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Introduction

The focus of this book is on how governments may effectively use recent advances in the understanding of human behavior to guide their efforts to modify people's behavior. To date, the insights of behavioral ethics that have completely revolutionized the business and management fields have yet to be applied in legal theory and policy research, especially in the context of legal enforcement and compliance. The growing recognition that misconduct can be facilitated by structural issues and is not just the product of a few "bad apples" has important implications for the creation and fine-tuning of institutional design and enforcement mechanisms. States need to modify their regulatory roles and functions based on the understanding that discrimination does not just stem from certain employers who hate minorities, that corruption is not just about greedy individuals, or that trade secrets are not just divulged for mercenary motives.

This book argues that the good-people rationale – the idea that ordinary people could engage in all types of wrongdoing without being aware of the full meaning of their behavior – greatly complicates the regulatory challenge of states. Because of various psychological and social mechanisms that prevent people from recognizing their wrongdoing and encourage them to feel as if they are far more moral, unbiased, and law abiding than they actually are, individuals today are less likely to react, at least not explicitly, to classical legal signals, which they view as directed to other, "bad" people. Similar self-serving mechanisms affecting their perception of social norms and fairness cause people to have very inaccurate views of the normative status of their behavior. Moreover, a great deal of uncertainty surrounds the good-people rationale and, as we will show from the literature, there is clearly more than one type of good person – different people use a variety of different mechanisms to justify their unethical and illegal behavior. We do not yet know how "good" the good

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* Parts of specific chapters are based on joint work with my coauthors. This chapter includes some text that appeared in "Behavioral Ethics Meets Behavioral Law and Economics," in *The Oxford Handbook of Behavioral Law and Economics*, ed. Eyal Zamir and Doron Teichman (2014).

people are in terms of their awareness and ability to control their conduct. Nor can we accurately quantify *ex ante* the ratio of good to bad people in society with regard to any particular behavior. Although we appreciate the need to address the misconduct of good and bad people differently, we do not know the costs of using the "wrong" intervention techniques to deal with various types of bad behavior. Bringing about the needed shifts in regulatory design first requires a shift in the behavioral analysis of law.

1.1 LIMITED COGNITION, LIMITED SELF-INTEREST, AND BEHAVIORAL ETHICS

The past 40 years have seen a dramatic increase in the influence of psychology on the field of economics in general and on the law and economics movement in particular. As a result, significant efforts have been devoted to mapping the flaws in human cognition and examining their implications for how individuals deviate from making optimal decisions.[1] For example, the literature has investigated how irrelevant factors of context, framing, or situation can cause individuals to make decisions that are contrary to their best interest. Daniel Kahneman's book, *Thinking, Fast and Slow*, popularized the concept of two systems of reasoning, which now is at the core of extensive research in behavioral law and economics.[2] Kahneman differentiates between an automatic, intuitive, and mostly unconscious process (System 1) and a controlled and deliberative process (System 2). Although many scholars – for example, Gigerenzer et al.[3] and Kruglanski[4] – have criticized this paradigm, recognition of the role of automaticity in decision making has played an important role in the emergence of behavioral law and economics.

It is essential to clarify at the outset the dramatic difference between the highly popular behavioral law and economics (BLE) and behavioral ethics (BE). BLE is concerned with people's limited ability to make "rational" decisions, whereas behavioral ethics addresses people's inability to fully recognize the ethical, moral and legal aspects of their behavior. How BE and BLE approach self-interest illustrates the main difference between them. BLE assumes that people cannot be fully trusted on their own to make decisions that enhance their self-interest because of the bounded rationality argument – that available information, cognitive ability, and

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[1] Jolls, C., Sunstein, C. R., & Thaler, R. (1998). A behavioral approach to law and economics. *Stanford Law Review*, 50, 1471–1550. See also Korobkin, R. B., & Ulen, T. S. (2000). Law and behavioral science: Removing the rationality assumption from law and economics. *California Law Review*, 88, 1051–1144; Langevoort, D. C. (1998); Behavioral theories of judgment and decision making in legal scholarship: A literature review. Vanderbilt Law Review, 51, 1499; Jolls, C. (2007). *Behavioral law and economics* (No. w12879). National Bureau of Economic Research.

[2] Kahneman, D. (2011). *Thinking, slow and fast*. New York: Farrar, Straus and Giroux.

