Abstract for the book

Although we traditionally think that the law’s main purpose is to protect us from the bad people who breach contracts, make a nuisance of themselves in public places, engage in corrupt behaviors, steal intellectual property, use damaging speech on Facebook, cut in lines, or use nepotism to advance their careers, this book’s main argument is that it is the good people whom we need to worry about. Behavioral ethics, a growing area within psychology and management literature claims that the treatment of the good people who commit many of these bad behaviors is the neglected task of the law as well as of legal theory. The dominant paradigm in enforcement scholarship in current legal theory is based on the need to assume that states are dealing with “bad people” who are pursuing their own self-interest and the law need to use its power to raise the price for misbehavior. People’s behavior is assumed to be deliberative and calculative and accordingly the means the government use to deal with people’s behavior are based on such assumptions, both on extrinsic measures such as sanctions and rewards and intrinsic measures related to procedural justice and persuasion of what is the right thing to do. Behavioral ethics studies the automatic cognitive processes that direct self-interest as well as “moral blind spots”, biases that allow people to bend the laws within the confines of their conscience through processes which are partially non-deliberative. The advancement of the behavioral ethics in the management literature and its collision with the traditional outlook requires a broad theoretical and empirical comparison of both traditional enforcement mechanisms and non-traditional measures to understand how states could deal with misdeeds often committed by normative citizens blinded by cognitive biases regarding their own ethicality.

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

Existing enforcement strategies are not suitable for such misconducts, and so new tools and modifications of traditional tools are essential. The main argument of the book is that the new insights of Behavioral Ethics into the cognitive and motivational aspects of the behavior of “good people” require the development of new and innovative approaches to the normative treatment of a diverse population consisting of both good and bad people. The innovative approach taken by the book connects the important but neglected theoretical puzzles raised by the area of Behavioral Ethics to the vast normative and jurisprudential literature on instrument choice and the various tools that policy makers can adopt to modify behavior.

More specifically, the book examines the ability to prevent people from engaging in uncooperative behaviours and wrongful conducts such as breaching contracts, engaging in corruption and employment discrimination and eschewing professional duties through traditional methods such as deterrence, social norms and procedural justice, and compares these methods with behaviourally informed enforcement mechanisms such as the nudge approach, choice architecture, and debiasing. The book discusses the pros and cons of the various intervention mechanisms when it comes to the neglected area of compliance with ethical and legal standards, and use this comparison to draw practical conclusions for legal policy makers on how to optimize their regulatory and enforcement efforts to affect both the deliberative and non-deliberative components of unethical behavior.

To achieve this goal, it is necessary to portray a coherent behavioral and moral accounts of the person the law tries to affect and control. In addition, a large number of unresolved theoretical questions are widely discussed in the book from various directions: How much can we know *ex ante* about the awareness, controllability, and modification of the unethical behaviors of good people? How can we know that their goodness is genuine and not faked? Are morality and traditional enforcement practices, such as deterrence, effective in curbing behaviors that are only partly deliberative? Can states regulate simultaneously good and bad people by using different intervention methods? Should the nudge approach, which avoids direct communication between the state and the people it regulates, replace all other intervention methods? Do we know what is lost in the sustainability of behavioral change and in autonomy when we abandon traditional intervention methods? Is there still an advantage of changing people’s intrinsic motivation when many of people’s misconducts are not done with full awareness? The book examines in what way the existing research fell short of offering a coherent behavioral and normative picture of the person we are trying to regulate.

In its call for regulatory reform, the book draws, in its last chapters to an extensive empirical research that I and other researchers have conducted in the past on these questions, demonstrating in a more particular and detailed way some of these challenges. Among them the effect of social norms on the perception of legality in the context of intellectual property, the effect of incentives on people’s intrinsic and extrinsic motivations in the area of environmental protection and whistle-blowing laws, and the effect of legal uncertainty on the compliance and performance of people with different motivational backgrounds. The ability deterrence and morality to change people’s behavior in subtle conflict of interests and the different implicit discrimination mechanisms used toward different social groups. The book moves a step further and fills the gap unresolved by these and other studies by offering a conceptual framework for researchers and for legal policy makers for the study and regulation of unethicality of good and bad people.

