## Variation in People’s Unethicality: A Differentiated Regulation Approach

First Draft[[1]](#footnote-1)

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# Two Aspects of the Behavioral Approach to Law

Variation in compliance motivation across individuals and situations becomes more important and complex when accounting for the role of non-deliberative choices in human behavior. In recent years, there has been an increase in research and conceptualization of non-deliberative choices, and numerous experiments have developed into competing paradigms describing various aspects of behavior that are not regulated by full consciousness.[[2]](#footnote-2) The popularity of scholars such as Daniel Kahneman and Eldar Shafir in psychology, Richard Thaler in economics, Cass Sunstein and Dan Kahan in law, government, and management demonstrates, in both applied and basic sciences, the importance of non-deliberative aspects of human choice and behavior. Indeed, various methods have been used to study non-deliberative choices. One paradigm that has gained popular recognition through Kahneman’s book, *Thinking, Fast and Slow*, developed the concept of two systems of reasoning, and this now stands at the core of much research in behavioral law and economics.[[3]](#footnote-3) Thousands of papers have been published based on this concept, including many collective works .[[4]](#footnote-4) Kahneman and others differentiate between an automatic, intuitive, and mostly unconscious process - *System 1*; and a controlled and deliberative process - *System 2.*[[5]](#footnote-5) The recognition of automaticity in decision-making has played an important role in the emergence of behavioral economics and behavioral law and economics.[[6]](#footnote-6) However, this paradigm has been criticized by many scholars.[[7]](#footnote-7)

This literature has already contributed to the legal scholarship and to behavioral economics.[[8]](#footnote-8) While indeed a large portion of the research on behavioral law and economics is related to biases attributed to non-deliberative choice, this is done mainly with regard to the effects of framing, perception of risk and probabilities with almost no focus on compliance motivation. In the following paragraphs, I will attempt to explain the other type of behavioral approach to law, which is based on the limitations of people as it relates to the morality of their behavior. This could be related to two different, albeit related, variations among people, namely in their motivation to comply and in their awareness of the illegality of their behavior.

## Variation in awareness:

Behavioral ethics replicates the focus of the biases and heuristics literature which is the basis of behavioral law and economics, and transfers this to the field of ethics and morality. It explores various contexts in which people either behaved unintentionally or without full awareness of how they came to do something wrong.[[9]](#footnote-9) Many paradigms of behavioral ethics are based directly or indirectly on "motivated reasoning, where people’s various types of motivations are affecting their understanding of reality."[[10]](#footnote-10) It has been shown that decisions are made based on implicit rather than explicit attitudes;[[11]](#footnote-11) the work of Haidt[[12]](#footnote-12) on moral intuition suggests that people make moral judgements on the basis of intuition, with reasoning being *post hoc*.

In contrast to behavioral law and economics, behavioral ethics, when focused on people’s inability to fully recognize their wrongdoings, seems to create the greatest challenge for policy makers who seek to curb misconduct in society.

Research conducted and summarized in recent volumes show that much of societal harm comes from non-deliberative misconduct.[[13]](#footnote-13) These scholars and many others emphasize that the role of automaticity and the repeated focus on "good people"[[14]](#footnote-14) attests to the growing recognition that many unethical decisions are not based on a deliberate intention to act wrong, but are consequential to the situation.

### Variation in Compliance Motivation

As suggested above, the traditional approach to legal compliance by behavioral scholars has focused on challenging the dominant perception that people are motivated by a fear of sanctions.[[15]](#footnote-15) Various highly influential research has focused on limited self-interest, with emphasis on the role of fairness and morality in legal compliance such as the work of Tyler, Darly, and Robinson, and Paternoster and Simpson.[[16]](#footnote-16)

In my previous research, I focused mainly on curbing deliberate misconduct and differentiated between various types of compliance motivations which exist in the literature (e.g. deterrence, fairness, citizenship, social norms). However, even when recognizing the type of motivations, an examination of most of the scholarship that underlies compliance motivation shows that the overwhelming assumption is of an individual who basically thinks deliberately on whether to obey the law.[[17]](#footnote-17) The first and best known regulatory approach targets the calculative or the incentive-driven individual. On many accounts, the literature that discusses this approach is the richest, given the centrality of both deterrence and incentives within legal scholarship.[[18]](#footnote-18)

After presenting the two main types of variation, in the next paragraph, I will focus on the main two regulatory choices that could be employed to change people's behavior in ethical contexts. The first is tailored toward individuals' intrinsic motivation, as opposed to those tailored toward extrinsic motivation. The second is the traditional command and control regulation versus non-traditional softer regulation.

## Regulatory focus on intrinsic vs. extrinsic motivation

The deterrence, or cost-benefit, model has been criticized on numerous grounds. Some scholars have demonstrated empirically the limits of deterrence in explaining both self-reported and actual compliance.[[19]](#footnote-19) Others have suggested that deterrence does not really work, simply because people have little awareness of the written law.[[20]](#footnote-20)

The main competition to the deterrence rationale probably comes from research on the limits of self-interest in accounting for individual motivation. Various studies demonstrate that fairness is a dominant factor in human motivation, at times overshadowing self-interest more than expected.[[21]](#footnote-21) Research by scholars like Tyler, Darly, and Robinson, and to some extent even Paternoster and Simpson, have shown the importance of fairness and morality in legal compliance.[[22]](#footnote-22) In my own research on this topic, I have examined how fairness could shift the behavior of people toward greater compliance and acceptance of organizational rules in various legal contexts,[[23]](#footnote-23) more sensitive environmental compliance[[24]](#footnote-24) and greater organizational enforcement.[[25]](#footnote-25)

While deterrence and legitimacy differ on various grounds in the type of motivation they attempt to influence, and in the type of people they interact with, both approaches as well as most of the other regulatory approaches still focus on people who make deliberate decisions regarding the law. Most variation is in motivation. However, it could be asked whether the behavior of individuals vis-a-vis the law is always as deliberative and planned as games-based methodology would suggest. Thus, for example, in the work of Fishbacher et al.,[[26]](#footnote-26) cooperativeness levels were measured by asking people to make a choice to either cooperate or free ride, where their choices between doing "good" or "bad" were clearly defined.