[3] Gigerenzer, G., Todd, P. M., & ABC Research Group. (1999). *Simple heuristics that make us smart*. New York: Oxford University Press.

[4] Kruglanski, A. W., & Gigerenzer, G. (2011). Intuitive and deliberate judgments are based on common principles. *Psychological Review, 118*(1), 97.

time constraints limit individuals' ability to make rational decisions. In contrast, BE focuses on people's inability to recognize the extent to which self-interest in its broader sense affects their behavior. BE assumes that many people's actions are based on self-interest, in that they serve the need to maintain a positive and coherent view of the self. It also accounts for the effect that self-interest has on cognitive processes (e.g., visual perception and memory), as opposed to simply looking at how self-interest affects motivation. Finally, BE is more concerned with how our self-interest affects us implicitly than with how it shapes our explicit choices. In light of these differences, the fact that BLE is so popular within the legal literature[5] while BE is almost entirely ignored[6] is quite counterintuitive.[7]

As I discuss in more detail in Chapter 2 – which focuses on the psychological foundations of behavioral ethics – good people are those who find themselves in situations in which they are not fully aware of the legal, moral, and ethical meanings of their behavior for a combination of reasons.[8] They then engage in motivated reasoning, in which their desires affect the types of information they pay attention to and how they process it.[9] Self-deception also plays an important role in their ability to accurately assess the nature of their actions and motives, causing them to believe they are acting more ethically than they actually are.[10] To use a common

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[5]   For example, Sunstein, C. R. (1999). Behavioral law and economics: A progress report. *American Law and Economics Review*, 1(1/2), 115–157. See also Langevoort, *supra* note 1.

[6]   For some comparison of the potential of the two literatures, see Amir, O., & Lobel, O. (2008). Stumble, predict, nudge: How behavioral economics informs law and policy. *Columbia Law Review*, 108(8), 2098–2137.

[7]   I discuss this point in Chapter 1, page 6.

[8]   For example, see Mazar, N., Amir, O., & Ariely, D. (2008). The dishonesty of honest people: A theory of self-concept maintenance. *Journal of Marketing Research*, 45(6), 633–644. See also Bersoff, D. M. (1999). Why good people sometimes do bad things: Motivated reasoning and unethical behavior. *Personality and Social Psychology Bulletin*, 25(1), 28–39; Kidder, R. M. (2009). *How good people make tough choices: Resolving the dilemmas of ethical living* (Rev. ed.). New York: Harper Perennial; Pillutla, M. M. (2011). When good people do wrong: Morality, social identity, and ethical behavior, in D. De Cremer, R. van Dijk & J. K. Murnighan (Eds.), *Social psychology and organizations* (p. 353). New York: Routledge; Hollis, J. (2008). *Why good people do bad things: Understanding our darker selves*. New York: Penguin; and Banaji, M. R., & Greenwald, A. G. (2013). *Blindspot: Hidden biases of good people*. New York: Delacorte Press. Many other authors do not use the term but make the same argument in the text (see, e.g., De Cremer, D., van Dick, R., Tenbrunsel, A., Pillutla, M., & Murnighan, J. K. (2011). Understanding ethical behavior and decision making in management: A behavioural business ethics approach. *British Journal of Management*, 22(s1), S1–S4. This is also the view held by Bazerman, M. H., & Tenbrunsel, A. E. (2011). *Blind spots: Why we fail to do what's right and what to do about it*. Princeton: Princeton University Press. This line of scholarship is completely different from the type of research conducted by Zimbardo, P. G. (2007). *The Lucifer effect*. New York: Random House Trade Paperbacks. These works generally try to explain how ordinary people end up doing evil or at least engaging in gross criminal behaviors.

[9]   Kunda, Z. (1990). The case for motivated reasoning. *Psychological Bulletin*, 108(3), 480.

[10] Chugh, D., Bazerman, M. H., & Banaji, M. R. (2005). Bounded ethicality as a psychological barrier to recognizing conflicts of interest. In D. A. Moore, D. M. Cain, G. Loewenstein, & M. H. Bazeman (Eds.), *Conflicts of interest: Challenges and solutions in business, law, medicine, and public policy* (pp. 74–95). Cambridge: Cambridge University Press.

example, 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[11] seem to be, on the surface, motivated primarily by his own self-interest.

