors that affected children's delay times, see also Walter Mischel et al., *Delay of Gratification in Children*, 244 *SCIENCE* 933 (1989).

The study implies that there is indeed a correlation between discount rates and social success. Moreover, it demonstrates the wide variety of behaviors from which discount rates may be inferred; it suggests that an observer could predict social competence as an adolescent, based not on gift giving or

Because a person's discount rate affects so many behaviors, there are many potential signals of discount rates. But some signals will be better than others. Imagine, for example, that I decide to enroll in college but my neighbor does not. This decision involves an exchange of current costs for future benefits, and so could be interpreted as a signal of discount rate. But the college decision is not solely a function of discount rate. For example, I may enjoy college courses, while my neighbor does not; in this case, it is the difference in our tastes that drives the difference in college attendance. Or I may want to become a college professor, and therefore expect to obtain a higher future payoff from education than my neighbor, who wants to become a salesperson. Or perhaps we both want to become salespeople, and both expect the same future payoff from education, but I value the future payoff more highly than my neighbor. An observer trying to determine the more cooperative partner must be able to distinguish the discount rate component of our decisions, which the last example illustrates, from the educational taste and expected payoff components. In other words, if I go to college but my neighbor does not, an observer can only properly infer that I have a lower discount rate if my neighbor and I have equal tastes for education (the "taste assumption") and equal educational payoffs (the "payoff assumption").²⁴

Posner therefore is correct in commenting that before the shunning of identifiable homosexuals could become an effective cooperativeness signal, people would need "to believe that discrimination expressed a desire to signal cooperativeness rather than moral conviction, prejudice, or taste."²⁵ But this comment reflects only one of the prerequisites for an effective signal (i.e., that the taste assumption holds). People would also need to believe that everyone deciding whether to shun homosexuals had the same expected payoffs from doing so. The likely payoffs would depend on a variety of factors, including the moral convictions, prejudices, and tastes of the people with whom the signal-senders interact. If person *A* discriminated and person *B* did not, and both the taste and payoff assumptions held, then observers would correctly infer that *A* had a lower

flag waving, but on the consumption of marshmallows years earlier. The interesting question, then, is why some actions that generate information about discount rates (like gift giving) become signals (and social norms), while others do not.

24. The taste assumption is equivalent to an assumption that my neighbor and I face the same costs of engaging in the signaling behavior. If my neighbor and I face different costs of college attendance, then our decisions about attending college will not just be based on differences in discount rates. For example, if I currently make \$20,000 per year, while my neighbor makes \$30,000 per year, I am more likely to go to college than my neighbor, all else equal, because I am sacrificing less income. Or if I am able to obtain financial aid, while my neighbor is not, then all else equal, I will be more likely to attend college.

25. POSNER, *supra* note 4, at 127. Posner acknowledges the difficulty of interpreting signals when observers do not know all the relevant parameters, including tastes and endowments, *e.g.*, *id.* at 27, and skills and expectations, *e.g.*, *id.* at 52.

discount rate than *B*.²⁶ *A* would therefore be a better cooperator than *B*. In fact, because there is little reason to expect that a person's willingness to trade off current for future benefits would vary by context, *A* would *always* be a better cooperator than *B*, regardless of the nature of the cooperative activity, assuming, as always, that the taste and payoff assumptions hold.

This sort of "pure discount rate" signaling model does not do a particularly good job of capturing real-world phenomena, however. While one clear signal should be sufficient to convey information about a discount rate, or at least about relative discount rates, people engage in many behaviors that could be interpreted as signals. One reason for this may be that the signaling behaviors to which Posner refers communicate more information than just discount rate.

In fact, it is difficult to think of any action that conveys information about discount rate without conveying any additional information about the actor. An actor has many possible choices of signals, and when an actor chooses one, observers will ascribe a meaning to the actor's choice. Even if the actor is not consciously sending a signal, the actor is consciously choosing his or her actions, and again, observers will ascribe meaning to the actions.²⁷ This is the reason for which it is difficult to accept as an accurate characterization of reality Posner's scenario in which "[t]he buyer of widgets cares little about whether the seller is a patriot or not . . . [t]he buyer of widgets is attracted to the flag waver because the cost of flag waving implies that the flag waver has a low discount rate."²⁸

