The Ethics of Intracorporate Behavioral Ethics

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INTRODUCTION

Behavioral ethics, the study of how and why people make ethical and unethical decisions, has come into its own. Following a meteoric rise over the last decade, the discipline has grown to occupy a distinct space within business ethics. What sets it apart is a focus not on the normative question of how individuals should act when facing ethical business quandaries—the province of moral philosophers and traditional business ethicists—but on the empirical question of how individuals actually do act in moral contexts and why that is. Researchers have found that a host of situational and social factors influence ethical decision-making; most of us are ethical, but only boundedly so. That insight, and the follow-on practical implications for corporate compliance, offers companies new and more effective approaches to lessen legal and ethical breaches by their employees. Corporate leaders are beginning to see behavioral ethics as the way to achieve more effective compliance at less cost.

Amid the promise of using behavioral ethics strategies to lessen corporate wrongdoing, however, lies a nagging unease. If ethical decision-making can be influenced by situational factors, then altering the conditions under which individuals make those decisions can change their behavior. And because much

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of our decision-making happens subconsciously, our behavior can be altered without us knowing it. Governments have already begun employing “choice architecture” in this manner, influencing our decisions by “nudging” us toward welfare-maximizing options.¹ Despite clear benefits, both individual and societal, critics have questioned the ethics of these nudges, particularly their impact on personal welfare, autonomy, and dignity.² But the critiques have been largely overcome based on assertions that choice architecture is inevitable, consistent with democratic norms, and, if administered transparently and subject to public scrutiny, fully legitimate.³ Indeed, the prevalence of choice architecture being used as a public policy tool has all but ended the debate.⁴

Yet the debate is not so settled when focusing on intracorporate uses of choice architecture, specifically nudges administered by companies to make employees more ethical. While the intended use of these nudges may be laudable—to increase employee ethicality—they are also susceptible to being used as a tool of unwarranted behavioral manipulation, assuming they even work in the first place. However, if intracorporate nudges do improve legal and regulatory compliance, they offer a new and compelling tool in the fight against corporate wrongdoing, one that may justify certain infringements on employee autonomy. These issues, largely ignored in business and legal scholarship, require a fresh analysis of the ethical implications of the evolving role of behavioral ethics within the corporation.⁵

This Essay begins by explaining the rise of behavioral ethics, its definition, and its central findings. The Essay then explores how companies are using behavioral ethics insights, which draw from behavioral economics research, to

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1. See Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness 6 (2008). Nudges are small design elements that structure the context in which choice is made to steer decision-making toward a welfare-maximizing direction. Id. at 3.


5. This Essay does not address the use of nudges and other behavioral marketing strategies by companies to influence consumer behavior. While the ethical boundaries of those practices are worth exploring, the focus here is on the ethical use of choice architecture in corporate compliance.
influence employee behavior. From there, the Essay turns to the ethical implications of this evolution, addressing the central question of whether companies using intracorporate behavioral ethics nudges on their employees are themselves acting ethically. Applying both an empirical and normative lens, the Essay suggests that while behavioral ethics strategies offer important opportunities for corporate compliance, they must be implemented with caution. That is because nudging employees to be more ethical is conceptually distinct from governmental nudges used to promote public welfare. As a result, companies that simply import behavioral economics-styled choice architecture into the workplace may find that it is not only ineffective, but also violates deeply held normative notions of personal autonomy, which ultimately may undermine the goals of corporate compliance. Put another way, intracorporate behavioral ethics nudging may be problematic because of what it doesn’t and shouldn’t do, requiring a reevaluation of its potential as a compliance tool.

A. The Rise of Behavioral Ethics

Behavioral ethics is a field not entirely well known in traditional legal or business circles. Therefore, a brief discussion of its history is in order—a history that is both very long and very short. The concept of behavioral ethics is far from new. In fact, philosophers going back to Aristotle grounded their exploration of ethics in individual behavior. Aristotle believed that we become ethical by undertaking ethical actions; that is, we build ethical character through habituation. Since the dawn of Western philosophy, then, there has been a strong relationship between ethics and behavior, which in turn has influenced legal doctrine and business practice.

As a distinct field of study, however, behavioral ethics has been around less than a generation. Robert Folger is credited with introducing the term roughly fifteen years ago and providing much of the field’s early intellectual vigor. But others had simultaneously taken up the mantle, focusing specifically on business behavioral ethics, which merged behavioral science and moral philosophy, and

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7. S. Michael Halloran, Aristotle’s Concept of Ethos, or If Not His Somebody Else’s, 1 Rhetoric Rev. 58, 61 (1982).


then applied it to business and management. The field, particularly its business-focused strain, has grown to a point where its findings are now used regularly in business ethics scholarship and teaching, and are becoming more explicitly prevalent in legal scholarship.

