Introduction Chapter from The Law of Good People: Challenging States’ Ability to Regulate Human Behavior

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Research assistants ...
Introduction

The focus of this book is on how governments may effectively use recent advances in the understanding of human behavior to guide their efforts to modify people’s behavior. To date, the insights of behavioral ethics that have completely revolutionized the business and management fields have yet to be applied in legal theory and policy research, especially in the context of legal enforcement and compliance. The growing recognition that misconduct can be facilitated by structural issues and is not just the product of a few “bad apples” has important implications for the creation and fine-tuning of institutional design and enforcement mechanisms. States need to modify their regulatory roles and functions based on the understanding that discrimination does not just stem from certain employers who hate minorities, that corruption is not just about greedy individuals, or that trade secrets are not just divulged for mercenary motives.

This book argues that the good-people rationale—the idea that ordinary people could engage in all types of wrongdoing without being aware of the full meaning of their behavior—greatly complicates the regulatory challenge of states. Because of various psychological and social mechanisms that prevent people from recognizing their wrongdoing and encourage them to feel as if they are far more moral, unbiased, and law abiding than they actually are, individuals today are less likely to react, at least not explicitly, to classical legal signals, which they view as directed to other, “bad” people. Similar self-serving mechanisms affecting their perception of social norms and fairness cause people to have very inaccurate views of the normative status of their behavior. Moreover, a great deal of uncertainty surrounds the good-people rationale and, as we will show from the literature, there is clearly more than one type of good person—different people use a variety of different mechanisms to justify their unethical and illegal behavior. We do not yet know how “good” the good people are in terms of their awareness and ability to control their conduct. Nor can we accurately quantify ex-ante the ratio of good to bad people in society with regard to any particular behavior. Although we appreciate the need to address the misconduct of good and bad people differently, we do

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1 Parts of the specific chapters are based on joint work with most of the my co-authors… Research assistance …. Language editing. this chapter includes some texts that appeared before in the chapter behavioral ethics meets behavioral law and economics, in the Oxford handbook of behavioral law and economics, Zamir and Teichman eds. 2014
not know the costs of using the “wrong” intervention techniques to deal with various types of bad behavior. Bringing about the needed shifts in regulatory design first requires a shift in the behavioral analysis of law.

Limited cognition, limited self-interest, and behavioral ethics

The last 30 years have seen a dramatic increase in the influence of psychology on the field of economics in general and on the law and economics movement in particular. As a result, significant efforts have been devoted to mapping the flaws in human cognition and examining their implications for how individuals deviate from making optimal decisions; see Jolls, Sunstein & Thaler,3 Ulen and Korobkin,4 Langevoort,5 and Jolls.6 For example, the literature has investigated how irrelevant factors of context, framing, or situations can cause individuals to make decisions that are contrary to their best interest. Kahneman’s book, Thinking, Fast and Slow,7 popularized the concept of two systems of reasoning, which now is at the core of extensive research in behavioral law and economics. Kahneman differentiates between an automatic, intuitive, and mostly unconscious process (System 1) and a controlled and deliberative process (System 2).

Although many scholars—for example, Gigerenzer8 and Kruglanski9—have criticized this paradigm, recognition of the role of automaticity in decision making has played an important role in the emergence of behavioral law and economics.

It is essential to clarify at the outset the dramatic difference between the highly popular behavioral law and economics (BLE) and behavioral ethics (BE). BLE is

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concerned with peoples’ limited ability to make “rational” decisions, whereas behavioral ethics addresses people’s inability to fully recognize the ethical, moral, (and legal) aspects of their behavior. How BE and BLE approach self-interest illustrates the main difference between them. BLE assumes that people cannot be fully trusted on their own to make decisions that enhance their self-interest, because of the bounded rationality argument—that available information, cognitive ability, and time constraints limit individuals’ ability to make rational decisions. In contrast, BE focuses on people’s inability to recognize the extent to which self-interest in its broader sense affects their behavior. BE assumes that many people’s actions are based on self-interest, in that they serve the need to maintain a positive and coherent view of the self. It also accounts for the effect that self-interest has on cognitive processes (for example, visual perception and memory), as opposed to simply looking at how self-interest affects motivation. Finally, BE is more concerned with how our self-interest affects us implicitly than with how it shapes our explicit choices. In light of these differences, the fact that BLE is so popular within the legal literature\textsuperscript{10} while BE is almost entirely ignored,\textsuperscript{11} is quite counter-intuitive.\textsuperscript{12}

As I discuss in more detail in Chapter 2—which focuses on the psychological foundations of behavioral ethics—good people\textsuperscript{13} are those who find themselves in


\textsuperscript{12}I discuss this point in more details in page _____

situations in which they are not fully aware of the full legal, moral, and ethical meanings of their behavior for a combination of reasons. They then engage in motivated reasoning, in which their desires affect the types of information they pay attention to and how they process it.\textsuperscript{14} Self-deception also plays an important role in their ability to accurately assess the nature of their actions and motives, causing them to believe they are acting more ethically than they actually are.\textsuperscript{15} To use a common example, a mayor will find it difficult admitting to himself that his behavior is driven by anything other than the benefit of the city he runs—even if his actions seem to be, on the surface, motivated primarily by his own self-interest.

As discussed in more details in chapter 2 and especially in chapter 9 that focuses on implicit corruption. The BE literature has produced many important and counterintuitive insights. For example, people behave less ethically in groups than when alone\textsuperscript{16} and also when they are acting on behalf of other people, rather than for themselves. Another example is that good people might ignore blatant conflicts of interest, having few qualms about accepting tickets to a sports event from a client, although they would shy away from taking a monetary bribe. Individuals who consider themselves to be “good” based on their past behavior may permit themselves to bend the rules (moral licensing) and are more likely to make unethical decisions when time constraints increase.\textsuperscript{17} These findings described in the literature pose a substantial challenge to the ability of the state to change the behavior of the public across many domains of law.

These psychological mechanisms not only amplify the effect of self-interest but also tend to limit peoples’ awareness of the role of self-interest in determining their behavior. Indeed, one of the unresolved issues is the degree to which individuals are
aware of their ethical behavior,\textsuperscript{18} and BE research has proceeded along several paths that argue different views on this topic. On the one hand, Marquardt and Hoeger\textsuperscript{19} showed that individuals make decisions based on implicit rather than explicit attitudes. Along similar lines, when examining the automatic system, Moore and Loewenstein\textsuperscript{20} found that the effect of self-interest is automatic, and Epley and Caruso\textsuperscript{21} concluded that automatic processing leads to egocentric ethical interpretations\textsuperscript{22}. However, within BE can be found theories such as Bandura’s theory of moral disengagement that maps post hoc deliberative self-serving justifications, creating a taxonomy of how people come to more explicitly rationalize their unethical behavior.\textsuperscript{23}

Another body of literature that stands in contrast to BE is that on limited self-interest, which emphasizes the role of fairness and morality in compliance with the law. A good example is the important line of research that derives from the prosocial account of human behavior (see for example works of Stout\textsuperscript{24} and Benkler\textsuperscript{25} on pro-social behavior). According to this literature, rational choice models cannot account for our ability to cooperate and engage in prosocial behavior beyond what is in our self-interest.

Both BE and the prosocial behavior literature agree on the need to take a broader view of what self-interest is relative to traditional economics, and both disagree with the notion that money is the main force motivating people. However, they do not agree on the implications of these assumptions: BE argues that a broad account of self-interest should reveal our tendency toward selfish action, whereas the prosocial literature claims the opposite. In this book, I do not suggest that we look at people’s selfish choices to

\textsuperscript{22} As will be discussed in chapter 2, this is more
understand their behavior. On the contrary, I offer a more complex view of what it means for a choice to be in one’s broader self-interest and how self-interest affects behavior.