## Variation in command and control vs. softer types of regulation

Variation in compliance motivation, which is evident in the above discussion, should be supplemented with a question regarding an individual's level of awareness of the legality of an action. However, the argument I wish to put forth is that, in many legally relevant situations, it is not always clear to people that an action is in fact a choice to be cooperative or non-cooperative. In such situations, differences between people are not necessarily related to their preferences as per the usual meaning of this term. Rather, there are other processes, both situational and personal, some deliberative and some not, which will affect the likelihood that an individual might view his or her behavior as cooperative or not. This is true for much of the research arguing that compliance motivation is explicit, where people are given vignettes and researchers attempt to assess the factors that interact with their decisions to obey the law. In that regard, the assumption is that people know when they are violating the law and the question is why they would choose to do so. The idea that individuals who violate the law do not necessarily know whether they are about to do so carries huge importance for legal policy-making. Hence for types of behavior that are carried out with limited awareness, the regulator should employ less traditional approaches such as nudges or situational design, which will increase the likelihood that people are fully aware of the meaning of their behavior.

There are various approaches to dealing with misconduct which could be implemented without full deliberation. Among them are *debiasing*, a group of cognitive methods used to overcome biased thinking and non-deliberative choice.[[27]](#footnote-27) This uses various techniques, such as consideration of the opposite approach, reflection on one’s choices, and taking an alternative view. An important form of debiasing is*accountability*, which asks individuals to explain why they made a certain decision after the fact.[[28]](#footnote-28) *Framing,*which is based on research showing how a shift in one’s reference point affects subsequent perceptions of gains and losses,[[29]](#footnote-29) is another technique which could be used to alter behavior.[[30]](#footnote-30) An additional approach is the use of *nudges*—an intervention that changes behavior by changing the situation, but not by creating economic incentives.[[31]](#footnote-31)

## The three main problems with current approach to enforcement

Based on the arguments mentioned above, there are three main problems with the current approach. First, incorrect assumptions exist about most types of misconduct perpetrated by most individuals. Second, the "one policy fits all" approach to regulation clearly misses the variation mentioned above. Third, because of the approach mentioned above, we are faced with the problem of employing enforcement measures which do not fit. For example, 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 behaviors that occur without the conscious awareness of the actors, who engage in them."[[32]](#footnote-32) This recognition lies at the heart of this paper. Indeed, many of psychologists who focus on ethical decision-making challenge the assumption held by most legal scholars about self-control, autonomy, and responsibility for actions. These assumptions are at the basis of most external measures, in particular incentives. These types of problems lead to the main challenge this paper is attempting to deal with, which is how to create a regulatory policy to deal with misconduct perpetrated with different levels of awareness and motivation.

## The differentiated regulation challenge

The question this paper attempts to address is what information could be gathered *ex ante* to design situations that are be responsive and that can deal with violations of the law perpetrated on varied levels of awareness and per various motivations. This ability is crucial since the law needs to use different measures for different types of misconduct, and since using the wrong measures might prove ineffective or even harm the situation, as in the case of the crowding-out motivation.[[33]](#footnote-33)

## Interpersonal variation

There are various paradigms which might explain the kinds of people who are more likely to engage in situational wrong-doing.[[34]](#footnote-34) Thus, there is variation not only in the level of intentionality and moral development, as traditional behavioral law and economics researchers have assumed. Rather, we argue that there is interpersonal variation in terms of the likelihood that a particular situation will affect an individual's behavior. With regard to intentional wrongdoing, we will start with the more familiar dimensions of the classical calculative wrongdoers which are related to risk, respect for the law, and moral decision-making.[[35]](#footnote-35)

Having discussed variation in the types of people that a situation is likely to affect, we will then move to examine scales which have potential for some variation among people regarding the likelihood that they will engage in misconduct which could be attributed to good people. Nonetheless, I will show that there are some stable differences between the levels of "goodness" of people that correlate to the likelihood that they will engage in non-calculated misconduct. I would suggest that overall, regarding those types of wrong-doing, the situational factor is much more dominant than the personal factor. Hence, from the perspective of the state, the focus should be on traditional methods of preventing transgressions that are more likely to be perpetrated by calculative wrong-doers, as well as on situational factors to shape situations so as to make most non-calculative wrong-doers less likely to do wrong. In other words, regarding what has sometimes been called ordinary unethicality,[[36]](#footnote-36) the existing scales do not seem to provide large enough differences to justify a differentiated approach regarding these types of misconduct.

### Variation in morality from an individual difference perspective.

This approach is very different from the classic treatment of morality in legal enforcement that can be seen for example in Rest’s work,[[37]](#footnote-37) which represents a traditional, deliberative approach to ethical decision-making, where certain people are simply more likely to be seen as bad people if they basically choose to do bad things.

