THE LAW OF GOOD PEOPLE

Currently, the dominant enforcement paradigm is based on the idea that states deal with "bad people" – or those pursuing their own self-interests – with laws that exact a price for misbehavior through sanctions and punishment. At the same time, by contrast, behavioral ethics posits that "good people" are guided by cognitive processes and biases that enable them to bend the laws within the confines of their conscience. In this illuminating book, Yuval Feldman analyzes these paradigms and provides a broad theoretical and empirical comparison of traditional and nontraditional enforcement mechanisms to advance our understanding of how states can better deal with misdeeds committed by normative citizens blinded by cognitive biases regarding their own ethicality. By bridging the gap between new findings of behavioral ethics and traditional methods used to modify behavior, Feldman proposes a "law of good people" that should be read by scholars and policy makers around the world.

Yuval Feldman is the Mori Lazarof Professor of Legal Research at Bar-Ilan University. He holds a PhD in Jurisprudence and Social Policy from the University of California, Berkeley (2004). His research focuses on compliance, law and behavioral economics, and empirical legal studies. He has coauthored more than 50 papers and has won more than 20 research grants and fellowships, including one at the Edmond J. Safra Research Lab at Harvard University. Feldman is a Senior Research Fellow at the Israel Democracy Institute, where he advises various governmental bodies on the usage of behavioral sciences, in areas related to regulatory design, corruption, and enforcement. In 2016, he was elected to the Israel Young Academy.

"A fascinating, comprehensive exploration of the complexities of human motivations – and of how to get good people to do really good things. Opens up new vistas in behavioral science, and also in public policy. Highly recommended."

Cass R. Sunstein, Robert Walmsley University Professor,
Harvard University, and coauthor of Nudge

"In mid-twentieth century, Hannah Arendt was criticized for speaking about the banality of evil in describing Adolf Eichmann, and even today Stanley Milgram's experiments showing the ease of ordering people to harm others is difficult to comprehend. Since then, psychological evidence has accumulated, revealing the undeniable daily harms that emerge from the unintended actions of 'good' people. In this excellent book, Yuval Feldman brings all the best research to those interested in imagining the good society. He admirably polishes the grimy results of behavioral science experiments until they shine with solutions for political and legal reform. It is rare to see a scholar write with the broad sweep Feldman does, and even rarer to have one so effectively persuade that central concepts in the law – property, conflict of interest, discrimination – cannot remain in their present form if only we would confront the evidence already before us."

Mahzarin R. Banaji, Richard Clarke Cabot Professor of Social Ethics
and Chair, Department of Psychology, Harvard University

"More than 40 years ago, economics revolutionized legal theory by analyzing the incentive effects of laws on people who are rationally self-interested. In recent years, cognitive psychology revolutionized law and economics by showing how legal incentives affect real people who are not purely rational. In *The Law of Good People*, Yuval Feldman provides a fresh perspective on laws aimed at motivating good people, as opposed to just deterring bad people. His creativity and knowledge of law, economics, and psychology will make readers rethink the incentive effects of laws and current theories of law and economics."

Robert Cooter, Herman Selvin Professor of Law and Co-Director
of Law and Economics Program, Berkeley Law School

"Should the law target the infamous Mr. Hyde? No, says Yuval Feldman, who demonstrates why most individuals are not hard-nosed Mr. Hydes. In fact, the law should be much more concerned with Dr. Jekyll, who could turn into Mr. Hyde at all times, but who will nevertheless convince himself that he remains the good-natured Dr. Jekyll. In short, motivational plasticity, as Feldman explains, is a much bigger normative problem than merely being a 'bad person' in the first place. This book not only alerts legal academia to this idea but also carefully discusses the implications for legal analysis and design."

Christoph Engel, Director, Max Planck Institute for Research on Collective Goods

"This book is the first to introduce the large and heterogeneous body of work on behavioral ethics to the world of law and legal policy. Drawing in part on the author's

own pioneering experimental work, the book moves beyond the reigning enforcement-based approach with its focus on cognition and deliberation and takes greater account of complex motivations, especially of people with a self-conception as being a good person. Feldman provides an important first installment on evaluating law and related interventions in the light of this promising new paradigm."

