Article

Big Data Solutions for the Epidemic of Ordinary Unethicality

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*This article addresses the challenge of regulating ordinary unethicality*: *common and routine unethical behavior that takes place in everyday life. We suggest a novel regulatory approach that uses big data analysis to tailor regulation to situations in which ordinary unethicality is common.*

*The motivation for proposing this regulatory scheme is the great cumulative harm caused by ordinary unethicality. Serious societal problems, such as sexual harassment, fraud in financial markets, misappropriation of corporate assets, and corporate and political corruption, originate from a continuous stream of small, routinely committed transgressions. In some cases, ordinary misconduct is so common that it becomes the norm rather than the exception, completely undermining the trust needed for the operation of markets and key social institutions. There is therefore urgent need to find solutions for the epidemic of commonplace ordinary unethicality.*

*The concept of ordinary unethicality has been recently introduced to legal scholarship through research in the bourgeoning field of behavioral ethics, which studies human behavior and decisions in various ethical contexts. This research offers an explanation for the ubiquity of ordinary unethicality: it is so common because it is practiced not only by anomalous "bad" individuals but also by ordinary people, who usually value ethical conduct. Behavioral ethics research also identifies the psychological mechanisms that facilitiate this type of unethical behavior. It suggests that ordinary people will behave unethically so long as they can do so while still maintaining a virtuous self-image. Ordinary people do not typically make a full, objective, and candid assessment of ethical dilemmas; rather they make biased ethical evaluations and tend to ignore or excuse their own wrongdoing.*

*We propose a novel scheme for regulating ordinary unethicality that has three central elements. First, since ordinary unethicality stems from the biased ethical thinking of ordinary people, the main aim of regulatory intervention should be to trigger more candid ethical deliberation. For this purpose, we propose the use of ethical nudges, legal instruments designed to encourage ethical self-reflection that thereby help potential wrongdoers refrain from engaging in biased ethical thinking.*

*Second, we suggest using big data analysis to identify situations in which ordinary unethicality is more likely to occur. Behavioral ethics research indicates that ordinary unethicality is situation-driven; in ambiguous or tempting situations in which ethical pitfalls are present, an alarmingly high percentage of individuals behave unethically. Therefore, the most cost-effective way to reduce ordinary unethicality is to focus enforcement efforts toward such problematic situations, which can be identified by analyzing existing databases that record legal disputes and unethical conduct. This article explores different datasets that might serve this purpose, particularly existing databases maintained by consumer protection agencies, financial regulators, and online dispute resolution centers.*

*Third, we show that after problematic situations are identified, big data analysis can guide regulators in the choice of the most appropriate legal response for each specific situation. This article offers a full menu of regulatory tools designed to target situational wrongdoing and ordinary unethicality and outlines the criteria for choosing among them. It concludes with a discussion of limitations and risks associated with such a regulatory scheme.*

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# Introduction

Behavioral ethics (BE), a growing field of scientific research, examines the behavior and decisions of individuals facing ethical dilemmas.[[3]](#footnote-3) This strand of research offers two seemingly contradicting empirical findings. First, a great majority of people say that they value honesty and believe strongly that they are moral individuals.[[4]](#footnote-4) Second, if presented with the right kind of opportunity, almost all people will choose to lie and cheat.[[5]](#footnote-5) These findings present a conundrum: How is it that "good people," who value morality, so often do bad things?

The answer provided by BE research is that people find ways to excuse, justify, or ignore their own unethical conduct.[[6]](#footnote-6) Thus, "good people" will engage in unethical behavior only as long as they can do so while still maintaining a positive self-image as moral individuals.[[7]](#footnote-7) For instance, a sales representative exaggerating the benefits of a financial instrument she is selling might convince herself that such exaggerations are not in fact "lying" since "everybody does this."[[8]](#footnote-8) Alternatively, she might admit to herself she is lying, but excuse this behavior by thinking that "no one gets hurt."[[9]](#footnote-9) Or, she might even slowly start to believe her own exaggerated statements, as a way to temporarily avoid the dissonance created by lying to her clients.[[10]](#footnote-10)

This type of behavior is referred to as *ordinary unethicality*, routine, everyday unethical acts committed by people who otherwise value morality and think of themselves as virtuous individuals.[[11]](#footnote-11) The concept of ordinary unethicality is based on an important observation. Acts usually described under this category might seem relatively mundane compared to other forms of misconduct. Thus, lying in negotiations, cheating on taxes, or inflating business expense reports – acts often described as forms of ordinary unethicality – might seem almost harmless compared to more serious crimes such as burglary or arson. Yet, it is precisely their "mundane" nature that makes these "ordinary" unethical acts so dangerous. Because such acts are less obviously harmful, it is much easier for good people to justify their engaging in them. And since these acts are easy to excuse, they can become extremely common and therefore far more harmful, in the aggregate, than serious forms of crime. Ordinary unethicality can thus easily become an epidemic, appearing as the norm instead of the exception.

To illustrate, consider the case of employee theft. We all know that stealing is wrong.[[12]](#footnote-12) Yet, people find it surprisingly easy to justify stealing small items from work, even if they would never consider stealing cash worth the same amount. Such misconduct is common, because employees are able to pass off their wrongdoing as harmless or socially accepted. Yet this supposedly mundane misdemeanor is in fact one of the most costly forms of crime,[[13]](#footnote-13) with losses for employers estimated at tens of billions of dollars annually.[[14]](#footnote-14) The harms of employee theft spread far beyond employers; in fact, it results in a 10 to 15 percent increase in the price of consumer goods, costing American families billions of dollars a year.[[15]](#footnote-15) Even more surprisingly, losses related to employee theft play a major part in the bankruptcies of between 30 to 50 percent of all insolvent organizations.[[16]](#footnote-16) The reason this form of crime is so costly is precisely *because* it appears relatively mundane. Because it is easy to excuse and justify, such misconduct can be easily practiced by the majority of ordinary normative people and can therefore become extremely common. And because ordinary unethicality is practiced so commonly, its cumulative impact is devastating.

This leads to a paradoxical result: unethical acts that are perceived as effectively harmless are in fact the *most harmful in the aggregate*, because they become so common. Thus, for instance, the practice of "wardrobing" –or buying an item, using it, and then returning it for a full refund – generates costs of $16 billion a year. Other "ordinary" unethical acts result in even higher costs. Accounting scandals account for the loss of $40 billion a year, insurance fraud for $24 billion a year, intellectual property theft for $250 billion a year, and tax deception for $333 billion a year. In contrast, the more "serious" crimes of car theft and burglary account for losses of $5.9 billion and $3.6 billion a year, respectively.[[17]](#footnote-17) This means that, in the aggregate, "ordinary" employee theft is a hundred times more harmful, in dollar amounts, than "serious" crimes such as burglary. Only a very few people can justify breaking into someone's home, but a great many can excuse stealing some paper from the office.

The concept of ordinary unethicality is also highly relevant in the context of sexual harassment. Sexual harassment is extremely common, with more than 80 percent of women reporting they have been harassed.[[18]](#footnote-18) Part of the reason sexual harassment is so widespread is that perpetrators, at least before the MeToo movement, were often able to shrug it off. They were able to convince themselves that their advances were welcome[[19]](#footnote-19) and that their behavior was harmless[[20]](#footnote-20) or socially acceptable.[[21]](#footnote-21) Importantly, the more subtle and ambiguous the harassing act is – the more "ordinary" and supposedly "harmless" it is – the easier it is for perpetrators to justify or excuse it, and therefore the more common it will become and the *more harmful* in the aggregate.

The prevalence of ordinary unethicality gravely harms interpersonal trust, which is the foundation of a functioning society.[[22]](#footnote-22) Unlike more serious misconduct, ordinary unethicality is extremely common and can easily become the norm. Therefore, it can completely undermine any mechanism that relies on people's mutual beliefs in the good intentions and honesty of others. If we “know” that "everybody lies" in the marketing world or that everybody steals from work, it makes it very difficult to trust in the integrity of others. Similarly, if students know sexual harassment is the norm in universities, their faith in the education system and its authorities can be completely shattered. Ordinary unethicality is also harmful because it has been shown that small ethical violations typically pave the way for greater ones, as they help individuals ease into the habit of engaging in unethical conduct.[[23]](#footnote-23)

Recognizing the epidemic of ordinary unethicality and its great dangers, this article proposes an enforcement scheme tailored to regulate this type of antisocial behavior. By highlighting the importance of regulating "minor" violations instead of "major" ones, this scheme reflects a paradigm shift away from the current understanding of law enforcement: it calls for a reorientation of enforcement policies and for the adoption of new regulatory means. Under this proposed regulatory scheme, the aim of regulatory intervention is to improve ethical deliberation and make it more difficult for ordinary people to behave unethically while maintaining a virtuous self-image. Big data analysis is used in two ways: to identify situations in which ordinary people find it easy to excuse their own wrongdoing and, after such problematic situations are targeted, to match the most appropriate regulatory response to each situation.

To outline our scheme in more detail*, first*, we propose to shift the focus of enforcement more explicitly toward heightening perpetrators' awareness of their actions. The root cause of unethical behavior is the inability to objectively capture the true meaning of one’s own wrongdoing; therefore, to combat misconduct, enforcement mechanisms must target ethical blind spots.[[24]](#footnote-24) More specifically, the goal of regulatory intervention is to make it more difficult for perpetrators to brush off or ignore the harmfulness of their actions. Thus, we propose the use of ethical nudges, regulatory tools that encourage ethical deliberation by directing wrongdoers toward a better understanding of their own behaviors. For instance, in the case of contractual misrepresentation, electronic messages may alert sales representatives to reconsider their statements when they contain false or exaggerated content. As we describe later, such tools are already being implemented in some contexts.[[25]](#footnote-25)

Shifting the focus of enforcement necessitates a reorientation of the aims of regulation and enforcement. Current legal practices adopt an ex-post perspective, deploying sanctions and punishment after misconduct has occurred. The problem is that these enforcement mechanisms do not address in a significant way the ex-ante awareness of potential perpetrators. Thus, they do very little to prevent wrongdoers from ignoring or excuse their own unethicality *at the time they decide how to behave*.[[26]](#footnote-26)

*Second*, we explain how big data analysis can be used to identify situations in which ordinary unethicality flourishes. Behavioral ethics (BE) research shows that ordinary people often engage in antisocial and harmful behavior. This means that the proportion of people whose behavior we need to regulate is far higher than previously assumed. And yet, to be effective, regulation of ordinary unethicality must be tailored to the situation and used appropriately. If everyone constantly encountered ethical nudges, such nudges would lose their meaning and impact. Ethical nudges must stand out to counter the phenomenon of *ethical numbing*, referring to individuals' decline in moral awareness in response to repetition and routine.[[27]](#footnote-27) Therefore, ethical nudges must be deployed carefully in a way that will maximize their impact on perpetrators' awareness.

Big data analysis can be used to identify more accurately those situations in which ordinary unethicality flourishes. This will allow us to identify those specific instances in which targeting transgressors' awareness and triggering moral deliberation will be most effective. A main finding of BE is that certain problematic situations can explain most of the variance in unethical behavior, above and beyond individual variation. In fact, recent BE research shows that, in some situations, unethical behavior is nearly universal.[[28]](#footnote-28) Therefore, regulators should focus on those circumstances that breed misconduct and then attempt to facilitate ethical decision making. Currently, many datasets document legal disputes and misconduct. By mining these datasets for patterns, we can learn to describe, in a much more fine-grained way, the specific characteristics of prevalent wrongdoing and identify the situations in which regulation will be most effective.

*Third*, after those situations that are most prone to ordinary unethicality are identified, big data analysis can also help legal policymakers determine the most appropriate type of regulatory intervention for each specific case. Unethicality is generated by a variety of different mechanisms that allow individuals to excuse, ignore, or justify their misconduct; biases hindering ethical deliberation can vary in each situation. Using big data analysis to monitor levels of misconduct after certain regulatory measures have been deployed can assist regulators in identifying the most effective regulatory remedy for each such bias. This article offers a full menu of regulatory tools designed to target different modes of biased ethical thinking. This comprehensive regulatory framework ties together the means of identifying, categorizing, and curbing the different manifestations of unaware misconduct.

This article proceeds as follows. Part I provides an introduction to BE and highlights its relevance to regulation and enforcement. Itsis to demonstrate that more explicitly targets the ethical awareness of potential perpetrators. After clarifying some of the main findings of BE research and differentiating this field from other branches of behavioral science, such as behavioral law and economics, Part I surveys prevailing theories of law enforcement and points out their inadequacies in light of BE findings: existing regulatory paradigms that emphasize such concepts as deterrence or even legitimacy fall short once we recognize the ability of perpetrators to ignore or justify their own unethical behavior.

Part II outlines the use of big data analysis to identify the hubs of ordinary unethicality. This is the first article to our knowledge that brings together two important emerging literatures: BE research and the legal scholarship on tailored regulation using big data analysis. This part provides a detailed analysis of different ways to employ big data analysis to regulate ordinary unethicality and trigger ethical deliberation among potential wrongdoers. It first considers the emerging big data literature on "personalized law," which suggests tailoring regulation according to interpersonal variation and personality traits.[[29]](#footnote-29) We show that the personalized law approach is not suitable for the regulation of ordinary unethicality. BE findings suggest instead that focusing on the characteristics of *situations (and not individuals)* is the most effective method for tailoring regulatory efforts. Thus, this part calls for the use of big data analysis to identify situations in which unethicality is prevalent. To supplement and support this use of big data analysis, we propose that the search for situations that breed unethicality should also be informed by BE's explanatory theory. BE research shows that ordinary unethicality is, in many ways, predictable. Specifically, ordinary unethicality is most common in situations where it is easy for perpetrators to excuse or ignore their own wrongdoing.[[30]](#footnote-30) This is the case, for instance, when legal standards are ambiguous,[[31]](#footnote-31) when harms are small,[[32]](#footnote-32) when harms are caused to unidentified victims, or when the wrong is committed in the name of an organization or a legitimate cause. BE provides detailed accounts of such conditions and their contribution to ordinary unethicality. These insights should guide the empirical aspects of our proposal and the use of big data analysis.

