

Battle for our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct

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In this article, we undertake the first analysis of optimal individual and corporate liability for organizational misconduct that incorporates crucial insights from psychology about people's motivations, their decision-making processes, and how laws and organizations affect people's behavior. Specifically, we develop an evidence-based deterrence theory predicated on empirical evidence from psychology that people have other-regarding preferences, the law can deter by expressing social condemnation as well as through sanctions, people rely on intuitive decision-making processes to make most decisions, and organizations influence deterrence by shaping employees' decision-making environment. Employing this framework, we show that the law cannot deter organizational misconduct through expressive channels or otherwise unless corporations are held liable for all their employees' misconduct, and subject to sanctions that eliminate their expected profit from misconduct. Corporate liability also must induce companies to self-report and fully cooperate. We also show that deterrence through expressive law requires that individual wrongdoers face a substantial risk of conviction, contrary to claims of prior scholars who have considered deterrence through expressive law without recognizing the importance of intuitive decision-making and the factors that influence it. Our framework has implications beyond liability for organizational misconduct.

Introduction

Corporate crime occurs regularly both in the U.S. and abroad, inflicting substantial costs on both individual victims and society.¹ Corruption drives up prices, lowers the quality of goods

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¹ Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923 (2019) (presenting evidence of frequent violations by three “average” public companies).

and services, and undermines the rule of law.² Health care fraud can physically harm patients; other frauds and antitrust violations can impose substantial financial harm. Crimes caused by large multinationals are particularly pernicious because these companies' extensive operations enable wrongdoers to cause wide-spread harm to people they never could reach on their own.

To protect their citizens, governments must adopt corporate and individual liability rules that effectively deter³ and remediate organizational misconduct.⁴ Yet governments remain divided on how to do so. U.S. federal law takes the most aggressive approach to corporate criminal liability, subjecting companies, through the doctrine of *respondeat superior*, to the threat of criminal liability for any crime committed by any employee in the scope of employment.⁵ All other countries and most states have rejected this approach. Instead, they restrict corporate criminal liability to crimes either by the board or senior management,⁶ or by companies without an effective

² E.g., SUSAN ROSE ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); see KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY* (2019).

³ The term “deterrence” refers to reducing the likelihood of misconduct. For a discussion of why deterrence, and not retribution or restitution, should be the primary goal of corporate criminal liability see, e.g., American Law Institute, *Criminal, Civil, and Administrative Enforcement Against Individuals and Companies for Organizational Misconduct*, §6.02 cmts h, j in *PRINCIPLES OF THE LAW OF COMPLIANCE AND ENFORCEMENT FOR ORGANIZATIONAL MISCONDUCT* (2022) (hereinafter, ALI, *Principles of Corporate Enforcement*); Arlen, *supra* note 6, at 161 & 161 n.17; Samuel Buell, *Retiring Corporate Retribution*, 83 *LAW & CONTEMP. PROBS.* 25 (2020) (explaining that retribution requires the imposition of suffering and thus is inapplicable to corporations).

⁴ In this article, we focus on organizational misconduct that employees undertake intentionally or knowingly in the scope of their employment. We also focus on differences in legal rules governing when employees and organizations are liable for employees' knowing or intentional misconduct. We do not address differences across legal regimes in what activities are criminalized.

⁵ *Respondeat superior* also requires that the employee had some intent to benefit the company, see, e.g., *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493–94 (1909); *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975), although the concept of scope of employment can capture this requirement. Employees act in the “scope of employment” when they undertake the tasks they were hired to perform, even if they violated their employer's policies or instructions against violating the law, and even if the organization had an effective compliance program. See, e.g., *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972).

⁶ Many states, the Model Penal Code, and many countries restrict corporate liability for most felonies involving *mens rea* to situations where the crimes were authorized, solicited, condoned or recklessly tolerated by the board or senior management, absent a clear legislative purpose to impose criminal liability on corporations. See *ORG. FOR ECON. COOP. AND DEV., THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT*, at 8 (2016) [hereinafter *The Liability of Legal Persons for Foreign Bribery*] <https://www.oecd.org/daf/anti-bribery/Liability->

compliance program.⁷ Yet reform is in the air. The U.S. is reforming its enforcement policy and multiple countries are expanding, or considering expansion to, corporate liability for organizational misconduct.⁸

Effective reform requires determining which corporate and individual liability rules optimally deter corporate misconduct. This determination should be based on a theory of deterrence that accurately predicts how the law can reduce people's inclination to commit organizational misconduct. Classical deterrence theory (hereinafter "CDT") is the dominant theory.⁹ CDT analysis of organizational misconduct has concluded that optimal deterrence requires

Legal-Persons-Foreign-Bribery-Stocktaking.pdf; ALI, *Principles of Corporate Enforcement*, *supra* note 3, at § 6.02 Repr. Note c; see Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, in RESEARCH HANDBOOK ON NEGOTIATED SETTLEMENTS (Abiola Makinwa & Tina Söreide eds., 2020) (discussing U.K. and French law on corporate criminal liability).

⁷ The Model Penal Code affords corporations a defense to criminal liability if a high managerial agent with supervisory authority over the activity producing the offense employed due diligence to prevent its commission. MODEL PENAL CODE AND COMMENTARIES §2.07(5) (AM. L. INST.1985); see also ALI, *Principles of Corporate Enforcement*, *supra* note 3, at § 6.02 Repr. Note c. Other countries, such as Italy, only impose corporate liability on firms that failed to adopt and maintain an effective compliance program. See Simone Lonati & Leonardo S. Borlini, *Corporate Compliance and the Privatization of Law Enforcement. A Study of the Italian Legislation in Light of the U.S. Experience*, in RESEARCH HANDBOOK ON NEGOTIATED SETTLEMENTS (Abiola Makinwa & Tina Söreide eds., 2020).

⁸ Reform is being prompted by the OECD Working Group on Bribery, U.S. prosecutors' success in obtaining substantial corporate criminal fines, and evidence of harmful criminal misconduct by many companies around the globe. See, e.g., Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 700-701, 703-04 (2020); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 197-200 (2017); see also KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY (2019).

⁹ Economic analysis of law analyses of how to structure individual and corporate liability to deter corporate crime include Arlen, *supra* note 6; Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON CRIMINAL LAW, at 167-172 (Keith Hylton & Alon Harel, ed., 2012) (explaining why optimal deterrence requires that both entities and individuals be liable for corporate misconduct); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); ; A. Mitchell Polinsky & Steven Shavell, *Should Employees be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?* 13 INT'L REV. L. & ECON. 239 (1993).

Other scholars ground policy recommendations for corporate liability on other goals and considerations. See, e.g., SAMUEL BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016); Miriam Baer, *Propping up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88 (2018); Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); William Laufer & Alan Strudler, *Corporate Intentionality, Desert and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L.

the imposition of criminal liability on the individuals who commit corporate crime; expected sanctions¹⁰ must exceed wrongdoers' expected benefit from misconduct.¹¹ CDT also has shown that individual liability alone is not sufficient because governments, acting alone, detect misconduct too rarely to sanction wrongdoers optimally.¹² Optimal deterrence thus requires that companies be held criminally liable their employees' crimes, with liability structured to induce companies to reduce employees' benefit from crime, increase their difficulty of committing it (for example through compliance programs),¹³ and induce them to increase employees' expected criminal sanction by detecting, self-reporting, and fully cooperating.¹⁴

The conclusions of CDT have been challenged, however, based on evidence that its foundational assumptions are not satisfied. All deterrence theories must make assumptions about four features of individual decision-making: (1) individuals' central motivations; (2) how the law influences choices; (3) how people make decisions; and (4) how institutions, such as companies, affect people's choices. CDT assumes that:¹⁵ (1) people act in their own narrow self-interest;¹⁶ (2)

REV. 1295 (2013); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319 (2007). This article focuses on using liability to reduce corporate crime.

¹⁰ The expected criminal sanction is the actual sanction multiplied by the probability that it is imposed. Thus, if a crime would result in a million dollar fine, but the probability of sanction is only one in a thousand, then the expected sanction is only \$1,000.

¹¹ Becker, *supra* note 11; see Jonathan Macey, *Agency Theory and the Criminal Liability of Corporations*, 71 B.U. L. REV. 315 (1991) (applying CDT to organizational misconduct); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (same); Polinsky & Shavell, *supra* note 9 (same); see also Arlen, *supra* note 9 (showing why corporate liability does not suffice to deter individual wrongdoers).

¹² See *infra* Section I.A.

¹³ See Arlen, *supra* note 9; Arlen & Kraakman, *supra* note 9. For a discussion of why corporate criminal liability is needed, and civil corporate liability does not suffice see Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, J. CORP. LAW (forthcoming).

¹⁴ See Arlen, *supra* note 9; Arlen & Kraakman, *supra* note 9. For an example of criminal and civil enforcement policy designed to deter and remediate misconduct see ALI, *Principles of Corporate Enforcement*, *supra* note 3.

¹⁵ Becker, *supra* note 11.

¹⁶ Rational choice theory consists of models that share a common structure: an agent with given beliefs and preferences chooses, from the available options and in a fixed environment, the action that makes her best off (given her preferences). The distinctive features of rational choice models, for our purposes, include the assumption that people employ deliberative decision-making to make all choices based on an assessment of all material features of all the available choices. Each individual then maps these features against her criterion of evaluation to determine which

criminal law only influences behavior through the threat of publicly-imposed sanctions;¹⁷ (3) people rely on full rational deliberation—weighing all expected costs and benefits—to make choices; and (4) companies affect employees’ decisions only by interventions, such as financial incentives, that alter the egoistic expected cost and benefit to employees. Yet recent empirical evidence on human decision-making shows that CDT’s four assumptions do not accurately describe human behavior.

First, in contrast to CDT, empirical evidence shows that people are not solely motivated by egoistic self-interest. They have other-regarding and social preferences; they care about others’ well-being and about their good standing in society. This motivates them to seek to maintain their self-image and the opinion of others that they are a good or ethical person.¹⁸ Second, CDT assumes the law only deters through sanctions. Yet empirical evidence finds that law also deters by expressing society’s condemnation of the prohibited conduct.¹⁹

Leading scholars relying on these first two insights have concluded that criminal law need not, and should not, impose the full, expected sanctions on individuals required by CDT because deterrence through the law’s expressions of social condemnation (expressive law) is as effective as, and less socially costly than, criminal enforcement and sanctions.²⁰ This claim, if true, would

choice maximizes her preferences. Ariel Rubinstein, *Lecture Notes in Microeconomic Theory: The Economic Agent* 3-4 (2d ed. 2012).

¹⁷ See, e.g., Arlen, *supra* note 9; Arlen & Kraakman, *supra* note 9; Polinsky & Shavell, *supra* note 9; see also Lewis Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982) (analyzing civil liability). For a discussion of “general deterrence” and economic analysis of reputational penalties see *infra* note 36.

¹⁸ See *infra* Section I.B. For a detailed discussion of a more nuanced understanding of the meaning of “preference” see Jennifer Arlen and Lewis Kornhauser, *Can the Law Change Preferences?*, 22 THEORETICAL INQUIRIES L. 175 (2021). Evidence that people care about others and norm compliance does not imply that they will automatically comply with a norm or act in the interests of others as such concerns are rarely a person’s only objective. See *supra* Section 2. For a discussion of variation in personality types see *infra* note 87.

¹⁹ See *infra* Section I.B.

²⁰ See *infra* Section I.C. There is extensive literature analyzing the laws’ ability to deter by expressing that prohibited conduct is socially harmful or violates social or ethical norms. See, e.g., Oren Bar-Gill & Chaim Fershtman, *Law and Preferences*, 20 J. L., ECON. & ORGAN. 331 (2004); Robert Cooter, *Do Good Laws Make Good Citizens: An Economic*

also undercut the justification for using organizational liability to enhance individual enforcement. Yet, like CDT, these analyses also rest on incorrect assumptions about decision-making because they do not incorporate two additional insights emerging from empirical psychology.

Specifically, in contrast with CDT, which assumes that people's choices are the result of a rational deliberation predicated on the costs and benefits of each option, empirical evidence reveals that people substantially rely on nonconscious, instantaneous, and emotion-driven intuitive processes to make most ethical decisions, even when they think they are actively deliberating.²¹ Moreover, evidence shows that intuitive decisions are based on both egoistic self-interest and people's desire to retain their own and others' good opinion of themselves. Evidence on the factors determining which motivation drives choices differ from the model of decision-making underlying both CDT and legal analyses of deterrence through expressive law (ELT). CDT ignores ethics or

Analysis of Internalized Norms, 86 VA. L. REV. 1577 (2000) [hereinafter Cooter, *Good Citizens*]; Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Robert Cooter, *Models of Morality in Law and Economics: Self-control and Self-Improvement for the Bad Man of Holmes*, 78 B.U. L. REV. 903 (1998); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990); Daniel Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) [hereinafter McAdams, *Attitudinal Theory*]; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) [hereinafter McAdams, *Origin*]; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2001); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1136-37 (1986); LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2011); see also Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 241 (Eyal Zamir & Doran Teichman eds., 2014); Ariel Porat, *Changing People's Preferences by the State and the Law*, 22 THEORETICAL INQUIRIES L. 215 (2021) (discussing why it may be optimal to change preferences). These scholars vary in their assessment of whether expressive law is a substitute for or requires enforcement and sanction. But one influential group of scholars have argued that the government should rely primarily on deterrence through expressive law and should largely reduce the use of enforcement and sanctions.

²¹ See, e.g., DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2013); Colin F. Camerer, et al., "*Neuroeconomics*" *How Neuroscience Can Inform Economics*, 43 J. ECON. PERSP. 9 (2005) (articulating the view that people employ multiple decision-making processes, both conscious and deliberative and nonconscious and intuitive); Colin F. Camerer & Ernst Fehr, *When Does "Economic Man" Dominate Social Behavior?*, 311 SCIENCE 47 (2006); Leda Cosmides & John Tooby, *Evolutionary Psychology, Moral Heuristics and the Law*, in *HEURISTICS AND THE LAW* (G. Gigerenzer & Christoph Engel eds., 2006); see also Jennifer Arlen & Eric Talley, *Introduction to Experimental Law and Economics*, in *EXPERIMENTAL LAW AND ECONOMICS* (Jennifer Arlen & Eric Talley ed., 2008) (discussing the multiple-process theories of decision-making and their implications for experimental law and economics); see *infra* Section I.C.

assumes ethical concerns are assessed by a cost-benefit analysis of the expected benefits of misconduct versus the expected costs, including reputational harm. Expressive law scholars assessing deterrence typically assume that people comply with social or ethical norms, even at the expense of self-interest.²² By contrast, empirical evidence on intuitive decision-making reveals that self-interest tends to dominate intuitive decisions, but it can be overridden by ethical concerns under the right circumstances. The law must leverage these circumstances reliably to deter through the law's expressive channels.

In addition, both CDT and ELT do not accurately incorporate evidence on the direct and dominant effect that companies (and other organizations) have on the law's ability to deter through expressive channels. CDT tends to assume that organizations deter entirely by leveraging employees' egoistic motivations; existing expressive law scholarship on deterrence tends to ignore the role of organizations in setting or affecting the influence of ethical norms altogether.²³ By contrast, empirical evidence on intuitive decision-making reveals that the law's ability to deter through expressive channels depends on whether the actors' decision-making environment makes the legal injunction a dominant focal concern whose violation would trigger guilt or shame at the moment the choice has to be made. Thus, the optimal role of organizational liability depends on whether these determinative features of employees' decision-making environments are under companies' control.

In this article, we undertake, to our knowledge, the first assessment of optimal corporate and individual for organizational misconduct²⁴ based on a deterrence theory that incorporates all four empirical insights about human decision-making. We call this theory Evidence-based

²² See *infra* Section I.B and note 25.

²³ See *infra* note 25.

²⁴ Our conclusions also should apply to other crimes which provide material benefit to perpetrators, can be justified as benefiting others, and harm people who are socially or geographically distant from the perpetrator.

Deterrence Theory (EDT).²⁵ In this analysis, we focus, in contrast with CDT, on how the law can deter by leveraging people's social and other-regarding motivations. Our analysis differs from prior analyses of deterrence through expressive channels in three ways. First, we explicitly recognize both people's primary reliance on intuitive decision-making processes and evidence about the features of the decision-making environment that determine whether ethics or self-interest prevail when the two conflict. Second, we focus on organizational misconduct, which we show affects the strength of the law's expressive messages. Third, we recognize companies' dominant role in determining their employees' decision-making environment, and thus employees' receptiveness to the law's expressive message. Employing this EDT framework, we determine optimal corporate and individual liability for organizational misconduct.²⁶

We first show why governments cannot reliably, or even usually, deter organizational misconduct through expressive channels absent corporate assistance. First, employees benefit personally from organizational misconduct, and intuitive decision-making processes are structured to bias people towards the choice that favors self-interest, unless the law can establish a genuinely salient norm. Second, we show that organizational misconduct has multiple features that undermine the law's ability to establish a salient, behavior-influencing norm on its own. Thus, the

²⁵ Prior analyses of the expressive role of individual criminal liability generally assume both that people's choices are completely determined by their preference for conforming to social and ethical norms and that the law directly determines people's beliefs about the social meaning of prohibited conduct. These analyses of individual criminal liability also generally do not consider the role of organizations. See *infra* Section I.C.

A few legal scholars have explored the effects of all four insights from psychology on corporate crime, but they have not analyzed optimal individual and corporate liability for organizational misconduct. Donald Langevoort explored the implications of intuitive decision-making for companies' design of and government evaluation of compliance programs. Donald Langevoort, *Culture of Compliance*, 54 AM. CRIM. L. REV. 933, 946 (2017). Yuval Feldman evaluated the implications of all four insights for the design and regulation of compliance programs but did not determine the optimal scope and magnitude of individual and corporate liability for organizational misconduct. YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR*, 127, 168-89 (2018); see also Yuval Feldman & Yotam Kaplan, *Preferences Change & Behavioral Ethics: Can States Create Ethical People?*, 22 THEORETICAL INQUIRIES L. 85 (2021) (explaining why promoting explicit ethical preferences does not necessarily lead to ethical behavior).

