essay

Differentiated Regulation across People and Situations: A Behavioral Ethics Perspective to Personalized Law

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*Wrongdoers often operate without being fully aware of the moral or legal consequences of their own actions. Thus, much of the unethical and illegal activity plaguing society is committed by self-perceived "good people". This insight, introduced to the legal field by behavioral ethics research, challenges our prior perceptions of law and law enforcement. Mainly, it is unclear that existing law enforcement mechanisms can be successful in curbing misconduct by those wrongdoers who are unaware of the unethicality of their own behavior.*

*This paper proposes a regulatory scheme designed specifically to overcome this problem and successfully regulate unaware misconduct. The first stepping stone in designing such a system would be to develop enforcement tools that focus on transgressors' awareness. Thus, we propose the use of moral reminders, nudging mechanisms that are designed to encourage moral deliberation and help potential wrongdoers recognize the unethicality and harmfulness of their conduct.*

*To use such regulatory tools effectively, we must be able to identify those instances in which people are likely to ignore the unethicality of their own actions. Building on research in the area of behavioral ethics, we suggest that enforcement tools designed to treat unaware misconduct should target* situations *rather than individuals. Behavioral ethics research shows that unaware misconduct is situation-driven; in situations in which moral pitfalls are present, an alarming percentage of individuals behave unethically. Therefore, to regulate unaware misconduct in a targeted way, we must recognize these problematic situations, and then deploy the appropriate regulatory answer.*

*For such an approach to work, policy makers will first need to know in advance how different situations might contribute to unethicality by ordinary people. Using traditional law enforcement methods, having such knowledge on any given situation might be prohibitive. Therefore, the paper calls for the use of Big Data in order to recognize situations in which unaware misconduct thrives. The use of big data has recently been popularized in the area of personalized law; we offer several important modifications that would allow the use of this approach in order to determine people’s likely unethical behavior in different situations. The paper explores different possible datasets that might serve this purpose, pointing mainly towards existing datasets maintained by consumer protection agencies, financial regulators and online dispute resolution centers.*

*Combining these elements together, the paper offers a full menu of regulatory tools designed to target situational wrongdoing by unaware transgressors. Based on big data analysis, regulators should be able to know when to use such mechanisms, and which specific tool is most suitable for each specific situation. We also discuss possible limitations and risks associated with such a regulatory scheme.*

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# Introduction

More often than not, wrongdoers operate with little-to-no awareness of the unethicality of their own actions. People ignore information, convince themselves of their own righteousness, and have difficulty in identifying their own faults. In other words, people, for the most part, do not think of themselves as "bad people." This insight is central to the field of behavioral ethics, studying human decision-making in the context of moral dilemmas.[[3]](#footnote-3)

Behavioral ethics replicates the focus of the biases and heuristics literature, which is the basis of behavioral law and economics, and transfers this to the field of ethics and morality. It explores various contexts in which people either committed wrong unintentionally or without full awareness of the antecedents of their transgression. Many paradigms of behavioral ethics are based directly or indirectly on concepts of “motivated reasoning", where people’s various types of motivations are affecting their understanding of reality.[[4]](#footnote-4) In this framework, it has been shown that people resolve moral dilemmas based on intuition, *post hoc* reasoning,[[5]](#footnote-5) and implicit rather than explicit attitudes.[[6]](#footnote-6)

The current paper joins an emerging trend of scholarship, carrying the teachings of behavioral ethics into the law.[[7]](#footnote-7) In particular, if wrongdoers often fail to understand they are acting badly, this has a profound impact on the way we currently understand and enforce the law. This is especially true with regard to *ordinary unethicality*, or the more mundane, day-to-day types of transgressions, such as breaching of contract or misrepresentation of information in commercial transactions. In those contexts, when unethical behavior is not particularly violent and its harms are not immediately obvious, transgressors find it especially tempting to rationalize their own wrongdoing.[[8]](#footnote-8)

Existing legal theory and legal practice emphasize concepts of sanction, deterrence and moral messaging. That is, to prevent wrongdoing, the law acts to punish and tarnish those who have acted badly. Of course, this can only be expected to work if we assume calculated and deliberate wrongdoing. The threat of sanction can deter potential wrongdoers only if they understand, or at least could be prompted to reflect and understand, that they are acting badly. On the other hand, once we realize misconduct often originates with non-deliberative choice, these existing conceptions of law enforcement are far less relevant. This change in perception creates many new challenges from a regulation and enforcement perspective. Mainly, it is unclear that existing legal instruments can effectively curb misconduct unaware wrongdoers. Symmetrically, the fact that misconduct can be commonly practiced by ordinary people suggests that the proportion of people whose behavior we need to regulate is far greater than previously accounted for.

These challenges lead us to explore the possibility that the personalized law approach, utilizing Big Data information, can offer solutions to the problem of oblivious misconduct. The bourgeoning personalized law literature highlights newfound abilities to tailor regulation to better fit personal capabilities and attributes.[[9]](#footnote-9) We take our cue from this pioneering branch of legal scholarship, and suggest some crucial modifications that might allow it to tackle the problems presented by behavioral ethics. We conclude that the most promising course of action is to design and target regulation not to specific individuals, but to specific *situations*.

We explain that this use of big data is more appropriate, in light of behavioral ethics research. A main finding of behavioral ethics is that suspicious situations predict unethicality far more accurately than personality traits can. In fact, recent behavioral ethics works show that in some situations unethical behavior is near universal.[[10]](#footnote-10) This means that, quite generally, regulators should go after typical problematic scenarios, which are proven to foster misconduct, rather than try to identify individuals that are more prone to misbehave.

Of course, this conclusion is not universal, and might be relevant in some contexts more than others. In this paper, we distinguish contexts in which misconduct appears to be particularly situation-driven by focusing our efforts on the more mundane forms of misconduct, those prevalent in day-to-day market activities, as opposed to more severe types of misconduct, such as violent crime.

The paper suggests that big data analysis can help identify those situations in which ordinary unethicality proliferates. Once those situations are identified, the paper offers specifically tailored regulatory tools that can effectively target specific types of immoral behavior. *The common theme here is that enforcement mechanisms must target transgressor's awareness, rather than their motivation*. Thus, we propose regulatory tools that will encourage moral deliberation, and are designed to direct wrongdoers towards a better understanding of their own actions.

By developing these arguments, the paper offers several novel contributions. First, this essay is the first law review publication to systematically introduce the teachings of behavioral ethics into a normative legal framework dealing with day-to-day unethicality. In this, we push a crucial point, highlighting the inherent weakness of existing regulatory paradigms, structured around the assumption that misconduct in areas such as white-collar crime, administrative delinquency or contract breach, is, as a general matter, deliberate.

Second, the paper offers another contribution by bringing together behavioural ethics research with the literature on tailored regulation and personalized law. This is the first paper to consider the possible connections between those two literatures and to bring together these two important current trends in legal scholarship.

The paper's third contribution is in offering, for the first time, a big-data regulation scheme that is situation-driven and not person-driven. In this, the paper suggests the mechanisms that might allow implementing a tailored regulation approach in a way that could tackle the problems and challenges presented by behavioural ethics teaching. We highlight the advantages of a situational approach in this context, but also point out some general advantages of situation-focused big data regulation. This means the approach we present here might be applicable beyond the present context of misconduct by unaware transgressors.

The paper's fourth and final contribution is in offering a full menu of regulatory tools designed to target misconduct by unaware transgressors. These include moral reminders, designed to prompt moral deliberation, as well as other tools promoting accountability and reflection in places where moral blind spots abound. We suggest that big data analysis can help indicate the precise type of regulatory intervention appropriate in different cases. The expansion in legal tools that was introduced by Thaler and Sunstein’s Nudge approach[[11]](#footnote-11) is taken in this paper a step further, as the paper offers a novel technique of tailoring non-traditional intervention tools to specific situations. In this, the paper offers a comprehensive regulatory framework, tying together the means of identifying, categorizing and curbing the different manifestations of unaware misconduct.

