

Theoretical Inquiries in Law

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THEORETICAL INQUIRIES IN LAW is a biannual English-language law journal published by the Cegla Center for Interdisciplinary Research of the Law at the Buchmann Faculty of Law, Tel Aviv University. The journal specializes in the application to legal problems of insights developed in other disciplines, such as moral and political theory, epistemology, history, cultural studies, social sciences, economics and game theory, probability theory, and cognitive psychology. The range of issues dealt with by the journal is virtually unlimited, in line with its commitment to the cross-disciplinary cultivation of ideas. Contributors to the journal are distinguished legal scholars working in different “law and . . .” areas. The journal also strives to offer a forum for contributions to legal theory by scholars working in disciplines outside of law.

The previous issues of the journal have been devoted to the following topics: Restitution and Unjust Enrichment; Judgment in the Shadow of the Holocaust; Contemporary Legal Scholarship: Achievements and Prospects; Protecting Investors in a Global Economy; Economic Analysis of Constitutional Law; Negligence in the Law (Parts 1 & 2); Writing Legal History; Liberty, Equality, Security; The Palestinian Refugees and the Right of Return: Theoretical Perspectives; The Role and Limits of Legal Regulation of Conflicts of Interest (Parts 1 & 2); The Excessive Use of Force; Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges; Critical Modernities: Politics and Law Beyond the Liberal Imagination; Why Citizenship?; Moral and Legal Luck; Legal Pluralism, Privatization of Law and Multiculturalism; Community and Property; Histories of Legal Transplantations; Money Matters: The Law, Economics, and Politics of Currency; Comparative Tax Law and Culture; Copyright Culture, Copyright History; Rights and Obligations in the Contemporary Family: Rethorizing Individualism, Families and the State; Back to the State? Government Investment in Corporations and Reregulation; International Courts and the Quest for Legitimacy; Public and Private, Beyond Distinctions?; New Approaches for a Safer and Healthier Society; Sovereignty as Trusteeship for Humanity: Historical Antecedents and Their Impact on International Law; Labor Organizing the Law; The Constitution of Information: From Gutenberg to Snowden; Law, Economy and Inequality; Sovereignty and Property; Fifty Years of Class Actions – A Global Perspective; The Tragedy of the Commons at 50: Context, Precedents, and Afterlife; The Problem of Theorizing Privacy; Freedom, Choice & Contracts; Elder Law and its Discontents; Historical Justice in the Israeli-Palestinian Context; Legal Discontinuity.

Forthcoming issues will include: The Global Law Market: New Frontiers for Economic and Empirical Analysis of Private International Law; Bilateral Labor Agreements; Private Law Meets the Law of Work.

An online version of the journal, as well as comments on articles published in the journal, are available in the *Theoretical Inquiries in Law* website (<http://en-law.tau.ac.il/til>). All articles are also indexed and available on HeinOnline, LegalTrac, Lexis-Nexis, and Westlaw.

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How Law Changes What You Want: Positive and Normative Effects of Law on Values and Preferences

In honor of Professor Robert Cooter

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The articles published in this volume were presented at a conference
in honor of Professor Robert Cooter
at Berkeley Law on February 28-29, 2020.

Robert Cooter, a pioneer in the field of law and economics, was educated at Swarthmore College, Oxford University, and Harvard University. After receiving his Ph.D. in economics in 1975, he joined the economics faculty at Berkeley. In 1980 he joined Berkeley's law faculty, where he is currently the Herman F. Selvin Professor. Cooter regularly teaches the economic analysis of law, and he has taught a variety of courses jointly with lawyers, including contracts, torts, corporations, financial services, the theory of adjudication, and law and anthropology.

Cooter has received various awards and fellowships, including Institute for Advanced Study, National Science Foundation, Guggenheim, Max Planck, American Academy of Arts and Sciences, Humboldt Research Prize, and the European Law and Economics Association Distinction Award for 2011. He was a founding director of the American Law and Economics Association and its President in 1994-1995. He co-founded the Berkeley Electronic Press (BEPress) in 1999. In 1999 he was elected to the American Academy of Arts and Sciences. He received an honorary doctorate from Hamburg University in 2002 and Universidad de San Martín de Porres, Lima, Peru, in 2012. He co-founded the Latin American and Caribbean Law and Economics Association (ALACDE), and he served as its president in 2005.