After the hubs of ordinary unethicality are identified and mapped, Part III describes possible regulatory responses aimed to increase perpetrators' awareness of their actions and to redesign problematic situations that breed unethical conduct. We describe four categories of regulatory mechanisms and describe the implications of each one. First, regulators can choose to trigger ethical deliberation directly by deploying ethical alerts, calling on wrongdoers to consider their actions or reminding them of facts they would prefer to forget. Second, regulators may engage in situational design, attempting to weaken or eliminate environmental cues that are proven to breed unethicality. Third, regulators can use situational liability, punishing those responsible for creating moral blind spots and situations in which unethicality flourishes. Fourth, regulators can modify traditional law enforcement mechanisms, such as administrative sanctions, in a way that will make such traditional measures more effective in triggering ethical deliberation by potential wrongdoers. This part shows how big data analysis can guide the selection of the most suitable regulatory response. These three parts are followed by a short conclusion.[[33]](#footnote-33)

# I. The Relevance of Behavioral Ethics to Legal Enforcement

Recently there has been a dramatic increase in the study and conceptualization of nondeliberative decision making: extensive research has generated competing paradigms describing various aspects of behavior that are not regulated with full consciousness.[[34]](#footnote-34) The prominence beyond academia of scholars such as Daniel Kahneman (who won the 2002 Nobel Prize in economics), Eldar Shafir in psychology, Richard Thaler in economics, Cass Sunstein and Daniel Kahan in law, and Daniel Ariely and Max Bazerman in management demonstrates the broad acceptance of the importance of intuitive and nondeliberative aspects of human choice and behavior. One paradigm that has been popularized by Kahneman’s book, *Thinking, Fast and Slow*, is the existence of two systems of reasoning.[[35]](#footnote-35) The dual-reasoning system, which has been the subject of thousands of papers[[36]](#footnote-36) and many books,[[37]](#footnote-37) differentiates between System 1, an automatic, intuitive, and mostly unconscious process, and System 2, a controlled and deliberative process.[[38]](#footnote-38) The recognition of automaticity in decision making has played an important role in the emergence of behavioral economics[[39]](#footnote-39) and subsequently behavioral law and economics.[[40]](#footnote-40) More recently, these insights have also been central to the development of the field of BE[[41]](#footnote-41) and to its introduction into legal scholarship.[[42]](#footnote-42)

## Behavioral Ethics versus Behavioral Economics

Both BE and behavioral law and economics address the role of self-interest in decision making. However, whereas BE examines how people are driven by self-interest even when that compels them to act unethically, behavioral law and economics (BLE) offers an explanation for why people do not make decisions that are in their best interests.[[43]](#footnote-43) BLE proposes the *bounded rationality* argument: because of information deficiencies, cognitive limitations, and time constraints, individuals fail to make rational decisions. Thus, people cannot be fully trusted to make decisions in a way that will enhance their own welfare. In contrast, behavioral ethics proposes the concept of *bounded ethicality*, which focuses on people's inability to recognize their own moral faults.[[44]](#footnote-44) Bounded ethicality clouds individuals' judgment and prevents them from seeing how their own self-interest is subconsciously driving their actions, even those that are unethical.

To illustrate this difference, consider an interaction between a financial advisor and her client. According to the concept of *bounded rationality* the client might have different biases that will prevent him from accurately assessing the value of the product offered to him. In other words, his cognitive limitations hinder his ability to make the decision that would best serve his self-interest. Conversely, *bounded ethicality* addresses the actions of the advisor and the mechanisms that limit her ability to realize she is deceiving her client. Here, cognitive limitations sabotage the advisor's ability to see that her self-interest is preventing her from acting morally. Behavioral law and economics and behavioral ethics can thus be understood as studying opposing archetypes of cognitive limitations related to self-interest. Behavioral law and economics studies the ways in which our cognitive limitations hinder our ability to promote our own self-interest, while BE is concerned with the power of self-interest to implicitly affect our ability to engage in candid ethical deliberation.

BE thus calls for reorienting behavioral analysis as applied to the law. It shifts the focus from whether people are able to act rationally and in their own self-interest to whether they understand that they are at fault, whether their behavior can be modified, and whether something in the situation has affected their ability to recognize their wrongdoing. Understanding these processes of decision making and how they affect questions of motivation, autonomy, and responsibility – rather than attempting to lead individuals toward their personal optimal outcome – is at the core of this new behavioral analysis of law. In our view, behavioral insights should inform efforts by legal policymakers to improve people’s ethical behavior, and not only their ability to make decision that benefit themselves.[[45]](#footnote-45) Toward this end, the introduction of *ethical nudges* offers a crucial refinement of the development of legal tools introduced by Thaler and Sunstein,[[46]](#footnote-46) refining the use of nudge tactics to improve ethical deliberation, rather than the calculated pursuit of self-interest.[[47]](#footnote-47)

## Behavioral Ethics and Ordinary Unethicality

Research in BE delves into the mechanisms that allow and facilitate bad conduct by self-perceived good people.[[48]](#footnote-48) Self-deception plays a key role, enabling wrongdoers to convince themselves they are committing no wrong. It is achieved, for instance, through *motivated reasoning*, a process in which individuals ignore some facts and emphasize others in a way that helps them support a perception of a moral self: they interpret situations in a way that makes ethical dilemmas go away. [[49]](#footnote-49) For instance, harassers often have a biased perception of reality, in which their advances are welcome, even when an objective evaluation would clearly indicate they are not. Wrongdoers also engage in *moral licensing*, which relies on their positive self-image as ethical individuals to justify minor deviations from ethical conduct. A related mechanism is *moral disengagement*, or the habit of finding ways to excuse unethical conduct, even when the perpetrator is aware of it. Such mechanisms allow individuals who value themselves as moral people to routinely engage in immoral behavior that is not accompanied by malice; in other words, acts of ordinary unethicality.[[50]](#footnote-50)

Self-serving mechanisms such as self-deception and motivated reasoning are relevant to all areas of life. Consider this example: a mayor finds it difficult to admit to herself that her behavior is driven by anything other than the benefit of the city she runs – even if her specific actions seem to be, on the surface, motivated primarily by her own self-interest.[[51]](#footnote-51) Such gaps in awareness are created because people tend to overestimate their own ability to remain impartial and to accurately assess the nature of their actions and motives.[[52]](#footnote-52) As a result they often believe they are acting more ethically than they actually are..[[53]](#footnote-53) Chugh, Bazerman, and Banaji attribute this inability to accurately assess one’s behavior to an *illusion of objectivity*, which causes people to view themselves as more objective relative to others.[[54]](#footnote-54) This notion relates to a broader concept of *ethical blind spots*, which is mostly associated with the work of Bazerman. Such blind spots are situations and mechanisms that allow individuals to ignore the adverse effects of their actions and prevent them from recognizing their own unethicality. Engaging in corrupt acts can also be explained by another cognitive mechanism: the gap between “the want self” (i.e., self-interest) and “the should self” (moral imperatives). As Bazerman and others have shown, this gap widens when the potential gains from unethical behavior increase. Therefore, people’s cognitive ability to restrain themselves cannot be relied on as an effective gatekeeper when the stakes become high. In other words, power literally corrupts. The work of Greenvald and Banaji on the power of implicit judgment is even more relevant here: because people love themselves so much, they have a hard time admitting, even to themselves, that they behave immorally.[[55]](#footnote-55)

The exact nature of the cognitive mechanisms that are responsible for creating moral blind spots is still debated among scholars. Many BE findings suggest a strong link between ethical blind spots and automated cognitive processes. An important contribution in this line of research is offered in a recent work by Chugh and Kern.[[56]](#footnote-56) They focus on how automatic processes are all largely related to self-driven bounded ethicality processes.[[57]](#footnote-57) Along similar lines, Marquardt and Hoeger show that individuals make ethical decisions based on implicit rather than explicit attitudes.[[58]](#footnote-58) In examining the automatic system, Moore and Loewenstein[[59]](#footnote-59) have found that the effect of self-interest is automatic, and Epley and Caruso[[60]](#footnote-60) conclude that automatic processing leads to egocentric ethical interpretations.[[61]](#footnote-61) In a recent meta-analysis, Kobis and his colleagues found evidence of intuitive self-serving dishonesty, meaning that people are more likely to lie and cheat when making ethical decisions based on intuition rather than full deliberation.[[62]](#footnote-62)

These psychological mechanisms not only amplify the effect of self-interest but also tend to limit people’s awareness of the role of self-interest in determining their behavior – thereby widening the gap between people’s actual behavior and their evaluation of its ethicality.[[63]](#footnote-63) Moore et al. demonstrate that people often truly believe their own biased judgments and thereby fail to recognize that their behavior is problematic.[[64]](#footnote-64) Gino and colleagues advance a similar view, showing that the level of control needed to behave ethically is much higher than that required to act unethically.[[65]](#footnote-65)

Whatever its cognitive sources, ordinary unethicality is ubiquitous. "Good people" can, and often do, engage in unethical behavior without full and objective deliberation of their actions. The next section highlights the importance of this conclusion for the law.

## The Importance of Behavioral Ethics across All Legal Fields

Clearly, the implicit effects of self-interest on how people make choices are highly relevant to almost any legal doctrine. Moral blind spots are very common, which makes the issue of legal compliance markedly more nuanced and more serious than previously appreciated.

Much of the current literature on legal compliance examines people’s moral judgment, ignoring the possibility that people might engage in motivated reasoning and self-deception. The rich experimental literature on compliance assumes that people recognize a moral conflict and then proceed to shape their actions in light of that conflict. In reality, however, people may not recognize that there is a conflict, or may choose to ignore it, or may simply reason it away. In other words, people decide what seems to be the right thing to do based on their highly motivated perception of the situation.

To illustrate, consider again the widespread phenomenon of sexual harassment. In the more extreme instances, harassment is deliberate, done with malice, and is intentionally aimed to harm others.[[66]](#footnote-66) Yet, in many cases, sexually toxic environments are created through routine interactions, initiated by individuals who are insensitive to the immense harmfulness of their own conduct.[[67]](#footnote-67) Individuals harassing others do not think of their own acts as harmful;[[68]](#footnote-68) in this sense, such individuals do not face an ethical conflict, because they either do not notice the conflict or reason it away.[[69]](#footnote-69) If individuals harassing others indeed engage in motivated reasoning and find ways to excuse their own unethicality, this has crucial implications for our understanding of this serious societal problem and of how to deal with it.

Sexual harassment is extremely common, so much so that it is often likened to an epidemic. Studies have produced varying estimates of its incidence, but all indicate that a very large percentage of women have experienced sexual harassment at some point. They show that 62% of female undergraduates,[[70]](#footnote-70) 44% of female graduate students,[[71]](#footnote-71) 70% of female field researchers, and 30% of female medical faculty[[72]](#footnote-72) report that they have been harassed. A recent survey indicates that more than 80% of all women have experienced sexual harassment.[[73]](#footnote-73) This means sexual harassment is not an anomaly or a problem originating with the misconduct of some atypical malicious individuals. Rather, it is a common practice, regularly carried out by ordinary people who are able to shrug off their own harmful misconduct.[[74]](#footnote-74)

Misrepresentation by financial advisors is another paradigmatic example of the epidemic of ordinary misconduct. In the United States alone, there are more than 650,000 financial advisors; they manage more than $30 trillion of assets for over 56 percent of all American households.[[75]](#footnote-75) The frequency of misconduct by those financial advisors is very troubling. In some firms, up to 15% of advisors have been accused of serious violations: providing unsuitable advice, misrepresenting the facts, and engaging in unauthorized activity.[[76]](#footnote-77) Presumably, "minor" violations are even more common.[[77]](#footnote-78) Financial advisors operate in an environment that is very conducive to ordinary unethicality. They enjoy a large informational advantage over their clients, operate under great pressures to make sales, and give advice about assets subject to volatile market conditions. When describing a financial instrument to their clients, financial advisors can find it easy to shrug off a "small" inaccurate statement as insignificant, despite the fact that the cumulative effect of such dishonesty can be devastating. BE research shows that under such conditions, ordinary unethicality flourishes.[[78]](#footnote-79)

A similar dynamic is salient in the context of breach of contractual obligations. In a contractual dispute, the court may eventually declare one party as a wrongdoer for breaching his or her contract. However, before that conclusion is reached, both parties typically claim very earnestly that each is in the right, that each is operating in good faith.[[79]](#footnote-80) When parties to a contractual dispute see themselves as "breaching" their contract, they thus justify their behavior with some self-interested interpretation of their contractual obligations.[[80]](#footnote-81) Such justifications could include arguments such as “everyone is performing the contract in a similar way” or “no one would care” about this behavior. Or a contracting party may excuse her own wrongdoing by claiming it was caused by the actions of the other side or might blame the other side for behaving similarly.[[81]](#footnote-82)

To illustrate these claims, consider the classic breach-of-contract case of *Jacob & Youngs, Inc. v. Kent*.[[82]](#footnote-83) The contract called for the contractor (Jacob & Youngs) to install a certain type of piping in the homeowner's (Kent's) house. The contractor installed a type that was substantially similar to that specified in the contract, but was made by a different manufacturer. The homeowner then sued him to force him to replace the piping and to install the type specified in the contract. The contractor clearly saw himself as a "good person," claiming (rightly) that there was no measurable difference between the type of pipe he installed and the type specified in the contract. At the same time, the homeowner also saw himself as a "good person," standing by his contractual right against transgression. This case illustrates a simple truth: people have a strong tendency to believe they are in the right. More generally, parties accused of having breached a contract typically do not think of themselves as having done so, but instead see their actions as grounded in a valid interpretation of the contractual obligation.[[83]](#footnote-84) In this sense, contract breach disputes are, in actuality, disputes concerning contract interpretation. This insight challenges much of the academic literature on contract breach, which employs unrealistic assumptions and describes breach of contract as a fully deliberate and conscious decision.[[84]](#footnote-85)

In a similar way, BE research should inform all aspects of administrative law, where the requirement to consider the public interest must overcome the agent’s self-interest.[[85]](#footnote-86) In the employment discrimination arena, Krieger and colleagues argue that most discriminatory decisions in this context are made implicitly, rather than explicitly.[[86]](#footnote-87) In corporate law, Feldman explores the numerous behavioral mechanisms that could explain various types of breach of duties of loyalty.[[87]](#footnote-88) One such mechanism is the creation of a distorted norm of professionalism, which puts the interests of the organization above anything else, including the legitimate interests of other parties. People have been shown to avoid experiencing guilt when they do not feel their wrong benefited them personally, but was instead committed for some "greater good" or for the benefit of others; this facilitates corporate misconduct. In tax law, the proliferation of ordinary misconduct can be explained by the type of misconduct committed in this context: it is typically manifested not in the commission of behavior, but rather by omission, which research has shown is generally easier to rationalize and justify.