²⁶ Ours also is the first EDT analysis of individual liability.

law cannot deter through expressive channels unless employees act within a decision-making environment that creates an omnipresent, strong, and salient ethical norm against misconduct that overrides their self-interest.²⁷

We then show that corporate criminal liability is a prerequisite to deterrence through expressive law. Companies control the features of employees' decision-making environment that determine whether employees will be influenced by the law's expressed condemnation to eschew profitable misconduct.²⁸ Companies largely control their employees' knowledge and understanding of laws against organizational misconduct, determine the salience of these injunctive norms, control employees' motivations to eschew or commit misconduct, and structure their employees' decision-making environments in ways that can either promote or disable the motivated reasoning that promotes misconduct.²⁹ Corporate criminal liability is needed to induce companies to use their control to enhance deterrence through expressive law because companies benefit from their employees' misconduct, and structuring an appropriate environment is costly.

Employing our EDT framework, we next show that states cannot reliably deter organizational misconduct through expressive law unless individual wrongdoers also are liable and face a substantial probability of conviction.³⁰ Moreover, because self-interest is a substantial impediment to expressive law, we find that individuals should face substantial expected sanctions structured to ensure that crime does not pay, consistent with CDT. In addition, we find, also consistent with CDT, that deterrence requires that corporate wrongdoers face a substantial risk of

²⁷ See *infra* Section II.

²⁸ See *infra* Section III.

²⁹ For a discussion of why corporate liability needs to be criminal see Arlen, *supra* note 13.

³⁰ Our conclusions on individual liability for organizational misconduct apply to other forms of misconduct that personally benefit wrongdoers and harm socially or geographically distant victims.

Although we focus on deterrence, we note evidence that punishment of wrongdoers benefits victims by enhancing their social standing. Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358 (2016).

sanction. To achieve this, corporate liability should be structured to induce self-reporting and full cooperation.³¹

Thus, in contrast to prior analyses, we find that deterrence through expressive law enhances, rather than undermines, most of the central policy conclusions of CDT about optimal corporate and individual liability for organizational misconduct. EDT modifies the CDT argument in one respect:³² by revealing the importance of ensuring that individual wrongdoers face a substantial risk of being convicted.

Our analysis proceeds as follows: Section I sets forth the conclusions of CDT and presents the challenges to the CDT framework emanating from empirical and experimental psychology. Section II sets forth an Evidence-Based Deterrence Theory (EDT) designed to enable scholars to evaluate the law's ability to deter through expressive channels and sanctions. It then shows that multiple features of organizational misconduct undermine the law's ability to deter through expressive law absent interventions that enhance its effectiveness. Section III employs EDT to show that corporations control multiple features of employees' decision-making environments that determine whether they will avoid misconduct and finds that broad organizational misconduct is vital to the law's ability to deter through expressive channels. Section IV shows that individual enforcement is essential to deterrence through expressive law, in turn demonstrating why corporate liability for organizational misconduct needs to induce self-reporting and cooperation, consistent with CDT. Section V explains why corporate liability is superior to broad liability imposed on managers through *respondeat superior*. Section VI concludes.

³¹ We define organizational liability structured consistent with CDT to be organizational liability with the features set forth in Section I.A.

³² Some CDT analyses do implicitly modify CDT to incorporate evidence that people regularly ignore low probability events. *E.g.*, Arlen, *supra* note 6.

I. The Challenge to CDT from Empirical Psychology

This Section presents CDT and its policy conclusions for individual and corporate liability for organizational misconduct. It then shows how evidence from psychology undermines the foundational assumptions of this theory, thereby potentially invalidating its policy conclusions. The Section next presents leading legal scholars' views on the normative implications for criminal liability of two of these insights and shows that these analyses fail to incorporate two important insights from psychology: (1) the dominant role and the nature of intuitive decision-making and (2) organization's effects on their employees' decision-making.³³

A. Classical Deterrence Theory and Optimal Liability for Organizational Misconduct

Economic analyses of law generally rely on CDT to determine the optimal scope of individual and corporate criminal liability for organizational misconduct.³⁴ All theories seeking to determine how the law can deter misconduct must make assumptions about four features of individual decision-making: (1) individuals' central motivations; (2) how people make decisions; (3) how the law influences choices; and (4) how the roles of institutions, such as companies, affect people's choices. CDT makes the following four assumptions about how the criminal law influences behavior. First, people are motivated solely by their own self-interest. Second, they make decisions rationally, weighing the costs and benefits of each option. They pick the option that maximizes their egoistic welfare, ignoring its effect on others or on norm compliance.³⁵ Third,

³³ See *infra* Section I.D; see BAZERMAN & TENBRUNSEL, *supra* note 70, at 35-36. But cf. *supra* note 25.

³⁴ Becker, *supra* note 11; see also *infra* notes 36 & 55 (distinguishing CDT from general deterrence).

³⁵ *Id.*

criminal law only alters behavior through one channel: criminal sanctions.³⁶ Thus, criminal law can only deter by increasing the probability or magnitude of the criminal sanction.³⁷

Finally, CDT assumes that organizations only affect their employees' choices through one channel: by altering the direct benefit and costs to employees of their actions. In the case of misconduct, an organization can deter by changing their compensation and promotion policies to reduce employees' expected benefit from crime. They also can increase costs by (1) adopting "prevention measures" that make crime more difficult or costly to commit; (2) firing employees who break the law; and (3) increasing employees' expected criminal liability through efforts to detect, investigate and self-report misconduct, and by fully cooperating with criminal enforcement authorities to help convict criminal employees.³⁸

1. Optimal Individual and Corporate Liability for Organizational Misconduct

CDT yields strong policy prescriptions for optimal individual and corporate liability for knowing or intentional organizational misconduct.³⁹ Employees' decisions knowingly or

³⁶ The assumptions of self-interested preferences and that the law deters solely through sanctions distinguishes CDT from "general deterrence theory" (hereinafter GDT). Both are predicated on rational choice theory. GDT recognizes additional mechanisms through which the law can deter. For example, a criminal conviction imposes reputational costs damage when it leads a wrongdoer's counter-parties (e.g., customers or employers) to refuse to deal with the wrongdoer, or do so on less favorable terms. *See, e.g.,* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993); Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING ch. 11 (Jennifer Arlen ed., 2018) (discussing when corporate violators are likely to incur costs from reputational damage); *see also* John Armour, Colin Mayer, & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. & QUANT. ANALYSIS 1429 (2017). In addition, rational choice theory recognizes that people can care about others and their place in society. GDT thus recognizes that the law can deter by leveraging people's other-regarding or social-preferences. GDT assumes, however, that all choices are made through a rational deliberative assessment of the costs and benefits of each choice. For a detailed discussion of a more nuanced understanding of the meaning of "preference", *see* Arlen & Kornhauser, *supra* note 18, at 188-90, 197 (explicating the distinction between CDT and GDT).

³⁷ *See, e.g.,* Becker, *supra* note 11; A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984).

³⁸ *See* Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

³⁹ This discussion is based on Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

intentionally to commit misconduct cause organizations to violate the law.⁴⁰ To deter organizational misconduct, criminal law must ensure that employee-wrongdoers face a material threat of criminal sanction,⁴¹ and are subject to expected sanctions that exceed their expected benefit from misconduct.⁴²

Individual liability is essential, but not sufficient. CDT analyses conclude that companies also must be criminally liable for their employees' crimes because the government cannot optimally deter without companies' assistance.⁴³ Without corporate assistance, enforcement officials can detect only a small fraction of organizational misconduct,⁴⁴ yielding a probability of

⁴⁰ See *supra* note 3. Early analyses recognizing that individual employees are the root cause of corporate misconduct include Arlen, *supra* note 11; Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 ILL. L. REV. 691; Macey, *supra* note 11; Polinsky & Shavell, *supra* note 9; see Kornhauser, *supra* note 18.

⁴¹ This analysis incorporates an evidence-based assumption that deviates from classic CDT: that people ignore very small probability events. Arlen, *supra* note 9. Classic CDT also reaches the same conclusion if, as is often the case, employees' benefit of misconduct is sufficiently large, and the probability of detection sufficiently small, that they can expect to benefit from misconduct under an optimal sanctions regime, given their asset constraints and the constraints on imprisonment arising from its enormous cost and marginal deterrence concerns. See Arlen, *supra* note 9, at 163-69; see also Arlen & Kraakman, *supra* note 9.

⁴² Arlen, *supra* note 9 (setting forth optimal individual liability for misconduct society wants to deter absolutely); see also Becker, *supra* note 11 (setting forth optimal individual liability for crimes that benefit society under certain circumstances); cf. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224 (1967) (explaining why a criminal's benefit from misconduct generally does not produce a social benefit).

⁴³ See, e.g., Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9; see Polinsky & Shavell, *supra* note 9; see also Kornhauser, *supra* note 17. For a discussion of why corporate liability must be criminal as opposed to civil, compare Arlen, *supra* note 13 with V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996), and Miriam Baer, J. CORP. LAW (forthcoming), and Samuel Buell, J. CORP. LAW (forthcoming), and Mihailis Diamintis, J. CORP. LAW (forthcoming), and William Laufer, J. CORP. LAW (forthcoming).

⁴⁴ See Arlen & Kraakman, *supra* note 9; see also Soltes, *supra* note 1, at 923-25 (presenting evidence that companies' internal reporting systems detect many more instances of misconduct than the government); accord Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010) (finding that the government rarely detects frauds, and more are brought to light by the firm or its employees).

For a discussion of how corporations use their political influence to induce elected public officials to undercut corporate enforcement—even when publicly espousing that they are tough on crime—see Arlen, *supra* note 43; Daniel Richman, *Corporate Head Hunting*, 8 HARV. L. & POL'Y REV. 265, 273-74 (2014).

detection and conviction that is too small to be material to employees and an expected sanction too low to optimally deter organizational misconduct.⁴⁵

Companies can enhance deterrence by reducing their employees' benefit and increasing their expected costs from misconduct.⁴⁶ Corporations determine employees' benefit from organizational misconduct because employees usually commit crimes to increase their pay, job security, or status in the firm.⁴⁷ Companies also can enhance deterrence by leveraging their superior ability to detect and investigate misconduct.⁴⁸ They can materially increase their employees' risk of punishment by assisting the government by self-reporting and fully cooperating.

Companies that are not criminally liable for their employees misconduct have little or no reason to undertake these costly measures to deter profitable misconduct, however.⁴⁹ Accordingly, CDT analyses conclude that companies should be held criminally liable for all material organizational misconduct by all employees, with sanctions that ensure corporations do not profit

⁴⁵ See Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9; see also EUGENE F. SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL (2016) (finding that the risk of sanction tends not directly affect white-collar criminals' decisions as it is not salient).

⁴⁶ See Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

⁴⁷ See Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9. Corporations also can deter by adopting prevention measures that make organizational misconduct more difficult or costly to commit. Arlen & Kraakman, *supra* note 9.

⁴⁸ See Arlen, *supra* note 9; Arlen & Kraakman, *supra* note 9.

⁴⁹ Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

It might appear that individual liability can suffice to ensure that companies do not profit from corporate crime because employees will require increased wages equal to their expected liability. Kornhauser, *supra* note 17; Polinsky & Shavell, *supra* note 9. Yet the indirect cost to companies of individual liability will not reliably ensure that companies do not profit from corporate misconduct for several reasons. First, employees' expected liability regularly is less than companies' expected benefit of misconduct because their risk of being sanctioned is so low and the state cannot optimally adjust the sanction to ensure that the expected cost to employees equals or exceeds companies' profit from misconduct. Second, companies do not reliably know their employees' costs from knowing and intentional misconduct to the extent that either (1) the risk of sanction is too low to be salient to employees or (2) the risk arises from knowing or intentional misconduct and thus is not a cost to employees' of working for the firm in good faith that warrants compensation. See Arlen, *supra* note 9, at 168-70. Beyond this, even if individual liability indirectly gives companies some incentive to deter misconduct, it does not provide incentives for them to self-report and cooperate. Thus, corporate liability is needed to achieve these goals. *Id.*

from their employees' crimes.⁵⁰ In addition, organizational liability should be structured to ensure that companies fare materially better if they self-report or fully cooperate than if they do not.⁵¹ CDT analyses also find that prosecutors must use the evidence they obtain from companies to convict the individual wrongdoers.⁵²

B. Challenge to CDT from Psychology

Evidence from experimental psychology calls into question the validity of these policy conclusions by demonstrating that the four foundational assumptions of CDT are not satisfied.⁵³

1. People Have Other-regarding and Social Motivations

CDT assumes that people are narrowly self-interested. Yet psychological studies show that people often value the welfare of, and their relationships with, others. Consequently, all else

⁵⁰ Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

⁵¹ See, e.g., Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9. For a discussion of how to structure corporate liability to achieve these goals see Arlen, *supra* note 6; ALI, *Principles of Corporate Enforcement*, *supra* note 3.

Optimal corporate liability may not optimally deter when managers, for personal benefit, fail to act in the companies' best interests. See, e.g., Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323 (2017); see also Arlen & Carney, *supra* note 40 (senior managers commit securities fraud that harms the firm when they fear termination if they report honest results). This problem can be reduced, but not eliminated, by imposing specific compliance mandates and an outside monitor on companies with detected misconduct whose management was not committed to deterrence. *Id.* By contrast, imposing liability directly on senior managers or directors for crimes by subordinate employees is not an optimal solution. E.g., Samuel Buell, *Criminally Bad Management*, ch. 3, in THE RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING, (Jennifer Arlen ed., 2018); Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors*, 105 MICH. L. REV. 1677 (2007).

⁵² Arlen, *supra* note 11; Arlen & Kraakman, *supra* note 9. Deterrence requires direct imposition of criminal liability on individual wrongdoers even when companies are liable, and can sanction employees, because companies cannot be relied on to optimally sanction wrongdoers. First, closely-held companies will not sanction their owners who commit misconduct; senior managers of publicly-held firms also may escape sanction as a result of agency costs. Arlen, *supra* note 9, at 157-172. Second, companies cannot optimally sanction employees whose assets are less than the optimal sanction. Kornhauser, *supra* note 17. Employees also are not deterred by the threat of termination if they expect to switch employers before the misconduct is detected or fear termination if they do not use crime to increase profits. Arlen, *supra* note 9, at 157-72; Arlen & Carney, *supra* note 40.

⁵³ A theory's validity depends on whether it is based on a framework that accurately captures the central features of the decision-makers whose choices it seeks to describe and the decision-making environment in which they make choices, as well as on whether it appears to accurately predict actual choices. This is one reason why empirical analysis is vital to the development of theories intended to provide normative policy prescriptions. See Jennifer Arlen, *The Essential Role of Empirical Analysis in Developing Law and Economics Theory*, 38 YALE J. REG. 480 (2021).

equal,⁵⁴ people prefer actions that either benefit, or do not harm, others. They also care about behaving ethically and being perceived by others as both ethical and a good member of society.⁵⁵

2. Deterrence Through the Law's Expressive Messaging

Psychological studies also find that the law can deter through avenues other than formal sanctions. Criminal law can deter through its ability to convey society's condemnation of prohibited conduct, thereby influencing people who care about their own ethicality, their effect on others, or others' perceptions of their ethicality.⁵⁶ There is evidence that, in some circumstances, criminal laws have been able to deter through these expressive channels even when there is little threat of enforcement.⁵⁷

Scholars have focused on two expressive channels through which the law can influence potential wrongdoers: the social norm mechanism and the social harm mechanism.⁵⁸

⁵⁴ Whether such preferences dominate when satisfying them comes at the expense of self-interest is an issue we discuss in Section II *infra*.

⁵⁵ Expressive law theories can be aligned with, or distinguished from, GDT depending on assumptions about the decision-making process. Under GDT, criminal law can deter by leveraging social norms either by triggering costs from reputational damage or causing a wrongdoer with other regarding-preferences to experience internal costs from harming others or violating a social norm. See *supra* note 36.

⁵⁶ See, e.g., Cooter, *Good Citizens*, *supra* note 20; Cooter, *Models of Morality*, *supra* note 20; Cooter, *Expressive Law and Economics*, *supra* note 20; Dau-Schmidt, *supra* note 20; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) [hereinafter Lessig, *Regulation*]; FELDMAN, *supra* note 25; Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996) [hereinafter Lessig, *Social Meaning*]; Kahan, *supra* note 20; McAdams, *Origin*, *supra* note 20; McAdams, *Focal Point Theory*, *supra* note 20; Sunstein, *Expressive Function of Law*, *supra* note 20; Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); STOUT, *supra* note 20; see also Bilz & Nadler, *supra* note 20.

⁵⁷ See, e.g., Bilz & Nadler, *supra* note 20; BENJAMIN VAN ROOIJ & ADAM FINE, *THE BEHAVIORAL CODE: THE HIDDEN WAYS LAW MAKES US BETTER ...OR WORSE*, 7-8 (2021) (discussing evidence that American's seatbelt usage increased from 10% to more than 50% following the adoption of laws requiring seatbelts even though noncompliance was rarely sanctioned); *id.* at 82-83 (discussing evidence that anti-littering laws deter through expressive channels).

⁵⁸ See *supra* note 56. Some scholars appear to offer a third mechanism: they claim that the law can change people's preferences, altering what they want and value. E.g., Bar-Gill & Fershtman, *supra* note 20, at 332 ("different legal systems may affect not just the behavior of individuals, but who they are."); Cooter, *Good Citizens*, *supra* note 20 (laws can cause people to change their moral values); Dau-Schmidt, *supra* note 20, at 2, 14 (criminal law seeks to establish new positive "norms of individual behavior by shaping the preferences of criminals and the public at large"); STOUT, *supra* note 20, at 228 ("criminal law changes *what people want*, in the process shifting their behavior from purely selfish and asocial to unselfish and law-abiding."); Daphna Lewisohn-Zamir, *The Importance of Being Ernst: Two Notions of Internalization*, 65 U. TORONTO L.J. 37, 39 (2015) (law can influence the content of preferences). Prior analysis has shown that none of the pathways through which scholars assert that the law changes involve the

a. Social Norm Mechanism

A criminal prohibition can express or amplify society's view that the prohibited conduct is unethical or otherwise violates appropriate norms of social conduct.⁵⁹ A criminal law establishes a social norm when it enjoins conduct that previously was accepted in the community.⁶⁰ A criminal law enhances a social norm when it makes a preexisting social or ethical norm against enjoined conduct more salient. Criminal law can deter by establishing or enhancing norms because, as previously discussed, people are averse to considering themselves, and being perceived by others, as immoral.⁶¹ Thus, they may comply with legal norms even if there is little risk of sanction.⁶²

alteration of people's fundamental preferences. Instead, these pathways rely on the channels discussed above to increase the internal cost to people of misconduct. *See* Arlen & Kornhauser, *supra* note 18.