In a way, this perspective is a direct attack on Tyler’s scenario-based research where people are told what a situation is and must be explicitly asked about the likelihood that they will obey the law in a certain way. If people are unable to understand their ethical behavior, which is mostly affected by situational heuristics, can they actually tell us something about their future ethical behavior in a survey which clearly defines what that is?[[38]](#footnote-38)

Jones was one of the first to argue that people need to recognize the moral issue in order to use moral rules.[[39]](#footnote-39) A more modern approach will combine deliberative and non-deliberative characteristics of the moral person. For example, such an approach could combine the Kohlberg model of morality which suggests that people who are low in cognitive moral development are likely to obey authority figures or act merely to avoid punishment[[40]](#footnote-40) with a measure of Machiavellianism – people's ability to manipulate others for their needs. The distinction we present between intentional and situational measures can be seen to have an interesting interaction with the individual measure, which has been shown to affect the likelihood of engaging in unethical behavior: an individual's locus of control. According to this, people who score high on external locus of control are more likely to see their actions as a choice of circumstance, and hence are more likely to view their ethical choices as beyond their control and are therefore less likely than others to engage in ethical choices. Another important observation is that these measures do not substitute for each other in multiple regressions, i.e. they have an independent effect on the likelihood of engaging in unethical behavior. These measures also offer a rich account of the self far beyond that which rational choice approaches usually account for. While in rational choice, the classical account focuses on self-gain, in social psychology there are other self-related mechanisms that are no less important, such as self-preservation.

A key point in our argument about the ability to connect the automaticity of ethicality and individual differences is related to the question of how individual differences affect the likelihood that individuals will even recognize that there is a moral issue.[[41]](#footnote-41) Thus, according to this perspective, something in a particular situation needs to trigger an individual's reflexive judgment in order for them to avoid engaging in automatic processing. Emerging from the accumulation of growing research on automaticity in moral reasoning is an understanding of the limitations of the current usage of moral reasoning in law.[[42]](#footnote-42) This is especially true with regard to the "self-reported scenarios" line of research, which has been highly influential on current scholarship on the behavioral analysis of law. According to that line of research, one can only capture people's motivation with regard to behaviors that they fully recognize as being in violation of the law. As the behavioral ethics research suggests this ignores behaviors which are not seen as fully illegal.

Tenrunsel and Smith-Crowe[[43]](#footnote-43) examine the possible connections between individual differences which might account for the likelihood that a certain individual will engage in wrongdoing. Among other things, they suggest that values orientation, ethical experience, and moral disengagement are more likely to be related to moral awareness than to aspects such as gender or nationality.

To find a relationship between the different possible scales, Raynold et al[[44]](#footnote-44) demonstrated that propensity for moral disengagement is moderately correlated with other traits such as Machiavellianism, moral identity, and cognitive moral development. Their overall argument is that there is some sort of interaction between an individual's moral knowledge of the situation and his or her propensity to morally disengage – this is basically a combination of the moral development and the cognition theories.

Some of the research we will review below suggests that we can definitely identify variation across individuals when it comes to various implicit measures. For example, research on the implicit attitudes test and individual differences, which became the gold standard in implicit employment discrimination, suggests that people do differ.[[45]](#footnote-45) The IAT basically gives people a score which predicts to some extent their explicit behavior. For example, in a legal context, research in the area of judicial decision-making has shown how the IAT score of judges affected their discriminatory behavior against black defendants.[[46]](#footnote-46) Similarly, in the controversy around IAT as a screening mechanism for employees in Walmart, much of the discussion regards the ability of the IAT to serve as a screening mechanism which informs employers about the future behavior of job candidates.

Similarly, Frederick's CRT (cognitive reflective test) is another example of a measure which could prove valuable for any interest in implicit misconducts.[[47]](#footnote-47) This scale rates people based on the likelihood that they will use sys 2 to overcome sys 1. The main focus of the studies carried out on the basis of this scale is related to the connection between people’s CRT grades and various other behavioral measures.[[48]](#footnote-48)

Two additional scales more directly related to implicit predictors of ethical behavior are: propensity to morally disengage and moral identity. Based on Bandura's famous concept related to moral disengagement, a scale of propensity to morally disengage has been developed.[[49]](#footnote-49) Moore attempts to use this concept to create a typology of people based on the likelihood of their engaging in ordinary unethicality at the workplace that focuses on the ability of people to find excuses for imposing harm on others (e.g. "he had it coming," "it would have happened without me," etc.). A related concept is called moral firmness.[[50]](#footnote-50) This scale differentiates between an individual's likelihood of engaging in misconduct based on their likelihood of exploiting some ambiguity. Finally, the moral identity of Aquino and the various studies that are based on his measures found that people’s likelihood of doing harm, even implicitly, could be different across different situations based on their level of moral identity.[[51]](#footnote-51)

## Fifty shades of unintentional unethicality

Current research on behavioral ethics is not very clear on the level of awareness associated with this ordinary unethicality. Some scholars differentiate between intentional unethicality -- where people know that their behavior is bad but are unware of the reasons that led them to engage in doing harm -- and unintentional unethicality, where people are not even aware of the fact that what they are doing is wrong.[[52]](#footnote-52) Others differentiate between system 1 and system 2 mechanisms which are responsible for individual wrongdoing.[[53]](#footnote-53) Thus it seems that even when it comes to ordinary unethicality we need to know more about what leads people to engage in situational wrongdoing. There are several reasons why this is required. First from a legal perspective, we are required to answer the question of responsibility, not to mention the criminal aspects of such behavior, which naturally requires more knowledge of an individual's state of mind. Second, from a more practical perspective, knowledge of individual difference is also important to examine whether we still need to have tailor-made enforcing mechanisms. If a certain level of tax is likely to cause 20% or 80% of people to evade taxes, this would naturally move legal policy makers to use additional enforcement mechanisms. Third, even the design of the situation itself is not cost-free (in a similar way to the crowding out argument, designing a situation without ambiguity carries various costs as well). Orly Lobel and I have attempted to show that the nudge approach associated with the work of Sunstein and Tahler[[54]](#footnote-54) carries with it various procedural and motivational costs.[[55]](#footnote-55) Thus, understanding variation in individual responses to a situation is important not only for the design of enforcement approaches but also for gaining advance knowledge of the extent to which a situation should be designed in such a way to minimize ordinary misconduct.