The contribution of economics to development of the behavioral analysis of law

The contribution of economics to law and psychology, which cannot be overstated, has brought about a shift in focus from the individual to the collective. Before the field of BLE developed, the law and psychology scholarship mostly took a forensic approach, evaluating individuals for the courts, primarily in criminal and family law contexts. Even research exposing biases at work in criminal and civil procedures, which is closely related to research in empirical legal studies (ELS),\(^\text{26}\) was often carried out in the context of individuals involved in particular court cases (e.g., jury selection and jury decision making). This orientation has limited the applicability of the traditional law and psychology scholarship to regulatory and legislative contexts.

In contrast, BLE scholarship focuses on understanding the behavior of ordinary people in everyday situations, with attention to situational context and the general effect of law on those actions. Many BLE findings have found practical application through communications with regulators, legislatures, and behavioral insight teams\(^\text{27}\).

Behavioral economics incorporates psychological insights into law through an economic lens. At the same time, BLE ignores many non-economic areas of psychology, focusing instead on theories related to judgment and decision making. The implications of the limited attention paid to the role of psychological mechanisms in people’s behavior are discussed in the next chapter.


This book challenges the excessive focus on cognitive biases at the expense of ethical biases that allow immoral behavior. Whereas the economics literature stresses rationality—that is, the outcome as a utility-maximizing decision relative to preference—I argue that it is the understanding of the importance of non-deliberative decision making that truly matters for legal theory; in addition, it is precisely the nuanced effect of this process on immoral behavior that economics fails to address.

Demonstration Through the “Self-Serving Bias”

The danger of BLE’s over-reliance on economics is best demonstrated in the ways its scholarship addresses the self-serving bias. Despite this bias’s clear relevance for morality and responsibility and therefore its close relationship to legal theory and enforcement, the BLE literature focuses on it instead as a deviation from rationality. For example, self-serving biases have been held responsible for people’s inability to estimate correctly the probability of winning legal battles. The most famous study was conducted by Babcock and Loewenstein,28 which showed that self-serving biases operated to reduce the likelihood of people settling out of court. This is a typical BLE finding because it assumes that people make rational decisions—that people do not pursue legal action when they are less likely to win. In this case the self-serving bias suggests a deviation from rationality, which requires intervention. But a much greater problem for law, currently being mostly ignored is the contribution of the self-serving bias to people’s inability to recognize both their lack of impartiality and the dominant role that their self-interest plays in their behavior, resulting in a crucial need for people to identify their own wrongdoing. The law and economics movement has thus limited the richness of the psychology being used in legal scholarship. The proposed legal perspective is not concerned with whether people are acting rationally. Instead, it is concerned with whether they are at fault, whether their behavior can be modified, and whether something in the situation has affected their ability to recognize their wrongdoing. Understanding these processes of decision making and how it affects questions of motivation, autonomy, and responsibility, rather than how to reach the optimal outcome, should be at the core of the new behavioral analysis of law.

Why Behavioral Ethics was neglected in Law

As suggested earlier, both the BE and the traditional BLE literatures focus on the automatic processes that underlie people’s decision making. However, they have different emphases: BE explores the automaticity of self-interest, whereas BLE examines areas in which automatic decisions undermine self-interest.

Given the importance of intentionality to the law, one would expect behavioral ethics to be more central to legal scholarship than it is today. Yet BE has had less of an impact on the legal arena than has behavioral law and economics. This is primarily because of BE’s structural limitations. For example, BE has a relatively large number of founding scholars, whereas BLE has two main ones: Kahneman and Tversky. As a result, BE suffers from the simultaneous development of multiple, competing paradigms, muddling the underlying points on which the literature agrees. These disagreements prevent BE from being able to propose consistent policy recommendations, which is another obstacle to its adoption within the law. Yet another limitation of BE is that it relies on a greater extent than BLE on dual reasoning mechanisms, whose concepts of automaticity, awareness, and controllability are difficult to explore and measure. How is it possible to prove that people are unaware of their selfish intentions? By contrast, classical BLE focuses on suboptimal outcomes, which can be easily examined empirically. This focus places many of the findings of BE at methodologically inferior positions relative to those of BLE.

Finally, another limitation of BE relative to BLE is the greater inability of third parties to recognize the biases of the decision making. When it comes to BLE related biases such as loss aversion, third parties can more easily recognize the fact that this bias undermines the ability of decision makers to treat loss and profit as similar consequences. By contrast, the main mechanisms in behavioral ethics are related to self-serving biases and motivated reasoning, BE arguing for people’s inability to recognize their own wrongdoing. Since these mechanisms are self-driven, it is harder for third parties to recognize

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that identify certain people as “good” people who simply cannot recognize their own
wrong-doing. To use a hypothetical example, if a public official promoted a friend, BE
suggests a whole array of mechanisms which might bias her ability to recognize the
impact of personal familiarity on the objectivity of their decisions. However, for third
parties, BE research suggests that they will have trouble believing that the public official
did not favor her friends knowingly. Such a gap been the decision maker and third
parties also contributes to the reluctance of BLE scholars from adopting BE based biases
as part of the bounded rationality project.

Despite the aforementioned limitations, bringing BE into mainstream legal
scholarship is both a challenging and rewarding task and it will be the primary occupation
of the present book.

The Gist of the Book

As alluded to in the previous paragraphs, in this book, I aim to create a new
branch of scholarship that focuses on the rule of law in a world populated by individuals
with different levels of awareness of their own unethicality. This book is based on the
assumption that many of the current directions in legal enforcement research miss important
elements of both behavioral and legal methods and theories. It challenges the ability of states to
systematically account for non-deliberative, unethical human behavior given a legal system based
largely on either sanctions or moral messages, both of which assume some level of calculation
and deliberation. The legal literature on enforcement needs to undergo a major revision in its
approach to the regulation of intellectual property, employment discrimination, conflict of
interest, and many other legally relevant behaviors that people engage in for multiple reasons and
with limited awareness of their full legal and moral meaning. In such contexts, the BE approach is
especially potent and needs to be taken into account. As suggested the book criticizes the

30 See discussion in Chapter two on the objectivity bias
31 See discussion in chapter 9 (on implicit corruption)
32 Compare with the argument made in the book “Why they do it” (Soltes, E. (2016). Why They Do It:
inside the mind of the white-collar criminal. PublicAffairs.) where convicted white color criminals
report they were unaware at the time that their behavior was unethical or illegal. The vast majority of
people find it very hard to believe that those people indeed didn’t know what they were doing.
behavioral-legal scholarship for overemphasizing rationality and cognitive biases at the expense of non-deliberative choice and ethical biases. However, as is shown throughout the book, the move to dual reasoning theories should not lead to a categorical rejection of deterrence and morality. In fact, the reverse is true: one of the arguments developed in later chapters is that traditional enforcement mechanism have more than one type of effect on people, and therefore the current fascination with nudges as a means of changing behavior, along with the abandonment of traditional intervention mechanisms, is misguided.

In latter chapters, I examine the new insights derived from behavioral ethics, a relatively overlooked area in current legal research, which help identify many mechanisms that prevent people from fully recognizing the wrongfulness of their behavior. At a conceptual level, the book revises some jurisprudential concepts related to choice, responsibility, and autonomy in light of growing knowledge about the role of non-deliberative choice in human behavior. Based on these insights, I revisit many of the existing behavioral paradigms of legal regulation and enforcement and conclude by presenting a multidimensional taxonomy of legal doctrines and of the various instruments that states can use to modify human behavior. I recommend certain changes that legal scholarship on enforcement needs to take to remain relevant in the face of recent behavioral research and regulatory changes.

