**A Behavioral Ethics Perspective on the theory of Criminal Law & Punishment**

Hadar Dancig Rosenberg & Yuval Feldman

Bar-Ilan University Faculty of Law

Contents

[Introduction 1](#_Toc91075185)

[What is behavioral ethics? 3](#_Toc91075186)

[Punishing self-justified wrongdoings 5](#_Toc91075187)

[Punishing omission versus commission 6](#_Toc91075188)

[How should we treat the negligent who inadvertently takes unreasonable risks? 8](#_Toc91075189)

[Accounting for contagiousness of misconducts 16](#_Toc91075190)

[Organizational influence as mitigating circumstances 17](#_Toc91075191)

[Conclusion 18](#_Toc91075192)

## Introduction

This chapter examines how the field of behavioral ethics – the study of how people make and perceive ethical decisions and behavior – could influence the theory and doctrine of criminal law and criminal punishment. It will do so by exploring a number of contexts in which applying behavioral ethics principles yield normative insights into criminal law and punishment doctrines. We will discuss some related issues about which applying behavioral ethics may challenge classical views of criminal law theory. Given its space limitations, this chapter should be seen as an introduction to a much broader and needed discussion on the ways in which the new findings of behavioral ethics could and should inform our thinking about how criminal law should react to misconducts.

We will present a few examples of dilemmas in criminal law to demonstrate our approach to the interaction between behavioral ethics and criminal law. First, consider the question of whether misconduct that is easier to self-justify should be punished more harshly than unjustifiable misconduct. Intuitively, from a retributive perspective, some criminal law scholars and laypersons might believe that the more serious and harder to justify the wrongdoing is, the harsher the punishment should be. Yet, from the perspective of deterrence, which focuses on the likelihood of a greater proportion of the population engaging in such wrongdoings prior to legal intervention, behavioral ethics mechanisms might support the opposite conclusion. The behavioral ethics approach may suggest that actions with greater normative ambiguity, which are therefore easier for more people to self-justify, should warrant harsher punishment.

A second questions is that of the motivation for the criminal wrongdoing, with conventional criminal law theory proposing that punishment might be mitigated and reduced in cases where the motive for committing the crime is an altruistic one. In contrast, the view of behavioral ethics research, which focuses on the mechanisms through which people can misperceive the morality of their own behavior, suggests that “good” people might find it easier to cheat and be dishonest when the consequences of their wrongdoing is shared with others or reduced.

# Third, we discuss the question of how we should treat negligent parties who inadvertently takes unreasonable risks. We note the potential relevancy of behavioral ethics to the normative controversy over the deontological and utilitarian justifications for criminalizing the negligent.

A fourth example is the contagiousness potential of a certain act as a justification for harsher punishment. People whose behavior is on the borderline between criminal and non-criminal are more likely to blur or cross this line, thereby expanding the acceptability and permissibility of acts which otherwise were more clearly perceived to be criminal. This, then, encourages others to follow suit. The unique danger of such misconduct derives from its potential to cause others to engage in activities that would otherwise be perceived as anti-social.

The last context we will briefly discuss involves the recognition that behavioral ethics highlights the strong effect of the circumstances of organizational settings on the likelihood of individuals committing wrongdoing. Understanding the magnitude of this effect might justify imposing criminal liability on organizations for using outcome-oriented incentives as part of their pay structure. This issue is exacerbated when the organizations are enforcement agencies in which promotion and pay depends on measured outputs.

Following this short introduction outlining the considerable potential of applying behavioral ethics to many aspects of criminal law, we will develop in more detail some of these contexts in which behavioral ethics could contribute to thinking about key aspects of criminal law theory, with a particular focus on punishment theory. As suggested in the introduction, this analysis should be seen as a preliminary step in giving more weight to the new science of behavioral ethics when interpreting the theory of criminal law and punishment.

## What is the field of behavioral ethics?

Before discussing the implications of behavioral ethics for criminal law, it is important to note that behavioral ethics is a relatively new field that examines people’s ethical decision-making processes.[[1]](#footnote-1) A book by one of this article’s co-authors, *The Law of Good People*,[[2]](#footnote-2) examines the challenges faced by governments that need to regulate people who, given their ethical and legal perceptions, or more accurately, misperceptions, of their own behavior, don’t view themselves as needing regulation.[[3]](#footnote-3) Scientific research on honesty and dishonesty has been on the rise in the last decade.[[4]](#footnote-4) In most studies, “dishonesty” is typically mentioned in the context of rule following or rule violation.[[5]](#footnote-5) Studies of dishonesty have shown dishonesty in games to be related to various types of unethical behaviors outside the laboratory. For example, dishonesty in dice role and coin toss tasks has been associated with free-riding on buses,[[6]](#footnote-6) not returning undeserved pay,[[7]](#footnote-7) and being late to work.[[8]](#footnote-8)

In addition to documenting how prevalent unethicality is among ordinary people, recent studies have also demonstrated how “good” people deceive themselves about their own behavior and even about having engaged in such a process of self-deception.[[9]](#footnote-9) An important strand within behavioral ethics suggests that after people actually do recognize that they have acted unethically, they strive to preserve their self-concept by changing the moral meaning of their misconduct through altering their assessment of the reality in which they operated and the effects of their actions on that reality.[[10]](#footnote-10) This reframing of reality is closely tied to other mechanisms underlying behavioral ethics; for example, its moral reasoning argument aligns well with the altering reality approach, as the former suggests that people’s motivation affects what they understand to be true[[11]](#footnote-11) as well as what they can actually see.[[12]](#footnote-12) The moral forgetting paradigm, originating from the work of Shu and Gino,[[13]](#footnote-13) holds that people change the perception of what kind of behavior is required from them as a way of enabling themselves to do bad things.