26. The connection between discrimination or nationalism and having a low discount rate is far from obvious. Posner hypothesizes that "discrimination against people with salient and immutable characteristics that systematically differ from those of desired cooperative partners serves as a signal to the latter that one has a low discount rate," and that people derive utility from discrimination only to the extent it "earns them reputational gains in cooperative relationships." *Id.* at 133-34. But it is unclear *why* discrimination should earn anyone reputational gains. Posner asks rhetorically why anyone would believe that people who discriminate have low discount rates, and speculates that equilibria can arise from historical accident, such as when a group has a connection to another group that threatens the majority (e.g., Americans of Japanese origin after the bombing of Pearl Harbor). *Id.* at 135. But this is more of an answer to a question about which groups fall victim to discrimination, rather than to a question about why discrimination makes sense at all. One possible explanation for discrimination would reintroduce taste into a signaling model. If I believe you have a taste for discrimination, and I have a low discount rate, then I might be willing to engage in discriminatory behavior that is costly to me in order to form a relationship with you that will result in future payoffs. Another possible explanation is that discrimination discourages cheating in relationships by reducing the number of outside cooperative opportunities available. This scenario is consistent with Posner's comments about demonstrating "loyalty" through discrimination, *id.* at 135, but does not involve discount rates; instead, it is an example of what Posner refers to as the "commitment model." *Id.* at 29.

27. Cass Sunstein explores the connection between social norms and social meanings, and discusses how meanings can change according to social context. Sunstein, *supra* note 2, at 925-26. Richard McAdams suggests that what an act signals depends on the norms that define the social act's meaning. McAdams, *supra* note 2, at 385. For further discussion of social norms and social meanings, see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) and Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996).

28. POSNER, *supra* note 4, at 116.

That most actions convey more information than just a discount rate is in fact critical to the development of many of the social norms that Posner describes. Posner tends to eschew "taste" theories of behavior in favor of signaling theories; he argues that people discriminate, send gifts, or vote in order to send signals, and not out of a taste for discrimination, altruism, or voting.²⁹ Yet tastes may ultimately play an important role in many of Posner's examples, by influencing actors' choices of signals. When cooperative payoffs hinge on the quality of interpersonal relationships, the most effective signals will convey two types of information. One is discount rate. The other is tastes and/or personality traits, characteristics that go far beyond relative valuations of the present and future.³⁰

Knowledge about tastes and personality traits is important because it gives signal recipients information about the potential payoffs from cooperation. It is true that if two potential partners are likely to generate the same payoff for me, I would prefer the partner with the lower discount rate. But at the same time, if two partners have the same discount rate, I would prefer the partner that can generate the higher payoff. Because the partner and I must work together, this payoff is likely to be a function not only of the partner's characteristics, but also of my own. I might look for someone whose tastes or traits are similar to mine, because similarity may improve communication, and thus increase future payoffs. Or I might simply enjoy interacting with someone whose views are similar to my own. Alternatively, I might look for someone whose traits differ from but complement my own, to increase the overall effectiveness of the relationship. A third possibility is to look for an indication of a particular trait that I believe to be associated with high payoffs in general, such as intelligence or generosity. Together, the two types of information, information about personality traits and information about discount rate, combine to give signal recipients some idea of the expected benefit of entering into a long-term relationship.

Posner implicitly recognizes the informational content of signals in several examples in the book. One prominent example occurs in the book's discussion of the use of a flag as a symbol. Posner points out that if the costs of flag-waver and flag-burner actions are such that separating equilibria exist (i.e., that some people find it worthwhile to take the action while others do not), both flag wavers and flag burners can show that they have low discount rates, and that they are good cooperators *within their respective groups*.³¹ The acts of burning and waving flags do

29. *Id.* at 49-50, 122-24, 133.

30. Posner does acknowledge that the potential cooperative payoffs of a potential partner matter. He notes that people are drawn to high-status people, where status is a function of a variety of characteristics, such as discount rate, business acumen, endowments, and generosity. *Id.* at 56-57. He does not, however, incorporate these characteristics into his signaling model. He also acknowledges that people may signal health or intelligence, but does not further consider how this signaling may affect his basic model. *See id.* at 225 n.3.