The social norm and harm mechanisms can be reconciled with GDT when individuals are assumed to rely on deliberative decision-making. *Id.* The implications change once it is recognized that people rely on intuitive decision-making processes.

⁵⁹ Sunstein, *Expressive Function of Law*, *supra* note 20; Sunstein, *Social Norms*, *supra* note 56; *see* McAdams, *Origin*, *supra* note 20; McAdams, *Focal Point*, *supra* note 20; *cf.* Ernst Fehr & Ivo Schurtenberger, *Normative Foundations of Human Cooperation*, 2 NATURE & HUM. BEH. 458, 463 (2018) (providing a definition of social norms). Thus, in this view deterrence through people's inclination to comply with the law depends more on people's general ethical and social preferences than on direct legal measures, such as enforcement. Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & CONTEMP. PROBL. 23, 46 (1997) (to deter, people need to be induced to obey the law for reasons of conscience and conviction, and not out of fear of punishment).

⁶⁰ For example, consider laws prohibiting bribery of foreign officials. Bribery has long been a commonplace activity that was accepted in the business community in the U.S. and around the world. In addition to sanctioning corruption, the Foreign Corrupt Practices Act (FCPA) and the OECD Convention express society's view that such conduct is both illegal and unethical. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (FCPA).

⁶¹ Considerable evidence supports this proposition. *See, e.g.,* Diana C. Robertson et al., *Business Ethics: The Promise of Neuroscience*, 144 J. BUS. ETHICS 679 (2017). *See also* Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, ch. 11 in THE RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); *see generally* Langevoort, *supra* note 25, at 946.

⁶² Paul H. Robinson & John M. Darley, *Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Janice Nadler, *Flouting the Law*, 83 TX. L. REV. 1399 (2005); McAdams, *Origin*, *supra* note 20; *see also* Bilz & Nadler, *supra* note 20, at 245. The seriousness of norm violation is communicated by both the criminal prohibition and by the sanction imposed for its violation. *See infra* Section II.D. For a discussion of whether sanctions for noncompliance may instead crowd out intrinsic motivations to comply with a norm *see infra* note 83.

b. Social Harm Mechanism

Alternatively, and relatedly, a criminal law can deter by expressing society's view that the prohibited conduct imposes unacceptably large harms on others.⁶³ This expression can deter people who care about others, or about being perceived to care about others; it also can express society's view that any personal benefit of the misconduct does not justify imposing such costs.⁶⁴

While the social harm pathway is distinct from the social norm pathway, the two converge in societies that have social or moral norms against conduct considered excessively harmful to others.⁶⁵

3. People's Decision-making Processes: Intuitive and Deliberative Processes

CDT assumes that people make choices through a deliberative process in which the full costs and benefits of the available choices are assessed and weighed.⁶⁶ Yet experimental psychology has provided a wealth of evidence that people do not use deliberative decision-making to make most choices.

Psychologists have found that people use one of two, quite separate, decision-making processes to make choices: (1) deliberative decision-making and (2) intuitive decision-making.⁶⁷

⁶³ The law could express that conduct is excessively harmful to others or to the actor. *See, e.g.,* Kahan, *supra* note 20; Lessig, *Regulation*, *supra* note 56; Lessig, *Social Norms*, *supra* note 56. The effectiveness of this expression depends on whether people trust legislatures to enact laws in the social interest. *See* Bilz & Nadler, *supra* note 20 (discussing how lack of trust of government authorities can alter the impact of laws).

⁶⁴ *See, e.g.,* Arlen & Kornhauser, *supra* note 18 (discussing the social harm mechanism). For example, traffic regulations setting speed limits near schools may alter peoples' beliefs about the danger to children of driving at speeds that would be acceptable in another location.

⁶⁵ Laws against harmful conduct can deter by inducing a new social equilibrium that produces a new social norm. *See e.g.,* Cooter, *Good Citizens*, *supra* note 20, at 1586-88 (smoking bans in public facilities or workplaces and pooper-scooper laws show how the legal rule almost instantly shifts society from one equilibrium to another).

⁶⁶ *See supra* note 36 (distinguishing CDT from general deterrence).

⁶⁷ *See, e.g.,* KAHNEMAN, *supra* note 21; Camerer, et al., *supra* 21 (people use multiple decision-making processes, both deliberative and nonconscious/intuitive); Camerer & Fehr, *supra* note 21 (same); *see also* Arlen & Talley, *supra* note 21 (discussing the implications of multiple-process theories for experimental law and economics).

Professor Daniel Kahneman refers to intuitive nonconscious processes as System 1 processes and deliberative conscious processes as System 2. KAHNEMAN, *supra* note 21.

Deliberative decision-making is conscious and involves a weighing of costs and benefits that involves time and cognitive resources.⁶⁸ Intuitive decision-making is nonconscious, instantaneous, and tends to rely on emotional reactions; it also relies on a relatively small set of heuristic decision rules that are easily understood.⁶⁹ When people face a conflict between two factors important to their intuitive decisions, their intuitive choice will tend to depend on which factor was most salient at the time, and not on a weighing of costs and benefits.

Full, conscious deliberation is cognitively costly and takes time that people often do not have. As a result, people rely on their intuitive (and emotional) processes to make most decisions,⁷⁰ even when they perceive themselves to have consciously deliberated. Psychology studies show that people tend to use their intuitive processes to decide; subsequently, they seek facts and arguments to justify the choice they have already made.⁷¹ This subsequent search for and evaluation of the facts does not produce a genuine deliberative assessment. Once people intuitively identify their preferred option, they focus on obtaining facts supporting that option, and give more weight to arguments in its favor. In turn, they may not entertain considerations against this option and may suppress facts that count against it. Thus, intuitive decision-making drives most decisions even when people believe they have consciously deliberated over the costs and benefits of different choices.⁷²

Understanding intuitive decision-making is crucial to optimal deterrence through the criminal law's expressive channels because psychological studies find that social and ethical

⁶⁸ This weighing is often distorted in ways discussed below.

⁶⁹ See KAHNEMAN, *supra* note 21; Camerer et al., *supra* 21; Camerer & Fehr, *supra* note 21 (same).

⁷⁰ For an extensive discussion of the role of System 1, see KAHNEMAN, *supra* note 21; Camerer et al., *supra* note 21. For a discussion of the role of intuitive decision-making when people are making ethical decisions within organizations, see, e.g., MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011); FELDMAN, *supra* note 25; Langevoort, *supra* note 25.

⁷¹ See *infra* text accompanying notes 91-.

⁷² *Id.*

norms, and thus expressive law, influence behavior through these intuitive processes.⁷³ Psychological studies also have provided important insights into the emotions – guilt and shame – that are key to the law’s ability to deter through expressive channels. Studies show that people are intuitively averse to violating social or ethical norms or to harming others when contemplating such actions causes them to experience guilt or shame.⁷⁴ People experience guilt when they fail to conform to their own expectations for their behavior.⁷⁵ People experience shame when they disappoint the expectations and ethical norms of others whose views they value.⁷⁶ These emotions are the channels through which our intuitive decision-making processes lead us to be better members of society.

Criminal law can deter organizational misconduct through expressive channels when it expresses or enhances a social or ethical norm that is sufficiently salient to cause employees contemplating misconduct to experience guilt or shame, and when avoidance of guilt or shame is the primary driver of their intuitive choices. Whether it can do so will depend on whether the

⁷³ See, e.g., Bibb Latane, *The Psychology of Social Impact*, 36 AM. PSYCH. 343 (1981); see FELDMAN, *supra* note 25, at 111; see also Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgement*, 108 PSYCH. REV. 814 (2001) (people usually use System 1 to make decisions but moral reason is a product of System 2).

⁷⁴ The psychological mechanisms that lead people to intuitively be averse to violating established ethical or social norms have not been concretely identified, but a dominant explanation involves the role of guilt and shame. See, e.g., Fehr & Schurtenberger, *supra* note 59, at 463; J. P. Tangney, *Self-Relevant Emotions*, 384, 386, in HANDBOOK OF SELF AND IDENTITY (J. P. Tangney & M. R. Leary eds. 2003); Jonathan Haidt, *The moral emotions*, 852, in HANDBOOK OF AFFECTIVE SCIENCES (2003) (R. J. Davidson, K. R. Scherer, & H. H. Goldsmith Eds. 2003); Jonathan Haidt, & Selin Kesebir, *Morality*, 797 IN HANDBOOK OF SOCIAL PSYCHOLOGY (S. T. Fiske, D. T. Gilbert, & G. Lindzey Eds., 2010); cf. McAdams, *Attitudinal Theory*, *supra* note 20, at 340 (people are motivated to comply with the law by their concern for avoiding disapproval by others in society); McAdams, *Origin*, *supra* note 20 (discussing the role of esteem in triggering norm compliance).

⁷⁵ Psychologists agree that guilt and shame are both emotions that serve to regulate our behavior by triggering feelings of distress in response to personal transgressions but disagree about precisely how to distinguish between them. Taya R. Cohen et al., *Introducing the GASP Scale, a New Measure of Guilt and Shame Proneness*, 100 J. PERS. & SOC. PSYCH. 947, 948 (2011). Under one widely accepted distinction views, guilt arises from violating one’s own conscious, whereas shame arises from other’s people’s reaction to the conduct. *Id.* at 948.

⁷⁶ See Cohen et al., *supra* note 75.

actors it seeks to influence exist in a decision-making environment that supports or undermines deterrence through expressive law.

4. Influence of Organizations on Employees' Choices

CDT recognizes that organizations are important to the law's ability to deter, but it assumes that they only influence employees through interventions directed at their self-serving preferences.⁷⁷ They thus affect organizational misconduct entirely by affecting the expected benefits from, and costs to, employees of committing misconduct.⁷⁸

Evidence shows that laws also have the potential to deter through expressive channels designed to leverage people's social- or other-regarding preferences. Yet contrary to much of the existing analysis of expressive law, evidence shows that the law itself is not the primary, institution influencing people's receptiveness to the law's expressive messages, particularly in the case of organizational misconduct. Companies are the dominant institution in employees' daily lives. Psychological studies show that companies can structure employees' decision-making environment to either enhance or mute employees' receptiveness to the law's expressive messages.⁷⁹

⁷⁷ See, e.g., Arlen, *supra* note 40; Arlen, *supra* note 9; Arlen & Kraakman, *supra* note 9; Kornhauser, *supra* note 17; Polinsky & Shavell, *supra* note 9; see also Nuno Garoupa, *Corporate Criminal Liability and Organizational Incentives: A Managerial Perspective*, 21 MGMT. DECIS. ECON. 243 (2000).

⁷⁸ See *supra* Section I.A.

⁷⁹ See *infra* Section III; see, e.g., BAZERMAN & TENBRUNSEL, *supra* note 70; FELDMAN, *supra* note 25; Langevoort, *supra* note 25; Langevoort, *supra* note 61. Additional discussion of the implications of psychology for organizations' efforts to deter misconduct can be found in chapters in recent books on compliance, including CORPORATE COMPLIANCE ON A GLOBAL SCALE: LEGITIMACY AND EFFECTIVENESS (Stefano Manacorda & Francesco Centonze eds, 2022); THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

C. Legal Scholarship Recognizing People's Social Preferences & Law's Expressive Role

Legal scholars have relied on evidence that the law can deter through expressive channels by leveraging people's other-regarding motivations to challenge the conclusions of CDT regarding individual criminal liability and, to a lesser degree, corporate liability.⁸⁰ These Expressive Law Theories (ELT) conclude that individual criminal liability can deter through sanctions that fall below those prescribed by CDT because the law also imposes costs on individual wrongdoers through its ability to express society's condemnation of the prohibited conduct or to establish that the conduct is excessively harmful.⁸¹

Under one view, which we refer to as the "strong" view of ELT, deterrence through expressive channels can obviate the need for enforcement and sanctions against individuals. In this view, enactment of a criminal law establishing a social or ethical norm can deter by changing people's preferences so that they no longer want to engage in this misconduct.⁸² Proponents of the strong view thus conclude that governments should reduce their reliance on enforcement and sanctions because they are socially costly and governments can deter as effectively, and at lower social cost, through expressive pathways.⁸³

⁸⁰ See, e.g., *supra* note 20.

⁸¹ See, e.g., Dau-Schmidt, *supra* note 20; Kahan, *supra* note 20; see also Sunstein, *supra* note 20; Bilz & Nadler, *supra* note 20; Cooter, *Good Citizens*, *supra* note 20.

⁸² See, e.g., Bilz & Nadler, *supra* note 20, at 241; Cooter, *Good Citizens*, *supra* note 20; Sunstein, *supra* note 20, at 1137 (if new legal rules can change preferences then people will not attempt to circumvent the new rules); see also Lewisohn-Zamir, *supra* note 58, at 39 (law can influence the content of preferences). For an explanation of why existing theories of expressive law do not support the conclusion that the law changes preferences, see Arlen & Kornhauser, *supra* note 18.

⁸³ See Bilz & Nadler, *supra* note 20, at 241; Cooter, *Good Citizens*, *supra* note 20; Sunstein, *supra* note 20, at 1137; see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY AND COMPLIANCE (2009) (people often are motivated to comply with the law by morality and fairness, and not the threat of sanctions); Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 632 L. & SOC'Y REV. 549 (1996) (same).

These scholars also claim that sanctions may reduce the effectiveness of expressive law by crowding out people's pros-social motivations to avoid prohibited misconduct. This observation is based on studies showing that sanctions can crowd out people's intrinsic motivations to avoid prohibited conduct. E.g., BRUNO S FREY, NOT JUST FOR THE MONEY (1998); see Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000) (the decision by a

Under the alternative account, criminal law is assumed to deter through expressive channels only if the law is enforced, as enforcement and sanctions express society's view of the seriousness of the wrong and its commitment to the social norm established by the legal injunction.⁸⁴ Yet these analysis assume that a strong expression of condemnation by legal institutions suffices to deter through expressive channels, thereby reducing the optimal magnitude of the government-imposed sanction below that prescribed by CDT.⁸⁵

ELT analyses also undermine the argument for corporate liability, since such liability is not needed to induce corporations to help deter if individual liability deters effectively through expressive channels. An alternative analysis reaches the same conclusion through a different avenue. According to this alternative view, governments should (1) rely on companies to express ethical messages to their employees and (2) eliminate corporate liability because the threat of corporate liability "crowds out" efforts companies otherwise would take to deter.⁸⁶

day care to impose a fine on parents who were late to pick up their children increased late pick-ups). Yet these studies have not examined the role of sanctions when people have strong self-interested motivations to engage in misconduct. Moreover, recent experimental studies provide evidence contrary to the crowding out hypothesis. *See* Cherie Metcalf, et al., *Is the Fine Still a Price? Replications as Robustness in Empirical Legal Studies*, 63 INT'L REV. L. & ECON. 1 (2020); Lewis Kornhauser, et al., *Testing a Fine is a Price in the Lab*, 63 INT'L REV. L. & ECON. (2020)

⁸⁴ See Kahan, *supra* note 20, at 354-55, 378-82 (discussing the importance of sanctions).

⁸⁵ *See also id.*

⁸⁶ See John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, J. CORP. L. (forthcoming 2022) [17, 20-21].

Mihailis Diamantis makes a related, albeit different claim. He recognizes the need for additional deterrence beyond the law's expressive message, and also the vital role companies can play in deterring misconduct. But he concludes that the state can best leverage companies' influence by eliminating corporate fines and other such costs and focusing instead on measures designed to reform companies' internal organizational processes, structures and characteristics to promote ethical conduct. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 548-57. For a discussion of why governments cannot optimally deter through a corporate regime predicated on optimal compliance see *infra* Section IV; *see also* Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*, in CRIMINALITA D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO (Stefano Manacorda and F. Centonze eds., 2018); Arlen & Kahan, *supra* note 51 (explaining why enforcement officials cannot reliably assess compliance ex ante independent before misconduct is detected).

1. Limitations of Existing Approaches

Existing analyses do not provide reliable policy prescriptions for how governments can best deter organizational misconduct through expressive law or otherwise, because they all rest on inaccurate assumptions about behavior. These analyses incorporate evidence that people have other-regarding preferences and can be influenced by the law's expressive channels. However, they all fail to recognize the central role of intuitive decision-making in driving choices. This is important because, as we shall show, analyses of intuitive decision-making reveal that we cannot assume that even a clear, well-known legal injunction automatically influences behavior. This evidence also reveals the factors that bear on whether the law can effectively deter through expressive channels, factors that must be examined in order to assess optimal corporate and individual liability for organizational misconduct.

Existing analyses of deterrence through expressive law also either fail to recognize, or do not accurately characterize, the dominant role that organizations play in determining the law's ability to deter through expressive channels. Empirical evidence reveals that employees' receptiveness to legal injunctive norms depends whether they operating within an organizational decision-making environment that promotes or undermines norms. Companies directly control this decision-making environment. They cannot be relied on to use this control to promote deterrence absent corporate liability because, as we will show, the actions needed to deter through expressive channels inevitably reduce profit, both directly and by deterring profitable organizational misconduct. Thus, the possibility of deterrence through expressive law potentially increases, rather than decreases, the need for corporate liability for organizational misconduct.

II. Evidence-Based Deterrence Theory and Challenges of Organizational Misconduct

This Section develops a theoretical framework, Evidence-based Deterrence Theory (“EDT”), that enables us to identify when, and how, the law can deter by leveraging the law’s expressive pathways. EDT improves on prior analyses of expressive law by recognizing people’s reliance on intuitive decision-making processes when making decisions. In this Section, we apply this framework to show why the simple adoption of a law against organizational misconduct is unlikely to deter employees through expressive channels—or otherwise. Subsequent sections show that deterrence of employees through expressive channels requires the identification and imposition of corporate and individual liability.