The behavioral ethics approach carries many implications for a number of legal doctrines. For example, it suggests that we should reexamine our understanding of what types of conflicts of interest should be regulated in various settings.[[14]](#footnote-14) For example, how do corporate settings affect the likelihood of misconduct by directors who make decisions favoring shareholders?[[15]](#footnote-15) How can behavioral ethics change what factors we should focus on when enforcing employment law violations in the workplace[[16]](#footnote-16) or what considerations should be given weight in determining the contexts in which regulation is especially needed?[[17]](#footnote-17) These issues touching on criminal law have not yet received systematic analysis, despite the questions of awareness and self-perception being perhaps more pressing in these than in any other legal field.

## 

## Punishing self-justified wrongdoings

The basic dilemma regarding the appropriate policy of criminalization and punishment in the case of self-justified acts arises from what behavioral ethics tells us about the type of misbehaviors in which normative people might engage. More people are likely to violate the law in circumstances in which “everybody is doing it” or when the nature of the harm associated with the particular misconduct might be ambiguous.[[18]](#footnote-18)

From a retributive perspective, one may argue that the more pronounced and normatively clear the wrongdoing is, the harsher the punishment should be. Yet, from a deterrence perspective, which focuses on the likelihood of a greater proportion of the population engaging in such misconduct, behavioral ethics mechanisms might support the opposite conclusion, arguing that actions with greater normative ambiguity could justify harsher punishment.[[19]](#footnote-19) Since it is easier for more people to engage in wrongdoing in such situations, harsher punishment is required to convey a clear message of deterrence.[[20]](#footnote-20) Similarly, while traditional criminal law theory would suggest that punishment might be mitigated in cases in which the motive for committing the crime is an altruistic one, behavioral ethics research suggests again the exact opposite.[[21]](#footnote-21) Since many more ordinary people might find it easier to misbehave when the consequences of their wrongdoing are reduced by being shared with others, there is greater scope to exercise deterrence.

More specifically, it is arguable that criminal law, involving criminalization of and punishment for highly common misconduct often engaged in by a large number of people, may be an unsuitable response. Rather, given that so many people might misbehave in such circumstances, the application of criminal law should be reserved only for non-normative misconduct, which causes harm that is clear to community members. Such an argument aligns with the *ultima ratio* principle, according to which criminal law is a draconian tool to be used only as a last resort.[[22]](#footnote-22) Therefore, the state should not apply it in cases in which “normative” people tend to misbehave to prevent the ensuing trivialization and abuse of criminal law and to its abuse. But what should be the response when these misbehaviors objectively constitute a significant harm, albeit one not subjectively perceived as a clear wrongdoing by many of those in a given community?

Applying different theories of punishment might lead to differing conclusions about the appropriate punishment policy. From a retributive perspective, it is arguable that an act that can be self-justified[[23]](#footnote-23) reduces the blameworthiness that should be attributed to the offender, that is, when a perpetrator commits an act they believe to be justified due to an incorrect interpretation of social norms, they appear less morally culpable than a perpetrator who commits the act with full knowledge that it violates social norms. An individual doing harm, and aware of the nature of that harm, displays considerably more hostility to the social contract than does someone who causes the same harm, unaware (or at least not fully aware) of the wrongful nature of the behavior. The first overtly defies and denigrates the protected social value prohibiting that misbehavior, whereas the latter does not deny the social value, but simply fails to recognize it or to attribute the correct meaning to the (mis)conduct.

In this context, a distinction should be drawn between various categories of wrongdoers; for example, the difference between those with “blinders” (who act in a case of a vague standard[[24]](#footnote-24)) and the justifiers (feeling that “everyone is doing it” or acting with altruistic motives). While the first type of wrongdoers acts without being aware of the illegality of the misconduct due to a vague definition of the offense, the second type of wrongdoers is fully aware that their acts are criminally prohibited but believe that there is no point in upholding the said law. Behavioral ethics might support differentiated policies for various categories, based on considerations of risk prevention and incentives creation.

In contrast, from a deterrence perspective, the need to send a signal to the public in cases where there is the potential for many people to possibly misbehave is greater. Actions which are more likely to be done by many “normative” people may require stricter policies to prevent others from engaging in such actions. In these cases, one may argue that stricter policies are needed even more than in cases where the perceived harm is clear and salient, because when there is a consensus about the anti-social character of the conduct, people have their intuitive internal mechanisms of self-prevention. However, when the anti-social character of the wrongdoing is not clearly perceived, the criminal law functions as a needed warning sign.

## Greater punishment for action or omission? Similar to the issue of the punishment of misconduct, that is easier to justify, the action-omission dilemma raises some challenges from a behavioral ethics perspective. In both the moral philosophy and the criminal legal theory discourses, we can find scholars who justify the distinction (whether moral, legal, or both) between causing harm through active behavior and not preventing a harm through passive behavior.[[25]](#footnote-25) Some have argued that doing harm by an active conduct is morally more grievous than not preventing a harm by an avoidance to act because engaging in active conduct directly creates the risk, while passivity entails failing to prevent a risk created by another. The “criminal energy” invested by the active actor is therefore greater than that involved in an act of omission; the agency of the actor is greater. Moreover, the causal relation between the behavior and the harm is more direct and stronger in a case of an active conduct than in a case of omission. These ontological differences are sometimes translated into legal policies. Although different criminal codes treat both types of behaviors – commissions and omissions –equally, in practice, courts sometime punish less severely in cases of omissions resulting in the same harm, probably due to the abovementioned differences that perhaps unconsciously influence prosecutors’ and judges’ discretion.