Henry Smith, Fessenden Professor of Law, and Director, Project on the Foundations of Private Law, Harvard Law School

"Weaving in disparate threads of economics and psychology, Professor Feldman delivers an exciting new approach to our understanding of ethical behavior. The implications of this work will influence our understanding of how to regulate good and evil for many years to come."

Jeffrey Rachlinski, Henry Allen Mark Professor of Law, Cornell Law School

The Law of Good People

CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR

YUVAL FELDMAN

Bar-Ilan University

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

Contents

Preface

Plato has famously argued that "laws are made to instruct the good, and in the hope that there may be no need of them; also to control the bad, whose hardness of heart will not be hindered from crime."[1]

The premise of this book is that "good" people need laws, but with a different regulatory approach. For law to be able to operate effectively and lead to behavioral change, it needs to understand why "good" people engage in wrongdoing. Yet, even today, the law's main purpose is understood as protecting others from the actions of "bad" people. In contrast, this book argues that it is "good" people (more accurately, those who think of themselves as good people) whose behavior should occupy more of the attention of the law. While, for understandable reasons, the legal system is primarily focused on the upper tail of the distribution of misconduct, in fact most misconduct – those acts we refer to in the book as ordinary unethicality – is actually found in the middle of that curve; in many contexts, its treatment requires completely different assumptions and consequently a modified set of regulatory and enforcement tools from those used to punish serious misconduct.

This book assumes that ordinary unethicality is the most common and relevant type of behavior that legal policy makers should attempt to regulate. Acts of ordinary unethicality are part of most private law disputes in areas such as contact breach, tortious behavior, and lack of respect for people's property rights.[2] In addition, much of people's misconduct in public law, such as tax law, administrative law, and corporate law, involve ordinary unethicality.

Research into behavioral ethics, a growing field within the psychology and management literatures, has demonstrated in numerous field and lab experiments that people's unethical behavior stems from numerous cognitive and social processes that are only partially related to people's deliberative and aware reasoning;

---

[1] Taken from Jowett, B. (1871). *The dialogues of Plato* (Vol. 8). Oxford: Oxford University Press, p. 128. Interestingly, the following "Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws" is a misquoted phrase of Plato that is indeed better for the purposes of the book.

[2] Both tangible property and even more so with regard to intellectual property.

hence, people can engage in misconduct and still think of themselves as "good" people.

For the purposes of the book, we divide good people into "authentic good people," who through various implicit self-serving processes, such as blind spots or moral forgetting, understand reality in a biased way without recognizing it, and situational wrongdoers who use various justifications in the situation to behave badly without feeling immoral.[3] In contrast to the current dominant enforcement paradigm, which assumes that states are dealing with bad people who are pursuing their own self-interest and that the law needs to increase the price for misbehavior through sanctions and punishment, behavioral ethics posits that good people are guided by both automatic and deliberative processes and biases that enable them to bend the laws within the confines of their conscience. The book claims that the regulatory treatment of the good people who commit many of these misconducts is the neglected task of the law and of legal theory. A focus on those good people will enable regulators to determine in advance which types of situations are likely to encourage acts of ordinary unethicality and to develop an effective regulatory toolbox.

Although behavioral approaches have been introduced into legal theory and practice in the past two decades, they have been narrowly focused on the biases and heuristics literature, which has served as the foundation of the field of behavioral economics: that dominant field deals with cognitive biases in decision making in contexts related to probability, risk, and money. In contrast, behavioral ethics, which focuses on people's biases in making ethical decisions, has received little attention. Yet, ethical biases are not only stronger in many ways than the cognitive biases of behavioral economics but also far more relevant for the regulation of people's ethical behavior. For example, whereas behavioral economics uses the optimism bias to understand why people pursue legal disputes in courts, the behavioral ethics approach suggests that people go to court because they fail to fully understand how problematic their own behavior is, both legally and morally; various self-maintenance mechanisms prevent them from recognizing their wrongdoing. In addition, loss aversion affects not just risk perception but also the likelihood that people will behave unethically.