At the same time, many of the individual differences presented above do suggest that there is greater likelihood that some people would violate the law. While as suggested above interpersonal variation is highly important for policy design, for a differentiated approach, given the complexity of predicting people’s behavior based on their personality *ex ante* we might need to look for other approaches on which to base the idea of differentiated regulation[[56]](#footnote-56). I will therefore examine two alternatives to personality-based differentiated regulation of good and bad people: demographics and level of intrinsic motivation.

### Demographic predictors of variation in unethicality:

Regarding demographic factors, the ability to regulate behavior *ex ante* is much larger. One can much more easily engage in differentiated regulation based on demographic relative to individual differences. However, from the review by Terbenusell et al[[57]](#footnote-57), it seems that for the most part, demographic factors do not carry a strong enough predictive value. They found zero to little relationship between factors such as gender, education level etc. Thus, organizations can avoid picking up "bad apples," but demographic strategies are not likely to be useful. They report mixed findings about the relationship between gender and unethicality. Regarding culture, there are conflicting studies which do not seem to represent a clear picture. Terbunssel et al. report that while some studies find a relationship between Brazilians and Americans,[[58]](#footnote-58) this effect was not found in later studies. Similar things can be said about other factors such as age and education, where some studies are more consistent than others.

One of the most impressive cross-societal studies was conducted by Gechter and Schulz[[59]](#footnote-59) where, using samples from different type periods, they can speak about causality between institutions and people’s honesty behavior. Overall, their argument is that there are a greater number of "honest" people in countries with stronger rule of law institutions, where people from less corrupt countries have lower claims regarding their dice-rolling. Weak institutions have therefore not only a direct effect on corruption and productivity, but might also create direct dishonesty. Countries with strong institutions are more likely to have lower values of justified unethicality. Gechter and Schulz also found variation between countries in mean claims. Frequency of high claims 3’4’5 is supposed to be 50% if everyone is honest and 75% under justified unethicality (because only in half of the cases they were offered the option to throw the dice twice).

In reality, the range across countries was from 61% to 84.3%, indicating that no country contains only honest people but that some countries do have only justified dishonest people at a rate of 71.8% on average.

Income maximizers are those who reported rolling a 5 – the random proportion of rolling 5, which is 16.7%, here to the range was between 0.3 to 38.3% of income maximizers (in our terminology calculated individuals) the mean is 16.2%

## Variation based on level of intrinsic motivation

The last type of variation between individuals is related to the difference between individuals from a legal perspective. This could have a different meaning than the individual differences concept used in psychology. As legal scholars, we sometimes need to know that in each situation, individual reactions to a new regulation will vary, but the variance will not necessarily be the same. For example, the most classical example is high versus low intrinsically motivated individuals. The example of high and low commitment to the values of the law could differ across different laws where people with high commitment in the context of one law might not have high commitment in a context of a different law.

## Variation in type of misconduct

An additional important aspect is related to the difference between the types of misconduct created by people intentionally and situationally. In other words, the difference is not just in the type of people, but also in the circumstances that allow for these two types. In that regard, Gephart et al.[[60]](#footnote-60) discussed the difference between two types of misconduct described by them as ethical impulse versus ethical calculus. In impulse, they suggest various non-deliberative mechanisms to operate and enable individuals' unethical activity. Nonetheless, the exact nature of non-deliberation always remains somewhat unclear. The Gephart model of compliance is combined and consists of three main aspects: the individualistic aspect, the nature of the moral issue aspect, and the environmental aspect. In the individualistic aspect, they refer mainly to three sub-aspects: cognitive moral development (Kohlberg), locus of control, and propensity to morally disengage (Bandura). In the moral development issue, they review characteristics such as moral intensity,[[61]](#footnote-61) proximity, and social consensus regarding the immorality of the act. With regard to environment, Gephart reviews concepts such as moral climate, social norms, organizational norms, and code of conduct enforcement.

Thus, according to the above argument, it is possible to focus on a differentiated approach based on the type of likely misconducts. In contexts where expected misconducts are clearly calculative, the best approach through traditional instrument choice of the most suitable enforcement mechanisms were based on traditional considerations (e.g. the limits of money, likelihood of detection, level of intrinsic motivations etc.).

However, in contexts where the expected harm is created by non-calculated misconduct, which even good people who usually avoid calculated wrongdoing might engage in, the focus should be on designing the situation to reduce the likelihood of an individual's ability to maintain the self-perception of themselves as good people. Such measures include reducing ambiguity, reducing excuses for wrongdoing, increasing accountability, etc.

# Possible Differentiated Regulation solution to the variation between people

## Using Big Data and experimental legislation approach to predict variation in unethicality

A possible solution to the complexity described above in accounting for the mixture of personal, situational, occupational, and demographic antecedents of unethicality is big data. Using big data, people’s past behavior in ethical contexts and across various domains can be used to help regulators implement an appropriate balance of measures. There is increasing research on the potential use of aggregated knowledge about human behaviors in different situations. Even if privacy concerns mean that big data could not be used for specific individuals, it could help regulators considerably in understanding situations where certain measures work better relative to others. This approach might be a mixture of a personal and occupational background of an individual's likely unethical behavior. Existing studies have already focused on the implication of big data for people’s future level of awareness and motivation for ethical behavior. The big data approach could be used to advance our knowledge on how well competing measures operate on certain people and help create a more tailored regulatory and enforcement approach to each situation.