From a behavioral ethics standpoint, however, these unconscious presumptions could change; we could become more concerned about people feeling comfortable with their reduced agency when causing harm through omission rather than through action. The origins of the omission bias—people’s tendency to judge harmful actions as worse than equally harmful omissions, if all other circumstances are equal —is one of the early findings of behavioral economics.[[26]](#footnote-26) The greater moral attribution and responsibility associated with an action than with an omission is one of the explanations for this bias.[[27]](#footnote-27) This lower degree of moral attribution and responsibility associated with omissions possibly impliesg that more normative individuals will be especially prone to pursue their self-interest through passive rather than active behavior. In this context, one of the main arguments of behavioral ethics is the notion of ethical self-management, whereby people want to avoid situations that may harm their self-image as ethical people.[[28]](#footnote-28) A related theory emphasizing individuals’ alteration of reality is “ethical fading,”[[29]](#footnote-29) according to which people undermine threats to their positive self-image by deceiving themselves and allowing ethical concerns to fade into the background of the decision-making process. Ethical fading also suggests that another way in which people reconcile the dissonance between reality and ethics is by focusing on the belief that they are better than those around them rather than thinking of themselves as objectively good people. The need to maintain such a self-concept is also central to the moral hypocrisy theory, which holds that people can maintain their self-concept by *not* comparing their behavior to preexisting moral standards. Support for this theory is found in the work of Bateson, who shows that self-interested behavior decreases when participants are placed in conditions of high self-awareness.[[30]](#footnote-30) The lower degree of moral attribution in the context of omissions enables them to maintain their moral self-perception while promoting their own interest.[[31]](#footnote-31)

# How should we treat the negligent who inadvertently takes unreasonable risks?

There is a long, ongoing debate in criminal law theory about whether negligent acts are sufficiently anti-social to be criminalized. In Anglo-American jurisdictions, a common definition of criminal negligence is based on risk-taking that is inadvertent as well as unreasonable.[[32]](#footnote-32) The negligent actor takes unreasonable risks, acting without being aware of at least one of the *actus reus* components of the offense, when a reasonable person should have been aware of them. In most Anglo-American jurisdictions, recklessness – and not negligence – is the default level of culpability for most crimes, requiring a perpetrator to consciously disregard a substantial and unjustifiable risk of harm. The “recklessness default” requirement is based on a rationale of free choice; it assumes that knowingly taking an unjustifiable risk, when the actor could have chosen to act differently, reflects a choice to commit a wrongdoing.[[33]](#footnote-33) However, most Anglo-American legal systems recognize negligence as a sufficient element for culpability, albeit perceiving negligence as a mode of culpability that reflects a lower degree of blameworthiness than does recklessness, and therefore restricts its scope to a limited number of offenses. The interesting question is what the moral justification for imposing criminal liability for negligence is, or, put otherwise, what the rationale for criminalizing negligence is.

How can criminal law theorists benefit from the insights provided by behavioral ethics regarding the controversy over the rationale for criminalizing negligence? Here we would like to point to the potential relevancy of behavioral ethics research to the normative discussion on criminalizing negligence. It seems that one type of negligent actor is the one who acts automatically, without giving attention or without being concentrated enough to the potential risk their behavior creates. The prevailing dichotomous Anglo-American approach assumes that defendants are either reckless or negligent. There is no “in-between” mental state. Therefore, a defendant must be classified under one (and only one!) of these categories. The case of the “automatic pilot” actor could fall within the negligence category due to lack of awareness to the potential unreasonable risk created by one’s actions.

Behavioral ethics research highlights the role of represents our automatic mode of thinking and processing (System 1) in generating moral judgments. Haidt demonstrated experimentally that System 1 plays a role in moral reasoning, which is a product of deliberative processes (System 2).[[34]](#footnote-34) Haidt concluded that moral judgments are not driven solely by moral reasoning, because the automaticity with which we evaluate targets undercuts deliberative, System 2 processes. He also cited behavioral evidence of the tendency to create rationales after the fact to explain events and discussed the important role of moral emotions in moral judgment, suggesting that System 1 is responsible for generating moral judgments.

Moreover, most behavioral ethics scholars agree that System 1 plays the leading role in unethical behavior. Moore and Lowenstein were among the first to show that self-interest and concern for others affect behavior through different cognitive systems and that self-interest is automatic, viscerally compelling, and often unconscious: “In many instances of conﬂict of interest, self-interest tends to operate via automatic processes whereas ethical and professional responsibilities operate via controlled processes.”[[35]](#footnote-35) By comparing private beliefs and public behavior, Moore[[36]](#footnote-36) demonstrates that people truly believe their own biased judgments, not recognizing that their behavior is problematic.[[37]](#footnote-37) Gino et al. advance a similar view, showing that the level of control needed to behave ethically is much higher than that required to act unethically.[[38]](#footnote-38)

Epley and Caruso conclude that automatic processing leads to egocentric ethical interpretations.[[39]](#footnote-39) Similarly, Van den Bos et al. find support for the notion that when appraising a situation, people prefer outcomes that benefit themselves and only later correct their views to take into account fairness toward others.[[40]](#footnote-40) Using an implicit association test, Marquardt and Hoeger show that decisions are made based on implicit rather than explicit attitudes (although they also found that implicit attitudes are correlated with choices that subjects believed to be moral).[[41]](#footnote-41) Berby, Mayer, and Shalvi review a series of studies that claimed that people’s intuitive reasoning makes them more likely to cheat and be less cooperative.[[42]](#footnote-42)

But here a normative question arises. If System 1 is so dominant in shaping our behavior, it seems that negligent behavior is natural in some sense. If we are all characterized by automatic thinking and, given that this dichotomy between System 1 and System 2 reflects human nature, then it is natural not to be aware at all times to all the risks around. According to this line of thought, utilizing criminal law in cases of negligent acts negates the *ultima ratio* principle, according to which criminal law should be applied only as a last resort.[[43]](#footnote-43) As a society, we seek to keep this draconian tool only for the most anti-social behaviors. Imposing criminal liability on “good people” for being involved in cases where they suffer from self-deception due to operation of System 1 might trivialize the effect and power of criminal norms and sanctions. If many of us act negligently from time to time, and this is a natural result of human nature, then criminalizing many of us would weaken the effect of such incrimination.[[44]](#footnote-44)

Moreover, some have emphasized that criminal liability should be contingent upon intentional acts. As Claire Finkelstein has explained, “responsibility judgments in ordinary morality are based on the agent having acted intentionallly, and that an agent does intentionally what he chooses to do. Because agents choose to bring about those effects of their actions they foresee as reasonably likely to follow from what they do, they are responsible for such effects. They are not responsible for effects they do not foresee, or for effects they deem highly unlikely, and they ought not to be held criminally liable for them either.”[[45]](#footnote-45) In case of the “automnatic pilot” actor, it is therefore arguably neither possible to speak about intention nor about a rationale of choice.