The paper proceeds as follows. Part I offers an introduction to behavioral ethics and highlights its relevance to the study of the law. This Part surveys prevailing theories of law enforcement and points out their inadequacy in light of behavioral ethics findings. In particular, this Part shows that existing regulatory paradigms, emphasizing such concepts as deterrence, fall short once the possibility of unaware misconduct is considered central. The aim of this Part is to call attention to the need for a new regulatory approach. Part II then proceeds to offer such an approach by exploring the possibility of regulating unaware misconduct using a tailored regulation methodology. This Part starts by surveying the personalized law literature, and points out some of the limitations of the existing model. Part II shows that the focus on personality traits, currently guiding the personalized law literature, can be counterproductive when attempting to regulate unaware misconduct. Instead, this Part offers a focus on the characteristics of situations as the preferable method for tailoring regulatory efforts. This Part then lists some general advantages of this proposed tactic. Part III completes the Paper by offering a list of regulatory tools designed specifically to target unaware misconduct. This Part explains how big data analysis, following the method outlined in Part II, can help match the appropriate regulatory solution for specific types of situational wrongdoing. A short conclusion follows.

# I. Behavioral Ethics and The Law

Variation in compliance motivation across different people and situations becomes more important and complex when accounting for the role of non-deliberative choices in human behavior. Recent years have seen an increase in the study and conceptualization of non-deliberative choices, and numerous experiments have developed into competing paradigms describing various aspects of behavior that are not regulated with full consciousness.[[12]](#footnote-12) The popularity of scholars such as Daniel Kahneman and Eldar Shafir in psychology, Richard Thaler in economics, Cass Sunstein and Dan Kahan in law and Dan Ariely and Max Bazerman in management, demonstrates in both applied and basic sciences, the importance of the intuitive and non-deliberative aspects of human choice and behavior. Indeed, various methods have been used to study non-deliberative choices. One paradigm that has gained popular recognition through Kahneman’s book, *Thinking, Fast and Slow*, developed the concept of two systems of reasoning, which now stands at the core of much research in behavioral law and economics.[[13]](#footnote-13) Thousands of papers have been published based on this concept,[[14]](#footnote-14) including many collective volumes.[[15]](#footnote-15) Kahneman and others differentiate between an automatic, intuitive, and mostly unconscious process—System 1; and a controlled and deliberative process—System 2. The recognition of automaticity in decision-making has played an important role in the emergence of behavioral economics and subsequently behavioral law and economics.[[16]](#footnote-16) Naturally, these paradigms have also been criticized by many scholars.[[17]](#footnote-17)

This literature has already contributed to legal scholarship and to economic research.[[18]](#footnote-18) While indeed a large portion of the research on behavioral law and economics is related to biases attributed to non-deliberative choice, this is done mainly with regard to the effects of framing and perception of risk and probabilities—with almost no focus on compliance motivation and biases in self-perception of one’s own unethicality. The introduction of behavioral ethics into the law, offered here, aims to fill this gap.

## Between Behavioral Ethics and Behavioral Economics

The field of behavioral ethics (BE) studies people’s inability to recognize the effect of self-interest on their behavior. This is a highly important aspect of human behavior, one which has been neglected by scholars in other fields. As one of us has discussed elsewhere,[[19]](#footnote-19) behavioral ethics is different from behavioral law and economics. Behavioral law and economics (or BLE) offers the *bounded rationality argument*: due to information deficiencies, cognitive limitations and time constraints, individuals fail to make rational decisions. This argument means that people cannot be fully trusted to make decisions in a way that will enhance their own welfare. BLE therefore highlights peoples' failure to serve their own self-interest. BE offers a supplementing concept – that of *bounded ethicality*, focusing on people's inability to recognize their own faults. Bounded ethicality appears to result from a long line of behavioral features, clouding individuals' judgement and preventing them from seeing how their own self-interest is subconsciously driving their actions. BE and BLE can therefore be understood as studying opposite architypes of cognitive limitations related to individuals' self-interest. BE is concerned with the power of self-interest to implicitly effect our decisions, while BLE studies the ways in which our cognitive limitations hinder our ability to promote our own self-interest.

BE therefore calls for a reorientation of the behavioral analysis of the law. This new perspective would no longer be primarily concerned with whether people are able to act rationally; instead, it is concerned with 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 how to lead individuals towards their personal optimal outcome, should be at the core of this new behavioral analysis of law.

## Behavioral Ethics and Ordinary Misconduct

Research in BE delves into the mechanisms that allow and facilitate bad conduct by self-perceived good people.[[20]](#footnote-20) Self-deception plays a key role here, as wrongdoers are able to convince themselves they are committing no wrong. This is achieved through *motivated reasoning*: individuals ignore some facts and emphasize others, in a way that helps them support a perception of a moral self. [[21]](#footnote-21) These mechanisms allow the existence of *ordinary unethicality* – immoral behavior that is not accompanied by malice and is conducted by individuals that value morality.

To give an intuitive example of such ordinary misconduct, a mayor will find it difficult admitting to himself that his behavior is driven by anything other than the benefit of the city he runs – even if his specific actions[[22]](#footnote-22) seem to be, on the surface, motivated primarily by his own self-interest. Such gaps in awareness are created because people tend to overestimate their own ability to remain impartial and assess the nature of their actions and motives. This means people will often believe they are acting more ethically than they actually are.[[23]](#footnote-23) Chugh, Bazerman, and Banaji explain such behaviors originate with an *illusion of objectivity* causing people to view themselves as more objective relative to others.[[24]](#footnote-24) This hinders individuals' ability to recognize their slips into corrupt and immoral behaviors. These notions relate to a broader theme, mostly associated with the work of Bazerman, exploring concepts of *ethical blind spots*. Such blind spots represent situations and mechanisms that allow individuals to ignore the adverse effects of their actions and prevent them from recognizing their own unethicality. Government corruption can also be explained by another cognitive block: 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 potential gains from unethical behavior grow. This means that peoples' mental ability to restrain themselves cannot be counted on as an effective gatekeeper when stakes become high. In other words, power, literally, corrupts. The methodological observation of Greenvald and Banaji on the power of implicit judgment may have even stronger force: because people love themselves so much, they have hard time admitting, even to themselves, that they behave immorally.[[25]](#footnote-25)

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.[[26]](#footnote-26) They focus on how automatic processes are all largely related to self-driven bounded ethicality processes.[[27]](#footnote-27) Along similar lines, Marquardt and Hoeger showed that individuals make ethical decisions based on implicit rather than explicit attitudes.[[28]](#footnote-28) When examining the automatic system, Moore and Loewenstein[[29]](#footnote-29) found that the effect of self-interest is automatic, and Epley and Caruso[[30]](#footnote-30) concluded that automatic processing leads to egocentric ethical interpretations.[[31]](#footnote-31)

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.[[32]](#footnote-32) Moore et al. demonstrate that people truly believe their own biased judgments, not recognizing that their behavior is problematic.[[33]](#footnote-33) Gino et al. advance a similar view, showing that the level of control needed to behave ethically is much higher than that required to act unethically.[[34]](#footnote-34)

For our purposes in this paper, whatever may be the cognitive sources of unaware misconduct, the result is the same: people can, and often do, participate in unethical behavior without fully realizing it. The next Part highlights the importance of this conclusion for the study of the law.

## The Importance of Behavioral Ethics Across all Legal Fields

Clearly, when examining the implicit effects of self-interest on how people make choices, one can easily see that this is highly relevant to almost any legal doctrine. Whatever its cognitive sources, moral blind spots abound. This makes the issue of legal compliance markedly more nuanced – and more troubling – than previously appreciated.

Much of the current literature on legal compliance examines people’s moral judgment, but ignores the possibility that people might engage in motivated reasoning. The rich experimental literature on compliance assumes that people recognize a moral conflict, and then proceed to shape their actions in the light of that conflict. This approach ignores the fact that, in reality, people might ignore the conflict to begin with, or 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.