Such a change in focus would greatly affect the design and enforcement of laws and regulations in many legal domains. For example, how can we justify the use of deterrence in light of the blind spot argument (i.e., ethical unawareness) advanced by scholars such as Bazerman and Banaji? How can we understand the legal responsibility of organizations given what we know about situational cues of unethicality? How should we think of nudges when our goal is to increase ethicality, rather than improving the available choices, although only the latter are in the long-term interest of individuals? How are we to understand the “Why people obey the law” project of Tom Tyler, which is based on self-report and explicit accounts of fairness, in light of the writings on moral

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33 supra note 10

intuition by Haidt\textsuperscript{35} and on moral identity by Aquino?\textsuperscript{36} Should we ascribe a new meaning to legal ambiguity, given its contribution to such processes as self-deception? Can states use enforcement mechanisms that distinguish between intentional and situational wrongdoers?

In general, I argue that we should separate between situations of specific individuals—where we need to define ex post what is the level of responsibility of a given individual who is on trial given his or her own limited awareness—and situations where we examine ex ante how to mobilize a given population, where our focus is on the collective. The first type of situation is the traditional view of law, but the fact that current studies show that ethical awareness is limited might not be enough to lead to normative change without more research. However, when it comes to ex-ante intervention, even when we cannot fully determine what is the strength of the non-deliberative component in people’s ethical motivation, we are able to predict that this component is likely to change the behavior of an unknown proportion of the population and hence should affect the ex-ante design of law.

In subsequent chapters, I attempt to bridge the gap between the new findings of the behavioral ethics approach to behavior and existing methods used to modify behavior. The new behavioral approaches to law enforcement assume that individuals are motivated to engage in illegal conduct by more than the pursuit of material self-interest. These approaches collide with the traditional outlook, requiring a broad theoretical and empirical comparison of both traditional enforcement mechanisms and non-traditional measures to understand how states may be able to cope with bad deeds carried out by people with a variety of motivations and levels of awareness. I explore the meaning of these variations across people, types of behavior, and legal doctrines.

This book explores the pros and cons of each regulatory tool available to government using an instrument-choice perspective based on the extensive knowledge we already have on the behavioral implications of each tool. This analysis assesses the advantages of


both traditional and non-traditional approaches to legal enforcement in addressing both
general enforcement dilemmas and contexts of fighting corruption and discrimination.

The challenge to legal enforcement posed by behavioral ethics

The underlying assumption of BE regarding the complex role played by the “self” in ethical decision making is clearly problematic for legal theory. BE claims that many of the claims about the responsibility of individuals as moral agents for their actions neglect the impact of the situation in which the decision-making process is taking place. It may be that the main driver of the individual’s behavior is the situation and not the individual’s current self-view. Furthermore, the automaticity of the self-enhancement process creates a “responsibility gap” for the individual who is not completely aware of the ethicality of his or her actions, and therefore cannot be held responsible for them. A possible way of bridging this gap is through “nudges” and by designing the situation so that it enhances moral awareness and calculated decision making.

The argument that I develop throughout the book is that the current level of knowledge that BE is able to provide is limited, especially with regard to important questions from a legal perspective, and therefore it is not able to provide policy makers with a clear list of recommendations on how laws should be changed. We lack sufficient knowledge about individuals’ awareness to the unethicality of their behavior and their ability to control them.37 The psychological and social mechanisms, which I describe in detail in the next chapter, paint a complex picture of human character according to which people mostly seek to promote their self-interest as long as they can feel good about themselves.38 Based on this theory, if we allow people to choose how to behave, many good people might resort to self-deception mechanisms, such as moral disengagement or elastic justification, and take advantage

37 See Hochman et al. supra note 14 conflicting results with regard to physiological indications of dishonesty among people.
38 See for example, Mazar, Amir and Ariely, Supra note 8.
of others’ trust to shirk their responsibilities, engage in dishonest behavior, or violate the law.

**Toward a broader perspective of the regulation of good people**

One of the most difficult challenges this book addresses is how interventions can increase ethical behaviors if most unethical actions are done unconsciously. For example, Bazerman and Banaji, two of the leading scholars of ethical decision making, argue that incentives and similar concepts fail to correct a large portion of unethical behaviors, because “such measures simply bypass the vast majority of unethical behaviours that occur without full conscious awareness of the actors, who engage in them.”

If we accept this argument, we can challenge enforcement methods that focus on external measures and incentives to control unethical behavior because they ascribe an unjustifiably key role to self-control, autonomy, and responsibility for action. One of the main shortcomings of the “good-people” literature is the gap between what we know about the dominant role of System 1 in ethical decision making and about what policy makers can do to curb thoughtless and unethical behaviors. Evidence of the automaticity of unethicality suggests that a new approach is required to create effective enforcement methods across all fields of legal regulation.

This recognition of the need for a new approach to enforcement lies at the heart of this book. I argue here that the state needs to differentiate enforcement methods: targeting “traditional” misconduct with traditional measures and non-traditional, only partially aware, misconduct with different types of intervention. Throughout this book, and particularly in Chapter 2, I describe mechanisms to address the non-traditional misconduct of people.

The book examines states’ and organizations’ ability to prevent people from engaging in uncooperative behavior, such as wrongful conduct, breach of contracts, and eschewing of professional duties, through traditional methods and compares those methods’ effectiveness and limitations to behaviorally informed enforcement mechanisms such as the new nudge approach, framing, expressive law, and procedural

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justice. After discussing the pros and cons of the various intervention mechanisms, the book recommends practical steps for legal policy makers to optimize their regulatory and enforcement efforts to influence both the deliberative and non-deliberative components of behavior.

These practical recommendations are based on a coherent account of the person that the law tries to affect and control, as well as an integrated consideration of many unresolved theoretical questions. These questions include the following. How much can we know ex ante about the awareness, controllability, and modification of the behaviors of good people? How can we know that their goodness is genuine and not fake? Are morality and traditional enforcement practices, such as deterrence, effective in curbing behaviors that are only partly deliberative? Can states regulate good and bad people by using different enforcement methods? Should the nudge approach, which avoids direct communication between the state and the people it regulates, replace all other intervention methods? Do we know to what degree the sustainability of behavioral change and autonomy are reduced when we abandon traditional intervention methods?

Some of these questions have been the subject of empirical and theoretical studies, and the book draws on extensive empirical research that others and I have conducted. For example, I have studied empirically the effect of social norms on the perception of legality in the context of intellectual property, the effect of incentives on people’s intrinsic and extrinsic motivations in the area of environmental protection and whistle-blowing laws, and the effect of legal uncertainty on the compliance and performance of people with different motivational backgrounds. The book moves one step further and fills the gaps unresolved by these and other studies by answering this key question: How much does the behavioral analysis of law (which studies deterrence, legitimacy, procedural justice, and the expressive function of the law) have to offer to improving legal compliance, as understood today, given what we know about the role of automaticity in legal compliance? Although earlier studies have contributed
to the body of knowledge of the behavioral analysis of law, they fall short of offering a coherent behavioral and normative picture of the person we are trying to regulate and of answering the questions raised earlier.

**Behavioral ethics and the instrument-choice literature**

An additional goal of the book is to integrate the growing interest in BITs with the increasing use of non-traditional measures, such as nudges, thereby addressing the debate in the literature over “legal instrument choice” and experimental legislation. The change in regulatory instruments follows directly from the recognition of people’s bounded rationality. One response to the greater appreciation of the role of non-deliberation in decision making is a move from a command-and-control approach to softer types of regulation. Traditional enforcement mechanisms used by states worldwide are based on the assumptions that people actively chose to engage in “bad” behaviors and that techniques such as incentives can be used to change those choices.