To regulate the involvement of "good" people in various types of noncooperative behaviors, this book provides a broad theoretical and empirical comparison of traditional and nontraditional enforcement mechanisms. It argues that many of the existing regulatory enforcement strategies are not suitable for addressing misconduct stemming from both deliberative and non-deliberative reasoning processes and biases. The insights of behavioral ethics into the cognitive and motivational factors guiding the behavior of good people require the development of innovative

---

[3] Obviously the majority of good people are found on a spectrum between those prototypes of good people, using both deliberative and implicit mechanisms to justify their unethically.

approaches to the normative treatment of a diverse population consisting of both good and bad people. These new approaches use an *ex ante* approach that attempts to regulate behavior in advance rather than an *ex post* approach that tries to determine responsibility, which behavioral ethics suggests is quite complex. The move to an *ex ante* design reduces the need to find the smoking guns required by evidentiary rules; hence, it gives more importance to dealing with minor misconducts that cannot justify *ex post* legal examination but in the aggregate are not less important. Good people's ignorance and unawareness of the moral meaning of their behavior provide another justification for a greater focus on detection than on punishment. This new paradigm facilitates a more nuanced understanding by regulators of the likely implicit and explicit effects on behaviors of specific situations. Finally, it suggests that differentiated approaches focusing on variation in people's level of intrinsic motivation should be supplemented by strategies that account for variation in people's level of self-awareness of the moral and legal meaning of their behavior.

The book examines the law's effectiveness in preventing people from engaging in uncooperative behaviors and wrongful conducts, such as breaching contracts, engaging in corruption and employment discrimination, and eschewing professional duties. More specifically, it compares the impact of traditional methods, including deterrence, social norms, and procedural justice, with that of behaviorally informed enforcement mechanisms, such as nudges, framing, and debiasing. The book discusses the pros and cons of these various intervention mechanisms, drawing practical conclusions for legal policy makers on how to optimize their regulatory and enforcement effects on both the deliberative and non-deliberative components of unethical behavior.

In addition, this book addresses key unresolved theoretical questions from several directions. How much can we know ex ante about good people's awareness and ability to control their unethical behaviors? How can we know that their goodness is genuine and not faked? Are considerations of morality and traditional enforcement practices, such as deterrence, effective in curbing behaviors that are only partly deliberative? Can states regulate simultaneously different types of individuals by using different intervention methods? Should the nudge approach, which avoids direct communication between the state and the people it regulates, replace all other intervention methods? Do we know what is lost in the sustainability of behavioral change and in autonomy when we abandon traditional intervention methods and replace them with interventions that don't require any deliberative reasoning by people? Is there still a benefit derived from changing people's intrinsic motivation when many of their misconducts are not done with full awareness? The book addresses these questions and examines in what way the existing research falls short of offering a coherent behavioral and normative picture of the person we are trying to regulate.

In its call for regulatory reform, the book does not focus only on theoretical discussions; instead, it draws on extensive empirical research that other researchers and I have conducted on these questions. It examines through case studies, the effect of social norms on the perception of legality in the context of intellectual property, the effect of legal incentives on people's intrinsic and extrinsic motivations in the area of environmental protection and whistle-blowing laws, the effect of legal uncertainty on the compliance and performance of people with different motivational backgrounds, and the effectiveness of deterrence and morality in enabling people to avoid subtle conflicts of interest and refrain from engaging in implicit discrimination toward different social groups.

Chapters 1 and 2 lay the groundwork for this innovative approach to the law. Chapter 1 outlines the main argument of the book, briefly describing the potential of behavioral ethics, exposing existing gaps in the behavioral analysis of law, and showing how the book proposes to fill them. Chapter 2 explains how both deliberate mechanisms, (e.g. moral disengagement) and non-deliberate mechanisms, (e.g. moral forgetting and motivated blindness) prevent people from recognizing the wrongdoing in their behavior and their own unethicality.

Chapters 3–5 address how to expand the regulatory toolbox, focusing on both formal and non-formal controls and their ability to deal with both explicit and implicit types of misconducts by both "good" and "bad" people. These chapters outline factors such as situational design, behavioral incentives, social and ethical nudges, fairness, social norms, and education. The focus on good people requires a shift in the focus of the legal regime from *ex post* liability to *ex ante* design. *Ex post* mechanisms that focus on liability and are designed to change people's *ex ante* calculations will not be effective because most "good" people are not likely to be aware of why they behaved in a certain way in the first place. We also argue for the importance of designing policies that make it difficult for people to interpret fairness in a self-serving way. There is a need to provide people with accurate information on the nature of social norms and their prevalence, because various cognitive mechanisms are likely to cause people to underestimate the true prevalence of cooperative norms. Incentives need to be sensitive to the crowding-out effect of intrinsic motivation and hence should account for people's motivational sensitivities. Ethical nudges need to be distinguished from other kinds of behavioral nudges, so that appeals to self-interest do not reduce their effectiveness.