## Increasing the focus on detection.

The relative effectiveness of enforcement versus severity of punishment in deterring misbehavior is still the subject of fierce debate.[[62]](#footnote-62) Most studies suggest that degree of punishment has only a marginal deterrent effect on the behavioral choices of people.[[63]](#footnote-63) We argue that this might be related to our argument about good people, because they do not think that they will be subject to punishment. In contrast, bad people know that if they are caught they will be punished; hence, they are more sensitive to the degree of punishment.

Instead, good people of both types—situational wrongdoers and blind-sport wrongdoers—are more likely to be affected by the likelihood of enforcement. Enforcement that is more frequent creates more reminders for people in a way that could reduce both their justifications and their lack of awareness that their behavior may lead to wrongdoing. It is also likely to reduce the uncertainty that might make it easier for people to deceive themselves as to the true legal meaning of their behavior. In other words, the relative deterrent value of frequent enforcement versus punishment degree depends on an individual's mindset. Raising the cost of wrongdoing only affects calculative people. For genuinely moral individuals whose wrongdoing is mainly related to their blind spots, clearly raising the expected price might not reduce that behavior.[[64]](#footnote-64)

Imposing harsh punishment does have value in clearly illustrating the government’s approach and commitment to enforcing morality. Yet, harsher punishment may reduce good people’s compliance.

The process of imposing this punishment is a lengthy one, which may allow time for a backlash.[[65]](#footnote-65) For example, Eerev,[[66]](#footnote-66) who examined enforcement of safety regulations in factories, found that more frequent enforcement with small fines was more effective than less frequent punishment with large fines. A longer process also enables good people to create justifications to engage in smaller level misconduct. Thus, criminal sanctions that might deter calculative people might do the opposite for the other two types of people who engage in noncompliant with limited awareness.

## Shifting the Focus on Regulating Situations Instead of Individuals

The recognition of the limited ability of individuals to monitor their own behavior gives the situation a different, and presumably larger, role than the more traditional law and economics perspective. In a sense, the now famous "nudge approach" suggests that given the growing recognition of people’s non-deliberative reasoning, situations should be modified in various subtle ways to improve behavior. However, in a sense, behavioral ethics simply exacerbate an already-growing recognition in the legal enforcement literature that the source of wrongdoing is not necessarily the "bad apples" but rather the environment in which they operate.

Various behavioral ethics scholars have attempted to understand the implications of behavioral ethics on the need to pay closer attention to the situation. Tenbrunsel and Smith-Crowe[[67]](#footnote-67) discuss the situational factors which affect the likelihood of moral awareness and conclude that ethical infrastructure is much more important for the likelihood of moral awareness relative to the individual factors. Along those lines, Tenbrunsel and Messick[[68]](#footnote-68) argue that formal systems, informal systems, and the organizational climate are responsible for much unethical behavior, especially because of the process of ethical fading which is trigged by euphemism.[[69]](#footnote-69)

## Green line/ Red line approach

One of the dominant voices in the attempt to differentiate people based on their willingness to engage in wrong-doing is Raskolnikov, who focuses mainly on tax evasion.[[70]](#footnote-70) In this typology he speaks about "gamers"[[71]](#footnote-72) who do everything in their power to pay less tax and, in that sense, are not reacting to situations but planning to do bad things.[[72]](#footnote-73) The "gamer" type is similar to the calculated wrongdoer model used in classical deterrence theory. However, what Raskolnikov fails to account for is the fact that even non-calculative people could engage in either intentional or unintentional wrong-doing. These are people who mostly react to a situation that allows them to do bad things without worrying too much about the consequences of the act on their consciousness or on their standing in society.

## Acoustic separation and Legal Ambiguity

Taking a different approach, Henry Smith and I have proposed an acoustic separation argument based on the usage of ambiguity.[[73]](#footnote-74) We have argued that different types of people react differently to legal ambiguity; whereas for some people ambiguity would harm the ability to find loopholes, for others it might allow various self-deception mechanisms associated with moral "wiggle room."

## The Pyramid of Regulation

According to Ayres and Braithwaite's responsive regulation pyramid of regulation approach[[74]](#footnote-75) most people in a population react to less strict interventions. The stricter interventions would be used in a consequential way for the portion of the population which did not react to previous, more lenient, messages.

According to Tyler, it is possible to design interventions based on people’s intrinsic motivation, beginning with those that target considerations of morality, fairness, and social values and then moving to a harsher approach for the minority of more calculated wrongdoers. This sequential move from soft to hard regulation may align with a move from nontraditional and situational enforcement, which focuses on good people, to traditional enforcement, which is always in the background but comes into play when nontraditional enforcement fails. However, while the approaches of Tyler and of Ayres and Braithwaite hold that soft regulation is mostly preferable to hard regulation, we recognize that nontraditional means such as nudges suffer from many limitations that make them inferior to traditional enforcement methods that involve deliberation.

# Conclusion [incomplete]

Part of the rationales I discuss in these papers claims that financial instruments are highly effective for people with low intrinsic motivation, but could be devastating for people with high intrinsic motivation, because of the crowding out phenomenon.[[75]](#footnote-76) In addition to the effect of variation regarding incentives, one could consider the parallel move of variation in effect of morality, where some people are more likely to react to moral language, relative to other approaches.[[76]](#footnote-77)

