Abstract for the book

Although the law’s main purposes are traditionally understand as protecting others from the “bad” people who breach contracts, make a nuisance of themselves in public places, engage in corrupt behaviors, steal intellectual property, use damaging speech on Facebook, cut in lines, or use nepotism to advance their careers, this book argues that it is “good” people whose behavior should be regulated by law. Behavioral ethics, a growing area within the psychology and management literature, claims that the treatment of the good people who commit many of these bad behaviors is the neglected task of the law and of legal theory. In contrast to the current dominant enforcement paradigm, which assumes that states are dealing with bad people who are pursuing their own self-interest and that the law needs to increase the price for misbehavior through sanctions and punishment, behavioral ethics posits that good people are guided by automatic cognitive processes and biases that enable them to bend the laws within the confines of their conscience. This book provides a broad theoretical and empirical comparison of traditional and nontraditional enforcement mechanisms to advance our understanding of how states can better deal with misdeeds committed by normative citizens blinded by cognitive biases regarding their own ethicality. ethicstraditional

In contrast to behavioral economics which focused on cognitive biases in making financial decisions, behavioral ethics, based on people’s biases in making ethical decisions, has been mostly ignored. while Behavioral Economics argues for a focus on optimism bias to understand why people pursue legal disputes in courts, the behavioral ethics approach suggests that people go to court because they fail to fully capture how problematic is their behavior, both legally and morally, due to the functioning of various self-related mechanisms that prevent them from recognizing their wrongdoing.

Existing enforcement strategies are not suitable for addressing misconduct stemming from nondeliberative reasoning processes and biases. The insights of behavioral ethics into the cognitive and motivational factors guiding the behavior of good people require the development of innovative approaches to the normative treatment of a diverse population consisting of both good and bad people. This book connects the important but neglected theoretical puzzles raised by behavioral ethics to the vast normative and jurisprudential literature on instrument choice and the various tools that policy makers can adopt to modify behavior.

More specifically, the book examines the law’s effectiveness in preventing people from engaging in uncooperative behaviors and wrongful conduct, such as breaching contracts, engaging in corruption and employment discrimination, and eschewing professional duties, through the use of traditional methods including deterrence, social norms, and procedural justice, and compares these methods with behaviorally informed enforcement mechanisms such as the nudge approach, choice architecture, and debiasing. The book discusses the pros and cons of the various intervention mechanisms designed to increase compliance with ethical and legal standards, drawing practical conclusions for legal policy makers on how to optimize their regulatory and enforcement efforts to affect both the deliberative and nondeliberative components of unethical behavior.

This book addresses key unresolved theoretical questions from several directions. How much can we know ex ante about good people’s awareness and ability to control their unethical behaviors? How can we know that their goodness is genuine and not faked? Are considerations of morality and traditional enforcement practices, such as deterrence, effective in curbing behaviors that are only partly deliberative? Can states regulate simultaneously good and bad people by using different intervention 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 what is lost in the sustainability of behavioral change and in autonomy when we abandon traditional intervention methods? Is there still a benefit derived from increasing people’s intrinsic motivation when many of their misconducts are not done with full awareness? The book addresses these questions and examines in what way the existing research falls short of offering a coherent behavioral and normative picture of the person we are trying to regulate.

In its call for regulatory reform, the book draws on extensive empirical research that I and other researchers have conducted on these questions; this work demonstrates in a detailed way some of these challenges faced in regulating the behavior of good people; for example, 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, the effect of legal uncertainty on the compliance and performance of people with different motivational backgrounds, the ability of deterrence and morality to enable people to avoid subtle conflicts of interest, and implicit discrimination mechanisms used toward different social groups.

The first part of the book lays the groundwork for its innovative approach to the law. Chapter 1 outlines the main argument of the book, briefly describes existing gaps in the research, and shows how the book proposes to fill them. In Chapter 2 we explain how a set of both deliberate and nondeliberate mechanisms, such as moral forgetting and motivated blindness, prevent people from recognizing the wrongdoing in their behavior and their own unethicality. We argue that many legal disputes are not a product of people miscalculating their winning chances, but rather of their inability to recognize, in an objective way, their unethicality.