As discussed in more details in Chapter 2 and especially in Chapter 9 that focuses on implicit corruption, the BE literature has produced many important and counter-intuitive insights with regard to the predictors of unethical behavior. For example, people behave less ethically in groups than when alone[12] and also when they are acting on behalf of other people, rather than for themselves. Another example is that good people might ignore blatant conflicts of interest, having few qualms about accepting tickets to a sports event from a client, although they would shy away from taking a monetary bribe. Individuals who consider themselves to be "good" based on their past behavior may permit themselves to bend the rules (moral licensing) and are more likely to make unethical decisions when time constraints increase.[13] These findings described in the literature pose a substantial challenge to the ability of the state to change the behavior of the public across many domains of law.

As will be developed throughout the book, current research on behavioral ethics could explain a long line of uncooperative behaviors and wrongful conducts, such as breaching contracts due to biased interpretation of the contractual negotiation, engaging in corruption for undermining the effect of self-interest on one's reasoning, employment discrimination due to social cognition processes, and eschewing professional duties of loyalty in various corporate and administrative contexts.

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. Indeed, one of the unresolved issues is the degree to which individuals are aware of their ethical behavior,[14] and BE research has proceeded along several paths that argue different views on this topic. On the one hand, Marquardt and Hoeger showed that individuals make decisions based on implicit rather than explicit attitudes.[15] Along similar lines, when examining the automatic system, Moore and Loewenstein[16] found that the effect of self-interest is automatic, and Epley and

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[11] For example, in choosing people he wants to promote, areas in the city he decides to develop, and contractors with whom he interacts. In Chapter 9, the fact that the contribution of the "best interest of the city" is an ambiguous concept is developed.

[12] Weisel, O., & Shalvi, S. (2015). The collaborative roots of corruption. *Proceedings of the National Academy of Sciences*, 112(34), 10651–10656.

[13] Shalvi, S., Eldar, O., & Bereby-Meyer, Y. (2012). Honesty requires time (and lack of justifications). *Psychological Science*, 23(10), 1264–1270.

[14] Hochman, G., Glöckner, A., Fiedler, S., & Ayal, S. (2016). "I can see it in your eyes": Biased processing and increased arousal in dishonest responses. *Journal of Behavioral Decision Making*, 29(2–3), 322–335.

[15] Marquardt, N., & Hoeger, R. (2009). The effect of implicit moral attitudes on managerial decision-making: An implicit social cognition approach. *Journal of Business Ethics*, 85(2), 157–171.

[16] Moore, D. A., & Loewenstein, G. (2004). Self-interest, automaticity, and the psychology of conflict of interest. *Social Justice Research*, 17(2), 189–202.

Caruso[17] concluded that automatic processing leads to egocentric ethical interpreta-
tions. However, within BE can be found theories such as Bandura's theory of moral
disengagement that maps *post hoc* deliberative and aware self-serving justifications,
creating a taxonomy of how people come to explicitly rationalize their unethical
behavior.[18]

Another body of literature that stands in contrast to BE is that on limited self-interest,
which emphasizes the role of fairness and morality in compliance with the law. A good
example is the important line of research that derives from the prosocial account of
human behavior (see, e.g., works of Stout[19] and Benkler[20] on prosocial behavior).
According to this literature, rational choice models cannot account for our ability to
cooperate and engage in prosocial behavior beyond what is in our self-interest.

Both BE and the prosocial behavior literature agree on the need to take a broader
view of how self-interest operates relative to traditional economics, and both disagree
with the notion that money is the main force motivating people. However, they do
not agree on the implications of these assumptions: BE argues that a broad account
of self-interest should reveal our tendency toward selfish action, whereas the proso-
cial literature claims the opposite. In this book, I do not suggest that we look at
people's selfish choices to understand their behavior. On the contrary, I offer a more
complex view of what it means for a choice to be in one's broader self-interest and
how self-interest affects people's understanding of the legal and moral meaning of
their behavior.

1.2 THE CONTRIBUTION OF ECONOMICS TO THE DEVELOPMENT
OF THE BEHAVIORAL ANALYSIS OF LAW

The contribution of economics to law and psychology, which cannot be overstated,
has brought about a shift in focus from the individual to the collective. Before the
field of BLE developed, the law and psychology scholarship mostly took a forensic
approach, evaluating individuals for the courts, primarily in criminal and family law
contexts. Even research exposing biases at work in criminal and civil procedures,
which is closely related to research in empirical legal studies (ELS),[21] was often
carried out in the context of individuals involved in particular court cases (e.g., jury
selection and jury decision making). This orientation has limited the applicability of
the traditional law and psychology scholarship to regulatory and legislative contexts.