Besides numerous articles, he is co-author of *Law and Economics* (6th edition, 2011, with Tom Ulen; also translated into Spanish, Portuguese, Italian, Hungarian, Japanese, Chinese, Korean, and Farsi), *The Strategic Constitution* (Princeton, 2000), *Solomon's Knot: How Law Can End the Poverty of Nations* (Princeton UP, 2012, with Hans Bernd Schäfer), and *Getting Incentives Right: Improving Torts, Contracts, and Restitution* (Princeton UP, 2014, with Ariel Porat). Cooter has published a wide variety of articles applying economic analysis to private law, constitutional law, and law in developing countries.

Introduction

In this issue of *Theoretical Inquiries in Law*, we seek to spark an academic discussion on a topic of interest for various scholars in the fields of law, economics, sociology and behavioral economics: the capacity of law to change the preferences of individuals, and the underlying causes and possible consequences of this phenomenon.

The volume is dedicated to Professor Robert Cooter, whose pioneer work in the field of law and economics, in particular on the effects of law on values and preferences of individuals, has inspired the research that is presented on the following pages. Cooter's innovative theory of Pareto self-improvement suggests that law can motivate individuals to alter and internalize a preference for a moral norm when the changed preference would be more advantageous than the previous one in obtaining economic gains. Based on the underlying idea that opportunities may induce preference change, Cooter emphasizes the central role of law in creating opportunities for individuals to improve their preferences, thus maintaining the voluntary aspect of the adoption of moral norms.¹

The issue offers various perspectives and arguments that have been inspired by Cooter's theory and explore it from various angles. Some articles raise critique, both fundamental criticism of the general ideas underlying preference satisfaction — as in Kreitner's contribution, suggesting that in some areas shaping policies through the prism of preference satisfaction may leave valuable aspects unseen — and normative criticism concerning the desirability of inducing preference change (Gilbert and Hayashi, Kaplan and Feldman). Other articles develop Cooter's theory further — as, for instance, Masur's contribution that aims to complement the idea of Pareto self-improvement with a novel concept allowing for the comparison of intrapersonal welfare states. Still other articles aim to provide an improved theoretical framework for understanding preference change — either by classifying various actions taken as a result of preference change (Porat), or by examining whether law-induced behavioral changes are indeed the result of a change in values and individual desires rather than a mere alteration in beliefs about the *costs* of

¹ See generally Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B.U. L. REV. 903 (1998); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

certain choices (Arlen and Kornhauser). Kricheli-Katz offers an empirical perspective on preference change and explores the effects of the salience of the law on people's preferences in interactions. Other contributions adopt a practical approach and explore the phenomena of preference change in specific contexts: the politics of Brexit (Schwartz), parenting (Sugarman), criminal law (Sood), and international law (Chilton and Linos).

The issue opens with Saul Levmore's contribution, which points to the growing use of law and aims to explore the reasons for this development. According to traditional accounts, the transition from small communities to larger populations required the invention of mechanisms that reduced violence and enabled coordination. As a result, the law emerged and has continued to develop ever since, setting out the rights that are vital for a harmonic community. In his Article, Levmore offers a novel theory that considers the addictive nature of law to be an important contributor to the continuous growth of law: as law entices individuals to adjust their preferences and to outsource conflict resolution to the law, rather than seek personal confrontation, there is an increasing use of and need for law. Over time, this growing "addiction to law" translates into more legal rules, rulings, petitions, and standards. Even though Levmore acknowledges that this practice affords some benefits, he concludes that less outsourcing and, consequently, more personal confrontation would be preferable.

Tamar Kricheli-Katz offers an experimental approach exploring the general effects of the salience of the law on people's preferences. Contributing to the rich literature on the "framing" effect in sociology and social psychology, her Article hypothesizes that the framing of an interaction as "legal" may lead individuals to interpret the interaction as more rational and instrumental. Corresponding with the hypothesis, it shows that when an interaction is framed as "legal," people tend to express more rational and instrumental preferences: they discount future payments less, prefer products over experiences, and are less willing to donate to charity. These results suggest that the salience of the law activates certain cultural scripts and rules of behavior that affect our preferences constantly and immediately.