1. Some of the ideas in this draft have been developed based on my forthcoming book, *The Law Of Good People*. [↑](#footnote-ref-1)
2. Haidt, J. (2001). The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment. *Psychological Review,* *108*(4), 814. [↑](#footnote-ref-2)
3. For the most recent collection of research in this area, see: Teichman, D., & Zamir, E. (2013). Judicial Decisionmaking: A Behavioral Perspective. In Zamir, E., & Teichman, D. (Eds.). (2014). *The Oxford handbook of behavioral economics and the law*. Oxford University Press, USA.Kahneman, *supra note* 1. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. Evans, J. S. B. (2008). Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition. *Annual Review of Psychology*, *59*. 255-278. [↑](#footnote-ref-5)
6. Gigerenzer, G. & Goldstein, D. G. (1996). Reasoning the Fast and Frugal Way: Models of Bounded Rationality. *Psychology Review*, *103*(4). 650. [↑](#footnote-ref-6)
7. Kruglanski, A. W. & Gigerenzer, G. (2011). Intuitive and Deliberate Judgments are Based on Common Principles. *Psychological Review*, *118*(1). 97. [↑](#footnote-ref-7)
8. Korobkin, R. B. & Ulen, T. S. (2000). Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics. *California Law Review,* *88*. 1051-1144. [↑](#footnote-ref-8)
9. For a recent review, see Gino, *supra note* 5. [↑](#footnote-ref-9)
10. Kunda, Z. (1990). The Case for Motivated Reasoning. *Psychological Bulletin*, *108*(3). 480; Merritt, A. C., Effron, D. A. & Monin, B. (2010). Moral Self‐Licensing: When Being Good Frees us to be Bad. *Social and Personality Psychology Compass,* *4*(5). 344-357. [↑](#footnote-ref-10)
11. Marquardt, N. & Hoeger, R. (2009). The Effect of Implicit Moral Attitudes on Managerial Decision-Making: An Implicit Social Cognition Approach. *Journal of Business and Ethics*, *85*(2). 157-171. [↑](#footnote-ref-11)
12. Haidt, J. (2001). The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgement. *Psychological review*, *108*(4), 814. [↑](#footnote-ref-12)
13. Banaji, M. R. & Hardin, C. D. (1996). Automatic Stereotyping. *Psychological Science*, *7*(3). 136-141; Mazar, N., Amir, O., & Ariely, D. (2008). The dishonesty of honest people: A Theory of Self-Concept Maintenance. *Journal of Marketing Research,* *45*(6). 633-644; Moore, D. A., & Bazerman, M. H.(2012). *Judgment in Managerial Decision Making (*8th ed.). USA: Courier Westford Inc.; Weber, J., Kurke, L. B., & Pentico, D. W. (2003). Why do Employees Steal? Assessing Differences in Ethical and Unethical Employee Behavior Using Ethical Work Climates. *Business & Society,* *42*(3). 359-380.; Gino, *supra note* 5. [↑](#footnote-ref-13)
14. For example, see: Mazar, Amir & Ariely, *supra note* 34; Bersoff, D. M. (1999). Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior. *Personality and Social Psychology Bulletin,* *25*(1). 28–39; Kidder, R. M. (2009) *How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living*. New York, NY: Harper Collins Publishers; Pillutla, Madan M. (2011). When Good People Do Wrong: Morality, Social Identity, and Ethical Behaviour. In De Cremer, D., Van Dijk, R. & Murnighan, J. K. (Eds.), *Social Psychology and Originations* (pp. 353-369); Hollis, J. (2008). *Why Good People Do Bad Things: Understanding our Darker Selves.* New York, NY: Penguin Group.; Banaji, M. R. & Greenwald, A. G*.* (2013). *Blindspot: Hidden Biases of God People.* New York, NY: Delacorte Press. Note that the "good people" scholarship is usually different from the type of research conducted by Zimbardo on the Lucifer effect, see: Zimbardo, Philip. (2007). *The Lucifer Effect: Understanding how Good People Turn Evil.* New York, NY: Random House Publishing House. These works attempt to explain how ordinary people end up doing evil or at least engage in gross criminal behaviors. [↑](#footnote-ref-14)
15. Becker, G. S. (1968). Crime and Punishment: An Economic Approach. *Journal of Political Economy, 76*(2), 169-217. [↑](#footnote-ref-15)
16. Tyler, T. R. (1990). *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance*. New Haven, CT: Yale University Press; Paternoster, R. & Simpson, S. (1996). Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime. *Law and Society Review*. *30*(3), 549-583; Robinson, P. H. & Darley, J. M. (1997). The Utility of Desert. *Northwestern University Law Review.* *91*, 453-499. [↑](#footnote-ref-16)
17. For a review see: Feldman, Y. (2011). For Love or Money? Defining Relationships In Law And Life: The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law. *Washington University Journal of Law and Policy,* *35*. 11-547. [↑](#footnote-ref-17)
18. See generally: Zimring, F. E., Hawkins, G. & Vorenberg, J. (1973). *Deterrence: The Legal Threat in Crime Control*. Chicago, IL: University of Chicago Press. 189-190; Tittle, C. R. (1980). *Sanctions and Social Deviance: The Question of Deterrence*. Westport, CT: Praager Publishers. [↑](#footnote-ref-18)
19. See for example: Braithwaite, J., & Makkai, T. (1991). Testing an Expected Utility Model of Corporate Deterrence. *Law and Society Review*, *25*. 7-40. [↑](#footnote-ref-19)
20. Robinson, P. H., & Darley, J. M. (2004). Does Criminal Law Deter? A Behavioural Science Investigation. *Oxford Journal of Legal Studies,* *24*(2). 173-205. [↑](#footnote-ref-20)
21. See for example: Kahneman. D., Knetsch, J. L., & Thaler, R. H. (1986). Fairness and the assumptions of economics. *Journal of Business*, S285-S300. [↑](#footnote-ref-21)
22. Tyler, *supra note* 8. [↑](#footnote-ref-22)
23. Feldman, Y., & Tyler, T. R. (2012). Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace. *Regulation and Governance Journal,* *6*(1). 46-65. [↑](#footnote-ref-23)
24. Feldman, Y., & Perez, O. (2012). 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 and Society Review*, *46*(2). 405-442. [↑](#footnote-ref-24)
25. Feldman, Y., & Lobel, O. (2009). The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality. *Texas Law Review*, *88*. 1151. [↑](#footnote-ref-25)
26. Fischbacher et al., *supra note* 19. [↑](#footnote-ref-26)
27. Jolls, C., & Sunstein, C (2005). Debiasing Through Law. *National Bureau of Economic Research,* No. w11738*.* [↑](#footnote-ref-27)
28. Lerner, J. S., & Tetlock, P. E. (1999). Accounting For The Effects of Accountability. *Psychology Bulletin,* *125*(2), 255-275. [↑](#footnote-ref-28)
29. For example, I have examined the relevancy of loss aversion to people’s ethical choices in contractual contexts. Feldman, Y., Schurr, A., & Teichman, D. (2013). Reference Points and Contractual Choices: An Experimental Examination. *Journal of Empirical Legal Studies,* *10*(3), 512-541. [↑](#footnote-ref-29)