31. POSNER, *supra* note 4, at 117.

more than just say that the actors are "cooperative" types willing to incur current costs for future benefits. They help to define a group of people with whom the actor will be willing to cooperate. An observer trying to decide whether to join the flag burners or the flag wavers will make a decision on the basis of his or her expectations about which group will produce the higher cooperative surplus. The observer's expectations about cooperative surpluses are likely to be a function of the extent to which the observer shares the flag-burner or flag-waver beliefs about (or tastes for) free speech or patriotism.

The idea that behaviors provide more information than just the discount rate may also illuminate Posner's discussion of the violation of social norms. He notes that people may show loyalty to one another by violating the norms of a dominant group; teenagers may acquire a tattoo in order to show that they are not cooperative partners for adults. If they are not cooperative with adults, then they will become more reliable partners for teenagers because they have nowhere else to turn. In Posner's terms, this is the "commitment model," which is distinct from a signaling model, because it does not require a low discount rate to function.³² But this whole scenario could just as easily be recast as a signaling model. Teenagers undertake a costly (and painful) behavior, getting a tattoo, to signal that they have low discount rates *and* that they will make good cooperative partners with other rebellious teenagers. Posner recognizes that different groups may be governed by different norms; teenagers simply constitute a distinct group characterized by rebellious norms.³³

Another example of signaling behavior that may communicate multiple kinds of information is charitable donations. Posner argues that gifts are signals, explaining that they are observable and costly actions (in terms of money or effort in both determining an appropriate gift and acquiring it) that waste resources.³⁴ He then discusses status theories of gift giving, outlining a signaling-status model where people signal generosity or wealth through gift giving to charities. This type of model involves current spending in the form of donations, in return for the resulting respect—and cooperation—of others, such as opera-goers who read the names of donors in their programs. But note that again, the trait signaled is not just discount rate, but also generosity. Throwing money in

32. *Id.* at 29.

33. *Id.* at 28. At some point, the personality-trait component of a signaling behavior may overwhelm the discount-rate component. Behaviors such as speeding or taking drugs, because they involve risk to future health or life, suggest the presence of high discount rates, rather than low discount rates. People may undertake these behaviors because they have an intrinsic taste for them, or for their results. In this case, they might speed or take drugs even if no one else is aware of their behavior. On the other hand, they may undertake these behaviors to signal to others their *high* discount rates. Even though people with high discount rates make bad cooperators, others may want to associate with them because, for one reason or another, they receive a high payoff from interacting with (or gaining recognition from) people with high discount rates.

34. *Id.* at 50.

the river, while observable, costly, and wasteful, would probably not result in the same response from potential future cooperators.

The fact that charitable donations communicate information about traits like generosity or altruism is one potential reason for which nonprofit status matters. In analyzing legal implications of gift giving as signaling, Posner briefly discusses theories about why institutions such as operas and universities maintain a nonprofit status.³⁵ He cites Henry Hansmann for a theory that people will not donate money to for-profit operas, because they want it used to improve the quality of production, rather than the financial status of shareholders.³⁶ Posner argues that this claim assumes that people are irrational, because rational people would free-ride. He suggests instead that donors to a nonprofit institution may earn returns through enhancements to their reputation, that reputation will not be enhanced if the institution does poorly, and that donors' resulting pressure substitutes for the market discipline that would keep for-profit institutions in line. But perhaps a better explanation of nonprofit status is a combination of these two theories that takes into account the behavioral-trait component of signaling. People donate to institutions in part to signal to others their generosity or altruism. If an institution is for-profit, and it is successful, then it will return profits to its owners. Rather than supporting an institution that others see as providing some sort of social benefit, the contributions will instead go to specific individuals who may not benefit much from the money. The donor's contribution to a for-profit institution does not indicate the donor's generosity, and so cannot serve as an effective signal. In this sense, donating to a for-profit institution is like throwing money into the river.

Throwing money into a river would seem to be a good candidate for effectively signaling a discount rate, because it is unlikely to generate much intrinsic pleasure for the person tossing the bills into the water. If there is no pleasure or displeasure (or in an economist's terminology, utility) generated by an act apart from that associated with its monetary cost, the act provides a much clearer picture of the up-front investment that someone is willing to make for future returns. The clearer the investment, the easier it will be to infer someone's discount rate.

