Each of these four insightful critiques of my book contributes to its attempt to create a framework for the interaction of behavioral ethics and law. Because each one addresses different issues, I respond separately to the arguments raised in each.

### Differences between Behavioral Law and Economics and Behavioral Ethics: Comments by Oren Bar-Gil

It is not surprising that Oren Bar-Gil, a leading scholar in behavioral law and economics (BLE), focuses his critique on positioning behavioral ethics (BE) as a subcategory of his field. In fact, despite the differences between the two areas, that behavioral ethics may become a subfield of behavioral law and economics, as advocated by Oren, is not farfetched. I do not see the two as mutually exclusive areas. For example, in the last two years the British Behavioral Insight Team has increasingly focused on areas unrelated to health, financial, and consumer behavior, as well as on compliance and enforcement: this new focus naturally suggests a reliance on BE.[[1]](#footnote-1) Furthermore, in many contexts, BLE findings have led to the creation of similar BE paradigms. Omission bias, loss aversion, and self-serving bias are classical behavioral economics mechanisms that could explain many of the findings of interest to behavioral ethicists. Finally, because BE is a new field, it is built on many of the prevailing paradigms of BLE. For example, a recent study claims that self-concept maintenance is the weakest model of explaining implicit unethical behavior.[[2]](#footnote-2)

Oren also addresses my use of rational-choice models, arguing that the claims I made based on behavioral ethics are at times too broad, redundant, or ambitious. I have addressed these concerns in a number of presentations of this book to economists and behavioral economists, and so my response includes the points they raised as well.

I am happy to use this opportunity to clarify my argument. Oren argues that BE’s claim that unawareness undermines the goal of deterring bad behavior is an overstatement. I agree that this claim has to be more nuanced, and in various sections of the book, I argue for supplementing and strengthening rational-choice enforcement mechanisms, rather than replacing them with nudges.[[3]](#footnote-3) The article by Kajackaite and Gneezy, [[4]](#footnote-4) published after my book went to press, on how incentives are more likely to affect behavior in dishonesty games in which detection is easier, supports the importance of rational-choice mechanisms and thus Oren’s critique. It does not rule out, however, the involvement of internal and social mechanisms in ethical decision-making as Gneezy and colleagues show in other work.[[5]](#footnote-5) As can be seen in Chapter 2 of the book, where I outline a long list of mechanisms and deviations from rationality, as well as in Shahar Eyal’s paper given at this symposium,[[6]](#footnote-6) too many behaviors by individuals cannot be explained solely by the rational-choice prediction of dishonesty.

Furthermore, to improve compliance and the effectiveness of regulation and enforcement, it is more important to know whether people are aware of their own wrongdoing, how they can be expected to react to different incentives, and how responsible they should be for their actions if they do not respond to those mechanisms, than whether their unethicality could be explained by rational-choice models, an issue that is more germane to economics than to law.[[7]](#footnote-7) Simply put, the difference between the focus on awareness and the focus on rationality is the primary difference between behavioral economics and behavioral ethics: behavioral economics attempts to uncover what prevents people from making optimal choices, and behavioral ethics tries to uncover the mechanisms through which people can behave less ethically. There may be some overlap between the two missions—for example, in a world with perfect enforcement— but they are clearly not the same. Whether people’s unethicality is rational or not is an important question that deserves further exploration, but it is secondary to the task of my book.

This difference between awareness and rationality is related to a discussion in the book on the double-edged impact of economics on the interaction between psychology and law.[[8]](#footnote-8) Clearly, the many works by Jolls, Sunstein, and Thaler in behavioral economics have greatly enhanced our understanding of the interaction between law and psychology.[[9]](#footnote-9) However, as I argue in the book, the fact that the interaction between law and psychology was but the price it has taken with regard to the types of areas in psychology which could not have affected the law, if they were not mediated by economics.

