Reading the four excellent pieces written by four prominent scholars on my book was an especially gratifying experience. Interestingly, their four approaches discuss in a very complementary way, different aspects of the book. Each one of them contributes to the book’s attempt to create the framework for the interaction of behavioral ethics and law. Since each one of the four pieces are so different, my reaction will be for the most part, separated to the different arguments raised in each one of the paper.

### Behavioral economics vs. behavioral ethics

Oren Bar-Gil, as expected from a leading behavioral law and economics scholar dedicates his paper to the attempt to include all of my arguments for the importance of behavioral ethics to law as a sub-category of behavioral law and economics. In addition he dedicates some of his comments to the protection of rational choice models, in areas where he feels that the claims I based on behavioral ethics are too broad, redundant or ambitious. During a number of presentations of this book to an audience of economists and behavioral economists, I engaged in similar debate and I will use the following lines to deal with some of these arguments as well, thus my reaction will be also to criticisms I have received from other behavioral economists, aside from Oren. I will start my response by I have to say that I agree with many of Oren’s criticism of my book in many way I felt some of them were related for not being clear enough and I am happy to use this opportunity to clarify my argument. For example, Oren argues that the behavioral ethics’ claim that unawareness undermines the goal of deterring bad behavior is an over-statement. I myself share this feeling and discuss this, in various sections of the book, to supplement rational-choice enforcement mechanisms rather than to replace them with nudges[[1]](#footnote-1). In many ways, the new papers by Gneezy et al[[2]](#footnote-2) which were published after the book manuscript was ready on how incentives are more likely to effect people behavior in dishonesty games in which detection is easier, gives even greater validity to Oren’s arguments. Nonetheless, one should note that while this new paper proves the importance of rational choice it doesn’t rule out at all the involvement of internal and social mechanisms in people ethical decision making as Gneezy’s later paper shows[[3]](#footnote-3). As could be seen from chapter 2 of the book, where I outline a long list of mechanisms and deviations from rationality, as well as from the paper of Shahar Eyal from this book symposium[[4]](#footnote-4), there are too many unexplained behaviors of people, which could not be explained solely by rational choice prediction of dishonesty.

Furthermore, From a compliance and enforcement perspective, part of the books argument is[[5]](#footnote-5) that we want to know more is how aware people are to their own wrong doing and how they react to incentives rather than whether their unethicality could be explained by rational choice models, a question which is more important to economics than for law[[6]](#footnote-6). Naturally, I do not disagree with the fact that the rationality debate is very important for the paternalism concerns of to the market vs. government dilemma but what it is less important for a book that attempts to improve regulation, compliance and enforcement. For such areas one might care more about the question of awareness as the main factor which might explain how we can expect people to react to different interventions and how responsible should they be if they are not reacting to those mechanisms. In a way, the difference between the focus on awareness and the focus on rationality is related to the difference between behavioral economics and behavioral ethics. While behavioral economics attempts to uncover what prevents people from making optimal choices or behavioral ethics tries to uncover the mechanisms, through which people can behave less ethically. There might be some overlap between the two missions – for example in a world with perfect enforcement -- but they are clearly not the same! Whether people unethicality is rational or not is an important question which should be explored further, but it is secondary to the task of the book. This difference between awareness and rationality is related to another discussion I have in the book[[7]](#footnote-7) with the regard to the double edge sword of economics in its effect on the interaction between psychology and law. Clearly following the thousands of paper written since by Jolls, Sunstein and Tahler, within the area of “behavioral economics” had huge contribution to the interaction between law and psychology[[8]](#footnote-8). However, as I argue in the book, the fact that the interaction between law and psychology was but the price it has taken with regard to the types of areas in psychology which could not have affected the law, if they didn’t mediated by economics.