However, recent research shows that much of that behavior is engaged in unconsciously. This book proposes the most effective ways to change behavior by accounting for the effect of both traditional and non-traditional enforcement methods on public trust, legitimacy, and the perceived rule of law. It addresses the following questions: How do the recommendations of BITs affect people with different modes of reasoning and with different motivations regarding the law? How do modes of reasoning interact with previously shown effects of motivations on legal compliance? What are the long-term effects of BIT’s proposals on people's perception of responsibility and autonomy? Can we find connections between knowledge of behavioral ethics on the part of the law and legal concepts such as negligence, acting knowingly, and intentionality? Can we identify connections between people’s motivation regarding the law and the likelihood of engaging in ethical biases? Can we find the optimal balance between traditional methods and non-traditional ones? Can we be sure that, when looking at the

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most effective legal intervention for a given situation, we measure not only short-term effects but also factors such as legitimacy, perception of the rule of law, and durability of behavioral changes?

For the interaction between behavior-based regulation and the broader concept of law to be meaningful, it is necessary to identify the steps that would allow psychological knowledge to be generalized to the societal level rather than remaining at the individual level. The ideal behavioral approach to law, advocated by this book, must be sensitive to various normative and institutional factors such as trust, legitimacy, and legal culture. Only by combining the behavioral approach with institutional and normative ones can we create a coherent theoretical framework for non-traditional instruments that states can use to achieve greater success than with earlier, narrower approaches. Integrative behavioral research, which explores and analyzes the approaches that government should follow to regulate various types of unethicallity in society, can provide policy makers with the methods they need across all legal contexts, going beyond the current focus on energy savings, pension planning, and food consumption; these methods can reach into areas where traditional enforcement methods have failed to produce sustainable change because of their limited focus.  

The BE paradigms require revisiting many of the existing behavioral models of legal regulation and enforcement, which for the most part have relied on the assumption of deliberateness and rationality. These questions need to be answered. What is the optimal use of incentives? Should we replace traditional enforcement mechanisms with nudge interventions? What should be our attitude toward the expressive function of the law, the effect of fairness, or the interaction between incentives and fairness? Furthermore, in contrast to behavioral economics, which deals with biases that prevent people from behaving in a desirable way (e.g., saving more, eating healthier), from the BE perspective, many people behave in a way that they consider to be desirable, even after they have had time to reflect on their behavior; others, however, do not.

Yet the need to regulate both good and bad people long preceded the BE revolution. States deal with a world in which people have different motivations to comply with the

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law, mostly because of their differing levels of internalized moral and legal norms. The solution to dealing with a variety of people lies in the common denominator approach, along with a nuanced use of incentives to prevent crowding-out effects. But when it comes to differences between people’s level of deliberation, it is not clear that there is a common denominator at work. And even with the spotlight aimed at the new approach, the previous dichotomies of extrinsic and intrinsic compliance motivations remain relevant, maybe even more so than before. We are now facing the need to regulate people across two dichotomies, which are not necessarily orthogonal: their internalization of norms and their mode of reasoning.

Despite our growing understanding of good people, no one-size-fits-all policy suggests itself. For the legal policy maker to be able to use the rich knowledge about people’s bounded ethicality, we need to create a multidimensional taxonomy of legal doctrines and of the various instruments that states can use in their attempt to modify human behavior. The deviation from the assumption that an actor did wrong because he or she had planned on doing so is justified only in some legal doctrines and only with regard to certain situations. Being able to recognize ex ante the areas in which people’s lack of moral awareness is expected to be significant can change the balance of the tools that should be used.

**Limitations in the current behavioral ethics literature**

Several limitations in the behavioral ethics literature prevent it from fully incorporating and applying the research on non-deliberative choice and then using the results to improve the ethicality of society in many important domains of life. There is almost no discussion in BE of such concepts as the controllability of non-deliberative choice and awareness of its effect on behavior. The absence of feedback from the applied
behavioral sciences limits the ability of basic theoretical science to provide clear answers regarding aspects of non-deliberative choice. In addition, very little comparative research has been conducted on the efficacy of various intervention methods in various contexts. The absence of research leads to a lack of serious attempts in the legal and behavioral literature to understand the mechanisms on which intervention methods are based. Behavioral research does not account for tradeoffs between the methods and therefore provides no normative guidelines for policy makers. Finally, because of an absence of substantial interaction with the legal scholarship, the fields of behavioral engineering and mechanism design treat law in a simplistic way, ignoring the normative complexities and goals embedded in each legal doctrine and painting all legal doctrines with a broad brush.

There is a great need for a richer view of the interaction between law and human behavior that accounts for the effect of legal intervention on good and bad people alike. There also needs to be a deeper understanding of tradeoffs, which should be taken into account when evaluating the effectiveness of government intervention in changing behavior. An example of such context sensitivity appears in this book when I address the area of ethical decision making. Empirical results show that accountability is effective in undermining unconscious biases However this might not be the case for bad people who are looking for ways to rationalize their intentional bad behaviors. The inability to predict the effect of various legal interventions on behavior demonstrates the need for evidence-based behavioral-legal scholarship. Legal scholarship must recognize that behavioral findings are not merely on the sidelines but are at the heart of the theory and practice of legal enforcement. It must also demonstrate to scholars in the behavioral and public policy fields that law is a unique area that cannot be overlooked. To regulate

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44 The assumption of a one-way influence is problematic on many grounds. In the area of non-deliberative choice, LGOOD will attempt to suggest that understanding what intervention methods work in what circumstances can help basic science gain clarity regarding the interplay between deliberative and non-deliberative choice.
45 See Feldman and Lobel. supra note 38.
46 For example, in many economics papers about contracts or employment discrimination, the legal doctrine is presented rather naively. The nudge approach often ignores alternative solutions offered by the doctrine itself.
behavior in a comprehensive way, legal scholarship must adopt an integrative methodological and theoretical approach to the deliberative and non-deliberative predictors of behavior.

Based on the new insights generated by BE, current research seeks to demonstrate that the methods of behavioral-legal scholarship are no longer sufficient. For example, the main studies in the “why people obey the law” tradition are based on self-reports rather than on actual behavior, and research on legal framing assumes for the most part a deliberative process. Likewise, game-based experiments on cooperation assume that people readily recognize their self-interest and the public interest. At the same time, the literature on non-deliberative choice ignores the possible effect of compliance on factors such as perception of legitimacy and public trust, as well as cultural and institutional constraints. Furthermore, lab research lacks the required methodological focus of field experiments that provide external validity, which is so much more important for law than for psychology.

For example, one of the main techniques that good people can use to self-justify unethical behavior is to engage in biased interpretation of the legal requirements they must follow. Research on corruption and conflict of interest has studied numerous examples of situations in which people who exhibit professional and moral responsibility have allowed their self-interest, admittedly without full awareness, to prevail over fulfilling their duties.\textsuperscript{49,50} The existing literature on contractual performance decisions and framing focuses on the dichotomous choice: to breach or not to breach. However, in a study co-authored with Teichman and Shur,\textsuperscript{51} I argued that the focus should not be on whether people choose to comply with contractual obligations, but on their decision to interpret the contract in a self-serving way. This is in contrast to the work of Wilkinson-Ryan and Baron; describing to their participants the promisor’s decision to breach a contract, they simply stated, “He decides to break his contract in order to take other, more profitable

\textsuperscript{49} There is a wealth of research on the prevalence of conflicts of interest in almost every field. See, for example, Rodwin, M. A. (1993). Medicine, Money, and Morals: Physicians’ Conflicts of Interest. Oxford University Press.


work."52 Such studies implicitly assume that choices are made in reference to clear contractual obligations. This book instead focuses on the arguably more common situation of how to interpret an ambiguous obligation.