But what is behavioral ethics, exactly? Like any emerging field, a concrete definition is difficult to pin down. One of the early and more widely cited definitions is the study of “individual behavior that is subject to or judged according to generally accepted moral norms of behavior.” A more focused definition, evidencing the field’s transition toward business, is a “scientific approach for studying perceptions of how we ought to treat one another in business-related matters and how such perceptions influence behavior.”

This second definition gets more to the heart of the matter, but to really understand what behavioral ethics is, a more practical definition is needed. One group of scholars offers the following: “The study of behavioral ethics . . . aims to understand how even well-intentioned people can sometimes behave unethically.” This focus on understanding the how and why is what provides the field its substantive and definitional niche. As such, behavioral ethics can best be described as the study of the “systematic and predictable ways in which individuals make ethical decisions and judge the ethical decisions of others.”

Critically, these ways are often “at odds with . . . our intuitive expectations and the goals of the broader society.” This definition makes clear that behavioral ethics research takes an empirical rather than normative approach. It also hints at the central findings of the many empirical studies conducted under the behavioral ethics umbrella—that “cognitive heuristics, psychological tendencies, social and organizational pressures, and even seemingly irrelevant situational factors can make it more likely that good people will do bad things.”


13. Folger, supra note 9, at 125.


16. Id.

are intent on doing right, behavioral ethics research tells us that we are not as ethical as we think we are.\textsuperscript{18}

Another way to look at this is that ethical decision-making is limited in a significant way. Most people will make moral decisions in line with their ethical beliefs, but only to a point. Because of cognitive obstacles, which can be exacerbated by external factors, we engage in unethical acts without even realizing it, acts that we would condemn upon further reflection.\textsuperscript{19} That means we are ethical, but only boundedly.

It is important to pause here for a moment because the term “bounded” naturally evokes behavioral economics. Behavioral economics, which has penetrated deep into legal scholarship and doctrine,\textsuperscript{20} combines the study of psychology and economics to investigate what happens in markets when agents display human limitations and complications.\textsuperscript{21} Linking behavioral ethics and behavioral economics is appropriate given that the two fields draw from the same intellectual (and empirically supported) roots, namely from research demonstrating that human decision-making is not strictly rational.\textsuperscript{22} But behavioral ethics is not merely an offshoot of behavioral economics. Behavioral economics is occupied with identifying the behavioral reasons that prevent people from realizing their rational self-interests. Behavioral ethics has a different aim. Its focus is identifying the factors that prevent people from understanding that their actions are self-interested, and therefore may lead to unethical behavior. Indeed, the “automaticity of self-interest” is one of behavioral ethics’ basic tenets.\textsuperscript{23} This distinction becomes critical when


\textsuperscript{21} Sendhil Mullainathan & Richard H. Thaler, \textit{Behavioral Economics}, National Bureau of Economic Research, Working Paper No. 7948, at 2, \url{http://www.aiinfinance.com/Mullainathan.pdf} [https://perma.cc/BQU7-CK3P]. “Economics traditionally conceptualizes a world populated by calculating, unemotional maximizers that have been dubbed Homo Economicus. . . . This unbehavioral economic agent has been defended on numerous grounds: some claimed the model was “right”; most others simply argued that the standard model was easier to formalize and practically more relevant. Behavioral economics blossomed with the realization that neither point of view was correct. Empirical and experimental evidence mounted against the stark predictions of unbounded rationality.” \textit{Id.} at 3.


evaluating the behavioral strategies being used to promote ethicality within corporations.

**B. Intracorporate Behavioral Ethics—Nudging to Increase Employee Ethicality**

The core of behavioral ethics, and its application to corporate compliance, stems from research exploring the differing modes of human thinking. In their groundbreaking work, Daniel Kahneman and Amos Tversky found that individuals possess both intuitive and reasoning cognitive processes. The intuitive, or System 1, process is “fast, automatic, effortless, associative, and often emotionally charged.” Because it operates by associative memory, it is “governed by habit and therefore difficult to control or modify.” In contrast, the reasoning, or System 2, process operates much slower. It is “serial, effortful, and deliberately controlled,” subject to logic and rules. Not surprisingly, System 2 thinking requires significantly more cognitive load than System 1.

That is not to say that System 2 is better than its counterpart; both modes of thinking have a role to play. Because System 1 thinking is effortless and efficient, it is suitable for making the vast majority of our daily decisions—imagine if we had to make a deliberate choice for each one of our routine daily activities. But for more important decisions, System 2 thinking is required to ensure a thoughtful, and likely more accurate, outcome. The problem is that because of the greater cognitive load required to employ System 2, it is often supplanted by the less effortful System 1. While we ideally want System 2 to operate as a watchful monitor, kicking in when important mental tasks arise, the reality is that System 1 is dominant—“most human decision making is done . . . by the unconscious system.” This results in decisions, even important ones, that are subject to biases and heuristics based on past experience and limited information.