A. Evidence-based Deterrence Theory

Empirical analysis of human decision-making shows that people have social- and other-regarding motivations as well as egoistic preferences. Laws that establish or enhance ethical or social norms could, as explained in Section I, potentially deter through expressive channels. Yet employees regularly benefit from organizational misconduct, producing a potential conflict between the choice that favors their egoistic self-interest and the ethical choice. To determine whether and when criminal law’s expressive messages can overcome self-interest, we must leverage empirical evidence on intuitive decision-making to ascertain when ethical motivations reliably dominate egoistic ones.⁸⁷

⁸⁷ This analysis focuses on evidence of the factors favoring ethical decision-making on average. Of course, people’s responses to ethical concerns will vary depending on their personality, including the strength of their other-regarding preferences and their susceptibility to guilt and shame. See e.g., Jennifer J. Kisk-Gephart, et al., *Bad apples, Bad cases, and Bad Barrels, Meta-analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCH. 1 (2010); see also Rebecca Stone, *Legal Design for the “Good Man,”* VA. L. REV. (2016); see generally FELDMAN, *supra* note 25, at 125-151; cf. Simon Gächter & J. F. Schultz, *Intrinsic Honesty and the Prevalence of Rule Violations Across Societies*, 531 NATURE 496 (2016) (discussing cultural differences). The evidence presented here relates to the choices of people who want to be, and perceive themselves to be, “good people.” As we shall see, this self-perception and motivation does not suffice to produce ethical choices. Studies of intuitive decision-making show that even people

Evidence shows that people use intuitive, nonconscious, decision-making to make most choices.⁸⁸ Rather than assessing and weighing all the costs and benefits of each choice, as CDT assumes, people decide instantaneously, based on limited, particularly salient features of the choices before them. What features are salient depends on what people care about most and what features of the choice are pushed to the foreground by their decision-making environment.

Empirical evidence shows that people are strongly motivated to comply with social or moral norms.⁸⁹ They want to perceive themselves and be perceived by others as moral and ethical; they try to avoid conduct likely to trigger guilt, shame, disapproval.⁹⁰ Yet ethical concerns do not tend to be the primary factor driving individuals' choices. Studies consistently find that, although people tend to believe that they will make the proper choice when ethics and self-interest conflict, their actual intuitive decisions strongly favor the choice that promotes self-interest, even when self-interest conflicts with ethics.⁹¹ People instinctively favor the choice that provides the greatest egoistic benefits because personal benefit comes naturally (and indeed is adaptive) and requires less cognitive energy. People thus reflexively favor self-interest if they can do so without material damage to their own self-image and their sense of others' perception of them.⁹²

who value others and their own ethicality regularly make unethical self-interested choices unless faced with an ethical norm that is salient at the moment of choice.

⁸⁸ See *supra* note 21.

⁸⁹ See *supra* note 87.

⁹⁰ See *supra* Section 1.C; Haidt, *supra* note 73; cf. *supra* note 87 (on different personalities).

⁹¹ See Dale T. Miller & Rebecca K. Ratner, *The Disparity between the Actual and Assumed Power of Self-interest*, 74 J. PERS. & SOC. PSYCH. 53 (1998). People tend not to accurately predict their behavior. They regularly predict they will select the ethical choice but, when the decision arises, "ethical fading" occurs and they serve their self-interest. BAZERMAN & TENBRUNSEL, *supra* note 70, at 70-72. Evidence that people's predictions about their own behavior are inaccurate has implications for experimental studies based on qualitative surveys, instead of actual choices.

⁹² BAZERMAN & TENBRUNSEL *supra* note 70, at 35-36. People have both their "wants" and their sense of what they should do. In a conflict between the "want self" and the "should self" the want self tends to dominate. The want self is particularly likely to dominate if the decision-maker is under time pressure. People's "should self" reasserts itself after the decision to reframe the choices in a way that justifies the choice. See BAZERMAN & TENBRUNSEL, *supra* note 70, at 66-69.

People's intuitive processes favor self-interest even in situations where objective observers would predict that people with other-regarding preferences should be deterred by the unethical nature of the decision. Intuitive decision-making involves a process called "motivated reasoning" that distorts both the collection and weighing of information. These distortions enable people to make self-interested decisions without being aware that they have acted unethically.⁹³ Specifically, when faced with a decision, people tend rapidly to make an intuitive decision that identifies, from the perspective of self-interest, their best course of action. They subsequently undertake a conscious deliberation over the choice, weighing the potential perceived costs and benefits of each option. However, this conscious deliberation is neither complete nor objective. Instead, the structure of intuitive decision-making processes renders more salient those considerations that favor the self-interested option while suppressing considerations that weigh against it, thereby biasing people's conscious deliberation towards the self-interested option.⁹⁴ For example, people

⁹³ See, e.g., BAZERMAN & TENBRUNSEL, *supra* note 70, at 48-50, 69; David M. Bersoff, *Why Good People Sometimes do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 PERS. & SOC. PSYCH. BULL. 28 (1999); ; Bicchieri et al., *It's Not a Lie if You Believe the Norm Does Not Apply: Conditional Norm Following with Strategic Beliefs*, CESifo Working Paper No. 8059 (Feb. 2020) (experimental evidence shows people may choose to strategically entertain beliefs that justify evading pro-social behavior that imposes costs on them); Robert B. Cialdini & Melanie Trost, *Social Influence: Social Norms, Conformity and Compliance*, Chapter 21, 160, HANDBOOK OF SOCIAL PSYCHOLOGY (Vol. 2) (1999) (People have a basic need to feel good about who they are and engage in a variety of defensive maneuvers to maintain a positive self-esteem); Nina Mazar, et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MKTG. RES. 633 (2008); see also DANIEL ARIELY, *THE HONEST TRUTH ABOUT DISHONEST: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012); Kess van den Bos, et al., *On Preferences and Doing the Right Thing: Satisfaction with Advantageous Inequity When Cognitive Processing is Limited*, 42 J. EXP. SOC PSYCH. 272 (2006) (people are more likely to prefer unequitable allocations that benefit themselves when cognitive processing is limited); Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171 (2004); FELDMAN, *supra* note 25, at 3, 35.

⁹⁴ See citations *supra* note 93; BAZERMAN & TENBRUNSEL, *supra* note 70, 50-52, 72-73. Self-interest emerges as a prime motivation because people rely on intuitive decision-making and tend to focus on self-interest when actually presented with a choice, even if they predict they will be ethical. Such motivations may be hardwired to increase our chance of survival. George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORG. BEHAV. & HUM. DEC. PROCESSES 272 (1996); see BAZERMAN & TENBRUNSEL, *supra* note 70, at 69-72; Langevoort, *supra* note 25, at 951-52; cf. Mina Cikara et al., *Their Pain Gives Us Pleasure: How Intergroup Dynamics Shape Empathic Failure and Counter-Empathic Responses*, 55 J. EXP. SOC. PSYCH. 110 (2014) (hormonally-driven competitive arousal and egocentric biases also may combine to facilitate moral blindness); Jason Pierce et al., *From Glue to Gasoline: How Competition Turns Perspective Takers Unethical*, 24 PSYCH. SCI. 1986 (2013).

tend to only identify arguments favoring the self-interested option, and do not consider the ethical problems with their self-interested choice unless the decision-making environment overwhelmingly amplifies the salience of those concerns.⁹⁵ This biased uptake and analysis of information renders people “morally blind” to concerns that would interfere with their pursuit of self-interest, allowing them to remain consciously unaware of any ethical costs of self-interested decisions that would otherwise trigger guilt or shame.⁹⁶

Accordingly, evidence that people have other-regarding or social preferences does not alone justify ELT’s assumption that the criminal law’s condemnation of prohibited conduct will deter organizational misconduct because employees usually benefit from, and thus are motivated by self-interest to commit, organizational misconduct. While organizational misconduct directly

In addition, people are more inclined to remember information that supports their preferred choice and enables them to view it as the fair outcome. Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORG. BEHAV. & HUM. DECISION MAKING PROCESSES 176 (1992); Linda Babcock et al., *Biased Judgements of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); see also Feldman & Kaplan, *supra* note 25, at 217; Eric L. Uhlmann, et al., *The Motivated Use of Moral Principles*, 4 JUDGMENT & DECISION MAKING 476 (2009).

People tend to misremember both what they did and were told to do when misremembering enables them to believe than they acted ethically. *E.g.*, Shu et al., *supra* note 95; see FELDMAN, *supra* note 25, at 47.

⁹⁵ See, e.g., Don A. Moore & George Loewenstein, *Self-interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189 (2004); Bicchieri et al., *supra* note 93; Francesca Gino et al., *Motivated Bayesians: Feeling Moral While Acting Egoistically*, 30 J. ECON. PERSPEC. 189 (2016); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990); David M. Messick & Keith P. Sentis, *Fairness and Preference*, J. EXPER. SOC. PSYCH. 418 (1979); David M. Messick & Keith P. Sentis, *Fairness, Preference, and Fairness Bias*, in EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES (David M. Messick & Karen S. Cook eds., 1983); see generally BAZERMAN & TENBRUNSEL, *supra* note 70, at 37, 48-52; see also Jonathan Baron & J. C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCH. 569 (1988); D. Chugh et al., *Bounded Ethicality as a Psychological Behavior to Recognizing Conflicts of Interest*, 74-95 in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE AND PUBLIC POLICY (David A. Moore, et al., eds., 2005) (discussing nondeliberative processes that enable good people to engage in unethical behavior without perceiving themselves to be unethical); L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY & SOC. PSYCH. BULL. 330 (2011); cf. D. G. Rand et al., *Spontaneous Giving and Calculated Greed*, 489 NATURE 427 (2012) (people in a competitive environment are more likely to behave competitively when using System 1).

⁹⁶ Messick & Sentis, *Fairness and Preference*, *supra* note 95; Messick & Sentis, *Fairness, Preference, and Fairness Biases*, *supra* note 95; see BAZERMAN & TENBRUNSEL, *supra* note 70, at 50, 66-72, 79; see Bicchieri et al., *supra* note 93; see also Don A. Moore, et al., *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37 (2010) (finding that people truly believe their own biased judgements and thus fail to recognize that their behavior is unethical).

benefits companies,⁹⁷ it also regularly provides substantial benefits to employees in the form of bonuses, promotions, and increased social standing conferred on people whose actions benefit the firm.⁹⁸ Employees thus are intuitively drawn to organizational misconduct when it is their most effective path to increased financial welfare; their other-regarding preferences cannot be presumed to deter them because they employ motivated reasoning to mute the law's expressive voice. Thus, the law can only deter through expressive channels if it can establish a social or ethical norm against misconduct that is so salient to employees at the moment that they could violate the law that socially-motivated employees have no choice but to eschew the misconduct, notwithstanding motivated reasoning.⁹⁹

Accordingly, a framework seeking to predict when the law can deter through such channels must identify the factors needed to create such a norm and determine how the law can most effectively create the necessary conditions to induce ethical choices.

B. Factors Bearing on Whether Ethical Concerns Will Triumph Over Self-Interest

Empirical studies provide a wealth of evidence on the features of the decision-making environment that bear on whether the law can establish a sufficiently salient and substantial norm to influence people to eschew profitable but unethical conduct.

These studies find that salience depends on multiple factors beyond simply the magnitude of the egoistic incentive to violate the law. First, employees must have been told that their preferred choice is unlawful, and the legal injunction must be one of the most focal norms guiding behavior

⁹⁷ See *supra* note .

⁹⁸ See Arlen & Kraakman, *supra* note 9.

⁹⁹ Salience of the legal injunctive norm is important because in any given context a variety of competing norms may apply. Situational signals may activate one norm over another. Thus, in order for an injunctive norm to influence choices, the decision-making context must promote its activation at the moment people are choosing whether to violate the law. See Cialdini & Trost, *supra* note 93, at 161.

when an opportunity to engage in misconduct arises.¹⁰⁰ To ensure this, people must be regularly reminded of the prohibition to help ensure that it is foremost in their mind when an opportunity to violate the law arises.

Second, salience depends on whether the harm that the law seeks to guard against is material for potential wrongdoers; the harm must loom large and have the potential to cause wrongdoers to experience material guilt and shame. The harms that laws seek to guard against are not all created equal. People respond more to intentional misconduct than to actions that create a risk of harm. They are less motivated to avoid conduct that creates a risk of harm to many unidentified people but will not definitely harm a particular person.¹⁰¹ They also are more responsive to a threat of harm to people they know, or to those in their immediate vicinity or in the same social group. By contrast, they tend not to care deeply about harm to unidentified strangers, especially those who are socially or geographically distant from the actor.¹⁰² Thus, any assessment of the deterrent effect of expressive law must take such considerations into account.

Third, whether law can deter by leveraging social motivations also depends on whether, at the moment of choice, employees' decision-making environment operates (1) to enhance or suppress the salience of the law's expressive message and (2) to give the decision-maker the ability to properly internalize and act on the law's condemnation of the illegal conduct. Thus, in assessing deterrence through expressive law, one must ask whether the decision-making environment is

¹⁰⁰ In order for an injunctive norm to influence choices the decision-making context must promote its activation at the moment people are choosing whether to violate the law. See Cialdini & Trost, *supra* note 93.

¹⁰¹ See, e.g., Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26(1) J. RISK & UNCER. 5 (2003); Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punitiveness*, 18 J. BEHAV. DECISION MAKING, 311 (2005); Tehlia Kogut & Ilana Ritov, *The Identified Victim Effect: An Identified Group or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157 (2005); T. Tehlian Kogut & Ilana Ritov, *The Singularity Effect of Identified Victims in Separate and Joint Evaluation*, 97 ORG. BEHAV. & HUM. DECISION MAKING PROCESSES 106 (2005); see Cialdini & Trost, *supra* note 93, at 159-160 (people less obligation to those they are in exchange relationships with, such as customers); see also SOLTES, *supra* note 45 (discussing how the absence of clear identified victims facilitates misconduct by white collar criminals).

¹⁰² See, e.g., Elizabeth Hoffman, et al., *Social Distance in Dictator Games*, 86 AM. ECON. REV. 653 (1996).

structured to prime people to focus on self-interest and profit or, alternatively, on ethical concerns and duty to others.¹⁰³

Fourth, evidence of the greater cognitive demands required to remain ethical implies that people are more likely to be ethical when, at the moment of decision, they are not under a substantial cognitive load.¹⁰⁴

Fifth, the law's ability to deter through expressive channels also depends on the ease with which people employing motivated reasoning can justify misconduct.¹⁰⁵ This in turn depends on whether people's decision-making environment provides an acceptable pro-social justification for the self-serving illegal behavior.¹⁰⁶ If the decision-making environment provides a pro-social justification, people will be able to violate the law and retain their perception that they are socially-motivated and ethical. The pro-social justification is particularly salient if the people benefited by the misconduct are known and proximate to the actor, either geographically or socially.¹⁰⁷

Sixth, whether the law establishes a salient norm depends more on the behavior of those who are closest, geographically and socially, to the actor contemplating a violation than it does on any statements in the law, or by government actors, about the law's importance. Studies show that people's beliefs about whether a law establishes a social or ethical norm depend substantially on whether others around them comply.¹⁰⁸ Compliance by others is the most salient demonstration of

¹⁰³ See *infra* Section 3.

¹⁰⁴ See *infra* Section 3.

¹⁰⁵ See *supra* text accompanying 93- (discussing motivated reasoning). Motivated reasoning enables people to employ an alternative pro-social goal to justify the violation even when objectively it is not a legitimate justification for the misconduct. See, e.g., Gino, et al., *Motivated Bayesians*, *supra* note 95; see Nadler, *supra* note 122, at 1207 (corruption is difficult to deter through expressive law because people can rationalize it through the benefits the corrupt deal provides to the firm and their co-workers).

¹⁰⁶ See Bicchieri, et al., *supra* note 93;

¹⁰⁷ See *supra* text accompanying notes 101-102 (discussing the relevance of identified people and social and geographic distance).

¹⁰⁸ People assess the validity of the norm based on whether other people voluntarily eschewed the prohibited conduct prior to the law's adoption or readily do so afterwards. E.g., Cialdini & Trost, *supra* note 93, at 154; van Rooij & Fine, *supra* note 57, at 125-35 (perceived injunctive social norms depend critically on the perceived behavior of others);

whether the society within which the employee operates views the legal injunction as a valid social or ethical norm. Noncompliance by others enables employees to violate the law without shame, as shame is triggered by anticipated condemnation by others. Studies show people do not condemn others for violating laws when violations are common and socially accepted. Others' violations of the law also may lead people not to experience guilt over failing to comply because people frequently predicate the correctness of their own actions on the conduct of others.¹⁰⁹ Others' decisions to violate the law provide moral cover to those seeking to engage in profitable misconduct while maintaining their self-perception of being an ethical person.

In determining whether the community views the legal injunction as a valid social or ethical norm, people tend to focus on the people they observe in their daily lives who face the same choices. Evidence shows that people are less likely to anticipate shame should they violate a legal norm if those in the social group to which they are most identified turn a blind eye to—and may even approve of—their illegal conduct. Indeed, they perceive the self-interested conduct of those around them as the dominant social norm.¹¹⁰

Finally, for an injunctive norm to be material to the choice, decision-makers need to experience guilt or shame when knowingly deciding to engage in illegal conduct. Guilt and shame are the intuitive, emotional responses that alter their behavior.¹¹¹ Studies show that people only

see also Fehr & Schurtenberger, *supra* note 59 (the formation and persistence of an injunctive norm depends on the anticipation that norm violations will be sanctioned).

¹⁰⁹ See Cialdini & Trost, *supra* note 93, at 172.

¹¹⁰ Motivated reasoning will tend to lead people to focus on the unethical behavior of others when assessing social expectations in order to justify their own unethical conduct. See, e.g., Francesco Gino & Adam D Galinsky, *Vicarious Dishonest: When Psychological Closeness Creates Moral Distance from One's Moral Compass*, 119 *ORGAN. BEHAV. AND HUMAN DEC. PROCESSES* 15 (2012) (an unethical norm is more likely to influence behavior the greater the degree of social closeness between the agent and those engaging in unethical behavior).

¹¹¹ See *supra* Section 3.4. There are potentially other explanations for why people respond to norms. For example, some attribute it to people's taste for behaving fairly. This can be incorporated into the view that people feel guilt to the extent that people experience negative emotions when they act contrary to their own expectation of themselves that they be fair. In addition, as discussed below, the literature on fairness reveals that responsibility for the decision also helps determine whether people will be averse to an unfair decision.

experience such emotions when, and to the extent that, they feel responsible for the decision that produced the outcome.¹¹² Peoples' perception of the set of choices for which they are responsible, moreover, diverges from the set of choices that they objectively helped caused to occur.¹¹³ This divergence likely occurs because people are motivated not to feel responsible for choices that could trigger negative emotions. Thus, people's internal views of when they are responsible enable them not to feel responsible for all the decisions they make that produce negative outcomes. Thus, to deter organizational misconduct through expressive channels, criminal laws must ensure that people operating within organizations feel responsible for misconduct.