But do people who act automatically indeed not avoid being in such a mental state? Is it impossible to control being under the influence of System 1 in some circumstances? These questions raise doubts about the capacity of people to avoid certain behavior; specifically, cases of actors who are prone to cognitive biases that cause them to be unaware of potential risks in circumstances in which resonable people should have been. Are these psychological proclivities controllable, allowing us to blame the actor for not opertaing their capacity to neutralize them; or are they uncontrollable so that we can then we blame the actor for possessing these defects?[[46]](#footnote-46) If acting automatically is uncontrolled for certain kinds of people, then it appears that the rationale of free choice does not apply. Here we have two options: if we persist with the rationale of choice as the sole moral basis for criminal liability, the idea of criminalizing the negligent should be abandoned; if we do not insist on the rationale of choice as the sole one, there is a need to find another moral basis which does not rely on free choice. Should we treat these psychological proclivities as character traits? If so, sould “bad” character be a legitimate moral base for blame? This question raises intense controversy.[[47]](#footnote-47) On the other hand, if we assume that people can control such tendencies, then the rationale of choice could justify criminalizing also the neglegent.

Criminal law scholars have noted the moral anti-sociality that characterizes negligent actors. A person acting negligently exhibits insensitivity to the interests of others because a reasonable person in similar circumstances should have been aware of the unreasonable risk taken inadvertently; the fact that *the individual* was not aware, while *a reasonable person* should have been aware of the risk reflects indifference to the interests of other. But again, does this explanation align with the rationale of free choice? Samuel Pillsbury argued that acting negligently derives from a preliminary choice not to be aware:

[T]he gathering and selecting of relevant information represents an affirmative mental activity. Information processing is something we *do,* not something that is *done* to us. We speak of *paying* attention as opposed to *falling* *asleep*. Perception… is a voluntary activity like talking or eating; it requires affirmative effort by the individual… While some basic perceptive abilities may be genetically encoded, the great majority must be learned. [[48]](#footnote-48)

Perception, according to this argument, is controlled. Findings based on neuropsychology support this argument by pointing to the ability of people to manage the process of acquiring information and using it.[[49]](#footnote-49) Consider, for example, an experienced driver who is accustomed to driving in a country where driving in on the right side of the road. If asked to drive a car in England, where cars drive on the left side, the driver would probably be able to do so, although their habit of frequently changing lanes might change. In such a new situation, which forces changes in automatic habits, the driver needs to spend significant efforts and to use the full capacity of their concentration to complete the mission. The driver, still be able to drive, may not have the energy left to invest in unnecessary actions,. This example demonstrates that people can increase their level of concentration and caution in specific circumstances, at least to some degree.

Assuming that people indeed have a capacity to advert, it makes sense to impose criminal liability on an actor whose perception is flawed, in situations where they failed to notice an unjustifiable risk that a reasonable person could and should have noticed. This failure to notice, which in the case of the “automatic pilot” actor could stem from the domination of System 1 and the tendency to self-deception, reflect indifference to protected social values which justifies the imposition of criminal liability and punishment. The indifference to interests of others is the reason for failing to be aware of the risk a reasonable person should have been aware of. This failure to notice can be actually described in terms of *mental omission*: the individual has a social expectation to notice an unreasonable risk and this expectation creates a legal duty; this breach of duty to be aware of that risk constitutes a moral justification to criminalize and punish the inadvertent action. This argument becomes even stronger in cases of repeat negligent actors who tend to repeatedly make self-benefiting mistakes. Their intensified indifference to others’ interests is reflected by their recurring failure to pay attention and be aware of unjustified risks.

In addition to the deontological justification for criminalizing the negligent, consequentialists might provide a utilitarian justification, based on insights regarding the greater likelihood that System 1 is more likely to lead to unethical behavior than is System 2.[[50]](#footnote-50) While the application of System 1 vs. System 2 is more familiar in the context of biases and heuristics,[[51]](#footnote-51) the backbone of behavioral economics,[[52]](#footnote-52) the greater activation of our intuitive reasoning in dishonesty[[53]](#footnote-53) is of course of great importance for criminal law research. If a negligent act would be criminalized, then people will sharpen their senses *ex ante*, make more efforts to concentrate and become more alert about potential risks, try to be more cautious, and generally adjust their behaviors accordingly. Criminalization of negligent behaviors could therefore create incentives for people to become more aware and concentrated from the outset, before they act. In a legal regime that tends criminalize negligent actors more than those acting on “automatic pilot,” people might tend to take fewer risks and take extra precautions to ensure that they are not doing something negligent. They will need to control their perceptions by neutralizing System 1 and using System 2 more, especially in situations in which an intensified risk can be anticipated. Criminal law could function as a tool which the state uses to “mark” these potential problematic situations *ex ante*. By imposing criminal liability for specific inadvertent acts, the state warns us—and especially those of us who have certain psychological proclivities described in the behavioral ethics literature—to “activate” System 2 and use it instead of System 1 in specific circumstances in which we are prone to operate according to System 1.

