

Changing People's Preferences by the State and the Law

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In standard economic models, two basic assumptions are made: the first, that actors are rational, and the second, that actors' preferences are a given and exogenously determined. Behavioral economics — followed by behavioral law and economics — has questioned the first assumption. This Article challenges the second one, arguing that in many instances, social welfare should be enhanced not by maximizing satisfaction of existing preferences but by changing the preferences themselves. The Article identifies seven categories of cases where the traditional objections to intentional preference change by the state and the law lose force and argues that in these cases, such a change warrants serious consideration. It then proposes four different modes of intervention in people's preferences, varying in intensity, on the one hand, and in the identity of their addressees, on the other, and explains the relative advantages and disadvantages of each form of intervention.

INTRODUCTION

Standard economic models make two basic assumptions: the first, that actors are rational, and the second, that actors' preferences are a given and

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exogenously determined.¹ Behavioral economics — followed by behavioral law and economics — has questioned the rationality assumption, with scholars in the field showing time and again that actors are often irrational in predictable ways.² Today, behavioral economics is justifiably considered an important subfield of economics.

This Article challenges the second assumption of the economic (and law and economics) models. It argues that in many instances, social welfare should be enhanced not by maximizing the satisfaction of existing preferences but by changing the preferences themselves.

To illustrate, imagine that in State X, people have strong preferences for sweet (and, let's assume, unhealthy) food. If preferences are taken as a given, the state should aim to maximize the satisfaction of the sum of all of its constituents' preferences, including for sweet food. Alternatively, the state could aim to change people's preferences for sweet food and, once that has been accomplished, maximize the satisfaction of all existing preferences, including the newly acquired ones. It is possible that most or even all individuals would thus be better off in terms of satisfying their preferences. First, those people with a preference for sweet food would now be healthier and happier than they were before the change to their preferences. Second, perhaps some social resources (such as the costs of manufacturing sweet food products) would be saved and directed instead to satisfying other preferences of the former sweet-food lovers or the preferences of other people.

So should the state consider changing its constituents' preferences as a social welfare-enhancing measure? Is it even appropriate for the state and the law to intervene in peoples' preferences to try to change them? Many preferences — such as those relating to sexual orientation — are rightly considered by many to be either unchangeable or such that the state should not intervene in. Other preferences are considered to merit being changed by the state or by others. For example, parents often try to change their children's preferences, as teachers try to shape their pupils' preferences. The state attempts to change value preferences by, for example, educating its citizens to be loyal to the state or to preserve the environment. Market forces transform people's preferences on a daily basis; Facebook, smartphones, and personal

1 See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 5 (1976) (presenting the fundamental economic assumption of stable preferences).

2 See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998) (presenting behavioral economics studies that challenge the rational actor assumption and discussing their implications for the economic analysis of law).

computers are just a few of the abundant examples of how the market can radically change people's preferences.³

While the market, the state and sometimes the law commonly shape people's preferences, *intentional* and, in particular, coercive intervention in those preferences by the state and the law is generally considered to be illegitimate and even dangerous (with a few exceptions, such as soft education for commonly accepted values). Why is this so? Suppose that the state's goal is to change people's preferences in order to maximize social welfare, thereby making every individual better off. Would such a goal be objectionable? Would changing people's preferences for unhealthy food be a legitimate goal for the state to pursue if we assume that all consumers will be better off once the change takes place? Alternatively, suppose (even though there is no good reason to assume this) that social welfare would be enhanced were all people to have heterosexual preferences. Very few would argue that the state should intervene to change people's sexual orientation — a central characteristic of many people's identity — even if no individual would be worse off. The question that arises, then, is what underlies the opposition to the state's changing people's preferences.

A number of objections can be raised against intentional state intervention in people's preferences. We discuss them in Part I of the Article.⁴

Insofar as those objections are intended to be general and broad in scope, they lose force once we acknowledge that in actuality, the state and the law influence our preferences in most aspects of our lives and, more importantly, that this is entirely unavoidable. Rights and duties, the allocation of private and public resources, and the social structure in which we live shape our preferences from the moment we are born. This seems to occur unintentionally, implicitly, and coincidentally, but it nevertheless occurs universally. So if this is the case, why should the intervention not be purposive, explicit, and with appropriate awareness, thereby making transparent a process that is currently obfuscated and surreptitious?⁵ Transparency would make the process of

3 The widespread use of smartphones, for example, could be explained by the network effect: the more people who have smartphones, the more beneficial it is to use them. Yet clearly, there is more to the choice of many to own a smartphone; it derives also from their (relatively new) preference to be in constant contact with others.

4 *Infra* Section I.B.

5 At the same time, it could be argued that coincidental changes of preferences by the state are inevitable and their presence does not justify intentional changes.

preference change by the state subject to public (as well as judicial) scrutiny and consistent with the basic tenets of liberal democracy.⁶

I begin in Part I by laying out what “preferences” will refer to in this Article. I distinguish between internal and external preferences and among preferences that are tastes, preferences tied to personal characteristics or tendencies, preferences relating to other people, preferences relating to ways of life, and preferences motivated by personal values. The discussion then elaborates on possible objections to the state changing preferences. This sets the stage for the Article’s main claim, put forth in Part II, namely, that at least in some circumstances, these objections lose their force, mainly because the benefits of state intervention exceed its costs. Based on the Article’s previous Parts, Part III proposes four possible ways the state can intervene in preferences.⁷

I. PREFERENCES AND OBJECTIONS TO INTENTIONAL STATE AND LAW INTERVENTION

This Part of the Article lays the groundwork for identifying cases in which at least certain modes of intentional state and law intervention in people’s preferences can be expected to trigger fewer objections than in other cases. Section A defines “preferences” for the purposes of this Article, explaining that the term is used in a far broader sense here than how it is generally used by economists. Section B then elaborates on central, possible grounds for objecting to the state changing preferences.

A. Defining Preferences

To define preferences, I will first exclude what can be termed external, as opposed to internal, preferences. External preferences refer to people’s desires

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- 6 Cass Sunstein asserted, in an article he published in 1986, that existing objections to changing private preferences through the law notwithstanding, this should be done, for the most part, in cases where some type of collective-action problem is preventing a desirable change. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). Here, I add several categories of cases to those Sunstein discussed, as well as offering more general guidelines for state intervention. In particular, I suggest various ways of changing people’s preferences, including “nudging,” a technique proposed by Thaler and Sunstein for changing people’s behavior but not preferences, RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2009), and show how they can be applied in different contexts.
- 7 Cf. Amir N. Licht, *Law for the Common Man: An Individual-Level Theory of Values, Expanded Rationality, and the Law*, 74 LAW & CONTEMP. PROBS. 175, 188 (2011) (presenting the psychological aspects of preference change).

to give precedence to one act or state of the world over another when this is motivated by either threat of sanction or promise of benefit from others. A person who likes smoking might have an external preference *not* to smoke because he fears legal sanctions or expects condemnation from his friends and family. A person might have an external preference not to smoke also because the price of cigarettes has gone up or he has been offered a monetary reward if he stops smoking. Such preferences are beyond the scope of this Article, which focuses on internal preferences, namely, those preferences that are generated by internal, rather than external, forces. For example, the person who likes smoking has an internal preference to do so even though his external preference is to stop smoking.

Internal preferences (which I will hereinafter refer to simply as “preferences”) can be both strictly and broadly defined. Strictly defined, they are the desires people have, when motivated by internal forces, to favor one act or state of the world over another. Broadly defined, preferences include also the values and tastes people have that affect and shape their strictly defined preferences. In this Article, preferences will be broadly, rather than strictly, construed.

What preferences do people have? One type of preferences is *tastes*, for example, a preference for sweet food. Someone with a taste for sweet food will be driven to prefer (strictly speaking) one type of food (sweet) over another type (non-sweet).