[17] Epley, N., & Caruso, E. M. (2004). Egocentric ethics. *Social Justice Research*, 17(2), 171–187.
[18] Bandura, A., Barbaranelli, C., Caprara, G. V., & Pastorelli, C. (1996). Mechanisms of moral disen-
gagement in the exercise of moral agency. *Journal of Personality and Social Psychology*, 71(2), 364.
[19] Stout, L. (2010). *Cultivating conscience: How good laws make good people*. Princeton: Princeton
University Press.
[20] Benkler, Y. (2011). *The penguin and the leviathan: How cooperation triumphs over self-interest*.
New York: Crown Business.
[21] Rachlinski, J. J., Johnson, S. L., Wistrich, A. J., & Guthrie, C. (2009). Does unconscious racial bias
affect trial judges? *Notre Dame Law Review*, 84(3), 1195.

In contrast, BLE scholarship focuses on understanding the behavior of ordinary people in everyday situations, with attention to situational context and the general effect of law on those actions. Many BLE findings have found practical application through communications with regulators, legislatures, and Behavioral Insight Teams (BIT).[22]

BLE incorporates psychological insights into law through an economic lens. At the same time, it ignores many noneconomic areas of psychology, focusing instead on theories related to judgment and decision making. The implications of the limited attention paid to the role of psychological mechanisms in people's behavior are discussed in the next chapter.

This book challenges the excessive focus on cognitive biases at the expense of ethical biases that allow immoral behavior. Whereas the economics literature stresses rationality – that is, the outcome as a utility-maximizing decision relative to preference – I argue that it is the understanding of the importance of non-deliberative decision making that truly matters for legal theory; in addition, it is precisely the nuanced effect of this process on immoral behavior that economics fails to address.

1.2.1 *Demonstration through the "Self-serving Bias"*

The danger of BLE's over-reliance on economics is best demonstrated in the ways its scholarship addresses the self-serving bias. Despite this bias's clear relevance for morality and responsibility and therefore its close relationship to legal theory and enforcement, the BLE literature focuses on it instead as a deviation from rationality. For example, self-serving biases have been held responsible for people's inability to estimate correctly the probability of winning legal battles. Babcock and Loewenstein conducted the most famous study, which showed that self-serving biases operated to reduce the likelihood of people settling out of court.[23] This is a typical BLE finding because it assumes that people make rational decisions – basing their decision to pursue legal action or settle based on their probability of winning. In this case, the self-serving bias suggests a narrow deviation from rationality, causing them to over-estimate their probability of winning. But a much greater problem for the law, one that currently is mostly ignored, is the contribution of the self-serving bias to people's inability to recognize both their own wrongdoing and the dominant role that their self-interest plays in their behavior – which limits their ability to understand why legal action is being brought against them. The law and economics movement has thus limited the richness of the psychology being used in legal scholarship.

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[22] For a review see Jolls et al., *supra* note 1. See also Korobkin & Ulen, *supra* note 1. See also Halpern, D. (2016). Inside the nudge unit: How small changes can make a big difference. Random House.

[23] Babcock, L., & Loewenstein, G. (1997). Explaining bargaining impasse: The role of self-serving biases. *Journal of Economic Perspectives*, 11(1), 109–126.

The proposed legal perspective is not concerned with whether people are acting rationally. Instead, it is concerned with whether 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 reach the optimal outcome, should be at the core of the new behavioral analysis of law.

1.3 WHY BEHAVIORAL ETHICS HAS BEEN NEGLECTED IN LAW

As suggested earlier, both the BE and the traditional BLE literatures focus on the automatic processes that underlie people's decision making. However, they have different emphases: BE explores the automaticity of self-interest, whereas BLE examines areas in which automatic decisions undermine self-interest.[24]

Given the importance of intentionality to the law, one would expect behavioral ethics to be more central to legal scholarship than it is today. Yet BE has had less of an impact on the legal arena than has behavioral law and economics. This is primarily because of BE's structural limitations. For example, BE has a relatively large number of founding scholars, whereas BLE has two main ones: Kahneman and Tversky. As a result, BE suffers from the simultaneous development of multiple, competing paradigms, muddling the underlying points on which the literature agrees. These disagreements prevent BE from being able to propose consistent policy recommendations, which is another obstacle to its adoption within the law. Yet another limitation of BE is that it relies to a greater extent than does BLE on dual-reasoning mechanisms, whose concepts of automaticity, awareness, and controllability are difficult to explore and measure. How is it possible to prove that people are unaware or even partly unaware of their selfish intentions? By contrast, classical BLE focuses on suboptimal outcomes, which can be easily examined empirically. This focus places many of the findings of BE at methodologically inferior positions relative to those of BLE.