This dynamic is salient in the context of civil litigation. For instance, in a contractual dispute, the court might eventually declare one party as a wrongdoer, for breaching his or her contract. However, prior to that conclusion, both parties will earnestly claim to be in the right, each convinced of his or her own good faith. Thus, it has been argued that parties to a contractual dispute do not typically see themselves as "breaching" their contract, but instead justify their behavior as complacent with some self-driven interpretation of their contractual obligations. Such justification could include arguments such as “everyone is performing their contract in a similar way” or “no one would care”. Similarly, a contracting party might excuse her own wrongdoing by attributing its causes to the other side to the contract, or blame the other side for behaving similarly.[[35]](#footnote-35)

This fact-pattern is squarely illustrated in the case of Jacob & Youngs, Inc. v. Kent,[[36]](#footnote-36) an all-time classic of contract law scholarship. In this case, a contractor (Jacob & Youngs) installed the wrong type of pipe in the homeowner's (Kent's) house. In this case, the contractor clearly saw himself as a "good person", claiming (rightly) that there was no measureable 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 illustrates a simple truth – people have a strong tendency to believe they are in the right. More generally, parties accused of having "breached their 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.[[37]](#footnote-37) 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 somewhat unrealistic assumptions describing breach of contract as a fully deliberate and conscious decision.[[38]](#footnote-38)

In a similar way, the teachings of behavioral ethics should inform all aspects of administrative law, where the requirement to consider the public interest must overcome the agent’s self-interest.[[39]](#footnote-39) In employment discrimination, Krieger et al have brought the attention of the legal academia to the fact that much of the discriminatory decisions made in employment context are made implicitly rather than explicitly.[[40]](#footnote-40) In corporate law, one of us has discussed elsewhere the numerous behavioral mechanisms that could explain various types of breach of duties of loyalty.[[41]](#footnote-41) One of these mechanisms is the creation of a distorted norm of professionalism, putting the interest of the organization above anything else, while ignoring the legitimate interests of other parties. Corporate misconduct is also facilitated by the fact that perpetrators can more easily avoid 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. In tax law, the proliferation of ordinary misconduct can be attributed to the fact that misconduct in these context is typically manifested in omission rather than active behavior. Research shows that people generally find it easier to reason around and justify misconduct by omission. In fiduciary law, financial advisers are obligated to consider the best interest of their clients in suggesting investment options. Several factors, including the inherent uncertainty of risky investments, contribute to the prevalence of ordinary unethicality in this context.

The current paper does not cover all of these topics. Instead, we focus here on ordinary misconduct between individuals, and not between an individual and the state. Thus, most of our examples are taken from contract law and fiduciary law, when one party might misrepresent the true value of an item in a bargaining context, fail to disclose important information, or otherwise take advantage of an advantageous position over others.

Behavioral ethics highlights the existence of moral blind spots, and points out peoples' ability to ignore their own wrongdoing. These insights pose new challenges for policy-makers. If wrongdoers often fail to understand they are committing a wrong, what can the law do to prevent them from acting badly? Familiar regulatory mechanisms, based on the ideas of deterrence, punishment, rewards and expressive morality, seem to fall short once this issue is considered. In the following paragraphs we first survey existing legal paradigms of law enforcement, and then move on to offer some novel concepts that might offer better solutions for enforcing the law on the self-perceived good people.

## The Need to Go Beyond Deterrence

Contemporary legal scholarship emphasizes deterrence as a primary policy goal.[[42]](#footnote-42) Within this framework, scholars study legal rules as sanctions, posing prices on certain types of undesirable behavior.[[43]](#footnote-43) Given some assumptions regarding rational decision-making, sanctions must be designed appropriately in order to incentivize wrongdoers to refrain from harming others.[[44]](#footnote-44) Generations of legal scholars and law and economics scholars have employed the deterrence perspective to study the effects of law on behavior.[[45]](#footnote-45)

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.[[46]](#footnote-46) 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.[[47]](#footnote-47) As discussed above, behavioral scholars have focused on challenging the dominant perception that people are motivated by a fear of sanctions.[[48]](#footnote-48) The relative effectiveness of enforcement mechanisms versus punishment levels in deterring transgressions remains the subject of fierce debate.[[49]](#footnote-49) Most studies suggest that degree of punishment has only a marginal deterrent effect on individual behavioral choices.[[50]](#footnote-50)

Behavioral ethics provides an explanation for this phenomenon. Self-perceived good people, blind to the immorality or illegality of their own actions, fail to consider the possibility that they will be punished. Therefore, the role of the law as a deterrent mechanism is limited at best. This insight has fundamental implications for our understanding of the legal system, its goals and functions. The possibility of large scale innocent wrongdoing shakes the foundations of deterrence as a theory of law enforcement. To see this more clearly, let us go back to the contract breach example. Current economic theory of contract breach compares different remedies in their ability to deter against breach. In this framework, an optimal contract remedy would set the correct level of sanction, in order to incentivize a party to a contract to breach when breach is "efficient", and only then.[[51]](#footnote-51) If, more often than not, parties breach their contracts without ever realizing they are doing so, this understanding of contract remedies loses its grip on reality.

To enforce the law on the unaware "good people", a different approach is required. For instance, people with limited awareness to their wrong-doing might be more easily affected by the likelihood of enforcement than by the severity of the punishment. The reason for this is that commonplace instances of enforcement could serve as a moral reminder, alerting the good people to the possible dangers of their actions. More frequent enforcement creates more reminders for individuals, which could reduce both their justifications for transgressions and their lack of awareness that their behavior may lead to wrongdoing. This will also likely reduce uncertainty around a particular situation, which may have made it easier for an individual to deceive themselves regarding the legality of their behavior. In other words, the relative deterrent value of frequent enforcement versus severity of punishment depends on an individual's mindset. Raising the cost of wrongdoing only affects calculative individuals. For genuinely moral individuals whose wrongdoing is mainly related to their blind spots, raising the expected cost of punishment might not reduce their likelihood of transgressive behavior.[[52]](#footnote-52)

Clearly, imposing harsh punishment does have value; it provides a clear message about the state’s approach and commitment to enforcing morality. However, harsher punishment may reduce the compliance of good individuals. The process of imposing punishment is lengthy, and may provide enough time for a backlash.[[53]](#footnote-53) For example, Erev,[[54]](#footnote-54) who examined how safety regulations were enforced in factories, found that more frequent enforcement with smaller fines was more effective than less frequent enforcement with larger fines. A longer enforcement process enables good people to create justifications for engaging in lower level transgressions. Thus, criminal sanctions that might deter calculative people might do the opposite for people who transgress with limited awareness.

## The Limits of Legitimacy

Alongside deterrence, legitimacy is offered as the main rationale for compliance with 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 factors in human motivation, at times overshadowing self-interest more than expected.[[55]](#footnote-55) Research by scholars like Tyler, Darly and Robinson, and to some extent also Paternoster and Simpson, have shown the importance of fairness and morality in legal compliance.[[56]](#footnote-56) As one of us has shown in his own work on this topic, fairness can shift the behavior of people toward greater compliance and acceptance of organizational rules in various legal contexts,[[57]](#footnote-57) more sensitive environmental compliance[[58]](#footnote-58) and greater organizational enforcement.[[59]](#footnote-59)

While deterrence and legitimacy differ on various grounds in the type of motivation they attempt to influence and in the type of people they interact with, both approaches still focus on people who make deliberate decisions regarding the law.

Thus, the assumption under compliance theory is that people evaluate the fairness (procedural or other) of the law, and then proceed to make a conscious decision whether or not to comply. Thus, for example, in the work of Fishbacher et al., levels of cooperativeness were measured 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.[[60]](#footnote-60) Of course, this type of framing ignores the possibility that people's compliance decisions are undeliberate. Alternatively, it might be that potential wrongdoers will engage in motivated reasoning when interpreting the legitimacy of the law, in order to justify their misconduct.