 Oren also claims that BE offers nothing new in understanding the effects of ambiguity, because that issue has already been addressed by BLE researchers. Yet it is important to note the difference between how ambiguity is treated in the two fields. BLE research holds that ambiguity will have a chilling effect on wrongdoing, reducing the likelihood of committing behavior in the “gray area.” In contrast, Teichman (2009)[[10]](#footnote-10) and Teichman and Schur (2013),[[11]](#footnote-11) in their work on legal ambiguity, found the opposite: people use ambiguity to deceive themselves about the meaning of their own behavior, thus increasing the likelihood of committing behavior that is not clearly wrong.

 Similarly, it is true that BLE scholars focused on the ex-ante function of the law, long before behavioral economics or BE researchers, but here too the motivation and contexts differ. In traditional law and economics, the use of ex-ante versus ex-post mechanisms is determined based on factors such as information and transaction costs.[[12]](#footnote-13) However, I argue that ex-post treatment of their behavior should be determined mainly by the limits of their awareness and ability to self-evaluate the legality and morality of their own behavior. There is no reason to think that these different types of factors should be treated in a similar way. For people to come to the realization that what they have been doing is problematic and hence should be deterred, many barriers must be crossed, because of their biased self-perception and interpretation of reality.

Oren is right, of course, to suggest that sanctions should not be taken off the table. In a sense my argument for the advantage of law over morality dovetails with his point. People’s ability to deceive themselves has limits. Therefore, I am not arguing that people will deceive themselves with regard to every legal requirement, but rather that they will find it easier to self-deceive with regard to morality than with regard to the law. As developed in my book, the more external the factor that evaluates one’s behavior, the less likely it is that people will be able to change their actions.[[13]](#footnote-14) Clearly, even though BE suggests that people find it difficult to recognize their own wrongdoing, the use of very strong sanctions will grab their attention. The question is how extensively a democratic state can use sanctions without alienating the public. Another problem in regard to sanctions is determining which actions should be deterred. Should we focus on actions that people find easier to justify because more people are likely to do them and then they seem less immoral? This creates a paradox in which, based on traditional arguments, we may want to punish more severely those people who are doing things that cannot be justified.[[14]](#footnote-15)

In the text near footnote 25, Oren argues that now assume that the law impasse on people who do A. I may think that the law is unjustified, but I would still avoid doing A. deterrence works” Regarding deterrence mechanisms, Oren argues that they are effective in inducing compliance even with those laws that people feel are unjustified and unfair. However, part of the BE argument is that, at the time that people decide to act in a way that violates the law, they may be unaware that they are in fact in violation. For example, when physicians choose one treatment over another, how can we be sure that they are making that decision because they have a conflict of interest of which they are unaware? It is possible but difficult to create rules that are not subject to interpretation.[[15]](#footnote-16)

The BLE approach translates many sanctions into the probabilities of being caught. Yet, it is not always clear that people do stop to evaluate those probabilities before they commit wrongdoing. A major theme of my book is that their minor, everyday acts determine people’s larger, deliberative decisions. Think, for example, of the numerous small decisions made by employers each day that affect the behavior of their employees. We always assume that we need to deal with probabilistic estimates of misbehavior when deciding who to retain or who to fire, but many people perform what they think are inconsequential actions that they cannot imagine would be penalized or seen as discriminatory. In the act of writing every prescription or advising every patient, does a doctor spend time weighing the options? It is an open empirical question whether doctors will perform fewer cesarean sections if there are stronger penalties for potential conflict of interest, because most will not even be aware of that conflict, unless we change the situation in which they make those decisions. Our implicit attitudes shape our judgment without us even realizing that our self-driven interpretation determines our actions.

To sum up, although I agree that behavioral ethics could benefit from a closer interaction with behavioral economics, it is still important to understand its unique contribution.