The book is divided to 11 chapters, in which the arguments discussed in the above paragraphs, is being developed. The first chapter which is an introductory one, outlines the main argument of the book and present the existing gaps in research and how the book could fill the existing gap in the literatures. The chapter outlines both the theoretical and the policy implications of this argument to the area of legal enforcement and compliance. In Chapter 2 we show that a set of both deliberate and non-deliberate mechanisms such as moral forgetting and motivated blindness prevent people from recognizing the wrongdoing in their behavior and their own unethicality. We argue that many legal disputes are not a product of people miscalculating their winning chances, but rather of their inability to recognize in an objective way their unethicality.

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

Chapter 6 which focuses on individual differences, complicate the a picture of good vs. bad people and suggests that even the good people could be divided to at least two types, as is evident also from the variation in self-deception mechanisms which were reviewed in chapter 2. The first type of good people genuinely don’t not their behavior or the relevant situation as it is, according to scholars such as Bazerman’s blind spot, Haidt’s “emotional dog” approach to Morality,[[1]](#footnote-1) or Balcetis’s motivated seeing,[[2]](#footnote-2) which rely on non-deliberative mechanisms. In that camp of the morally blind people belong those who engage in implicit job discrimination or in implicit corruption in subtle conflict-of-interest situations. The second type of good people, knows that what they do is impermissible, but they find various rationales that they can use to allow themselves to do bad things and still feel great about themselves. The related work of Bandura on moral disengagement or Shalvie’s work on justified dishonesty shows that this is mostly a deliberate process. In the camp of the justifiers we can find those committing various parking violations, cutting in lines, or using contacts to get a job. In this chapter, we also analyzed numerous relevant individual differences scales, such as moral identity and social value orientation. Recognizing the limitations of identifying individual variance ex-ante, the chapter concludes with suggestion for alternative ways to differentiate between people based on their commitment to the law as well as their occupation make up as a way to have better predictions that policy makers could use in an ex-ante design of the law.

Chapter 7 on the pluralistic effect of law and Chapter 8 on the tradeoffs between the different likely effects of laws recommended how policy makers could balance the effects of the different aspects of the law, on different people, with regard to different behaviors. The complex effect of law, the existence of various types of regulatory tools, the power of the situation and the variation among people creates a highly complex picture that chapter 8, which focuses on enforcement trade-offs. The concept of behavioral trade-off suggests that each type of intervention raises different behavioral reaction, since people are more complex that assumed by the traditional enforcement. It is rarely the case that and that one policy will be superior the others on all of the behavioral dimensions and the ability of policy makers to develop an effective policy lies in the ability to take all of the above factors into consideration, as well as the particular of the situations in which people make decisions. The focus of chapter 7 is on the different and sometimes even competing behavioral effects that the law creates and the focus of the chapter 7 is on how policy makers could balance this effects in a given situation.

This new approach to law is applied in Chapters 9 and 10 to corruption and employment discrimination respectively; these two case studies show how to create an effective balance between different regulatory tools and the need to address different types of population with different states of mind toward the law. The interesting characteristics of both topics, in a very simplistic way is the fact that the behavior in itself is not problematic, only the state of mind of the individual when doing them. For example, for a mayor to hire a certain contractor, is problematic only if he is doing it for her own self-interest. For an employer not to hire someone for a job, is problematic only if he had certain factors on his mind, when making the decision.

Chapter 11 concludes with discussion of some of the key concepts for policy making in word with these new assumptions about wrong-doing. Is examines the role of intrinsic motivation when decisions are non-deliberative. The ability to use taxonomies of the regulatory contexts as a way to suggest for policy makers how to balance the different regulatory tools. To offer various approaches to this new complex world, parallel, consequential and empirical approaches to usage of the different regulatory tools and to offer some insights towards the future of the field as well as its limitations.

Abstracts + key words

## Chapter 1: introduction

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

Abstract:

## The first chapter which is an introductory one, outlines the main argument of the book and present the existing gaps in research and how the book could fill the existing gap in the literatures. The chapter outlines both the theoretical and the policy implications of this argument to the area of legal enforcement and compliance .The chapter builds on the justifications for the project from both theoretical and practical perspective and builds the structure of the chapters and their content.