Having said that, despite the differences that I see in the interaction between behavioral ethics and behavioral economics, I think that the likelihood of behavioral ethics becoming a sub-field of behavioral economics, as advocated for by Oren is not farfetched. In many ways, my argument for lack of focus on improving people’s ethicality is a matter of balance and emphasis, I don’t see the two literatures as of two mutually exclusive fields. BLE is a much larger and more developed area and if one looks really carefully it can find everything, including processes which are part of behavioral ethics. However, my critique was of focus and of balance. For example, the British behavioral insight team has increasingly moves in the last two years to focus on areas which are not related to health, financial and consumer behavior but also to areas related to compliance and enforcement, which naturally suggests reliance on behavioral ethics[[9]](#footnote-9). Furthermore, there are many contexts in which the findings of behavioral economics has led to the creation of similar behavioral ethics paradigms. Omission bias, loss aversion, self-serving bias are classical behavioral economics mechanisms which could explain many of the findings that behavioral ethicists focus on.

### What kind of ambiguity?

Along similar lines are refer to Oren’s claim that there is no need to employ behavioral ethics in order to understand the effect of ambiguity as this was already discussed by law and economics scholars. But it is important to note the difference between how ambiguity is treated in law and economics --- as something which will cause a chilling effect thus reducing “gray” behavior while according to the analysis of the work with Teichman (2009)[[10]](#footnote-10) and with Teichman and Schur (2013)[[11]](#footnote-11) on legal ambiguity the result is the opposite where people use the ambiguity to self-deceive themselves about the meaning of their own behavior thus increasing the likelihood of “gray” behavior.

### Ex-ante function of the law

Similarly, it is true that law and economic scholars have focused on the ex-ante function of the law, long before behavioral economics or behavioral ethics but here too the motivation for that and the contexts the usage of ex-ante is needed is important. In traditional law and economics, the differences between ex-ante and ex-post will be determined based on factors such as information and transaction costs[[12]](#footnote-12), but the arguments I make with regard to people in ability to account for the ex-post treatment of how their behavior will be determined focused mainly on the limits of awareness and people’s ability to self-evaluate the legality and morality of their own behavior. There is no reason to think that these different types of justifications should be treated in a similar way. What I argue is that for people to come to the realization that what they do is problematic and hence be deterred, there are many barriers to pass, mostly because of the perspective in which they are, their self-perception and their biased interpretation of reality.

Oren is right of course to suggest that sanctions should not be taken of the table and In a sense my argument for the advantage of law over morality is exactly on this point, peoples’ self-deception has limits and therefor it is not that I argue that people will self-deceive themselves with regard to every legal requirement. It is easier to have self-deception with regard to morality than with regard to the law. As develop in the book[[13]](#footnote-13), the more external is the factor that evaluate one’s behavior, the less likely it is that people will be able to amend it. Clearly even though behavioral ethics suggests that people are less likely to recognize their own faulty behavior, if we use very high sanctions, it is safe to assume that this grab their attentions. The question is whether a democratic state could use sanctions without alienating the public. Another problem that I raise in the book with regard to sanctions is related to the dilemma of what are the things that should be deterred. Should we focus on the things that are easier to self-justify because they are less immoral since more people are likely to engage in them? This create a puzzle where on one hand, based on traditional desert based arguments we might want to punish more severely those people who are doing things which could not be justified[[14]](#footnote-14).

In the text near footnote 25, Oren argues that now assume that the law impasse on people who do A. I may think that the law is unjustified, but I would still avoid doing A. deterrence works” However, part of the behavioral ethics argument is that it is not always clear to people, at the time that they make their decisions that what they do is A. If there is a penalty for conflict of interest, are we sure that medical doctors feel that there are in some kind of conflict of interest and that that penalty is related to their own decision to prefer one treatment method over the other? It is possible to create rule, which are not subject to interpretation, but this is very hard and not always easy[[15]](#footnote-15).