Similarly, much of the current literature on morality and legal compliance examines people’s moral judgment, but ignores the role of moral intuition and the fact that people might engage in motivated reasoning. The classical approach assumes that people consider the situation, recognize the moral conflict, and then decide what to do. This approach ignores that fact that they decide what seems to be the right thing to do based on their highly motivated perception of the situation. Their behavior may be immoral, but they still view themselves as moral people because they frame the situation in such a way that it “allows” immoral behavior. Clearly, people’s self-image of being cooperative or moral is not based on acting morally. Another relevant study on moral intuition is Tom Tyler’s seminal work, “Why People Obey the Law.”53 Tyler suggests that people decide to obey the law because the law is legitimate. Many studies in the social cognitive literature discuss mechanisms that either prevent people from knowing in advance that they are violating the law or enable them to develop an ex post approach that uses various strategies to change people’s perception of the wrongfulness of their behavior. Ariely et al.54 have shown that people do not believe that it is legitimate to cheat more if one is financially deprived. But when they were manipulated into thinking that they were deprived (by receiving a smaller amount of money in a game) they were quick to start cheating. This finding shows the importance of explicit judgment not only relative to implicit judgment but also to actual behavior. The methodological observation of Greenvald and Banaji55 on the power of implicit judgment may have even stronger force: because people love themselves so much, there is no reason for them to admit to themselves that they behave amorally.

52 Wilkinson-Ryan & Baron, 413. See also Wilkinson-Ryan, T., & Hoffman, D. A. (2010). Breach is for Suckers. Vanderbilt Law Review, 63, 1003. , at 1029 (using precisely the same phrase in order to describe the decision to breach).
Structure of the book

As described earlier, this book is divided into 11 chapters. The first two chapters focus on the theoretical dimension of the interaction between BE and the law.

Chapters 1 and 2 provide a critical overview of the theoretical and applied research on the role of the behavioral sciences in law, describing in broad strokes the current situation and highlighting the challenges and unresolved questions. After examining the literature on law and psychology and the law and behavioral economics movements, I compare the pros and cons of each body of knowledge, taking into account the absence of any connection between the two. I then compare the relative effectiveness of behaviorally informed enforcement strategies, such as deterrence, morality, social norms, and procedural fairness in modifying behavior. I show that for the most part, these strategies have overemphasized deliberative choice and ignored questions that emerge from what we know about non-deliberative choice regarding awareness and malleability.

Next (chapters 3-5), I examine the interaction between deliberative and non-deliberative choice in a legal decision-making context. I show that the current literature, despite the various behavioral approaches to law, does not provide a coherent account of the person that states are trying to regulate. I show how various sub-disciplines that have developed under the aegis of the behavioral approach to law (e.g., social norms, compliance motivation, the perceived role of self-interest, the non-instrumental effects of law) should be revised in light of new knowledge about dual-system reasoning and BE. I conclude with a description of the challenges that policy makers face in light of recent findings about ethical decision making and the development of various behaviorally informed approaches to legal compliance.

The next 3 chapters 6-8 incorporate concrete content into the general theoretical arguments presented in the first part concerning BE, traditional and non-traditional enforcement methods, behavioral tradeoffs, and variations among people. First I demonstrate some of the inconsistencies in the law. Second, I create a taxonomy of factors that legal policy makers should take into account when developing behaviorally informed approaches. I examine discrimination and corruption as two case studies that illustrate the challenges legal policy makers face when dealing with people in various states of awareness and motivation. Chapter 9-10 make the above arguments even more
concrete demonstrating the above arguments in two legal areas, where agent’s state of mind could be harder to determine – (implicit) corruption and (implicit) employment discrimination. The book concludes with an outline of the next steps in legal research, which should integrate the findings of BE and non-deliberative choice into legal policy making.

Brief outline of the chapters

Chapter 2. The potential of Behavioral ethics for legal research and policy.

In this chapter, I review the work of scholars such as Bazerman, Banaji, Ariely, Gino, Haidt, Barybay, Meir, Shalvi, and others on deliberative and non-deliberative mechanisms that people use to promote their self-interest and result in good people doing bad things. I discuss the relevance to BE of several theoretical mechanisms: moral disengagement, embodiment, self-deception, moral licensing, automaticity of self-interest, moral hypocrisy, elastic justification, ethical fading, and the dishonesty of honest people. I also describe various phenomena that challenge the current regulatory approach followed by most states.  

In the last part of this chapter I offer a few words of caution to states that wish to use the knowledge of behavioral ethics to modify legal policy making. The field is relatively young, and it is not yet able to answer important questions with regard to ethical biases, such as their internal mechanisms, the awareness of the existence of biases, and the variation between people in the ability to overcome those biases. However, I strongly believe that legal scholarship cannot wait for a consensus to be reached on those questions. Although we do not know the percentage of good versus bad people, the extent of involvement of the automatic system in decision making, or the level of awareness of its role, the recognition that a substantial portion of the population engages in non-deliberative choices is enough to shift the normative debate. The chapter concludes that knowing the ratio of people of each

56 In the next chapter, I examine the relevancy of paradigms such as egotism (sharing first names, birthdays); embodiment (washing hands, closing one eye, carrying weight); food consumption (drinking coffee, glucose studies); priming the ten commandments, eyes, faces, money, dirty money and various situational cues that trigger compliance (teddy bears).
type and the exact level of people’s awareness is secondary in importance to the
fact that such variation exists and that legal policy making has to recognize the
need to adopt more than one type of intervention to deal with different modes of
awareness. We cannot afford to wait until we know more before we act.

In Chapter 3, on traditional enforcement mechanisms, I reexamine some
behavioral theories that explain people’s motivation to follow the law.

One of the key arguments of this book is that, to deal with good people, we do
not need to abandon everything we know about legal enforcement; we just need to
revise our current understanding of how traditional intervention methods can
influence different types of people. Chapter 3 focuses on traditional enforcement
methods that were not intended to take into account dual reasoning and the need to
deal with non-deliberative choices. Nevertheless, many of those traditional paradigms
are highly sensitive to the behavioral revolution. Among the concepts reviewed in this
chapter are deterrence, morality and fairness, incentives, social norms, and the
expressive function of the law.

In this chapter I examine the techniques that governments use to regulate
behavior. These techniques fall into two categories: traditional approaches, which
presuppose that (bad) people act deliberately, and softer regulation, which for the
most part assumes an absence of full deliberation by (good) people. Traditional
intervention methods discussed in the literature include incentives (all forms of
penalties, fines, rewards, and other external measures) and more intrinsic measures

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57 There is a huge literature on the typology of regulatory approaches that I do not discuss here. I
review many of them in my work with Lobel. supra note 38; Feldman, Y., & Lobel, O. (2010).
Individuals as Enforcers: The Design of Employee Reporting Systems. in Parker, C., & Nielsen, V.
Publishing.

58 For the literature on this topic, Becker, G. S. (1968). Crime and punishment: An economic
approach. Journal of political economy, 76(2), 169-217. See also Feldman, Y., & Lobel, O.
(2009). Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and
Protections for Reporting Illegality. Tex. L. Rev., 88, 1151. - for a comparison of the efficacy of
Motivating environmental action in a pluralistic regulatory environment: An experimental study of
framing, crowding out, and institutional effects in the context of recycling policies. Law & Society
Review, 46(2), 405-442.for a comparison of the effects of sanctions vs. taxes in environmental
contexts.