In all these cases, wrongdoers harm others through routine, supposedly minor, infringements while easily shrugging off, ignoring, or excusing the harmfulness of their own actions. These mechanisms are at work when people drive over the speed limit or engage in unauthorized file sharing.[[88]](#footnote-89) We all know that driving over the speed limit is prohibited and potentially dangerous, yet so many people routinely do it anyway; we all know it is wrong to lie and cheat, yet people so often find it easy to pass off their own lies as acceptable. More generally, lab experiments show that dishonesty is nearly universal under some circumstances. In a recent meta-analysis of studies involving more than 30,000 participants, researchers found that people choose to lie and cheat in about 50% of all experimental observations.[[89]](#footnote-90) What makes this finding even more troubling is that the incentive to cheat in a lab setting is typically relatively small and ethical standards are made explicitly clear to participants; in real life, when possible monetary gains from dishonest behavior are significantly higher and ethical standards are often ambiguous or vague, cheating should likely occur even more frequently.

BE research thus highlights the existence of moral blind spots and points out people’s ability to ignore their own wrongdoing. If wrongdoers often fail to understand they are committing a wrong, what can the law do to prevent them from acting badly? Traditional regulatory mechanisms based on deterrence, punishment, rewards, and expressive morality seem ineffective, given perpetrators' bounded ethicality and their limited awareness of the full meaning of their wrongdoing.[[90]](#footnote-91) In the remainder of Part I, we outline existing legal paradigms of law enforcement and then offer some novel strategies that may improve the compliance of self-perceived good people.

## The Need to Go beyond Deterrence

Current legal scholarship emphasizes deterrence as a primary means of curbing illegality.[[91]](#footnote-92) Within this framework, scholars study legal rules as sanctions that impose a price on certain types of undesirable behavior.[[92]](#footnote-93) Based on assumptions regarding rational decision making, sanctions have been designed to incentivize wrongdoers to refrain from harming others.[[93]](#footnote-94) Generations of legal scholars and law and economics scholars have studied the effects on behavior of law based on the deterrence approach.[[94]](#footnote-95)

However, more recently, the deterrence or cost-benefit model has been criticized on numerous grounds. Some scholars have demonstrated empirically the limits of deterrence in accounting for both self-reported and actual compliance.[[95]](#footnote-96) Others have suggested that deterrence does not work in practice for the simple reason that people are for the most part unaware of the written law.[[96]](#footnote-97) As discussed earlier, behavioral scholars have challenged the dominant perception that people are motivated by a fear of sanctions.[[97]](#footnote-98) The relative effectiveness of enforcement mechanisms versus levels of punishment in deterring transgressions remains the subject of fierce debate.[[98]](#footnote-99) Most studies suggest that the severity of punishment has only a marginal deterrent effect on individual behavioral choices.[[99]](#footnote-100)

BE research provides an explanation for the failure of deterrence to curb wrongdoing. Self-perceived good people engage in motivated reasoning and often fail to recognize the unethicality of their own actions. Because they are blind, at least partially, to their own unethicality, they therefore have little reason to give appropriate consideration to the possibility that they will be sanctioned for their behavior.[[100]](#footnote-101) In any event, much more effort must be devoted to assuring that potential perpetrators actually consider the possibility that they will be punished.

BE offers an alternative to the economic rational choice model of crime, which holds that a potential wrongdoer will choose to behave unethically if the gain from doing so outweighs the expected sanction. In contrast, under the BE framework, an individual will behave unethically if he can do so while still believing that he is a moral person.

To illustrate this point, let us return to the contract breach example. Current economic theory compares the ability of different remedies to deter contract breaches. In this framework, an optimal contract remedy would set the sanction at the correct level to incentivize a contractual party to breach only when such breach is "efficient.”[[101]](#footnote-102) If, more often than not, parties breach their contracts without ever realizing they are doing so, this understanding of contract remedies loses much of its relevance. It would be more productive to focus our efforts on finding ways to assure that the contractual party engages in more careful deliberation regarding the possibility that she is in breach of her contractual obligation.

More generally, the possibility of innocent wrongdoing committed on a large scale has fundamental implications for our understanding of the legal system and shakes the foundations of deterrence as a theory of law enforcement. For instance, if people tend to ignore their own unethical behavior, a frequently imposed sanction might be much more impactful than a severe one. This is because frequently occurring enforcement measures could serve as moral reminders, alerting potential perpetrators to the possible harms resulting from their actions. More frequent enforcement creates more reminders for individuals, which could reduce both their tendency to justify transgressions and their lack of awareness that their behavior may lead to wrongdoing. It may also reduce the ambiguity surrounding the unethicality of some acts or situations, which may have made it easier for individuals to deceive themselves regarding the legality of their behavior.

Clearly, imposing harsh punishment does have value in certain situations; it provides a clear message about the state’s approach and commitment to enforcing morality. As we suggest later, increased punishment, if implemented properly, can also heighten people’s awareness of certain problematic behaviors.[[102]](#footnote-103) However, evidence suggests that, for “good people” whose wrongdoing is mainly related to their moral blind spots, raising the expected cost of punishment might not reduce their likelihood of committing transgressive behavior.[[103]](#footnote-104) Increasing the severity of punishment may also have an unintended consequence of reducing compliance. The legal process of imposing punishment is lengthy and may provide enough time for a backlash, in which people revert to their bad behavior.[[104]](#footnote-105) For example, Erev finds that more frequent enforcement of safety regulations in factories, through the imposition of smaller fines, is more effective in inducing adherence than less frequent enforcement with larger fines.[[105]](#footnote-107) That is because a longer process of implementing enforcement gives people the time to create justifications for engaging in low-level transgressions. Thus, criminal sanctions that might deter the illegal acts of calculative people might do the opposite for people who transgress with limited awareness.

## The Limits of Legitimacy

Along with deterrence, legitimacy is offered as a principal rationale for compliance with the law. While deterrence and legitimacy are considered to influence different types of motivation and foster compliance in different ways, the effectiveness of both is still predicated on the assumption that people make deliberate decisions regarding the law.

The rich scholarship on compliance and legitimacy posits that people obey the law because they perceive it as legitimate, fair, or just. The main indicator for legitimacy is usually described as procedural fairness; that is, individuals tend to obey the law if they think it is the product of a just process of legal deliberation and rule-making. Various studies demonstrate that perceptions of fairness are dominant motivational factors, at times even overshadowing self-interest.[[106]](#footnote-108) Research by scholars such as Tyler, Darly, and Robinson and, to some extent, also Paternoster and Simpson, has shown the importance of fairness and morality in legal compliance.[[107]](#footnote-109) As one of us has found in his own work on this topic, their perceptions of fairness can shift the behavior of people toward greater compliance and acceptance of organizational rules in various legal contexts,[[108]](#footnote-110) as well as toward more sensitive environmental compliance[[109]](#footnote-111) and greater organizational ethicality.[[110]](#footnote-112)

The assumption underlying compliance theory is that people evaluate the fairness (procedural or other) of the law and then make a conscious decision whether or not to comply. For example, Fishbacher and colleagues measured levels of cooperativeness by asking people to make a choice to either cooperate or enjoy a “free ride,” where the choices between doing “good” or “bad” were clearly defined.[[111]](#footnote-113) Of course, this type of framing ignores the possibility that people's compliance decisions are nondeliberate or that potential wrongdoers engage in motivated reasoning when interpreting the legitimacy of the law in order to justify their misconduct.

The assumption that people’s behavior is based on deliberative decision making also underlies work on compliance with contractual obligations. The literature on legitimacy and fairness hypothesizes that individuals will comply with a legitimate contractual agreement. In a study designed to test this claim, Wilkinson-Ryan and Baron asked participants to evaluate a promisor’s decision to breach a contract, which they described as follows: “He decides to break his contract in order to take other, more profitable work.”[[112]](#footnote-114) They found that people were very sensitive to the moral dimensions of a breach of contract, particularly to the perceived intentions of the breacher. Contractual obligations, they concluded, carry significant moral weight for many individuals and effectively alter their behavior. Their argument is therefore that the perceived moral force of the contractual promise generates compliance.

Recent BE research findings strongly challenge this conclusion. This literature on contractual performance decisions focuses on the dichotomous choice: to breach or not to breach. The way in which Wilkinson-Ryan and Baron framed their experiments, as evaluating a "decision to break a contract," implicitly assumes that choices are made deliberatively and in reference to clear contractual obligations; it ignores the more realistic possibility that contractual parties face the additional challenge of even recognizing that their actions might contradict their contractual obligation.[[113]](#footnote-115) In contractual contexts, people behave based on their understanding of the contractual negotiations. Motivated reasoning can easily alter this understanding to fit the dictates of each individual's self-interest.[[114]](#footnote-116) This means we cannot be so quick to rely on legitimacy, as suggested by existing research, to assure the performance of contractual obligations – or to assure compliance with the law more generally.

Again, these insights call for a change in emphasis in law enforcement. Instead of trying to make sure that the laws appear procedurally legitimate, legal policy makers should focus their efforts on improving the ability of potential perpetrators to appreciate that they are indeed in violation of these laws. Of course, once this understanding is achieved, perceptions of legitimacy might prove to be important in assuring compliance. Yet, for people who are not engaging in ethical deliberations and are not made more fully aware of the unethicality of their actions, legitimacy on its own cannot achieve compliance.

## The Need to Expand the Regulatory Toolbox

This analysis of deterrence and legitimacy highlights a serious problem underlying our legal system: the existing regulatory approach fails to provide an adequate response to most instances of wrongdoing. Incentives-based enforcement fail to correct a large proportion of unethical actions, because “such measures simply bypass the vast majority of unethical behaviors that occur without the conscious awareness of the actors, who engage in them.”[[115]](#footnote-117) Indeed, many psychologists who focus on ethical decision making challenge the assumptions held by most legal scholars about self-control, autonomy, and responsibility for action, which are fundamental to contemporary regulatory theory and to the operation of most enforcement measures.

They key challenge addressed by this article is how to create a regulatory policy to deal with misconduct perpetrated with varying levels of awareness and motivation. To facilitate compliance with the law, it is not enough to threaten individuals with sanctions, nor it is sufficient to assure that laws are perceived as fair. Because deterrence and legitimacy cannot fully regulate ordinary unethicality, some additional regulatory approaches are needed.

The key to developing these approaches is to shift the focus of enforcement to perpetrators' awareness. Current regulatory tools aim to influence people’s motivations, mainly by providing ex-post sanctions. In contrast, BE findings indicate that we should instead trigger more genuine moral deliberation by potential perpetrators ex ante, at the time ethical decisions are being made. In regulating conduct, therefore it is not sufficient to increase the effectiveness of underlying incentive structures (since perpetrators are not necessarily aware of them): it is more important to improve deliberation and ethical engagement.

Several types of regulatory tools can be used to trigger deliberation by potential wrongdoers. Ethical nudges, moral reminders, and a variety of de-biasing mechanisms, if designed appropriately, can address the problem of ordinary unethicality by encouraging perpetrators to use System-2 thinking and override self-serving biases.[[116]](#footnote-118) These techniques can prompt potential wrongdoers to consider the effects of their actions, to view the situations from the perspective of potential victims, or to report their decisions to an objective third party. The choice of regulatory tool depends on the particular bias hindering ethical deliberation. Thus, if a perpetrator engages in motivated reasoning and interprets a situation in a way that makes it difficult to see the wrongfulness of her actions, it may be necessary to alert her to the true nature of the situation. Alternatively, if a perpetrator is morally disengaged – that is, he is aware of the facts of the situation, but finds ways to justify his misconduct – an ethical nudge emphasizing the moral dilemma or a reminder of possible legal sanctions may be effective in preventing misconduct. To illustrate these concepts, consider again the contractor in *Jacob & Youngs, Inc. v. Kent*. Let us assume he made a biased interpretation of the contract, which led him to believe that he was not in breach of it. It might have been possible to prevent this wrongdoing by requiring him to document and explain in writing some of his decisions in performing the contract. Even if such reports are never read by the other party, the mere act of writing them may trigger a more candid deliberative process by the contractor that could lead to a less biased interpretation. Alternatively, if we assume the contractor knew he was in breach, but was morally disengaged and excused this fact as harmless, it might have been useful to alert him to the possible legal consequences of contract breach by providing an ethical nudge in the form of a reminder of the possible legal sanction. The use of such tools must be thoughtful and targeted, so as to avoid the dangers of moral numbing. For instance, if contractors are made to document every aspect of their work, this exercise may lose its potency as a moral reminder; in addition, the cost of instituting such a documenting requirement might be extremely high, making it impracticable. And

An alternative approach to explicitly targeting perpetrators’ awareness is to improve their ethical deliberation indirectly, by employing *situational design* tools and preventing circumstances that lead to ordinary unethicality. Instead of providing moral reminders, regulators may strive to eliminate moral blind spots or assure that ethical traps are not created in the first place. For example, ordinary unethicality is prevalent in situations in which people find it easy to ignore their own wrongdoing;[[117]](#footnote-119) designing situations so they facilitate the awareness of unethicality can prove crucial in reducing misconduct.

