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. Our theory improves on both classical deterrence theory and expressive law theory. We show that optimal deterrence through expressive law requires both individual liability and corporate liability that both eliminates companies' expected profit from misconduct and induces them to detect, self-report and cooperate. Our framework has implications beyond liability for organizational misconduct.

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I. 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 and services, and undermines the rule of law.[2] Healthcare 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 widespread harm to people they never could reach on their own.

1. *See* Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 924 (2019) (presenting evidence of frequent violations by three "average" public companies).

2. *E.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 21 (1999); *see* KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 42 (2019).

To protect their citizens, governments must adopt corporate and individual liability rules that effectively deter[3] 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] 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 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]

3. Throughout this Article, we use the term "deterrence" to refer to the use of the law to reduce people's inclination to engage in misconduct by increasing their expected costs from misconduct—whether those costs are imposed by government institutions, markets (as a result of the legal prohibition), or internally (*i.e.*, through guilt and shame over violating the law). For a discussion of why deterrence, and not retribution or restitution, should be the primary goal of corporate criminal liability see, for example, Am. L. Inst., *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*]; Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES 161, 161 n.17 (Abiola Makinwa & Tina Söreide eds., 2020); Samuel W. Buell, *Retiring Corporate Retribution*, 83 L. & CONTEMP. PROBS. 25, 26 (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). The concept of "scope of employment," however, 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 employers' 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, 660 (2d Cir. 1989); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (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. & DEV., THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT, at 53 (2016) https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf [https://perma.cc/C247-34WT]; ALI, *Principles of Corporate Enforcement*, *supra* note 3, § 6.02 rep. note c. *See generally* Arlen, *supra* note 3 (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, § 6.02 rep. 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 Privatization of Law Enforcement: A Study of the Italian Legislation in the Light of the U.S. Experience*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES 1, 4–5 (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 W. Buell, *The Law of Corporate Investigations and the*

Effective reform requires determining which corporate and individual liability rules optimally deter[9] 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. We offer such a theory, which we call Evidence-Based Deterrence Theory ("EDT"), here. We undertake, to our knowledge, the first assessment of optimal corporate and individual liability for organizational misconduct[10] based on a deterrence theory that incorporates four empirical insights about human decision-making.[11] These four insights are largely consistent with common sense. First, people are motivated by both self-interest and the desire to perceive themselves—and to be perceived by others—as ethical people.[12] Second, and as a result, criminal law can deter prohibited conduct in at least two ways: through formal sanctions and by expressing society's condemnation of the enjoined conduct.[13] Third, individuals contemplating whether to violate the law typically do not deliberate fully over their decisions, carefully weighing costs and benefits. Rather, individuals usually make decisions nonconsciously, instantaneously, and intuitively, often driven by emotion rather than reason.[14] Finally, organizations play a dominant role in de-

Global Expansion of Corporate Criminal Enforcement, 93 S. CAL. L. REV. 697, 700–01, 703–04 (2020); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 197–200 (2017); *see also* DAVIS, *supra* note 2, at 128.

9. *See supra* note 3 (defining deterrence).

10. 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.

11. Our analysis is the first to consider the implications of all four insights for deterrence theory. Prior deterrence analyses have recognized both that people have social motivations and that criminal law can deter individuals by expressing the laws' condemnation of the prohibited conduct. *See infra* Section II.B. But these analyses tend to assume 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. They thus do not incorporate the evidence about the primary role and nature of intuitive decision-making. 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, 101 (2021) (explaining why promoting explicit ethical preferences does not necessarily lead to ethical behavior).

12. *See infra* Subsection II.B.1. For a detailed discussion of a more nuanced understanding of the meaning of "preference," see generally Jennifer Arlen & Lewis A. Kornhauser, *Does 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 infra* Subsection II.B.3. For a discussion of variation in personality types, see *infra* note 105.

13. *See infra* Subsection II.B.2.