Jonathan S. Masur discusses Cooter's idea to consider a shift in individuals' behavior and preferences as Pareto self-improvement, when the internalization of a moral norm makes the individual better off according to their preference function both before and after internalizing the respective norm. In order to overcome the difficulties of measuring intrapersonal welfare through preference satisfaction, Masur takes Cooter's theory a step further by introducing the

concept of “Kaldor-Hicks self-improvement.” Suggesting that welfare can best be understood in terms of subjective mental states, Masur proposes the use of behavioral law and economics and hedonic psychology to assign cardinal values to welfare states, thus allowing for inter- and intrapersonal welfare comparisons. Arguing that individuals will not always recognize opportunities to improve their welfare, Masur proceeds to highlight the role of government in encouraging the internalization of welfare-enhancing moral norms, as deriving from its role to improve people’s lives.

In her Article, Avani Metha Sood puts the favoring of “general verdicts” over “special verdicts” in the American criminal justice system to an empirical test. In a first step, she critically ponders over the legal misapplications, misunderstandings, and fundamental biases that general verdicts may give rise to. Sood then proceeds to sketch an empirical method that aims to assess the extent to which the legal status quo in favor of general verdicts accurately considers the views of the criminal justice system’s stakeholders and relevant cognitive aspects of lay decision-making processes. While the author is not advocating for either type of verdict, she suggests that efforts to empirically examine verdict formats in criminal cases may help improve the ability of the legal system to optimize certain qualities of jury decision-making, such as integrity, fairness, and constitutionality.

Engaging with a more foundational question concerning preference change, Yuval Feldman and Yotam Kaplan seek to critically examine basic assumptions utilized by the law and economics literature on preference change, and suggest their reevaluation in light of behavioral ethics findings. According to cognitive and social psychology scholarship, contradictions between explicit preferences and actual choices taken may be connected to implicit cognitive mechanisms, biases and other decision-making processes. Integrating these insights with the literature on preference change, Feldman and Kaplan argue that people’s preferences should be regarded as fragmented and lacking internal consistency, which may adversely affect the law’s ability to improve them. Against this backdrop, the authors examine whether the state should promote moral behavior by targeting the relevant decision-making mechanisms and cognitive biases. While they consider the exertion of direct influence on ethical behavior unreasonable due to its interference with fundamental rights and freedoms, Kaplan and Feldman suggest that indirect influencing may be plausible. Acknowledging that the law seems unfit to generate such change independently, they conclude that it could instead operate in conjunction with other societal institutions, which may in turn promote the desired moral behavior.

In a more specific context, Paul M. Schwartz examines how Brexit and the resultant changes in the UK’s legal system have affected personal and

social preferences. The author presents five possible explanations for the UK's choice to adopt and implement the GDPR despite Brexit, based on five different theoretical models, one of which is Robert Cooter's concept of Pareto self-improvement. By this means, Schwartz aims to shed light on the British people's and policymakers' decision to adopt the GDPR despite having chosen to cut ties with the European Union. Going beyond a simple analysis of personal preferences, the Article analyzes the relationship between legal systems and social norms and explores how they may affect one another.

Michael D. Gilbert and Andrew T. Hayashi examine the idea of how certain laws can result in changing people's attitude or values towards their peers and, in particular, whether good citizens need good laws. But instead of focusing on the widely discussed question of why or how law alters preferences, they explore whether the law *should* change preferences and, in doing so, demonstrate that improving preferences does not automatically translate into social benefits. To this end, Gilbert and Hayashi examine a simple economical model of a driver, a pedestrian, and a lawmaker under the strict liability rule and discuss the effect of changing individuals' preferences in light of two alternative social welfare functions: "utilitarian" and "atomistic." Throughout the Article, they explore the potential of both approaches to realize the benefits of law's expressive function and conclude that either solution necessitates a loosening of traditional assumptions promoted by normative economics.

In recent years, law and economics theory has accepted that the law influences behavior through several elements beyond the threat of sanctions. However, does the law also shape preferences? In their Article, Jennifer Arlen and Lewis A. Kornhauser argue that, in order to alter preferences, law must affect the agent's criteria of evaluation or the integration of these criteria into their basic preferences rather than the agent's choices and behavior only. To establish this claim, the authors first elaborate on the differences between choices and preferences. They then introduce rational choice models that explore the ways in which law can alter behavior. Lastly, the Article addresses three central mechanisms for preference-shaping developed in the literature — the "serious harm" mechanism, the "social norm" mechanism, and the "self-improvement" mechanism. It concludes that none of the three mechanisms alters peoples' underlying preferences, but, rather, they affect the agent's beliefs about their choices, leaving their fundamental wants and desires untouched. Arlen and Kornhauser thus consider the preference-shaping literature to be consistent with rational choice theory, enabling the use of the expressive features of the law without risking undermining people's individuality and autonomy.