To illustrate this alternative approach, consider again the widespread problem of sexual harassment in the workplace. Research on sexual harassment indicates specific circumstances under which sexual harassment is more common;[[118]](#footnote-121) for example, in male-dominated environments or under male supervisors.[[119]](#footnote-122) Apparently, in such settings individual have found it easier to shrug off aggressive sexual behavior as harmless or accepted. One obvious way to deal with this problem would be to provide sexual harassment training, which would directly increase the level of awareness of potential perpetrators. Another course of action would be to reshape the situation, thereby eliminating the circumstances in which perpetrators find it easier to ignore or excuse their own unethicality. This can be achieved, for instance, by assuring equal representation for women in the workplace or in executive positions.[[120]](#footnote-123)

Using big data analysis in conjunction with BE insights can increase the effectiveness of such regulatory measures. This analysis can provide regulators a more accurate and nuanced understanding of the specific circumstances under which unethicality thrives, thereby enabling them to redesign situations to eliminate those situations that foster misconduct.

# II. Targeted Regulation through Big Data Analysis

In this part, we discuss how big data analysis can be used to shape regulation so that it most effectively increases the awareness of wrongdoers. We evaluate several possible schemes for the use of big data, starting with the trending personalized law approach. We conclude that the most appropriate way to fine-tune regulation to address ordinary misconduct is by focusing on situational differences, rather than personal ones.[[121]](#footnote-124)

## Personalized Law

Legal scholars have recently begun exploring the use of big data analysis to enhance the implementation of legal rules. The personalized law approach, which calls for more nuanced legal responses tailored to the personal characteristics of specific individuals, is the most prominent focus of this exploration.

The personalized law approach upends the fundamental feature of the legal system: that the law treats all individuals equally and thus aspires to be objective and impersonal. To that end, many legal doctrines are based on objective standards of behavior and set general criteria against which to measure each individual's conduct. For instance, in tort law, the standard of the reasonable person sets a uniform requirement for appropriate care and caution. Similarly, contract default rules seek to mimic the presumed intentions of the typical contracting party. These "one size fit all" standards structure the law according to some general and objective point of reference.

Scholars have started to question this basic framework and to call for the more personalized application of legal standards.[[122]](#footnote-125) They argue that, given recent technological advancements, the law can – and should – embrace subjectivity and set legal standards that are tailored more precisely to each specific individual. Thus, the actions of a tortfeasor should not be measured against the general and objective standard of the "reasonable person," but rather against a "reasonable self"; that is, the court should be asked to verify whether or not the tortfeasor behaved in a way that can be considered reasonable *for him or her*, considering all personal abilities and limitations.[[123]](#footnote-126) Scholars have also pointed out that this approach is not entirely foreign to existing legal practices and, in fact, has always existed alongside the objective, impersonal framework. Given the much greater availability and verifiability of information about individuals today, they advocate that the balance should now tilt toward more subjectivity.[[124]](#footnote-127)

The personalized law approach uses big data to discern individual characteristics and then to apply a more nuanced type of law tailored to the needs and abilities of specific individuals. Research studies have shown that personality traits can be discerned from the analysis of readily available information, such as people's smartphone usage patterns or shopping history. On the basis of this information, regulators can construct person-level psychological profiles and subsequently apply legal standards that would offer a good fit at the individual level.[[125]](#footnote-128)

At first glance, the personalized law approach offers a promising opportunity to address the compliance challenges presented in Part I. Theoretically, identifying each individual’s psychological profile could be key in regulating ordinary unethicality: if we could find those "good people" who are more prone to moral blind spots, we would be able to target specific enforcement efforts to enhance their awareness. Yet, as we discuss, it is not easy to identify indicators of the likelihood to engage in ordinary unethicality. In addition, because such a high percentage of people engage in ordinary unethicality, it may be problematic to tailor regulation based on interpersonal variation.

## Interpersonal Variation from a Behavioral Ethics Perspective

BE research suggests it may be possible to identify variation among individuals in terms of ordinary unethicality, using several existing paradigms to identify the kinds of people who are more likely to engage in wrongdoing with limited awareness.[[126]](#footnote-129) For example, studies using the implicit association test (IAT), which has become the gold standard for measuring employment discrimination, suggest there are measurable individual differences.[[127]](#footnote-130) The IAT was not designed to predict unethicality, but gives people a score that predicts to some extent explicit behavior; such scores have been used to predict ethical conduct. For example, research in the area of judicial decision making has shown that the IAT score of judges predicted their discriminatory behavior against black defendants.[[128]](#footnote-131) Similarly, Walmart has used the IAT to inform employee hiring decisions, although the extent to which it predicts future workforce behavior is the subject of controversy.

Frederick's cognitive reflection test (CRT) is another measure that may prove valuable for predicting implicit misconduct.[[129]](#footnote-132) This scale rates individuals based on the likelihood that they will use System 2 thinking to overcome System 1 reasoning. Studies using this scale have focused on the correlation between an individual’s CRT grade and other behavioral measures.[[130]](#footnote-133)

Other scales that more directly assess implicit predictors of ethical behavior measure the propensity to morally disengage and the strength of an individual’s moral identity. Bandura's well-known concept of moral disengagement[[131]](#footnote-134) is the basis for the scale of the propensity to morally disengage created by Celia Moore.[[132]](#footnote-135) One of the key elements of her typology, which is based on the likelihood of engaging in ordinary unethicality in the workplace, is an individual’s propensity to make excuses for imposing harm on others, such as “he had it coming” or “it would have happened if I hadn’t been there.” A related concept, moral firmness,[[133]](#footnote-136) associates the likelihood of individuals to commit transgressions to their tendency to exploit the ambiguity of a given context. Reynolds et al. demonstrate a moderate correlation between moral disengagement and traits such as Machiavellianism, moral identity, and cognitive moral development.[[134]](#footnote-137) They argue for an interaction between an individual's moral knowledge of the situation and his or her propensity to morally disengage, thereby melding moral development and social cognition theories. Aquino’s moral identity scale and the various studies based on it have shown that an individual’s likelihood of causing harm, even implicitly, varies in different situations based on the strength of his or her moral identity.[[135]](#footnote-138)

Fine and Van Rooji take the concept of individual variation a step further, claiming that two key factors predict sensitivity to unethical behavior.[[136]](#footnote-139) They argue that people who have a high propensity for moral disengagement and a weak rule orientation will be less likely to respond to deterrence methods.[[137]](#footnote-140) The rationale is that people who are able to reduce the moral tension inherent in committing a certain behavior and who are more likely to see the law as offering gray areas rather than black-and-white distinctions will be less sensitive to deterrence threats.

## The Inadequacy of Personality Traits as Predictors of Unethicality

Despite this rich literature on variation between people in the likelihood of their engaging in ordinary unethicality, interpersonal variation is not dramatic enough or stable enough to allow differentiation in legal treatment. In fact, as discussed earlier, BE findings indicate that an overwhelming percentage of individuals will behave unethically in some situations.[[138]](#footnote-141) Thus, in certain circumstances, personality traits barely contribute to differences in behavior, so interpersonal variance is largely unhelpful in focusing regulation efforts. Similarly, there is very little research to indicate that any of the earlier mentioned scales consistently identify what type of people are likely to engage in ordinary unethicality.

Personality prediction may be more helpful in legal contexts that focus on extreme behaviors, such as determining an individual’s level of dangerousness in the criminal law context[[139]](#footnote-142) or suitability to become a parent in the context of family law.[[140]](#footnote-143) In cases involving extremely threatening behaviors, prediction might be possible based on individual variance, because the focus is on people who rank very high on many of the relevant scales related to deviant behavior.[[141]](#footnote-144) In contrast, ordinary unethical acts can be committed by individuals closer to the middle of the curve in terms of personal propensities.[[142]](#footnote-145) Even with the use of big data analysis, it is not clear that we can know, prior to a given transaction, whether or not individual personality traits would matter enough to justify targeted regulation. Thus, we disagree with the approach advocated by Porat and Strachilevitz, who call for reliance on the Big Five theory in the creation of personalized contracts.

Applying a personalized approach to target ordinary unethicality may also be problematic because it may fail to capture temporal variance. BE research suggests that past behavior may not adequately predict future conduct because of the phenomenon of *moral licensing*, in which people use their past good deeds to excuse later misconduct.[[143]](#footnote-146) Monin and Miller found that participants in their experiments who believed that they had previously established their moral credentials (in this case, a lack of prejudice) felt empowered to subsequently express views that conflicted with moral norms.[[144]](#footnote-147) In other words, individuals who consider themselves to be “good” based on their past behavior may permit themselves to bend the rules and thus be more likely to make unethical decisions when time constraints increase.[[145]](#footnote-148) These findings are contrary to the traditional view, which holds that those who behaved badly in the past are more likely to do so in the future. Because individuals' past behavior is not always a good indicator of their future conduct, a personalized law approach to ordinary misconduct may not be useful.

## Personalizing Law Based on Demographic Information

As discussed, existing scales designed to measure personal tendencies toward ordinary unethicality do not uncover large enough differences among people to justify a differentiated regulatory approach. Therefore, it might be worthwhile to explore the possibility of using demographic data instead of personal-level data; indeed, advances in computing power have made more feasible the analysis of demographic data and its correlation to behavior.

Research findings are mixed on the usefulness of demographic data. Tenbrunsel and colleagues suggest that demographic factors lack significant predictive value: they found no or only a small correlation between demographic factors such as gender or education level and the propensity to commit wrongdoing.[[146]](#footnote-149) However, other researchers have found a more consistent relationship between demographic factors and misconduct.[[147]](#footnote-150) Studies on the relationship between culture and unethicality have also produced conflicting findings. For example, a previously reported compliance gap between Brazilians and Americans was not found in later studies.[[148]](#footnote-151) Tenbrunsel and colleagues also have reported mixed findings on the relationship between gender and unethicality. On the whole, research suggests that demographic data are not likely to be useful, at least not in a consistent way.

Additionally, the use of demographic information might raise constitutional concerns and be objectionable on moral grounds. Targeted regulation based on demographic information is likely to be considered a type of profiling and therefore prohibited.[[149]](#footnote-152)

## Tailoring Regulation to Situations rather than People

Ordinary unethicality is situation driven; it does not require any exceptional antisocial sentiment on the part of the perpetrator. To the contrary, any self-perceived "good person" can fall into a moral blind spot. However, moral blind spots are not always operative, and their presence depends on a host of factors that can join together to create situations in which individuals' moral judgment is more easily impaired. For instance, BE experiments have identified some situations in which up to 80 percent of people were found to lie consistently; more generally, the experiments described here show that ordinary unethicality is not limited to any specific group of people, but is ubiquitous.[[150]](#footnote-153) Thus, the best way to identify focal points of ordinary unethicality is by targeting suspect situations, rather than suspect individuals.

Focusing on situational rather than individual variation offers several advantages in targeting ordinary unethicality.[[151]](#footnote-154) Because individuals have a limited ability to monitor their own behavior, situational factors play a larger role in prompting individuals to commit wrongdoing than is traditionally assumed in legal scholarship. There is a

The nudge approach follows from this understanding: it alters situations in various subtle ways to improve compliance. Our proposed regulatory scheme uses a modified version of the nudge approach, one that is relevant to problems raised by behavioral ethics. Such an approach modifies environments and situations with the goal not of facilitating decisions that would best serve people’s self-interest, but that would help them avoid unethicality.

Much research has been done on the connection between ordinary unethicality and the context in which it is committed. In their discussion of the situational factors affecting moral awareness, Tenbrunsel and Smith-Crowe conclude that an ethical infrastructure (based on cultural and institutional factors) is related much more closely to the level of moral awareness than are individual factors.[[152]](#footnote-155) Along those lines, Tenbrunsel and Messick[[153]](#footnote-156) argue that the design of formal and informal systems, as well as the general organizational climate, is responsible for much unethical behavior, especially because the process of "ethical fading" is triggered by the use of euphemism.[[154]](#footnote-157) Thus, in contexts where the expected harm is created by a nondeliberative transgression, which may be committed by good people who usually avoid calculated wrongdoing, the focus should be on an ex-ante design of the situation to diminish their ability to maintain their self-perception as still being good people while committing harm. Situations should be designed in such a way as to reduce ambiguity, discourage excuses for wrongdoing, increase accountability, and encourage moral deliberation.

To create effective and targeted regulation, we need to know more specifics about those situations that tend to trigger unethical behavior. For instance, we should try to identify the times of day in which people are more likely to behave unethically. Other factors include the identity of the parties to a specific transaction, the nature of the goods or services provided, the relationship between the parties, and whether each of them is a repeat or one-time player. The more information we have about the situational causes of unethicality, the more likely it becomes that targeted situational regulation will effectively reduce it. The use of big data can prove invaluable for this purpose.

## Adapting the Big Data Approach to Situational Regulation

We propose using big data to identify situational wrongdoing and then design tailored enforcement solutions to combat it. Importantly, the nature of the information to be analyzed here is markedly different from that required by the personalized law approach. The latter approach requires information that can be explicitly attributed to a specific individual. Thus, a regulator may use an individual’s smartphone use history to build a personal profile, which would then be used to construct a standard of behavior specifically tailored to him or her. This approach obviously raises significant privacy concerns.

In contrast, a situational regulatory approach requires information relating to situations, not individuals. Regulators would need to know what situations lead to an exceptionally high incidence of unethical behaviors, regardless of the identity of the specific wrongdoers. Thus, they would not gather information on specific individuals, but instead would generate data on an aggregate basis to construct, for instance, an occupational profile that provides insight into the behavior of people across certain situations where ordinary unethicality might be on the rise. Therefore, the main databases relevant for our needs are those documenting and recording misconduct or disputes. There are several types of such datasets.