Not surprisingly, research has found that shifting modes of thought from one system to another can have profound effects on decision-making. This

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25. *Id.* at 1451.

26. *Id.*

27. *Id.* A good way to think about the two systems is to picture a big dog running toward you. System 1 is likely “squawking” (maybe screaming) at you to run because the dog might hurt you. System 2 reminds you that most dogs are pets, and pets are generally friendly, so you should stay put. See Thaler & Sunstein, *supra* note 1, at 21.


understanding serves as the foundation of choice architecture, the deliberate structuring of the context in which people make decisions.\textsuperscript{30} The primary tool of choice architects, those responsible for that structuring, is the “nudge.” Nudging, a term coined by behavioral economist Richard Thaler and legal scholar Cass Sunstein, is an intervention that steers decision-making in a particular direction.\textsuperscript{31} As proponents of nudges are quick to point out, however, not all interventions count as nudges. A true nudge “must fully preserve freedom of choice,” which would exclude interventions that impose significant costs on the chooser.\textsuperscript{32} “To nudge, then, is to design the context in which individuals make decisions so as to influence their behavior without eliminating any options and without employing direct economic penalties or payments to do so.”\textsuperscript{33}

Understanding nudges, and how they use systems of thinking to steer decision-making, is best done through example. These are easy to come by because nudges have been widely adopted by government; both the U.S. and U.K. have their own “nudge units” charged with enhancing public policy through behavioral insights.\textsuperscript{34} Among other things, nudges have been used to increase 401(k) retirement savings, optimize stimulus spending, improve tax compliance, and lower youth alcohol consumption.\textsuperscript{35}

Let’s look in more detail at the 401(k) example. It turns out that enrolling in a 401(k) plan is an obstacle for many Americans, who on the whole don’t save enough for retirement.\textsuperscript{36} Eligible employees fail to enroll or delay enrolling for a host of reasons, even though doing so offers significant tax benefits and matching employer funds. Be it from inertia, frivolousness, or lack of education or knowledge, roughly 30 percent of eligible employees don’t enroll and therefore are under-saving for their retirement.\textsuperscript{37} As Thaler and Sunstein put it, “[t]hese folks could clearly use a nudge.”\textsuperscript{38}

Studies conducted by behavioral economists found that simply changing the default enrollment provisions of 401(k) plans from “opt-in,” in which employees have to fill out forms and make investment choices to begin saving, to “opt-out,” in which employees are automatically enrolled but can elect to stop

\begin{thebibliography}{99}
\bibitem{31} THALER \& SUNSTEIN, supra note 1, at 3.
\bibitem{32} Sunstein, supra note 3, at 417. This would include legal prohibitions and many rules of corporate compliance. Thaler and Sunstein believe that nudges are a tool of libertarian paternalism, a “new movement” whereby choice architects may legitimately try to influence peoples’ behavior in order to make their lives better through non-traditional mechanisms. THALER \& SUNSTEIN, supra note 1, at 5.
\bibitem{34} See note 4, supra.
\bibitem{36} THALER \& SUNSTEIN, supra note 1, at 103, 106-07.
\bibitem{37} Id. at 107.
\bibitem{38} Id.
\end{thebibliography}
saving, caused enrollment rates to increase to 98 percent. Structuring choice in this manner nudged employees to make the optimal decision. In 2009, the Obama administration used these findings to create a package of regulations that encourages employers to adopt automatic enrollment plans. The result was increased saving rates, increasing individual and societal welfare.

This example highlights two important aspects of nudges. One is how a nudge can alter or harness a mode of thinking to increase welfare. For the vast majority of non-enrolling employees, their System 1 thinking was active when confronted with the decision to enroll—they reacted to the prospect of opting in, which required significant thought about future retirement needs and complex investments, by ignoring the decision or delaying it. Unfortunately, 401(k) enrollment is a task that requires a System 2 mind to complete. Switching to the opt-out enrollment regime altered the choice architecture so that the dominant System 1 thinking actually helped employees save; in fact, a System 2 override was now required to not save for retirement.

Secondly, nudges operate against the backdrop of the chooser’s preferences. As presented above, employees falling prey to System 1 thinking, who were then nudged into enrolling in a 401(k) plan, are now acting consistent with their long-term preferences. That is because saving reflects their “deeper preference” for a comfortable retirement over their “shallow desire” to spend the money otherwise or waste it through inaction. The nudge works because it helps individuals achieve the long-term goals they have already formulated. Nudging under these conditions appears to offer a win-win—a small intervention helps overcome a cognitive block inhibiting a sincere preference, which when realized increases individual and social welfare.