Chapters 3–5 address how to expand the regulatory toolbox, focusing on both formal and nonformal controls and factors such as situational design, behavioral incentives, social and ethical nudges, fairness, social norms, and education. The focus on good people requires a shift in the focus of the legal regime from ex-post liability to ex-ante design. Ex-post mechanisms that focus on liability and are designed to change people’s ex-ante calculations will not be effective because most people are likely not to be aware of why they behaved in a certain way in the first place. In terms of fairness, we argue for the importance of designing policies that make it difficult for people to interpret fairness in a self-serving way. With regard to social norms, there is a need to provide people with accurate information on the nature of the norm and its prevalence, because various cognitive mechanisms are likely to cause people to underestimate the true prevalence of cooperative norms. Incentives need to be sensitive to their crowding-out effect of intrinsic motivation and hence should account for people’s motivational sensitivities. Ethical nudges need to be distinguished from other kinds of behavioral nudges, so that appeals to self-interest do not reduce their effectiveness. Chapter 3 focuses on formal and traditional intervention methods, Chapter 4 on nonformal controls and less traditional intervention methods, and Chapter 5 on the ability of social-norms-based interventions to change behavior in the desired direction.

Chapter 6, which focuses on individual differences, complicates the picture of good vs. bad people by arguing that good people should be divided into at least two types, based on the variation in self-deception mechanisms reviewed in Chapter 2. Good people of the first type genuinely do not understand their behavior or the relevant situation as it is, because of cognitive mechanisms, such as Bazerman’s blind spot, Haidt’s “emotional dog” approach to morality,[[1]](#footnote-1) or Balcetis’s motivated seeing,[[2]](#footnote-2) which rely on nondeliberative processes. In that camp of morally blind people belong those who engage in implicit job discrimination or in implicit corruption in subtle conflict-of-interest situations. Good people of the second type know that what they are doing is impermissible, but they find various rationales that allow themselves to do bad things and still feel great about themselves. The related work of Bandura on moral disengagement or Shalvie’s work on justified dishonesty shows that this is mostly a deliberate process. In the camp of the justifiers we can find those committing various parking violations, cutting in lines, or using contacts to get a job. In this chapter, we also analyze relevant individual differences scales, such as moral identity and social value orientation. Recognizing the limitations of identifying individual variation ex ante, the chapter concludes with a discussion of alternative ways to differentiate between people based on their commitment to the law and their occupation makeup so policy makers can more accurately predict their behavior.

The complex effects of law, the existence of various types of regulatory tools, the power of the situation, and the variation among people together create a highly complex regulatory picture. Both Chapter 7 on the pluralistic effect of law and Chapter 8 on the tradeoffs between the different likely effects of laws present research that guides how policy makers can balance the effects of different aspects of the law, on different people, with regard to different behaviors. The concept of behavioral tradeoffs suggests that each type of intervention produces a different behavioral reaction, because people are more complex than is assumed by traditional enforcement methods. It is rarely the case that any one policy will be superior in terms of every behavioral dimension. Developing an effective policy requires taking many factors into consideration, as well as the particular context of the situations in which people make decisions.

This book’s innovative approach to the law is applied in Chapters 9 and 10 to corruption and employment discrimination, respectively; these two case studies show how to create an effective balance between different regulatory tools that address different types of population who have different mindsets toward the law. For both corruption and employment discrimination, it is not the behavior itself, but the state of mind of the individual when doing it that is problematic. For example, when a mayor hires a contractor, that behavior is only of concern when that decision is made based only on his or her self-interest. When an employer decides not to hire someone for a job, that decision is problematic only if he or she based it on prejudice.

Chapter 11 concludes with a discussion of some key policy-making concepts derived from the book’s assumptions about wrongdoing and the good vs. bad people typology. It first examines the role of intrinsic motivation when decisions are nondeliberative. We then outline the use of taxonomies of regulatory contexts as a way to determine which regulatory tools to use in which context and for which purpose. We conclude with a discussion of the future of the field of behavioral ethics and some of its limitations.

Abstracts + key words

## Chapter 1: introduction

Good people, behavioral law and economics, behavioral ethics, legal enforcement, deliberate and nondeliberative decision making, dual reasoning, ethical decision making

Abstract:

## The first chapter presents the main argument of the book, the existing gaps in research, and how to fill them. It outlines both the theoretical and the policy implications of this argument for legal enforcement and compliance .The chapter expands on the justifications for the project from both a theoretical and practical perspective and describes the structure of the book and the chapter content.