EDT reveals that assessments of whether the law can deter misconduct involve a different calculus than that assumed by both CDT and ELT analyses. CDT does not allow for deterrence through expressive law. By contrast, ELT assumes that people automatically respond to the law's

¹¹² The literature on the link between responsibility and negative emotions such as regret, guilt, shame or unfairness aversion has focused on regret and unfairness. Articles establishing that perceived responsibility is a prerequisite to experiencing regret, guilt, or shame and showing that responsibility-sharing can facilitate egoistically self-interested choices unburdened by such emotions include: Jennifer Arlen & Stephan Tontrup, *Does the Endowment Effect Justify Legal Intervention? The Debiasing Effect of Institutions*, 44 J. LEGAL STUD. 143 (2015); Björn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility*, 79 REV. ECON. STUD. 67 (2012) (principals can shift responsibility, and thus blame, for unfair decisions by delegating to agents even when they retain significant control over the agent's decision); John R. Hamman, et al., *Self-Interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship*, 100 AM. ECON. REV. 1826 (2010); Zachary Grossman & Regine Oexl, *Delegating to a Powerless Intermediary: Does it Reduce Punishment?*, 16 EXP. ECON. 306 (2012); Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship between Blame Shifting and Control*, 12 J. EMPIRICAL. LEGAL STUD. 311 (2015) (principals can evade blame by delegating conduct to others, even when agents are effectively powerless); M. Steffel & E.F. Williams, *Delegating Decisions: Recruiting Others to Make Choices We Might Regret*, 44 J. CONSUMER RES. 1015 (2018); Marwa El Zein, et. al, *Shared Responsibility in Collective Decisions*, NATURE HUM. BEHAV. (April 2019) (collective decision-making shields people from the psychological costs of negative outcomes by reducing both regret (self-blame) and third-party blame); Marwa El Zein & Bahador Bahrami, *Collective Decisions Divert Regret and Responsibility Away from the Individual* (Aug. 2019); see also Adam Waytz & Liane Young, *The Group-Member Mind Trade-Off: Attributing Mind to Groups Versus Group Members*, 23 PSYCH. SCI. 77–85 (2012) (the more a group appears to have a group mind the less others attribute responsibility to its individual members); Max H. Bazerman, et al., *Dirty Work, Clean Hands: the Moral Psychology of Indirect Agency*, 109 ORG. BEHAV. & HUM. DECISION MAKING. PROCESSES. 134 (2009); Marcel Zeelenberg, et al., *Reconsidering the Relation between Regret and Responsibility*, 74 ORG. BEHAV. & HUM. DECISION MAKING. PROCESSES. 254 (1998); cf. Janice Nadler, *Blaming as Social Process: The Influence of Character and Moral Emotion on Blame*, 75 L. & CONTEMP. PROBS. 1 (2012).

¹¹³ Barbara A. Spellman, *Crediting Causality*, 126 J. EXP. PSYCH.: GEN. 323 (1997).

expression. By contrast, EDT reveal that deterrence depends on whether the law can establish a sufficiently salient injunctive norm to overcome the bias towards self-interest. This in turn depends on two considerations. First, whether the adoption of the law itself creates the required conditions for success. Second, whether the decision-making environment creates the conditions needed for success, which we will show depends on liability, is structured to produce such an environment.

C. Attributes of Organizational Misconduct That Undermine Expressive Law

Before considering why liability is needed to alter the decision-making environment to promote expressive law, we need to consider whether enactment of a law in and of itself can deter violations. Deterrence depends on people's motivations to violate the law and on whether the nature of the misconduct and context at the moment of the decision combine to create a material norm against the misconduct that people find salient and dominant. This Part applies the insights of EDT to organizational misconduct and shows that laws prohibiting organizational misconduct do not, on their own, have sufficient expressive force to deter because organizational misconduct has multiple features that undermine the law's ability to create salient injunctive norms that deter through expressive pathways.¹¹⁴ Effective deterrence through expressive law is unlikely unless the law can intervene to alter employees' incentives and decision-making environment to render the law's expressive message salient and effective.

1. Self-interest as an Impediment to Deterrence Through Expressive Law

Self-interest is usually both the prime driver of intuitive decision-making and a material damper of any expressive messages emanating from the law.¹¹⁵ In many areas in which the law has been shown to deter through expressive channels, people obtain little, if any, financial benefit

¹¹⁴ For a discussion of the challenges of deterring organizational misconduct through individual sanctions alone see Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

¹¹⁵ See *supra* Section 2.B.

from the violation.¹¹⁶ By contrast, in cases of organizational misconduct, employees often obtain material benefits from violating the law.

Organizational misconduct directly benefits companies, at least in the short run.¹¹⁷ But employees who offend also obtain substantial benefits. These benefits include bonuses, promotions, and enhanced job security. They also may gain greater social standing within the firm as a result of their actions to benefit the firm.¹¹⁸ These material benefits will tend to be a focal consideration for employees presented with an opportunity to violate the law. These benefits can also trigger motivated reasoning, especially given the other features of organizational structure that undermine the law's ability to establish a salient dominant norm against misconduct.

2. Nonsalience of the Law and the Harm Caused

The adoption of laws governing organizational misconduct tend not to create the required salient norm on their own because both the laws themselves and the harms they seek to guard against tend not to assume prominence in employees' lives.

First, mere enactment of laws prohibiting organizational misconduct do not, alone, create a prohibition that employees will necessarily know about and deem to be unethical.¹¹⁹ The initial enactment and publication of a law does not suffice to inform employees about its existence, as societies have many criminal laws that are not saliently, publicly disseminated when adopted.

Moreover, many laws are decades old. Employees governed by them today often were not alive when the laws were adopted. Thus, they need to be informed about them. Yet laws governing organizational misconduct usually do not address the type of harms that the primary social

¹¹⁶ See *supra* note 57 (discussing the expressive effect of seatbelt laws and antilittering laws on seatbelt usage and littering, respectively).

¹¹⁷ See *supra* note .

¹¹⁸ See Arlen & Kraakman, *supra* note 9.

¹¹⁹ This holds unless companies intervene to make it salient. See *supra* Section III.

institutions that convey information about ethicality or legality, such as schools, religious institutions and the TV news usually discuss. Educational and religious institutions regularly and explicitly condemn murder, assault, and other such crimes; they typically do not discuss norms against making gifts to public officials or failing to comply with laws requiring financial institutions to file Suspicious Activity Reports. In addition, laws prohibiting business crime often prohibit conduct, such as corruption and insider trading, that previously was not deemed unethical; indeed, it may have been customary prior to (and often after) the law's adoption.¹²⁰ Criminal law in such contexts seeks to transform people's perception of the enjoined conduct by expressing society's conclusion that the conduct is unethical and harmful. The law cannot achieve this goal unless people are aware of it.

Second, laws prohibiting organizational misconduct usually prohibit categories of harm that are not salient. Organizational misconduct, such as corruption, environmental degradation or price-fixing create a risk of statistical harm to people who are distant geographically and socially from the wrongdoer. Yet, as previously explained, people tend to place little weight on statistical harms that create a risk of harm to many unidentified people, but not risk certain harm to identifiable people. They also place far less weight on conduct that risks harm to people who are geographically, socially or temporally distant.¹²¹ Finally, some organizational misconduct, such as environmental violations, involves harm that may not occur for years.

¹²⁰ For example, consider laws prohibiting bribery of foreign officials. Both the FCPA and the OECD Convention on Bribery express society's view that corruption is unethical and contrary to appropriate social norms. See *supra* note 60. Yet long after the adoption of the FCPA, foreign bribery remained commonplace. Moreover, consistent with motivated reasoning, people regularly appeared to justify it as complying with local culture. Attitudes towards foreign corruption appeared to change after the U.S. and other countries started actively enforcing laws against foreign corruption. This enforcement was well-publicized and helped express societies' condemnation of this misconduct. Enforcement actions did not alter behavior, however, until they were accompanied by imposed enormous sanctions that exceeded the benefit of corruption, for reasons that we explicate below.

¹²¹ See *supra* Section II.B.

3. *Countervailing Social Norm Justifying Violation*

Organizational misconduct is especially resistant to deterrence solely through expressive channels because employees tend to have ready access to a salient pro-social justification for their misconduct. Organizational misconduct generally benefits both the company and the unit for which the employee works, as well as her fellow employees in the unit. As these others are socially close, the other-regarding justification for the misconduct tends to be far more salient than the harm caused by the misconduct.¹²² Employees perceive themselves to be good actors because they are helping others.¹²³

4. *Dispersed and Shared Responsibility for Misconduct*

The nature of organizational misconduct also often eliminates an essential prerequisite to deterrence through expressive law: employees' perceived responsibility for the misconduct.

Deterrence through the law's expressive pathways requires that potential wrongdoers expect to experience guilt or shame should they violate the law. Yet not all decisions that cause an unlawful or unethical outcome trigger guilt or shame. Individuals anticipate guilt or shame from decisions that cause legal violations only if they feel responsible for the ultimate decision to violate the law.

¹²² See BAZERMAN & TENBRUNSEL, *supra* note 70, at 74, 98. For example, people inclined to benefit themselves by cheating are more likely to do so if they can identify benefits to others that "prove" they are not acting selfishly. Scott S. Wilreemuth, *Cheating More When Spoils Are Split*, 115 ORG. BEHAV. & HUM. 157, 159 (2011); Francesca Gino et al., *Self-Serving Altruism? The Lure of Unethical Actions that Benefit Others*, 93 J. ECON. BEHAV. & ORG. 285, 289 (2013); Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 PSYCH. SCI. 1153 (2009); *see also* Cialdini & Trost, *supra* note 93, at 160 (people need to evaluate themselves positively and employ a variety of defensive maneuvers to maintain self-esteem and self-worth while pursuing self-interest); Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. L. REV. 1205, 1214 (2020) (people making unethical choices for personal benefit resolve the contradiction between their self-image and self-interest by being blind to the misconduct, minimizing our responsibility for it, or reframing the conduct); Celia Moore, *Always the Hero to Ourselves: The Role of Self-Deception in Unethical Behavior*, in CHEATING, CORRUPTION, AND CONCEALMENT, 98 (Jan-williem van Prooijen & Paul A. M. van Lange eds. 2016);

¹²³ See Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERS. & SOC. PSYCH. REV. 193 (1999); FELDMAN, *supra* note 25, at 223.

The finding that perceived responsibility is a prerequisite to deterrence through expressive law severely weakens the case for deterring organizational misconduct through the criminal law's expressive pathways because employees engaging in organizational misconduct regularly do so in a context that negates their perceived responsibility. Studies show that people often do not perceive themselves to be responsible for negative outcomes that they help cause when they share responsibility for making the decision with others.¹²⁴ For example, in situations with sequential decision-making, the first person to make a decision leading to unethical conduct does not feel responsible if the final outcome required a subsequent affirmative choice by another.¹²⁵ Similarly, when one person made an affirmative decision to engage in unethical conduct, those who possessed, but knowingly failed to exercise, authority to stop them do not see themselves as responsible for the outcome.¹²⁶ Finally, people deciding in a group, as through consensus or voting, tend not to view themselves as responsible for the collective decision.¹²⁷

People appear to intuitively recognize the effect of responsibility-sharing on their ability to pursue self-interest through unethical or unfair conduct, without anticipated guilt and shame. Evidence shows that people who can benefit from making an unfair decision will use an agent to make the decision, rather than making it themselves, even when using the agent is costly.¹²⁸

¹²⁴ See citations *supra* note 112.

¹²⁵ Spellman, *supra* note 113; see Arlen & Tontrup, *supra* note 112.

¹²⁶ Spellman, *supra* note 113; see Arlen & Tontrup, *supra* note 112.

¹²⁷ For example, people do not anticipate regret over decisions that are the product of a majority vote. Indeed, people do not feel responsible for a choice that results from a vote even when the decision-maker retained the right to make a choice contrary to the vote after it was taken. Arlen & Tontrup, *supra* note 112, at 162.

Consistent with this, evidence shows that people tend to behave less ethically in groups than alone. See FELDMAN, *supra* note 25, at 4.

¹²⁸ See, e.g., Bartling & Fischbacher, *supra* note [128]; Hamman, et al., *supra* note [128]; Arlen & Tontrup, *supra* note [128]; see *supra* note 112 (discussing the evidence).

People usually do not perceive themselves as responsible if they delegate the decision to an agent, even if the agent was incentivized to make the personally-beneficial but unethical choice. Bartling & Fischbacher, *supra* note 112; Hamman, et al., *supra* note 112. Indeed, this result holds even if the decision-maker had the choice set the agent's compensation to favor one choice over another. See Arlen & Tontrup, *supra* note 112. Delegation also can mute

Moreover, responsibility-sharing not only mutes guilt, it also mute shame because other people tend not to view an actor who shared responsibility as primarily responsible for the unethical choice.¹²⁹

This evidence on the pernicious effect of responsibility-sharing on guilt and shame from unethical choices is important because employees engaged in organizational misconduct often act as part of a team or take only one step in a series of decisions leading to the illegal result. Criminal laws prohibiting organizational misconduct that arises in these circumstances thus cannot reliably deter through expressive channels, absent enforcement and sanctions, because the group decision-making context mutes the anticipated guilt or shame for each individual.

III. Optimal Corporate Criminal Liability for Organizational Misconduct

This Section employs EDT to show why corporate liability is a necessary prerequisite to deterrence of organizational misconduct through expressive channels. Our analysis thus supports the conclusions of CDT analysis about the need to impose corporate liability to effectively deter organizational misconduct through government-imposed sanctions.¹³⁰

The previous section showed that promulgation of a law prohibiting organizational misconduct does not suffice to deter through expressive channels because the nature of organizational misconduct undermines the law's ability to create a sufficiently salient and material

perceived responsibility, —thereby negating guilt and shame even when the person delegating retained authority to veto the decision. Such delegation dissipates responsibility because people tend to attribute responsibility for a choice to the person who took the last affirmative action in the causal chain, even when preceded by affirmative action favoring the choice or followed by subsequent inaction. See Spellman, *supra* note 113. Group decision-making also can promote unethical decisions in other ways. There is evidence that people deciding collectively engage in Groupthink—their strong preference for unanimity can lead them not to fully interrogate the legitimacy of the choice they are making, and thus do not fully consider either the potential consequences of the preferred choice or alternative options. BAZERMAN & TENBRUNSEL, *supra* note 70. People also can displace responsibility by blaming a superior who they believe ordered (directly or implicitly) the unlawful act. See FELDMAN, *supra* note 25, at 223.

¹²⁹ Neeru Paharia, et al. *Dirty Work, Clean Hands: The Moral Psychology of Indirect Agency*, 109 ORG. BEHAV. & HUM. DECISION MAKING PROCESSES 134 (2009).

¹³⁰ See, e.g., Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9; see also Arlen & Kahan, *supra* note 51.

injunctive social norm. This Section shows that corporations control the features of their employees' decision-making environment that determine whether the law can create a sufficiently salient and material injunctive norm to deter organizational misconduct that benefits employees. They determine their employees' incentives to commit misconduct, their knowledge of the law, the salience of the legal injunction and whether employees have sufficient cognitive energy to overcome temptation, employees' prosocial motivations for misconduct, the likelihood that employees' immediate social environment supports the legal norm or is violating it, and employees' perceived sense of responsibility for the misconduct. This suggests that the law can deter through expressive channels indirectly if, but only if, it can induce corporations to alter their employees' decision-making environment in ways that give primary salience to the law's injunctive norms.

Corporate liability is vital to deterrence through expressive law because a corporation's profit motivations will incline it to create an environment that undermines expressive law unless it faces liability for its employees' misconduct. Corporate crimes regularly enhance profit, absent liability for misconduct.¹³¹ Moreover, interventions that deter are expensive. Companies incur direct costs from compliance, training and investigations. They also incur indirect costs from reduced productivity from deterrence measures designed to mute employees' single-minded focus

¹³¹ Moreover, absent corporate liability, the threat of reputational sanctions often is not sufficiently material to deter. First, the vast majority of employee misconduct is not detected, *see* Soltes, *supra* note 1, and even less would be detected absent corporate liability designed to induce self-reporting. *See* Arlen & Kraakman, *supra* note 9. Second, economic analysis of reputational damage costs shows that companies do not suffer reputational damage from many forms of misconduct. Firms suffer reputational damage when counterparties respond to detected misconduct by refusing to deal with the firm on favorable terms, because the misconduct signals that the firm presents an enhanced risk of harming future counterparties. Counterparties tend not to derive such a signal from misconduct that harms non-counterparties, such as environmental violations. *See* Karpoff & Lott, *supra* note 36. An organization will suffer little cost from reputational damage when counterparties have no reasonable alternative to the firm or when either the misconduct was isolated to a single unit that was not the companies' major source of profit or the organization subsequently adopted (or was required to adopt) apparently effective internal reforms to their compliance function. *See* Alexander & Arlen, *supra* note 36.

on profit. They have little reason to take any of these costly actions unless they face liability for corporate crime. Thus, to deter, corporations must be subject to liability that ensures they do not expect to profit from organizational misconduct, consistent with CDT.¹³²

A. How Organizations Affect Deterrence Through Expressive Law

Legal analysis of the law's ability to deter criminal misconduct through expressive law generally assumes that the law is the primary institution for communicating both the existence and content of the legal injunction and social norms, and that these expressions directly alter people's decisions.¹³³ Yet the law and legal institutions are not the primary arbiter of social and moral norms for employees. A host of other institutions shape perceptions about social norms and responses to the law's efforts to deter through expressed norms.¹³⁴

Companies are the dominant institutions in their employees' daily lives and have the greatest ability to affect the decision-making environment in which their employees decide whether to engage in organizational misconduct. They can structure their employees' decision-making environments to enhance or negate the law's ability to deter misconduct through expressive channels.

As previously explained,¹³⁵ the law cannot reliably deter organizational misconduct through expressive channels unless several conditions are met. First, employees must know the

¹³² See *supra* Section I.A.

¹³³ See *supra* Section I.C.1.

¹³⁴ See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject for Study*, 7 L. & SOC'Y REV. 719, 721 (1973); STOUT, *supra* note 20, at 170 (corporations influence how people behave. Employees who spend their days focused on making profits over other goals will tend to emulate this behavior); Buell, *supra* note 9; Diamantis, *supra* note , at 540 (corporate culture can have a significant effect on how people behave); Mihailis Diamantis, *Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865, 874 (2019) (same); see also Max Weber, ON LAW IN ECONOMY AND SOCIETY, 38 (Max Rheinstein ed, 1954); Baer, *supra* note 9; Langevoort, *supra* note 25.