*First*, valuable information about disputes can be gleaned from online dispute resolution (ODR) records. Since the 1990s, online markets have developed their own dispute resolution systems operating alongside, and sometimes instead of, more traditional systems of adjudication. These new systems manage an enormous volume of disputes, which are typically fully documented online. Tapping into these datasets would enable an analysis of those situations that typically give rise to legal disputes following some type of misconduct. Relevant datasets include those maintained by eBay's Resolution Center, Amazon, or any other major online seller. The analysis of the information might show which types of products or services are more likely to generate disputes. From a legal perspective, there is currently no difference between misrepresentation in selling a used car or in selling a used toy. However, from a behavioral perspective, such differences are likely to exist, and some transactions, more than others, are expected to lead seller or buyers to more readily engage in motivated reasoning and unknowingly cheat. The use of big data analysis can reveal such trends, which will allow the deployment of appropriate regulatory tools.

*Second*, datasets maintained by regulators or consumer protection agencies may also prove very useful. For instance, in the context of financial regulation, the Securities and Exchange Commission, the Office of the Comptroller of the Currency, and other regulatory bodies hold extensive records on unethical behavior – as do the Federal Trade Commission’s Bureau of Consumer Protection and any other entity dealing with consumer complaints. Mining the information currently held by those institutions will enable us to characterize the types of situations under which unethical conduct seems to flourish. After such situations are identified, they can be targeted by regulatory measures that either encourage moral deliberation or hold accountable those responsible for creating these situations.

*Third*, private commercial actors may also have useful databases; many are already implementing some forms of situational regulation. For example, JP Morgan provides ethical reminders to employees, warning them when they are approaching the limits of legitimate business practices. Such warnings are based on "predictive monitoring" algorithms and attempt to prevent wrongdoing before it occurs.[[155]](#footnote-158) This type of mechanism, which is based on big data analysis, is now being adopted by other financial institutions.[[156]](#footnote-159) The information collected by JP Morgan and similar institutions can be used, barring proprietary considerations, as another source of information for a larger big data regulatory scheme.

*Fourth*, general-use databases can also contain much detailed information about situational wrongdoing and circumstances that lead to unethicality. For instance, Google search records have proved valuable in uncovering patterns of human choice and behavior in a variety of contexts.[[157]](#footnote-160) Online behavior patterns can be used to determine those settings that tend to encourage dishonesty.

## The Advantages of Situational Regulation

There are many benefits to identifying differences across situations, rather than across people (as suggested by the personalized law approach). *First*, as suggested earlier, a focus on individuals is unlikely to significantly improve the predictability of ordinary unethicality, because such a large proportion of people engage in such misconduct in certain circumstances.

*Second*, a focus of situations may help prevent ethical numbing. Using ethical reminders only when they are most relevant is helpful in their retaining their force. If regulators know which situations call for misconduct, they can address problems in a targeted manner and trigger moral deliberation only when most impactful. This is a significant advantage of situational differentiation over personal differentiation. If regulation were to be targeted toward specific individuals, this would necessarily mean that those individuals would encounter moral reminders very frequently, thereby diluting the effectiveness of such reminders and defeating the purpose of the regulatory intervention.

*Third*, when focusing on the individual, we are faced with many contingency problems in every situation where more than one person is involved, which occurs in most commercial contexts; hence finding the best regulatory tool to deal with the individual based on past behavior would be problematic. In addition, individual behavior is also contingent on its interaction with the situation, which also limits the accuracy of individual-based prediction.

*Fourth*, there are many more data points on situations than on individuals, particularly given the evidence-based approach of the personalized law literature. Even the analysis of a very specific type of transaction is likely to generate multiple data points on each situation, greatly increasing the likelihood that prediction will be accurate.

*Fifth*, the focus on the situation also reduces the saliency of distributive justice considerations, because it is the context, and not the people who are being treated differently based on their past behavior. Recommended policy changes will then be based on differences between situations and not between individuals.

*Sixth*, the focus on the situation, not the individual, eliminates privacy concerns associated with the use of big data. Most privacy issues arising in this context are related to the ability to gather private information about specific individuals, rather than gathering aggregate statistics, which provide data regarding the behavior of many unidentified individuals in a particular situation.[[158]](#footnote-161)

## Situational Variance and a More Nuanced Legal Instrument Choice

A key feature of the law is some facts are considered to have legal consequences, while others do not. Thus, many features of the context may not be legally relevant. For instance, contractual misrepresentation is equally unlawful whether the bargain is made in the morning or in the afternoon, as the time of day is not a legally relevant fact. However, implementation of a situational regulatory approach, together with the use of big data, may reveal that factors that we currently dismiss as legally irrelevant actually do affect behavior. A more nuanced law may then result that is sensitive to differences that we currently ignore. Thus, after conducting big data analysis, we may find out that the time of day does affect people's willingness to cheat; this knowledge might then inform our regulatory policy, fine-tuning the allocation of enforcement efforts.

The goals of big data analysis should be to identify those situations in which "good people" are able to justify or excuse their own misconduct and then to offer an appropriate regulatory response. BE research suggests that a very large variety of factors can affect individuals' tendency to justify unethical behavior, and enforcement measures should be tailored to each factor. This means, for instance, that enforcement measures could vary between cash and credit transactions and between those you make in your home town and those you make as a tourist, those you make as a young adult and those you make when you are older, those you make with people you know and those you make with strangers, or those you make only one time and those you make regularly. All these distinctions can affect participants' ability and willingness to engage in motivated reasoning and other forms of biased ethical deliberation, as well as their tendency toward ordinary unethicality. Incorporating this knowledge into our regulatory scheme will led to enforcement solutions that are tailored to specific situations, specific types of misconduct, and bounded ethicality

To take another example, currently, the law treats most types of discrimination in a similar way, but clearly some factors matter more for certain types of discrimination than for others. For example, people are more likely to have familiarity with members of the opposite gender than with members of a minority group. One could then expect (as is supported by some studies) that blinding the information of the candidate might be more effective in reducing discrimination against minorities than in mitigating gender-based discrimination.[[159]](#footnote-162) Each stage of the employment process – the hiring, promoting, or firing of employees –also gives rise to different forms of employment discrimination, yet the law applies the same legal standards to all three stages. The use of big data would make it relatively easy to document the size of the implicit bias that leads to discrimination in each stage, and hence to offer a more nuanced treatment.

Currently, there is also an overly broad treatment of consumer protection: the law treats all types of transactions in a similar way. However, in reality, deception is practiced more commonly in certain types of transactions. For example, most consumer protection laws regulate the car buying process the same way they regulate the purchase of furniture, even though the likelihood of commercial misconduct occurring in the first type of purchase is much higher.

Similarly, although there is a clear recognition that insurance contracts need to be treated differently from other contracts, to date there is only a limited ability to differentiate among the different types of insurance contracts in terms of the common types of misconduct they may evoke. Consumers do not always understand the terms of their insurance policies, and a main concern is misrepresentation by sellers. Such misrepresentation and subsequent misunderstandings arise in different sections of insurance contracts, depending on the type of insurance. Big data analysis can identify the specific problematic contract elements that give rise to complaints and in what forms of insurance they commonly occur. Based on this information, we may be able to devise better-tailored regulatory schemes that prompt moral deliberation among sellers.

Another element that has an effect on ordinary unethicality is the physical setting in which it occurs. For instance, sellers and buyers may behave differently in an open-air marketplace than in a Big Box or online store. Such differences may relate to the seller's willingness to lie or misrepresent the product, as well as to the buyer's ability to verify information or compare prices. The law, of course, does not make a distinction between these various settings, but it is very possible that big data analysis will reveal differences in individuals' tendencies toward ordinary unethicality in each of these locales. Once this type of situational variation is identified, specific regulatory mechanisms can be deployed.

## Theoretically Informed Big Data Analysis

As already mentioned, big data analysis and the search for situations that breed misconduct should be informed by BE research findings. They provide insight into the conditions that lead to unethicality, and these insights can help guide big data analysis.

For instance, a key behavioral finding is that unethicality is more common in circumstances in which the misconduct is subtle or not obviously harmful. This insight can help direct enforcement efforts. Thus, regulators may use big data analysis to look for very common, smaller, subtler lies, as opposed to obvious, large ones. BE research tells us that people find it easier to lie when information is not known with certainty because those statements are less clearly self-identified as lies. For instance, financial advisors might be more likely to lie regarding future profits (which are speculative) than about fees, which are fixed and known. This insight should guide the design of big data analysis to more effectively uncover unethical behavior and dishonesty by financial advisors.

Similarly, BE research shows that verbal, unwritten communication may foster uncertainty and ambiguity and that oral contracts are therefore likely to lead to more instances of misrepresentation. In situations where there is little or no written documentation, the regulatory response should focus on clarifying the ambiguity; for example, by obligating salespersons to create written summaries of their interactions and so encourage moral deliberation.

BE research singles out several other situational conditions that are typically associated with increased wrongdoing. For the most part, these conditions are not yet specifically targeted by legal doctrines. As mentioned, people typically find it easier to commit wrongdoing by omission than by commission.[[160]](#footnote-163) For instance, sellers find it easier to misrepresent material facts by withholding information, rather than by actively lying. Interestingly, the law typically imposes stricter standards for active misrepresentation, the case in which misconduct, from a behavioral perspective, seems less likely.

Big data analysis might also enrich our understanding of the motivations underlying ordinary unethicality. For instance, some BE studies show that people find it easier to lie on behalf of others and not for themselves. Other research suggests that altruism can promote corruption: people’s misbehavior increases when they think they can benefit others through their misconduct.[[161]](#footnote-164) Similarly, employees have been found to be more likely to act unethically when profits from their wrongdoing do not benefit themselves, but accrue to the corporation.[[162]](#footnote-165) These findings run contrary to the rational choice perspective, which holds that people are more likely to behave unethically when they perceive that they themselves benefit from doing so. BE studies also find that unethicality can increase when wrongdoers enjoy only part of the benefit acquired through the wrong, and not all of it.[[163]](#footnote-166) This is typical for misconduct in large organizations, such as commercial corporations, where revenues from such misconduct may be distributed among shareholders.

These findings can have direct legal implications in the context of misconduct by agents. Thus, sales representatives may be more inclined to lie if they perceive they are doing so on behalf of the corporation, and not for direct personal profit. This willingness to engage in wrongdoing may be affected by the organizational culture and incentive structure within the corporation. Again, big data can be helpful in tackling such issues. For instance, big data analysis might show that some policy change within the company is correlated with a rise in consumer complaints. Thus, a change in sales incentives may have pressured sales representatives to sell more forcefully (and less honestly) to clients. Such a finding might support special types of organizational liability, holding accountable those who initiated the problematic policy change.[[164]](#footnote-167) We discuss this possibility in more detail, as well as other regulatory options, in Part III.

# III. The New Regulatory Toolkit

Big data analysis can thus be used to identify situations associated with significant increases in ordinary misconduct, as well as the sources and characteristics of different manifestations of ordinary unethicality. Once such situations and their features are identified, these findings can be useful in two ways.

*First*, such findings could alert legal policymakers to the ubiquity of a specific type of violation in certain situations, which can highlight the need for increased enforcement efforts. Simply calling attention to commonly repeated offenses might eliminate some instances of ordinary unethicality. Big data analysis offers a crucial contribution here, as it provides much needed accuracy and specificity. Thus, for instance, simply announcing that misconduct by financial advisors is common, without any further detail, has little impact: this type of information is too general to trigger any specific action by regulators, potential perpetrators, or potential victims. Conversely, if big data analysis provides more accurate details regarding the specific circumstances under which misconduct occurs, potential perpetrators, victims, and regulators can be more mindful of those specific situations and respond accordingly. Potential perpetrators (in this case financial advisors) cannot overcome their ethical biases 24/7 and thus need more information about what situational factors are likely to elicit unethicality.[[165]](#footnote-168) Buyers of financial instruments could avoid financial products that are often subject to misrepresentation, or an advisor could be alerted to the high probability of unethicality in a specific type of transaction.

*Second*, big data analysis can guide the selection of the most appropriate regulatory tools to trigger ethical deliberation by potential wrongdoers. These tools should accompany, modify, or replace the traditional types of intervention currently used by regulators and legal policymakers. They should target both awareness and motivation in order to effectively address the problem of ordinary unethicality.

To select the most effective intervention, regulators will need to know which cognitive mechanisms are responsible for generating misconduct in specific cases. For instance, assume a wrongdoer behaves unethically because she is able to convince herself that her behavior harms no one. Then, the most effective tool is one that alerts her to more honestly consider possible harms she may be causing others. Alternatively, assume a wrongdoer commits an offense because the legal standard is ambiguous, and he is able to convince himself his behavior is permitted. In such a case, the simplest, most effective intervention is to clarify the legal rule or to nudge the perpetrator to make a more candid deliberation of its meaning.

The cognitive source of unethicality cannot be usually observed directly. However, legal policymakers may be able to determine indirectly which mechanism is operative by using both big data analysis and an experimental approach. In the first stage of this experimental approach, different interventions – designed to overcome different types of biases and chosen from a large menu of mechanisms used to improve deliberation – will be deployed randomly. In a later stage, big data analysis will be used, for a second time, to evaluate the effectiveness of the different measures that were used and find those that proved most effective. This information, together with BE research findings, can help policymakers infer the cognitive sources of unethicality and fine-tune the type of regulatory intervention going forward.

The following sections offer a menu of such regulatory responses, or ethical nudges, designed to overcome different types of ethical biases and improve ethical deliberation in a variety of ways. Ethical nudges are related to, yet distinct, from traditional nudges as popularized by Sunstein and Thaler. Traditional nudges are policy interventions designed to change behavior without creating economic incentives or limiting people's freedom of action by eliminating other possibilities; they aim to improve people's ability to make informed and rational choices to maximize their own well-being.[[166]](#footnote-169) In contrast, ethical nudges are designed to encourage more ethical conduct.