The same is true for the interpretation of contracts or contractual obligations. When designing experiments to study individuals' attitudes towards contract breach, Wilkinson-Ryan and Baron describe to their participants the promisor’s decision to breach a contract, by straightforwardly stating that, “He decides to break his contract in order to take other, more profitable work.”[[61]](#footnote-61) The authors then proceed to find that contractual obligations carry significant moral weight for many individuals, and effectively alter behavior. The argument is, therefore, that the perceived moral force of the contractual promise generates compliance.

Of course, this conclusion must be challenged in light of behavioral ethics findings. This literature on contractual performance decisions focuses on the dichotomous choice: to breach or not to breach. The way Wilkinson-Ryan and Baron frame their experiments, as studying a "decision to break a contract" implicitly assume that choices are made deliberatively, in reference to clear contractual obligations, ignoring the more realistic possibility that contractual parties face an additional challenge in recognizing the fact their actions might contradict their contractual obligation.[[62]](#footnote-62) In contractual contexts, people need to behave based on their understanding of the contractual negotiations. Motivated reasoning can easily change this understanding to fit the dictates of each individual's self-interest.[[63]](#footnote-63) This means we cannot be so quick to rely on morality and legitimacy, as suggested by existing research, to assure performance of contractual obligations – or to assure compliance with the law more generally.

## The Need to Expand the Regulatory Toolbox

The analysis of deterrence and compliance given above stresses three main problems with the current approach to regulation and law enforcement. First, incorrect assumptions exist about most types of misconduct perpetrated by most individuals. Second, the "one policy fits all" approach to regulation clearly overlooks variation between individuals in terms of their level of awareness to wrongdoing. Third, the existing regulatory approach fails to provide adequate response to most instances of wrongdoing. Thus, two leading figures of the ethical decision-making scholarship argue that incentives-based enforcement fail to correct a large portion of unethical behaviors, because “such measures simply bypass the vast majority of unethical behaviors that occur without the conscious awareness of the actors, who engage in them.”[[64]](#footnote-64) This insight lies at the heart of this paper. Indeed, many psychologists who focus on ethical decision-making challenge the assumption held by most legal scholars about self-control, autonomy, and responsibility for action. These assumptions are fundamental to contemporary regulatory theory, and to the operation of most external enforcement measures. These types of problems lead to the main challenge with which this paper seeks to contend: 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 sanction, nor it is sufficient to assure laws are perceived as fair. With the recognition that deterrence and legitimacy cannot fully regulate ordinary unethicality, some additional regulatory approaches are needed. The challenge for such regulatory mechanisms would be to effectively regulate wrongdoing by perpetrators who are less than fully aware of their misconduct.

The key move towards achieving this goal is in shifting the focus of enforcement from the level of intrinsic motivation to the level of awareness. Current regulatory tools aim to influence people's motivations by offering sanctions, rewards or moral pressures. Behavioral ethics findings indicate that we should instead focus on awareness and trigger more genuine moral deliberation by potential perpetrators. The basic goal in regulating conduct, therefore, should not be to improve incentives, but instead to improve deliberation.

Numerous types of regulatory tools can be used to target awareness and trigger deliberation by potential wrongdoers. These include nudges, moral reminders and a variety of de-biasing mechanisms. Such measures, if designed appropriately, can be used to contend with the problem of misconduct by the good people. Such de-biasing efforts aim to prompt individuals to use System-2 thinking and override self-serving biases.[[65]](#footnote-65) This can be achieved through various techniques, for instance, by prompting potential wrongdoers to consider the effects of their actions, to view the situations from the perspective of potential victims, or to report their decision to an objective third party.

To illustrate these concepts, consider again the case of the contractor in Jacob & Youngs, Inc. v. Kent. In this case, it might be possible to prevent wrongdoing by requiring the contractor to document and explain in writing some of his decisions in performing the contract. Even if such reports are never read by anyone, the mere need to compose them might act to trigger deliberation by the contractor, in a way that could prevent much unaware wrongdoing. Naturally, it would be necessary to use such mechanisms sparingly, so as to avoid making performance prohibitively costly. This can be achieved by tailoring regulation to specific people and situations. We cover this topic in the next Part.

# II. Differentiated Regulation and Personalized Law

Part II presents an important idea. To regulate ordinary misconduct, we must revise our current understanding of law enforcement and come up with a new type of regulatory approach. New enforcement mechanisms are required, ones that are able to enforce the law on people who are unaware of their own unethicality. Wrongdoers act with varied levels of awareness; this is crucial, since the law needs to use different measures for different types of misconduct, and since using the wrong measure might prove ineffective, or even counterproductive.[[66]](#footnote-66) Therefore, Part III discuss a central implementation challenge – how would we know when to use these novel types of enforcement mechanisms? To answer this question, we must come up with some form of a tailored regulation approach, that would differentiate cases in a way that will correctly assign the appropriate regulatory mechanism in each case. This Part discusses several alternative approaches to conceptualize such a regulatory scheme.

## Personalized Law

We are all equal in the eyes of the law. Traditionally, the law aspires to be objective and impersonal, and this aspiration is considered a fundamental feature of the legal structure. Many legal doctrines utilize objective standards of behavior, and set general standards as touchstones against which each individual's conduct is measured. 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. This is again a "one size fit all" standard, structuring the law according to some general and objective point of reference.

However, recent scholarly works have started to push against this long standing tradition, and to call for different versions of more "personalized" forms of law.[[67]](#footnote-67) The crux of the argument is that, considering recent technological advancements, the law can – and should – embrace subjectivity and set legal standards that are more precisely tailored for 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.[[68]](#footnote-68) 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 view. The argument is therefore that the balance should now tilt towards more subjectivity, in light of the fact that nowadays we have more available and verifiable information about individuals than ever before.[[69]](#footnote-69) Courts can therefore use Big Data analysis to discern individual characteristics, thereby allowing a more nuanced type of law, better tailored to the needs and abilities of specific individuals. The personalized law literature utilizes research showing that personality traits can be discerned from available information, such as people's smartphone usage patterns or shopping history. This can allow regulators to construct person-level psychological profiles, and to subsequently apply legal standards that would offer a good fit at the individual level.[[70]](#footnote-70)

At first glance, this burgeoning literature on personalized law offers a promising opportunity for solving the difficulties we highlight in Part II above. Theoretically, identifying individuals' psychological profile can be key in regulating unaware misconduct: if we could find those "good people" that are more prone to fall in a moral blind spot, we would be able to target specific enforcement efforts at such individuals. To accomplish this, however, we must first identify the indicators for those individuals that are more likely than others to engage in ordinary unethicality. This, unfortunately, proves to be a treacherous task.

## Interpersonal Variation from a Behavioral Ethics Perspective

Several paradigms exist which might explain the kinds of people who are more likely to engage in situational wrong-doing.[[71]](#footnote-71) However, variation is not limited to the level of intentionality and moral development, as traditional behavioral law and economics researchers have assumed. Rather, variation between individuals exists also in terms of their likelihood to be effected by particular situations.

BE research suggests the possibility of identifying variation among individuals with regards to ordinary unethicality. For example, research on the implicit association test (IAT) and individual differences, which became the gold standard for studying implicit employment discrimination, suggests variation among people.[[72]](#footnote-72) The IAT gives people a score which predicts to some extent their explicit behavior. For example, in a legal context, research in the area of judicial decision-making has shown how the IAT score of judges affected their discriminatory behavior against black defendants.[[73]](#footnote-73) Similarly, in the controversy around IAT as a screening mechanism for employees in Walmart, much of the discussion focuses on the ability of the IAT to serve as a screening mechanism which will inform employers about the future behavior of job candidates.