As Posner explains, governments may choose to increase the clarity of a signal in order to create or reinforce a social norm.³⁷ In the context of discrimination, for example, Posner suggests that norm entrepreneurs

35. *Id.* at 66-67.

36. *Id.* at 66 (citing HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996)).

37. Governments can also change social norms by making signals less clear. Lawrence Lessig suggests as an example that prior to the enactment of a law requiring seatbelts, a passenger may be afraid that wearing a seat belt implies distrust of the driver. Once a law mandates seat belt use, however, the signal sent by seat belt use is no longer so clear; a passenger may wear the seat belt because of distrust for the driver, or in order to comply with the law. McAdams, *supra* note 2, at 346 n.36 (citing Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 952, 1010-12 (1995)). Note that Lessig's conception of signaling is much broader than Posner's, incorporating messages such as "distrust," rather than just discount rate.

afraid of discriminatory signals losing their clarity might advocate anti-miscegenation laws.³⁸ There would seem to be more socially productive ways of creating clear signals, however. If all that is needed to generate a clear signal is certification of wasteful consumption or destruction of resources, then governments could fairly easily provide this function, as could private entities. They could solicit contributions, for example, and then use them in ways that benefit the public good. This transfer of goods would be wasteful from the point of view of the transferring entity, which loses control over the use of the money, but more beneficial to society as a whole than throwing money in the river.³⁹

And yet few real-world examples of purely wasteful behavior exist.⁴⁰ One reason is that, although quantifying the amount invested in such a signal should be easy,⁴¹ it does not communicate desirable traits like generosity, or any sort of affinity between the signal-sender and the intended signal recipient. In fact, it may communicate a taste for wastefulness, which in most contexts would not be an attractive quality. A second reason is that pure wastefulness does not communicate much information about a target signal recipient group, or the likely cooperative surplus with that group. Although Posner's discount rate signaling model goes far in explaining the creation of social norms, most behaviors convey more information than just the discount rate, leaving signal recipients—and analysts of laws and social norms—to sort out the mixed messages.

38. POSNER, *supra* note 4, at 138–39.

39. One article envisions the existence of private tax collectors who would support “money burning” signals by charging purchasers for their “services,” which would consist of nothing. As the article explains, however, it may be hard for private entities to resist giving secret price reductions. B. DOUGLAS BERNHEIM & LEE REDDING, OPTIMAL MONEY BURNING: THEORY AND APPLICATION TO CORPORATE DIVIDEND POLICY 17–18 (Nat'l Bureau of Econ. Research, Working Paper No. 5682, 1996).

40. Perhaps the best candidate for a purely wasteful signal discussed in the signaling literature is the payment of cash dividends by corporations. Because cash dividends are taxed more heavily than stock repurchases, they would not seem to be an optimal means of transferring cash to shareholders. One theory explains that “money burning” is important when high-quality firms cannot sufficiently distinguish themselves from low-quality firms given the cost structure of available signals; they must then engage in enough supplementary “money burning” that lower-quality firms cannot afford to send the same signal. Corporations may try to signal their profitability by burning money through corporate dividends (or more precisely, through the tax on dividends). Even in this model, though, preferences matter, because corporations can choose other money-burning signals, such as charitable contributions. BERNHEIM & REDDING, *supra* note 39, at 1–5, 10, 19–20.

41. Posner suggests that “burning money and running around in circles” would be problematic signals because these actions are uncommon and people are therefore unfamiliar with their cost structure. See POSNER, *supra* note 4, at 155. All else equal, more common actions will make better signals because observers better understand their cost structure. All else is not equal, however. When the money burned is visible, burning money should make an unusually good signal, because the cost of the action should be the same to all (unlike the effort involved in purchasing a gift, for example). Even the cost of running around in circles should not be difficult to quantify, because observers could easily replicate the action themselves.

IV. THE MISSING MODEL OF NORM ENTREPRENEURSHIP

The inclusion of "tastes" in economic models is often a matter of methodological convenience. If a modeler does not know or care why someone engages in a particular type of behavior, the modeler may assume that the person has a taste for the behavior, or the result of the behavior. Assumptions about tastes simplify models. In some cases, however, it may be important to understand the forces that create the taste. If people have an inherent taste for discrimination, for example, then it may be difficult to change their behavior. But if behavior that seems to result from taste actually results from attempts to signal a discount rate, then we may have more tools (or more effective tools) at our disposal to combat the behavior. In other words, if we avoid making convenient methodological assumptions about behavior and instead work to understand the forces underlying it, we may be able to respond to those forces.