### Behavioral Ethics and Corporate Culture: Comments by Adi Libson

I credit Adi Libson for recognizing that corporations are an excellent example of how situations may be designed in such a way as to predict the commission of unethical behavior by the people who operate in them. Is it even rational for a corporation to act more ethically, if doing so will decrease the value of its shares? In other words, what impact does acting honestly have on performance? For example,attractingbein the future, likely causing ? And if independent directors do not affect performance, is that lack of impact related to the level of integrity of the corporation?[[16]](#footnote-17)

In light of Oren’s critique, which I addressed above, I also wonder whether incentives can change corporate culture, especially if we look at the corporation as some sort of “ethical mediator” between the regulatory state and the employee. The effectiveness of incentives may depend on to the degree to which the corporation sees preventing or lessening the unethical behavior of its employees as its responsibility. Relatedly, will state-initiated incentives cause corporations to assume more of that responsibility? We may need to revise the conclusion of Chough, Bazerman, and Banaji[[17]](#footnote-18) that state that intervention is only effective in addressing the mediating factors of corporations when it draws their attention to unethicality and encourages them to use broader types of incentives to increase employees’ ethical behavior. In other words, the corporation’s level of motivation will mediate the ability of the state to make people more aware of their actions. Clearly, one can expect that levying substantial monetary sanctions on corporations would likely encourage them to find the most effective organizational and behavioral ways to eradicate acts of ordinary unethicality.

A general comment regarding Adi’s comments is that it is easier to use BE to understand why some of the existing solutions do not work than to come up with those that will improve the situation. BE’s critique of corporate governance practices is that existing enforcement measures are not tailored toward the right people: it is difficult for the state to target ordinary good people instead of conventionally “bad” people. Therefore, corporations will need to adopt some degree of self-governance to make that targeting possible.

In the project described by Adi, most of the solutions offered to the problem of unethicality were behavioral interventions that focused on changing the defaults, increasing reflection, and altering the accountability mechanism. Most of the changes proposed in our joint work on corporate governance and BE address day-to-day corporate behavior and do not challenge the doctrines of corporate law. An open question is whether it may be possible to make more systemic changes in corporate structure that will make corporate unethicality less pervasive. I hope Adi and other corporate law scholars will be able to suggest substantial reforms in the law.

### An Ex-Ante Approach: Comments by Benjamin Van Rooji

Benjamin’s critique advocates for an ex-ante treatment of law because of factors unrelated to BE, which I support.[[18]](#footnote-19) His paper does an excellent job of providing an additional set of explanations for the advantages of adopting an ex-ante approach to law.

The BE field, which also supports the ex-ante approach, goes further than traditional or BLE literatures in predicting when that approach should be used and when it should not, based on an additional set of factors. Because many decisions to violate rules happen without any deliberate thought and people are not wired to have a clear view of their own ethicality, it is likely that ex-post allocation responsibility will be less effective than assumed by BLE.

Benjamin’s paper raises an additional interesting question regarding the responsibility of states versus organizations in creating situations in which “good” people will end up behaving badly: Why is it the case that organizations enjoy greater leverage in choosing ex-ante intervention than can states? In many ways we think about state intervention as only dealing with people whose behavior clearly violates the law. The traditional view is that the law does not have much to say about people’s ethics, which is seen as related to individual or communal norms. For example, the Chinese social credit experiment has come under extensive criticism from many scholars.[[19]](#footnote-20) Yet, there is not the same level of criticism of organizations that attempt to educate people about ethical behavior, even in areas that are not strictly illegal. It seems that once individuals become employees of the organization, it can intervene in more ways to make them into more moral beings. Perhaps this distinction between state and corporation on the level of intervention needs to be revisited. Similarly, encouraging employee loyalty is seen as more legitimate than encouraging citizens’ loyalty. Probably one of the main exceptions is regulating the behavior of drivers, where it seems legitimate to educate drivers not only to avoid breaking the law but also to be very focused and vigilant. That rationale in driving is clear—not paying attention might cause serious harm to others—but there are other contexts in which people could harm others where behavioral training does not seem legitimate.

 In many ways my book supports Benjamin’s arguments, which recognize that the focus on smaller actions rather than on smoking guns could be better justified if we prioritize the ex-ante rather than the ex-post approach. Small violations do not meet the requirement of having strong enough evidence for using the ex-post approach,[[20]](#footnote-21) but an ex-ante approach does not have that requirement. Yet, because smaller actions are more likely to effect a change in business norms, to be prevalent, to lead to an escalation, and to change the default for what is the right things to do, the ex-ante approach is clearly the better one.