¹³⁵ See *supra* Section I.

legal prohibition in question, perceive it to be a legitimate social norm, and retain it as a salient consideration when presented with an opportunity to violate the law. Second, the law's norm must be the primary consideration for employees when an opportunity to violate it arises. This requirement has four entailments: (1) employees should not obtain material personal benefit from violating the law; (2) they should not have ready access to an ethical or other-regarding motivation for violating the law; (3) they should be able to deliberate fully; and (4) decision-making should be structured so that employees in a position to cause organizational misconduct perceive themselves as responsible for the crime; thus responsibility should not be sufficiently diffuse to lead them not to experience guilt or shame.¹³⁶ Organizations largely determine whether these preconditions to reliable deterrence through expressive law are satisfied.

B. Organizations Determine Employees' Understanding and Perception of the Law

Criminal law can only deter conduct through expressive channels if employees know the legal injunction exists, understand what it prohibits, and believe that it expresses a legitimate social or ethical norm.¹³⁷ Organizations determine whether these conditions are met.

Our society relies on corporations to teach their employees the relevant laws on organizational misconduct.¹³⁸ Employees do not join organizations already aware of most laws prohibiting organizational misconduct. Most were enacted before the employees entered the workforce; they also generally are not taught in secondary school, college, or during religious services. Moreover, the contours of these laws often cannot be ascertained from the statutes or rules alone.¹³⁹

¹³⁶ See *supra* Section II.B.4.

¹³⁷ See Bilz & Nadler, *supra* note 20 (discussing how lack of trust in the legitimacy of government actions can undermine the law's ability to deter through expressive channels).

¹³⁸ See *supra* Section II.A.

¹³⁹ See *supra* Section II.A.

Corporations are often the only institutions educating employees about these laws. They also affect whether their employees perceive the legal injunction as establishing a valid social or ethical norm. Organizations influence their employees' understanding of the law and the salience of legal injunctions through the training they provide; their public statements; the quality of the compliance office; their managers' actions in affirming, ignoring, or denigrating the legal injunction;¹⁴⁰ their compensation and promotions policies; and their approach to employees with detected misconduct. Companies thus are in a unique position to influence employees' understanding of the law, the salience of the legal injunction, and employees' perception of whether the law expresses a legitimate ethical norm or is an illegitimate impediment to lawful business. Companies' expressions are particularly salient because studies show people are guided by the most immediate voice of authority—in this case their corporate employer and their direct supervisors.¹⁴¹

Moreover, the corporate messages with the greatest influence are not those emanating from the CEO or in the firm's ethics policy. Employees' beliefs about prevailing business ethical norms are based on their lived experiences in the company and the statements and actions of the supervisors who directly affect their welfare.¹⁴² Knowingly or unknowingly, organizations, even when publicly espousing "good business practices,"¹⁴³ negate the law's expressive message when they adopt compensation, promotion and retention policies that prioritize employee performance

¹⁴⁰ See, e.g., Neil Barofsky, et al., *Changing Corporate Culture*, in GUIDE TO MONITORSHIPS (2d ed. 2020) (middle managers in effect set the cultural tone experienced by employees).

¹⁴¹ See STOUT, *supra* note 20, at 220. Employees are particularly likely to focus on the companies' expression—instead of that of the law—if it justifies acts that align with their self-interest.

¹⁴² See *supra* Section 2.B.2;

¹⁴³ Organizations' public statements of culture are often at odds with the informal corporate culture that guides their employees' behavior. Ann E. Tenbrunsel et al., *Building Houses On Rocks: The Role of Ethical Infrastructure in the Ethical Effectiveness of Organizations*, 16 SOC. JUST. RES. 285, 288 (2003); see BAZERMAN & TENBRUNSEL, *supra* note 70, at 103-104, 114-117. Organizations that allow informal cultures that promote profit over misconduct, in effect, express their view that legal compliance is not a priority.

over ethics, and enable line managers to base performance reviews and salary determinations solely on objective measures of productivity. Through these actions, employees learn that the dominant authority at their companies values outcomes over all else, including legal compliance.¹⁴⁴ The recurrent drumbeat of this message pushes profit to the forefront and relegates legal injunctions and ethics to the shadows.¹⁴⁵

Companies also can undermine the law's expressive message—or alternatively enhance it—through their decisions to either remain silent or regularly remind employees about the fate of employees who have violated the law. Creating a salient injunction depends on employees' daily awareness of the risks they face if they violate the law. Companies are the primary institutions capable of regularly reminding employees about the dire consequences for employees caught violating the law.¹⁴⁶

¹⁴⁴ See, e.g., BAZERMAN & TENBRUNSEL, *supra* note 70; Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUT. U.L. REV. 421, 474 (2017) (companies communicate what is most important to them through their incentive systems).

Organizations substantially undercut the law's expressive force when their managers discipline under-performing employees who complied with the law while rewarding employees that perform well because they have violated legal or ethical norms. See, e.g., Eugene Soltes, *Unsubstantiated Allegations and Organizational Culture*, 43 SEATTLE L. REV. 413, 423-33 (2020) (finding that employees in units with unaddressed ethical allegations are less likely to internally report misconduct and more likely to engage in it).

¹⁴⁵ Indeed, organizations' regular exhortations to focus on performance undermines expressive law through the pathways expressive law seeks to leverage—people's tendency to defer to instructions from and the expectations of those in authority. See Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 Annual Rev. Psych. 591 (2004); see also Blake E. Ashford & Vikas Anand, *The Normalization of Corruption in Organizations*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR (B. M. Staw & RM Kramer eds., 2003) (subordinates follow their supervisors instructions even if it would lead to an unethical or illegal act); Brief, et al., *Releasing the Beast: A Study of Compliance with Orders to Use Race as a Selection Criterion*, 51 J. SOC. ISSUES 177 (1995) (same).

¹⁴⁶ See van Rooij & Fine, *supra* note 57, at 39-40 (deterrence depends on the perceived risk of punishment which in turn requires that enforcement be effectively and regularly communicated to potential wrongdoers).

C. Organizations Determine the Salience of the Legal Injunction

Organizations not only educate employees about the law also control most of the features of employees' decision-making environment that determine whether the legal injunction is salient and capable of deterring through expressive channels, or otherwise.

Other-regarding preferences do not suffice to enable the law to deter through expressive channels. Instead, deterrence depends on whether the decision-making environment leads people's intuitive decision-making processes to prioritize compliance with the law.

Empirical studies have identified a host of features of employees' decision-making environment that determine whether the law can establish a sufficiently salient norm that can overcome employees' self-interested motivations for misconduct. Organizations control these features and face strong market incentives to use this control to take actions that undermine deterrence through expressive law. First, organizations determine employees' self-interested incentives to violate the law.¹⁴⁷ Second, organizations regularly undermine expressive law by structuring employees' tasks to curtail their attention to ethics. Third, organizations regularly provide employees with pro-social justifications for violating the law. Finally, companies' internal disciplinary policies and practices determine whether employees exist in a local culture that supports or ignores the law's injunctions.

1. Employees' Benefit from Misconduct

Organizations determine their employees' incentives to engage in misconduct through the way they structure their compensation, retention and promotion policies and practices.¹⁴⁸ Organizations are the direct beneficiaries of crimes such as corruption, securities fraud,

¹⁴⁷ Arlen & Kraakman, *supra* note 9.

¹⁴⁸ Arlen, *supra* note 9 (organizations directly impact employees' expected benefit from misconduct).

environmental violations, price fixing and corporate fraud. Their employees only benefit indirectly when, and to the extent that, companies predicate employees' compensation, bonuses, job tenure, and likelihood of promotion on employees' effect on firm performance.¹⁴⁹

Psychological studies reveal that corporate incentives to violate the law have a greater effect on employees than CDT suggests. CDT contemplates that the expected benefit of crime is only one factor to be weighed against expected costs. Psychology finds that employees primarily rely on intuitive decision-making, which treats self-interest as the primary objective. Self-interest triggers motivated reasoning, which enables employees to violate the law without experiencing guilt or shame.¹⁵⁰

Companies can undermine the law's capacity to deter by providing employees with strong incentives to produce objective results, coupled with a threat of termination for failure; they also regularly remind them about the importance of corporate profits. The joint effect of personal incentives combined with efforts to focus employees' attention on productivity or financial success leads employees to concentrate primarily on self-interest and financial returns, disabling the law's expressive message.¹⁵¹

¹⁴⁹ See Macey, *supra* note 40 (concluding the corporate crime is an agency cost); Arlen, *supra* note 48 (same); *see also* Arlen & Carney, *supra* note 40 (concluding that securities fraud is a last period problem in that managers are motivated to commit fraud when at risk of termination or other serious negative consequences if they reveal the truth).

Indeed, empirical evidence suggests that the incidence of certain corporate crimes is higher when agents' compensation or performance evaluations are based largely on their employers' rate of return or short-term profits, as opposed to long-run profits. Charles W. L. Hill, et al., *An Empirical Examination of the Causes of Corporate Wrongdoing in the United States*, 45 HUM. BEHAV. 1055 (1993); John Lott & Tim C. Opler, *Testing Whether Predatory Commitments Are Credible*, 69 J. BUS. 339-382 (1996); *see* Mark Cohen and Sally Simpson, *The Origins of Corporate Criminality: Rational Individual and Organizational Actors*, in DEBATING CORPORATE CRIME: AN INTERDISCIPLINARY EXAMINATION OF THE CAUSES AND CONTROL OF CORPORATE MISCONDUCT (William Lofquist, M. Cohen, & G. Rabe, eds. 1997).

¹⁵⁰ See *supra* Section II.B.1; *see citations supra* note 93.

¹⁵¹ Priming people with subtle reminders of money and financial returns increases their inclination to engage in unethical behavior and reduces their pursuit of cooperative and pro-social choices. Maryam Kouchaki, et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORG. BEHAV. & HUM. DECISION MAKING PROCESSES 53 (2013); *see also* Qing Yang, et al., *Diverging Effects of Clean versus Dirty Money on Attitudes, Values, and Interpersonal Behavior*, 104 J. PERS. & SOC. PSYCH. 473 (2013); Yuval Feldman,

2. Control over Job Structure: Time Pressure, Targeted Goals, and Multi-tasking

Organizations also substantially determine their employees' receptiveness to the law's expressive messages through the way they structure their employees' jobs. As previously explained, intuitive decision-making is primarily motivated by self-interest.¹⁵² By contrast, deliberative processes, when activated and dominant, place greater weight on other-regarding moral concerns.¹⁵³ Corporations that promote active deliberation can enhance employees' ability to overcome self-interest and choose to behave lawfully.

But corporations regularly curtail their employees' deliberation through the way they structure their employees' jobs. Companies induce employees to rely on intuitive decision-making by giving them too many tasks to complete and too little time to complete them, thereby preventing full deliberation over the choices presented by any one task.¹⁵⁴

Companies further suppress ethical considerations by sub-dividing corporate projects into discrete units, in which each separate team or individual employee is assigned a specific and narrow objective. Studies shows that employees given a narrow targeted objective focus primarily

Behavioral Ethics Meets Behavioral Law and Economics, ch. 9, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doran Teichman eds., 2014), at 216.

¹⁵² See *supra* text accompanying notes 91-98 (discussing motivated reasoning and self-interest); see Moore & Loewenstein, *supra* note 95; see also Francesca Gino, et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORG. BEHAV. & HUM. DECISION MAKING PROCESSES 191 (2011) (finding that the level of control needed to behave ethically exceeds the level needed to take a self-interested unethical act); cf. David G. Rand, et al., *Spontaneous Giving and Calculated Greed*, 489 NATURE 427 (2012) (people in a competitive environment are more likely to be competitive, as opposed to cooperative, when they use System 1 reasoning).

¹⁵³ KAHNEMAN, *supra* note 21.

¹⁵⁴ Full deliberation takes time and mental effort, which is why intuitive decision-making tends to dominate. BAZERMAN & TENBRUNSEL, *supra* note 70, at 50-51; see NL Mead et al., *Too Tired to Tell the Truth: Self-control Resource Depletion and Dishonesty*, 45 J. EXPER. SOC. PSYCH. 594 (2009). Placing people under time pressure or other cognitive burdens increases their propensity to engage in misconduct. *E.g.*, Saul Shalvi et al., *Honesty Requires Time (and Lack of Justification)*, 23 PSYCH. SCI. 1264 (2012); Nils C. Köbis, et al., *Honesty Requires Time: A Meta-Analysis* (working paper); Brian C. Gunia, et al., *Contemplation and Conversation: Subtle Influences on Moral Decision Making*, 55 J. ACAD. MGMT. 13 (2012); see also Nicole L. Mead, et al., *Too Tired to Tell the Truth: Self-Control, Resource Depletion, and Dishonesty*, 45 J. EXP. PSYCH. 594 (2009); see generally FELDMAN, *supra* note 25, at 45-46 (discussing the evidence).

on that objective, without considering whether their actions are illegal or unethical.¹⁵⁵ The tunnel-vision problem is exacerbated when employees also are required to make multiple distinct decisions in a limited amount of time.¹⁵⁶ Employees under this cognitive strain rely on intuitive decision-making processes, which lead them to prioritize self-interest and achieving their employers' objectives, morally blind and deaf to ethicality and the exhortations of expressive law.¹⁵⁷

3. Provision of an Alternative Prosocial Norm

Empirical studies show that employees are more likely to commit crimes if they can justify their conduct as benefiting others. This justification amplifies the negative effect of motivated reasoning¹⁵⁸ by enabling employees to benefit from organizational misconduct while telling themselves that they are acting to benefit others, and thus are ethical.¹⁵⁹

Organizations regularly provide employees such pro-social justifications. For example, they frequently predicate employees' compensation on the performance of their unit or the firm. As a result, an employee acting to benefit herself by boosting her unit's performance also benefits

¹⁵⁵ Employees provided one-dimensional goals focus on those objectives, ignoring the ethical dimensions of their actions. People given one-dimensional goals tend to be extrinsically motivated—by the desire to comply—rather than intrinsically motivated to do what is right. BAZERMAN & TENBRUNSEL, *supra* note 70, at 107-08. Moreover, motivated reasoning leads people to favor outcomes the firm rewards, and to dismiss considerations against their preferred choice. *See supra*, notes 93 & 95; SOLTES, *supra* note 45, at 149-150. Thus, employees under pressure to produce specific results may blindly violate the law in pursuit of those objectives, without shame or guilt, even when with 20/20 hindsight, the legal violation is obvious to others. *See, e.g.*, SOLTES, *supra* note 45, at 149-54; BAZERMAN & TENBRUNSEL, *supra* note 70.

¹⁵⁶ FELDMAN, *supra* note 25, at 17.

¹⁵⁷ *See supra* note 155.

¹⁵⁸ *See supra* note 92 and accompanying text (discussing the conflict between the “want self” and more deliberative “should self”). BAZERMAN & TENBRUNSEL, *supra* note 70, at 66-68.

¹⁵⁹ *See supra* Section II.C.2; *see supra* notes 93 & 95; *see, e.g.*, SOLTES, *supra* note 45, at 169-70, 197 (many executives committing securities fraud felt as though they were helping others, the firm and the shareholders); FELDMAN, *supra* note 25, at 51-2 (discussing moral licensing and moral justification).

her co-workers.¹⁶⁰ Companies also regularly enhance the salience of such other-regarding motivations through interventions designed to promote service to the firm and one's immediate team as a dominant local social norm.¹⁶¹

Such "team-oriented" internal norms provide employees with an other-regarding, and ethical, justification for misconduct, thereby enabling employees guided by motivated reasoning to engage in organizational misconduct without experiencing the guilt that would normally accompany such conduct.¹⁶² Team structures can also negate shame. Shame requires an expectation that others will disapprove. Yet studies show that employees acting to benefit other employees anticipate correctly that their peers will not sanction them. Employees who benefit from another employee's misconduct do not stigmatize the wrongdoer because their own self-interest leaves them morally blind to the wrongfulness of their colleague's actions. Negation of anticipated shame eliminates expressive law's most important channel of influence.¹⁶³

Expressive law's injunctive force can be effectively negated by strong internal pro-social justifications for misconduct because a company's internal norm tends to exert greater influence over its employees than does the legal norm. As previously noted, employees' intuitive decision-making processes are structured to focus on other-regarding norms that justify their preferred self-interested choice and ignore counter-vailing considerations.¹⁶⁴ Thus, corporations that promote loyalty to the firm and fellow employees in effect enable misconduct by providing the fuel needed

¹⁶⁰ For example, bribery that enables the firm to make a big sale or accounting fraud that boosts reported profits can inure to the benefit of employees in the same division as the wrongdoer, and may benefit all employees, at least in the short run.

¹⁶¹ Priming employees to focus primarily on productivity also promotes misconduct by promoting financial considerations over ethical ones. *See supra* note 151 and accompanying text.

¹⁶² BAZERMAN & TENBRUNSEL, *supra* note 70, at 72-76; see also FELDMAN, *supra* note 25, at 230. Thus, corporations actively undermine deterrence when they both impose tough performance targets with material consequences and promote the pro-social norm of serving your "team" (or co-workers).

¹⁶³ *See supra* text accompanying notes 93-96 (discussing motivated reasoning and moral blindness).

¹⁶⁴ *See supra* text accompanying notes 92-98.

by motivated reasoning to enable employees to commit crimes, unaffected by the guilt or shame that would normally accompany an unethical illegal act.

A company's pro-social norm will tend to dominate over the norms expressed by laws prohibiting organizational misconduct both as a result of motivated reasoning and because the interests protected by the company's norm are more salient to employees than those protected by the law. People care most about people who are proximate to them;¹⁶⁵ they tend not to care deeply about statistical lives or people who are distant socially, geographically or temporally.¹⁶⁶ Co-workers are proximate in time and space and tend to be in a similar social group. By contrast, as previously discussed, laws prohibiting organizational misconduct usually protect statistical victims or distant unidentified strangers, whose welfare is not a salient concern.¹⁶⁷

Thus, organizations can counteract or negate the deterrent effect of expressive law by establishing an internal norm to benefit fellow employees. This norm is more salient than the norms that laws prohibiting organizational misconduct seek to establish,¹⁶⁸ and enables employees to commit self-interested crimes without guilt, suffused with the warm glow of having acted to benefit others.¹⁶⁹

¹⁶⁵ See *supra* Section II.C.3.