Frederick's CRT (cognitive reflection test) is another example of a measure which could prove valuable for showing implicit misconduct.[[74]](#footnote-74) This scale rates individuals based on the likelihood that they will use System 2 to overcome System 1. Studies carried out using this scale have focused mainly on the correlation between an individual’s CRT grade and various other behavioral measures.[[75]](#footnote-75)

Two additional scales that are more directly related to implicit predictors of ethical behavior measure the propensity to morally disengage and moral identity. The scale of propensity to morally disengage[[76]](#footnote-76) was developed on the basis of Bandura's well-known concept of moral disengagement.[[77]](#footnote-77) Celia Moore attempts to use this concept to create a typology of individuals based on the likelihood of their engaging in ordinary unethicality in the workplace. This typology focuses on an individual’s propensity to make excuses for imposing harm on others, such as “he had it coming,” “it would have happened if I hadn’t been there,” etc.). A related concept, moral firmness,[[78]](#footnote-78) differentiates between the likelihood of individuals to commit transgressions based on the likelihood that they would exploit a degree of ambiguity. Seeking a relationship between the different possible scales, Raynolds et al demonstrated that propensity for moral disengagement is moderately correlated with other traits such as Machiavellianism, moral identity, and cognitive moral development.[[79]](#footnote-79) Their overall argument is that there is some type of interaction between an individual's moral knowledge of the situation and his or her propensity to morally disengage; this is basically a combination of the moral development and social cognition theories.

Finally, Aquino’s moral identity scale and the various studies that are based on these measures found that an individual’s likelihood of causing harm, even implicitly, is different across different situations based on his or her level of moral identity.[[80]](#footnote-80) A recent paper by Fine and Van Rooji takes the concept of individual variation a step further and examines two central components of behavioral ethics as predicting sensitivity to unethical behavior.[[81]](#footnote-81) According to this approach, if people are high on moral propensity and are low on rule orientation they will be less likely to react to deterrence.[[82]](#footnote-82) The rationale is that people who are able to reduce the morality tension from a 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 that they will engage in ordinary unethicality, interpersonal variation is not dramatic enough or stable enough to allow differentiation in legal treatment. Even with the use of big data methods, it is not clear that we can know, prior to a given transaction, whether or not the personality traits would matter enough to justify targeted regulation.

It seems that personality prediction might be helpful in legal contexts that focus on extreme behaviors such as dangerousness in the criminal law context,[[83]](#footnote-83) or suitability to become a parent in the context of family law.[[84]](#footnote-84) In those cases, where the source of concern is highly threatening behaviors, an individual's personality may indeed be highly predictive. However, in the types of misconduct that are the focus of the current inquiry, this does not seem to be the case. In this paper, we seek to study the more benign types of misconduct, the day-to-day violations that slowly but surely erode peoples' rights, without ever forcing the transgressor to face the results of his or her actions. In those cases, of misrepresentation in commercial and consumer contracts, of contract breach and breach of fiduciary duty, personality predictions seem to be weak. In fact, behavioral ethics research reveals that many more people than previously assumed could act badly in these types of everyday situations. This makes the of focus on individual variance in unethicality less productive from a predictability standpoint.

In this, our approach differs from that of scholars such as Porat and Strachilevitz, who call for reliance on the big five theory as a way of creating personalized contracts. In our view, this focus on personal-level variation is limited in its ability to significantly predict most of the behaviors that are relevant for the law.

Furthermore, applying a personalized approach to target ordinary unethicality might also be problematic also because such an approach might fail to capture temporal variance. Thus, behavioral ethics research indicates that past behavior may not adequately predict future conduct, because of the phenomenon of *moral licensing*. Moral licensing theory suggests that people use past good deeds to excuse later misconduct.[[85]](#footnote-85) Monin and Miller find that experiment participants 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.[[86]](#footnote-86) These findings are contrary to the traditional view among jurists, which holds that those who behaved badly are more likely to do so in the future. Contrary to this traditional view, individuals who consider themselves to be “good” based on their past behavior may permit themselves to bend the rules and can be more likely to make unethical decisions when time constraints increase.[[87]](#footnote-87) As individuals' past behavior is no always a good indicator for their future conduct, a personalized law approach to ordinary misconduct seems problematic.

## Personalizing Law Based on Demographic Information

As differentiated regulation cannot currently be based on interpersonal variation, it might be worthwhile to explore the possibility of using demographic data instead if personal-level data.

Generally, it seems to be much easier to engage in differentiated regulation based on demographic, as opposed to individual, differences. However, Tenbrunsel et al suggest that for the most part, demographic factors lack a significant predictive value.[[88]](#footnote-88) They found that there was no, or only a small correlation between factors such as gender or education level and propensity to wrong-doing. This suggests that demographic strategies are not likely to be useful. Tenbrunsel et al further report mixed findings about the relationship between gender and unethicality. Regarding the relationship between culture and unethicality, there are conflicting studies which do not present a clear picture. Tenbrunsel et al. report that while some studies find a gap between Brazilians and Americans with regard to compliance, this effect was not found in later studies.[[89]](#footnote-89) Other factors such as age and education have also produced mixed findings, with some studies showing a more consistent relationship than others.[[90]](#footnote-90)

Additionally, the use of demographic information might raise constitutional concerns, and be highly objectionable on morality grounds. Targeted regulation based on demographic information is likely to be considered a type of profiling, and therefore prohibited.[[91]](#footnote-91)

## Tailoring Regulation to Situations Rather than People

Ordinary unethicality seems to be situation-driven. By the nature of unaware misconduct, it does not require any exceptional anti-social sentiment by the perpetrator. To the contrary, any self-perceived "good person" can fall into a moral blind spot. However, moral blind spots are not always present – their existence depends on a host of factors that can joint together to create situations in which individuals' moral judgement would be more easily impaired. For instance, some behavioral ethics experiments identified situations in which up to 80% of people were found to lie consistently; yet more generally, the aggregate result of the numerus experiments we mention throughout the paper is that ordinary unethicality is not limited to any specific group of people, but is ubiquitous.[[92]](#footnote-92)

This suggests that the best way to identify focal points of ordinary wrongdoing might be by targeting suspect situations, rather than suspect individuals. Therefore, the regulation of ordinary misconduct might require an updated version of responsive regulation, one that singles out situations and not individuals. Below, we describe some additional advantages in focusing on situational rather than individual variation. Those advantages seem dominant in the context of ordinary unethicality.[[93]](#footnote-93)

As mentioned above, existing scales designed to measure personal tendencies towards ordinary unethicality do not provide large enough differences between people to justify a differentiated regulatory approach. Those limits of interpersonal variation lead us to suggest that generally speaking, the situational factor is much more dominant than the personal factor, at least in the context of types of misconduct we study here.

By recognizing the limited ability of individuals to monitor their own behavior, we give the situation a different, and presumably larger, role than it has had in the more traditional law and economics perspective. The now famous “nudge approach” suggests that, given our growing recognition of people’s non-deliberative reasoning, situations should be modified in various subtle ways to improve behavior. We call for a modified version of the nudge approach, that would be relevant to problems raised by behavioral ethics. Such an approach would seek to modify environments and situations – not in order to help individuals arrive at the decisions that would best serve their self-interest – but in order to help them avoid unethicality. This follows from the growing recognition in the legal enforcement literature that the source of wrongdoing is not necessarily the “bad apples” but rather the environment in which they operate.

Various behavioral ethics scholars have attempted to understand the connections between behavioral ethics and situational wrongdoing. Tenbrunsel and Smith-Crowe discuss the situational factors affecting moral awareness. They conclude that ethical infrastructure is much more important for moral awareness relative to individual factors.[[94]](#footnote-94) Along those lines, Tenbrunsel and Messick[[95]](#footnote-95) argue that formal and informal systems, and general organizational climate are responsible for much unethical behavior, especially because of the process of "ethical fading", trigged by the use of euphemism.[[96]](#footnote-96)

Thus, in contexts where the expected harm is created by a non-calculated transgression, which could be carried out by good people who usually avoid calculated wrongdoing, the focus should be on designing the situation so that an individual's ability to maintain his or her self-perception as a good person is diminished. Such measures include reducing ambiguity, reducing excuses for wrongdoing, increasing accountability and encouraging moral deliberation.