When analyzing standard economic models, two basic assumptions are made: first, that actors are rational and welfare-maximizing, and second, that their preferences are a given and exogenously determined. While the first

assumption has already been subject to scholarly discussion and criticism, Ariel Porat's Article sets out to challenge the second assumption. Porat questions the characterization of preferences as an inflexible attribute and argues that welfare should be enhanced by changing individual preferences rather than maximizing the satisfaction of existing preferences. In light of current literature, the Article classifies various types of state intervention that are aimed at changing preferences according to their intrusiveness. On that basis, Porat presents challenges and possible arguments in favor of state intervention and suggests a variety of circumstances in which the benefits of intervening in individuals' preferences may outweigh potential disadvantages.

Adam Chilton and Katerina Linos look at international law's ability to constrain and alter behavior or preferences, which is considered limited due to its unique characteristics, such as the absence of a global legislature and a centralized enforcement body, as well as its dependence on consent. To explore how international law may nevertheless generate change in state behavior, Chilton and Linos revisit two central theories discussing the nature and effectiveness of international law: (1) the "compliance-pull theory," suggesting that international commitments change public opinion as citizens become more supportive of politics that are consistent with legally binding agreements; and (2) the "insincere-ratification theory," according to which governments insincerely ratify treaties to gain public relations benefits. The Article then proceeds to review existing empirical research on the impact of information about international law on policy preferences and outlines its limitations. Chilton and Linos suggest that while commitments to international law may indeed alter the preferences of the general public, further research needs to be done to better understand both the circumstances under which such changes materialize and their particular impact on behavior and policy. The Article concludes by proposing three avenues for future study.

Roy Kreitner critiques welfare economics' popular theory of preference-satisfaction, i.e., the idea that wellbeing can be measured by the extent to which preferences are satisfied. He begins by advancing an internal critique of the theory by challenging the assumption that preference satisfaction is equivalent to welfare and questioning the capacity of choices to accurately convey preferences. To the extent that the theory can overcome such challenges and preference satisfaction may indeed provide a workable normative framework, Kreitner raises an external critique, revealing the price of adopting this theoretical approach. Using labor and employment law as examples, Kreitner illustrates how preference satisfaction obscures important factors that other normative theories consider. Kreitner concludes by suggesting a more pluralistic approach to understanding individual welfare by alternating between mental

state theories, preference theories, and objective list theories based on their respective suitability for determining wellbeing in the particular context.

Finally, Steven D. Sugarman's Article puts forward the hypothesis that if governments promoted income equality, parents would adopt more permissive parenting styles, thus encouraging and enabling children to explore their own preferences. The claim is partially based on a 2019 publication by the economists Matthias Doepke and Fabrizio Zilibotti, who analyzed the influence of economics on parenting styles and came to the conclusion that intrusive "helicopter parenting" may be the result of income inequality. The author aims to take Doepke and Zibbotti's argument a step further and suggests that income equality could allow for more permissive parenting, nurturing the ability of children to embrace and act upon their own preferences.

The articles collected in this issue are the product of the conference on Preference Change, held at the University of California at Berkeley, Faculty of Law, in February of 2020. *Theoretical Inquiries in Law* thanks Ariel Porat, Tamar Kricheli-Katz, Avani Metha Sood, Katerina Linos and Steven D. Sugarman, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors of this issue; Berkeley Law for co-sponsoring the conference together with the Cegla Center for Interdisciplinary Research of the Law; Ruvik Danieli for style-editing the articles; Michal Semo Kovetz for graphics; and all the conference participants and commentators for a most fruitful discussion. We also thank our Managing Editor, Sharon Vered Shaked, for her wonderful work. Finally, we thank the Editor in Chief, Yishai Blank, for his trust and guidance. The articles published in this issue are available online at the *Theoretical Inquiries in Law* Website (<http://en-law.tau.ac.il/til>).

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and Assistant Editors