These are not easy tasks. As explained previously, Posner tries to accomplish these tasks through his exploration of individual rationality-based signaling models. But unfortunately, in sacrificing the methodological convenience of taste, Posner must turn to another methodological convenience: the norm entrepreneur.⁴² The norm entrepreneur does a significant amount of work in Posner's conception of the signaling model. For example, public shaming is modeled as a phenomenon that begins when a shame entrepreneur sends a signal by shaming someone.⁴³ Those who witness the entrepreneur's actions may respond by shunning the target, or they may seize the opportunity to signal by more actively participating in the shaming. As more people respond by engaging in shaming behavior, others will feel compelled to signal by joining in, and the shame entrepreneur will have created a new signal. The new signal involves undertaking the costly activity of punishing someone who behaved in a deviant manner.

It is not at all clear, however, how the norm entrepreneur would draw his or her followers, especially the earliest followers. Given that there are many actions that could conceivably serve as signals, why should anyone choose the action suggested by the norm entrepreneur? In describing the role of the norm entrepreneur, Posner notes that senders of signals choose their symbols based on "custom" and "meanings provided by the *Zeitgeist*"; "salience" is also an important condition.⁴⁴ Norm entrepreneurs, meanwhile, shrink the pool of signals from which to choose.⁴⁵ They may contribute to the creation of focal points, which are very important to the development of social norms.⁴⁶ While all of these

42. For a discussion of the role of norm entrepreneurs, see Sunstein, *supra* note 2, at 909.

43. POSNER, *supra* note 4, at 89-90.

44. *Id.* at 31.

45. *Id.*

46. Focal points play a frequent role in Posner's descriptions of social norms. *E.g.*, POSNER, *supra* note 4, at 97 (conspiracy theories provide a focal point for discrimination), 114 (world events sup-

statements are no doubt correct, they do not provide much insight into how norms develop.

Justifications for adopting a signal in the early stages (i.e., before it becomes a widely recognized signal) include (a) an innate preference for the action that constitutes the signal, such as a taste for violence, or (b) a belief not only that this action is a signal of being a good type, but that for some reason it is necessary to send this particular type of signal. Consciously or unconsciously, the norm entrepreneur somehow imparts meaning to the signal. Your behavior standing alone may indicate to me that you are willing to sacrifice the present for the future and therefore meet the basic requirements of a good cooperator. But it may take the actions of a norm entrepreneur to help me understand that you will in fact make a good cooperator with me in particular.

Understanding the work of norm entrepreneurs is important because signals and norms can and do change over time. If we believe that some behaviors or norms are preferable to others, and we understand how to create a norm, then we can try to create socially beneficial norms and destroy detrimental ones. One example of this sort of endeavor is the many public service campaigns that governments and others undertake. Public agencies, for example, may try to serve as norm entrepreneurs in changing the meaning of smoking as a signal; commercials try to convey the idea that smoking is the antithesis of "cool." If we decide that we want to change norms, we need to understand how they arise.⁴⁷

Posner acknowledges but does not devote much effort to understanding the work of norm entrepreneurs, and probably rightly so. Such an analysis would take him far afield from his exploration of signaling and social norms. The tools of sociology and psychology, among other disciplines, seem especially suited to the examination of norm entrepreneurship. A good understanding of the interaction between law and social norms, however, will ultimately require a much better understanding of the creation process for social norms.⁴⁸

ply a focal point), 116 (flag as focal point), 170 (moon and moon cakes as focal points). While Posner occasionally refers explicitly to norm entrepreneurs creating focal points, *id.* at 142 ("entrepreneurs seized on one strand of a long tradition of discrimination . . . creating a focal point around which people could coordinate"), he also believes that focal points can arise spontaneously. *Id.* at 31. The signaling theory does not predict when the involvement of a norm entrepreneur is necessary for the creation of a social norm.

