

Moral Norms, Adaptive Preferences, and Hedonic Psychology

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In a series of important papers published roughly twenty years ago, Professor Robert Cooter developed a comprehensive economic theory of moral norms. He explained the value of those norms, described the process by which norms are adopted, and offered a set of predictions regarding the circumstances under which an individual will choose to adopt a particular moral norm. This brief Article applies behavioral law and economics and hedonic psychology to expand upon Professor Cooter's path-breaking theory. In particular, understanding welfare in hedonic terms — rather than preference-satisfaction terms — suggests a multitude of further situations in which individuals will justifiably seek to internalize moral norms. The hedonic approach to welfare then further suggests an enhanced role for the government to play in encouraging the adoption of welfare-enhancing norms. Cooter's theory, combined with modern understandings of welfare and human behavior, thus offers powerful predictive and prescriptive possibilities.

INTRODUCTION

In a series of path-breaking and provocative papers published roughly twenty years ago, Professor Robert Cooter explored a set of foundational questions regarding the existence and adoption of moral norms — for example, a norm favoring honest dealing, or an individual work ethic. Most interestingly, he addressed the critical questions of how, when, and why individuals might choose to adopt moral norms, and whether these norms (and their adoption) could be understood in economic terms. While these articles have sometimes been

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overlooked in the shadow of Cooter's more famous work on torts,¹ contracts,² taxation,³ and other subjects, they deserve substantial attention for their impact on the past two decades of scholarship in social norms, adaptive preferences, and even behavioral heuristics. It is possible that contemporaneous readers did not appreciate the insights contained within these papers; but even if so, the subsequent twenty years of work have made their contributions clear.

In this short Article, I first describe Cooter's insights and connect them to the broader literature on behavioral law and economics, which Cooter's work anticipates and prefigures. I then couple Cooter's foundational framework to modern conceptions of hedonic psychology — including ideas related to human adaptation and affective forecasting — and demonstrate that it can produce new insights into human behavior in the presence of social norms. The addition of a hedonic perspective to Cooter's theory allows one to predict a far greater swath of human behavior than could standard economic conceptions of welfare alone. The final Part asks, as Cooter did, what role the government might play in instantiating moral norms in light of Cooter's economic conception of morality. Here, too, I suggest that Cooter's powerful theory offers more sweeping implications than he may have realized.

I. A BEHAVIORAL THEORY OF MORAL NORMS

Before there was behavioral law and economics, there was Bob Cooter. The beginning of behavioral law and economics as a field is typically traced to the famous 1998 Jolls, Sunstein, and Thaler paper, *A Behavioral Approach*

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- 1 Robert Cooter & Ariel Porat, *Disgorgement Damages for Accidents*, 44 J. LEGAL STUD. 249 (2015); Robert Cooter & Ariel Porat, *Lapses of Attention in Medical Malpractice and Road Accidents*, 15 THEORETICAL INQUIRIES L. 329 (2014); Robert Cooter & Ariel Porat, *Tort Liability for Excessive Harm*, 36 J. LEGAL STUD. 63 (2007); Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203 (2002); Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986); Robert Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982).
 - 2 Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63 (1987); Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432 (1985); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985).
 - 3 Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984); Robert D. Cooter, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

to *Law and Economics*,⁴ that gave the field its name, or to the only slightly less famous (and similarly named) 2000 paper by Korobkin and Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*.⁵ Yet in the years before those papers were published, Cooter had already written a substantial body of work exploring what would come to be seen as central questions in behavioral law and economics: the development of social norms; the genesis of (apparently) deontological notions of morality; the extent to which these norms cause individuals to behave in ways that are not predicted by standard rational-choice economics; and the question of whether these types of norms can be justified or explained in rational terms.⁶

I do not know whether Professor Cooter would describe himself as working in the field of behavioral law and economics. (I have never asked him.) His work is deeply embedded in the rational-choice law and economics tradition, in the sense that his project is to describe the rationality behind the evolution of social and moral norms. A related focus is the way in which social norms that would seem to hinder or inhibit individual options can actually be welfare-promoting for those individuals in the longer run. This means that the emergence of a certain norm might seem irrational at retail, for a given individual in a given situation. But on a wholesale level, across many individuals and a longer time horizon, that same norm can be substantially welfare-enhancing and thus rational.

4 Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

5 Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

6 Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000) [hereinafter *Do Good Laws*]; Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); 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) [hereinafter *Models of Morality*]; Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997); Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73 (1997); Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717 (1997); Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 FORDHAM L. REV. 1275 (2006).