Another problem with the translation of everything into probabilities is related to the fact that it is not always clear that there is some point, in which people stop to evaluate their probabilities, part of the argument of the book is that there are smaller acts by people who determine their larger and deliberative decisions. Think for example on the role of smaller daily decisions by employers with regard to their employees. We always assume that we need to deal with people’s probabilistic estimates when deciding who to accept or who to fire but decisions are being performed also with regard to much smaller decision toward which people cannot even expect to imagine that they are now performing a behavior which could be penalized or could be seen by someone as discriminatory. On every prescription that a doctor writes or an advise he gives, could they spent time weighting their options? Its an open empirical question whether doctors will perform less c-sections if there are going to be more penalties for conflict of interest, most of them won’t even notice that conflict to begin with unless we change the situation in which they make the decision. Our implicit attitudes change are judgment in a way, which prevents us from even thinking that when I have interpreted the world reasonable this happened because of my perspective or my self driven interpretation.

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

**Adi Libson[[16]](#footnote-16)**

It is important to note that since behavioral ethics is a newer field, many of the prevailing paradigms of behavioral law and economics should still need to be evaluated. For example a recent study has challenged the self-concept maintenance is the weakest model of explaining implicit unethical behavior[[17]](#footnote-17)

It is also wonder if the lack of effect of independent directors on the performance of public companies is related to integrity of the company or to performance of its share and to what extent the effect of integrity should be seen with regard to performance[[18]](#footnote-18). This line of research is related to the puzzle presented above of whether being more ethical as a company is indeed rationale, as could be seen from the perspective of the share value.

I also wonder in light of the criticism by Oren discussed in the previous section on the possibility that incentives will change corporate culture especially if we look at the corporation as some sort of “ethical mediator” between the regulatory state and the employee. Thus the interesting question might be whether indeed it is possible using all of the What are the corporations policies toward which we would see the corporation as responsibility for the unethical behavior of its employees. Will state initiated incentives cause corporations to make sure their employees will not behave unethically? According to this perspective, we might need to revise the statement of Chough, Bazerman and Banaji[[19]](#footnote-19) On the lack of effect of incentives not working on the mediating factors of corporations, where state use incentives to draw the attention of corporation and make them employ broader types of incentives to change the ethical behavior of employees. In other words the corporation’s motivation will mediate the ability of the state to get to people’s awareness. In that regard, clearly, one can expect that substantial monetary sanctions on corporations are likely to lead them to find the best organizational and behavioral ways to eradicate all of these acts of ordinary unethicality. A related question is to what extent will bonuses for getting more clients at some stage should become prohibited given their effect on the likelihood that they will cause their employees to behave less ethically.

A general comment with regard to some of the points raised in Adi’s comment, is that it is easier to use behavioral ethics to understand why some of the existing solutions don’t work, but it is harder to come up with solutions which will make the situation better. This is especially the case, since part of the criticism of BE on corporate governance practices is that the existing solutions are such that are not tailored towards the right people. In contrast to responsive regulation, when it comes to corporations, it is not always easy for the state to be able to target certain people before of others. There is some level of self-governance, which the corporation will need to adopt.

It is interesting to think of whether the state should be more dominant in setting how corporations regulate the ethicality of their own employees. In the project described by Adi, most of the solutions offered to the problem of unethicality where behavioral interventions that focused on changing the defaults, increasing reflection and changing the accountability mechanism. An open question to explore is whether it might be possible to make more system changes in the corporate structure, which will make it less likely that corporate unethicality will not be so pervasive. Thus most of the changes proposed in our joint work on corporate governance and behavioral ethics are mostly in the daily operation of corporate behavior and they don’t challenge the actual doctrines of corporate law and I hope Adi and other corporate law scholars will be able to tackle with some suggestions for substantial reform in the law.