47. A recent article reported that colleges have abandoned scare tactics aimed at reducing binge drinking, such as posters showing students covered with vomit. On the theory that this strategy may have created the perception that "heavy drinking fits the model of the American college student," colleges are now advertising statistics indicating that most students are only moderate drinkers. The article noted that "[d]evotees call the campaigns 'social norms' marketing." Data from a few campuses indicate that the new approach might be working. Kate Zernike, *New Tactic on College Drinking: Play it Down*, N.Y. TIMES, Oct. 3, 2000, at A1. This approach accords with McAdams' theory that norms may change rapidly when new information is revealed about what a consensus actually is. McAdams, *supra* note 2, at 396.

48. An interesting and accessible recent book providing insight into the creation of social norms is Malcolm Gladwell's *The Tipping Point*. Recounting numerous anecdotes and citing previously pub-

V. THE ROLE OF GOVERNMENT

Although it does not fully explore the forces behind the creation of social norms, *Law and Social Norms* does not shy away from the issue. Recognizing that governments may want to create or destroy a social norm, the book considers how governments might take on this task (and the advisability of doing so). The book's insights are scattered throughout its chapters, but perhaps the most succinct statement about the legal tools available for influencing signaling behavior (and hence social norms) is found in a chapter discussing symbolic behavior:

First, the law can modify the cost of sending a signal. Second, the law can modify the payoffs from cooperation. Third, the law can modify people's beliefs about the proportion of types in the population. Fourth, the law can modify the norm entrepreneur's payoff from constructing a signal or the law can construct a signal itself.⁴⁹

Modifying the cost of a behavior can increase or destroy its effectiveness as a signal. For example, penalizing the burning of the flag can make it into a strong signal, because only people willing to bear the high costs involved will send the signal, or eliminate it as a signal, if no one is willing to bear the associated costs.⁵⁰ Modifying the payoffs from cooperation can also influence behavior; if the payoff from cooperation is very high, cooperation will be sustained even in the presence of a high discount rate, reducing the need to signal. Modifying beliefs about the proportion of types in the population affects the likelihood of signaling behavior; if there is a general belief that everyone is a good type, everyone will be willing to cooperate with everyone else without the need for signaling.⁵¹ Modifying the norm entrepreneur's payoff will make the entrepreneur more or less likely to construct a new signal. Finally, in addition to changing or eliminating signals, governments can create them; Posner cites the example of Martin Luther King Jr. Day.⁵²

But there are still other ways to alter social norms. One possibility is to actually change a person's "type," in the most basic sense: a per-

lished studies, it examines the spread of "epidemics" as varied as fashion trends and teenage smoking. Gladwell writes that "[e]pidemics are a function of the people who transmit infectious agents, the infectious agent itself, and the environment in which the infectious agent is operating." MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 18 (2000). Gladwell hypothesizes that epidemics are spread by a few exceptional people "through social connections and energy and enthusiasm and personality," *id.* at 22, people who could be called norm entrepreneurs. The examples in the book imply layers of real-life complexity that cannot be explored using the simple (but insightful) signaling models in *Law and Social Norms*.

49. POSNER, *supra* note 4, at 115.

50. The same reasoning could also be applied to the enforcement of norms, where enforcement is itself a signal. The government can reduce the cost of sending an enforcement signal by reducing the costs of detection of those who deviate from norms. As an example of cost-reducing government actions, Posner refers to the publishing of names of people who solicit prostitution. *Id.* at 94.

51. *Id.* at 120.

52. *Id.* at 30.

son's discount rate.⁵³ To the extent their discount rates fall, people will value their future payoffs more highly, and become better cooperators in general. Lowering discount rates can have at least two effects. First, it can increase the number of cooperative relationships into which I am willing to enter. The lower that discount rates are in absolute terms, the lower the likelihood that cheating will occur, and the more attractive cooperative relationships become. Second, it can change the identity of people with whom I ultimately cooperate. It may be true that I would prefer to interact with people with the lowest (relative) discount rates, all else equal, simply because the lowest possible discount rates allow partners to maintain cooperation even at very low levels of cooperative payoffs. In this case, interventions that lower discount rates across the board will have little effect on my choice of cooperative partners. But if the projects I consider have sufficiently high payoffs, and the potential cooperative partners have sufficiently low discount rates, then I need not conduct a rank-ordering of discount rates. People will not need to devote resources to signaling their type, and I will be willing to choose cooperative partners that I might not have otherwise chosen. (I also may choose different cooperative partners if interventions lower discount rates for particular groups of people.)