An important example of this line of argument is Cooter's analysis of the internalization of moral norms, developed over a series of brilliant papers in the late 1990s and early 2000s. Cooter's project is to define and describe what a moral norm really is, and then to explain how or why individuals might "internalize" a moral norm — that is, incorporate the moral norm into the individual's utility function. Here, the very nature of the project involves an innovative departure from standard law and economics. Rational-choice economists typically treat preferences as given and fixed a priori, and so the very notion that an individual might alter her preferences substantially — potentially through intentional and deliberate action — is striking.⁷

Cooter describes morality or moral norms as individual preferences for certain types of behaviors, such that the individual who holds the preference will reap some benefit for behaving in that manner and bear some cost for behaving in an inconsistent manner.⁸ The individual will also benefit from punishing other people who violate the moral norm and bear some cost if another person violates the norm and goes unpunished. For instance, to take one of Cooter's examples, an individual might internalize the norm of honesty and fair dealing in commercial settings.⁹ That individual would then bear a cost for lying while negotiating over a transaction (separate and apart from any consequences of the lie itself) or experience a welfare gain from telling the truth. The individual would also experience a welfare gain from punishing others who lied and thus be willing to bear some personal cost, if necessary, to effectuate that punishment.

From a simplistic rational-choice perspective, adopting this preference would seem irrational in that it constrains the individual's options and reduces her ability to defect and extract rents. But Cooter argues persuasively that an honesty norm can be rational because it can induce other parties to contract.¹⁰ If an individual can credibly signal that she is honest and is not likely to try to cheat her business partner, counterparties will be more willing to strike deals with her. In essence, the individual is trading off some potential for short-term gain via rent extraction in favor of longer-term contractual and business success.

7 Jason F. Shogren, Gregory M. Parkhurst & Prasenjit Banerjee, *Two Cheers and a Qualm for Behavioral Environmental Economics*, 46 ENVIRON. RESOURCE ECON. 235, 239 (2010) ("With rational choice theory the baseline is fixed and clear — predicted behavior given optimization over fixed preferences, resource endowments, and relative prices.").

8 Cooter, *Decentralized Law*, *supra* note 6, at 1665.

9 Cooter, *Do Good Laws*, *supra* note 6, at 1593.

10 Cooter, *Normative Failure Theory*, *supra* note 6, at 958-59.

Moreover, Cooter explains, this creates an incentive for the individual to truly internalize the moral norm — that is, make it part of her utility function — rather than merely *behave* in an honest manner in order to cultivate a reputation for honesty. An individual who is behaving honestly for strategic reasons can cease doing so if she believes that the payoff from lying or cheating would be greater than the payoff from remaining honest. This raises the possibility of bad behavior in one-shot or end-period situations, or where enforcement is difficult, and may therefore dissuade some counterparties from wanting to do business.¹¹ Moral internalization, by contrast, is a commitment device. The individual cannot change her preference for honesty; it has become part of who she is. She will bear personal welfare costs from lying no matter what, and those costs will constrain her from acting dishonestly even if it would be financially advantageous to do so. So long as she can credibly signal her internalization of this moral norm, she can pre-commit not to exploit a business advantage.

This conception of internalized moral norms helps explain (and give content to) some of the most famous results in behavioral economics, including the ultimatum game. Even in a one-shot ultimatum game, participants will not offer negligible amounts of money to their experimental partners, and they will not accept negligible amounts of money when offered. That is, participants will be willing to incur costs (in the form of refusing an offer of free money) in order to punish wrongdoers (participants who have made offers that are too small). This is because they have internalized moral norms for the fair distribution of assets.

Cooter's theory of moral norm internalization thus offers a rational explanation for the persistence of one of the most famous results in behavioral psychology. But it should not be understood as contrary to the central tenets of behavioral law and economics. Rather, it is part of the foundation for the central tenets of behavioral law and economics. The theory of behavioral law and economics is not that people behave irrationally, in the sense that their actions have no connection to the ends they are attempting to achieve. It is that individuals exercise "bounded rationality," in the sense that they operate pursuant to a series of heuristics or shortcuts. These heuristics generally

11 Of course, if enforcement is perfect and costless, then internalization of moral norms will cease to matter in these types of third-party transactions. Technology is reducing the costs of observing others' behavior and enforcing prosocial rules, see, e.g., Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Investigations*, 68 UCLA L. REV. (forthcoming 2021), but we are still far from eliminating them. In addition, the internalization of moral norms would still be important for first-party behavior, as Parts II and III describe.

function well, which is why they have developed in the first place. But occasionally they misfire when applied in situations that diverge from the typical contexts in which they were meant to operate. Through these misfires, they produce results that naïve rational-choice economics cannot explain or predict effectively.

The ultimatum game is such a context. Fairness norms might serve individuals very well in standard day-to-day transactions, and so it may be rational for individuals to adopt them and act according to them over the long run. But they are a poor fit in the anonymous, one-shot setting of the ultimatum game. In the context of the ultimatum game, the individual who adheres to a fairness norm is relying on a behavioral heuristic.