59 Gneezy, Meier and Rey-Biel, supra note 36.
such as fairness-, legitimacy-, and morality-based interventions,\textsuperscript{60} social norm-based interventions,\textsuperscript{61} and the expressive function of the law, which shapes the social meaning of behaviors.\textsuperscript{62} Another technique reviewed in this chapter focuses on disclosure and transparency, which assume that people engage in deliberation, so that given enough information, they will make the right decision or will avoid making the wrong one if what they do is open for everyone to see.

The theoretical and critical part of this chapter focuses on examining how formal enforcement methods should be modified, given that people are not fully deliberative in their decisions to disobey the law or breach their contracts. I show how various sub-literatures in the behavioral approach to law (e.g., social norms, compliance motivation, the perceived role of self-interest, the non-instrumental effects of law) should be revised in light of the new knowledge regarding dual-system reasoning and BE. The chapter concludes with a description of the new challenges that policy makers face as a result of recent findings about ethical decision making (e.g., do people who do not want to discriminate react to penalties?) and the development of various behaviorally informed approaches to legal compliance.

The traditional line of research on the role of fairness and morality in legal research could be traced to reasoning advocated by scholars such as Kohlberg\textsuperscript{63} on moral development or Kelman\textsuperscript{64} on compliance. Kohlberg’s ideas, which were incorporated into legal theory, maintain that people clearly recognize that they are facing a moral dilemma, and the question is only what kind of moral rule they use in any given context. By contrast, I argue that people do not regard much of the bad


\textsuperscript{63} Kohlberg, L. (1981). The philosophy of moral development moral stages and the idea of justice.

behavior in which they engage as bad behavior at all. Various processes, operating on various levels of self-awareness, help them interpret their behavior as being either legal and ethical, or justifiably illegal and unethical. Some mechanisms even prevent people from recognizing that they are facing a moral dilemma.

The BE perspective also differs from that of most of the compliance motivation literature, including Kelman’s basic paradigm on compliance and Tyler’s procedural fairness approach. According to his approach, the main difference is between people with an extrinsic versus those with an intrinsic commitment to obey the law. I claim instead that in many cases people do not make an informed decision about the right way to act based on their level of commitment to the law. The approach I advocate suggests that the effect of morality on law operates in a completely different way, at least in some cases of legal noncompliance. The core argument of BE is that in a considerable number of cases people do not engage in any form of deliberative moral reasoning before deciding whether or not to obey the law. Many bad deeds are not seen as such by the people who commit them, and therefore they are not always aware that they might be about to perpetrate a moral wrong. It follows that the focus should be on identifying both the situational and the personality characteristics that will increase the likelihood that people will recognize the moral flaw in their behavior.65

People’s lack of awareness of their wrongdoing, a central claim of BE research, renders ineffective the traditional enforcement mechanisms (e.g., fines, procedural justice processes) presented in Chapter 3. These mechanisms are based on the assumption that people who behave badly engage in some level of a deliberative process before they reach the decision-making stage. According to the traditional approach, certain techniques, most notably incentives,66 can be used to change the behavior of people so

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that they do not act in an unethical manner in situations relevant to legal and public policy. In the last three decades, this approach, based on the neoclassical economic doctrine of rational choice, has been challenged by theories based on the behavioral approach to human judgment and decision making. Various alternatives and modifications in regulating human behavior, going beyond simple incentives, have been offered over the years, including some in my own research. For example, the following interventions have been proposed: those that change the wording of incentives (to make people more likely to consider their ethical behavior), that increase legitimacy (by mandating employee voice procedures in workplace), that account for crowding out (e.g., when people would rather do things without being compensated for them), that increase the sensitivity to cognitive limitations (e.g., in examining how people engage in aggressive interpretation when contractual obligations are framed as a potential loss rather than a potential gain). Nonetheless the challenge to legal enforcement posed by the BE perspective has not been explored in this context, mainly because of the dominance of economics in the interplay between law and psychology.

Chapter 4. Non-formal enforcement revisited

This chapter examines new non-traditional, soft enforcement methods that take into account people’s limited awareness and cognition; these methods include the nudge (an intervention that changes behavior without creating economic incentives or banning other possibilities), de-biasing (a group of doctrines and methods used to overcome biased thinking), accountability, and reflection (which requires individuals to explain why they made a certain decision after making it). I also emphasize the effectiveness of these new behavioral measures, which were developed to deal with cognitive biases, in overcoming ethical biases. This chapter concludes with a description of experimental

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68 Thaler and Sunstein, supra note 7.
70 Lerner and Tetlock, supra note 58. There are many other techniques that have been studied in recent years, such as signing first and teddy bears, reviewed and assessed in Feldman, Y. (2014). Behavioral Ethics Meets Behavioral Law and Economics, Oxford Handbook of Behavioral law and Economics (Zamir and Teichman Eds.)
work comparing the efficacy of explicit and implicit types of interventions on how people behave in subtle conflict of interest situations.

In the chapter I review the studies that have demonstrated the limitations of each intervention when dealing with people who lack a full awareness of their behavior; these limitations are evident in the few famous failures of the nudge-based approach. For example, initially the default rule—having to opt in versus out when donating—seemed to be a very effective nudge in increasing rates of organ donation; however, later studies showed that the nudge was actually much less effective.71 The message, “Save more tomorrow,” shown to be a strong nudge in pension savings, also turned out to be less effective in the long term.72 Generally speaking, giving people full information proved to be problematic;73 debiasing was found to produce limited results,74 as was disclosure of conflicts of interest, which in many contexts ended up having the opposite effect from the desired one.75 Masking personal information in hiring applications was found to be more effective in reducing biases against minorities than against women.76 Thus predicting when and how to change behavior through incentives has proven to be difficult.77

Chapter 5: The role of Social Norms in legal compliance

Chapter 5 focuses on the social norms in legal compliance. This chapter was separated from chapter 3 and 4 due to its interaction with both traditional and non-traditional means of intervention. Hence, this relatively short paper outlines the main literature on the role of social norms, with particular focus on non-deliberative processes in how people perceive social norms and in how it affects their behavior.
Chapter 6. Variation among people in obeying the law

In this chapter I examine several factors that might explain the variations among people in their level of implicit and explicit legally relevant behaviors. Because personality scales are an important measure of such variations, I review several scales, including will and grace,\(^78\) moral identity,\(^79\) level of moral disengagement,\(^80\) and moral firmness,\(^81\) as well as context-specific measures, such as racism, which are based on the implicit association test.

Second, following a critical assessment of the relevance of data accumulated in personality research to legal compliance, given the great variation in the factors that could be correlated with that compliance, I examine the research in economics, psychology, and law concerning the differences between the intrinsic and extrinsic motivation of individuals; this is another way to differentiate among people.\(^82\) Variations in compliance usually depend on the particular content of the law; some people may be highly motivated to obey certain laws, but not have the same level of intrinsic motivation to obey other types of laws.\(^83\)

To understand the good-people paradigm, it is necessary to take into account the correlation between people's level of motivation and their personality traits. For that reason I focus on more specific personality traits that influence people’s general tendency to obey or disobey the law. I discuss the work of Glockner et al., who

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\(^83\) Although as is explained in this chapter, there are some general tendencies to obey the law. This tendency is supported also with regard to the citizenship approach to legal compliance where people obey the law simply because it is the law. It is interesting to examine whether people who obey laws simply because they are laws should be seen as intrinsically committed individuals. [see discussion in JITE 2014]
compared situational and individual factors related to legal compliance, with a focus on self-control. In addition, I review a new scale developed by in a joint work with Fine, Van Rooij and others on people’s ability to find excuses for themselves to violate the law.