## Chapter 2 behavioral ethics

Key words:

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

Abstract

This chapter reviews the main theories of behavioral ethics and their relevancy to legal policy making. BE takes the broad view that many people’s actions are based on self-interest in that they serve a need to maintain a positive and coherent view of the self. It accounts for the effect that self-interest has on our cognitive processes (e.g. memory, sight, and information processing) as opposed to simply looking at how self-interest affects motivation. It is concerned with the implicit effects of self-interest, without peoples’ admitting to themselves that such influence exist, than with how it shapes explicit choices. The chapter also focuses on various other behavioral factors, which are of importance for legal policy, such as people’s level of awareness to their own wrong-doing, their ability to control it and the situations which are likely to increase it.

## Chapter 3 formal controls

Key words:

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

Abstracts:

This chapter discusses the formal and classical interventions which were traditionally used by state to regulate the behavior of people when the assumption is that most relevant to people with that mindset. The chapter focuses on three main mechanisms of legal compliance—price, fairness, and the expressive effects of law—that aim to change people’s explicit behaviors that are the result of a deliberative process. Since the focus of the book is on implicit processes, the chapter revisits the desirable and undesirable implicit processes that accompany the usage of formal controls, such as crowding out, misperception of norms and socialization, social norms and moral intuition, and egocentric interpretations of fairness. Based on the recognition of these processes the chapter tries to evaluate the strengths and weaknesses in regulating human behavior. The chapter concludes with some of the changes that need to be done with regard to the formal approaches to regulation.

## Chapter 4 non-formal controls

Nudges, debiasing, Ethical nudges, limits of nudges in general and ethical nudges in particular, accountability, choice architecture, ethical training

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

## Chapter 5 social norms

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

Abstracts: Social norms can both increase and reduce compliance by good people. This chapter focuses on cognitive and motivational limitations in relation to social norms that play an important role in the ability of states to trigger informal controls and other enforcement tools. An important component that underlies social norms’ impact on behavior is individuals’ misperception of norms, which encourages them to violate the law in accordance to what they perceive incorrectly as the prevailing social norm. When people self deceive themselves with regard to what is the prevailing norms, it is easier to self-justify wrong doing Focusing on two main phenomnea of false consensus and pluralistic ignorance the chapter demonstrates the role of social norms in causing good poepel to engage in bad behaviors. The chapter uses the example of trade secrets divulgence in silicon valley, as a way to demonstrate many of the effects of social norms.

## Chapter 6 individual differences

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

Abstract:

While the goal of this book is to draw attention toward situational wrongdoers, there remains the need to set them apart from intentional wrongdoers on the one hand and from individuals who are less likely to engage in situational wrongdoing on the other. Thus, while in earlier chapters of the book, I have argued that regulators need to recognize that situational effects are often more important than individual factors in determining misbehavior, individual variation cannot be ignored. Misconducts continue to be committed deliberately by those individuals who intend to do harm, and there is likely a variation in how situations affect good people’s likelihood to engage in uncooperative behavior. Recognizing and understanding this variation is hence crucial to any normative recommendation we make with regard to the situation. Thus for the purposes of this chapter it is useful to consider three types of people: (1) calculated wrongdoers, who resemble those described by the “bad man” approach[[4]](#footnote-4); (2) situational wrongdoers, who engage in wrongdoing in situations (e.g., those characterized by ambiguity or by following social norms) that allow them to rationalize their misconduct and thereby reduce their motivation to do good; and (3) genuinely good people who actively want to do good things, but end up violating the law or behaving unethically because of reduced awareness of the wrongdoing (e.g. blind spot, motivated reasoning) or internal justifications that reduce their motivation to do good (e.g., moral licensing, moral forgetting). The chapter then concludes that individual variation might not be stable enough and examines few alternative to individual variation- demographic, occupational and variation base on people’s level of intrinsic motivation.

## Chapter 7 pluralistic effect of the law

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

This chapter examines the ability of the law to communicate with people with different modes of reasoning, or from different segments of the population using traditional and nontraditional enforcement mechanisms,. The chapter examines, based on the richer behavioral account of the people, the law tries to regulate, how we could reanalyze some of the main concepts of the law. For example, the dilemma of detection vs. punishment is revisited, given the good people approach to law. In addition, this chapter analyzes some of my own empirical studies on compliance and legal enforcement. In doing so, I highlight some of the inconsistencies found in my research on the likely effect of a legal action in a given situation on peoples’ behavior. In other words, the multiple processes that underlie compliance behavior, as shown in the earlier chapters, require us to account for the multiple effects of law on behavior. It is therefore not surprising that the predictability of law in inducing compliance is limited.