Other well-known behavioral heuristics exhibit the same characteristics. Consider, for example, the availability heuristic, which induces individuals to overstate the likelihood or importance of highly salient events.¹² The availability heuristic likely bears some share of the blame for the fact that individuals tend to overweight the danger presented by, for instance, nuclear meltdowns (which are highly available events) and underweight the danger posed by climate change (which is slower-moving and much less available). It likely made sense, particularly for humans operating in a pre-technological age, to attach greater significance to salient events. Their very salience may have been a strong indication that they presented the greatest risks. But in a modern world, where it is possible to perform quantified risk calculations, the availability heuristic is no longer so useful. This is not a moral norm, of course, but its origin and operation are essentially the same.

Thus, what Cooter has done is to provide rational-choice micro-foundations (or, in some cases, macro-foundations) for behavioral tendencies. This, by itself, is an important and impressive achievement, analogous in some ways to the move in economics toward establishing micro-foundations for macroeconomics theory (though without the rigid assumptions that have hamstrung that approach).¹³ This framework is particularly powerful in that it allowed Cooter to think about what appeared to be deontological moral commitments in economic and utilitarian terms. That led Cooter to further breakthroughs, among them a strategy for thinking about adaptive preferences and the provocative idea of “Pareto self-improvements.” The next Part turns to those ideas.

12 See Jolls et al., *supra* note 4.

13 See, e.g., E. ROY WEINTRAUB, *MICROFOUNDATIONS: THE COMPATIBILITY OF MICROECONOMICS AND MACROECONOMICS* (1979); Simon Wren-Lewis, *Internal Consistency, Price Rigidity and the Microfoundations of Macroeconomics*, 18 J. ECON. METHODOLOGY 129 (2011).

II. NORMS AND SELF-IMPROVEMENT

When an individual internalizes a moral norm, her preferences change. As noted above, this idea, which is central to Cooter's theory, runs counter to some of the most closely-held precepts of rational-choice economics. Rational-choice economics has long rejected the idea of changed preferences because, by ascribing an individual's actions to changing preferences, an economist could explain anything and therefore nothing. The notion of changing preferences is thought to dilute the power of economics as an explanatory science. Cooter, however, understood the power of altered preferences to explain both the long-term evolution in an individual's behavior and the emergence and adoption of moral norms.

This idea also allowed Cooter to connect his theories to longstanding debates in philosophy and economics about adaptive preferences — preferences that change in response to external stimuli. One problem presented by changing preferences is that they create, in some sense, two versions of the individual: the version who existed before the preferences changed, and the version who exists after the preferences changed. What is good for the pre-change version of the individual might not be good for the post-change version, precisely because preferences have adjusted. Moreover, if one adopts a preference-based view of welfare (as Cooter does), it is generally thought to be impossible to make interpersonal welfare comparisons (except in very limited circumstances). That is, if Person A has satisfied some number of her preferences, and Person B has satisfied some number of her preferences, it is generally impossible to determine whether Person A or Person B is better off. In the case of a single individual who has internalized some moral norm, it will be generally impossible to determine whether that individual was better off before internalizing the moral norm, when she was presumably leading a different type of life and satisfying different preferences, or better off after having internalized the moral norm and changing her preferences.

In response to this apparent dead-end, Cooter introduced the idea of a "Pareto self-improvement."¹⁴ A Pareto self-improvement is the internalization of a moral norm that makes the individual better off according to both her preference function *after* internalizing the norm and her preference function *before* internalizing the norm. That is, whichever version of the self one examines, the internalization of the norm has improved that self's welfare. By way of example, Cooter suggests an individual who does not have a strong work ethic and therefore cannot hold down a steady and remunerative job. This person then gains a strong work ethic — she internalizes a moral norm that it is

14 Cooter, *Models of Morality*, *supra* note 6, at 904-05.

good to work hard. At this point, she takes on steady and regular employment. The individual's situation is certainly an improvement from the perspective of the post-change self; she is satisfying her preference for hard work, and in so doing she is reaping rewards from her labor. But it might also constitute an improvement from the perspective of the pre-change self. The individual is working harder than her pre-change self did and has less time for leisure, but she also now has greater wealth and thus better opportunities available for how to spend that leisure time. The pre-change self might well prefer the life that the post-change self is living to the life that the pre-change self was previously living.¹⁵ If so, then she has made a Pareto self-improvement — one that is superior, by her own lights, regardless of which set of preferences one privileges. Cooter suggests further that this idea has predictive power as well.¹⁶ We can anticipate that people will internalize moral norms when doing so will lead to Pareto self-improvements, because even the self that is doing the internalizing realizes that it would be better off after the preference change.

Again, this is a powerful and provocative idea. Cooter's approach to the internalization of moral norms and his conception of a Pareto self-improvement made tremendous progress on a subject that had long stymied economists and philosophers. But I believe it can be pushed even further, both normatively and descriptively. As an initial matter, it is descriptively the case that people frequently internalize moral norms in situations where it is implausible or even impossible that their pre-internalization selves would have been better off with the post-change life. Take, for example, Cooter's example of the acquisition of a work ethic. It must surely be the case that some individuals who acquire work ethics end up holding down steady or even demanding jobs that would have made their pre-internalization selves miserable. Imagine the impetuous twenty-three-year-old who would rather die than be cooped up in an office all day, but by age thirty-five is leading a satisfying life as a lawyer at a large firm. (We have probably taught many such people.) We need a theory that explains why these individuals would choose to internalize norms, assuming that they have chosen to do so.