Therefore, to target regulation effectively, we would need to know more about which situations trigger more unethical behavior. The specifics are highly important here. For instance, we should try to identify the times of day in which people are more likely to behave unethically. Other factors might include the identity of the parties to a specific transaction, the nature of the goods or services provided, the relationship between the parties, the role each of them has as a repeat or one-time player, and so on. The more information we have about the situational causes of unethicality, the more likely it becomes that targeted situational regulation could 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 in order to recognize situational wrongdoing and offer tailored enforcement solutions designed to combat it. Importantly, the nature of the information required here is markedly different from the information used under the "personalized law" approach. The personalized law approach requires information that can be explicitly attributed to a specific individual. Thus, a regulator would use, for instance, one's smartphone use history in order to build a personal profile, which will be used, in turn, to construct a standard of behavior specifically tailored to this individual. This, naturally, raises significant privacy concerns. Conversely, the type of information required under a situational regulatory approach refers to situations rather than individuals. That is, the regulator would need to know what situations lead to exceptionally large volumes of wrongdoing, regardless of the identity of the specific wrongdoers. Thus, even if privacy concerns mean that big data cannot be used for specific individuals, it could still be of considerable use in helping regulators to understand situations in which certain measures work better than others. This could involve constructing a personal and occupational background that provides insight into the behavior of people across certain situations where ordinary unethicality might be on the rise.

The types of data relevant here are different from the ones used under a personalized law approach. Thus, to identify situational wrongdoing, the focus should not be on personal information (such as smartphone use) since the primary goal is to characterize situations and not individuals. Therefore, the main databases relevant to our needs are those documenting and recording misconduct. At least two distinct types of datasets can be relevant here.

First, much information about disputes can be gleaned from Online Dispute Resolution (ODR) records. Since the 1990s, an ever growing part of our economy is conducted through online markets. Such markets have developed their own dispute resolution systems, often operating alongside, and sometimes instead of, the more traditional systems of adjudication. These new systems manage an enormous volume of disputes, which are typically fully documented online. It would be extremely useful to tap into these datasets in order to characterize the situations that more typically give rise to legal disputes, that often follow some type of misconduct. Relevant data sets could be those maintained, for instance, by EBay's Resolution Center, or by similar systems operated by Amazon, or any other major online seller. The analysis of the information contained in those sources can significantly improve our understanding of ordinary misconduct. For instance, it might be possible to show which types of products or services are more often the source of a dispute. From a legal perspective, there is no difference between misrepresentation in selling a used car or in selling a used toy. However, from a behavioral perspective, it very well may be that some differences exist, and that some items, more than others, cause seller or buyers to more easily engage in motivated reasoning and unknowingly cheat. The use of big data analysis can reveal such trends, which will allow deployment of appropriate regulatory tools.

A second type of dataset that might prove useful are those currently held by regulators or consumer protection agencies. For instance, in the context of financial regulation, the Securities and Exchange Commission (SEC), the Office of the Comptroller of the Currency (OCC), and countless other regulatory bodies hold extensive records on unethical behavior. The same can be said for The FTC’s Bureau of Consumer Protection, and any other regulator dealing with consumer complaints. By mining the information currently held by those institution, we could begin 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 responsible, when possible, those responsible for creating these situations.

Importantly, some forms of situational regulation are already being implemented by private actors. Thus, for instance, JP Morgan provides ethical reminders to employees, warning them of the possibility they are approaching the limits of legitimate business practices. Such warnings are based on "predictive monitoring" algorithms and attempts to prevent wrongdoing before it occurs.[[97]](#footnote-97) This type of mechanism is gradually being adopted by more financial institution,[[98]](#footnote-98) and is based on big data analysis. 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.

## The Advantages of Situational Regulation

There are many reasons for why it is better to focus on finding differences across situations, rather than across people (as suggested by the personalized law approach).

First, as suggested above, a focus on individuals is unlikely to significantly improve the predictability of misconduct. This is especially true when the focus is on ordinary unethicality, considering behavioral ethics findings regarding the large proportion of people who would engage ordinary misconduct under some circumstances.

Second, when focusing on the individual, we are faced with many contingency problems in every situation where there is more than one person involved. In many commercial contexts, there is more than one individual involved and hence finding the best regulatory tool to deal with the individual based on his past behavior will be problematic. In addition, the individual behavior is also contingent upon the interaction with the situation, which also makes the individual-based prediction highly limited.

Third, there are many more data points on situations, relative to individuals. Given the evidence-based approach of the personalized law literature, this indicates a clear advantage for focusing on situations. Even the most refined situational perspective which will attempt to identify a very specific type of transaction, is likely to be able to collect many more data points, making the likelihood that prediction will be accurate far more likely.

Fourth, the focus on situation, is also better for distributive justice considerations, where people are being treated differently based on their past behavior. When focusing on the situation, this concern is being reduced dramatically, when the change in policy is based on differences between situations and not between individuals.

Fifth, the focus on the situation is better also for various privacy issues, associated with the use of big data. Overall, most privacy issues arising in this context are related to the ability to learn private information about specific individuals, rather than aggregate statistic information regarding the behavior of many unidentified individuals in a particular situation.[[99]](#footnote-99)

## Situational Variance and a More Nuanced Type of Law

Many day-to-day distinctions are not legally relevant. It is a key feature of the law that some facts are considered to have legal consequences, while others do not. 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, once a situational regulatory approach is implemented, together with the use of big data, it might be possible to offer a much more nuanced law, sensitive to differences that we currently, for the lack of a better option, ignore. Thus, if we find out that the time of day actually effects people's willingness to cheat, this might inform our regulatory policy in terms of improving the allocation of enforcement efforts. In a similar manner, many other distinctions that are not currently legally significant may end up informing regulatory policy. Thus, enforcement could vary between cash and credit transactions, between transaction you make in your home town and those you make as a tourist, between those you make as a young adult and those you make when you are older, between those you make with people you know and those you make with strangers, or between those you make for the first time and those you make regularly. All these distinctions can affect participants' ability and willingness to engage in motivated reasoning and their tendency towards ordinary unethicality. Incorporating this knowledge into our regulatory scheme will help provide better enforcement solutions for specific situations and for specific types of misconduct.

For instance, the law treats most types of discrimination in a similar way, but clearly there are factors which matter more for certain types of discrimination relative to others. For example, with regard to gender discrimination, people are more likely to have familiarity with the opposite gender relative to their familiarity with members of a minority group. Under such circumstance, it is possible to expect (as one can also see from some studies) that blinding the information of the candidate might be more useful when it comes to minorities than when it comes to gender based discrimination.[[100]](#footnote-100)

Another situational difference is between the different stages of the employment process, where in some context people are asked to hire, promote or fire employees. Employment discrimination law applies the same legal standards to all these stages of the employment process. With the use of big data, it would be relatively easy to document the size of the implicit bias which lead to discrimination in each stage, and hence to offer a more nuanced treatment.

Moving from employment discrimination to consumer protection law, one can also recognize an overbroad treatment of consumer protection law in all types of transactions. The law treats all types of transactions in a similar way. However, in reality deception is more common in certain types of transaction relative to others. For example, overall, most consumer protection laws don’t differentiate between people who buy a car and people who buy a bed, although there are many types of differences between the likelihood that various commercial misconducts might happen in such situations.

Similarly, while there is clearly a recognition that insurance contracts need to be treated differently than other contracts, there is less ability to differentiate between the different types of insurance contracts in terms of the common types of misconduct they give rise to. Here too, big data can allow to identify what are the types behaviors people complain about, in order to make regulatory predictions in a far more refined way. In insurance contract, a main concern is misrepresentation by sellers, as consumers do not always understand the terms of their policy. Naturally, in different types of insurance contracts such misrepresentation and misunderstanding would pertain to different parts of the policy. By recognizing these differences, we might be able to devise better-tailored regulatory scheme, prompting moral deliberation among sellers in relation to those aspects of their specific contract that were found to be problematic.