14. *See, e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW 225 (2013); Colin F. Camerer, George Loewenstein & Drazen Prelec, *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LIT. 9, 9–

termining the law's ability to deter through both sanctions and expressive channels; the law's ability to deter through expressive channels depends on whether the organization structures the actors' decision-making environment to make the legal injunction a dominant focal concern.

Our EDT framework rests on empirical analyses of intuitive decision-making. While evidence shows that intuitive decisions are based on both self-interest and people's desire to retain their own and others' good opinion of themselves, it also reveals that, when pursuit of self-interest would entail violating a legal injunction, people's intuitive processes are structured to enable them to pursue self-interest, without experiencing guilt or shame over the legal violation, unless the legal injunction is salient and focal at the moment of choice and dominates competing justifications for the self-interested choice. We then show that organizational misconduct commonly has multiple features that can be expected to promote employees' pursuit of self-interest through misconduct and weaken the expressive force of social or legal norms against the misconduct. Accordingly, to deter, the law needs both to reduce employees' incentives to engage in misconduct and to enhance the salience of the law to create an unavoidable, strong, and salient ethical norm against misconduct.[15]

Employing this framework, we then show that, in order to deter through expressive law, corporations must be held liable for their employees' misconduct with sanctions structured to ensure they do not profit from crime. The same conclusion holds for deterrence through sanctions.[16] 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.[17] 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.[18] 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. Companies thus cannot be relied on to structure their employees' decision-making environment to effectuate norms against misconduct unless the law ensures they do not profit from misconduct.

11 (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 SCI. 47, 47 (2006); Leda Cosmides & John Tooby, *Evolutionary Psychology, Moral Heuristics and the Law*, *in* HEURISTICS AND THE LAW 186 (G. Gigerenzer & Christoph Engel eds., 2006); *see also* Jennifer H. Arlen & Eric L. Talley, *Introduction*, *in* EXPERIMENTAL LAW AND ECONOMICS *xv, xxix* (Jennifer H. Arlen & Eric L. Talley eds., 2008) (discussing the multiple-process theories of decision-making and their implications for experimental law and economics); *infra* Section II.B.

15. *See infra* Part III.

16. *See infra* Section II.A,

17. *See infra* Part II.

18. For a discussion of why corporate liability should be criminal, see Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 862 (2022).

Employing our EDT framework, we next show that states cannot reliably deter organizational misconduct through expressive law unless individual wrongdoers are also liable and face a substantial probability of conviction.[19] 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. In addition, we find that deterrence requires that individual wrongdoers face a substantial risk of sanction. To achieve this, corporate liability should be structured to induce self-reporting and full cooperation.

Our analysis contributes to the literature in three important ways. First, we establish a framework for analyzing deterrence through legal rules that is consistent with empirical evidence and enables considerations of deterrence through both incentives and expressive law. Second, we explicate the important interaction between the law and organizations, showing how organizations can enhance or undermine deterrence through law through both the incentives they provide and the way they structure their employees' decision-making environment. Third, we identify the important ways in which organizations can induce misconduct even when they have an ostensibly effective compliance program, thereby explicating why legislatures should not insulate companies with an effective compliance program from liability.

Our evidence-based EDT framework contrasts with both of the two leading alternative deterrence theories—classical deterrence ("CDT") and expressive law theories ("ELT")—neither of which is fully consistent with the empirical evidence. ELT appears to be the most consistent with EDT in that ELT scholars recognize that people have both non-egoistic and egoistic preferences and that the law can deter through expressive channels.[20] Yet ELT deterrence

19. 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. *See generally* Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358 (2016).