Finally, another limitation of BE relative to BLE is the greater inability of third parties to recognize the biases of the decision making. When it comes to BLE-related biases such as loss aversion, third parties can more easily recognize the fact that this bias undermines the ability of decision makers to treat loss and profit as similar consequences. By contrast, the main mechanisms in behavioral ethics are related to self-serving biases and motivated reasoning, which contribute to people's reduced ability to recognize their own wrongdoing. Since these mechanisms are self-driven, it is harder for third parties who look at others' bad behaviors to recognize them as

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[24] Kish-Gephart, J. J., Harrison, D. A., & Treviño, L. K. (2010). Bad apples, bad cases, and bad barrels: Meta-analytic evidence about sources of unethical decisions at work. *Journal of Applied Psychology*, 95(1), 1. See also Bazerman, M. H., & Gino, F. (2012). Behavioral ethics: Toward a deeper understanding of moral judgment and dishonesty. *Annual Review of Law and Social Science*, 8, 85–104.

"good" people who simply cannot recognize their own wrongdoing. To use a hypothetical example, if a public official promoted a friend, BE suggests a whole array of mechanisms that might bias her ability to recognize the impact of personal familiarity on the objectivity of her decisions.[25] However, for third parties, BE research suggests that they will have trouble believing that the public official did not favor her friends knowingly.[26] Such a gap between the decision maker and third parties also contributes to the reluctance of BLE scholars to adopt BE-based biases as part of the bounded rationality project.[27] Despite the aforementioned limitations, bringing BE into mainstream legal scholarship is both a challenging and rewarding task and it will be the primary occupation of the present book.

1.4 THE GIST OF THE BOOK

As alluded to in the previous paragraphs, in this book, I aim to create a new branch of scholarship that focuses on the rule of law in a world populated by individuals with different levels of awareness of their own unethicality. This book is based on the assumption that many of the current directions in legal enforcement research, especially with regard to 'ordinary unethicality' miss important elements of both behavioral and legal methods and theories. It challenges the ability of states to systematically account for non-deliberative, unethical human behavior given a legal system based largely on either sanctions or moral messages, both of which assume some level of calculation and deliberation. The legal literature on enforcement needs to undergo a major revision in its approach to the regulation of intellectual property, employment discrimination, conflict of interest, and many other legally relevant behaviors that people engage in for multiple reasons and with limited awareness of their full legal and moral meaning. In such contexts, the BE approach is especially potent and needs to be taken into account. This change in perception creates many new challenges from a regulation and enforcement perspective, as it is unclear to what extent current legal instruments could be seen as effective in curbing misconducts conducted by people limited awareness to the full meaning of their own behavior. The focus of the book is to explore the ability to create regulatory and enforcement tools that will be able to target people who differ in their self-awareness to wrongdoing.

As suggested, the book criticizes the behavioral-legal scholarship for overemphasizing rationality and cognitive biases at the expense of non-deliberative choice and

[25] See discussion in Chapter 2 on the objectivity bias.
[26] See discussion in Chapter 9 on implicit corruption.
[27] Compare with the argument made in Soltes, E. (2016). *Why they do it: Inside the mind of the white-collar criminal*. New York: PublicAffairs, where convicted white color criminals report they were unaware at the time that their behavior was unethical or illegal. The vast majority of people find it very hard to believe that those people indeed did not know what they were doing.

ethical biases. However, as is shown throughout the book, the move to dual-reasoning theories should not lead to a categorical rejection of deterrence and morality. In fact, the reverse is true: one of the arguments developed in later chapters is that traditional enforcement mechanisms have more than one type of effect on people; therefore, the current fascination with "nudges"[28] as a means of changing behavior, along with the abandonment of traditional intervention mechanisms, is misguided.