## Chapter 2 behavioral ethics

Key words:

Self-deception, motivated reasoning, ethical blind spots, legal ambiguity, bounded ethicality, deliberate vs. nondeliberate processes

Abstract

This chapter reviews the main theories of behavioral ethics (BE) and their relevance to legal policy making. BE takes the broad view that many people’s actions are based on self-interest in that they serve a need to maintain a positive and coherent view of the self. It accounts for the effect that self-interest has on cognitive processes (e.g. memory, sight, and information processing) as opposed to simply looking at how self-interest affects motivation. The chapter also focuses on other behavioral factors of importance for legal policy, such as people’s level of awareness of their own wrongdoing, their ability to control it, and the situations that are likely to increase it.

## Chapter 3 formal controls

Key words:

Incentives, command and control, intrinsic vs. extrinsic motivation, crowding-out motivation, morality, procedural fairness, self-interest, compliance motivation, legal interpretation vs. legal choice

Abstracts:

This chapter discusses the formal and classical interventions traditionally used by the state to regulate the behavior of people. It focuses on three main mechanisms of legal compliance—price, fairness, and the expressive effects of law—that aim to change people’s explicit behaviors, which are assumed to be the result of a deliberative process. Given the book’s focus on implicit processes, the chapter revisits the desirable and undesirable implicit processes that accompany the usage of formal controls, such as crowding out, misperception of norms and socialization, social norms and moral intuition, and egocentric interpretations of fairness. It then evaluates the strengths and weaknesses in regulating human behavior. The chapter concludes with some of the needed changes in formal approaches to regulation.

## Chapter 4 nonformal controls

Ethical and social nudges and their limits, debiasing, accountability, choice architecture, ethical training

Chapter 4 focuses on nonformal approaches that assume that people’s decision making with regard to the law is not fully deliberative. There are three main nontraditional approaches to regulating behavior. The most classical approach is *debiasing*, a group of cognitive methods used to overcome biased thinking and nondeliberative choice.[[3]](#footnote-3) It uses various techniques, such as consideration of the opposite approach, reflection on one’s choices and explaining why a certain decision was made, and taking an alternative view. *Framing,*which is based on research showing how a shift in one’s reference point affects subsequent perceptions of gains and losses, is another technique that can be used to alter behavior. A third, widely used nontraditional approach is the *nudge*—an intervention that changes behavior by changing the situation, but not by creating economic incentives. Whereas the nudge approach aims to directly affect the individual’s System 1 by changing the situation, debiasing, for the most part, attempts to encourage the person to use System 2 thinking. Nonetheless, in recent years there have been various examples of System 2 nudges. This choice architecture approach, rather than attempting to curb people’s biases, uses knowledge to shift their choices toward the desired direction. The best-known examples of choice architecture with a nudge mindset derive from the default rule relating to organ donation or saving for retirement. Most of these approaches were mostly studied in the context of cognitive biases and the rest of the chapter discusses to what extent these approaches are suitable for ethical biases which are different that the biases from rationality. In particular, the chapter challenges the ability to use nudges for contexts in which the interest of the individual is not to pay attention to the nudge. The chapter concludes with a discussion of the importance of intrinsic motivation in ethical decision making.

## Chapter 5 social norms

Keywords: Misperception of norms, false consensus, pluralistic ignorance, constructive social comparison, group identity, intellectual property norms

Abstracts: Social norms can both increase and reduce compliance by good people. This chapter focuses on cognitive and motivational limitations—particularly the false consensus and pluralistic ignorance mechanisms—in relation to social norms. An important contributing factor to social norms’ impact on behavior is individuals’ misperception of them, which encourages them to violate the law in accordance with what they perceive incorrectly to be the prevailing social norm. When people deceive themselves about the prevailing norms, they find it easier to-justify their wrongdoing. This chapter uses the example of divulging trade secrets in Silicon Valley to demonstrate many of the effects of social norms.

## Chapter 6 individual differences

Key words: Cognitive reflection test, moral identify, locus of control, propensity to morally disengage, proportion of good/bad people in a society.