15 It is worth noting that a change in preferences of this type is more powerful — and better for the individual — than a mere change in habits. If a lazy person adopts the habit of working hard, she will still suffer costs every time she works, precisely because it is not her preference to work hard. In addition, if others understand that she has merely adopted a habit of hard work, rather than a preference for hard work, they may not trust her to continue to work hard in situations where shirking is possible. By contrast, if she internalizes a preference for hard work, she gains benefits from working hard and can more credibly signal her intentions to continue to work hard, come what may.

16 Cooter, *Models of Morality*, *supra* note 6, at 905.

Similarly, Cooter offers too narrow a conception of the circumstances under which governments should induce individuals to internalize salutary moral norms. He cleverly finesses the issue by noting that if internalization of the norm would lead to a Pareto self-improvement, the government would be justified in inducing internalization.¹⁷ From any perspective, the individual is made better off. But if this is the only circumstance in which government is justified in inducing individuals to internalize moral norms, then the role of government is very limited. Readers with libertarian inclinations may think this is to the good — perhaps the government should not be involved in shaping preferences, or should engage in such activity only in these very limited circumstances. But from a welfarist perspective, this curtailed approach leaves opportunities on the table. There might be many ways in which government could help instantiate moral norms that would lead to increases in social welfare, even if they were not Pareto self-improving.

The problem is that preference-based conceptions of welfare are not equipped to measure improvements in welfare in cases where preferences have changed. That is, there is no easy way to perform a welfare analysis when pre-change individuals and post-change individuals might assign very different values to the costs and benefits of an intervention.

Changed preferences eliminate the possibility of comparing welfare across various selves precisely because it is unclear whose preferences should count. Another way of saying this is that a preferentist view of welfare does not easily enable cardinal measures of welfare or interpersonal welfare comparisons (or in this case, intrapersonal welfare comparisons across a person who has changed preferences over time).

But preference satisfaction is neither the only nor the best way to understand welfare. As I have argued extensively elsewhere, welfare is best understood in terms of subjective mental states: an individual's welfare is the aggregate of that individual's positive and negative thoughts and feelings over time.¹⁸ This "hedonic" conception of welfare is highly intuitive. Welfare is meant to describe how an individual's life is going for her — that is, by her own lights.¹⁹ In other words, welfare is an individual's own experience of life: all of the

17 Cooter, *Do Good Laws*, *supra* note 6, at 1596-98.

18 JOHN BRONSTEEN, CHRISTOPHER BUCCAFUSCO & JONATHAN S. MASUR, HAPPINESS AND THE LAW (2015); John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010).

19 Of course, welfare is not necessarily the only good that should matter to a policymaker. But, all else equal, the goal of policy should be to increase welfare whenever possible. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1628-29 (2013).

moments, good and bad, that make up a person's conscious experience of the life she is leading. If a person regularly experiences pain and bad feelings, it would be unintuitive to claim that such a person's life is going well for her; likewise, if a person goes through life consistently feeling happy, contented, and satisfied, it would seem counterintuitive to claim that such a person's life is going badly for her.

Readers steeped in traditional preferentist conceptions of welfare might be initially dubious of a hedonic approach. But they need not be. The hedonic view of welfare is, in fact, conceptually similar to the most plausible type of preference-based conception of welfare. Scholars have understood for a long time that welfare cannot be understood as satisfaction of an individual's actual preferences,²⁰ at least if those preferences include basic, immediate preferences for goods and experiences (sometimes referred to as "first-order preferences").²¹ Rather, those preferences must be laundered, such that they more closely resemble the preferences that a self-interested individual would hold under conditions of full information. On the requirement of full information: suppose Caroline has a strong preference to eat a bowl of chocolate ice cream, thinking it will be delicious. When she actually consumes the ice cream, however, she finds that she does not like the taste of chocolate ice cream after all. It would be unintuitive to maintain that Caroline's welfare has increased simply because she has satisfied her preference for eating the ice cream. And on the requirement that preferences be self-interested: to borrow a well-known example, suppose that Sheila has a preference that an endangered species of squirrel in a remote country not become extinct.²² Suppose Sheila never learns the fate of the squirrel. It would be unintuitive to claim that Sheila's welfare has increased if the squirrel lives, or decreased if the squirrel dies, if she never learns the news. The squirrel's fate would not have affected her life in the least and thus it could not have affected her welfare. This type of "remote" preference has no impact on her welfare.

Accordingly, scholars have long understood that preferences must be laundered before we can treat them as the basis for welfare.²³ They must be fully informed — the individual holding the preference must know all

20 JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE* 21-40 (1986); Matthew D. Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 *J. LEGAL STUD.* S253, S257-59 (2008).