So how does this all apply to intracorporate behavioral ethics, specifically nudges aimed at fostering ethicality within a corporation? First of all, it should be no surprise by now what cognitive process is predominant in ethical decision-making. Although we would hope that resolving decisions of “ethical import” consistently harnesses System 2’s deliberative logic, most ethical decisions are

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39. Id. at 109.
41. Yeung, supra note 30, at 134. Some may disagree that failing to save for retirement exhibits a failure to follow the chooser’s deeper preferences. That may be true for some employees who do not plan to retire in a traditional manner, are certain they will not need retirement savings, or truly value spending money today over saving for the future (or based on current financial pressures really need the money now). While these employees certainly exist, I submit it is a small minority that looking back from retirement age would objectively prefer to have saved less. For those rare individuals, the nudge can be overcome with little effort. For the rest of us subject to a less-than-fully considered analysis of our future needs, System 1 thinking explains why we act inconsistent with our deeper long-term preferences. See THALER & SUNSTEIN, supra note 1, at 108 (providing example of a U.K. defined-benefit plan in which no employee contribution is required to receive benefits, but only half of eligible employees signed up).
made “before the cognitive parts of the brain . . . engage.” Indeed, research shows that self-interest, oftentimes the antagonist of ethical decision-making, is “automatic, viscerally compelling, and often unconscious.” System 1 is creating the automaticity of self-interest that must be reigned in by System 2 if an individual is to act ethically. While most of us are able to achieve this, many do not, causing great harm to themselves, their companies, and society. Ethical decision making, then, appears to occupy the same space as some financial decision making—like potential 401(k) enrollees, those faced with ethical decisions could seemingly benefit from a nudge.

That’s certainly what corporations believe. Cutting edge corporate compliance programs are now using behavioral ethics nudges in an attempt to prevent employee wrongdoing. The most ubiquitous example is that of companies asking their employees to read and affirm ethics-focused certifications before they engage in behavior that has historically created compliance risk, e.g., filling out expense reports, transferring client funds, or meeting with government officials. Studies show that reminding employees of morality before they act reduces dishonesty, likely because it prompts deeper reflection regarding the ethics surrounding the task. This type of “just-in-time” compliance nudge was first used in the insurance business, but is now considered standard practice in many companies.

International Paper uses a similar behavioral ethics nudge. Instead of certifications, the company provides all employees with a wallet card containing ethics-related questions. The idea is that when making business decisions, employees will be reminded of the questions and contemplate their ethical obligations. The University of Arizona nudges its management students to refrain from cheating by hanging posters in testing rooms with images of fire alarms. Research shows that even simple visual cues such as this can lessen the occurrence of wrongdoing.

42. Drumwright, et al., supra note 18, at 433.
43. Feldman, supra note 23, at 7 (citing Don A. Moore & George Loewenstein, Self-Interest, Automaticity, and the Psychology of Conflict of Interest, 17 SOC. JUST. RESEARCH 189, 190–91 (2004)).
44. Even more troubling, research demonstrates that even when people think that are reasoning their way to a rational answer to an ethical question, their System 2 is often rationalizing a decision their System 1 has already made. See Drumwright, et al., supra note 18, at 434.
48. Id.
49. Id.
50. Posters of eyes watching you also works, as does invoking the Ten Commandments, even if you’re not religious. See Max Ernest-Jonesa, Daniel Nettle & Melissa Bateson, Effects of Eye Images
Companies are also using more sophisticated behavioral compliance strategies. For example, Bank of America (BofA) piloted a program that monitored employees for six weeks with wearable sensors, tracking “where [they] went and who they talked to, [and] how the tone of their voice and the movements of their body changed.”\(^{51}\) When the monitoring indicated that social employees were more productive, BofA changed the physical layout of its offices, nudging employees to informally socialize more. The changes increased employee satisfaction, which studies show leads to increased organizational ethicality.\(^{52}\)

Another large bank, JPMorgan, is using proprietary software to monitor the email and telephone communications of its traders to ensure they “adhere to ‘personal trading rules’ and risk limits.”\(^{53}\) While employee monitoring, even high-tech monitoring, has been part of corporate compliance for years, JPMorgan’s efforts are noteworthy because the bank’s software algorithms attempt to predict unethical or illegal trading behavior and stop it before it occurs. This so-called “predictive monitoring” uses technology that was created specifically to combat terrorism.\(^{54}\) Although details of the program are limited, it undoubtedly uses a series of alerts to nudge traders if they are about to violate a company or legal rule.