Another attribute that might affect ordinary unethicality is the physical setting in which it occurs. For instance, seller and buyers might behave differently in an open air marketplace, as compared to a chain or an online store. The law, of course, does not make a distinction between these different settings, but it is very possible that big data analysis will reveal differences in individual's tendencies towards ordinary unethicality in each of these situations. Such differences could relate to the seller's willingness to lie or misrepresented the product, as well as to the buyer's ability to verify information or compare prices. Once this type of situational variation is identified, specific regulatory mechanisms can be deployed.

Behavioral ethics research singles out several other situational conditions that are typically associated with increased wrongdoing. For the most part, these conditions are not specifically targeted by legal doctrine. Thus, it has been shown that people typically find it easier to act badly by omission.[[101]](#footnote-101) 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 in the case of active misrepresentation, the case in which misconduct, from a behavioral perspective, seems less likely.

Another central behavioral ethics finding is that uncertainty and ambiguity increase the likelihood that deterrence and other incentives-based mechanisms will fail to induce compliance. In such situations, therefore, the regulatory response should focus on clarifying the ambiguity. This general finding can indicate, for instance, that verbal, unwritten communication, which breeds uncertainty and ambiguity, might also foster misconduct. Therefore, oral contracts are likely to lead to more instances of misrepresentation. This might justify obligating sales persons to create written summaries in order to encourage moral deliberation.

Big data analysis might also enrich our understanding of ordinary unethicality in terms of perpetrator-motivation. For instance, some behavioral ethics studies show that people find it easier to lie for others and not for themselves. In fact, employees were found to be more likely to act unethically when profits from wrongdoing went to the corporation, rather than the individual wrongdoer.[[102]](#footnote-102) These findings run contrary to rational choice perspective, which holds that people are more likely to behave unethically when they themselves benefit from doing so. studies also indicate that unethicality can increase when wrongdoers enjoy only part of the benefit acquired through the wrong, and not all of it.[[103]](#footnote-103) This is typical for misconduct in large organizations, such as commercial corporations, where revenues from misconduct might be distributed among shareholder or other participants. Other works suggest that altruism can promote corruption: people’s misbehavior increases when they think they can benefit others through their misbehavior.[[104]](#footnote-104) These findings can have direct legal implications in the context of misconduct by agent. Thus, a sales representative might be more inclined to lie, if he or she is lying for the corporation, and not for direct personal profit. This willingness might depend on organizational culture and on the 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, it might be that a change in sales incentives pressured sales representatives to sell more forcefully (and less honestly) to clients. Such a finding might support special types of liability, holding accountable those who have initiated the problematic policy change. We discuss this possibility in more detail, as well as other regulatory options, in the next Part.

# III. The New Regulatory Toolkit

Big data analysis can be used to identify situations associated with significant increases in ordinary misconduct. Once such situations are recognized, appropriate regulatory tools can be deployed. Such regulatory tools should target awareness rather than motivation, in order to correctly address the problem of misconduct by the good people.

Big data analysis should also be used to help identify the sources and characteristics of different manifestations of ordinary unethicality, in order to offer the best fit out of the wide selection of available regulatory tools. For this purpose, big data analysis should by behaviorally informed. In other words, data analysis should not merely seek misconduct, but be guided by existing theoretical knowledge in order to identify the specific problem at hand, so it can be fitted with the best possible regulatory response.

In the following sections, we provide a large menu of such tools, offering a wide selection of regulatory solutions that can be useful in varied situations. Some of these tools have been mentioned in passing above; here, we provide a more systematic analysis.

## De-biasing

Many tools that could be used to target undeliberate misconduct is related to the concept of *de-biasing*. This term refers to a group of cognitive methods used to overcome biased thinking and non-deliberative choice.[[105]](#footnote-105) De-biasing can be achieved through various techniques. For instance, biased thinking can be circumvented by prompting individuals to consider an alternative view, to entertain an opposite position or to reflect on one’s choices.

Behavioral ethics research shows that much ordinary misconduct is the result of biased thinking, as perpetrators unintentionally limit themselves to a very narrow, self-serving view of the situation. De-biasing efforts would aim to help individuals overcome such self-serving biases and adopt a more candid and comprehensive form of moral deliberation.

In the context of misconduct by good people, de-biasing can be achieved by prompting potential wrongdoers to consider the effects of their actions, to view the situations from the perspective of potential victims, or to report their decision to an objective third party.

## Moral Reminders

Moral reminders are any simple cues that can be used to trigger moral deliberation. For instance, behavioral ethics researchers have found that people are less likely to act badly after reading morally-laden texts, even brief ones. By planting such moral reminders in crucial junctures of possible misconduct, we can significantly lower the risk of unintended wrongdoing. Moral reminders can be thought of as a type of "moral nudge". Nudges, popularized by Sunstein and Thaler, are policy interventions designed to change behavior without creating economic incentives or limiting people's freedom of action by banning other possibilities.[[106]](#footnote-106) Moral reminders are nudges that aim to encourage more ethical conduct, as opposed to traditional nudges that aim to improve people's ability to make informed and rational choices to maximize their own well-being.

## Accountability

Accountability is an important form of de-biasing, by which individuals are asked to explain the reasoning for their decision after the fact.[[107]](#footnote-107) Accountability is useful in a wide variety of situations. Any professional required to justify his or her actions is prompted to reconsider them. This is especially true if reasoning for decision-making is done in writing. First, the mere need to articulate a justification can prompt System-2 thinking. This, 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, the main benefit of accountability reports is in those cases when they are never eventually read: the need to write them suffices to stifle wrongdoing to begin with.

Accountability might be especially useful when wrongdoers operate under a veil of anonymity, feel they are difficult to recognize and do not know the potential victims of their actions. Behavioral ethics research indicates that misconduct is especially common when there is no one identified victim but rather many unidentified ones.[[108]](#footnote-108) This is so since moral deliberation is often triggered by personal interaction. Accountability can substitute for such interaction when it is otherwise missing.

## Framing

Framing is another way of curbing motivated reasoning by creating slight perspective shifts. For instance, people generally treat potential losses very differently from potential profits. In particular, people might be much more likely to lie in order to avoid a loss, compared to their willingness to lie to secure a future profit.[[109]](#footnote-109) This finding can be utilized to improve contract design. Thus, a liquidated damages close often serves as a sanction, threating a contractual party with a possible loss in case she is late to perform her contractual obligation. This can create psychological pressure, leading that party to engage more quickly in motivated reasoning in order to come up with excuses that will ease the internal tension and free him or her of the pressing obligation to perform on time. This problem can be mitigated if liquidated damages are framed differently, not as a sanction for performing to late, but as a reward for timely performance. This framing can contribute towards a lesser tendency for motivated reasoning, and eventually, towards more timely performance of contractual obligations.[[110]](#footnote-110)

## Reflection

Reflection technics offer another way of triggering moral deliberation, by directly forcing individuals to take a few extra seconds to consider them implications of their actions. This can be especially useful to curb routine unethicality. For example, JP Morgan uses reflection technics to help insure its employees do not engage in work-related misconduct. Thus, JP Morgan traders might get electronic warnings prompting them to make sure they remain within the boundaries of the personal trading rules.[[111]](#footnote-111) These measures aim to give employees some pause, alerting them to engage in system 2 thinking before completing the task at hand.[[112]](#footnote-112)

## Declarations

Declarations of various types also offer opportunities to avoid unintended misconduct. Declarations include any measure prompting individuals to state 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 mora deliberation in many situations.