¹⁶⁶ Small & Loewenstein, *Helping a Victim*, *supra* note 101; Kogut & Ritov, "Identified Victim" Effect, *supra* note 101; Kogut & Ritov, *The Singularity Effect*, *supra* note 101. People are especially blind to unethical behavior that risks harm only in the future because people tend to judge the ethics of a choice by whether harm occurred, rather than the ethics of the risks created by the choice. BAZERMAN & TENBRUNSEL, *supra* note 70, at 94-99.

¹⁶⁷ SOLTES, *supra* note 45, at ch. 7.

¹⁶⁸ See Nadler, *supra* note 122, at 1215; Gino et al., *supra* note 122, at 289; Gino & Pierce, *supra* note 122. Indeed, studies show that company cultures that establish a salient internal loyalty norm significantly increase employees' willingness to make choices that benefit the team at the expense of harming outsiders. *E.g.*, John Hildreth et al., *Blind Loyalty: When Group Loyalty Makes Us See Evil or Engage in It*, 132 ORG. BEHAV. & HUM. DECISION MAKING PROCESSES, 16, 16-17 (2016); Ori Weisel & Saul Shalvi, *The Collaborative Roots of Corruption*, 112 PROC. NAT'L ACAD. SCI. 10651 (2015); see Langevoort, *supra* note 25, at 947.

¹⁶⁹ *E.g.*, BAZERMAN & TENBRUNSEL, *supra* note 70; see SOLTES, *supra* note 45, at 169-70 (the availability of pro-social justifications facilitates misconduct); see also *id.* at 197 (many executives committing securities fraud felt as though they were helping others, the firm and the shareholders); see FELDMAN, *supra* note 25, at 51-2 (discussing moral licensing and moral justification).

4. Failure to Discipline Employee-Wrongdoers

Employees' conception of whether the law expresses a norm also depends on whether misconduct is sanctioned by those closest to them, particularly those in positions of authority.¹⁷⁰ Thus, companies that reward productive employees and fail to sanction unlawful and unethical conduct undermine the criminal law's ability to establish a social norm. When norm violators are not sanctioned, fairness and other pro-social norms rapidly decay over time.¹⁷¹ Employers also are the most visible source of potential discipline and sanctions in most employees' lives, with the greatest ability to detect and respond to misconduct.¹⁷² They undermine the law's expressive effect when they do not sanction those that engage in misconduct or do so without informing other employees.¹⁷³

The negative effect of companies' inattention to misconduct is amplified by its effects on other employees. Companies that signal that misconduct is tolerated by productive employees promote a corporate culture in which employees regularly behave unethically without guilt or shame.¹⁷⁴ They will predicate their assessment of the correctness of their own actions on the actions of others who are psychologically close to them and fail to treat the legal injunction as a social

¹⁷⁰ See, e.g., Cialdini & Trost, *supra* note 93, at 152-54, 166 (people care most about the social approval of those with whom they have a long-term relationship and those with whom they are in an interdependent relationship, such as co-workers).

¹⁷¹ See Fehr & Schurtenberger, *supra* note 59, at 463. Employer-imposed sanctions are important even when employees can be held criminally liable because corporations can better detect misconduct and respond to it immediately.

¹⁷² See Arlen & Kraakman, *supra* note 9; see also Soltes, *supra* note 1 (providing evidence). Companies in the U.S. also can investigate misconduct without the procedural impediments imposed on the government. See Arlen & Buell, *supra* note 8.

¹⁷³ Companies that neither discipline nor self-report also undermine deterrence through individual criminal liability by reducing employees' likelihood of being sanctioned. See Arlen & Kraakman, *supra* note 9.

¹⁷⁴ See *supra* text accompanying notes 173-177; see also Soltes, *supra* note 1, at 423-33 (2020) (employees in units with unaddressed ethical allegations are more likely to engage in misconduct).

norm.¹⁷⁵ They will not experience shame because people do not anticipate social condemnation when violations are commonplace and unsanctioned.¹⁷⁶

D. Organizations Negate Employees' Guilt/Shame Over Violations

Finally, organizations can undermine the criminal law's ability to influence employees through expressive channels, wittingly or unwittingly, by structuring employees' jobs in ways that disperse their perceived responsibility for misconduct. This undermines expressive law by enabling employees to take actions they know will violate the law without experiencing guilt or shame from the resulting legal violation.¹⁷⁷ Many companies disperse responsibility by either assigning tasks to teams or employing hierarchical decision-making in which the people taking the illegal actions act at the behest of supervisors who are not themselves taking the illegal actions.¹⁷⁸ As a result, the team can make decisions that cause a violation of the law without any member of the team perceiving herself as responsible for the violation because that consideration fell outside their remit.¹⁷⁹ The problem is exacerbated in companies that assign employee teams narrow tasks, without officially designating a member of the team as responsible for legal compliance and ethics.

¹⁷⁵ See Cialdini & Trost, *supra* note 93, at 171-172; van Rooji, *supra* note 57 (people are more likely to violate the law when doing so is normal); Robert B. Cialdini, *Crafting Normative Measures to Protect the Environment*, 12 CUR. DIR. PSYCH. SCI. (2003); Robert B. Cialdini, *Descriptive Social Norms as Underappreciated Sources of Social Control*, 72 PSYCHOMETRIKA (2007); Robert B. Cialdini et al., *Managing Social Norms for Persuasive Impact* 1 SOC. INFLUENCE (2007); Bicchieri et al., *supra* note 93.

¹⁷⁶ Fehr & Schurtenberger, *supra* note 59; STOUT, *supra* note 20, at 107 (conformity is a fundamental aspect of human nature; people tend to behave pro-socially when led to believe that others around them will do so).

¹⁷⁷ See *supra* text accompanying notes -129. Max E. Bazerman & Ann Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV. (April 2011) (managers routinely delegate unethical behaviors to others, and not always consciously).

¹⁷⁸ Managers can delegate actions to employees to distance themselves from responsibility for the misconduct, enabling them to profit from inducing its commission without experiencing guilt or shame. See *supra* note 128; Max E. Bazerman & Ann Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV. (April 2011) (Managers routinely delegate unethical behaviors to others).

¹⁷⁹ See BAZERMAN & TENBRUNSEL, *supra* note 70, at 16, 213.

In this context, the whole team will focus on the assigned objective and are unlikely to experience guilt or shame over satisfying that objective by violating the law.¹⁸⁰

E. Implications for Organizational Liability for Misconduct

Thus, criminal law cannot effectively deter through expressive channels unless corporations structure their internal operations to reduce employees' incentives to commit crimes and amplify the deterrent effects of expressive law and the threat of individual liability. Companies will not do so absent legal intervention, however. They regularly profit from misconduct while the actions needed to deter misconduct are costly.¹⁸¹ They also benefit from other techniques that effectively negate expressive law, such as compensation and promotion policies predicated on performance, the establishment of strong internal prosocial norms, the establishment of goal-specific teams, and placing large demands on employees.¹⁸²

Accordingly, corporate liability must ensure that companies are better off when employees comply with the law.¹⁸³ This requires that companies be held liable for all their employees' crimes and subject to active enforcement and substantial sanctions, consistent with CDT. This legal requirement will eliminate corporate incentives to use their authority over employees' decision-making environment to negate the law's ability to deter through expressive pathways.¹⁸⁴

Corporate liability structured to remove companies' profit from misconduct also helps deter through expressive channels through its effect on managers and employees. As previously

¹⁸⁰ See *supra* text accompanying notes 154-157.

¹⁸¹ See Arlen & Kraakman, *supra* note 9.

¹⁸² See *supra* Section III.C.

¹⁸³ For a discussion of why criminal liability imposed on individual employees will not provide companies with optimal incentives to deter misconduct see *supra* note 49; Arlen, *supra* note 9.

Absent corporate liability, companies are not adequately deterred by their expected cost from reputational damage should their employees' misconduct be detected. See *supra* note 131.

¹⁸⁴ CDT has already established that corporate liability is essential to the law's ability to deter individual employees through the threat of sanctions. See *supra* Section I.A; Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

explained, employees who commit crimes that benefit the firm are not stigmatized by their fellow employees and can embrace a pro-social justification for the misconduct. By contrast, employees who commit crimes that harm the firm can expect to be ostracized by their fellow employees. Corporate sanctions that eliminate companies' profit from misconduct also removes employees' pro-social justification for misconduct.

1. Implications of EDT for Corporate Liability with a Compliance Defense

Our analysis not only reveals why companies must be liable for their employees' misconduct but helps explicate¹⁸⁵ why corporate criminal liability should not be restricted to companies that had an ineffective compliance program, as some states and many countries have done.¹⁸⁶

Corporate criminal liability imposed for all employees' misconduct (as with *respondeat superior*) provides companies essential material financial incentives to make optimal decisions about a wide-range of features of their internal systems that materially affect employees' likelihood of engaging in misconduct: compensation and promotion policy, approach to self-reporting and cooperation, disciplinary policy, compliance, how tasks are divided within a team, time pressure, corporate culture (both global and local), protocols and practices on internal discipline, and responsibility-sharing. With respect to each feature, firms must achieve the right balance between its effect on profitability and deterrence, understanding how these features of the internal

¹⁸⁵ Previous analysis employing CDT has shown that corporate liability with a compliance defense is suboptimal for several reasons. First, effective compliance entails decisions across a wide range of features of the firm—see ALI *Principles of Corporate Enforcement*, *supra* note 3—and exists along a continuum. Prosecutors, even acting *ex post*, do not have sufficient information to evaluate whether the program was effective, unless they rely heavily on the existence of widespread or on-going misconduct, which in effect eliminates the compliance defense for most material crimes. Arlen, *supra* note 6; see also Arlen & Kraakman, *supra* note 9; Arlen & Kahan, *supra* note 51 (discussing why *ex post* mandates are superior to *ex ante* regulation of compliance). Second, optimal deterrence requires that companies self-report and fully cooperate. Companies with a compliance defense have no reason to do so (unless self-reporting and full cooperation is a prerequisite to obtaining credit for an effective compliance program, which it is not under state law or the law of other countries.) See Arlen, *supra* note 6.

¹⁸⁶

environment interact to deter misconduct. Many, if not most, of these features lie outside the purview of the corporate compliance program. A compliance defense undermines optimal incentives by enabling a company to avoid liability if it had an apparently effective compliance program, even if its compensation system and the other features of its internal decision-making environment promote misconduct.¹⁸⁷

Moreover, states cannot address this problem by redefining effective compliance to include every feature of the corporate decision-making environment that materially influences the likelihood of crime. As this Section has shown, deterrence concerns reach into almost every feature of the decision-making environment. Yet enforcement officials cannot determine whether companies have made optimal choices with respect to each feature of their employees' lives because each choice entails a trade-off between productivity and deterrence, and the different features of the firm's internal system interact, with some serving as potential substitutes or complements for others. Further, adopting laws that require companies to do so risks prosecutors employing rules of thumb about optimal internal structures that may in fact not be optimal.¹⁸⁸ By contrast, the company can make these assessments and will do so appropriately if subject to criminal liability for all employees' crimes that eliminates their expected profit from crime. For example, companies also can use their internal reporting systems to assess the effectiveness of their systems; they also can identify specific individuals who either are particularly effective at inducing ethical behavior or are undermining corporate culture

IV. Individual Liability and Importance of Inducing Corporate Policing

¹⁸⁷ For additional CDT-based arguments against a compliance defense see Arlen, *supra* note 6; see also *infra* text accompanying notes x-y.

¹⁸⁸ See Arlen & Kraakman, *supra* note 9 (making a similar point about effective compliance); see also Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. LAW, ECON. & ORGAN. 279 (1980) (negligence liability can lead to excessive or ineffective care if the legal decision-makers err in their assessment about what constitutes optimal care).

Corporate liability designed to induce companies to structure their internal operations to deter misconduct is necessary for effective deterrence through expressive law, as well as through sanctions,¹⁸⁹ but it is not sufficient. This Section shows that to establish a salient ethical norm against organizational misconduct the law must ensure that individual wrongdoers face a substantial and salient probability that they will be convicted for their crimes and subject to liability that effectively negates their anticipated benefit from misconduct. The conclusion that the individuals must be held liable is consistent with CDT.¹⁹⁰ EDT also diverges from both CDT and most ELT analyses in concluding that wrongdoers must face a substantial risk of enforcement; weak enforcement will not suffice. This Section also shows that achieving this latter goal requires both active enforcement against individuals and also the adoption of a corporate liability regime that incentivizes companies to detect, investigate, self-report and fully cooperate. The government cannot effectively create a material risk of individual enforcement unless it leverages companies' superior ability to detect and investigate misconduct. Accordingly, and consistent with CDT, corporate liability must be structured to induce companies to self-report and fully cooperate.¹⁹¹

A. Vital Role of Individual Liability

This Part shows that individual liability is needed to deter organizational misconduct either through sanctions or through expressive pathways for a variety of reasons.

1. Individual Liability as a Counterweight to Self-Interest

¹⁸⁹ Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

¹⁹⁰ See *supra* Section II.A.

¹⁹¹ See Arlen, *supra* note 9; Arlen & Kraakman, *supra* note 9.

EDT reveals that individuals' incentives to commit misconduct stand as the primary impediment to deterrence through either traditional sanctions or through the law's expressive channels.¹⁹² Thus, criminal law cannot effectively deter when individuals benefit from misconduct.

Governments cannot eliminate employees' incentives to engage in misconduct simply by imposing liability on companies. Corporate liability encourages companies to balance deterrence against productivity in structuring compensation and promotion policies, but it will not induce them to eliminate the incentives they provide employees to enhance profit even by committing misconduct. The actions needed to eliminate employees' incentives to engage in misconduct would impose excessive costs on firms. Thus, to deter, criminal law must counteract employees' self-interested motivations by imposing a sufficient direct cost on employees that commit misconduct to negate their incentives to commit crimes. The state must impose this sanction because, as CDT has shown, companies cannot be relied on to optimally sanction individuals; the government can impose far larger sanctions than can companies.¹⁹³

EDT reveals that, to counteract motivated reasoning produced by the benefit of crime, enforcement authorities must ensure that individual wrongdoers face a sufficiently high probability of enforcement to be salient.¹⁹⁴ The conclusion that a high probability of punishment is vital to deterrence differs from the standard policy prescription of CDT. As previously discussed, CDT has concluded that a policy of high sanctions with a low risk of enforcement can be cheaper yet as effective as a policy of lower sanctions with a higher risk of enforcement, as long as the expected sanction— (probability of the sanction)x(sanction)— is the same. EDT reaches a different result because evidence on intuitive decision-making finds that, in order to deter, people tend to ignore

¹⁹² See *supra* Section II.

¹⁹³ See *supra* note 52.

¹⁹⁴

a threat of sanction unless the risk of sanction is sufficiently great to be salient.¹⁹⁵ In addition, enforcement authorities and firms need to ensure that enforcement that is kept fresh in employees' minds.¹⁹⁶ Thus, EDT—with its focus on intuitive decision-making—reveals that both classic deterrence through sanctions and deterrence through expressive law require active enforcement against individuals.¹⁹⁷

2. Public Enforcement as an Essential Component of the Law's Expressive Voice

Enforcement against individuals is not only needed to counteract employees' incentives to engage in misconduct, but also is a crucial part of the law's ability to express society's condemnation of the prohibited conduct. Enforcement, in other words, is a component of the law's expressive voice.¹⁹⁸

Active and regular enforcement against individuals helps create a salient injunctive norm by motivating employees to be more attentive to the training that corporate liability induces companies to provide. Enforcement and sanctions also help establish the injunctive norm by expressing both society's commitment to it and its view of the magnitude of the harm caused.¹⁹⁹ People often predicate their perceptions of the immorality of a prohibited act on the sanctions imposed for its violation.²⁰⁰ Criminal laws that are not enforced tend not to be perceived as

¹⁹⁵ van Rooji & Fine, *supra* note 57, at 32, 44 (social scientists have shown that certainty of punishment plays a crucial role in deterring crime). Evidence appears to suggest that the threat of punishment deters crime when the certainty of punishment is between 25 and 40 percent. *Id.*

¹⁹⁶ See Cialdini & Trost, *supra* note 93, at 161 (priming people with stories of people who were punished renders an injunctive norm more effective).

¹⁹⁷ See Cialdini & Trost, *supra* note 93, at 161 (priming people with stories of people who were punished renders an injunctive norm more effective).

¹⁹⁸ Thus, contrary to the views of some expressive law scholars, see *supra* text accompanying notes 83–, enforcement is not rendered unnecessary by expressive law but is instead essential to the law's ability to deter through expressive channels. See also Kahan, *supra* note 20.

¹⁹⁹ See *supra* note and accompanying text.

²⁰⁰ Punishment is one of the features of the law that can change the social meaning of behavior and express society's condemnation of the prohibited conduct. See, e.g., J. P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE at 58 (1975); Kahan, *supra* note 20; see Raymond Paternoster, et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?* 17 L. & SOC. REV. 457 (1983) (perceived punishment is a significant predictor of an act's perceived morality); see

reflecting a genuine norm.²⁰¹ Societies often indicate that a legal injunction is no longer important through non-enforcement. While it is true that the company can express its own norm against the conduct, the norm expressed by a company often will not be as strong as the combined effect of the law's sanctions and the company's messaging for two reasons. First, the law adds the weight of the broader society to the company's message, which may be enhanced further through enforcement. Second, companies inevitably provide employees with multiple normative exhortations: avoid misconduct and pursue profit.

Active, salient enforcement also helps undermine motivated reasoning in several ways. First, it can provide a salient expression of society's view that the misconduct is not justified by the benefits of the misconduct to others in the firm. Enforcement and sanctions can also enhance anticipated shame by indicating that others will not embrace such self-interested justifications.²⁰² They also can counteract motivated reasoning by reducing employees' "moral wiggle room." Laws prohibiting organizational misconduct tend to be too broad or technical clearly to communicate the boundaries of the prohibited conduct.²⁰³ The resulting uncertainty provides employees

also FELDMAN, *supra* note 25, at 153-54; 169. For evidence that punishment changes the social meaning of behavior, operating as a material component of the criminal law's expressive channels see J. P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE at p. 58 (1975).

²⁰¹ See Kahan, *supra* note 20.

²⁰² See also Nadler, *supra* note 122, at 1226 (discussing evidence that authorities can deter tax cheating by both sending letters than indicate that people are being monitored and including language that emphasizes the unfairness of nonpayment and the benefit to society of taxes).