While these behavioral compliance advancements are fascinating, the central question remains: are companies employing these types of behavioral ethics nudges acting ethically themselves?

### C. The Ethics of Intracorporate Behavioral Ethics

The answer to that question requires analysis through both an empirical and normative lens. Put another way, the ethics of intracorporate behavioral ethics depends on whether behavioral ethics nudges actually work, and if they do,
whether they should be used to influence employee behavior. If the answer to either question is no, it may be difficult to justify the use of these nudges as a legitimate tool of corporate compliance.

1. Evaluating intracorporate behavioral ethics nudges from an empirical standpoint

As an initial matter, it’s difficult to know how effective behavioral ethics nudges are in practice. Most of the research on nudges has been conducted not in field experiments, but in university labs and classrooms where student subjects are easily acquired. I’m unaware of any significant data demonstrating that intracorporate nudges have achieved the goal of increasing employee ethicality. Yet, this is not a fatal critique. In all fairness, the use of behavioral ethics nudges is on the cutting edge of corporate compliance; given enough time and inventiveness in research design, behavioral scientists should be able to determine whether nudging employees to be more ethical is truly effective.

A more fundamental limitation is the following: there is a conceptual difference between public policy–aimed nudges used by government and behavioral ethics–aimed nudges used within companies. As explained above, governmental nudges are aimed at increasing individual and societal welfare by structuring choice to help people achieve their true preferences. When a 401(k) plan’s default enrollment provision is structured as an opt-out, the choice architecture allows our natural tendencies (the dominance of System 1’s low cognitive load thinking) to help us save more, which is our “true preference” and what we would have chosen if we had employed System 2’s high cognitive load thinking, the appropriate mode of thinking for the task. That is the reason this particular nudge works so well—it helps us do what we deep down want to do anyway, and would have done, but for a cognitive obstacle. This approach is consistent with behavioral economics research focused on identifying and eliminating impediments to fulfilling our rational self-interests.

But behavioral ethics nudges aimed at increasing ethicality are different. They can’t help us do what we want to deep down, because deep down we want to act in our own self-interest, which more often than not is antithetical to ethical action. This is consistent with the core findings of behavioral ethics research,

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55. See e.g., Francesco Gino & Sreedhari D. Desai, Memory Lane and Morality: How Childhood Memories Promote Prosocial Behavior, 102 J. PERSON. & SOC. PSYC. 743 (2012) (experiments conducted on undergraduates to test relation between memory and morality). A related concern is that these studies often examine “ethical shifts produced by atypical cues,” therefore limiting their “face validity,” Feldman, supra note 23, at 17.

56. And, of course, public policy nudges have been shown to encourage all kinds of beneficial choices. See Scott Killingsworth, Behavioral Ethics: From Nudges to Norms 3 (Jan. 9, 2017), [http://ethicalsystems.org/content/behavioral-ethics-nudges-norms](http://ethicalsystems.org/content/behavioral-ethics-nudges-norms) (identifying effective public policy nudges but questioning their role as a new compliance tool).

57. See Yeung, supra note 30, at 134; Thaler & Sunstein, supra note 1, at 107–08.

58. Feldman, supra note 23, at 22. Again, such a nudge can easily be overcome if the chooser’s preferences are different than believed to be by the choice architect. See note 44, supra.
which is not that we all want to act ethically, but fail to do so because of a cognitive obstacle. The core finding of behavioral ethics is that we come up with many ways to delude ourselves—consciously and subconsciously—into thinking we are acting ethically, but in reality we are acting unethically, driven by self-interest. Thus, our true preference is to keep our self-perception as an ethical person intact while we act self-interestedly to the contrary.

While this finding sometimes troubles those that hear it for the first time, it is supported by significant research across disciplines. For example, since the 1950s criminologists have identified “neutralizations” as one of the primary causes of unethical and illegal acts, particularly in business settings. Neutralizations, or what are commonly referred to as rationalizations, are the processes by which we internally verbalize our future wrongdoing so as to minimize the moral guilt associated with it. By rationalizing our actions, we keep our self-perception as “good people” intact while simultaneously doing bad things. Cognitive scientists agree. The recent book “The Enigma of Reason” explains that while humankind’s biggest advantage over other species is our ability to cooperate, “freeloading is always the best course of action” from an individual perspective. Thus, the authors argue, reason developed to help us do so effectively, solving a problem created by living in our “hypersocial” world. The findings of these divergent disciplines support those made specific to ethical decision-making: that when “when appraising a situation, we prefer outcomes that benefit ourselves, and only later correct to take into account fairness toward others.”