A second type of preferences relates to *personal characteristics* or *tendencies*, like sexual preferences, for example. A man's homosexual tendencies result in his preference (strictly speaking) for intimate relations with a man rather than with a woman.

A third type of preferences relates to *attitudes towards other people*, such as racist preferences. A person with racist preferences prefers (strictly speaking) the company of people from one or more races to the company of people from another race or other races.

A fourth type of preferences is connected to *ways of life*, for example, the preference to live as part of a family unit or to be connected to many (or few) people. A person with a preference to live as part of a family unit prefers (strictly speaking) getting married (or living with a common-law partner) to remaining single.

Fifth and lastly, there are preferences that are tied to *values* that people hold, such as solidarity, individualism, or materialism.⁸ A person with a preference

8 The term “preference” could relate to almost everything, including matters that are in no way connected to the well-being of the preference holder (say, an American citizen with a preference that the Israeli prime minister be good-looking). Therefore, some argue, the only preferences that should count are

for solidarity, for example, might prefer (strictly speaking) to support (morally or materially) certain groups or communities with whom she identifies over not supporting those groups or communities.

It becomes clear, then, that preferences often involve views and moral stances that might be based on accurate or false evidence or beliefs. Thus, a person might prefer sweet to non-sweet food based on the mistaken perception that the former is healthier than the latter; he might prefer to avoid social interaction with gay people, mistakenly believing homosexuality to be immoral; he might have racist preferences regarding ethnic minorities, mistakenly holding them to be inferior; or he might prefer not to smoke or to eat excessively even though he enjoys both, simply because he believes smoking and overeating to be unhealthy. Even addictions are preferences under this Article's terminology, regardless of whether the addict prefers, in a deep sense, not to be addicted.⁹

Certain distinctions emerge amongst the examples presented thus far: between authentic and acquired preferences; between preferences that are central to an individual's personality and preferences that are peripheral to personality; and between preferences with a moral or value dimension and preferences that lack such a dimension. While these distinctions are important in any discussion of preferences and the various options for changing them, all of these preferences are related to as simply "preferences" in the discussion in this Article.

those that relate to the preference holder's life or well-being. *See, e.g.*, DEREK PARFIT, *REASONS AND PERSONS* 484 (1987). *But see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 275-76 (1980). Dworkin distinguishes between external preferences, which relate to other people, and internal preferences, which relate to the preference holder. According to Dworkin, only the latter should count. *See also* AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 14-15 (1999), who maintains that a person's private preferences derive from his conception of what he can attain.

- 9 There are philosophers who would consider only rational preferences based on a deliberative process in which a person chooses her own rational ends to be internal preferences. This is a Kantian conception, under which only rational behavior, which is directed at choosing the right end, is authentic and not subject to external motivations. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (H.J. Paton trans., Harper Torchbooks 1964) (1785). By this conception, a preference for sweet food is an external rather than internal preference (of the body and not of the mind). In contrast, Hume argued that as a purely empirical matter, we cannot talk about any preferences being authentic or essential to a person. DAVID HUME, *A TREATISE OF HUMAN NATURE* 293-96 (Dover Publications 2003) (1740).

B. Against Intentional State Intervention

Why should intentional state and law intervention in people's preferences not be allowed as an intermediate measure towards maximizing social welfare? On what grounds could this be opposed?

One argument against such intervention concerns *personal freedom*: regardless of whether changing a person's preferences enhances her welfare, her freedom would be infringed. Per this argument, freedom precedes welfare, at least insofar as the basic freedom to shape one's preferences is concerned. Interfering with this freedom, the argument goes, is analogous to cloning human beings as it alters their self and identity.

This argument rests on the premise that a person should have the freedom to choose her preferences just as she has the freedom to choose her way of life, even when those choices impair her welfare.¹⁰ Thus, a person's preference to smoke should be respected regardless of the proven risks that preference subjects her to, and the state should not intervene in her choice.

A different angle to this argument is that interfering in people's preferences infantilizes them.¹¹ Rather than being instigated by mental evolution and growth or a simple learning process, the changes to people's preferences will be the outcome of the state's paternalistic intervention. Commonly raised regarding paternalistic intervention in behavioral choices,¹² this objection is no less valid — if not more so — when preferences are at stake. In the case of smoking, for instance, there is much merit to smokers' undergoing a process of realizing that their smoking preferences are detrimental to their well-being and changing them accordingly. When the state assumes responsibility for

10 See Amartya Sen, *Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms*, 45 OXFORD ECON. PAPERS 519, 524 (1993). Sen takes the “process aspect of freedom” to include decisional autonomy and immunity from interference. The former, he stresses, “is concerned with the operative role that a person has in the process of choice ... [T]he crucial issue here is self-decision, e.g., whether the choices are being made by the person herself-not (on her behalf) by other individuals or institutions.” *Id.*

11 Cf. Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1070-71 (2012) (arguing that paternalistic intervention in individual decision-making “tends to infantilize the public”).

12 CASS R. SUNSTEIN, WHY NUDGE? 94-96 (2014) (presenting the objection to soft paternalism on the grounds of possible public infantilization).

detecting and changing such preferences, individuals may be led into a state of atrophy.¹³

A *second argument* against preference changing by the state centers on the *abuse of power* concern. According to this argument, since political power is always coercive and backed by the state's ability to impose sanctions,¹⁴ the state is likely to exploit its power to change people's preferences in a way that serves its own interests rather than those of the individuals.¹⁵ Such changes should therefore be prohibited or, at the very least, strictly limited. This argument is a derivative of the basic idea that the ruler's authority should always be limited given the danger that it will try to capture more than its fair share of the "good."¹⁶ This concern also arises with respect to paternalistic intervention by the state in general,¹⁷ and it has even greater force regarding preferences: intervention in preferences is analogous to subordinating citizens to the will of the monarch through brainwashing and similar techniques.

In abusing its power, the state could be *internally* motivated by the interests and views of the policymaker herself. Such would be the case, for example, when a conservative administration promotes prolife preferences or a liberal administration promotes prochoice preferences regardless of how such a change could impact social welfare. The state's motivation could also, however, be *externally* driven, the product of the lobbying of a nongovernmental actor.¹⁸ This would be the case when a fast-food corporation used its political clout to promote a change in people's taste preferences, thereby benefiting itself at the

13 Cf. JOHN STUART MILL, ON LIBERTY 37 (David Bromwich & George Kateb eds., 2003) ("The mental and moral, like the muscular powers, are improved only by being used.").

14 JOHN RAWLS, POLITICAL LIBERALISM 136 (1993) (discussing the features of political power within constitutional regimes).

15 There are any number of alternatives for intervening in people's preferences. Some would be more objectionable than others because of the risk of abuse of the state's power. See *infra* Part III. THALER & SUNSTEIN, *supra* note 6, famously advocated intervening in people's behavior (not preferences!) through "nudging." This suggestion has drawn some criticism, to which Sunstein has attempted to respond in SUNSTEIN, WHY NUDGE?, *supra* note 12, at 12.

16 John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in NATURAL LAW, LIBERALISM AND MORALITY 1, 2 (1996) (discussing the justification for limited government).

17 MILL, *supra* note 13, at 143-44 (arguing that intervention in a person's life is justified only when she inflicts harm on others).

18 A similar concern has been raised as an objection to soft paternalism. *The State Is Looking After You*, ECONOMIST (Apr. 6, 2006), <http://www.economist.com/node/6772346>.

expense of the public good. What is troublesome in such cases, in other words, is not that efforts to change preferences are unilateral, with the state the sole initiator of the change, but rather that they are bilateral or multilateral, with interest groups seeking to change the social planner's preferences,¹⁹ who, in turn, would implement policies that impose those preferences on the public.