This argument assumes that people have the capacity to advert. And if they indeed have the capacity not to conduct wrongful acts, then it is plausible that legal sanctions can induce them to exercise that capacity.[[54]](#footnote-54) The creation of negligence offenses provides “nudges” that could help people recognize situations in which they are at risk of misconduct, thereby encouraging them to manage the operation of Systems 1 and 2, given that they cannot use System 2 all the time due to limited mental energies. The *ex ante* function of criminal law—to define criminal offenses and warn us from committing them—could help “good people” avoid risky situations in which they might act inadvertently. When someone is already involved in such a situation, it is likely self-serving biases would act to prevent that individual noticing the potential harm. Criminalization of such cases could normatively reframe these situations so that behaviors which were perceived as “normal” due to various biases, would now be recognized as misconducts. Raising the awareness of potential negligent actors to these risky situations in advance could help reduce the likelihood that they will get involved in them. After all, the “typical negligent” individual does not act out of wickedness, but is usually either careless, impulsive, stupid, selfish, awkward and the like, but not dishonorable.[[55]](#footnote-55)

Behavioral ethics insights might provide some support, for example, for the criminalization of rape based on negligence. Many legal jurisdictions criminalize rape based on recklessness as a minimal threshold, namely, require proving that the perpetrator committed a nonconsensual sexual act, being aware of the lack of consent. However, in circumstances of sexual erosion, the likelihood of acing under the influence of self-serving biases, which increases the chance of denial or lack of attention to “red lights” indicating that the woman does not consent, seems to be higher.[[56]](#footnote-56) Adopting the doctrine of negligent rape could convey a normative message regarding the severity of such behavior and create incentives for “good people” to sharpen their awareness *before* getting into intimate situations. The Canadian doctrine of affirmative consent is another interesting example of adopting a nudge mechanism in the context of sex offenses. This doctrine imposes a duty on a man to actively obtain a consent from the woman before having sexual contact. A failure to fulfill the duty creates a presumption of lack of consent. This mechanism has a double effect: one, in a manner similar to that of honesty pledges,[[57]](#footnote-57) it reminds “good people” that in intimate situations there is a significant likelihood of stumbling and making such a mistake; the second is to make it harder for them to self-deceive themselves by requiring them to positively obtain consent. This doctrine of affirmative consent could provide a conceptual model for other negligent offenses as well in situations where we seek to prevent people from self-deceiving themselves.

However, not everyone agrees with the utilitarian justification. A possible objection contends that there is no point in criminalizing the negligent based on consequentialist considerations. When a person acts with no awareness of one of the *actus reus* components, including in cases of the “automatic pilot” type, criminalizing that behavior would not create a deterrence effect, because choice is needed for deterrability:

The incentive effects of legal sanctions work though the minds of actors. The dominant point of opportunity for deterrence to do its work is thus the realization by those actors that they are doing (or at least risking the doing of) something that the law forbids. This realization, again, is just what is missing in the mind of merely negligent actors.[[58]](#footnote-58)

Therefore, if someone has a proclivity for inadvertent biases that prevent that individual from being aware of potential unjustifiable risks, the fact that the law criminally prohibits such an act cannot change that person’s uncontrolled mental state and or cause them to be aware of it. If the individual is indeed not aware of the unjustifiable risk, a law prohibiting it will have no deterrent effect.[[59]](#footnote-59) It seems that a central issue of the controversy is whether the negligent individual indeed has the capacity to advert. Research exploring the complex operation mechanisms of Systems 1 and 2 is warranted for settling this dispute.

## Accounting for contagiousness of misconducts

A related issue is the contagiousness potential of a certain act as a justification for harsher punishment.[[60]](#footnote-60) Behavioral ethics research demonstrates the contagious potential of misconducts, namely, the likelihood of people engaging in unethical behavior because they see others behaving unethically.[[61]](#footnote-61) People whose behavior is on the borderline between criminal and non-criminal are more likely to blur this line and cause others to follow them, thus expanding the acceptability and permissibility of acts which would otherwise be more clearly perceived as criminal. The special severity of such toxic acts derives from their potential to cause other people to become involved in activities that were previously perceived as anti-social.

From a retributive justice perspective, it makes sense to think that those people whose misconduct lies on the borderline between the normative and non-normative should not be treated severely because the anti-social nature of their misconduct is not severe or significant in an absolute sense. Under the traditional concept of retribution, we usually seek for proportionality between the punishment imposed on the perpetrator and the severity of the offense (given the harmed protected social value), in addition to considering the blameworthiness of the offender. When the harm to the protected social value is minor, the severity of the offense is low.

However, one may argue that the severity of such misconducts derives not only from the magnitude of the harm to the protected social value, but also from their contagiousness. Their contagious nature makes these misconducts particularly anti-social. When someone creates—by self-misbehaving—conditions which might encourage others to follow, that person should receive a punishment greater than he or she would have otherwise received had the misbehavior not had the contagiousness effect. An interesting, albeit not close, analogy might be cautiously drawn with the special severity attributed to inciters, who cause others to commit a crime, by planting the idea to do so in their minds.[[62]](#footnote-62) Although complicity laws are based on totally different rationales and are contingent upon different conditions that must exist, the general idea of attributing a special anti-sociality to incitement (the inciter “creates” not only offenses but also new offenders), corresponds in some sense with the idea of attributing special severity to contagious misconduct of people who knowingly create, by their own misbehaviors, the atmosphere and conditions under which others would tend more easily to commit such misbehaviors.

Moreover, there is a risk that perpetrators who commit borderline misconducts would not only “create” more offenses (and offenders) but also increase the likelihood that the “new offenders” would take these acts a step further, that is, commit more severe misconducts. This slippery slope phenomenon is particularly relevant in cases of borderline behavior, where the anti-social nature of the acts is not significantly salient. In such cases, the willingness of ordinary people to commit these crimes might be higher than the likelihood that they would engage in crimes that are significantly more severe. When more and more “ordinary” people engage in such borderline misbehaviors, the borderline itself might move over time. Thus, conducts which should be perceived as non-ethical wrongdoing would actually be perceived as legitimate; this is how bad norms become “normative.” The contagious misconduct is therefore characterized by an intrinsic increased anti-sociality, which justifies imposing a more severe punishment on the perpetrator.