What this means is that the choice architecture used to nudge 401(k) enrollees will likely be ineffective when used to influence corporate ethicality. In fact, it may not work at all. And to go a bit further, governmental nudges imported into the corporation can’t work, or at least not in any sustainable way, because nudging employees toward their true preferences would foster self-interested behavior that actually promotes unethical acts. As Yuval Feldman has

60. See Donald R. Cressey, The Respectable Criminal, 3 CRIMINOLOGICA 13, 14–15 (1965) (outlining neutralization theory supported by study of embezzlers).
61. The prototypical verbalization, which is essentially a conversation with oneself, is an embezzler conceptualizing her behavior as “borrowing” money that will be paid back. Id. See also, Todd Haugh, The Criminalization of Compliance, 92 NOTRE DAME L. REV. 1215, 1255-59 (2017) (discussing how rationalizations foster white collar crime and their role in undermining corporate compliance); Vikas Anand, Blake E. Ashforth & Mahendra Joshi, Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations, 18 ACAD. MGMT. EXEC. 39, 40–44 (2005) (same).
63. MERCIER & SPERBER, supra note 62, at 330.
put it, “we are likely to encounter significant resistance to nudge-like approaches” when “the objective is to drive [people] away from their self-interest.”

This can be further understood by considering the complexity of a decision to act unethically. While ethical choices are often viewed as simple, especially after-the-fact, the inputs affecting those choices are many and impact diverse aspects of personal and professional life. The recent Wells Fargo scandal provides a good example. Although details are still emerging, it appears that many of the 5,200 employees fired amid allegations that they improperly cross-sold financial products and created fake customer accounts were pressured to do so by internal and external factors. A number of former employees have come forward reporting that despite extensive training on the company’s code of conduct and banking regulations, and even explicit messages from headquarters to “not create fake bank accounts,” an aggressive sales culture “honored over decades” overrode any explicit compliance measures. One former personal banker explained that creating fake accounts “was like jaywalking”—everyone did it because “[t]hey needed a paycheck.”

Under these conditions, could a behavioral ethics nudge have worked to eliminate wrongdoing? At first glance, this situation appears perfect for a “just-in-time” certification-type nudge, in which employees are prompted to consider moral standards before opening additional employee accounts. Yet a deeper look tells us that even if an employee had received the nudge perfectly, she would interpret it against the backdrop of her true preferences—here, to act unethically to preserve her job while telling herself that it’s necessary, everyone else is doing it, or no one will really be harmed. These are classic rationalizations employed by white-collar offenders, and they act as powerful counters to any behavioral ethics nudges that reach the employee.

Undoubtedly, more empirical research is necessary to determine whether intracorporate behavioral ethics nudges will help achieve their compliance goals. As it stands, that seems unlikely given that companies, and those advising them, appear to be equating governmental nudges with behavioral ethics nudges, without understanding their conceptual differences. If this failure leads to intracorporate nudges that don’t work or are severely limited in their effectiveness, it would be difficult to justify their use in corporate compliance.

65. *Id.* at 17.
67. *Id.*
68. *Id.*
69. See Haugh, supra note 61.
2. Evaluating intracorporate behavioral ethics nudges from a normative standpoint

Even assuming intracorporate behavioral ethics nudges can overcome the conceptual and empirical challenges raised above, that doesn’t answer the question of whether they should be used within the corporation.

To begin, much has been said regarding the ethics of governmental nudges. Scholars such as Karen Yeung, Luc Bovens, and others have categorized and critiqued nudges, inviting responses by Thaler and Sunstein. While a review of that back-and-forth is too much to undertake here, some highpoints of the debate are instructive.

The first is that nudges have the potential to negatively impact individual autonomy to a degree that renders them unethical. Even proponents of choice architecture acknowledge this; any discussion of nudges quickly turns to concerns over their potential to coerce in a way that impermissibly reduces individual autonomy. Autonomy is “generally understood to refer to the capacity to be one’s own person, to live one’s own life according to reasons and motives that one takes to be one’s own and not the product of manipulative or distorting external forces.” Building on this definition, an autonomous decision is one made by a “fully informed agent, arrived at through a process of rational self-deliberation, so that the agent’s chosen outcome can be justified and explained by reference to reasons that the agent has identified and endorsed.” An act by government or business that significantly curtails the autonomous decision-making of an individual is therefore susceptible to attack on ethical grounds.