Chapter 6, which focuses on individual differences, complicates the picture of good vs. bad people by arguing that good people should be divided into at least two types[4], based on the variation in self-deception mechanisms reviewed in Chapter 2. Good people of the first type genuinely do not understand their behavior or the relevant situation as it is, because of cognitive mechanisms, such as Bazerman's blind spot, Haidt's "emotional dog" approach to morality, or Balcetis's motivated

---

[4] This dichotomy is first developed in Chapter 4.

seeing, which rely mostly on non-deliberative processes. In that camp of morally blind people belong those who engage in implicit job discrimination or in implicit corruption in subtle conflict of interest situations. In contrast, good people of the second type know that what they are doing is impermissible, but they find various rationales that allow them to do bad things without harming their moral self-image. The related work of Bandura on moral disengagement and Shalvi's work on justified dishonesty in the dice-under-the-cup paradigm shows that this is mostly a deliberate process. In the camp of the deliberative justifiers, we can find those committing various parking violations, cutting corners, or using personal contacts to bypass a certain bureaucratic procedure.[5] In this chapter, we also analyze relevant individual differences scales, such as moral identity and social value orientation. Recognizing the limitations of identifying individual variation ex ante, the chapter concludes with a discussion of alternative ways to differentiate between different types of people based on their commitment to the law or the norms of their profession. Such approaches are more likely to be known ex ante by regulators.

The complex effects of law, the existence of various types of regulatory tools, the power of the situation, and the variation among people together create a highly complex regulatory picture. Both Chapter 7 on the pluralistic account of law and Chapter 8 on the trade-offs between the different likely effects of laws present research that guides how policy makers can balance the effects of different aspects of the law, on different people, with regard to different compliance behaviors. The concept of the pluralistic approach to law refers to the fact that the law tries to change the behavior of people with different compliance motivations and different levels of awareness, and through the use of both implicit and explicit signals; thus, there are many possible conflicting behavioral outcomes to any law that is enacted. The concept of behavioral trade-offs suggests that each type of intervention produces a different behavioral reaction, because the behavioral ethics perspective on people's approach to unethicality is far more complex than is assumed by traditional enforcement methods. It is rarely the case that any one policy will be superior in terms of every behavioral dimension. Developing an effective policy requires taking many factors into consideration, as well as the particular context of the situations in which people make decisions.

This book's approach to law enforcement is applied in Chapters 9 and 10 to corruption and employment discrimination, respectively; these two case studies demonstrate how to create an effective balance between regulatory tools that address different types of populations with different mind-sets toward the behavior to be regulated. For both corruption and employment discrimination, it is not the behavior itself, but the state of mind of the individual when doing it that is problematic – and that is very hard to prove in court. For example, when a mayor hires a contractor,

---

[5] As suggested above, many good people are on a spectrum between those two prototypes, depending on the specific situation.

that behavior is only of concern when that decision is made based at least partially on his or her self-interest. When an employer decides not to hire someone for a job, that decision is problematic if he or she based it on prejudice. These chapters examine the different set of regulatory tools to be used *ex ante* rather than *ex post* to deal with legal violations in these two fields.

Chapter 11 concludes with a discussion of some key policy-making concepts derived from the book's assumptions about wrongdoing and the good vs. bad people typology. It first examines the role of intrinsic motivation and moral education when decisions are non-deliberative. It then outlines the use of taxonomies of regulatory contexts to determine which regulatory tools to use in which contexts and for which purposes and reviews possible approaches to deal with people's unethical and illegal behavior, such as differentiated or targeted regulation and responsive or sequential regulation. It concludes with a discussion of the future of the field of behavioral ethics in the theory of legal enforcement and some of its limitations.