In latter chapters, I examine the new insights derived from behavioral ethics, a relatively overlooked area in current legal research, which help identify many mechanisms that prevent people from fully recognizing the wrongfulness of their behavior. At a conceptual level, the book revises some jurisprudential concepts related to choice, responsibility, and autonomy in light of growing knowledge about the role of non-deliberative choice in human behavior. Based on these insights, I revisit many of the existing behavioral paradigms of legal regulation and enforcement and conclude by presenting a multidimensional taxonomy of legal doctrines and of the various instruments that states can use to modify human behavior. I recommend certain changes that legal scholarship on enforcement needs to make to remain relevant in the face of recent behavioral research and regulatory changes.

Such a change in focus would greatly affect the design and enforcement of laws and regulations in many legal domains. For example, how can we justify the use of deterrence in light of the "blind spot" argument (i.e., ethical unawareness) advanced by scholars such as Bazerman and Tenbrunsel as well as Banaji and Greenwald?[29] How can we understand the legal responsibility of organizations given what we know about situational cues of unethicality? How should we think of nudges when our goal is to increase ethicality, rather than improving the available choices, although only the latter are in the long-term interest of individuals? How are we to understand the *Why People Obey the Law* project of Tom Tyler,[30] which is based on self-report and explicit accounts of fairness, in light of the writings on moral intuition by Haidt[31] and on moral identity by Aquino?[32] Should we ascribe a new meaning to legal ambiguity, given its contribution to such processes as the moral wiggle room and self-deception? Can

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[28]   The concept of nudges, which is discussed in Chapter 4, was advanced in the 2008 book by Richard H. Thaler and Cass R. Sunstein (2008). N*udge: Improving decisions about health, wealth, and happiness.* New York: Penguin, 2008. A nudge is a simple intervention, such as changing the default setting in decision making, that policy makers can institute to change people's behavior with a limited need for them to make any deliberative choice.

[29]   See Sunstein, *supra* note 5. See also Bazerman & Tenbrunsel, *supra* note 8; Banaji, M. R., & Greenwald, A. G. (2016). *Blindspot: Hidden biases of good people.* New York: Bantam Books.

[30]   Tyler, T. R. (2006). W*hy people obey the law.* Princeton: Princeton University Press.

[31]   Haidt, J. (2001). The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review, 108*(4), 814.

[32]   Aquino, K., & Reed II, A. (2002). The self-importance of moral identity. *Journal of Personality and Social Psychology, 83*(6), 1423.

states use enforcement mechanisms that distinguish between intentional and situational wrongdoers?

In general, I argue that we should separate situations of specific individuals – where we need to define *ex post* the level of responsibility of a given individual who is on trial given his or her own limited awareness – from situations where we examine *ex ante* how to mobilize a given population, where our focus is on the collective. The first type of situation is the traditional view of law, but the fact that current studies show that ethical awareness is limited might not be enough to lead to a normative change without more research. However, when it comes to *ex ante* intervention, even when we cannot fully determine the strength of the non-deliberative component in people's ethical motivation, we are able to predict that this component is likely to change the behavior of an unknown proportion of the population and hence should affect the *ex ante* design of law.

In subsequent chapters, I attempt to bridge the gap between the new findings of the behavioral ethics approach to behavior and existing methods used to modify behavior. The new behavioral approaches to law enforcement assume that individuals are motivated to engage in illegal conduct by more than the pursuit of material self-interest. These approaches collide with the traditional outlook, requiring a broad theoretical and empirical comparison of both traditional enforcement mechanisms and nontraditional measures to understand how states may be able to cope with bad deeds carried out by people with a variety of motivations and levels of awareness. I explore the meaning of these variations across people, types of behavior, and legal doctrines.

This book explores the pros and cons of each regulatory tool available to government using an instrument-choice perspective based on the extensive knowledge we already have on the behavioral implications of each tool. This analysis assesses the advantages of both traditional and nontraditional approaches to legal enforcement in addressing both general enforcement dilemmas and contexts of fighting corruption and discrimination.

1.4.1 *The Challenge to Legal Enforcement Posed by Behavioral Ethics*

The underlying assumption of BE regarding the complex role played by the "self" in ethical decision making is clearly problematic for legal theory. BE proposes that many of the claims about the responsibility of individuals as moral agents for their actions neglect the impact of the situation in which the decision-making process is taking place. It may be that the main driver of the individual's behavior is the situation and not the individual's current self-view. Furthermore, the automaticity of the self-enhancement process creates a "responsibility gap" for the individual who is not completely aware of the ethicality of his or her actions and therefore cannot be held responsible for them. A possible way of bridging this gap is through nudges and