30. See Levin, I. P., Schneider, S. L., & Gaeth, G. J. (1998). All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects. *Organizational Behavior and Human Decision Processes,* *76*(2), 149-188.for the most comprehensive analysis of these approaches. [↑](#footnote-ref-30)
31. Sunstein, C., & Thaler, R. (2008). Nudge. *The politics of libertarian paternalism. New Haven*. [↑](#footnote-ref-31)
32. Bazerman, M. H., & Banaji, M. R. (2004). The Social Psychology of Ordinary Ethical Failures. *Social Justice Research,* *17*(2), 111-115. [↑](#footnote-ref-32)
33. Gneezy, see empirical demonstration of the harm associated with incentives used toward the wrong people in joint works with Perez and Lobel. [↑](#footnote-ref-33)
34. For a more elaborate review of the processes, see reviews of bounded ethicality by Gino et al., Shalvi et al, and Chou et al. For a review with legal implications see Feldman, Y. (2014). Behavioral Ethics Meets Behavioral Law and Economics, in E. Zamir and D. Teichman (Eds.), *The Handbook of Behavioral Law and Economics*. Oxford, England: Oxford University Press. [↑](#footnote-ref-34)
35. See for example: Rest, J. R. (1986). Moral Development: Advances in Research and Theory. Westport, CT: Preager Publishers; Trevino, L. K. (1992). Moral Reasoning and Business Ethics: Implications for Research, Education, and Management. *Journal of Business Ethics,* *11*(5-6), 445-459. [↑](#footnote-ref-35)
36. E.g. see: Gino, F. (2015), Understanding Ordinary Unethical Behavior: Why People Who Value Morality Act Immorally. *Current Opinion in Behavioral Sciences, 3,* 107-111.; Brazerman M. H., & Tenbrunsel, A. E. (2011) *Blind Spots: Why we Fail to do What’s Right and What to do About it.* Princeton, NJ: Princeton University Press. [↑](#footnote-ref-36)
37. Rest, *supra note* 4. [↑](#footnote-ref-37)
38. This ability is being challenged in other parts of the book on various other grounds, related to people's inability to recognize wrongdoing in their own behavior. See for example: Mazar et al., *supra note* 34. [↑](#footnote-ref-38)
39. Jones, *supra note* 46. [↑](#footnote-ref-39)
40. Kohlberg, L., & Kramer, R. (1969). Continuities and discontinuities in childhood and adult moral development. *Human development*, *12*(2), 93-120. [↑](#footnote-ref-40)
41. Reynolds, S. J. (2006). Moral awareness and ethical predispositions: investigating the role of individual differences in the recognition of moral issues. *Journal of Applied Psychology*, *91*(1), 233. [↑](#footnote-ref-41)
42. For an excellent review of much of the current research on morality and law, see: Zamir, E., & Medina, B. (2010). *Law,* *Economics and Morality.* Oxford England: Oxford University Press, 2010. [↑](#footnote-ref-42)
43. Tenbrunsel & Smith‐Crowe, *supra note* 36. [↑](#footnote-ref-43)
44. Supra note 66 [↑](#footnote-ref-44)
45. Greenwald, A. G., McGhee, D. E., & Schwartz, J. L. (1998). Measuring Individual Differences In Implicit Cognition: The Implicit Association Test. *Journal of Personality and Social Psychology,* *74*(6), 1464.; Greenwald, A. G., Poehlman, A. T., Uhlmann, E. L. & Banaji, M. R. (2009). Understanding And Using The Implicit Association Test: III. Meta-Analysis of Predictive Validity. *Journal of Personality and Social Psychology, 97*(1), 17-41. [↑](#footnote-ref-45)
46. Rachlinski, J. J., Johnson, S. L., Wistrich, A. J., & Guthrie, C. (2009). Does Unconscious Racial Bias Affect Trial Judges? *Notre Dame Law Review*, *84*, 3. [↑](#footnote-ref-46)
47. Frederick, S. (2005). Cognitive Reflection And Decision Making. *Journal of Economic perspectives, 19*(4), 25-42; Toplak, M. E., West, R. F., & Stanovich, K. E. (2011). The Cognitive Reflection Test As A Predictor Of Performance On Heuristics-And-Biases Tasks. *Memory and Cognition,* *39*(7), 1275-1289. [↑](#footnote-ref-47)
48. Toplak, West & Stanovich, *supra note* 61; Paxton, J. M., Ungar, L., & Greene, J. D. (2012). Reflection and Reasoning In Moral Judgment, *Cognitive Science, 36*(1), 163-177. [↑](#footnote-ref-48)
49. Bazerman & Moore, *supra note* 34. [↑](#footnote-ref-49)
50. Shalvi, S., & Leiser, D. (2013). Moral Firmness, *Journal of Economic Behavior and Organization, 93*, 400-407. [↑](#footnote-ref-50)
51. Aquino, K., Freeman, D., Reed II, A., Lim, V. K., & Felps, W. (2009). Testing A Social-Cognitive Model of Moral Behavior: The Interactive Influence Of Situations And Moral Identity Centrality. *Journal of Personality and Social Psychology, 97*(1), 123. [↑](#footnote-ref-51)
52. Gino, *supra note* 3. [↑](#footnote-ref-52)
53. Shaul Shalvi & Yoella Bereby-Meyer (under revision). [↑](#footnote-ref-53)
54. Thaler, R. H., & Sunstein, C. R. (2008). *Nudge: Improving D*ecisions About Health, Wealth, And Happiness. New York, NY: The Penguin Group. ‏ [↑](#footnote-ref-54)
55. Lobel & Feldman, Supra Note 2. [↑](#footnote-ref-55)
56. Although, See: Porat, A., & Strahilevitz, L. J. (2013). Personalizing Default Rules And Disclosure With Big Data. *Michigan Law Review,* *112*, 1417; in the context of form contract: Ben-Shahar, O., & Porat, A. (2009). Foreword: Fault in American Contract Law. *Michigan Law Review, 107*(8), 1341-1348; in the context of personalized negligence: Feldman, Y., & Smith, H. E. (2014). Behavioral Equity. *Journal of Institutional and Theoretical Economics JITE,* *170*(1), 137-159. Their work focuses on how legal ambiguity could be used to create an ex post acoustic separation between good and bad people. [↑](#footnote-ref-56)
57. Tenbrunsel, A. E., & Smith‐Crowe, K. (2008). 13 ethical decision making: where We’ve been and where We’re going. *Academy of management Annals*, *2*(1), 545-607. [↑](#footnote-ref-57)
58. For example, see: Haidt, J., Koller, S. H. & Dias, M. G. (1993). Affect, Culture, And Morality, Or Is It Wrong To Eat Your Dog? *Journal of Personality and Social Psychology,* *65*(4), 613. [↑](#footnote-ref-58)
59. Gächter, S., & Schulz, J. F. (2016). Intrinsic honesty and the prevalence of rule violations across societies. *Nature*, *531*(7595), 496-499. [↑](#footnote-ref-59)
60. Kish-Gephart, J. J., Harrison, D. A., & Treviño, L. K.  (2010). Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work. *Journal of Applied Psychology,* *95*(1), 1. [↑](#footnote-ref-60)
61. E.g. Jones, 1991 [↑](#footnote-ref-61)
62. Becker, G. S. (1968). Crime and punishment: An economic approach. In *The Economic Dimensions of Crime* (pp. 13-68). Palgrave Macmillan UK. [↑](#footnote-ref-62)
63. Chiricos, T. G., and Waldo, G. P.. (1970). Punishment and Crime: An Examination of Some Empirical Evidence. *Social Problems*, *18*(2), 200-217.‏;