From a consequentialist perspective, contagious misconduct reflects the dangerousness of the offender in that it increases the likelihood of others committing similar crimes. Since borderline unethicality is more likely to have a negative effect on more people, consequentialists might support punishing such acts more severely in order to deter the offender in the first place from crossing the blurred borderline and engaging in such wrongful acts.

## Organizational influence as mitigating circumstances

Another issue which we will discuss is related to the recognition that behavioral ethics highlights the potential effect of organizational circumstances on the likelihood of individuals becoming involved in committing wrongdoing. Understanding the scope of this effect might justify imposing criminal liability on organizations for using outcome-oriented incentives as part of their pay structure. This issue is exacerbated when the organizations are enforcement agencies in which promotion and pay depends on measuring outputs.

When the employee cheats his client because of the need to “show results” as a result of outcome-based remuneration, one may argue that when this misconduct is aligned with the interest of the corporation, the employee deserves a lenient punishment because of these circumstances, in which their free choice was constrained in a competitive work environment which created intolerable pressure to engage in misconduct. Such a toxic culture in the workplace might drive employees to justify misconducts that they would not have been engaged in without the existing payment structure; in some cases, they may even become blind to its wrongfulness. Criminal law theory provides justifications to not criminalize individuals at all in cases where their free choice is totally eliminated, such as in cases of duress.[[63]](#footnote-63) However, when an individual’s free choice in not negated but only partially restricted, criminal law theory supports only the mitigation of punishment but the total abandonment of the imposition of criminal liability.

## Conclusion

In this short chapter we have demonstrated the potential for a revolution of how we think about criminal law in a few contexts. As suggested in the introduction, all the areas within criminal law that could benefit from reevaluation based on behavioral ethics are beyond the scope of one chapter. Future research should revisit some of the research directions outlined in this chapter and enhance the development of more behaviorally informed criminal law and punishment.