Despite the value of the ex-ante approach, there is greater support for harsh punishment and an ex-post focus on bad apples for some behaviors. Think, for example, of corruption. What people want is to find some scapegoat who can be punished, and will make everyone feel great about themselves. The identified victim effect suggests that people like to pay attention to some really bad people who have hurt specific individuals. The ex-ante approach does not serve those needs. In addition, criminal law is such a problematic, broad tool, with so many hoops to jump through in order to convict one person, that it is not clear how effective it is; more importantly by focusing on the worst cases ex-post, it inadvertently legitimizes the more benign and frequent types of misbehavior. So in a way, the “good” people are those who show the greatest support for the ex-post approach: when they compare themselves to real criminals, they are able to maintain their self-image, even if they cut corners professionally or engage in ordinary unethicality.

I fully agree with Benjamin’s focus on the cognitive biases that make the ex-ante approach less desirable, but I think that their effect could be counteracted by the motivational biases just presented. The punishment reflex described by Benjamin has more to do with people’s need to feel good about themselves than just the need to punish the bad guys.

The big data approach advocated for in my research with Kaplan[[21]](#footnote-22) increases the effectiveness of the ex-ante approach by determining which type of means to use in implementing it in which situations. The ex-ante approach is even broader than the ex-post approach, making data even more important so that it can be adapted to meet specific kinds of misbehavior.

### Psychosocial Processes: Comments by Shahar Eyal

Shahar Ayal’s in-depth discussion of psychosocial processes is, of course, especially important for a book that attempts to connect BE to law. In my book, I focused on describing similar theories and mechanisms, but from the perspective of a legal scholar, which differs from that of a psychologist.

Ethical dissonance, by which people attempt to maximize their self-interest while still maintaining their self-image, which is described by Shahar, is one of the core principles of the law of good people. However, as a legal scholar the challenge is to understand to what extent this mechanism could effectively stop people from fully maximizing their self-interest. How can the state create a situation in which the laws increase the dissonance that people experience when contemplating committing unethical behavior and so reduce the likelihood of their engaging in such actions? Furthermore, the legal perspective requires us to take into account the institutional aspects of trust and legitimacy of the rules that dictate what is the legal or ethical thing to do and how they interact with the justifications that people can use to rationalize their behavior.[[22]](#footnote-23)

 One of the interesting concepts that Shahar discusses is that of “half-lies”: she claims that people do not lie as much as they could. Perhaps this is related to the recent findings of Gneezy and others that incentives do have an effect on people’s likelihood of committing unethicality. While the evidence for and against this paradigm is still developing, I do not think that it threatens the BE models. For example, it might be the case that the likelihood of getting caught, and not only the price that people will pay if caught, as studied in Gneezy’s 2017 work, could make it harder for people to self-deceive about what the right thing is to do .

 Shahar’s discussion of altruistic corruption raises an important legal dilemma between deterrence and desert-based justifications for punishment. From a deterrence perspective, the law of good people suggests that we need to worry more about the violations that people can easily justify or discount. Thus, because more people are likely to feel comfortable taking nonmonetary than monetary bribes, we need to invest more resources in preventing the former behaviors. However, these more justifiable corruption claims also mean that the public is less likely to view negatively those who commit them, thereby changing the rationale for their punishment.

Similarly, she raises the issue of fuzziness as allowing for greater moral wiggle room and unethicality. I discuss this phenomenon in my book from a legal perspective with a focus on standards and legal ambiguity. There are obvious differences between legal ambiguity and other types of uncertainty (are all legal probabilities created equal).

 I agree with both Benjamin and Shahar on the need to focus on smaller unethical violations. Yet, in addition to the aggregated effect and slippery slope arguments, from a legal perspective it is essential to differentiate between the kind of violation that will always seem deviant and the kind that may soon become the prevailing social and then legal norm. Those latter unethical behaviors are those that create cultures of what can become and be seen as legitimate in many commercial transactions and in the daily interactions of people with the regulatory state and with various law enforcement agents.