## Triggering Deliberation

BE research shows that much ordinary misconduct is the result of biased thinking, which causes perpetrators to unintentionally limit themselves to a very narrow, self-serving view of the situation. Using motivated reasoning, perpetrator tend to ignore or disregard crucial facts, which enables them to avoid ethical conflicts instead of facing them. Therefore, one simple mechanism to prevent unethicality is to remind potential perpetrators of facts they might otherwise ignore or to prompt them to engage in more honest ethical deliberations.

Ethical reminders are simple cues that can be used to trigger moral deliberation: planting such ethical reminders in crucial junctures of possible misconduct can significantly lower the risk of unintended wrongdoing. For example, on placing a request for office supplies on a company's computerized system, one of a variety of reminders of the harms of employee theft may pop up on the screen. Employees may be reminded that stealing is wrong, that office supplies cost money, that consumer goods cost 10 to 15 percent more due to employee theft, that employee theft is a major societal issue resulting in losses more than ten times those from house break-ins, that it is defined as a crime and is punishable by a severe fine, and that companies regularly go out of business due to employee theft. Alerting potential perpetrators to such facts can trigger ethical deliberation and make it more difficult for them to shrug employee theft off as ethically weightless.

Ethical reminders can be highly effective in varied contexts.[[167]](#footnote-170) In a recent meta-analysis, Kobis and colleagues show that intuitive dishonesty disappears if perpetrators are reminded of potential harms to victims.[[168]](#footnote-171) That is, when making ethical choices, intuitive thinking leads people to reach self-serving decisions, but only when no specific individual is assumed to get hurt.[[169]](#footnote-172) Prompting perpetrators to consider the case of a specific potential victim can improve conduct even if decision making remains intuitive rather than deliberate.

Of course, such reminders are only effective if they are targeted and arrive at the appropriate time. If employees are randomly bombarded with such messages, they will lose their impact. Big data analysis can be used to assure that employees encounter such reminders at appropriate times. The specific content of the reminder should be randomized, at least initially. *First*, doing so helps avoid ethical numbing. If the message of the alert is different every time, it will more easily capture the attention of potential perpetrators; if the message is always identical, it will quickly become routine and be ignored. *Second*, randomized content can use the protocols of experimental design and their varying effects studied using big data analysis. After randomized messages are deployed, big data analysis can provide insight into the effectiveness of each one. Thus, in some cases reminding perpetrators of possible legal sanction may be the most effective route, while in other cases it may be more productive to remind them of the harms their actions can cause others. Note that such reminders may also refer to the potential penalty for violation of duty or a breach of the obligation to represent the true value of a good. Adding references to legal sanctions may help people recognize that their true self-interest lies in overcoming their tendency to deceive themselves.[[170]](#footnote-173)

Yet in other cases, it may make most sense not to remind individuals of any specific outcome or fact, but simply to prompt them to engage in moral deliberation.[[171]](#footnote-174) This can be achieved, for instance, by directing people’s attention to ethical symbols or messages. Studies have shown that individuals are less likely to act badly after reading morally laden texts, even short ones. Such measures are designed to de-bias people’s bounded ethicality and prompt potential wrongdoers to consider the effects of their actions, to view situations from the perspective of potential victims, or to report their decisions to an objective third party.

De-biasing tools employ a variety of cognitive-based techniques to overcome biased thinking and nondeliberative choice and make it possible for people to engage more fully in moral deliberation.[[172]](#footnote-175) Techniques that encourage reflection and self-awareness can be especially useful in curbing routine unethicality and discouraging work-related misconduct. Reflection can be achieved directly, by forcing individuals to take a few extra moments to consider the implications of their actions. For instance, after making certain types of sales, which appear suspicious based on big data analysis, financial advisors may be prompted to take a moment to consider the deal they are offering. As mentioned, JP Morgan sends electronic warnings on a routine basis to its traders that prompt them to ensure they are remaining within the boundaries of the personal trading rules.[[173]](#footnote-176) These measures alert employees to engage in System 2 thinking before completing the task at hand.[[174]](#footnote-177)

Similarly, sales representatives may receive randomly generated alerts that require them to occasionally record face-to-face meetings or phone calls. Alternatively, they may be required to produce written protocols, report their actions to a colleague or a supervisor, or share more information with their client. Such prompts can facilitate divergence from their routines, thus encouraging them to use System-2 thinking and gain additional perspective on their situation.

Accountability mechanisms are also a highly useful form of de-biasing, in which individuals are asked to explain the reasoning for their decision after the fact.[[175]](#footnote-178) These tools are effective in a wide variety of situations, because the mere act of justifying one’s actions, particularly in writing, prompts reconsideration of them. First, merely articulating a justification can prompt System-2 thinking, which, by itself, can prevent some cases of ordinary unethicality. Second, people's awareness of the possibility that their written report may be read by somebody else also serves to trigger caution and deliberation. Importantly, this benefit of accountability reports is realized even in those cases when they are never read: the requirement to write them suffices to stifle wrongdoing.

Accountability mechanisms might be especially useful when wrongdoers operate under a veil of anonymity, are confident that their wrongdoing will not be discovered, and do not know the potential victims of their actions. BE research indicates that misconduct is especially common when there is no one identified victim, but rather many unidentified ones.[[176]](#footnote-179) This effect occurs because moral deliberation is often triggered by personal interaction. Accountability measures can substitute for such interaction when it is missing.

Requiring potential perpetrators to make declarations of various types is another opportunity to avoid unintended misconduct. Individuals may be prompted to declare their commitment to a code of conduct, to ethical behavior generally, or to adherence with a legal standard. Such speech-acts have been shown to trigger moral deliberation in many situations. A simple example of the use of declarations is found in the context of corporate governance or fiduciary duties. For instance, before important votes are made, directors and executives can be required to sign declarations stating they are aware of the legal standards under which they operate, that they know what types of conflicts of interest they are obligated to reveal, and that such conflicts are not present. Such declarations serve a dual purpose. First, according to BE research, actively declaring adherence to a legal standard, in writing, can circumvent unethical behavior. Requiring people to actively declare their intentions prevents them from downplaying the omissions of important facts[[177]](#footnote-180) or excusing themselves for telling passive lies.[[178]](#footnote-181) Making a declaration changes the status of the unethical conduct in a way that makes it much less likely that executives will fail to announce a conflict of interest. Second, from a legal perspective, signing a declaration reminds people that they can be prosecuted for perjury: reminders of legal consequences have shown to be effective in preventing even subtle conflict of interests.

Mechanisms employing reflection, accountability, and declarations can benefit greatly from detailed schemes that use big data analysis to better tailor regulatory intervention. For example, consider again the case of a contractor performing construction work. Homeowners regularly complain about minor breaches by such contractors, with complaints covering the full range of aspects of the builders' work. Big data analysis can be useful in pointing out which features of the work elicit the most common complaints. In accordance with BE research, we would expect that the features most commonly neglected by contractors are those whose neglect they can justify or excuse most easily. Thus, contractors may breach in relation to aspects of the work that they think homeowners do not care about, will not notice, or consider unimportant. Once we identify those aspects of the work that contractors neglect most commonly, we can implement different mechanisms that will help remedy these tendencies. For instance, a contractor may be obligated to document performance of some aspects of the work in writing. This will encourage reflection and accountability regarding those features that are typically neglected by contractors.

In summary, to know when and how to use different enforcement tools, regulators first need to collect relevant information indicating that this type of intervention is desirable. The big data approach that is being increasingly used in the personalized law paradigm should be reoriented to map the situations most likely to trigger various types of ordinary unethicality. With this information, regulators and enforcers can focus their attention on and use the most suitable tools for those situations.[[179]](#footnote-182),[[180]](#footnote-183)

## Situational Design

BE research shows that specific scenarios and circumstances greatly contribute to unethicality. In many cases, the best way to nudge wrongdoers is by treating the underlying situation, rather than the individuals operating within it. In other words, moral pitfalls and blind spots are everywhere, and regulators should work to weaken or prevent them when possible by redesigning the circumstances that trigger them. In fact, many existing law enforcement practices can be explained as being designed to achieve precisely this goal. For instance, putting a lock on a door is hardly an efficient protectionary measure against a determined burglar, who can easily break it. Instead, the lock helps eliminate an ethical pitfall for ordinary people, not professional criminals: the lock removes easy opportunities for misconduct in the form of open doors, through which anyone may enter. To give another example, there is ample evidence to show that in male-dominated environments, many more individuals will sexually harass. Therefore, the policy recommendation should be to eliminate male-dominated environments, if and when possible. Thus, the idea underlying avoiding moral pitfalls is simple: regulators should find those situations in which it is easy for *ordinary people* to behave unethically and then work to alter these situations.

In diffusing moral blind spots, as in the context of mechanisms designed to trigger ethical deliberation directly, the use of big data is imperative. *First*, big data analysis can help identify those situations in which ordinary unethicality is most common. *Second*, once regulatory interventions are initiated to change these problematic situations, big data analysis should be used to support experimental regulation and help identify those changes that prove most effective in reducing misconduct.

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## Situational Liability

Another way to reduce ordinary unethicality is to target not the direct perpetrators, but those responsible for creating the problematic situations in which misconduct becomes very common. This calls for a special type of vicarious liability, which we term *situational liability*. To illustrate this concept, consider the work environment of brokers and investment advisors, who are responsible for providing financial services and investment advice to clients. Several factors combine to make investment advisors and brokers particularly susceptible to ethical blind spots and thus to be more likely than others to participate in ordinary unethicality.[[181]](#footnote-184) First, such professionals typically enjoy an informational advantage over their customers. Second, the information they provide their clients is, by definition, highly speculative: BE research shows that people find it much easier to persuade themselves they are not lying when the information they are presenting is very uncertain. Third, the legal standards used to regulate the actions of investment advisors are very broad. Advisors typically operate under a fiduciary duty, understood as an obligation to give priority to their customers' interests over their own.[[182]](#footnote-185) The problem with such a broad standard, of course, is its inherent vagueness, which many behavioral studies have shown leads to blind spots.[[183]](#footnote-186) People find it much easier to convince themselves they are not committing a wrong when the definition of a wrong is not clear-cut. In the case of brokers, who are not legally considered investment advisors, the legal standard is even murkier. Currently, the precise nature of the legal standard under which brokers operate is unsettled, and it is not even clear if this standard is equivalent to a fiduciary duty or to some other, lesser form of duty toward their clients.[[184]](#footnote-187) The regulation of broker-dealers has also emphasized advanced disclosure requirements, rather than the avoidance of conflicts of interest, which suggests a narrower scope of the fiduciary duty. Finally, brokers and investment advisors stand to make great profits through slight wrongdoing, if they distort their advice in a way that maximizes their own commission instead of their clients' revenue. Along these lines, Gill et al. show that certain types of bonus-based compensation plans used by firms can facilitate increased cheating among employees.[[185]](#footnote-188) The joint effect of these factors—advantages in information, uncertainty regarding future events, unclear legal standards, and great profits accruing from wrongdoing—creates an environment that breeds misconduct. And indeed, unethical behavior abounds. In some financial firm, up to 15% of advisors have been accused of serious misconduct, with a median settlement paid to consumers of $40,000 and the mean being as high as $550,000.[[186]](#footnote-189) Misconduct by financial advisors is a problem of staggering dimensions,[[187]](#footnote-190) considering the fact they manage more than $30 trillion of investable assets for American households alone.[[188]](#footnote-191)

Given the enormity of the problem, the traditional approach is to call for enhancing deterrence, for instance, by increasing monetary sanctions. Indeed, enforcement efforts typically focus on the personal level, offering sanctions against "bad apples" – those employees who have been caught mismanaging their clients' assets.[[189]](#footnote-192) However, a behavioral perspective highlights the inadequacy of such a regulatory solution that is not sensitive to specific types of misconduct. A more appropriate remedy would be to target those firms and managers who are responsible for shaping the situations in which financial advisors operate. The great variation in wrongdoing among firms indeed suggests that some companies create environments that encourage wrongdoing.[[190]](#footnote-193) Unethicality in a specific firm can be driven by its hiring practices, corporate culture, history, or explicit or implicit business model.[[191]](#footnote-194) Some firms have incentive structures that are more likely to pressure advisors to behave unethically. The concept of situational liability calls for imposing sanctions on those responsible for designing the work setting and for redesigning incentive schemes in those companies that display an exceptionally high level of misconduct.

## Targeted Enforcement

In addition to the regulatory measures described earlier, big data analysis can also help guide traditional enforcement tools, such as criminal sanctions or administrative fines. Importantly, such enforcement, if executed correctly, can affect perpetrators' deliberations and in this sense can also be considered a type of an ethical nudge. For instance, an enforcement campaign targeting employee theft can help raise awareness of this issue and improve employees' deliberation when making decisions regarding workplace resources.

Our approach helps remedy an additional limitation of the current literature, in which nudges are seen as being separate from or as competing with the classical command-and-control approach to regulation. Nudges are typically developed as extralegal instruments. We argue instead that, in ethical problematic situations, traditional legal instruments should be seen as a type of nudge, operating to improve deliberation and overcome biased thinking.

Ethical nudges require greater persuasive force than do traditional nudges. As described earlier, traditional nudges, following the model proposed by Thaler and Sunstein, aim to help people overcome the cognitive biases that prevent them from promoting their self-interest. In contrast, ethical nudges help people engage in more candid moral deliberation and to consider the interests of *others*. An ethical nudge operating alone may not be potent enough to make people aware of the ethical implications of their behavior and may need to be reinforced by some external threat. For that reason, legal sanctions, designed in accordance with insights of the nudge approach, may serve as the most effective ethical nudges. While reminding people of their unethicality, such instruments also draw their attention to the potential legal consequences of behaving unethically. When functioning as nudges, the legal instruments should be designed to focus less on changing people’s cost-benefit calculation and more on increasing their awareness of the full meaning of their wrongdoing.