Chapter 7. Theoretical limitations and the need for a pluralistic account of the possible effects of law on behavior

The pluralistic account of the effect of the law on behavior is based on several assumptions developed in this chapter. Most people obey the law for multiple reasons, but people are more likely to experience and report their more noble motivations. Dual reasoning greatly reduces our ability to measure the “true” effect of the law. The law must communicate with different populations at the same time. Some aspects of the law serve multiple functions simultaneously, as do the expressive effects of punishments.

Chapter 7 and 8 The pluralistic effect of law and enforcement dilemmas

Is it possible to use both traditional and non-traditional methods simultaneously, or are they based on conflicting assumptions? Research in other contexts suggests that it is not always possible to use approaches that combine intrinsic and extrinsic measures. Research conducted by various scholars suggests that the interaction between intrinsic motivation and implicit behaviors is more complex than what the legal literature assumes. My research is based on the assumption that governments must invest in improving legitimacy and morality of law even in areas that seem to involve automatic behavior. As an alternative to focusing on individual behavior, the chapter examines the

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85 See Feldman, *supra* note ___ for a review


87 Legault, L., Gutsell, J. N., & Inzlicht, M. (2011). Ironic effects of antiprejudice messages: How motivational interventions can reduce (but also increase) prejudice. *Psychological Science, 22*(12), 1472-1477. For evidence of backfire effects when attempting to change people’s prejudice either explicitly or implicitly.
contexts in which governments, organizations, and individuals engage in improving their automatic ethical behavior. I also discuss the many tradeoffs that the BE literature requires us to take into account. For example, as suggested earlier, is accountability good or bad? Does it undermine some biases, but allow others? How important is legitimacy in a dual-reasoning context? To what extent is it possible to treat both good and bad people using different enforcement mechanisms? Should we even let people know about the existence of the nudge88?

Chapter 9. The corruption of good people

Individuals often feel that they are not being treated fairly by employers, public officials, or people whom they hire to attend to their best interests in various capacities such as lawyers, physicians, architects, and accountants. Professionals whom we trust to behave responsibly and to focus primarily on our interests (when we hire them), on the interest of the public (in the case of public officials), or on the workplace (in the case of the employer) turn out instead to be influenced by personal or competing institutional interests. For example, at the workplace, an individual who may be up for promotion may develop the impression that other candidates are more likely to know the decision makers personally and thus have an unfair advantage. In the areas of corruption and discrimination, the notion of trust in the system is highly important because it affects individuals’ ability to trust the professionals who are expected to attend to their interest (lawyers, physicians, etc.), public officials (municipal officers), and hiring managers (in employment situations).

Often the potential deviation from objectivity and impartiality is relatively subtle, and the professional can easily deny or ignore it based on legitimate rationales. In hiring or promotion contexts and regarding the exercise of professional duties, subtle deviations usually occur in situations in which there is more than one legitimate choice, and therefore there is room for various interpretations of what is the right thing to do. In the presence of vagueness, people have greater room for self-deception and motivated reasoning, and we expect that good people are more likely to find ways to justify their bad behavior. Some argue that such deviations are therefore beyond the

88 See PhD Dissertation of Ariel Tikochiski on this topic.
reach of classical enforcement mechanisms. Yet the focus on subtle deviations from impartiality creates a rich ground for research on the interplay between legal theory, ethical decision making, and empirical analysis of the law.

Many deviations from impartiality and professional integrity are carried out without full awareness. But because the proportion of unethical behaviors that are carried out with full awareness in any given context is unknown in advance, it is necessary to explore a hybrid approach to modifying human behavior that allows us to address both implicit and explicit violations, with limited cross-interference. Although soft interventions are criticized because of their threat to autonomy, ethical nudges—which are aimed at curbing corruption and discrimination—generate a different type of policy tradeoff, as explained above.

In this chapter I pay special attention to answering the following theoretical and applied policy questions: What effect does group or institutional affiliation have on bias and impartiality? How do monetary incentives affect impartiality? To what extent are people aware that such effects can change their judgment as well as that of others, and how does it affect their trust in the integrity of these processes? To what extent do people believe in the efficacy of various traditional and BIT-related legal instruments? What legal interventions are most likely to be regarded as legitimate and improve public trust both in society and in the ability of the state to change human behavior in a sustainable way?

Focusing on implicit corruption, I compare the different intervention methods, examining their effectiveness in curbing people's behavior in situations of conflict of interest. I pay special attention to subtle conflicts of interest, where many good people may not recognize that there is something unethical about their behavior. This focus is needed because, globally, countries experience some degree of corruption at most levels.


90 Here are a few examples of subtle conflict of interest situations: voting on the academic promotion of a friend, consulting for a firm that may compete in the future with one’s current employer, when a civil servant treats an affluent entrepreneur with greater consideration than usual, when a physician performs a procedure because he is more comfortable with it but it may not be what the patient would most benefit from, or a lawyer rejecting a plea bargain or a settlement that is in the best interests of her client.
of government,\textsuperscript{91} and corruption arises in a different form in the private sector (e.g., in the area of corporate governance).

Research on corruption and conflict of interest contains numerous examples of situations in which people who exhibit professional and moral responsibility have allowed their self-interest, admittedly without full awareness, to prevail over fulfilling their duties.\textsuperscript{92,93} One of the most studied areas in this context is the conflict of interest of physicians who conduct clinical studies financed by pharmaceutical companies or who prescribe drugs based on their relationship to such companies.\textsuperscript{94} Most clinicians do not think they are doing anything wrong when they prescribe a certain course of treatment to their patients while ignoring the subtle effects of competing interests. In many similar situations, most good people may believe that the option that promotes their self-interest is also the correct one. We can include in this group lawyers dealing with their clients, executives acting on behalf of shareholders, prosecutors making plea bargains, and academics deciding whether their colleagues should be promoted.

In the context of implicit corruption, psychological processes such as self-deception, elastic justification, moral disengagement, and motivated reasoning enable people to behave unethically without recognizing their wrongdoing.\textsuperscript{95} As in research on prejudice and discrimination, a vast literature suggests that self-interest may influence people without their recognizing its effect on their behavior.\textsuperscript{96} Moore et al.\textsuperscript{97} showed that people truly believed their own biased judgments and had limited ability to recognize that their behavior was affected by self-interest.\textsuperscript{98} These conclusions are also supported by the

\textsuperscript{91} For example, a 2012 report found that all European countries suffer from political corruption at some level.

\textsuperscript{92} There is a wealth of research on the prevalence of conflict of interest in almost every field. See, for example, Rodwin, supra note 67.

\textsuperscript{93} Thompson, supra note 68, 573-573.


\textsuperscript{95} “Much of the problem with conflicts of interest is not intentional corruption but unintentional bias. Bias is widespread and is a problem even for well-meaning professionals” Cain, D. M., & Detsky, A. S. (2008). Everyone’s a little bit biased (even physicians). JAMA, 299(24), 2893-2895.