21 Cooter, *Do Good Laws*, *supra* note 6, at 1595-96.

22 MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006).

23 Bronsteen, Buccafusco & Masur, *Welfare as Happiness*, *supra* note 18, at 1585-87.

information relevant to the formation of that preference. Caroline must be aware that she will not enjoy the chocolate ice cream. And they must be self-interested and not remote; the preference must involve something that will actually impact Sheila's life experience.²⁴ These conceptions largely align with the idea of higher-order preferences — preferences over more general or abstract experiences or feelings, rather than more immediate goals or things.²⁵ Cooter gives the example of a lower-order preference for milk over soda, which is driven by a higher-order preference for good health. These types of higher-order preferences relate closely to the types of positive mental states and emotions that form the core of a subjective well-being view of welfare. As Cooter notes, “[t]heorists have tried to identify a supreme value that orders all specific choices. Traditional candidates among philosophers include pleasure and happiness.”²⁶

Conceiving of welfare in hedonic terms opens up a variety of analytic possibilities that are closed to a preference-based conception of welfare. As an initial matter, it is conceptually possible to create cardinal measures of hedonic welfare. An individual's welfare is the sum of the moments she is alive, whether good or bad, and the goodness or badness of those moments is determined by whether they involve positive or negative feelings. In this manner, an individual's welfare over any given time period can be quantified as a single number. The science of measuring positive and negative feelings is still in its infancy; we cannot insert hedometers into people's brains and measure how many positive and negative feelings they are experiencing. Instead, we must rely on self-reporting: individuals indicating, in response to prompts, the extent to which they are experiencing positive and negative feelings. However, even these self-reports have shown high levels of test-retest reliability, and they score well on typical measures of external validity.²⁷ They are highly correlated with external evidence, such as how often the individual smiles, rates of depression, and reports from the individual's family and friends.²⁸

24 For criticism of even idealized preference-satisfaction theories of welfare, see Daniel M. Hausman & Michael S. McPherson, *Preference Satisfaction and Welfare Economics*, 25 *ECON. & PHIL.* 1 (2009).

25 Cooter, *Good Laws*, *supra* note 6, at 1595-96.

26 *Id.* at 1596.

27 Michael Eid & Ed Diener, *Global Judgments of Subjective Well-Being: Situational Variability and Long-Term Stability*, 65 *SOC. INDICATORS RES.* 245, 245-46 (2004).

28 Ulrich Schimmack, *The Structure of Subjective Well-Being*, in *THE SCIENCE OF SUBJECTIVE WELL-BEING* 97, 97 (Michael Eid & Randy J. Larsen eds., 2007); Heidi Lepper, *Use of Other-Reports To Validate Subjective Well-Being Measures*, 44 *SOC. INDICATORS RES.* 367, 367 (1998); Ed Sandvik, Ed Diener & Larry Seidnitz,

If one can assign cardinal values to welfare states, then it is also possible to make interpersonal welfare comparisons. If Alice has welfare of 50 over a given time period measured in hedonic terms, and Beth has welfare of 100, then we can conclude that Beth has led a better life over that period than Alice. Cardinal measures of welfare would similarly enable *intrapersonal* welfare comparisons as between two states of an individual who has altered her preferences over time. Imagine that Alice lives for 10 years as a layabout and has total welfare during that time of 65. She then internalizes a moral norm for a strong work ethic, and over the next 10 years her total welfare is 75. From this we can conclude that Alice's life was better — by her own lights — after she internalized the work ethic norm than it was before.²⁹ Such comparisons are (generally) conceptually incoherent under a preference-based view of welfare but intelligible under a hedonic conception of welfare.

This approach can provide greater purchase on when people are likely to decide to internalize moral norms and when it is good for them to do so. Cooter's idea of Pareto self-improvement is very clever. But that surely does not describe the only situations in which an individual will choose to internalize a moral norm, and it is not the only situation in which we can say that internalizing a moral norm is welfare-enhancing. The hedonic conception of welfare allows us to extend Cooter's insight by introducing the concept of "Kaldor-Hicks self-improvement." An individual engages in Kaldor-Hicks self-improvement when she internalizes a moral norm that causes her post-internalization self to have greater welfare than her pre-internalization self. The analogy to Kaldor-Hicks efficiency³⁰ is not perfect, but the connection is relatively straightforward: the individual gains more than enough through the internalization to compensate herself for anything that might have been

Subjective Well-Being: The Convergence and Stability of Self-Report and Non-Self-Report Measures, 61 *J. PERSONALITY* 317, 322 (1993); Tiffany A. Ito & John T. Cacioppo, *The Psychophysiology of Utility Appraisals*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 470, 479 (Daniel Kahneman, Ed Diener & Norbert Schwarz eds., 2003); Timothy G. Dinan, *Glucocorticoids and the Genesis of Depressive Illness: A Psychobiological Model*, 164 *BRIT. J. PSYCHIATRY* 365 (1994); Ed Diener & Richard E. Lucas, *Personality and Subjective Well-Being*, in *THE SCIENCE OF WELL-BEING* 213, 213-14 (Felicia A. Huppert, Nick Baylis & Barry Keverne eds., 2006).