 Shahar was one of the creators of the REVISE paradigm, a holistic approach to regulation that is rarely taken by psychologists. Yet, in a broader enforcement regime it cannot be seen as representing the whole picture, because many people are calculative and will be less sensitive to these mechanisms. Similarly people will care less about considerations of morality without the big stick that governments wield to force people to reflect more and take its ordinances seriously. Along those lines, the work with Hallali on how small punishments can have a big impact could be seen as supportive of this approach. Finally, attempts to increase ethicality and compliance should move beyond nudges to changes in the law itself, which I hope will occur when more scholars join the work on behavioral ethics.

1. See for example their work on tax compliance <https://www.bi.team/what-we-do/policy-areas/tax/> [↑](#footnote-ref-1)
2. Jacobsen, Catrine, Toke Reinholt Fosgaard, and David Pascual‐Ezama. "Why do we lie? A practical guide to the dishonesty literature." *Journal of Economic Surveys* 32, no. 2 (2018): 357-387. [↑](#footnote-ref-2)
3. Cite to page number in the book [↑](#footnote-ref-3)
4. Kajackaite, Agne, and Uri Gneezy. "Incentives and cheating." *Games and Economic Behavior* 102 (2017): 433-444. [↑](#footnote-ref-4)
5. Gneezy, Uri, Agne Kajackaite, and Joel Sobel. "Lying Aversion and the Size of the Lie." *American Economic Review* 108, no. 2 (2018): 419-53. [↑](#footnote-ref-5)
6. Cite [↑](#footnote-ref-6)
7. In recent years there has been extensive research within the field economics on modeling people’s ethical decision making from a rational-choice perceptive, see Gneezy et al, supra note 3 and see the meta-analysis of Abler et al work in Econometrica Abeler, Johannes, Daniele Nosenzo, and Collin Raymond. "Preferences for truth-telling." (2016). [↑](#footnote-ref-7)
8. At page 5 [↑](#footnote-ref-8)
9. Jolls, Christine, Cass R. Sunstein, and Richard Thaler. "A behavioral approach to law and economics." *Stan. L. Rev.* 50 (1997): 1471. For the most recent review see Zamir and Teichman Behavioral law and Economics [↑](#footnote-ref-9)
10. Cite [↑](#footnote-ref-10)
11. Cite [↑](#footnote-ref-11)
12. E.g. Bebchuk, Lucian Arye. "Property rights and liability rules: The ex ante view of the cathedral." *Mich. L. Rev.* 100 (2001): 601. [↑](#footnote-ref-13)
13. LOGP At page 20 [↑](#footnote-ref-14)
14. Cite desert deterrence [↑](#footnote-ref-15)
15. Cite behavior equity on the importance of standards [↑](#footnote-ref-16)
16. Question which is related to the dilemma mention in the previous section – whether being ethical is rational? [↑](#footnote-ref-17)
17. Chugh, Dolly, Max H. Bazerman, and Mahzarin R. Banaji. "Bounded ethicality as a psychological barrier to recognizing conflicts of interest." *Conflicts of interest: Challenges and solutions in business, law, medicine, and public policy* (2005): 74-95. [↑](#footnote-ref-18)
18. Supra note \_\_\_\_ [↑](#footnote-ref-19)
19. Chen, Yongxi, and Anne SY Cheung. "The transparent self under big data profiling: privacy and Chinese legislation on the social credit system." (2017). [↑](#footnote-ref-20)
20. <https://hbr.org/2019/03/companies-need-to-pay-more-attention-to-everyday-unethical-behavior> [↑](#footnote-ref-21)
21. Feldman, Yuval, and Yotam Kaplan. "Big Data & Bounded Ethicality." *Bar Ilan University Faculty of Law Research Paper*19-05 forthcoming (2019) [↑](#footnote-ref-22)
22. Fine, Adam, Benjamin Van Rooij, Yuval Feldman, Shaul Shalvi, Eline Scheper, Margarita Leib, and Elizabeth Cauffman. "Rule orientation and behavior: Development and validation of a scale measuring individual acceptance of rule violation." *Psychology, Public Policy, and Law* 22, no. 3 (2016): 314. [↑](#footnote-ref-23)