1. Treviño, L. K., Weaver, G. R., & Reynolds, S. J. (2006). Behavioral ethics in organizations: A review. *Journal of management*, *32*(6), 951-990 [↑](#footnote-ref-1)
2. Feldman, Y. (2018). *The law of good people: Challenging states' ability to regulate human behavior*. Cambridge University Press [↑](#footnote-ref-2)
3. Feldman, Y., van Rooij, B., & Rorie, M. (2019). Rule-breaking without Crime: Insights from Behavioral Ethics for the Study of Everyday Deviancy. *Feldman, Y., Rorie, M., & Van Rooij, B.(2019). Rule-breaking without Crime: Insights from Behavioral Ethics for the Study of Everyday Deviancy. The Criminologist*, *44*(2), 8-11. [↑](#footnote-ref-3)
4. Bazerman, M. H., & Gino, F. (2012). Behavioral ethics: Toward a deeper understanding of moral judgment and dishonesty. *Annual Review of Law and Social Science*, *8*, 85-104; Feldman, Y. (2018). *The law of good people: Challenging states' ability to regulate human behavior*. Cambridge University Press. [↑](#footnote-ref-4)
5. Pascual-Ezama, D., Prelec, D., Muñoz, A., & Gil-Gomez de Liano, B. (2020). Cheaters, liars, or both? A new classification of dishonesty profiles. *Psychological Science*, *31*(9), 1097-1106. [↑](#footnote-ref-5)
6. Dai, Z., Galeotti, F., & Villeval, M. C. (2018). Cheating in the lab predicts fraud in the field: An experiment in public transportation. *Management Science*, *64*(3), 1081-1100 [↑](#footnote-ref-6)
7. Potters, J., & Stoop, J. (2016). Do cheaters in the lab also cheat in the field?. *European Economic Review*, *87*, 26-33. [↑](#footnote-ref-7)
8. Hanna, R., & Wang, S. Y. (2017). Dishonesty and selection into public service: Evidence from India. *American Economic Journal: Economic Policy*, *9*(3), 262-90. [↑](#footnote-ref-8)
9. Pronin, E., Lin, D. Y., & Ross, L. (2002). The bias blind spot: Perceptions of bias in self versus others. *Personality and Social Psychology Bulletin*, *28*(3), 369-381. [↑](#footnote-ref-9)
10. 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-10)
11. Kunda, Z. (1990). The case for motivated reasoning. *Psychological bulletin*, *108*(3), 480. [↑](#footnote-ref-11)
12. Dunning, D., & Balcetis, E. (2013). Wishful seeing: How preferences shape visual perception. *Current directions in psychological science*, *22*(1), 33-37. [↑](#footnote-ref-12)
13. Shu and Gino (2012) [↑](#footnote-ref-13)
14. Langevoort, D. C. (2018). Behavioral ethics, behavioral compliance. In *Research handbook on corporate crime and financial misdealing*. Edward Elgar Publishing. [↑](#footnote-ref-14)
15. Feldman, Y., Libson, A., & Parchomovsky, G. (2020). Corporate Law for Good People. *Northwestern University Law Review*, *115*, 20-03. [↑](#footnote-ref-15)
16. Feldman, Y., & Nadiv, N. (2021). A Behavioural Ethics Approach to Employment Law and Workplace Norms. *International Journal of Comparative Labour Law and Industrial Relations*, *37*(2/3). [↑](#footnote-ref-16)
17. Feldman, Y., & Kaplan, Y. (2019). Big Data and Bounded Ethicality. *Cornell JL & Pub. Pol'y*, *29*, 39. [↑](#footnote-ref-17)
18. Moore, C. (2015). Moral disengagement. *Current Opinion in Psychology*, *6*, 199-204. [↑](#footnote-ref-18)
19. Dana, J., Weber, R. A., & Kuang, J. X. (2007). Exploiting moral wiggle room: experiments demonstrating an illusory preference for fairness. *Economic Theory*, *33*(1), 67-80. [↑](#footnote-ref-19)
20. This argument assumes that the severity of the punishment indeed contributes to deterrence – an assumption which is itself disputable. See: [↑](#footnote-ref-20)
21. Gino, F., Ayal, S., & Ariely, D. (2013). Self-serving altruism? The lure of unethical actions that benefit others. *Journal of economic behavior & organization*, *93*, 285-292. [↑](#footnote-ref-21)
22. See, e.g., Douglas Husak, *The Criminal Law as Last Resort* 24(2) Oxford Journal of Legal Studies 207 (2004); Nils Jareborg, *Criminalisation as Last Resort (Ultima Ratio)*, 2 Ohio st. J. Crim. L. 521-534 (2005). [↑](#footnote-ref-22)
23. It should be noted here that the concept of self-justification in itself requires further nuanced analysis which will disentangle the different types of justification people use and the normative consequences that it entails. See Bazerman, M. H., & Gino, F. (2012). Behavioral ethics: Toward a deeper understanding of moral judgment and dishonesty. *Annual Review of Law and Social Science*, *8*, 85-104; Feldman, Y., & Smith, H. E. (2014). Behavioral equity. *Journal of Institutional and Theoretical Economics: JITE*, 137-159. [↑](#footnote-ref-23)
24. The principle of legality requires a clear and unequivocal prohibition, rather than a one which could be interpreted with more than one option. The problem is that the principle of legality is not always implemented. There are criminal prohibitions that are vaguely defined. [↑](#footnote-ref-24)
25. There is a wide body of writing discussing the moral and legal distinction between acts and omission. For a few examples, out of many, see: Michael S. Moore, Act And Crime: The Philosophy of Action And Its Implication for Criminal Law 58 (1993); George P. Fletcher, Basic Concepts of Criminal Law 59-70 (1998); Philippa Foot, Killing and Letting Die, in Killing And Letting Die 280, 281-282 (Bonnie Steinbock and Alastair Norcross ed,. 1994) [↑](#footnote-ref-25)
26. Regarding the omission bias, *see* Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 Sci. Am. 160 (1982); Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, 3 J. Behavioral Decision Making 263 (1990). The omission bias’ effect on corporate actors might exacerbated because once someone has done nothing in an early stage of a process, he is more likely to do it in latter stages. *See, e.g.*, Orit E. Tykocinski & Thane S. Pittman, *The Consequences of Doing Nothing: Inaction Inertia as Avoidance of Anticipated Counterfactual Regret*, 75 J. Pers. Soc. Psychol 607 (1998). Regarding to its general application to the legal context, *see* Adi Libson, *Missing Inaction: Internalizing Beneficial Omissions*, 32 Yale L. Pol'y Rev. 427 (2013) [↑](#footnote-ref-26)
27. David B. Sugarman, *Active versus Passive Euthanasia: An Attributional Analysis*, 16 J. Applied Soc. Psychol. 60 (1986); Mark Spranca, et al., *Omission and Commission in Judgment and Choice*, 27 J. of Experimental Soc. Pychol. 76 (1991); Johanna H. Kordes-de Vaal, *Intention and the Omission Bias: Omissions Perceived as Nondecisions*, 93 Acta Pshychologica 161 (1996); Ritov & Barron, *supra* note 196. [↑](#footnote-ref-27)
28. Grossman, Z., & Van Der Weele, J. J. (2017). Self-image and willful ignorance in social decisions. *Journal of the European Economic Association*, *15*(1), 173-217. [↑](#footnote-ref-28)
29. Tenbrunsel, A. E., & Messick, D. M. (2004). Ethical fading: The role of self-deception in unethical behavior. *Social justice research*, *17*(2), 223-236.2004 [↑](#footnote-ref-29)
30. Batson, C. D., Thompson, E. R., Seuferling, G., Whitney, H., & Strongman, J. A. (1999). Moral hypocrisy: appearing moral to oneself without being so. *Journal of personality and social psychology*, *77*(3), 525. [↑](#footnote-ref-30)
31. Nina Mazar & Scot Hawkins, *Choice Architecture in Conflicts of Interest: Default as Physical and Psychological Barriers to (Dis)honesty*, 59 J. Experimental Soc. Psychol. 113 (2015). The greater likelihood of dishonesty in the context of omission than in the context of commission. Their experiment documents the greater likelihood of dishonesty in the context of omission than that of commission. They demonstrate that people are much more prone to approve a false financial statement that benefits them, than actively assert false financial information. [↑](#footnote-ref-31)
32. Alexander, L., & Ferzan, K. K. (with Morse, S.) (2009). Crime and culpability: A theory of criminal law. Cambridge University Press. pp. 69, 78. There is an alternative interpretation of criminal negligence, such as reflected in the German law, which allows for the possibility of there being advertent negligence. *See* Michael S. Moore and Heidi M. Hurd: “Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence,” 5 *Criminal Law & Philosophy* 147, 149-150 (2011). [↑](#footnote-ref-32)
33. See Hart, H. L. A., *Negligence, Mens Rea and Criminal Responsibility*. In Hart, punishment and