Antunes, G., & Hunt, A. L. (1973) The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis. The Journal of Criminal Law & Criminology, (4), 486-493.;

Von Hirsch, A., Bottoms, A. E., Burney, E., & Wikstrom, P. O. (1999) Criminal deterrence and sentence severity: An analysis of recent research (p. 63). Oxford: Hart Publishing.‏

Nagin, D. S., and Pogarsky, G. (2011) Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence. Criminology, 39(4), 865-892.‏ for a review of much of the literature on the advantage of certainty over severity see Webster, C. M., & Doob, A. N. (2012). Searching for Sasquatch: Deterrence of crime through sentence severity. The Oxford handbook of sentencing and corrections, 173. [↑](#footnote-ref-63)
64. In a work with Doron Teichman, I focused on a different approach to this dilemma. See Feldman, Y., & Teichman, D. (2009). Are all legal probabilities created equal. *NYUL Rev.*, *84*, 980. [↑](#footnote-ref-64)
65. Dickens, W. T., Katz, L. F., Lang, K., & Summers, L. H. (1989). Employee crime and the monitoring puzzle. *Journal of labor economics*, *7*(3), 331-347. [↑](#footnote-ref-65)
66. Schurr, A., Rodensky, D., & Erev, I. (2014). The effect of unpleasant experiences on evaluation and behavior. *Journal of Economic Behavior & Organization*, *106*, 1-9. [↑](#footnote-ref-66)
67. Tenbrunsel, A. E., & Smith‐Crowe, K. (2008). 13 Ethical Decision Making: Where We’ve Been and Where We’re Going. *The Academy of Management Annals,* *2*(1), 545-607. [↑](#footnote-ref-67)
68. Tenbrunsel, A. E., & Messick, D. M. (2004). Ethical fading: The Role of Self-Deception in Unethical Behavior. *Social Justice Research*, *17*(2), 223-236. [↑](#footnote-ref-68)
69. Based on Bandura, *supra note* 32. [↑](#footnote-ref-69)
70. Raskolinkov, A. (2009). Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*. Columbia Law Review, 109*, 689. [↑](#footnote-ref-70)
71. See also: Raskolnikov, A. (2006). Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty. *Columbia Law Review*, *106*(3). 569-642. [↑](#footnote-ref-72)
72. Trevino, L. K., & Youngblood, S. A. (1990). Bad Apples in Bad Barrels: A Causal Analysis of Ethical Decision-Making Behavior. *Journal of Applied Psychology,* *75*(4). 378. [↑](#footnote-ref-73)
73. Feldman & Smith, *supra note* 78. [↑](#footnote-ref-74)
74. Ayres, I., & Braithwaite, J. (1995). Responsive regulation: Transcending the deregulation debate. Oxford University Press on Demand. [↑](#footnote-ref-75)
75. Compare with Feldman, *supra note* 8. [↑](#footnote-ref-76)
76. Compare with Aquino, *supra note* 64. [↑](#footnote-ref-77)