In the common abuse-of-power scenario, there would be a "slippery slope,"²⁰ where the state gradually eases its restraint and intensifies its intervention for the sole purpose of furthering its own objectives and interests. There are two ways in which this could happen: through an intensification of *means*, whereby the state unnecessarily and disproportionately shifts from soft to harsh intervention or, alternatively, resorts to progressively less visible means of persuasion;²¹ or through an intensification of *scope*, whereby the state begins to take avenues of intervention initially deemed excessively pervasive or offensive, such as intervention in sexual preferences.

The concerns regarding state overreach are exacerbated by the lack of transparency that intervention policies tend to suffer from. Coercive forms of intervention²² can be expected to be conducted in public view; this would be the case, for instance, with the prohibition of an activity that is intended to impact private preferences to engage in that activity. However, subtler and softer forms of intervention²³ might not be publicly visible, as their effectivity hinges on a certain degree of ambiguity. Sunlight has been called the best of disinfectants,²⁴ so it is clear why already-suspect intervention intensifies concerns when performed behind the veil of opacity. Even a state that severely

19 See Mingli Zheng, *Lobbying for Wealth Redistribution by Changing the Social Planner's Preferences*, 26 J. THEORETICAL POL. 79, 79-92 (2013) (modelling the effects of interest group lobbying on a framework for changing the social planner's preferences).

20 See THALER & SUNSTEIN, *supra* note 6, at 236-38, who debate a similar slippery-slope objection in the context of state intervention in people's behavior. For an example of such an objection, see Douglas Glen Whitman & Mario J. Rizzo, *Paternalistic Slopes*, 2 N.Y.U. J.L. & LIBERTY 411 (2007) (reviewing and analyzing the relationship between the slippery-slope argument and paternalist policymaking).

21 See Riccardo Rebonato, *A Critical Assessment of Libertarian Paternalism*, 37 J. CONSUMER POL'Y 357, 368-69 (2014) (applying the slippery-slope argument to the possibility of modes of influence becoming less overt).

22 *Infra* Sections III.A-B.

23 *Infra* Sections III.C-D.

24 LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (Harper Torchbooks 1967) (1914).

infringes on civil rights and acts against the will of its people cannot be held accountable if its actions are not subject to proper public scrutiny.²⁵

A *third argument*, which is related to the second one, focuses on *the role of the state*. Per this argument, the state should take a neutral stance on people's preferences.²⁶ The main justification for this is that people have many different and, at times, conflicting conceptions of what constitutes the "good," while the state's traditional role of promoting the good cannot encompass all of those conceptions.²⁷ Accordingly, under liberal political theory, the state's role should be limited to protecting and enforcing the most fundamental civil liberties and political rights, producing public goods, and enabling all individuals to pursue their own conceptions of the good.²⁸ It is the state's duty, therefore, to set the boundaries within which individuals live their lives and guarantee the conditions necessary for them to fulfill their hopes and ambitions as they see fit.²⁹

Given this, the state should not determine which preferences are the "right" ones for individuals and intervene to promote them, even if this would not amount to an abuse of its power. For example, a particular group within the state might impose conservative dress codes on its members as part of its religious ideology, while other groups might strongly oppose this norm as oppressive. Under the logic of the role of the state argument, the state should not interfere with the former group's preferences or actions even if positive utility effects can be expected from this intervention, for it would be akin to

25 For a discussion of publicity concerns in the context of soft paternalism, see SUNSTEIN, *WHY NUDGE*, *supra* note 12, at 144-51. *See also* Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 151-52 (2006) (objecting to soft paternalism due to the greater difficulty of monitoring it as compared to hard paternalism).

26 RAWLS, *supra* note 14, at 133-211 (explaining that the state ought not to privilege one conception of good over another).

27 RAWLS, *supra* note 14, at 134-36, 191-92.

28 JOHN RAWLS, *THE LAW OF PEOPLES* 172-73 (1st ed. 1921) (1999) (discussing the basic liberties the state should protect).

29 Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852, 854 (1989) (defining the proper role of the state under liberal political theory); Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1539 (1983). *But see* Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, 7 MIDWEST STUD. PHIL. 89, 116 (1982), who differentiates between taking coercive measures against morally unacceptable activities (which he rejects) and fostering positive ideas while suppressing the conditions that make negative ideas appealing (which he supports).

depriving religious freedom and preferring a progressive notion of the “good” over a conservative one.

The fourth and last argument relates to *uncertainty*: it is often unclear whether the state's intervention in preferences would actually increase and not decrease social welfare. This argument tends to be supported by both economists and legal economists.³⁰ In constructing their models, economists commonly assume preferences to be a given and exogenous (i.e., not shaped through state intervention). While primarily motivated by a desire to simplify a rather complicated model, this assumption rests on the premise that it is too difficult to predict how intervention would change individuals' preferences. The resulting conclusion is that the state should not intervene in preferences, since intervention cannot be justified if we cannot predict the outcome.

But there is another dimension to the uncertainty argument: if the state's goal is to maximize the utility of the satisfaction of existing preferences, there is no need to measure the utility that people derive from their preferences. It is sufficient that the preferences are satisfied, since more satisfaction means more utility, or welfare, and that is all that matters. Yet this does not apply when the state's goal is to change preferences in order to increase social welfare: here the state *should* measure the utilities of existing preferences, compare them with the utilities of the potential preferences, and decide accordingly whether the change is worth pursuing. Measuring utilities and conducting the necessary comparisons could be a formidable task for the state.³¹ Therefore, even if we could resolve the uncertainty about the change that the state's intervention in preferences would bring about, the uncertainty as to whether that change would be good or bad would still remain.³²

30 LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 413-31 (2002) (suggesting that changing undesirable preferences might be welfare-enhancing and discussing the problems with identifying such preferences).

31 *Cf.* Glaeser, *supra* note 25, at 151 (arguing against soft paternalism on grounds of expected errors).

32 *Cf.* Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government*, in *THE COLLECTED WORKS OF JEREMY BENTHAM* 393 (J.H. Burns & H.L.A. Hart eds., 1977). Bentham argues that a person's happiness is valued according to her balance of pleasure and pain. Therefore, the state bears a duty to increase the amount of pleasure for the greatest number of people. Mill, who distinguished between higher and lower pleasures, argued that higher pleasures are generally more intellectual than physical (for example, the pleasure in practicing philosophy versus the pleasure derived from tasty food). JOHN STUART MILL, *UTILITARIANISM*, at ch. 2 (Oskar Piest ed., Bobbs-Merrill 1957) (1861).

The four objections to intentional preference change by the state discussed above are not without merit. They can explain the resistance of many economists and moral philosophers to the idea that changing preferences can sometimes be a desirable intermediate stage on the way to maximizing social welfare. Part II now proceeds to identify categories of cases in which some of these objections are less compelling than usual, mostly because the benefits of state intervention in people's preferences exceed its costs.

II. WHEN OBJECTIONS TO STATE INTERVENTION LOSE FORCE

There are various ways in which preferences are first acquired and then subsequently altered. Some preferences can be changed by the preference holder himself, with or without the assistance of others; other preferences are difficult to change without state intervention. Some preferences have almost no external effects on third parties, while others do. Some preferences do not truly, in a deep sense, constitute preferences, whereas others are genuine preferences. Finally, some preferences relate to people's identity and personality, and others are peripheral. These variations in preferences are relevant to whether intentional state and law intervention to change them is desirable. This Part will respond to this question by identifying cases, or conditions, in which intervention might be justified.

A. Adverse Effects on Others

A common justification for the state and the law to intervene in people's behavior is when that behavior adversely affects other people's interests. This is the rationale for tort law, for example.³³ Likewise, in contract law, the imposition of negative externalities on third parties is a common justification for intervening in contracts: a contract will be found unenforceable on public policy grounds when it can negatively affect third parties or society at large.³⁴ In addition, a common justification for regulations is the need to restrain activities that put third parties at risk.³⁵

The possibility of preferences' creating negative externalities for third parties undermines the objection to state intervention. Clearly, the risk of negative externalities per se would not necessarily be a sufficient condition for

33 DAN B. DOBBS, *THE LAW OF TORTS* 12 (2000).

34 RESTATEMENT (SECOND) OF CONTRACTS §§ 178-99 (1981).

35 *See generally* A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932) (proposing that externalities be remedied through regulation in the form of taxes).

intervening in the risk-creator's preferences, just as this would not necessarily justify intervening in people's behavior. Nevertheless, negative externalities are an important factor when considering state intervention in both conduct and preferences.