## Chapter 8 enforcement trade-offs

In this chapter, we focus on the enforcement dilemmas arising from the different interventions. Its aim is to enable policy makers to design the optimal mix of behavioral change measures, given all of these complexities, while recognizing the tradeoffs between competing policy goals. Rarely does one policy affect all types of behavior in the same way in all contexts. Much more often, the same policy will facilitate one type of desired behavioral change while discouraging another type of welcomed change. For example, some policies produce long-term change at the expense of short-term change. Others encourage more sustainable behavioral change but at the cost of being more restrictive. Some regulations make the desired behavioral change more explicit (the expressive effect of the law), while others rely on nudges, which work without people’s full awareness. The chapter creates some guidelines for policy makers need to be aware of all of these effects and decide which are the most important to target and when.

## Chapter 9 corruption

Key words: implicit corruption, non-monetary corruption, agency and corruption,

The chapter discusses the implication of behavioral ethics research to the regulation of corrupt.

In this chapter, we will Identify situations in which research on behavioral ethics should change legal assumptions about causes of concern. Contexts such as vagueness will be discussed to demonstrate the potential for corruption. Another context which will be discussed is non-monetary connection which according to behavioral ethics research is more dangerous as people are less likely to self monitor themselves. Along those lines, we will analyze also the situation of partial financial dependency of politicians which was argued to be better than full dependency, but again according to BE research might be harder to block Finally we will analyze situations where the unethical behavior is being performed by agent as in context of lawyers, for a cause (as in some public or philanthropy contexts) for a larger group or by a group of people(as in the context of corporation). The rest of the chapter will review the ability of different regulatory means both formal and informal which could be used to curb corruption of good people. I will rely on some of my joint empirical studies in this context to suggest some new ways of thinking on how to deal with implicit corruption. Finally the chapter analyzes some of the pros and cons of the different tools to curb corruption in light of the above perspective on corruption. For example whether ethical nudges relative to the more established behavioral nudges in the context of health, energy etc.

## Chapter 10 employment discrimination

Key words: implicit discrimination, stereotypes, hiring decisions.

As suggested above, the processes leading people to discriminate are oftentimes unconscious – especially those involved in the first stage where people’s genuine primary prejudice is generated. Research on the non-rational aspects of discrimination is related to social and cognitive psychology research on intergroup psychology.[[5]](#footnote-5) Over the years, social psychology focused on the stereotyping processes as one of the central processes in charge of implicit discrimination. Within this literature the work of scholars such as Fiske’s is especially promising because it offers a more nuanced and multi-dimensional approach to discrimination. In the context of discrimination, it has been shown that both conscious and unconscious processes interact without individual's full awareness that discrimination even occurs.

## Chapter 11 conclusion

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

The last chapter focuses on summarizing the arguments made in the different chapters. The summarizes the different approaches to legal interventions, consequential, where the less traditional approach follows the formal controls, a parallel approach, where few measures are being used at the same time and targeted, where for a particular situation a more nuanced approach is being used. The demonstrates the importance of intrinsic motivation and the ability to change it through extrinsic measures as well as through training so people’s system 1 will be more in line with our cooperative behavior. The chapter then moves to examine various taxonomies, which could be used to know in advance what type of approach is more suitable for each situation. In the taxonomies, we take into account factors such as the nature of the behavior, the cost of mistakes, the ability to use external measures and the proportion of cooperation needed. Durability of the behavioral change needed in the particular context, is there a moral consensus etc. The chapter concludes with direction for future research in the area of behavioral ethical and enforcement policy making.

1. [↑](#footnote-ref-1)
2. Balcetis, E., & Dunning, D. (2006). See what you want to see: motivational influences on visual perception. *Journal of personality and social psychology*, *91*(4), 612. [↑](#footnote-ref-2)
3. Jolls, C., & Sunstein, C (2005). Debiasing Through Law. *National Bureau of Economic Research,* No. w11738*.* [↑](#footnote-ref-3)
4. In later parts, I discuss also the possibility of calculative individual who could not be seen as “bad” people. [↑](#footnote-ref-4)
5. Tajfel, H. (2010). *Social identity and intergroup relations*. Cambridge: Cambridge University Press; Taifel, H., & Turner, J. C. (1979). Realistic Group Conflict Theory. *The social psychology of intergroup relations,* 33-47. [↑](#footnote-ref-5)