Accordingly, nudges might be seen as sitting along an ethical continuum based on how deeply they impinge upon autonomous decision-making. The most problematic nudges from an ethical standpoint would be those “intended to work deliberately . . . to by-pass the individual’s rational decision-making processes in order to channel behaviour in the direction preferred by the choice architect.” These “irrationality-exploiting” nudges are so concerning because

[they] entail not letting . . . actions be guided by principles that

70. See Yeung, supra note 30.
72. See Robert Baldwin, From Regulation to Behavioral Change: Giving Nudge the Third Degree, 77 MODERN L. REV. 831 (2014); Guldborg & Jespersen, supra note 35; Hasnas, supra note 33.
74. Id. at 11, 237.
75. Yeung, supra note 30, at 135.
76. Id.
77. Id. at 135–36.
individual] can underwrite, so these actions are not autonomous. They can be said to be irrational in so far as what is driving [the individual’s] action does not constitute a reason for [their] action (i.e. not a feature of the action that [they] endorse as a feature that makes the action desirable).78

According to critics, nudges of this kind are behavioral manipulation. By taking advantage of people’s tendency to act unreflectively, they are inconsistent with demonstrating respect for autonomy.

A nudge’s place on the ethical continuum is also affected by its level of transparency. This flows from the conception of autonomous decision-making. It would be difficult to argue that a non-transparent nudge allowed a “fully informed agent” to arrive at his decision “through a process of rational self-deliberation.”79 All nudges have some weaknesses here. Generally, when government acts to influence the public’s behavior, usually through lawmaking and regulation, it is “open, discussed, and implemented after representative procedures have been followed.”80 Nudging, even governmental nudging, is inherently more secretive, however. The process used to effect a nudge often flows from a government agent’s decision, one that is not subject to advanced disclosure or debate. While this does not necessarily mean that all agency-created nudges are unethical—after all, most of how government directs the public occurs through some form of administrative action—it does increase their potential to negatively impact autonomy.

Not to mention that nudges are most effective when the intervention is the least transparent to the person being nudged. In fact, alerting people to nudges may undermine their effectiveness entirely. For example, when you explain to drivers that the white lines painted on sections of Lake Shore Drive in Chicago are a visual trick intended to nudge slower driving, they may consciously ignore the trick the next time and speed as they did before the nudge was implemented.81 As Luc Bovens succinctly puts it, nudges “work best in the dark.”82 That is true as an empirical proposition, and it also weakens the normative claim that nudges are not volitive of personal autonomy.83

So where do intracorporate nudges land on the ethical continuum, when taking into account transparency and the exploitation of irrationality? Unfortunately, that question can’t be answered in the aggregate; to be fair, the

78.  Id. at 136 (citing Bovens, supra note 71, at 210).
79.  Id. at 135.
80.  Baldwin, supra note 72, at 845.
82.  Bovens, supra note 71, at 217.
83.  Yet, there may also be “autonomy-respecting” nudges that, although inherently less transparent than other regulatory tools, are aimed at correcting cognitive defects and biases to promote more informed decision-making. Yeung, supra note 30, at 137. These “deliberation tools” seem least problematic from an ethical viewpoint. Id.
analysis must be undertaken nudge by nudge. Why this is raises an additional aspect of the debate that is critical to the question of ethicality. Each nudge must be evaluated separately because its intended purpose helps us meaningfully assess the relationship between means and ends. This assessment matters for determining ethicality because “the means which we employ is frequently contingent upon its relationship to the ends we seek to secure.”

So, where a particular behavioral ethics nudge falls on the continuum must include an assessment balancing its negative impact on autonomous decision-making with the benefits the nudge provides to the individual and larger society.

In the intracorporal behavioral ethics context, this includes the reduction of unethical and potentially illegal conduct, a significant individual and societal harm. Estimates are that between $300 and $600 billion is lost each year to white collar crime. And, as the public was so vividly reminded during the financial crisis, monetary losses translate into real human suffering. Therefore, any reduction in corporate wrongdoing through the use of nudging would likely be significant, given the scope of the problem.

Taking this into account, let’s consider a few of the behavioral ethics nudges mentioned in this Essay. The ethics-focused certifications that are now all but standard within companies would seem to be on the “mostly ethical” side of the continuum. They work by reminding employees of their ethical duties, or morality more generally, before employees take actions that have historically invited compliance risk. That would be both a transparent nudge and one that does not prey on the irrational decision-making of an employee; in fact, the whole point is for the employee to read a statement (very transparent) that triggers deeper System 2 thought about moral obligations (very rational). While it’s true that the nudge is driving the employee away from her true preferences—as all behavioral ethics nudges do—the benefits here could be significant. If the certifications are able to minimize employee lying, and that translates to reductions of specific compliance risks (which have been identified based on

84. Id. at 138 (emphasis omitted).
85. See Bovens, supra note 71, at 217; Yeung, supra note 30, at 139.
88. See Part C.1., supra.
historical data compiled by the company), that serves as a true benefit and one potentially worthy of a minor impact on employee autonomy.89