There are two ways in which preferences might produce negative externalities. First, some preferences could be transformed into conduct that inflicts harm on third parties. Second, people with certain undesirable preferences might "infect" others with those preferences.³⁶ In some cases, these two modes of externalization converge: some preferences are both injurious and infectious. It is in this latter type of cases that the objection to state and law intervention becomes especially weak.

Arguably, the state and the law could wait to contend with the externalization risk until it actually materializes. But as I will demonstrate, the earlier the intervention, the more likely it is to be both more effective and, ultimately, less burdensome for the preference holder. To illustrate, consider racist preferences: imagine that the law could alter these preferences and eliminate them. Should it intervene to that effect? One possible response is that the law, and the state, should ignore racist preferences so long as they do not result in injury to third parties. Indeed, various laws prohibiting racist incitement condition legal intervention on injurious effects on third parties or at least an imminent risk of such injury.³⁷

Arguably, however, this is not enough. To begin with, racist preferences could result in injurious conduct that is difficult or even impossible to detect: it is completely implausible that anyone who acts in a racially discriminatory way towards others will be brought to trial. Second and more importantly, racist preferences are infectious and epidemic;³⁸ infection is bad on its own but much worse when it exacerbates the risk of injury to third parties. Thus, racist parents are likely to infect their children with their racist preferences, as

36 Other preferences relate to other people's behavior without creating negative externalities. *See supra* note 8.

37 *See* Sunstein, *supra* note 6, at 1147 (arguing for the injurious effects of discriminatory preferences even when the injured party seems content with the status quo).

38 *See, e.g.,* Bobbie Harro, *The Cycle of Socialization*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE 15, 15-18 (Maurianne Adams et al. eds., 2000) (discussing how personal identities and views, particularly oppressive and prejudiced opinions, are shaped by one's parents and the institutions one attends); Jeff Greenberg & Tom Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 61 (1985) (showing that ethnic slurs cue prejudiced behavior in those who are exposed to them).

racist teachers are likely to infect their pupils. Racist leaders might infect their supporters with their preferences, as might cultural icons. In fact, anyone with racist preferences is likely to infect others. So while it is possible to refrain from intervention until actual injury (or “infection”) occurs, prior intervention to change racist preferences — particularly when held by people who tend to wield influence over others — will often be much more effective than at the later stage. How such intervention can be accomplished is a different question altogether and will be discussed in Part III.

State intervention in people’s preferences to prevent injury to third parties is essential not only for replacing existing “undesirable” preferences with “desirable” ones, but also for creating completely new preferences. Take the example of the preference for order. Sometimes this preference can do more harm than good, especially if it becomes obsessive or impairs discretion.³⁹ Yet sometimes this preference is crucial. In the military or in the framework of risky activities, a preference for order could save lives. It is no coincidence that armies consistently strive to instill this preference in their soldiers. In this context, too, it could be argued that armies should focus on the injurious effects of disorder rather than on fostering a preference for order. However, the risk that a lack of preference for order (or a preference for disorder) will spread and infect others and result in irreparable harm justifies creating a preference for order amongst soldiers (up to a certain point) even prior to the occurrence of injury to third parties. The early stages of this process could be considered a change to an external preference,⁴⁰ since soldiers prefer order because of the threat of punishment from their superiors. But its ultimate goal is a change of an internal preference, through the development of personal characteristics independent of external incentives or threats.

Thus far, we have seen that intervention in preferences by the state and the law would be more effective at preventing negative externalities to third parties if it were carried out prior to the actual infliction of harm. But no less significant is the fact that early intervention can be less burdensome or less costly to the preference holder. To understand this, assume that the state seeks to prevent smoking in public places so as to protect third parties from passive smoking. One way to accomplish this would be to prohibit smoking in public places and impose sanctions on violators. Another way, however, would be to change smokers’ preferences so that they would cease to prefer

39 See, e.g., Emel Arslan, *An Investigation of Social Skills in Children with Different Perfectionism Levels*, 6 EDUC. RES. & REV. 279, 281 (2011) (arguing that perfectionist individuals, who tend to be excessively organized, suffer from distressed and unsatisfying lives).

40 *Supra* Section II.A.

smoking.⁴¹ Not only would the latter solution be more effective in attaining the state's goal, but it could also reduce or even eliminate the costs to smokers of quitting smoking.⁴² For any smoker who would retain a weak preference for smoking, light sanctions would suffice to deter him from satisfying that preference in public places.⁴³

The context of environmental protection well exemplifies the advantages of early intervention.⁴⁴ Here, changing preferences might be not only the more effective way to achieve this goal, but also less costly to the individuals required to act to preserve the environment.⁴⁵ Sex offenders are another, albeit very different, example. In some countries, sex offenders such as pedophiles are offered the option of medical treatment that will alter (or suppress) their sexual preferences instead of serving a long jail sentence.⁴⁶ While coercive medical treatment is strongly objected to, this opposition diminishes if the offender agrees to the treatment voluntarily.⁴⁷ But regardless of one's moral

41 See Bryan Norton et al., *The Evolution of Preferences: Why "Sovereign" Preferences May Not Lead to Sustainable Policies and What to Do About It*, 24 *ECOLOGY ECON.* 193, 205-06 (1998) (debating the concept of discouraging preferences for smoking to advance the social goal of ensuring a healthy population); Christina Rasco, *Discouraging Smoking: Interventions for Pediatric Nurse Practitioners*, 6 *J. PEDIATRIC HEALTH CARE* 200 (1992) (outlining methods for discouraging adolescent smoking).

42 Changing preferences would also suppress smokers' desire to smoke in private places, which would be for their own good. At the same time, some smokers might prefer to retain their preferences to smoke and engage in smoking in private places.

43 See Daphna Lewinsohn-Zamir, *The Importance of Being Earnest: Two Notions of Internalization*, 65 *U. TORONTO L.J.* 37, 67 (2005) (changing preferences might infringe on autonomy less than interference in behavior).

44 Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 *J. LEGAL STUD.* 217 (1993) (presenting the preference change effects of environmental regulation).

45 For example, recycling might be less burdensome for a person who has a strong preference for environmental preservation.

46 It could be argued, however, that the medical treatment does not truly change their preferences but only inhibits their satisfaction.

47 See Karen Harrison, *The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?*, 46 *HOWARD J.* 16, 19 (2007) (discussing objections to surgically castrating offenders and noting that this practice is offensive when performed against the offender's will); John McMillan, *The Kindest Cut? Surgical Castration, Sex Offenders and Coercive Offers*, *J. MED. ETHICS* 1 (2013) (discussing the validity of sex offenders' consent to undergoing

stance on medical treatment as an alternative to a jail sentence, it could be fairly argued that treatment is often the less burdensome option for the offender.

Clearly, however, state intervention in preferences is not justified in all instances in which the relevant preferences could impose negative externalities on others. In addition to the potential infringement of the individual's freedom, the state's intervention could have other negative effects. Many potentially injurious preferences have positive aspects that would be lost were those preferences changed. While a preference for aggressiveness could impose negative externalities on others, it might, at the same time, offer social benefits, for example, for the military, which cannot function without soldiers with at least some aggressiveness.

B. Market Forces

Market forces shape people's preferences on a daily basis. Underlying these forces is the desire of merchants to maximize their profits rather than enhance social welfare. In fact, market forces could certainly operate to enhance social welfare. But because of information asymmetries, consumer irrationality, or the inability of consumers to organize to promote their collective interests,⁴⁸ market forces tend to change consumer preferences in a way that serves merchants' rather than consumers' interests.