**Benjamin Van Rooji,**

In my comments to Benjamin, I would like refer also to earlier arguments in the first comment with regard to the fact that the concept of ex-ante treatment of law was advocated for factors unrelated to behavioral ethics, a comment to which I of course agree[[20]](#footnote-20). With regard to my own endorsement of the move toward an ex-ante approach, I focus on factors, which I believe will lead to different predictions of when an ex-ante approach should be used and didn’t exist in either the traditional or behavioral law and economics. For example, since according to behavioral ethics, many of the decisions to violate rules happen without any deliberate thought and given the fact that people are wired not to have a clear view of their own ethicality, it is likely that ex-post allocation responsibility will be less effective than assumed by law and economics. It is clearly that case that there are other important rationales to prefer the ex-ante focus of law and Benjamin paper does an excellent job in providing an additional set of explanations for the advantages of adopting an ex-ante approach to law.

Organizations vs. states

The paper of Benjamin raises an additional interesting question that is dealt with in the book with regard to the responsibility of states vs. organizations with regard to creating the situation in which “good” people will end up behaving badly. From the perspective of Benjamin’s work it is interesting to think why it is the case that organizations can enjoy greater leverage in choosing ex-ante intervention relative to states. In many ways when we focus on ex-ante we deal with a jurisprudential concerns where we are more worried about state treatment of good people than that that happen organizations when organization attempt to use ways which will enhance the future ethicality of their employees. In many ways when we think about the role of the state, we feel that people need to be dealt with only when it comes to the clear violation of laws. The traditional view is that the law has not much to say when it comes to people’s ethics, which is seen as related to individual or communal norms. The Chinese social credit experiment is criticized a lot by many scholars[[21]](#footnote-21) We don’t see many more criticism on the organizational ability to attempt to educate people on future behavior even in areas which are beyond legality in its strictest way. In a way the argument is that once you become an employee the organization can reach out to more means in an attempt to make you in to a more moral employee and this distinction might need to be revisited. Similarly, encouraging employee loyalty is seem as a more legitimate that encouraging citizen’s loyalty. Probably one of the main exceptions is behavior of drivers where it seems legitimate to educate drivers not just not to break the law but to be very focused and vigilant. The rationale is clear, not paying attention might cause serious damages to others, but there are other contexts in which people could harm others and we don’t see an even closer legitimacy.

### Focus on the smaller things

In many ways the book gives more ammunition for many of Benjamin’s arguments where the recognition of the need to focus on smaller things rather than on smoking gunes could be better justified if we do think ex-ante rather than ex-post. The requirement of having strong enough evidence in the ex-post approach could not be justified for smaller violations[[22]](#footnote-22). But from an ex-ante this difference is less important. Since the smaller things are more likely to effect the change in business norms, as they are more likely to be prevalent, are more likely to lead to an escalation and to change the default for what is the right things to do, we believe that the ex-ante approach is a better one.

Needless to say that there are many behavioral reasons, when we see greater support for harsh punishment and for ex-post focus on bad apples. Think for example on the area of corruption. What people want is to find some scapegoat which will make everyone feel great about ourselves. The identified victim effect suggests that people might be far more willing to pay attention to some really bad people who have identified victims to focus on. The ex-ante perspective doesn’t serves that need to have the people in the margins who supposed to help us feel really good about our selves in a relative terms. The problem is that criminal law is such a problematic tools with so many loops to jump through to be able to convict one person that it is not clear how effective it is and more importantly by focusing on the worse cases ex-post, it inadvertently legitimize the more benign and frequent types of misbehavior. So in a way, the “good” people are those who have the greatest support for the ex-post approach. If they are interested in maintaining their self-image they are not as bothers with themselves cutting corners or engaging in ordinary unethicality.

I will also add that I fully agree with Benjamin’s focus on the cognitive biases which make the ex-ante approach less desirable but I think that they could be supplemented by the motivational biases presented above. In a sense the punishment reflex suggested by Benjamin is related to this same argument but again I think it could all be attributed to people need to feel good about themselves more than just the need to punish the bad guys.