29 Bronsteen, Buccafusco & Masur, *supra* note 19.

30 A project is Kaldor-Hicks efficient if there is a potential wealth transfer that, if executed after the project was completed, would leave at least one party better off and no party worse off than before the project was begun. ANTHONY E. BOARDMAN, DAVID H. GREENBERG, AIDAN R. VINING & DAVID L. WEIMER, *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* 32 (1996).

lost, such that her overall welfare increases. (Indeed, whereas Kaldor-Hicks efficiency is not determinative of welfare,³¹ a Kaldor-Hicks self-improvement is one in which welfare has by definition increased.) Equivalently, one might say that the gains to the individual from internalization outweigh the costs.

Armed with the notion of Kaldor-Hicks self-improvement, we can predict a broader range of circumstances in which individuals will elect to internalize moral norms: they will do so when they believe that it will lead to Kaldor-Hicks self-improvement. For instance, our impetuous twenty-three-year-old will elect to internalize a moral norm for hard work and diligence when she comes to believe that the life she will lead after internalizing the norm — including a satisfying career as an attorney — will be better for her than the life she would lead without such a norm. Understanding welfare in hedonic terms makes this comparison possible, even though she is to some extent a different person after internalizing the norm.

Of course, there is significant ambiguity bound up within the question of “when they believe” that internalizing a moral norm will lead to greater welfare. An individual attempting to make this judgment must imagine what her life will be like after she has internalized the moral norm, thus changing both her preferences and the way in which she lives her life. Then she must compare it to the life she is currently leading. A significant body of research demonstrates that humans fare poorly when trying to make these types of predictive judgments. They very commonly fall prey to what are known as “affective forecasting errors” — they struggle to forecast their expected levels of positive or negative affect (that is, subjective well-being) in the future, after some change has occurred in their lives.³² In most cases, affective forecasting errors seem to occur because of “adaptation neglect” — people do not take into account how readily they will adapt to changed circumstances.³³ Accordingly, they are prone to overestimation, both of the negative emotion they will feel from negative events and the positive emotion they will feel from positive events.

Here, affective forecasting errors will likely be magnified by the fact that the individual is envisioning a change in her preferences, as well as

31 Adler & Posner, *supra* note 20, at S265.

32 See, e.g., Daniel T. Gilbert & Timothy D. Wilson, *Prospection: Experiencing the Future*, 317 *SCI.* 1351, 1354 (2007); Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting: Knowing What To Want*, 14 *CURRENT DIRECTIONS PSYCHOL. SCI.* 131, 131 (2005).

33 Shane Frederick & George Loewenstein, *Hedonic Adaptation, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 302, 311-18 (D. Kahneman, E. Diener & N. Schwarz eds., 1999).

a change in her life more generally. In all likelihood, the individual will underestimate the extent to which her new life will fit her new preferences; she will be more focused on how that new life would comport with her old preferences. Accordingly, we can supplement our prediction about Kaldor-Hicks self-improvement with another prediction: individuals will fail to internalize moral norms in many cases where doing so would lead to Kaldor-Hicks self-improvement, because they will not recognize or anticipate that it would increase their welfare. That is, Kaldor-Hicks self-improvement will be substantially underutilized.³⁴

III. THE GOVERNMENT'S ROLE IN MORAL NORM INTERNALIZATION

To this point, the discussion has focused on individuals' decisions to internalize moral norms for their own benefit. But it is of course possible that government has a role to play as well in encouraging or facilitating the internalization of socially beneficial moral norms. There is widespread agreement that one of the central purposes of government is to improve people's lives, at least when all else is equal.³⁵ Cooter's analysis makes clear that individuals can in some cases increase their welfare by internalizing new moral norms. This suggests that government may have a role to play in facilitating or encouraging the internalization of welfare-enhancing moral norms.

In his writing on the subject, Cooter is relatively pessimistic about the ability of government to play an efficacious role in changing moral norms. He suggests, quite correctly, that it will be very difficult for the government

34 In addition, it is of course not the case that individuals will always attempt to internalize new norms when they believe that it would increase their welfare to do so. People may well be driven by motivations that are external to welfare, and certainly external to their own welfare. *See, e.g.*, Bronsteen, Buccafusco & Masur, *supra* note 11, at 1628-29. The point is merely that individuals will frequently be motivated by the desire to increase their own welfare and will frequently act on that motivation. In addition, in many instances — including the examples of norms for hard work or honesty described here — the welfare-enhancing moral norm will also satisfy or promote an individual's non-welfarist criteria.