To understand this, let us return to the smartphone example. For many people, smartphones create a preference to be in continuous social contact. Merchants have an obvious interest in shaping such a preference: the more people have these phones, the more other people buy them and related applications and accessories, and the stronger people's preference to be connected. Needless to say, the big winners are inevitably the merchants. Merchants have a similar self-evident interest to foster consumer preferences to over-consume. As with smartphones, consumers are incapable of organizing to prevent the cultivation of these new and not necessarily desirable preferences, making merchants free to do whatever will advance their interests.

Addiction is particularly illustrative of this phenomenon: merchants and manufacturers strive to make their products addictive for consumers, with cigarettes, alcohol, and drugs the most obvious examples. As we will see

castration and concluding that it should not be viewed as cruel or inhumane treatment when no coercion is involved).

48 OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 17 (2013) (presenting the notion of market failure in consumer markets).

below,⁴⁹ addiction is a subcategory of a broad class of cases in which people have a second-order preference (to avoid drugs, for example) about a first-order preference (to consume drugs). In such instances, state intervention to change first-order preferences could be justified regardless of whether they were produced by market forces or created in a different way.

A final example comes from the world of modeling. Modeling agencies notoriously demand of their models, especially female ones, to maintain a low weight even if harmful to their health. The economic motivation behind this is the notion that clothing looks best on thin models. This serves to cultivate in many young girls, who are exposed to these images of thin models, a narrow perception of beauty and a strong preference for thinness, to the point of anorexia in extreme cases.⁵⁰

The question that arises wherever market forces shape people's preferences is why not allow the state to intervene to prevent the preference-changing effects of the market or to restore the original preferences if appropriate? Note that state intervention in such cases would reverse effects imposed by third parties rather than create new preferences. Indeed, in all the contexts discussed above, it can be argued that consumers made their own choices and that the state should stay out of those choices. But the response to this argument is that when merchants exploit consumers' ignorance, irrationality, and inability to organize and shape their preferences so as to serve the merchants' interests, state intervention through the law is justified no less than when market failures facilitate consumer exploitation without changing preferences.

C. Preferences about Preferences

People often have second-order preferences regarding their first-order preferences, and they need the state's or law's assistance to satisfy the second-order preferences.⁵¹ In those cases, intervention by the state or the law could lead to a Pareto improvement: everyone is made better off and no one is made worse off. A classic illustration of the possible tension between first- and second-order preferences can be drawn from Homer's tale of Odysseus and

49 *Infra* Section C.

50 *See, e.g.*, Hayley K. Dohnt & Marika Tiggemann, *Body Image Concerns in Young Girls: The Role of Peers and Media Prior to Adolescence*, 35 J. YOUTH & ADOLESCENCE 141 (2006) (finding that body image concerns are relevant for girls as young as five to eight years old and noting a correlation between dieting awareness and exposure to magazines promoting thinness and attractiveness by presenting underweight models).

51 Sunstein, *supra* note 6, at 1140 (explaining the preference about preference phenomenon).

the Sirens.⁵² Odysseus had a first-order preference to listen to the Sirens' song but knew that this would lead him to his death. His second-order preference was to live. In order to satisfy the latter preference, Odysseus could have plugged his ears with beeswax, as his ship's crewmen did, and avoided hearing the Sirens' song. Instead, however, he came up with a plan that enabled him to enjoy the best of both worlds (satisfying both his first- and second-order preferences): he had his crew tie him to the ship's mast and ordered them not to untie him even if he commanded them to do so. In this way, Odysseus was able to listen to the Sirens' song and stay alive.

In contrast to its originality in the context of the ancient tale, Odysseus' solution manifests itself in many situations in the real world. Anyone who has ever tried to lose weight or stop smoking, for example, will recognize this. A person could have a first-order preference to overeat or to smoke and, at the same time, a second-order preference to avoid overeating or smoking.⁵³ His second-order preference often motivates him to take measures to prevent being tempted by his first-order preference. Thus, a person who wants to lose weight might refrain from bringing high-calorie food into his home; likewise, a person trying to quit smoking might commit to paying his family and friends a fine if he succumbs to the temptation to smoke. Indeed, self-binding mechanisms can serve desirable goals, and a person may be willing to adopt them if they can prevent him from satisfying his undesirable (first-order) preferences.⁵⁴

But when individuals are incapable of applying self-binding mechanisms, the state could assist them in facilitating their second-order preferences,⁵⁵ by intervening to change their undesirable first-order preferences. To illustrate, imagine that many people consume drugs and cigarettes. Assume that most of them realize that they would be better off were their preferences to change; in fact, they might be quite happy were the state to intervene to effect this change.

52 HOMER, *THE ODYSSEY* 146-47 (Walter Shewring trans., Oxford Univ. Press 1980) (c. 800 B.C.E.); JON ELSTER, *SOUR GRAPES*, at vi (1983); Sunstein, *supra* note 6, at 1140.

53 See Jan Schnellenbach, *Nudges and Norms: On the Political Economy of Soft Paternalism*, 28 *EUR. J. POL. ECON.* 266, 270 (2012) (explaining the concept of meta-preferences, which are analogous to second-order preferences, with the example of "a smoker who maximizes his short-term utility by surrendering to his addiction, but whose meta-preferences are such that he would in fact prefer to be a non-smoker").

54 First-order and second-order preferences should be distinguished from conflicting preferences that the preference holder would try to balance between.

55 Cf. Michael Abramowicz & Ian Ayres, *Commitment Bonds*, 100 *GEO. L.J.* 605 (2012); Saul Levmore, *Internality Regulation Through Public Choice*, 15 *THEORETICAL INQUIRIES L.* 451 (2014).

Moreover, given the opportunity, they would perhaps even call on the state to intervene. Under such circumstances, state intervention could be justified.

Consider people's preferences to save and preferences to consume. Many consume more and save less than what their second-order preferences entail.⁵⁶ How can the state help such individuals satisfy their second-order preferences? One way would be to impose mandatory rules to save more and consume less. However, a more practical and effective way (but which would certainly generate objections) would be to change the first-order preferences (to save less and consume more) and thereby further the second-order preferences (to save more and consume less).⁵⁷

Sometimes individuals have second-order collective preferences that clash with their first-order private preferences. Such a conflict requires collective action, which is often unfeasible for individuals. The state could solve this problem by changing their first-order preferences and enabling the realization of their second-order preferences.⁵⁸ Take the case of organ donation. There is general consensus that both society at large and every individual person would be better-off were there widespread organ donation. Thus, (almost) all people might have a collective preference for organ donation but a private preference not to donate their own organs. If people's private preferences regarding their own organ donation could be changed by the state, this would be consistent with the collective preferences of most people. But how could the state accomplish this? One option is to change the default rule from "no donation" to "donation." This arrangement, which allows people the opportunity to opt-out of donating, has been adopted by several countries and shown to increase organ donation dramatically.⁵⁹ A standard explanation for people's inclination not to opt-out of the "donation" default rule is the natural human reluctance to face matters related to death.⁶⁰ An alternative (or perhaps supplementary) explanation is that the "donation" default rule was embraced by the public

56 See, e.g., James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, in 16 TAX POLICY AND THE ECONOMY 67, 72 (James M. Poterba ed., 2002) (finding that 68% of employees report their actual savings rate to be too low compared to their ideal rate).

57 This is not the nudge that Thaler & Sunstein advocate. See *infra* Section III.D.

58 See Sunstein, *supra* note 6, at 1140 (demonstrating the preference about preference phenomenon in the context of consumption choices and suggesting how to contend with it).

59 See Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 35 (2013) (showing that a default rule in favor of organ donation can increase significantly people's willingness to be donors).

60 See *id.* at 34.

as a new norm and shaped people's first-order (private) preferences to bring them closer to their second-order (collective) preferences.