Changing relative valuations of the present and the future is likely to be difficult. The most obvious way of changing discount rates would be to convince people that they will live longer than they might otherwise expect. If I believe I will die young, then I will attach a very high discount rate to payoffs that will occur well in the future. But if I believe that I might survive to see those payoffs, I will be more patient in relationships that could generate high payoffs in the future. In other words, I will be less likely to cheat. Interventions that change expectations about the future can thereby change discount rates.⁵⁴

Another way that governments or others could intervene in the signaling and social norm development process is by changing the cost of information about a person's type. Signaling, which is costly, is undertaken because it conveys information about the type of a potential cooperative partner. If this information were available in another way, signaling would not be necessary. A government or other entity could publish

53. This argument is very similar to, but still distinguishable from, Posner's argument concerning beliefs about type. His argument is essentially that if I believe that the population is generally cooperative, I will interact with everyone despite a lack of signals. The main difference between his argument and this one is that a government may attempt to adjust people's beliefs about the cooperativeness of a population (for example, by changing beliefs about payoffs from cooperation, or by changing beliefs about discount rate), without actually changing the underlying parameters.

54. An empirical study of the finances of a drug-selling gang found that gang members actively engaged in the drug trade during a four-year period had a roughly one in four chance of dying. STEVEN D. LEVITT & SUDHIR ALLADI VENKATESH, *AN ECONOMIC ANALYSIS OF A DRUG-SELLING GANG'S FINANCES* 25 (Nat'l Bureau of Econ. Research, Working Paper No. 6592, 1998). If this figure is representative of gang members in general, they will likely have a very high discount rate, and little motivation to sustain relationships with long-term payoffs.

information about past behavior from which discount rates might be inferred. For example, it might identify contributors to a public cause (or even a private cause) through awards, medals, or other forms of recognition, much as charities publish the names of donors. This sort of publication would reduce the frequency with which signals would need to be sent, by increasing the number of people that any given signal can reach. Publication of prior behavior might not be sufficient to prevent signaling, because it might not reveal much information about the potential cooperative surplus in a given situation, but it will make information more cheaply obtainable.

Governments could also intervene in the signaling process by developing a screening mechanism. In a signaling model, a person who has knowledge about his or her own type sends a signal to reveal that type to others. In a screening model, an entity that does not have knowledge about people's types attempts to construct a set of choices in such a way that people will reveal their types through their choices.⁵⁵ Signaling models can sometimes result in pooling equilibria, where everyone undertakes the same action. At best, a pooling equilibrium conveys no information (because no one sends a signal), and at worst, it conveys no information yet is costly (because everyone sends a signal). An entity creating a screening mechanism, however, tries to design it in such a way that a separating equilibrium results (where some people send a signal, and others do not). One potential government screening mechanism is a state higher education system in which state residents choose among educational institutions stratified by cost and length of attendance required, among other factors. All else equal, the more effort and money that someone is willing to spend in the short term for a fixed level of benefits in the long term, the lower that person's discount rate.⁵⁶

The fact that government can intervene in the signaling and social norm development process does not mean that it should. Many of the steps that a government could take would violate the First Amendment, such as a prohibition on flag burning. Other interventions may not necessarily infringe upon constitutional rights, but would still raise objections among the public. One example of this is the recent controversy surrounding the inclusion of antidrug messages in television programs.

55. ANDREU MAS-COLELL ET AL., *MICROECONOMIC THEORY* 460-67 (1995).

56. "All else equal" is a condition that is rarely met in the real world. People often differ, for example, in the amount of money at their disposal. When signaling is financially costly, some people will be unable to signal. In his discussion of gifts, Posner points out that if capital markets functioned properly, some people would actually borrow money to give expensive gifts as signals. POSNER, *supra* note 4, at 51. Governments can smooth the functioning of capital markets for people who are liquidity-constrained, allowing people facing budget constraints to signal. One example of this is government-supported school loans, which permit people who might otherwise not be able to afford tuition to send signals by attending school. This argument could be viewed as a variant of the point that governments can affect signaling by changing the costs of signaling; for liquidity-constrained people, government intervention can effectively lower the cost of signaling from infinity to something more manageable.