\textsuperscript{97} See Moore and Loewenstein supra note 16. =


“Private” evaluations were measured by giving participants incentives to be accurate in their predictions. See also Bazerman, M. H., & Sezer, O. (2016). Bounded awareness: Implications for
work of Gino et al.\textsuperscript{99} and of Shalvi et al.\textsuperscript{100} regarding honesty and by the work of Halali et al. regarding fairness.\textsuperscript{101} Although the debate in the literature continues,\textsuperscript{102} from an applied perspective, making the behavior of good people more ethical requires an understanding of implicit corruption and the fact that it is difficult to manage.\textsuperscript{103} Various studies have shown that disclosure, which has been regarded as the ultimate solution for curbing corruption, does not work for implicit processes and can even have the reverse effect from that desired.\textsuperscript{104}

Chapter 10. Managing discrimination by good people at the workplace and beyond

Employment discrimination is one of the most serious problems in labor markets worldwide and so has attracted more attention than other forms of discrimination (e.g., financial, residential). Anti-discrimination employment laws prohibit specific forms of employment discrimination; for example, that based on race, sex, religion, and age.\textsuperscript{105} But usually these laws do not address each form of discrimination individually, nor do they take into account the different sociological and psychological mechanisms behind each form. In most countries, the legal approach is a general one, and similar remedies and prohibitions are applied to various forms of discrimination.


\textsuperscript{100} See Shalvi, Eldar and Bereby-Meyer supra note 16


\textsuperscript{104} See Cain, Loewenstein, and Moore, supra note 64.

\textsuperscript{105} Civil Rights Act, Title VII (1964). prohibits employment discrimination on the basis of religion, race, and sex. The Age Discrimination in Employment Act of 1967 (ADEA) protects applicants and employees who are 40 years old and older from discrimination. Both laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC). In the United States, the difference between the categories of discrimination is mostly due to constitutional reasons rather than behavioral ones.
Research on the non-deliberative aspects of discrimination uses the insights of social and cognitive research in intergroup psychology, which has focused on stereotyping processes. Fiske’s work is especially promising for legal scholars because it offers a nuanced and multidimensional approach to discrimination. Psychological insights have been incorporated into the study of employment discrimination to a greater extent than in any other legal area. Legal scholars, most notably Krieger, have suggested that many biased employment decisions result not from discriminatory motivations but from a variety of unintentional categorization errors. Considering the richness of behavioral findings on employment discrimination, the lack of responsiveness of the law to this knowledge is frustrating. Krieger and Fiske discussed the outdated nature of US laws in this area from both jurisprudential and practical aspects. For

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example, the law requires showing intention and finding evidence for what has occurred at the stage of discrimination, but falls short of providing a comprehensive legal alternative to implicit discrimination.

Some legal scholars have acknowledged that most acts of discrimination are the product of a variety of unintentional errors. As in most other types of research on non-deliberative choice, the recent literature on discrimination reveals the problems associated with automatic reasoning, but offers almost no suggestions for the format of a new legal policy that would address both deliberative and non-deliberative discriminatory behavior. For the most part, the law still looks for a smoking gun when identifying employers as committing acts of discrimination and prejudice.

Chapter 11
Conclusion

It is important both theoretically and practically to understand that there is no one-size-fits-all solution to incorporating considerations of the intrinsic versus extrinsic dynamic into government policies. It is difficult to predict the accumulated effect of these mechanisms without taking into account the context, and in any case, the accuracy of predictions will always be limited. I therefore recommend that theoretical efforts be

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focused on creating a multidimensional taxonomy of contexts that elucidates the
dynamics of intrinsic-extrinsic motivations.

First, what is the nature of the behavior we want to encourage?\textsuperscript{114}

It is important to take into account the behavior that the policy maker wishes to
promote. One cannot excel in recycling or even in organ donation;\textsuperscript{115} for the most part,
policy makers care only about one’s activity level and willingness to pay for engaging in
recycling. In various other legal contexts, however, the quality of the behavior is more
important. For example, in whistleblowing or blood donation it is less helpful to think about
employees who do it for purely extrinsic reasons. In a legal context, where extra-role
activity is desired, the cost of reducing intrinsic motivation increases, and one should be
more cautious in introducing extrinsic motives.

Second, what proportion of the target population do we need to cooperate?\textsuperscript{116}
When the level of intrinsic motivation is heterogeneous, what proportion of the target
population do we need to comply?

In the context of trade secrets, we need the cooperation of 100\% of the target
population, from those with the highest level of intrinsic motivation to those with the
lowest. Therefore, the effect of reducing the intrinsic motivation of committed employees
may be secondary to making sure that even those without intrinsic motivation remain
loyal to their employers. In the case of whistleblowing the exact opposite is true, and we
need the cooperation of only some of the employees to come forward when some illegal
activity is taking place within the organization. Therefore, the policy maker can focus
primarily on those who are high on intrinsic motivation.\textsuperscript{117} For obvious reasons, we may
not even want to provide incentives to those without intrinsic motivation because of fear
of false reports by bounty hunters. Finally, in the context of recycling, we are interested
in averaging, so that as many people as possible recycle as much as possible. In this

\begin{footnotesize}
\textsuperscript{114} To date, I have presented data about three main types of activities (trade secrets, recycling,
whistle-blowing): I use these three examples to help us think about the importance of being aware of legal
contexts when policy makers attempt to decide how to provide incentives for certain behaviors without
harming individuals' intrinsic motivations.

\textsuperscript{115} But this is not the case with regard to blood donation.

\textsuperscript{116} see Benabou and Tirole supra note 88

\textsuperscript{117} This argument is obviously oversimplified, and fine-tuning is highly needed here.
\end{footnotesize}
situation, we have no preference for either high or low intrinsically motivated individuals; therefore, the balancing consideration for the policy maker is whether or not to use extrinsic motivation and, if yes, determining which types of incentives to use.

Third, how important is it to think that others are being motivated by intrinsic motives?

People are biased in their perceptions of what others are doing and for which reasons. It is clear, however, that the effect of knowing why other people do what they do is different depending on the context, the nature of the relationship, the level of reciprocity, the importance of others’ motivation to one’s evaluation of its authenticity, and more. Presumably, the closer the behavior is to areas where one would expect identity-related factors to be dominant, the greater the damage is to the other from viewing one's motivation as being extrinsically motivated. In commercial contexts, we are less likely to find that extrinsic motivation harms perceptions of authenticity in the behavior of others. A relatively straightforward aspect we may want to consider is the visibility of the behavior and the ability to measure both its quantity and quality (recycling in houses vs. loyalty to an employer in keeping proprietary information secret). It is safe to assume that, with more visible and measureable behavior, the policy maker should care less about harming intrinsic motivation whose main advantage is its limited dependence on external measurement. Thinking about these context dimensions could lead the policy maker to focus efforts on protecting intrinsic motivation in the most suitable contexts.

In the next section of the conclusion chapter, I examine the ability of law to change people’s implicit tendency to behave unethically, relating this discussion to the research conducted by scholars such as Devine and Inzlicht on the ability to change peoples’ intrinsic tendency to rely on stereotypes. Furthermore because the focus of this book is on legal enforcement, I examine whether existing mechanisms through which the law could change the social meaning of certain behaviors could end up also affecting the unethical behavior of people that is based on implicit processes.

The concluding section of this chapter summarizes the many important questions we have discussed in the book and suggests that they remain open to further research.
Because some of the most important interactions between psychology and law have not yet been studied, the book cannot be expected to resolve all these issues or even address them. In this section I focus on emerging research directions. First, I present the set of jurisprudential questions that should be addressed more extensively, such as free will, autonomy, variations among people, equality, and the role of law relative to morality. As long as these questions are being addressed mainly from a legal enforcement perspective, without extensive involvement by scholars of law and philosophy, the ability to change the field remains limited. Second, I present a series of research questions on enforcement mechanisms. For example, given what we know about good people, should we change the desired standard of behavior? How much information should the state collect on people’s attitudes and preferences? Should states impose standards of behavior where organizations are actively required to actively engage in regulating situations? Should people’s and organizations’ failure to adopt certain situational procedures to prevent unethicality put them in some legal responsibility by omission?