35 Bronsteen et al., *Well-Being Analysis*, *supra* note 19, at 1611; Adler & Posner, *NEW FOUNDATIONS*, *supra* note 22, at 177. Adler and Posner take the view that welfare is one thing that matters to society, if not the only thing, and refer to this view as "weak welfarism." In prior work, I have similarly adopted weak welfarism as a normative framework.

to reward prosocial moral norms or punish antisocial ones because it cannot observe an individual's true character — it can only observe her behavior.³⁶ That means that the government can reward or punish prosocial or antisocial behavior, thus increasing or decreasing the incidence of that behavior, but it cannot reward or punish the internalization of norms directly. And an important lesson from Cooter's scholarship is that internalization of the norm is more valuable (socially) than mere reward and punishment of behavior. If an individual has not internalized a moral norm of, say, honesty in commercial dealings, she will act dishonestly whenever it seems to her advantage to do so. Shortcomings in enforcement of state-generated rewards and punishments — driven by resource deficiencies, or inability to observe certain behaviors — will leave gaps where antisocial behaviors may persist. Thus, it would be preferable if the state were able to play a greater role in promoting actual norm internalization.

Here, too, it is possible to draw upon Cooter's theory to extend his analysis. Even though the government cannot observe character directly, there are a variety of actions it can take to encourage the formation of prosocial moral norms. Cooter notes that while the government cannot observe character, an individual's acquaintances — friends, family, co-workers, etc. — often can, precisely because they can come to know the individual far better personally than an officer of the state ever could. Cooter notes that individuals can enforce norms against one another, as when a group of people socially sanction an individual for lying, or for not working hard enough, or similarly antisocial behaviors. The government can change the costs and benefits of socially sanctioning or socially rewarding behavior by facilitating coordination. Suppose the government makes it a crime to litter but cannot effectively enforce the crime. It sends a signal that littering is antisocial and in so doing conveys information that many people believe that littering is bad behavior.³⁷ As a result, any individual who dislikes littering and knows about the penalty will come to believe that her antipathy to littering is shared by many other people, not to mention backed by the force of law. This will lower the costs to her of socially sanctioning someone who litters.³⁸ She will believe that she is acting in solidarity with many others, and the notion that she is engaging in herd behavior will mitigate the psychological costs of confronting the individual who is littering.

36 Cooter, *Good Laws*, *supra* note 6, at 1583-85.

37 See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

38 Cooter, *Good Laws*, *supra* note 6, at 1585-86.

Government could also invest resources in supporting cultural, educational, charitable, or even religious institutions that promote prosocial moral norms. It could spend money on advertising the value of moral norms, including tying those norms to other admirable traits or people.³⁹ All told, the government has substantial ability to shape norms, even without imposing legal sanctions, simply through its funding power.

But we can push this further. It may well be that Cooter was too pessimistic about the ability of the government to change character — that is, to induce the internalization of prosocial moral norms — using many of the same mechanisms that it uses to change behavior. The same rewards and punishments that can affect behavior, if deployed effectively, can also lead individuals to internalize norms. To begin with, whenever the government rewards or punishes a behavior and thereby sends a signal regarding what other people think of that behavior, this changes the costs and benefits of internalizing the norm from the perspective of the individual who observes the state's action. Suppose the government enacts a law, such as the Earned Income Tax Credit, that rewards hard work. This sends a signal that most people think hard work is valuable and worthwhile. An indolent person, who is considering trying to develop a work ethic, will observe this law and realize that most of the people around her have probably internalized the norm of a work ethic, or at least believe that it is good to possess such a norm. That, in turn, changes the costs and benefits of internalizing a work ethic for that individual. She will realize that she will receive positive rewards from her acquaintances — the people who can actually observe her character, present and future — for having internalized such a norm. The same herd effects and conformity-inducing forces that Cooter describes as facilitating interpersonal rewards and punishments for moral character will also induce changes to that character.

Of course, this type of law might also change the payoffs from others from internalizing a moral norm. If an individual's friends and acquaintances believe that she has become hard-working only because the law has instructed her that hard work is good, they might be less inclined to reward her for her change in attitude. Nonetheless, there will likely be many situations in which the benefits to internalizing a new norm — including the approbation of one's acquaintances — will still outweigh the costs of doing so.