D. Lack of Opportunities

It is strongly debated in many liberal democracies whether and to what extent the state should respect the preferences of members of minority groups not to be treated equally.⁶¹ In the Jewish orthodox community, for example, women are often excluded from the public sphere. Should the state intervene if it is convincingly shown that most women in this community prefer such treatment, which liberal communities consider illegitimate discrimination? A plausible response is that the state should intervene regardless of the women's own preferences since the intervention would bring about desirable social change, which is more important than the women's private preferences. This claim could be supplemented by the paternalistic assertion that this social change would, in the long run, serve the interests of women who currently prefer to prevent the change and even resist it.

An alternative argument for state intervention would be that the women's preferences were shaped in a world offering very limited opportunities to develop different preferences; or in other words, these women adapted their preferences to the world into which they were born. Therefore, their existing preferences should not be a compelling consideration against social change and there could be particular justification for the state to intervene not only in conduct but also in the women's preferences themselves.

Preferences that are endogenous to the prevailing legal or social order are quite common, and the exclusion of women in the Jewish orthodox community is only one example. Another is the segregation of Whites and Blacks in the United States up until about fifty years ago.⁶² In this context, too, it was claimed that segregation was compatible with Black preferences at the time. This can also be countered, however, with the argument that those preferences were shaped in a world in which Blacks had very limited opportunities to develop other preferences. Therefore, state intervention not only in conduct but also in preferences should not be objected to.

In other cases, it is not a lack of opportunities that produces "problematic" preferences but the availability of bad opportunities. For instance, a state's

61 Cf. Menachem Mautner, *From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES L. 609, 610-11 (2008).

62 Sunstein, *supra* note 6, at 1149 (explaining how Blacks long tended to shape their preferences in accordance with the discriminatory status quo).

indirect encouragement of the prostitution industry might lead some men to develop preferences for sex for money. Here, state intervention to change preferences should clearly be allowed, especially if those preferences are likely to adversely affect others.⁶³ But there is a more general argument to be made: since any allocation of entitlements and resources in society affects people's preferences and since the state shapes people's preferences through these allocations, it is legitimate, in the appropriate circumstances, for it to change those preferences, which it in fact created. Applying this logic, the preference of Blacks, at a certain point in time, to be segregated was a product of the racial segregation and oppression imposed by the state for centuries. Why, then, should the state not be permitted to rectify what it has done by changing those preferences? Certainly, not all means of preference change are legitimate, and sometimes the change is unjustified even if it serves an admirable goal. But the aim of this Part of the Article is simply to suggest that in certain circumstances, the objection to preference change should be relaxed.

E. Lack of Information and Cognitive Limitations

There are also cases in which individuals do not lack sufficient opportunities, but their lack of information and cognitive limitations cause them to develop preferences they would not have developed given full information and full rationality. From a certain perspective, this category of cases is interrelated with the previous category: whereas the latter relates to a lack of opportunities for objective reasons, the present category involves a lack of opportunities for subjective reasons.

Let us return to the smoking example. In the past, many individuals developed a preference to smoke because of a lack of information. Had they known the health risks from the outset, they might have refrained from smoking. Smoking also leads to addiction, and addiction (at least when it is more psychological than physical in nature) resembles a cognitive limitation: even though the individual knows what is good for him, he is incapable of pursuing that good. It might be similarly claimed that racist preferences are also the product of a lack of information and cognitive limitations, although clearly such preferences are motivated by other factors as well.

The general argument being made here is that when preferences developed due to a lack of information or cognitive limitations, the objections to the state's changing them lose much of their force. In particular, the argument that preference changing by the state would inappropriately intervene in people's personality becomes less compelling.

63 *Supra* Section II.A.

F. The Collective Action Problem

The state often intervenes in the market when individuals fail to take collective action that can be expected to improve their well-being. To illustrate, one of the state's most important roles is to produce public goods. When every individual expecting to benefit from the public good refuses to share in the costs of production, hoping to free ride on other people's investments, collective action becomes impossible and state intervention necessary. An analogical situation warranting state intervention is when collective action is necessary to change people's preferences, but they are incapable of initiating this themselves. Such a need for collective action arises when no individual finds it beneficial to change his preferences so long as others do not do the same, and no one wants to be the first to initiate the change. In such conditions, the only way to move the group of individuals from one state of equilibrium to a new (perhaps better and more efficient) one is for the state to intervene in their preferences.⁶⁴

Consider the preference to live in a traditionally structured family unit. Satisfying this preference depends substantially on the preferences of others: so long as the majority of other people have this preference, developing a preference *not* to live in a family unit at all or a preference to live as a nontraditional family runs counter to every individual's interest. Note that although this recalls the lack of opportunities category of cases,⁶⁵ what is problematic here is that each and every individual has a strong interest not to change his preferences so long as other individuals do not change their preferences. Thus, whereas a lack of opportunities could be resolved through state provision of the missing opportunities,⁶⁶ in the present category of cases, the state must attend to a collective action problem.

It is quite unlikely that were the state to recognize only the traditional family unit and even restrict the establishment of "new families," individuals would develop a preference not to live as a traditional family or in a family unit at all. This brings into question the claim that the state's recognition of alternative families is unjustified because most people's preferences pull in the opposite direction. Setting aside other important considerations for recognizing new families, it should be noted that preferences against the nontraditional family frameworks could be a product of the existing legal and

64 Compare this to the category of cases in which market forces shape the preferences of consumers who cannot organize to take collective action against those effects. In such circumstances, state intervention could be justified to contend with the collective action problem. *Supra* Section II.B.

65 *Supra* Section II.D.

66 *Infra* Section III.D.

social order, which cannot change spontaneously.⁶⁷ Only state intervention, through explicit recognition of nontraditional families, can induce people to change their seemingly unalterable preferences or at least make them more tolerant and accepting of such families.

One way to understand this category of cases is as a manifestation of the tendency to conform and, perhaps, the herd effect. People often have a tendency to do or think exactly as others do or think, unhesitatingly. Sometimes defined as conservatism or adherence to the status quo,⁶⁸ this tendency is in fact driven by a different logic: the mere fact that other people behave in a certain way seems good reason to behave in the same way. The tendency to conform could explain why people's preferences generally do not change when they are relatively homogeneous and interdependent with the preferences of others. State intervention might encourage outliers to step forward and enable, in the long run, a change in the preferences of many other people. Interestingly, conformism and the herd effect can operate to make state intervention quite effective: if enough people change their preferences, a new, stable equilibrium can emerge, from which deviations will be unlikely.

G. Existing versus Future Preferences

Up to this point, we have discussed cases in which state intervention could *change* existing preferences. But consider now cases in which such intervention could *prevent* new preferences from forming. In such cases the objections to state intervention in preferences are even less compelling. Let's return to the case of smoking: it is one thing to intervene in people's preferences to smoke and quite another to intervene to prevent people from ever developing a preference to smoke (for example, by prohibiting everyone born after 2005 from smoking). Similarly, it is one thing to intervene in people's preference for sweet or salty food, and quite another to intervene to prevent such preferences from developing in the first place or from intensifying.

In the categories of cases discussed in this Part, state intervention in people's preferences can be justified at least to some extent. But what forms of intervention

67 For a general analysis highlighting the inherent difficulties in changing the legal order, which stem from the system's architecture, see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

68 See Abhijit Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797, 802 (1992) (presenting the basic model of herd behavior).

would be legitimate? In Part III, four modes of state intervention in people's preferences will be presented, each varying in terms of pervasiveness and intensity, on the one hand, and the identity of their addressees, on the other.

III. DIFFERENT MODES OF INTERVENTION

As noted above, the ways in which the state intervenes in people's preferences can differ in pervasiveness and intensity. On the one hand, state intervention can be coercive (for example, when the state imposes duties on specific parties) and, on the other hand, it can be soft (as when the state transmits educational messages). The intervention can also differ in terms of its addressee: it could address third parties who can affect people's preferences (indirect intervention), or it could address the preference holders themselves (direct intervention).