Networks submitted television shows to the White House Office of National Drug Control Policy, which reviewed them to determine if the network should be given credit for making a public service announcement. While both public service announcements and the story lines of television shows can communicate messages to the public, only the government's review of television shows raised concerns about government control of media content.⁵⁷ People are clearly wary of some forms of government involvement in the norm creation process.⁵⁸

VI. CONCLUSION

While discussing and analyzing many topics related to law and social norms, *Law and Social Norms* leaves room for future exploration. One question that deserves further investigation is the interaction between law and norms. Despite being justifiably reluctant to advocate legal intervention in the signaling and norm development processes, Posner suggests in at least one context (with respect to illegitimacy-related stigma) that laws can displace outdated nonlegal enforcement mechanisms.⁵⁹ But it is not clear how this would happen. It would make an interesting case study to trace the actual process through which laws have displaced social norms, particularly when the law and social norms were fundamentally at odds. Which of the tools that Posner outlined were used to accomplish this purpose?⁶⁰

Another issue which could be addressed in future work is whether, or how, signaling will change with changes in society. For example, imagine that geographic mobility increases for a given segment of society. It may be that people who move need to signal more, because they know their neighbors less well. But at the same time, to the extent that signals are developed within geographically based communities, geographic mobility may increase confusion about the interpretation of signals, and thereby decrease their effectiveness. The Internet also has an uncertain effect on the transmission of signals. The Internet reduces the cost of information transmission, including transmission of information

57. Marc Lacey & Bill Carter, *In Trade-Off with TV Networks, Drug Office Is Reviewing Scripts*, N.Y. TIMES, Jan. 14, 2000, at A1.

58. Some of the most powerful arguments against government interference are not constitutional, but practical. POSNER, *supra* note 4, at 117-19.

59. Noting that an illegitimacy stigma has outlived its purpose, Posner writes that the "historic rise of a public family law, then, might be seen as an effort by authorities to substitute neutral legal enforcement mechanisms for more chaotic discriminatory nonlegal enforcement mechanisms." POSNER, *supra* note 4, at 84.

60. One case study that has explored the interaction between law and social norms in the area of family law is Li-Ju Lee, *Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law*, 8 S. CAL. REV. L. & WOMEN'S STUD. 413 (1999). The author argues, with respect to conflicting law and social norms, that "legal reform, though having only a limited initial impact on social norms, creates an opportunity to overhaul social norms, and is even able to weaken certain social norms by creating new, competing norms." *Id.* at 415. It is not clear, however, how Lee's discussion of the effects of societal change can be reinterpreted in terms of a signaling model.

concerning previous signaling behavior. At the same time, the Internet facilitates interactions of strangers, and this could increase the need for signaling. It is difficult to predict how signaling, and therefore the development and enforcement of social norms, might change in the future.

Ultimately, policy makers must decide whether they want to try to influence the signaling process. In *Law and Social Norms*, Eric Posner persuasively argues that "it will often be desirable for the state to modify signaling equilibriums, but it will often be the case that it cannot."⁶¹ Signals like discrimination can create considerable social harm, and society would gain if they were replaced by effective signals that on net produce social good.⁶² Unfortunately, as Posner explains, the effects of intervention can be unpredictable; for example, even if society were to successfully destroy a problematic signal, another objectionable signal might take its place.⁶³ In addition, it can be difficult to change social norms through the use of the law, because politicians may fear the consequences of not adhering to prevailing social norms themselves.⁶⁴ On the other hand, change is the primary function of leadership—or rather, norm entrepreneurship.

61. POSNER, *supra* note 4, at 32. For an analysis of the efficiency (or lack thereof) of social norms, see *id.* at 171–79.

62. *Id.* at 33.

63. For a discussion of the importance of considering substitute symbols in the context of marriage law, see *id.* at 72. For a more in-depth discussion of the difficulty of predicting the effect of laws on social norms, see *id.* at 117–19 (on the many possible effects of a law requiring respect for the flag).

64. *Id.* at 131. Posner also suggests that government-led norm entrepreneurship can be problematic, because groups advocating different symbols (or norms) will consume resources in vying for governmental support. *Id.* But any decision-making process involving the gathering of information, including information about divergent views, is necessarily costly. The ultimate question is whether the action resulting from the decision-making process will sufficiently increase social welfare to justify the resources consumed in making the decision. Admittedly, this is a difficult question to answer.