²⁰³ See, e.g., Samuel Buell, *The Upside of Overbreadth*, 83 NYU L. REV. 1491 (2008); see van Rooji, *supra* note 57. Important federal laws not only use broad undefined language but also create legal injunctions that do not align with popular conceptions of what conduct is unethical. For example, consider domestic corruption. People who believe corruption is unethical would likely conclude that it is unethical for a public servant to sell their ability to influence decisions for personal profit. See also ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2016). Yet U.S. federal law on domestic corruption permits corporations to provide massive corporate campaign contributions and lobbying expenditures that unambiguously influence legislatures. Moreover, under federal law it is lawful to pay federal and state legislators and Governors to exert their influence on a firm's behalf through acts other than taking an official act. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

motivated by self-interest with moral wiggle room to conclude that their conduct is lawful.²⁰⁴ Enforcement of these laws in criminal courts, and the publicity that surrounds such cases, operates to clarify and publicly communicate the legal prohibition.²⁰⁵

Active enforcement with material sanctions can help address the socially distant victim problem. Enforcement can render victims identifiable and give them a public voice. In addition, individual sanctions transform the harm resulting from the misconduct from one befalling strangers to a harm that befalls wrongdoers themselves; imprisonment or the imposition of substantial fines provide an expression of the harm suffered by victims that is salient to wrongdoers.

Finally, regularly occurring and adequately publicized enforcement against individuals can address the diffuse responsibility problem by communicating, in a salient way, society's view that each employee who knowingly engaged in acts that caused the legal violation is legally and morally culpable. As previously discussed, responsibility for the actions producing organizational misconduct often is shared by multiple employees. Diffusion of responsibility enables employees to conclude that they are not responsible for the misconduct, obviating anticipated guilt and shame over illegal acts by enabling them to conclude that they were not, and society does not view them as, responsible for unethical conduct. Instead, they were following orders, or under pressure from

²⁰⁴ Legal ambiguity can provide a source of "moral wiggle room." See Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INST. & THEORETICAL ECON. 137 (2014); Yuval Feldman & Doran Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 995-97 (2009); Yuval Feldman, *Self-Interest and the Ambiguity of Legal Norms: An Experimental Analysis of the Rule Versus Standard Dilemma*, 4 REV. L. & ECON. 81 (2008).

²⁰⁵ See *infra* Section II.B.1 (discussing motivated reasoning).

Enforcement is particularly vital in business crime cases as courts delineate the boundary between lawful and unlawful conduct in ways that would not be apparent to someone relying on either common ethical understanding or the language of the statute. For example, while an average person might believe that it is unethical or immoral for public officials to receive payments in return for using their public office to benefit the person giving them the payment, in the U.S., federal law prohibits such payments to foreign officials, Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (FCPA), while allowing U.S. federal officials to seek and receive substantial payments in return for agreeing to use the influence afforded them by their public office to benefit the payer under a host of circumstances.

supervisors to maximize profits, focused on other objectives, or part of a team that collectively caused the violation.²⁰⁶ Public identification of employees as criminals, even when they were following orders, were acting within a group, or were not the last or most senior person in the chain, contributes to a salient public expression of who is responsible and who will be blamed that can lead employees to anticipate shame and guilt when they otherwise would not. When only organizations are held liable, the identity of the individuals responsible for the misconduct may never become known or publicized.²⁰⁷ This removes wrongdoers' anticipated shame because the people in the community are unlikely to learn that they were responsible for the crime.

Thus, EDT supports the conclusion of CDT that individual liability is vital to deterrence but reveals why the effective deterrence requires that individuals face a sufficiently high probability of enforcement to create material and salient injunctive norms and negative their incentives to commit crimes. A low risk of enforcement coupled with high sanctions is not an effective deterrent.²⁰⁸

B. Structuring Corporate Liability to Induce Corporate Policing

The conclusion of EDT theory that individual wrongdoers must face a material and salient risk of sanction also provides has implications for corporate liability, providing additional support for CDT's conclusion that corporate liability should be structured to induce corporate detection, investigations, self-reporting, and full cooperation.

²⁰⁶ See *supra*

²⁰⁷ See U.S. Dep't of Just., Just. Manual § 9-11.130 (2018) (providing that individuals who have not been charged should not be identified by name in a charging document or in a resolution as having engaged in the misconduct). Organizations' disciplinary actions against individual wrongdoers generally will not ensure that individual wrongdoers are identified because organizations tend to try to keep their disciplinary actions confidential and unpublicized.

²⁰⁸ Compare with Becker, *supra* note 11.

To create a material risk of sanction, the government needs to induce corporate self-reporting and cooperation because corporations are better able to identify and detect misconduct than the government.²⁰⁹ Accordingly, consistent with CDT, corporate liability must be structured to ensure both that companies cannot retain the benefit of their misconduct and to incentivize companies to self-report and fully cooperate.²¹⁰

V. Is Supervisory *Respondeat Superior* Liability Superior to Corporate Liability

EDT thus reveals that corporate liability is needed to induce companies to (1) optimally structure their employees' internal decision-making environments, and to (2) self-report and fully cooperate. We reach this conclusion after rejecting an alternative solution: to impose criminal *respondeat superior* liability on the board or senior management for misconduct by those over whom they exert direct control.²¹¹ This alternative warrants consideration because corporate liability falls on shareholders whereas managers and directors control the firm's internal operations.

In this Section we show that our EDT framework helps us elucidate why senior manager *respondeat superior* liability is not an adequate substitute for corporate liability. We also show that it is not the preferable substitute. It also shows that there currently exist mechanisms that can

²⁰⁹ See Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

²¹⁰ For a discussion of how to structure liability to achieve this goal see Arlen, *supra* note 6.

²¹¹ We focus on supervisory *respondeat superior* because senior management of large companies are rarely directly involved in corporate crime. Moreover, they already can be held liable for crimes they help commit knowingly or intentionally through the doctrines of aiding and abetting and conspiracy.

We do not consider negligence liability for directors and senior managers because, as previously discussed, EDT analysis reveals that optimal deterrence requires inter-dependent decisions across so many different areas; moreover, the optimal choice for each decision will vary across firms, depending on the circumstances. Thus, courts would not be able to determine whether managers made reasonable decisions due to hindsight bias. Indeed, the decisions required go to the heart—and breadth—of directors' duties to manage the company. The difficulty of determining whether directors and managers have made these decisions optimally led long ago to the adoption and wide-spread embrace of the Business Judgement Rule, that insulates directors from liability for inadequate substantive due care, as long as they acted in good faith. *Smith v Van Gorkom*; *Stone v Ritter*. For a further discussion of the limits of managerial negligence liability see Buell, *supra* note 51; Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors*, 105 MICH. L. REV. (2007).

be used to help ensure that companies respond optimally to the threat of corporate liability, notwithstanding agency costs.

A. Supervisory Respondeat Superior Liability Should Not Replace Corporate Liability

Criminal law in the U.S. and abroad generally does not impose strict *respondeat superior* liability on the board and senior managers²¹² in most situations because criminal liability imposed without fault offends our sense of due process, even if the person was indirectly responsible for this misconduct. Yet one statute, the Food, Drug and Cosmetics Act, has been interpreted to impose strict *respondeat superior* misdemeanor criminal liability for crimes by employees on those senior officers who had authority to stop the misconduct, and did not, even if they failed to stop it because they were unaware of it. With few exceptions, such liability has generally been restricted to controlling shareholders of closely-held companies who also control the firms daily operations.

Nevertheless, the imposition of corporate criminal liability on publicly held firms through *respondeat superior* raises the question of whether such liability should instead be targeted at the board members or senior executive officers who control the firm's internal operations. EDT helps illuminate why corporate liability is superior to strict *respondeat superior* liability imposed on senior managers.

Section IV showed that corporate liability is needed to induce companies to deter by making optimal decisions about a plethora of internal issues that materially affect employees' incentives to commit corporate crimes: compensation and promotion policy, compliance, internal discipline, salience of the law, salience of sanctions impose on those who violate the law, self-reporting and cooperation, salience of ethics in employees' day-to-day lives, and the salience of

E.g., *U.S. v. Park*, 421 U.S. 658 (1975). In practice, this liability is usually reserved for senior managers who knew about—or set up systems that would lead to—the misconduct, even though the government need not prove knowledge. E.g., *Id.*; *U.S. v. Dotterweich*, 320 U.S. 277 (1943); see *U.S. v. DeCoster*, 828 F.3d 626 (8th Cir. 2016).

the inducements to misconduct (both self-interested and opportunities to benefit the firm and other employees). Each of these factors affects both deterrence and productivity. Thus, tradeoffs between the two concerns are inevitable. Corporate liability for crime gives corporate decision-makers—who are properly incentivized to act for the firm—optimal incentives to appropriately balance the quest for profit with the need to deter misconduct when making the plethora of decisions that impact both compliance and productivity.²¹³

Respondeat superior liability imposed on managers of publicly held firms would be an ineffective and inefficient substitute for corporate liability. Supervisory *respondeat superior* would be unlikely to induce effective deterrence through the manifold features of the firm that EDT has shown affect deterrence because no one manager—or group of managers—has authority over the set of decisions that EDT reveals affect the probability of misconduct. For example, directors and senior management can determine the compensation and promotion policy that governs employees, but they do not control how decisions about productivity versus ethics are made and communicated on the ground. Line managers control such decisions, and also have initial control over how employees' tasks are structured, but they cannot ensure that they have the human capital resources or messaging from above, needed to create a salient culture of compliance. Thus, each manager subject to *respondeat superior* would only exert control over a facet of the decisions that affect the probability of misconduct, leaving them subject to a material risk of liability arising from choices made by others even if they acted optimally. Supervisory liability thus would not reliably produce the needed corporate reforms that EDT reveals need to be undertaken.

²¹³ See Arlen & Kraakman, *supra* note 9 (making a similar point using CDT analysis about the effect of corporate liability on firm's incentives to adopt the set of measures to prevent misconduct recognized by CDT theory).

Managers' unavoidable risk of criminal liability would distort corporate decision-making about compliance away from the optimal choice. Managers threatened with criminal liability whenever anyone below them commits a crime would have strong incentives to have the firm over-invest in efforts to deter crime because managers would directly benefit from the resulting deterrence, whereas the cost of their actions—both direct and through reduce productivity—would fall disproportionately on non-management shareholders. The market for control and activism would be unlikely to adequately address this problem as most firms would be plagued with a similar problem. By contrast, corporate liability should provide optimal incentives to balance compliance and productivity because they would bear a proportionate share of the each through their shareholdings and incentive-based compensation.

Finally, supervisory *respondeat superior* would also unnecessarily increase companies' labor costs because all supervisors subject to this form of liability would require a substantial increase in pay to compensate them for their risk of liability for harms that are beyond their control.²¹⁴ Economic analysis long ago established that imposing strict liability on risk-averse employees to induce them to take actions to benefit a company is inefficient because risk-averse employees will require far more than the expected value of their loss to compensate them for the threat of liability that they cannot control.

Corporate criminal liability thus is superior to imposing *respondeat superior* liability on supervisors who could have taken action to reduce the risk of misconduct.

²¹⁴ See PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION & MANAGEMENT* (1992) (showing that high powered incentives that impose liability on management for bad outcomes that are beyond their control are inefficient because they impose costs on risk averse managers who require more to compensate them for the risk).

B. Current Solutions to Agency Costs

Although corporate liability is superior to supervisory liability imposed through *respondeat superior*, there is no doubt that, to optimally deter through corporate liability, policy makers should strive to reduce the pernicious effect of managerial agency costs on corporate compliance.

The compensation of board members and senior executives is strongly tied to the company's financial welfare, which ameliorates the agency cost problem. It nevertheless does not eliminate it when managers obtain material benefits from crime or from weak actions to deter crime.²¹⁵ The U.S. system has taken—and could enhance—several interventions that potentially address this problem that are superior to supervisory *respondeat superior* liability.

First, Delaware law helps deter directors and officers from deliberate neglect of their oversight duties over the firm's compliance with the law by holding them liable for harm to the firm arising from legal violations should they act in bad faith either in establishing measures to deter crime or in responding to evidence of misconduct.²¹⁶ The modern cases have enhanced the threat of this liability for firms whose activities are subject to regulations designed to protect the public welfare,²¹⁷ thereby enhancing directors' (and officers) incentives to give serious attention to compliance.²¹⁸

In addition, current federal enforcement policy, if properly applied, operates to deter managers from neglecting their duty to help ensure the firm's compliance by increasing their threat of being terminated should they encourage or knowingly fail to terminate misconduct. Under existing policy, companies seeking favorable treatment—e.g., a deferred or non-prosecution

²¹⁵ E.g., Arlen & Kahan, *supra* note (discussing agency costs affecting compliance); Arlen & Carney, *supra* note 40 (explaining why nonculpable managers may benefit from not intervening to stop other executives' securities fraud).

²¹⁶ *Caremark*, 698 A.2d 959 (Del. Ch. 1996); *Stone v. Ritter*, 911 A.2d at 362.
; *Stone*; *Marchand*; *Boeing*.

²¹⁷ See Jennifer Arlen, *Caremark 2.0: Creating Agency Costs in the Public Interest* (draft in progress)

²¹⁸ *Id.*

agreement—are expected to fully remediate both the harm caused by the misconduct and its root causes.²¹⁹ Such remediation properly includes identifying and appropriately addressing (including potentially firing) the managers whose inappropriate conduct either helped induce the misconduct or enabled it to continue.²²⁰

Finally, enforcement authorities can deter neglect of compliance by adopting a policy of imposing a monitor—with authority to oversee the firm’s compliance function—on any firm with detected misconduct whose directors and officers did not intervene appropriately to deter misconduct, unless the firm self-reported and truly fully cooperated.²²¹

Of course, these interventions are only partial solutions to the agency cost problem. Additional measures are needed, yet the most effective additional steps would not be to impose supervisory *respondeat superior*, but would be to instead expand on and improve U.S. laws offering whistleblower bounties to ensure that people in the firm, with evidence about misconduct, are strongly incentivized to report misconduct to the government if the firm does not. Given the structure of directors’ and officers’ compensation, a truly effective whistleblower system could provide companies with the needed additional incentives to both deter misconduct and ensure that companies detect and self-report it.

VI. Conclusion

Corporate crimes cause enormous harms. They must be deterred. Corporate enforcement authorities around the world struggle to do so. They are invariably under-staffed and under-resourced. Deterrence requires that the law use all effective means possible to reduce organizational misconduct.

²¹⁹ See U.S. Dep’t of Just., Just. Manual § 9-11.130 (2018).

²²⁰ ALI, *Principles of Corporate Enforcement*, *supra* note 3, at §6.07 (discussing corporate remediation)

²²¹ Arlen & Kahan, *supra* note 51.

CDT has long provided a clear set of policy prescriptions about how to deter organizational misconduct. Employees must be held criminally liable for all their knowing misconduct. Companies also should be held liable through *respondeat superior* with liability designed to ensure both that crime does not pay and that companies are strongly motivated to self-report detected misconduct and fully cooperate with enforcement authorities.²²² Yet many legal scholars have contested the conclusions of CDT on the grounds that CDT rests on inaccurate assumptions. They claim that a more accurate model of human behavior reveals that the law can deter by expressing social or ethical norms; as a result, criminal law need not impose the substantial sanctions recommended by CDT.²²³

In this Article, we have shown that these legal scholars correctly observed that the foundational assumptions of CDT are inaccurate, and that the law can deter through expressive channels. However, existing scholarship draws the wrong conclusions from these insights because their analyses also rest on inaccurate assumptions about people's behavior. In particular, previous analyses of deterrence through expressive law do not recognize the primary roles of either intuitive decision-making or organizations in influencing employees' choices about organizational misconduct.

Leveraging the literature from empirical psychology, we develop an Evidence-based Deterrence Theory that recognizes that (1) people have both egoistic motivations and other-regarding ones, (2) the law affects behavior through both sanctions and expressive channels, (3) people employ two different decision-making processes but rely primarily on intuitive decision-making, and (4) organizations affect employees' actions through both incentives and through how

²²² See Section I.A; Arlen & Kraakman, *supra* note 9; Arlen, *supra* note 9.

²²³ See Section I.C.

they structure their decision-making environment. We use this framework to evaluate both optimal corporate liability and individual liability for organizational misconduct. We conclude that the law cannot reliably deter through expressive channels unless, consistent with CDT, both employees and their corporate employers face a material, salient risk of liability for organizational misconduct and sanctions structured to ensure that neither expects to profit from crime. Corporate liability also must induce corporate self-reporting and cooperation.

Deterrence through expressive law requires that companies and individuals face a salient threat of liability structured to ensure that crime does not pay because the profit to each individual employee, and to the firm and their co-workers, from misconduct, combined with people's rejection of personal responsibility, and organizations' conventional approach to structuring their internal environments, all stand as enormous impediments to the law's ability to deter by activating people's social-regarding preferences. Criminal law cannot deter unless it ensures neither employees nor companies profit from crime and also saliently attributes responsibility to employee wrongdoers, enabling society to express its opprobrium. Corporate liability also is needed to induce companies to both restructure their employees' internal decision-making environment to enhance the salience of ethical concerns and legal compliance, and to enhance the law's salience by self-reporting and fully cooperating.

Our analysis thus reveals that many U.S. states, the ALI's Model Penal Code,²²⁴ and many countries have taken the wrong approach to organizational liability by restricting corporate liability either to crimes caused by directors or senior managers or firms without an effective compliance program. Such narrow corporate liability regimes undermine deterrence by enabling companies to profit from many (if not most) crimes, thereby incentivizing companies to structure their internal

operations to promote productivity, even at the expense of compliance. They also fail to induce corporate self-reporting or full cooperation.²²⁵

Moreover, such rules do not even achieve their own internal goals of attributing liability to firms whose senior officials are responsible for misconduct. Our analysis shows how management can foster crime without engaging in an illegal act themselves and while ostensibly maintaining an effective compliance program, by adopting measures—such as compensation and promotion policies and a culture of loyalty to the firm—likely to increase profits by promoting misconduct. Moreover, they can do so fully aware of how their decisions will affect their employees' conduct and can profit from doing so when firms retain the profit of crime. Thus, governments that are genuinely committed to deterring corporate crime need to impose far broader and more robust corporate and individual liability than most do at present.

²²⁵ See Arlen, *supra* note 6.