This Part discusses four different modes of state intervention, categorized according to intensity and addressees: coercive-direct, coercive-indirect, soft-direct, and soft-indirect.

A. Coercive and Direct

The most extreme form of intervention in preferences occurs when the state forces individuals to change their preferences. While it would be an understatement to say that such intervention is undesirable, it could, nonetheless, be an option in some very rare cases. Consider, again, a sex offender, who poses a high risk to women. Say he consents to undergo medical treatment that will change his sexual preferences in return for mitigation of his sentence. In such extreme circumstances, state intervention might warrant serious consideration.⁶⁹

Another prevention option — which would likely trigger less opposition — is to change people's preferences by coercing them into changing their behavior. Cognitive psychology research has shown that when people are forced to change their behavior, particularly by way of light sanctions, they may also eventually change their preferences.⁷⁰ Thus, imposing a light sanction for smoking could be an effective means of changing people's preference to smoke.⁷¹ In Part II, we saw that a lack of appropriate opportunities prevents people from

69 It is questionable, however, whether this intervention is really about changing preferences and not about preventing their satisfaction.

70 See Lewinson-Zamir, *supra* note 43, at 58 (arguing that mild sanctions are likely to reinforce voluntary compliance).

71 See THALER & SUNSTEIN, *supra* note 6, at 232 (explaining how small nudges can help people quit smoking).

developing certain preferences because they adapt their preferences to the available opportunities.⁷² To extend this claim, if people lack the opportunity to smoke (assuming they are law-abiding citizens), then presumably they will adapt their preferences and abandon any preference to smoke.

The reverse is also possible, however: sometimes the unavailability of opportunities can intensify rather than repress preferences or simply have no effect on them at all. The U.S. Prohibition era is illustrative of this phenomenon. The ban on selling, manufacturing, importing, and transferring alcohol⁷³ did not alter people's preferences to consume alcohol, but quite the contrary: for many, it in fact intensified those preferences.⁷⁴ In contrast, for people who have yet to develop such preferences (e.g., people who are only potential alcohol consumers or potential smokers), eliminating the opportunities to consume alcohol or to smoke could be a very effective way to prevent those preferences from ever forming.⁷⁵

B. Coercive and Indirect

As noted above, consumers' preferences are often shaped by market forces. Preferences for overconsumption and preferences for being in constant social contact are just two examples that illustrate how merchants use their power to change people's preferences to serve merchants', rather than consumers', interests.⁷⁶ One way for the state to intervene in consumers' preferences is to restrain the market forces and their effect on those preferences. Accordingly, when merchants engage in tactics that are likely to radically change consumers' preferences, the state should treat the merchants' motives with suspicion and intervene in the appropriate cases, just as it does when merchants exploit consumers' lack of information, irrationality, or inability to organize themselves. This is indirect, albeit coercive intervention since it is directed not at the preference holders but at those who could shape the preferences.

Another type of coercive indirect intervention arises when the state addresses third parties and directs them to create, or not to inhibit, opportunities⁷⁷ that are essential for new preferences to develop. Take, for example, the resistance

72 *Supra* Section II.D.

73 The National Prohibition Act, 27 U.S.C §1, 49 (1919).

74 Jack S. Blocker, *Did Prohibition Really Work?*, 96 AM. J. PUB. HEALTH 233, 238 (2006) (presenting the effects of the National Prohibition Act on Americans' drinking habits).

75 *Supra* Section II.G.

76 *Supra* Section II.B.

77 *Supra* Section II.D.

of ultra-orthodox Jews to liberal arts and science studies for their children.⁷⁸ This attitude is probably a manifestation of the parents' genuine preference to avoid exposure to secular studies; this, in turn, is likely the product of the lack of opportunities in their communities, the social structure into which they are locked from birth, or the values that were instilled in them in their community. The state could intervene by forcing the parents to provide their children with secular instruction, in the hope that this will change the parents' preferences in the long run. This would be coercive and direct intervention in people's preferences. Alternatively, the state could force the community's religious leaders or institutions to make secular studies available to its members. Eventually, more and more members of the community would be exposed to such studies and change their preferences accordingly. This would constitute coercive but indirect intervention in people's preferences: it would not be coercive towards the preference holders but, rather, towards those who can impact their preferences.

C. Soft and Direct

Soft and direct state intervention in people's preferences is the most common form of intervention. Education, in which the state is often an active player, shapes values and changes preferences.⁷⁹ The law, as an agent of the state, sometimes performs an expressive and educational function.⁸⁰ Constitutions shape value preferences (for equality, dignity, etc.), as do court decisions occasionally. And as some commentators have noted, criminal law has an expressive function too.⁸¹ Take, for example, laws prohibiting sexual harassment in the workplace. On the one hand, these laws are coercive: they prohibit certain types of behavior and ideally change the preferences of harassers and potential harassers in the long run. Even more interesting, however, is that these laws can also affect the preferences of people who are not harassers

78 For a brief historical account of the attitude within ultra-orthodox Jewish communities towards secular studies, see JACOB LUPU, *NEW DIRECTIONS IN HAREDI SOCIETY IN ISRAEL: VOCATIONAL TRAINING AND ACADEMIC STUDIES* 10-12 (2005).

79 It is questionable whether educational intervention in preferences is necessarily soft. In extreme cases, it will be more "brainwashing" than education.

80 See generally RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015).

81 Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 MINN. L. REV. 261, 303-07 (2009) (discussing the expressive justifications for criminal sanctions).

or potential harassers, by conveying feminist messages in a direct but soft way to all.⁸²

Moreover, the state can take soft and direct intervening measures when a lack of opportunities or a collective action problem prevents people from forming new preferences.⁸³ The state can thus assist individuals who are already considering changing their preferences. For example, by offering subsidies to ultra-orthodox Jews who are willing to move to a secular neighborhood or to secular families willing to move to an ultra-orthodox neighborhood, the state would be encouraging people to consider opportunities that were previously unavailable to them, thereby creating the potential for preference change. While the geographical move in this example would stem from external financial incentives, the introduction of a previously unavailable opportunity could have the additional effect of altering the target group's internal preferences.

In addition, soft and direct intervention might also be suitable when people have preferences about preferences.⁸⁴ In such cases, people are aware that a first-order preference they hold is inconsistent with a second-order preference. In some circumstances, the state could help them to further their second-order preferences, for example, by offering to subsidize gastric-banding surgery for obese people, which would counteract their overeating preferences.⁸⁵

D. Soft and Indirect

The Thaler and Sunstein “nudge” idea exemplifies soft and indirect state intervention. In their book *Nudge*, they argued that the state can often change people's behavior not only through coercive intervention but also by “nudging” them to do what the state wants them to do, while leaving them with the ultimate choice of whether or not to do it. Thaler and Sunstein call their theory “Libertarian-Paternalism”⁸⁶ — paternalism because the nudge pushes people into doing what the state considers to be for their good, and libertarian because the choice of what to do remains in the hands of the individual. Although nudging generally exploits people's cognitive limitations, this is, according to Thaler and Sunstein, to a virtuous end. In some circumstances, however, the nudge in fact neutralizes people's cognitive limitations that would have

82 Cf. Richard Mullender, *Racial Harassment, Sexual Harassment, and the Expressive Function of Law*, 61 MOD. L. REV. 236, 240 (1998).

83 *Supra* Sections II.D-F.

84 *Supra* Section II.C.

85 It can be argued, however, that the operation impacts the satisfaction of the preference as opposed to its very existence.