The big data approach advocated for, in the research with Kaplan[[23]](#footnote-23), improve the ex-ante approach by suggesting in what situations to use what types of means. As the ex-ante is of course a very broad, and in many ways is broader than the ex-post approach and need to learn how to design the situatoin and how to adapts it for a specific misbehavior.

**Comment by Shahar eyal**

Shahar Ayal’s in-depth discussion of some of the social psychological processes, which are part of the behavioral ethics, are of course especially important for a book that attempt to connect behavioral ethics to law. While, I too, In many chapters of the book, focus on describing similar mechanisms, there is of course a difference in the perception of a legal scholar on the same theories and in the following paragraphs I will show some of the different views on some the same theories.

The focus on the ethical dissonance – by which people attempt to balance their need to maximize their self-interest with that of their self-image - mentioned by Shahar, is one of the core principles of the law of good people. However, as a legal scholar the challenge is to understand to what extent this mechanism could really stop people from fully maximizing their self-interest, how can state create a situation where the laws increase the dissonance that people experience to make sure they are more likely to reduce their unethical behavior? Furthermore, the legal perspective requires us to ask how can we take into account the institutional aspects of trust and legitimacy of the rules that dictates what is the legal or ethical thing to do and how they interact with the justifications that people can use to neutralize their behavior[[24]](#footnote-24).

### The problem with the half lies paradigm

One of the interesting results that shahar discuss which are seen as the notion of “half-lies” With regard to the discussion of Shahar on the fact that people don’t lie as much as they could, it might be needed to take into account the recent critiques of Gneezy and others on how incentives do have an effect on people’s likelihood of getting caught. While the evidence for and against this paradigm are still building, I don’t think that it threaten these models as such. For example, it might be the case that the likelihood getting caught manipulated in Gneezy’s 2017 work, could be seen as making it hard for people to self deceive themselves on what is the right thing to do, not just as affecting the price that people will pay if caught.

### Who do we want to punish?

The discussion of Shahar with regard to the altruistic corruption raises an important legal dilemma between deterrence and desert based justifications for punishment. From a deterrence perspective, the argument of the law of good people suggests that we need to worry more about the violation that people can easily justify or ignore their importance. Thus in a similar way to my argument on non-monetary bribes …. Since more people are likely to feel comfortable taking such bribe we need to invest more resources in preventing such behaviors. However, these more justifiable corruption claims also means that the public is less likely to have a negative sentiment against those who commit them affecting a different rationale for punishment – dessert …

Similarly shahar discuss the notion of fuzziness as allowing for greater moral wiggle room and unethicality. This phenomenon is discussed in the book from a legal perspective with the focus on standards and legal ambiguity. There are obvious differences between legal ambiguity and other types of uncertainty (are all legal probabilities created equal)

### The problem with smaller violations

As discussed in my response to Benjamin’s piece, I also share with shahar the need to focus on smaller unethical violation but in addition to the aggregated effect and slippery slope argument, from a legal perspective we have to diffrenatiate between the kind of violation which will always seems as deviance and the kind of vioaltoin which soon become the prevailing social and then legal norms. Those unethical behaviors are those which create cultures of what become and seen as legaimate in many commercial transaction and the behavior of people in their daily interactions with the regulatory state and with various law enforcement agents.

### What can be done to improve ethicality ?

The foucs of REVISE that shahar was one of its creators is also interesting as it suggests a holistic approach to regulation which is rare to see a psychologist take. However, even that is something that in a broader enforcement regime cannot be seen as representing the whole picture. As we need to understand that many of the people are calculative and will be less sensitive to these mechanisms. Similarly people will care less about many of these reflection without the big stick that governments needs to hold for people to reflect more and to take its ordinance in a serious way.

Along those lines the work with Hallali on how small punishments can have a big impact could be seen a supportive of this approach.

Also as I suggest in my response to Adi, the next step in the attempt to increase ethicality and compliance should move beyond nudges to changes in the law itself which I hope when more scholars will join the work on behavioral ethics.