    responsibility: Essays in the philosophy of law. Oxford: Oxford University Press (1968). [↑](#footnote-ref-33)
34. Haidt, J. (2001). The emotional dog and its rational tail: a social intuitionist approach to moral judgment. *Psychological Review, 108*(4), 814-834; Haidt, J., & Joseph, C. (2004). Intuitive ethics: How innately prepared intuitions generate culturally variable virtues. *Daedalus* *133*(4):55-66. Haidt’a views have been subject to a variety of criticisms. For example, Cushman et al. argue that the intuitiveness of morality cannot be assumed across the board and that the accessibility of different moral principles in people’s automatic and conscious mechanisms varies. *See* Cushman, F., Young, L. & Hauser, M. (2006). The role of conscious reasoning and intuition in moral judgment testing three principles of harm. *Psychological science* *17*(12)1082-1089. Moral identity may be more central to their behavior of some people than of others. Along those lines, the dynamic view of the moral self makes it more difficult to predict the effect of social norms. For example, working with others who seem to be acting morally might evoke resentment, whereas observing them from afar might elicit admiration. *See* Monin, B., & Jordan, A. H. (2009). The dynamic moral self: A social psychological perspective. In D. Narvaez & D. Lapsley (Eds.), Personality, identity, and character: Explorations in moral psychology (pp. 341–354). New York: Cambridge University Press. [↑](#footnote-ref-34)
35. Moore, D. A., & Loewenstein, G. (2004). Self-interest, automaticity, and the psychology of conflict of interest. Social Justice Research 17(2)189-202, pp. 195. [↑](#footnote-ref-35)
36. *Moore*, D. A., Tanlu, L., & Bazerman, M. H. (2010). Conflict of interest and the intrusion of bias. Judgment and Decision Making, 5(1), 37–53. [↑](#footnote-ref-36)
37. The measurement of “private” evaluations was done by giving participants incentives to be accurate in their predictions. [↑](#footnote-ref-37)
38. Gino, F., Schweitzer, M. Mead, N. & Ariely, D. (2011). Unable to resist temptation: How self-control depletion promotes unethical behavior. *Organizational Behavior and Human Decision Processes* *115*(2), 191-203. [↑](#footnote-ref-38)
39. Epley, N., & Caruso, E. M. (2004). Egocentric ethics. *Social Justice Research* *17*(2):171-87. [↑](#footnote-ref-39)
40. Van den Bos, K., S., Peters, L. Bobocel, D. R.& Ybema, J. F. (2006). On preferences and doing the right thing: Satisfaction with advantageous inequity when cognitive processing is limited. *Journal of Experimental Social Psychology* *42*(3):273-829. [↑](#footnote-ref-40)
41. Marquardt, N & Hoeger. R. (2009). The effect of implicit moral attitudes on managerial decision-making: An implicit social cognition approach. *Journal of business ethics* *85*(2), 157-171. [↑](#footnote-ref-41)
42. Shalvi, S., Eldar, O., & Bereby-Meyer, Y. (2012). Honesty requires time (and lack of justifications). *Psychological science*, *23*(10), 1264-1270. [↑](#footnote-ref-42)
43. *See supra note* 22. [↑](#footnote-ref-43)
44. Harel, A., & Klement, A. (2007). The economics of stigma: Why more detection of crime may result in less stigmatization. *The Journal of Legal Studies*, *36*(2), 355-377. [↑](#footnote-ref-44)
45. See, *e.g.,* Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 Ohio St. J. Crim. L*.* 579 (2005) [↑](#footnote-ref-45)
46. For a discussion of this questions also in other cognitive sources of inadvertence, *see* Moore & Hurd, p. 168. [↑](#footnote-ref-46)
47. *See, e.g.,* Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 Cardozo Law Review1019 (2003). [↑](#footnote-ref-47)
48. Samuel H. Pillsbury, *Crimes of Indifference,* 49 Rutgers L. Rev. 105, 143 (1996). [↑](#footnote-ref-48)
49. Id. [↑](#footnote-ref-49)
50. Köbis, N. C., Verschuere, B., Bereby-Meyer, Y., Rand, D., & Shalvi, S. (2019). Intuitive honesty versus dishonesty: Meta-analytic evidence. *Perspectives on Psychological Science*, *14*(5), 778-796. [↑](#footnote-ref-50)
51. Daniel, K. (2017). Thinking, fast and slow. [↑](#footnote-ref-51)
52. Mullainathan, S., & Thaler, R. H. (2000). Behavioral economics. [↑](#footnote-ref-52)
53. Shalvi, S., Eldar, O., & Bereby-Meyer, Y. (2012). Honesty requires time (and lack of justifications). *Psychological science*, *23*(10), 1264-1270. [↑](#footnote-ref-53)
54. See HLA Hart (1968) pp. 156-157 [↑](#footnote-ref-54)
55. Moore & Hurd [↑](#footnote-ref-55)
56. Ariely, D., & Loewenstein, G. (2006). The heat of the moment: The effect of sexual arousal on sexual decision making. *Journal of Behavioral Decision Making*, *19*(2), 87-98. [↑](#footnote-ref-56)
57. Peer, E., & Feldman, Y. (2021). Honesty pledges for the behaviorally-based regulation of dishonesty. *Journal of European Public Policy*, *28*(5), 761-781. [↑](#footnote-ref-57)
58. Moore & Hurd, p. 150. [↑](#footnote-ref-58)
59. *See, e.g*., Jerome Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 135-139 (2nd ed. 1960); Robert P. Fine & Gary M. Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, *16* Buf. L. Rev. 749(1966–1967). [↑](#footnote-ref-59)
60. Gino, F., Ayal, S., & Ariely, D. (2009). Contagion and differentiation in unethical behavior: The effect of one bad apple on the barrel. *Psychological science*, *20*(3), 393-398. [↑](#footnote-ref-60)
61. Bobek, Donna D., Amy M. Hageman, and Charles F. Kelliher. "Analyzing the role of social norms in tax compliance behavior." *Journal of Business Ethics* 115, no. 3 (2013): 451-468. [↑](#footnote-ref-61)
62. For an analysis of the special severity embedded within incitement, see Dancig-Rosenberg, H. (2021). The Puzzle of Complicity: A Normative Inquiry into Fundamentals of Criminal Law. *Jerusalem Review of Legal Studies*.‏ [↑](#footnote-ref-62)
63. For the distinction between justification and excuse as criminal defenses *see* Albin Eser*, Justification and Excuse*, 24 Am. J. Comp. L. 621 (1976). [↑](#footnote-ref-63)