Importantly, enforcement that is targeted according to the insights generated by big data analysis may have a regulatory focus that is quite different from what is currently observed. BE research shows that unethicality is most prevalent in situations where legal standards are vague or misconduct is manifested in subtle, rather than obvious, violations. Therefore, enforcement should be targeted at such situations, as opposed to clear-cut, more serious examples of misconduct.

# Conclusion

This article suggests a new type of regulatory scheme that challenges existing legal paradigms on many grounds. In contrast to current personalized law approaches, which attempt to target different people based on their individual attributes and preferences, the future of tailored regulation lies in understanding better how knowledge aggregated in a smart way can have predictive ability regarding the likely types of violations in specific situations.

That situations matter in affecting behavior has long been understood by social psychology. However, the fast-growing BE literature shows that situations play a far more important role in influencing unethical behavior than was previously appreciated. The particulars of the situations appear to be highly predictive of many ordinary unethical behaviors by people with limited awareness of their own breaches, misconduct, and violations.

The focus on situational design rather than on personality traits is based on the recognition that current regulatory paradigms are far too centered on deliberative choice: they completely fail to address the possibility of misconduct with limited awareness. They thus ignore the dramatic effect of the situation on the likelihood of people’s misbehavior.

We therefore propose a double shift in enforcement policy. First, we call for new types of enforcement mechanisms that explicitly target awareness among wrongdoers. Such enforcement tools include de-biasing efforts, aiming to trigger moral deliberation among unaware transgressors, and broader types of liability, designed to hold accountable organizations and individuals who have contributed to the creation of moral blind spots. To use such mechanisms successfully and to minimize chilling effects, much more fine-grained information is needed.

The second change we propose is that such information be derived from big data analysis that focuses on suspect situations rather than on suspect individuals. This new use of big data in the service of law enforcement will differ from its use to support the personalized law approach; it will delve into characteristics of different situations in which people who are ethically bounded are more likely to violate the rules or behave uncooperatively. We highlight numerous reasons why big data analysis should be used to tailor regulation to specific situations, and not to specific people. This type of targeted regulation is more appropriate to the nature of ordinary misconduct, which is situation driven and commonly practiced by a far greater number of individuals than is currently assumed by legal scholars.[[192]](#footnote-195)

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17. About $5.9 billion was lost to motor vehicle theft in 2016, according to the FBI’s [Uniform Crime Report](https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016). Victims of burglary offenses suffered an estimated $3.6 billion in property losses in 201 <AU: Please provide year here.> [↑](#footnote-ref-17)
18. [↑](#footnote-ref-18)
19. [↑](#footnote-ref-19)
20. [↑](#footnote-ref-20)
21. [↑](#footnote-ref-21)
22. Robert D Putman, Bowling Alone (2000). [↑](#footnote-ref-22)
23. Welsh, D. T., Ordóñez, L. D., Snyder, D. G., & Christian, M. S. (2015). The slippery slope: How small ethical transgressions pave the way for larger future transgressions. *Journal of Applied Psychology*, *100*(1), 114. [↑](#footnote-ref-23)
24. **Max H. Bazerman & Ann E. Tenbrunsel,** Blind Spots Why We Fail to Do What's Right and What to Do about It (2012); Mahzarin Banaji and Anthony Greenwald, Blind Spot: Hidden Biases of Good People (2013). [↑](#footnote-ref-24)
25. Todd Haugh, *Nudging Corporate Compliance*, 54 Am. Bus. L. J. 683, 712, 736 (2017); Portia Crowe, *JP Morgan Is Working on a New Employee Surveillance Program*, Bus. Insider (Apr. 8, 2015, 9:52 AM), http://www.businessinsider.com/jpmorgans-employee-surveillanceprogram-2015-4. [↑](#footnote-ref-25)
26. Yuval Feldman, The Law of Good People: Challenging States’ Ability to Regulate Human Behavior, ch. 2 (2018).. [↑](#footnote-ref-26)
27. A. Bandura, *Moral Disengagement in the Perpetuation of Humanities*. 3 Person. Soc. Psychol. Rev. 193–209 (1999); S. Bok, Secrets ; A. E. Tenbrunsel & D. M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 Soc. Justice Res. 223–36 (2004). [↑](#footnote-ref-27)
28. Dan Ariely & Simon Jones, The (honest) Truth about Dishonesty: How We Lie to Everyone, Especially Ourselves (2012) (the aggregate result of the experiments and findings presented by the authors emphasizes how widespread unethicality actually is). [↑](#footnote-ref-28)
29. *See, e.g.* Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 7–10, 56–57 (2013); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 Mich. L. Rev. 1417 (2014) (suggesting that the use of big data can help courts tailor default rules that will better fit individual contracting parties); Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. Cal. Interdisc. L.J. 1, 4 & n.15 (1993) (generally discussing the appropriate specificity of contractual default rules); George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 Tul. L. Rev. 1109, 1114–15, 1129–59 (2006); Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y. L.++++ Rev. 627 (2016) (suggesting that courts can utilize big data information to better tailor personalized standards of care for specific tortfeasors and tort victims). [↑](#footnote-ref-29)
30. # *See* Nina Mazar, On Amir, & Dan Arieli, “The Dishonesty of Honest People: Theory of Self-Concept Maintenance**,**”45 J. Marketing. Res. 633–44 (2008) (suggesting that people might feel better about engaging in wrongful behavior in contexts in which they can tell themselves justifications regarding their unethicality). This is the opposite from the traditional focus of the law, which is on those situations that create most of the risk <AU: Or harm?>to society. However, most ordinary people abstain from engaging in misconduct because it is hard for them to justify to themselves that violating the law in those contexts is permissible. *See* Yuval Feldman & Eliran Halali, “Regulating Good People in Subtle Conflict of Interests,” J. Bus. Ethics 2017. See also Shalvi et . Honesty requires time and lack of justifications

    [↑](#footnote-ref-30)
31. For a discussion of how legal ambiguity faciltiates engaging in motivated reasoning, see for example Yuval Feldman and Doron Teichman , Are all legal Probabilies Created Equal NYU … ; Yuval Feldman and Henry Smith Behavioral Equity JEIT (discussing how people may engage in an egoistic interpretation of legal standards); Bossalis, Feldman and Smith Effect of Specificity on Legal Compliance Reg and Gov, (showing experimentally the greater effect of good faith on unspecified contracts). <AU: The greater effect on what? Please clarify.> [↑](#footnote-ref-31)
32. Cite Jason Dana The moral wiggle room. Ziva Kunda 1990 motivated reasoning [↑](#footnote-ref-32)
33. Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108(4) Psychol. rev. 814, 814-15 (2001) (arguing that moral reasoning is typically the result of quick, automatic evaluation and that rational justification comes only after the fact). [↑](#footnote-ref-33)
34. *Id*., at 814-15. [↑](#footnote-ref-34)
35. Daniel Kahneman, Thinking, Fast and Slow (2011). [↑](#footnote-ref-35)
36. Cass R. Sunstein, *Behavioral law and economics: a progress report*. 1 Am. L.Econ. Rev. 115, 115 (1999) ("the last decade has seen an outpouring of work in behavioral law and economics; in the last few years, the outpouring has become a flood"); Donald C. Langevoort, *Behavioral theories of judgment and decision making in legal scholarship: A literature review*. 51 Vand. L. Rev. 1499 (1998). [↑](#footnote-ref-36)
37. *See* Doron Teichman & Eyal Zamir, *Judicial Decisionmaking: A Behavioral Perspective*, *in* The Oxford handbook of behavioral economics and the law (Doron Teichman & Eyal Zamir eds., 2014). [↑](#footnote-ref-37)
38. This paradigm has also been criticized by scholars; Arie W. Kruglanski & Gerd Gigerenzer, *Intuitive and Deliberate Judgments Are Based on Common Principles* 118(1) Psychol. Rev. 97, 98 (2011) (surveying some of the literature criticizing the "dual model" for separating intuitive from deliberative judgment). [↑](#footnote-ref-38)
39. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Calif. L. Rev*.* 1051, 1075 (2000) (the authors survey the deep impact of the concepts of bounded rationality on legal scholarship). [↑](#footnote-ref-39)
40. Sunstein, *supra* note 12, at 117-121. [↑](#footnote-ref-40)
41. [↑](#footnote-ref-41)
42. [↑](#footnote-ref-42)
43. Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, *in* The Oxford handbook of behavioral economics and the law (Doron Teichman & Eyal Zamir eds., 2014) (comparing the concepts of bounded rationality and bounded ethicality, especially with relation to self-interest). [↑](#footnote-ref-43)
44. Todd Hau Behavioral Ethics Corporate Deviance California Law Review Online [↑](#footnote-ref-44)
45. Thaler and Sunstein Nudge (focusing on health, finance, and food as the goals of the legal policymaking). <AU: Please clarify the material in parenthesis: is that related to compliance in those areas?> [↑](#footnote-ref-45)
46. Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (2008) (famously proposing the "nudge approach," aiming to affect choice without limiting freedom). [↑](#footnote-ref-46)
47. See Feldman, Behavoiral Ethics meets Behavioral Law and Economics for a discussion of the greater difficulty of implementing ethical nudges relative to traditional nudges. In ethical nudges, people are better off ignoring the nudge (promoting their self-interest while feeling ethical), whereas traditional nudges help people promote their self-interest (e.g. to save more money for retirement)). [↑](#footnote-ref-47)
48. *See e.g.* [[Nina Mazar, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-concept Maintenance*, 45(6) J. Marketing Research 633, 633 (2008) (offering the theory of self-concept maintenance, according to which "people behave dishonestly enough to profit but honestly enough to delude themselves of their own integrity"); David M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior*, 25(1) Personality & Soc. Psychol. Bulletin 28 (1999); Rushworth M. Kidder, How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living (Rev. ed. 2011); Madan M. Pillutla, *When Good People Do Wrong: Morality, Social Identity and Ethical Behavior*, *in* Social psychology and organizations 353 (David De Cremer, Rolf van Dijk, & Keith J. Murnighan eds. 2011); James Hollis, Why good people do bad things: Understanding our darker selves (2008); Mahzarin R. Banaji & Anthony G. Greenwald, Blindspot: Hidden biases of good people (2013); David De Cremer, Rolf van Dijk, Ann E. Tenbrunsel, Madan M. Pillutla & Keith J. Murnighan, *Understanding Ethical Behavior and Decision Making in Management: A Behavioural Business Ethics Approach*, 22(s1) British J. Management S1–S4 (2011); This is also the view held by Max H. Bazerman & Ann E. Tenbrunsel, Blind Spots: Why We Fail to do What’s Right and What to do About it (2011); This line of scholarship is completely different from the type of research conducted by Philip G. Zimbardo, The Lucifer effect(2007); these works generally try to explain how ordinary people end up doing evil or at least engaging in gross criminal behaviors. [↑](#footnote-ref-48)
49. On the mechanics of motivated reasoning, see Kunda, *supra* note 2, at 480. [↑](#footnote-ref-49)
50. See Feldman, the law of good people, Chapter II discussion of the meaning of good people for legal policy making. [↑](#footnote-ref-50)
51. For example, in choosing people she wants to promote, areas of the city she wishes to develop, and contractors with whom she chooses to interact. Contributing to this effect is the fact that the “best interest of the city” is an ambiguous concept. [↑](#footnote-ref-51)
52. Citation here for the “objectivity bias” Ovul Sezer, Francesca Gino & Max H. Bazerman, *Ethical blind spots: Explaining unintentional unethical behavior*, 6 Curr. Opinion Sci. 77, 77 (2005) ("People act against their ethical values without conscious awareness in many other ways. Research shows that individuals maintain an ‘illusion of objectivity’ that is, they incorrectly view themselves as more objective than others <AU: Where does this quote end here?> [↑](#footnote-ref-52)
53. Dolly Chugh, Max H. Bazerman, & Mahzarin R. Banaji, *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Intere*st, *in* Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy 74 (Don. A. Moore, Daylian M. Cain, George Loewenstein & Max H. Bazeman eds., 2005). [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102(1) Psychol. Rev. 4, 10-11 (1995). [↑](#footnote-ref-55)
56. Dolly Chugh & Mary C. Kern, *A Dynamic and Cyclical Model of Bounded Ethicality*, 36 Research in Organizational Behavior 85 (2016). [↑](#footnote-ref-56)
57. *Id.*, at 85; *see also* Chugh, Bazerman & Banaji, *supra* note 21, at 74. [↑](#footnote-ref-57)
58. Marquardt & Hoeger, *supra* note 4, at 157. [↑](#footnote-ref-58)
59. Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17(2) Soc. Just. Research 189, 189 (2004) (“In many instances of conﬂict of interest, self-interest tends to operate via automatic processes whereas ethical and professional responsibilities operate via controlled processes.”). [↑](#footnote-ref-59)
60. Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17(2) Social Justice Research 171 (2004). [↑](#footnote-ref-60)
61. *Id.*, at 173; *see also* Moore & Loewenstein, *supra* note 27, at 195. [↑](#footnote-ref-61)
62. Nils C. Köbis, Bruno Verschuere, Yoella Bereby-Meyer, David Rand & Shaul Shalvi, *Intuitive (Dis)honesty – A Meta-Analysis*, 1 (working paper 2018). [↑](#footnote-ref-62)
63. Guy Hochman, Andreas Glöckner, Susann Fiedler & Shahar Ayal, “*I Can See it in Your Eyes”: Biased Processing and Increased Arousal in Dishonest Responses*, 29(2-3) J. Behavioral Decision Making 322 (2016). [↑](#footnote-ref-63)
64. Don A. Moore, Lloyd Tanlu & Max H. Bazerman, *Conflict of Interest and the Intrusion of Bias*,5(1) Judgment and Decision Making 37 (2010) (the authors suggest that individuals' true judgments can be discerned by rewarding participants for being accurate in their predictions). [↑](#footnote-ref-64)
65. Francesca Gino, Maurice E. Schweitzer, Nicole L. Mead & Dan Ariely, *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115(2)Organizational Behavior and Human Decision Processes, 191, 192-3 (2011). [↑](#footnote-ref-65)
66. [↑](#footnote-ref-66)
67. Rotundo M, Nguyen DH, Sackett PR. 2001. A meta-analytic review of gender differences in perceptions of sexual harassment. *J. App. Psych.* 86: 914-22 (The authors report that women, as compared to man, perceive many more behaviors as harassing; this means potential perpetrators often do not recognize the harmfulness of their behavior). <AU: Not sure this is the best way to explain this finding. It seems to put the blame on women for being too sensitive. Almost like blaming victims of assault because they wore provocative clothing.> See also Kunstman JW, Maner JK. 2010. Sexual over-perception: Power, mating motives, and biases in social judgment. *J. Pers. Soc. Psych.* 100: 282-94 (finding that some men tend to systematically overestimate the sexual interest others have in them). [↑](#footnote-ref-67)
68. [↑](#footnote-ref-68)
69. [↑](#footnote-ref-69)
70. Cantor D, Fisher B, Chinbnall S, Townsen R, Lee H, Bruce C, Thomas G. 2015. Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. September 21. <http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%20on%20AAU%20Campus%20Climate%20Survey.pdf>; [↑](#footnote-ref-70)
71. Clancy KBH, Nelson RG, Rutherford JN, Hinde K. 2014. Survey of academic field experiences (SAFE): Trainees report harassment and assault. PLoS ONE. 9 (7): e102172.https://doi.org/10.1371/journal.pone.0102172. [↑](#footnote-ref-71)
72. Jagst R, Griffith KA, Jones R, Perumalswami CR, Ubel MD, Stewart A. 2016. Sexual harassment and discrimination experiences of academic medical faculty. J. Amer. Med. Assoc. 315: 2120-21. [↑](#footnote-ref-72)
73. The Facts Behind the #MeToo Movement: a National Study on Sexual Harassment and Assault, http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf [↑](#footnote-ref-73)
74. Of course, some <AU: Again I think you are minimizing sexual harassment and giving men a pass here. I would argue that more than “some” instances are calculative and that many are motivated by a desire to exert power and diminish women.> and instances of sexual harassment or sexual violence are explicit, purposeful, and calculative (O’Leary-Kelly AM, Paetzold RL, Griffin RW. 2000. Sexual harassment as aggressive behavior: An actor based perspective. Aca. Mgt. Rev. 25: 372-388). We make no sweeping claim here that all sexual harassment is "ordinary." All that the data shows is that many, but not all, instances of sexual harassment can be characterized as "ordinary."<AU: I think this assertion as is will be questioned. I suggest rather than “ordinary” to express something along the lines that it occurs frequently.> [↑](#footnote-ref-74)
75. Andrew Coen, *Investable Assets Hit $33.5 Trillion*, Financial Planning (Nov 13 2015) https://www. financial-planning.com/news/investable-assets-hit-335-trillion [accessed on 5/2/2017]. [↑](#footnote-ref-75)
76. Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, J. Pol. Economy (forthcoming). For similar work in the context of auditing, *see* Max H. Bazerman, George Loewenstein, & Don A. Moore, *Why Good Accountants do Bad Audits*, 80(11) Harv. Bus. Rev. 96 (2002). [↑](#footnote-ref-77)
77. Luigi Zingales, *Does Finance Benefit Society*?, 70(4) J. Fin. 1327 (2015.); Anna Prior, *Brokers are Trusted Less than Uber Drivers, Survey Finds*, Wall Street J. (2015) http://www.wsj.com/articles/brokers-are-trusted-less-than-uber-drivers-survey-nds -1438081201 [accessed on 2/26/2015]. [↑](#footnote-ref-78)
78. [↑](#footnote-ref-79)
79. *Jacob & Youngs, Inc. v. Kent* 230 N.Y. 239 (1921). [↑](#footnote-ref-80)
80. [[An early empirical study found that 25.8% of a sample of 500 cases raised interpretation and parole evidence issues. Harold Shepherd, Contracts in a Prosperity Year, 6 STAN. L. REV. 208, 222–24 (1954); see also David A. Dilts, Of Words and Contracts: Arbitration and Lexicology, 60 DISP. RESOL. J. 41, 43 (2005) (“The construction of contract language is the controversy most evident in contract disputes.”); John P. Tomaszewski, The Pandora’s Box of Cyberspace: State Regulation of Digital Signatures and the Dormant Commerce Clause, 33 GONZ. L. REV. 417, 432 (1997–1998) (“Most contract litigation involves disputes over construction of the terms in a contract.”)]] [↑](#footnote-ref-81)
81. For an analysis of typical justifications used to justify unethicality, see Alfred Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3(3) Personality & Soc. Psychol. Rev. 193 (1999). For a discussion of the types of misconduct that are more likely to resembles those in private law contexts, see Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 Research in organizational behavior 1 (2003). [↑](#footnote-ref-82)
82. 230 N.Y. 239 (1921). [↑](#footnote-ref-83)
83. Robert E. Scott, *Contract Design and the Shading Problem*, 99(1) Marq. L. Rev. 1, 8-9 (2015). [↑](#footnote-ref-84)
84. Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 Yale L.J. 829, 822-3 (2003) (discussing the standard assumptions of rationality in the context of the economic theory of contract law). [↑](#footnote-ref-85)
85. Eyal Zamir and Raanan Sulitzeanu-Kenan, *Explaining Self-Interested Behavior of Public-Spirited Policymakers*. Pub. Admin. Rev. (2017). [↑](#footnote-ref-86)
86. Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1164 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94(4) Calif. L. Rev. 997, 1027-30 (2006). [↑](#footnote-ref-87)
87. Yuval Feldman, *Using Behavioral Ethics to curb organizational misconduct,* Behaivoral Science and Policy special volume on corruption (forthcoming 2018) Available at SSRN: <https://ssrn.com/abstract=2913425>. [↑](#footnote-ref-88)
88. For a review of the rationales used by people to justify file sharing, see feldman and Nadler file sharing laws and norms (2006) [↑](#footnote-ref-89)
89. Philipp Gerlach, Kinneret Teodorescu, & Ralph Hertwig, The Truth about Lies: A Meta-Analysis on Dishonest Behavior available at