In addition, law can induce learning, which can in turn affect individual decisions to internalize moral norms. Suppose that the government passes a law that heavily penalizes some sort of antisocial behavior, such as failing to

39 See, e.g., Lessig, *supra* note 24, at 962-64.

keep the sidewalk in front of one's house free from snow and ice.⁴⁰ Imagine an individual who would prefer not to have to shovel snow but is now forced to do so, given the steep monetary penalties (and ease of detection). When that individual begins to fulfill her responsibilities under the law, she might find that she does not mind shoveling snow nearly as much as she expected. She might find that she enjoys getting a bit of exercise, that she stays warmer in cold weather than she expected, or that shoveling snow offers opportunities to socialize with her neighbors. She would then understand that she has much more to gain from internalizing a norm of altruism towards her neighbors (here, manifested in shoveling snow) than she originally believed.⁴¹ (For that matter, she might also realize that she actually prefers shoveling her snow over not doing so, even given her current preferences.) The result could be a decision to internalize a new moral norm. Here, the pathway is from a change in behavior, to learning, to a reassessment of costs and benefits, to a decision to internalize a new norm.⁴² The new norm could even alter her behavior with respect to other altruistic activities; for instance, it might cause her to shovel her neighbors' sidewalks or their parking spaces.⁴³

The most obvious application of such a principle would be to promote prosocial behaviors, particularly those that produce external benefits to third parties. For instance, the government might attempt to cause individuals to internalize norms favoring voting, or honest dealing in contracts, or regard for others and one's environment, or any number of other traditional governmental objectives. In doing so, the government would be acting well within the normal boundaries of its authority and activity. Just as it can use the force of law to alter behavior in prosocial ways, it can use the law to induce individuals to change their own preferences in prosocial ways.

40 See, e.g., City of Chicago, Sidewalk Snow Removal, https://www.chicago.gov/city/en/depts/cdot/supp_info/sidewalk_snow_removal.html#:~:text=Yes,property%2C%20including%20any%20crosswalk%20ramps (last visited Apr. 5, 2021).

41 Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014). After the individual has internalized the moral norm, the law would become superfluous.

42 This is consistent with modern psychotherapy, where scholars now believe that changes in behavior can induce changes in preferences, beliefs, and mental states. See, e.g., Barbara Olasov Rothbaum, Elizabeth A. Meadows, Patricia Resick & David W. Foy, *Cognitive-Behavioral Therapy*, in EFFECTIVE TREATMENTS FOR PTSD: PRACTICE GUIDELINES FROM THE INTERNATIONAL SOCIETY FOR TRAUMATIC STRESS STUDIES 320-325 (E. B. Foa, T. M. Keane, & M. J. Friedman eds., 2000).

43 See Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 528-32 (2002).

But the state could go even further. One could imagine the state using law to induce individuals to shift their preferences not only in cases where doing so would eliminate negative externalities, but even in circumstances where doing so would benefit the individual alone. That is, the state could engage in purely paternalistic actions to cause individuals to internalize beneficial moral norms, with the idea of improving those individuals' lives. As an initial matter, this extension of Cooter's theory will undoubtedly strike some readers as misguided. "Paternalism" is a dirty word under the best of circumstances. And these are not the best of circumstances. It is one thing to use law with paternalist intentions to alter an individual's behavior. That alone will seem overly interventionist to many people. But here the idea is to use law to change an individual's preferences. This seems even more interventionist; it seems to implicate the government in one's most personal affairs. Of course, the law is not prohibiting or requiring any type of action. It would only involve changing the costs and benefits of certain types of actions in order to make them appear more or less attractive. Nonetheless, that defense is not likely to assuage anyone concerned by the policy.

So there is an obvious objection to this type of approach on libertarian grounds. But that is not a welfarist objection. Again, from a preference-based perspective on welfare, the government could be involved in shifting preferences only in very limited circumstances: where doing so would satisfy Cooter's Pareto self-improvement criterion. But under a hedonic view of welfare, the government's options are more capacious. Most importantly: there is a welfarist argument for government interventions that would produce Kaldor-Hicks self-improving preference shifts. It is the central role of government to improve the welfare of its citizens. If the government could reliably produce these improvements through law, it should at least consider the option.

CONCLUSION

Cooter's work on moral norms and changing preferences belongs in the pantheon alongside his more famous writing on torts and contracts. Cooter situates moral norms within a law and economics framework, explains the rational process by which people might elect to internalize new norms, and hypothesizes the circumstances ("Pareto self-improvement") under which such internalization will take place. He then suggests circumstances in which the government itself might play a role in promoting the internalization of moral norms.

Yet it is possible to extend Cooter's important work even further by coupling it with contemporary ideas of behavioral and hedonic psychology. Viewing

welfare through a hedonic lens, rather than a preferentist one, allows for cardinal measures of welfare and thus for interpersonal welfare comparisons. This makes possible the concept of “Kaldor-Hicks self-improvement,” in which the individual who internalizes a moral norm is better off (in cardinal welfare terms) than she was before the internalization. As a predictive matter, the concept of Kaldor-Hicks self-improvement expands the range of situations in which we can expect individuals to deliberately internalize moral norms. And as a normative matter, contemporary research in behavioral law and economics suggests further contexts in which government intervention to encourage such internalization might be appropriate. There may be a larger role for the government to play in the lives of a larger number of people than Cooter realized.

Among the highest compliments one can pay to a scholar’s work is that it lives on, generating new insights and new ideas among others well past its publication date. Cooter’s work on moral norms will surely exceed that standard.