Acknowledgments

I wish to thank a number of people and institutions for their important assistance while writing this book. First, I would like to thank Matt Gallaway from Cambridge University Press for proposing the initial idea to write this book. Without his encouragement, this project may not have come to fruition. I would like to thank Catherine Smith and Meera Seth from the Press for managing the production of the book. I would also like to thank Mathivathini Mareesan and the Production team at Integra software services Pvt., Ltd.

This book has been published with the help of generous funding by the Bar-Ilan Faculty of Law, where I have worked for the past 13 years. The support this faculty has shown me over the years truly knows no bounds. I would like to express thanks in particular to former dean Prof. Sahar Lifstitz, as well as the entering dean Prof. Oren Perez. So as not to leave anyone out, I would like to express my thanks to the faculty as a whole. Many of the ideas for this book were formulated as a result of my countless conversations with other faculty members. The individual help I received from many of them, particularly from Tsilly Dagan and Adi Leibson, does not go unnoticed. Over the past four years, I have also been fortunate to conduct my more applied research on the implications of behavioral economics and ethics to regulation and compliance in the Israel Democracy Institute. It was there that I learned the gap between lab experiments and behaviorally based policy making by governmental institutions.

Earlier drafts of the book were presented in seminars at Berkeley, Stanford, UC Hastings, Oxford, Dublin, Turin, Munich, the Israeli Democracy Institute in Jerusalem, Tel-Aviv University, and Bar-Ilan University. I appreciate the helpful comments I have received from those attending.

In addition to my institutional colleagues, I wanted to thank Christoph Engel, Jeff Rachlinski, Shaul Shalvi, Dan Arielly, Hanoch Dagan, Tom Tyler, Max Bazerman and Ariel Porat, whose conversations with me have afforded much insight into the topics discussed in this book.

I was fortunate enough to spend a number of productive years in the Corruption Lab at Harvard University headed by Larry Lessig and the Implicit Social Cognition

lab headed by Mahzarin Banaji, also at Harvard University. Most of my knowledge about behavioral ethics was attained during this time. The intellectual tools I gained while working in these labs have exerted a considerable influence on the course and direction of my research. The creation of this book evinces this influence, for which I am deeply grateful.

Some of the research in this book can also be traced to an even earlier – my doctoral studies at the University of California–Berkeley. Naturally, my advisors Bob Cooter and Rob MacCoun – whose different but equally sophisticated and coherent views on rationality and decision-making processes helped shape my current view about "good people" – require much gratitude. I would also like to thank the entire Jurisprudence and Social Policy faculty at Boalt Hall for their indirect help with the creation of this book. It took me many years to recognize the importance of studying not just the behavioral and economic approaches to law but also the sociological, philosophical, and political science views on decision making in legal contexts.

The vast majority of my research has been conducted in collaboration with scholars from numerous disciplines, such as law, psychology, sociology, political science, philosophy, economics, and game theory. Generally, credit is given to each person in the appropriate chapter.

However, since so much of my research has emerged from that collaborative work, I feel the need to thank each one of them for their specific contribution to this work as a whole:

To Doron Teichman, for a series of joint papers regarding the nuanced effect of law on behavior, the last three being in collaboration with Amos Schur and Uriel Haran.

To Henry Smith, Constantine Boassalis, and Alon Harel, for our joint work on theoretical and empirical aspects of legal ambiguity.

To Orly Lobel, for our joint work on legal instruments, behavioral trade-offs, whistle-blowing, and new regulatory tools.

To Oren Perez, for our joint work on various legal incentives and their effect on environmental behavior.

To Tom Tyler, for our joint work on the effect of law on procedural justice.

To Eliran Halali, for our joint work on competing approaches to enforcing behavior in subtle conflict of interest situations.

To Michal Feldman and Bob Cooter, for our joint work on biases in the perception of norms.

To Tammi Krichelli-Katz and Haggay Porat, for our joint work regarding employment discrimination.

To Maryam Koachaki and Francesca Gino, for our joint work regarding the expressive effects of ethical codes.

Finally, I would like to extend my gratitude to the numerous research assistants who helped in various stages of this book's preparation: Noam Loshinsky, Jasmin Goldofsky, Russel Shitrit-Leibovitch, Or Ashual, Aelet Sender, Maryam Jacobi,