    https://www.researchgate.net/publication/320868309\_The\_Truth\_About\_Lies\_A\_Meta-Analysis\_on\_Dishonest\_Behavior [↑](#footnote-ref-90)
90. CITE here from the first chapter of the book – cho banaji bazerman – incentives won’t affect, those who think that there is nothing wrong in their behavior. [↑](#footnote-ref-91)
91. Franklin E. Zimring , Gordon J.Hawkins & James Vorenberg, Deterrence: The Legal Threat in Crime Control 189-190 (1973); Charles R. Tittle, Sanctions and Social Deviance: The Question of Deterrence (1980). [↑](#footnote-ref-92)
92. This literature, in its current form, originates with Ronald Coase, *The Problem of Social Cost*,3 J.L. & Econ. 1 (1960), still the mostcited work in legal scholarship (Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review Articles of All Times*, 110 Mich. L. Rev. 1483, 1489 (2012)). [↑](#footnote-ref-93)
93. Thomas J. Miceli, The Economic Approach to Law 1 (2004) (“The economic approach to law assumes that rational individuals view legal sanctions (monetary damages, prison) as implicit prices for certain kinds of behavior, and that these prices can be set to guide these behaviors in a socially desirable direction.”); Werner Z. Hirsch, Law and Economics: An Introductory Analysis 1 (1988) (“Laws are authoritative directives that impose costs and benefits on participants in a transaction and in the process alter incentives”); Steven Shavell, *Law Versus Morality as Regulators of Conduct* 4 Am. L. & Econ. Rev. 227, 227 (2002) (“It is evident that both law and morality serve to channel our behavior. Law accomplishes this primarily through the threat of sanctions if we disobey legal rules.”). [↑](#footnote-ref-94)
94. William M Landes & Richard Posner, The Economic Structure Of Tort Law 4 (1987) (reviewing the long history of deterrence as a primary goal of the legal system). [↑](#footnote-ref-95)
95. *See* John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence* 25 L. & Soc. Rev. 7, 7 (1991). [↑](#footnote-ref-96)
96. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24(2)Oxford J. Legal Stud. 173, 175-8 (2004). [↑](#footnote-ref-97)
97. Gerry S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) Journal of Political Economy 169 (1968). [↑](#footnote-ref-98)
98. *Id.* [↑](#footnote-ref-99)
99. Theodore G. Chiricos & Gordon P. Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence*, 18(2) Social Problems 200, 217 (1970); George Antunes & Lee A. Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis,* 4 J. Crim. L. & Criminology 486, 492 (1973); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney & Per-Olof H. Wikström, Criminal deterrence and sentence severity: An analysis of recent research 63 (1999); Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39(4) Criminology 865, 892 (2011). Many works support the advantage of certainty over severity; for a review, *see* Cheryl Marie Webster & Anthony N. Doob, *Searching for Sasquatch: Deterrence of Crime Through Sentence Severity*, *in* The Oxford Handbook of Sentencing and Corrections 173, 173 (2012). [↑](#footnote-ref-100)
100. [There is a cite in the book of Bazerman and Banaji about incentives not working for people who don’t think that their behavior is problematic [↑](#footnote-ref-101)
101. Steven M. Shavell, *Damage Measures for Breach of Contract*, 11 Bell J. Econ. 466 (1980) (showing that expectation damages lead to optimal levels of performance and breach). <AU: Or the expectation that there may be damages?> [↑](#footnote-ref-102)
102. See Law of Good People in Chapter 6 on the multifaceted effects of law on behavior. See also Zimring on deterrence and awareness [↑](#footnote-ref-103)
103. For a different approach to this dilemma, *see* Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?* 84 N.Y.U. L. Rev. 980 (2009). [↑](#footnote-ref-104)
104. William T. Dickens, Lawrence F. Katz, Kevin Lang & Lawrence H. Summers, *Employee Crime and the Monitoring Puzzle*, 7(3) J. lab. econ. 331 (1989). [↑](#footnote-ref-105)
105. Amos Schurr, Dotan Rodensky & Ido Erev, *The Effect of Unpleasant Experiences on Evaluation and Behavior*, 106, 106 J. Econ. Behavior & Org. 1 (2014). [↑](#footnote-ref-107)
106. Daniel Kahneman, Jack L. Knetsch, Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59(4) J. Bus. S285, S299 (1986). [↑](#footnote-ref-108)
107. Tom R. Tyler, Why People Obey the Law (1990). [↑](#footnote-ref-109)
108. Yuval Feldman & Tom R. Tyler, *Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace*, 6(1) Reg. & Governance J. 46, 46 (2012). [↑](#footnote-ref-110)
109. Yuval Feldman & Oren Perez, *Motivating Environmental Action in a Pluralistic Regulatory Environment: An Experimental Study of Framing, Crowding Out, and Institutional Effects in the Context of Recycling Policies* 46(2) L. & Soc. Rev. 405 (2012). [↑](#footnote-ref-111)
110. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 Tex. L. Rev*.* 1151, 1151-2 (2009). [↑](#footnote-ref-112)
111. Urs Fischbacher, Simon Gächter & Ernst Fehr, *Are People Conditionally Cooperative? Evidence from a Public Goods Experiment*, 71(3) Econ. Letters 397, 398-9 (2001). [↑](#footnote-ref-113)
112. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in. Breach of Contract*, 6 J. Empirical Legal Stud. 405, 413 (2009); Tess Wilkinson-Ryan & David A. Hoffman, *Breach is for Suckers*, 63Vand. L. Rev*.* 1003, 1029 (2010) (using precisely the same phrase to describe the decision to breach). [↑](#footnote-ref-114)
113. This direction is explored in Yuval Feldman, Amos Schurr & Doron Teichman, *Reference Points and Contractual Choices: An Experimental Examination*, 10(3) J. Empirical Legal Stud. 512 (2013) (arguing that the focus should not be on whether people choose to comply with contractual obligations, but on their decision to interpret the contract in a self-serving way). [↑](#footnote-ref-115)
114. *Id.* [↑](#footnote-ref-116)
115. Max H. Bazerman & Mahzarin R. Banaji, *The Social Psychology of Ordinary Ethical Failures*, 17(2) Soc. Just. Research 111, 111 (2004). [↑](#footnote-ref-117)
116. Christine Jolls and Cass R. Sunstein, *Debiasing through Law,* (March 2005). U Chicago Law & Economics, Olin Working Paper No. 225; Harvard Law and Economics Discussion Paper No. 495. Available at SSRN: <https://ssrn.com/abstract=590929> or [http://dx.doi.org/10.2139/ssrn.590929](https://dx.doi.org/10.2139/ssrn.590929). [↑](#footnote-ref-118)
117. [↑](#footnote-ref-119)
118. Ann E. Tenbrunsel, McKenzie R. Rees, Kristina A. Diekmann

     **Sexual harassment in academia: Ethical climates and bounded ethicality**

     *Annual Review of Psychology* 5 (the authors investigate "the contextual influences surrounding sexual harassment".)

     Knapp DE, Faley RH, Ekeberg SE, DuBois CLZ. 1997. Determinants of target responses to sexual

     harassment: A conceptual framework. *Aca. Mgt. Rev.* 22: 687, 709 (“sexual harassment does not occur in a vacuum but, rather, in an organizational environment that affects the way people behave”);

     Willness CR, Steel P, Lee K. 2007. A meta-analysis of the antecedents and consequences of

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     (Studying the role leaders and organizations play in the slippery slope as they give or deny a harasser the opportunity to harass again in the future) [↑](#footnote-ref-121)
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191. *Id.*, at 1 ("Misconduct is concentrated at firms with retail customers and in counties <AU: Or countries?>with low education, elderly populations, and high incomes. Our findings are consistent with some firms "specializing" in misconduct and catering to unsophisticated consumers, while others use their clean reputation to attract sophisticated consumers.") [↑](#footnote-ref-194)
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