86 THALER & SUNSTEIN, *supra* note 6, at 4-6.

otherwise led them in the wrong direction. An example of such nudging is the default rule implemented in most countries, under which a certain amount of a worker's wages is transferred to a pension fund unless she explicitly opposes this. This rule encourages, rather than obliges, saving for retirement; anyone can opt out of the default if she so desires.⁸⁷ Yet the majority of people submit to the default rule, due to either the status quo bias⁸⁸ or the omission bias.⁸⁹ This context illustrates how the nudge uses people's cognitive limitations to direct them to what the state deems to be good for them (since if they were to forgo the payments to a pension fund, they would save less and consume more, which is assumed to be contrary to their interests). From a different perspective, the nudge here can be said to neutralize the common cognitive limitation of over-optimism, or the optimism bias.⁹⁰ If people fail to save money for a rainy day because they are overoptimistic about their future needs, the nudge pushes them into doing what they would not have done because of their cognitive limitation. It has also been proposed that nudging be applied to lead people to act in society's best interests.⁹¹ For example, a default rule of assumed organ donation unless the deceased explicitly indicated otherwise would result in more organ donations to the benefit of all, as compared to a default rule that requires explicit consent to being an organ donor.⁹²

Thaler and Sunstein applied their idea of nudging to changing people's behavior. Could this idea be extended to changing preferences? I believe it could. First, the law could nudge people into behaving in a certain way that would ultimately lead to a change in their preferences as well.⁹³ The second and more interesting option would be for the nudge to be used to impact preferences without directly affecting behaviors.

87 THALER & SUNSTEIN, *supra* note 6, at 108-09.

88 See Doron Teichman & Eyal Zamir, *Judicial Decision-Making: A Behavioral Perspective*, in EYAL ZAMIR & DORON TEICHMAN, *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 664, 674 (2014) (discussing the status-quo bias in the context of judicial decision-making).

89 Jonathan Baron, *Moral Judgement*, in ZAMIR & TEICHMAN, *supra* note 88, at 61, 71 (arguing that omission bias is the tendency to judge harmful acts as worse than no less harmful omissions).

90 For a discussion of the optimism bias in relation to consumer conduct, see BAR-GILL, *supra* note 48, at 22-23.

91 See THALER & SUNSTEIN, *supra* note 6 (discussing the idea of nudging people in order to change their behavior in relation to protecting the environment).

92 Sunstein, *supra* note 59, at 42-43 (arguing that different default rules regarding organ donation could increase people's willingness to be donors).

93 *Supra* Section II.A.

To see how this second alternative can work, let's return to the preferences of ultra-orthodox Jews not to expose their children to secular studies. Assuming these preferences were shaped partially due to a lack of opportunities to develop other preferences,⁹⁴ the state's mere provision of the missing opportunities would constitute a nudge towards considering replacing the old preferences with new ones. Thus, making public colleges and universities more accessible to ultra-orthodox Jews could, in the long run, bring about a change in their preferences regarding their children's education. In Israel, for example, universities are wrestling with the issue whether to allow gender-segregated classes for ultra-orthodox Jewish students.⁹⁵ There are certainly good arguments against doing this, but one advantage, which should not be easily dismissed, is that it would make higher education more feasible for the ultra-orthodox community and provide its members with the opportunities they currently lack when forming their preferences. Note that in this example, as opposed to Thaler and Sunstein's nudging context, there is no manipulation involved: people would be offered previously unavailable opportunities that are essential for shaping their preferences.

Another soft and indirect way to change people's preferences is through a "natural selection," or evolutionary, process.⁹⁶ This approach lies on the borderline between indirectly changing preferences by directly changing behavior and directly changing preferences: the law creates the conditions in which it is easier, or more attractive, for people to develop "desirable" preferences, and thus more and more people eventually do develop them. To illustrate, suppose that the law tends to oblige lawyers to behave altruistically towards their clients. We can therefore expect that this will lead to people with an altruistic bent to be more attracted to becoming lawyers than other people are. Alternatively, suppose that we want people who care significantly more about their social contribution than their income to be our judges or doctors.

94 *Supra* Section II.D.

95 HCJ 6667/14 Tirosh v. Council for Higher Education (Mar. 19, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (an appeal to the Israel High Court of Justice against government funding of gender-segregated classes at public universities).

96 *Cf.* Oren Bar-Gill & Chaim Fershtman, *Public Policy with Endogenous Preferences*, 7 J. PUB. ECON. THEORY 841 (2005) (explaining how monetary incentives might induce changes in people's internal preferences); Oren Bar-Gill & Chaim Fershtman, *Law and Preferences*, 20 J. L. ECON. ORG. 331 (2004) (making a similar argument in a contractual context).

In order to attract the people with the “right” preferences, then, judges’ and doctors’ salaries should not be set too high.⁹⁷

Note that in these examples, the law does not change people’s preferences but instead creates conditions that make certain professions more attractive to people with certain preferences. It is quite possible, however, that the more the state, or the law, makes certain professional fields appealing to people with certain preferences, the more people will develop such preferences. This would occur particularly if the attraction to a given field were to depend not only on the preference considered most essential to that field but on other preferences as well. Thus, if enjoyment of legal challenges is the appeal for many people of being a judge but the salary is low, more and more lawyers who are attracted to the judiciary for this particular reason will develop preferences for making a social contribution and thereby compensate themselves for the non-appeal of the low salaries.

CONCLUSION

This Article’s ambition is to provide a preliminary answer to the question of when it might be desirable for the state to intervene in people’s preferences. The Article accounts for and contends with the general arguments against state intervention: *personal freedom, abuse of power, the role of the state, and uncertainty*.

The *personal freedom* argument falters in all categories of cases discussed in Part II. When preferences create a risk of the *imposition of negative externalities* on third parties, the personal freedom argument is less compelling, since externalities is a common justification for the law to intervene and curtail risk creators’ freedom. When state intervention is aimed at preventing *market forces* from shaping people’s preferences, the state is acting to eliminate effects created by third parties rather than to create new preferences. Therefore, such intervention should not be considered as diminishing consumers’ freedom, for if anything, it enhances their freedom. When intervention promotes people’s *second-order preferences* at the expense of discouraging their first-order preferences, the state is not infringing on people’s freedom but rather assisting them in achieving their goals. In such cases the preference change is a Pareto improvement: everyone is made better off and no one is made worse

97 See Stephen J. Choi, Mitu G. Gulati & Eric A. Posner, *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 56 (2009) (arguing that increased salaries will attract more people to the judiciary but lower salaries will attract more suitable people, namely, those who wish to serve as judges unrelated to salary or social status).

off. Preferences that were shaped due to a *lack of opportunities* or *cognitive limitations* are not authentic in the deep sense and were not genuinely created by an autonomous individual. Thus, state intervention in such instances is aimed at placing the individual in the position he would have occupied had the missing opportunities been available to him from the outset and had he been rational and adequately informed. Finally, when the state intervenes in preferences in response to a *collective action problem*, it is in no way certain that nonintervention would serve individual freedom better than the intervention does. On the contrary, soft intervention might enable individuals to shape their preferences more freely than they would absent the intervention.

The other three arguments against state intervention in preferences should be closely examined in each individual case that raises a need for the state to change people's preferences. Thus, I will comment only briefly on each of them. The risk of abuse of power particularly diminishes when the state intervention is soft and indirect (for example, when the state makes available opportunities that were unavailable when people formed their preferences). The *uncertainty* argument, for its part, is not a valid concern in the many instances in which it is quite clear what the change in preferences will bring about (for example, when changing racist preferences or preferences not to smoke).⁹⁸

The state intervenes — either through the law or by other means — and changes people's preferences unintentionally and implicitly on various occasions. Individuals and, perhaps, also legislators and public officials are only rarely aware of the effects of such intervention. It would be far better that as long as state intervention in preferences takes place, it is executed explicitly and transparently. This would make the intervention open to both public debate and judicial scrutiny, which would be consistent with liberal democratic principles.⁹⁹

98 *Supra* Section II.A.

99 An interesting question which has not been discussed in this Article is whether NGOs or other nongovernmental institutions are better suited or capable than the state, under certain conditions, to intentionally change people's preferences.