Abstract:

While the goal of this book is to draw attention to situational wrongdoers, there remains the need to set them apart both from intentional wrongdoers and from individuals who are less likely to engage in situational wrongdoing. This chapter thus focuses on misconductir. Recognizing and understanding this variation are crucial to developing effective legal policy. The chapter concludes by examining other types of variation: demographic, occupational, and that based on people’s level of intrinsic motivation.

## Chapter 7 pluralistic effect of the law

Acoustic separation, legal specificity and effects of language, legal detection, pluralistic effects of law, deterrence

This chapter examines the ability of the law using traditional and nontraditional enforcement mechanisms to affect the behavior of people with different modes of reasoning or from different segments of the population. It argues that we should rework some of the main concepts of the law to reflect variations among the types of people to be regulated; for example, it revisits the dilemma of detection vs. punishment. In addition, this chapter analyzes some of my empirical studies on compliance and legal enforcement, finding that multiple processes underlie compliance behavior. It is therefore not surprising that the predictability of law in inducing compliance is limited.

## Chapter 8 enforcement trade-offs

The aim of this chapter is to enable policy makers to design the optimal mix of behavioral change measures while recognizing the tradeoffs between competing policy goals. Rarely does one policy affect all types of behavior in the same way in all contexts. Much more often, the same policy will facilitate one type of desired behavioral change while discouraging another type of welcomed change. For example, some policies produce long-term change at the expense of short-term change, whereas others encourage more sustainable behavioral change at the cost of being more restrictive. The chapter creates guidelines for policy makers that increase their awareness of all of these effects and enhance their ability to decide which are the most important to target and when.

## Chapter 9 corruption

Key words: implicit corruption, nonmonetary corruption, agency and corruption

The chapter discusses the implications of behavioral ethics research for the regulation of corruption, focusing on situational factors that are likely to affect corrupt behavior, such as legal vagueness and ambiguity, nonmonetary forms of corruption, and partial versus full dependency. It then analyzes situations where the unethical behavior is being performed by an agent; for example, by a lawyer on behalf of a charity or a group of people in a corporation. Based on some of my empirical research on implicit corruption, the rest of the chapter reviews the effectiveness of different regulatory means, both formal and informal, to curb the corruption of good people.

## Chapter 10 employment discrimination

Key words: implicit discrimination, stereotypes, hiring decisions

The processes leading people to discriminate are often unconscious, especially those involved in the first stage when people’s genuine primary prejudice is generated. Research on the nonrational aspects of discrimination has been influenced by social and cognitive psychology research on intergroup psychology,[[4]](#footnote-7) which has focused on stereotyping processes. The work of scholars such as Fiske is especially promising because it offers a more nuanced and multidimensional approach to discrimination. Both conscious and unconscious processes interact without individual's full awareness that discrimination is even occurring.

## Chapter 11 conclusion

Key words: taxonomies, intrinsic motivation, ethical training, debiasing, future research, rebound effect

After summarizing the different approaches to legal interventions, this concluding chapter focuses on the importance of intrinsic motivation and the ability to increase it through extrinsic measures and training. The chapter then examines various taxonomies that could help policy makers determine which type of approach is most suitable for each situation. These taxonomies take into account these factors: the nature of the behavior, the cost of mistakes, the ability to use external measures, the proportion of cooperation needed, durability of the behavioral change needed, and whether there is a moral consensus. The chapter concludes with directions for future research in the area of behavioral ethical and enforcement policy making.

1. [↑](#footnote-ref-1)
2. Balcetis, E., & Dunning, D. (2006). See what you want to see: motivational influences on visual perception. *Journal of personality and social psychology*, *91*(4), 612. [↑](#footnote-ref-2)
3. Jolls, C., & Sunstein, C (2005). Debiasing Through Law. *National Bureau of Economic Research,* No. w11738*.* [↑](#footnote-ref-3)
4. Tajfel, H. (2010). *Social identity and intergroup relations*. Cambridge: Cambridge University Press; Taifel, H., & Turner, J. C. (1979). Realistic Group Conflict Theory. *The social psychology of intergroup relations,* 33-47. [↑](#footnote-ref-7)