A simple example of the use of declarations can be offered in the context of corporate governance or fiduciary duties. For instance, before important votes are made, directors and executives could sign declarations stating they are aware of the legal standards under which they operate, know what types of conflicts of interest they are obligated to reveal, and that such conflicts are not present. Such declarations serve a dual two purpose. First, from a behavioral ethics perspective, actively declaring adherence to the legal standard, in writing, can circumvent unethical behavior. Omissions of important facts can be downplayed in a person’s mind, [[113]](#footnote-113) meaning that people excuse themselves for passive lies much more easily than they are able to do for active ones.[[114]](#footnote-114) By requiring a declaration, we can change the statues of the unethical conduct, in a way that will make it much more likely that executives will fail to announce a conflict of interest. Second, from a more legal perspective, writing a declaration in one’s own handwriting reminds people that they can be prosecuted for perjury; reminders of legal consequences have shown to be effective even for relatively subtle conflict of interests.

## Situational Liability

Another approach for dealing with unaware misconduct is by targeting not the direct perpetrators, but those responsible for creating a situation prone to ordinary unethicality. Unaware misconduct is situation-driven; behavioral ethics research indicates that in some situations, a large percentage of people is likely to act unethically. This calls for a special type of vicarious liability, which we term *situational liability*. Situational liability captures that idea of targeting those responsible for creating situations that are likely to make others fail in unaware unethical behavior.

To illustrate, consider the situation of employees working as brokers and investment advisers, responsible for providing financial services and investment advice to clients. Such individuals are highly susceptible to moral blind spots, and are relatively more likely than others to participate in ordinary misconduct.[[115]](#footnote-115) Several factors joint together to make investment advisors and brokers particularly likely to fail due to moral blind spots. First, such professionals typically enjoy an informational advantage over their customers. Second, the value they provide their clients is, by definition, highly speculative. This is important, as behavioral ethics research shows that people find it much easier to persuade themselves they are not lying when the information they are presenting is highly uncertain. Third, the legal standards used to regulate the actions of investment advisers is highly flexible. Investment advisors typically operate under a fiduciary duty, understood as an obligation to give priority to their costumers' interests over their own.[[116]](#footnote-116) The problem with such broad standards, of course, is their inherent vagueness. Many behavioral studies indicate that blind spots become more common when operative instructions are vague.[[117]](#footnote-117) The reason for this is that 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 advisers, the standard is even murkier. Currently, the law is unsettled regarding the precise nature of the legal standard under which brokers operate, and it is not even clear if this standard is an equivalent to a fiduciary duty, or some other, lesser, form of duty towards their clients.[[118]](#footnote-118) The regulation of broker-dealers has also emphasized advanced disclosure requirements rather than avoidance of conflicts of interest, also suggesting a narrower scope of the fiduciary duty. Finally, brokers and investment advisers 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. The joint effect of these factors – advantages in information, uncertainty regarding future events, unclear legal standards and great profits from wrongdoing – all contribute to an environment that breeds misconduct. And indeed, unethical behavior abounds. In some financial firm, up to 15% of advisers are accused of serious misconduct, with median settlement paid to consumers standing at $40,000, the mean being as high as $550,000.[[119]](#footnote-119) Misconduct by financial advisors is a problem of colossal dimensions.[[120]](#footnote-120) In the United States, over 650,000 financial advisers manage over $30 trillion of investible assets, for over 56% of all American households.[[121]](#footnote-121)

Facing these numbers, a traditional approach might call for enhancing deterrence, for instance, by increasing monetary sanctions. And indeed, enforcement efforts typically focus on the personal level, offering sanctions against "bad apples" – those employees that have been caught mismanaging their clients' assets.[[122]](#footnote-122) However, a behavioral perspective points out the inadequacy of such a regulatory solution, that is not sensitive to the specific type of misconduct. From a behavioral standpoint, a more appropriate remedy would be to target firms and managers, responsible for shaping the situations in which financial advisors operate. Variation in wrongdoing among firms is great;[[123]](#footnote-123) this suggests that some firms create environments that encourage wrongdoing more than others.

The concept of situational liability would call for a sanction against those responsible for designing the work-setting and incentive-schemes in those companies that display an exceptionally high level of misconduct. Importantly, researchers have documented the effect of incentive structures on misconduct. Thus, Gill et al. show that certain types of bonus-based compensation plans used by firms can contribute towards more cheating among employees. [[124]](#footnote-124)

## Integrated Approaches

Naturally, the differences between the regulatory tools listed above are rarely clear cut. More often than not, one regulatory measure can fit under multiple categories. For instance, to curb misconduct by sales representatives, we might require them to occasionally record face to face meetings, and not just phone calls. This can be considered a framing device, and the divergence from their routine can prompt professionals to use their System-2 thinking. This is also a de-biasing mechanism, as it can help potential perpetrators gain an additional perspective on their situation. Such a requirement might also be considered an accountability mechanism, if sales representatives are required to offer some justifications for their decisions.

A more systematic integrated approach has been proposed by Shahar Ayal and his colleagues, under the heading *REVISE*.[[125]](#footnote-125) *REVISE* stands for *RE*mind, *VI*sibility and *SE*lf-engagement. Under this approach, first, individuals should be reminded of the need to engage in moral deliberation. Second, people must be made aware of their own visibility – the fact their actions are being observed by people who know them. Finally, this approach calls for self-engagement, aiming to minimize the gap between people's self-perception of a morality and their actual conduct. A simple example of this type of multilayered technic is observed when an organization informs employees that new technologies are now being used to monitor computer-based transactions. This should work to increase employees’ awareness that the organization demands ethical behavior.

Again, to know when and how to use such special enforcement, regulators would first need to collect relevant information indicating that this type of intervention is desirable. The current big data approach, which is being increasingly utilized in the personalized law paradigm, should be tuned to map the situations in which a larger portion of the population is likely to engage in various types of ordinary unethicality. With this information, regulators and enforcers could focus their attention and use the best suited tools for those cases that appear to be most likely to trigger the different types of ordinary misconduct.

# Conclusion

This paper suggests a new type of legal personalization, which challenges existing paradigms on many grounds. While current personalized law approaches attempt to target different people based on their preferences, we believe that the future of personalized law lies in understanding better how knowledge aggregated in a smart way could have predictive ability regarding the likely types of violations both in administrative and in private law contexts.

The fact that situations matter is long understood by social psychology. However, the fast growing literature on behavioral ethics shows situations to be far more important than previously appreciated. The particulars of the situations appear to be highly predictive of many ordinary unethical behaviors by people with limited awareness to their own breaches, misconducts and violations

The need to focus on situational design rather than on personality traits is based on the recognition that the current regulatory paradigms is far too focused on deliberative choice, and completely neglects to address the possibility of unaware misconduct. This omission means that current thinking missis on 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, types that explicitly target awareness (rather than motivation) among wrongdoers. Such enforcement tools include de-biasing efforts, aiming to trigger moral deliberation among unaware transgressors, and also broader types of liability, designed to hold accountable organizations and individuals that have contributed to the creation of moral blind spots. To use such mechanisms successfully, and to minimize chilling effects, much information is needed. We suggest that such information can be derived from big data analysis, when the focus is on suspect situations rather than suspect individuals. This leads us to offer a second modification, calling for a new use of big data in the service of law enforcement. This proposed regulatory scheme will mimic the personalized law approach, but 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. We argue that his 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 currently assumed by legal scholars.[[126]](#footnote-126)

1. \* Yuval Feldman, Mori Lazarof Professor of Legal Research, Bar-Ilan University Law School, PhD 2004 UC Berkeley; BA, LLB 1998 Bar-Ilan University. [↑](#footnote-ref-1)
2. \*\* Yotam, Kaplan, Assistant Professor, Bar-Ilan University Law School, S.J.D Harvard Law School, LL.B Hebrew University of Jerusalem. The paper was accepted for presentation at the Private Law Consortium in Harvard Law School in May 2018. We wish to thank Noam Gidron, Ehud Guttel, Ariel Porat and Henry Smith for useful comments and discussions, and Shani Wiersch for excellent research assistance. [↑](#footnote-ref-2)
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