A poster of a fire alarm in the employee lunchroom falls toward the “unethical” side of the continuum. While that may seem odd given how innocuous a poster is, the nudge being employed is problematic. Yes, the poster itself is highly transparent as a visual cue, but how it harnesses reactive thinking is not. The nudge works by triggering our System 1 process; we see a fire alarm and our brain processes it as danger, which causes hyper-vigilance.90 Thus, the image does not cause employees to deliberatively consider their ethical obligations, but instead exploits the non-deliberative “irrational” system. While it could be argued that the ends of decreasing wrongdoing justify the autonomy-impinging means, that appears weak considering the poster’s placement in the lunchroom, where not a lot of serious wrongdoing is likely to occur, and its unspecified benefits. In fact, in order for this type of nudge to intervene to stop wrongdoing, the posters would have to be almost everywhere, which would complicate their effectiveness.91

Finally, JPMorgan’s predictive monitoring algorithm likely falls somewhere in between. On the one hand, a program that monitors every aspect of an employee’s actions with the purpose of identifying wrongdoing before it happens would seem to violate individual autonomy deeply. Yet, the actual nudge—here, likely an electronic warning or reminder of some kind—is transparent and intended to give the employee pause before acting. Like the ethics certification, the nudge works by alerting the employee that System 2 thinking needs to be engaged to complete the task. That is not irrationality-exploiting, but rather a “deliberation tool” that might prevent a trader in the midst of a quickly moving transaction from reflexively committing wrongdoing.92 In addition, means-ends analysis suggests that the negative impacts on autonomy may be justified given the potential harm—here, a possible corporate crime that may have deleterious effects on the individual, the company, and society. For example, a single trader recently lost his bank over $6 billion by failing to follow internal rules, inviting criminal and civil investigations and liability for himself

89. It is critical that this type of nudge has been demonstrated to work in the field. See Gino et al., supra note 47 (discussing use in the insurance industry); Ariely, supra note 46, at 45–51 (discussion of use in insurance industry and with the IRS).
90. See Gino, et al., supra note 47.
91. This may be thought of generally as the problem of mis-nudging, i.e., when a nudge operates differently than the choice architect intended. See Evan Selinger & Kyle Whyte, Is There a Right Way to Nudge? The Practice of Ethics and Choice Architecture, 5 SOC. COMPASS 923, 931 (2011) (suggesting that to properly nudge, choice architects would need to do “localized sociological and psychological studies”); Luc Bovens, Nudges and Cultural Variance: A Note on Selinger and Whyte, 23 KNOW. TECH & POL’Y 483, 484 (2010) (explaining how behavioral bias, often a function of idiosyncratic cultural differences, can complicate nudge design and effectiveness).
92. Yeung, supra note 30, at 137.
and his employer. An algorithmic nudge that is able to preemptively intervene could change the landscape of corporate compliance for many firms in the financial sector.

While there is not sufficient space in this Essay to work through all the normative permutations of behavioral ethics nudging, considering their placement on an ethical continuum highlights their potential to impact individual autonomy, balanced against the potential beneficial ends to be achieved. This analysis is one that compliance professionals and business leaders should undertake if they intend to ethically use behavioral ethics nudges within their companies.

CONCLUSION

Behavioral science has captured our collective interests. Governments are using the findings of behavioral economics research, namely that choice architecture can be used to nudge people toward welfare-maximizing decisions, to enhance public policy. That same promise would seem to hold for intracorporate nudges, specifically those aimed at increasing employee ethicality. Yet there is a conceptual disconnect between the governmental nudges we’ve become accustomed to and the realities of how we make ethical decisions. The central findings of behavioral ethics, a new but rising field, tells us that ethical decision-making operates in a way that is incompatible with many nudges. What this means is that intracorporate behavioral ethics nudging may not only be ineffective, but may also violate deeply held normative notions of personal autonomy. While the above analysis suggests some intracorporate nudges being used today may pass ethical muster, all should be evaluated anew before being used as a regular tool of corporate compliance.


94. See Killingsworth, supra note 56, at 4.

95. One aspect of balancing autonomy costs is the agency relationship between the corporation and its employee, usually typified as one in which the agent aligns his preferences with the principle under an at-will employment arrangement. While this may lessen autonomy costs on employees, it is not dispositive, as there are legal and moral limits to the principle’s actions. See Dennis P. Quinn & Thomas M. Jones, An Agent Morality View of Business Policy, 20 ACAD. MGMT. REV. 22 (1995); Charles J. Muhl, The Employment-at-Will Doctrine: Three Major Exceptions, MONTHLY LAB. REV. January 2001, https://www.bls.gov/opub/mlr/2001/01/art1full.pdf [https://perma.cc/E45E-VYDZ]. A full discussion of autonomy costs is addressed in the author’s forthcoming work. See Todd Haugh, Nudging Corporate Compliance, 52 AM. BUS. L. REV. (forthcoming).