1. Cite to page number in the book [↑](#footnote-ref-1)
2. Kajackaite, Agne, and Uri Gneezy. "Incentives and cheating." *Games and Economic Behavior* 102 (2017): 433-444. [↑](#footnote-ref-2)
3. Gneezy, Uri, Agne Kajackaite, and Joel Sobel. "Lying Aversion and the Size of the Lie." *American Economic Review* 108, no. 2 (2018): 419-53. [↑](#footnote-ref-3)
4. Cite [↑](#footnote-ref-4)
5. The Law of Good People at P. 35 [↑](#footnote-ref-5)
6. In recent years there is an extensive research within economics attempting to model people’s ethical decision making from a rational choice perceptive, see Gneezy et al, supra note 3 and see the meta-analysis of Abler et al fourthcoming work in Economertica Abeler, Johannes, Daniele Nosenzo, and Collin Raymond. "Preferences for truth-telling." (2016). [↑](#footnote-ref-6)
7. At page 5 [↑](#footnote-ref-7)
8. Jolls, Christine, Cass R. Sunstein, and Richard Thaler. "A behavioral approach to law and economics." *Stan. L. Rev.* 50 (1997): 1471. For the most recent review see Zamir and Teichman Behavioral law and Economics [↑](#footnote-ref-8)
9. See for example their work on tax compliance <https://www.bi.team/what-we-do/policy-areas/tax/> [↑](#footnote-ref-9)
10. Cite [↑](#footnote-ref-10)
11. Cite [↑](#footnote-ref-11)
12. E.g. Bebchuk, Lucian Arye. "Property rights and liability rules: The ex ante view of the cathedral." *Mich. L. Rev.* 100 (2001): 601. [↑](#footnote-ref-12)
13. LOGP At page 20 [↑](#footnote-ref-13)
14. Cite desert deterrence [↑](#footnote-ref-14)
15. Cite behavior equity on the importance of standards [↑](#footnote-ref-15)
16. It is hard to reply to a paper that discusses ideas which were developed in a join work, although the credit should go to Adi for recognizing the theoretical connection between corporations as a perfect example of how there are situations that predict unethical behavior by people who operate in them. [↑](#footnote-ref-16)
17. Jacobsen, Catrine, Toke Reinholt Fosgaard, and David Pascual‐Ezama. "Why do we lie? A practical guide to the dishonesty literature." *Journal of Economic Surveys* 32, no. 2 (2018): 357-387. [↑](#footnote-ref-17)
18. Question which is related to the dilemma mention in the previous section – whether being ethical is rational? [↑](#footnote-ref-18)
19. Chugh, Dolly, Max H. Bazerman, and Mahzarin R. Banaji. "Bounded ethicality as a psychological barrier to recognizing conflicts of interest." *Conflicts of interest: Challenges and solutions in business, law, medicine, and public policy* (2005): 74-95. [↑](#footnote-ref-19)
20. Supra note \_\_\_\_ [↑](#footnote-ref-20)
21. Chen, Yongxi, and Anne SY Cheung. "The transparent self under big data profiling: privacy and Chinese legislation on the social credit system." (2017). [↑](#footnote-ref-21)
22. <https://hbr.org/2019/03/companies-need-to-pay-more-attention-to-everyday-unethical-behavior> [↑](#footnote-ref-22)
23. Feldman, Yuval, and Yotam Kaplan. "Big Data & Bounded Ethicality." *Bar Ilan University Faculty of Law Research Paper*19-05 forthcoming (2019) [↑](#footnote-ref-23)
24. Fine, Adam, Benjamin Van Rooij, Yuval Feldman, Shaul Shalvi, Eline Scheper, Margarita Leib, and Elizabeth Cauffman. "Rule orientation and behavior: Development and validation of a scale measuring individual acceptance of rule violation." *Psychology, Public Policy, and Law* 22, no. 3 (2016): 314. [↑](#footnote-ref-24)