20. *See infra* Section II.A. There is extensive literature analyzing the law's 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. LAW, ECON. & ORG. 331, 332 (2004); Robert Cooter, *Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1601 (2000) [hereinafter Cooter, *Good Citizens*]; *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 433 (1997) [hereinafter McAdams, *Origin*]; Richard H. McAdams, *Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1729 (2001) [hereinafter McAdams, *Focal Point Theory*]; 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 220 (2011); Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014); Ariel Porat, *Changing People's Preferences by the State and the Law*, 22 THEORETICAL INQUIRIES L. 215, 240 (2021) (discussing why it may be optimal to change preferences). *See generally* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998) [hereinafter Cooter, *Expressive Law*]; 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, 929 (1998) [hereinafter Cooter, *Models of Morality*]; Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 38 (1990); Dan M. 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*].These scholars vary in their assessment of whether expressive

scholars do not incorporate the role of intuitive decision-making. Instead, they generally assume that people will conform to social and ethical norms that are expressed or enhanced by a legitimate legal injunction. This leads many to conclude that the law need not rely primarily on sanctions or enforcement 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.[21] ELT deterrence theorists[22] also do not recognize the effect of organizations on expressive law and thus fail to support broad organizational liability.[23] By contrast, our analysis reveals that active and salient individual and corporate liability are essential to the law's ability to deter through expressive channels. Thus, expressive law increases, rather than reduces, the deterrence benefits to society of active enforcement against individual wrongdoers and firms.

EDT's structure and policy conclusions also differ from CDT, the dominant theory employed to assess deterrence of organizational misconduct. Unlike EDT, CDT assumes that:[24] (1) people act in their own narrow self-interest;[25] (2) individual criminal liability only influences behavior through the threat of publicly imposed sanctions;[26] (3) people rely on full rational deliberation—weighing all expected costs and benefits—to make choices;[27] and (4) companies

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 infra* Part II. Some expressive law scholars recognize that enforcement and sanctions are part of how the law expresses its condemnation, *see* Kahan, *supra* note 20, but they do not recognize, as we do here, the dependency of expressive law on expected sanctions that eliminate wrongdoers expected benefit from misconduct.

22. We use the term "ELT deterrence theorists" to refer to scholars who examine the implications for ELT for individual or corporate liability, as distinct from those who explore the implications of norms for behavioral ethics or compliance. *See infra* note 23.

23. *See infra* Section II.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. Langevoort, *supra* note 11, at 946. 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. FELDMAN, *supra* note 11, at 168–89; *see also* Feldman & Kaplan, *supra* note 11, at 101 (explaining why promoting explicit ethical preferences does not necessarily lead to ethical behavior).

24. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169–217 (1968).

25. *Id.* The assumption that people pursue their narrow economic self-interest distinguishes CDT from general deterrence theory. *See infra* note 40.

26. *See, e.g.*, Becker, *supra* note 24; Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW, 144, 167–84 (Keith N. Hylton & Alon Harel, eds., 2012). *See generally* 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); Lewis Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982) (analyzing civil liability). For a discussion of "general deterrence" and economic analysis of reputational penalties, see *infra* note 40.

27. 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

affect employees' decisions only by interventions, such as financial incentives, that alter the egoistic expected cost and benefit to employees of misconduct. Empirical evidence on human decision-making contrasts with each of these assumptions. Ironically, CDT yields policy conclusions that more closely align with those of EDT than does ELT. CDT favors holding both individuals[28] and corporations criminally liable[29] for organizational misconduct with expected sanctions[30] that equal or exceed their expected benefit from misconduct.[31] CDT also recognizes that corporate liability should be structured to induce firms to detect, self-report, and cooperate.[32]

EDT policy conclusions, however, differ from CDT in three important ways. First, CDT favors achieving the desired expected sanction by coupling high sanctions with a low probability of enforcement.[33] EDT's focus on intuitive decision-making reveals why this approach is ineffective. Second, CDT ignores the role of expressive law and thus does not support government efforts to enhance the salience of the law and the social harm associated with it, as EDT would. Finally, CDT fails to recognize the myriad of ways that companies affect their employees' risk of misconduct other than by influencing employees' financial incentives. By contrast, EDT reveals why prosecutors and corporate officers are right to focus on a company's internal environment—including its culture—when seeking to deter misconduct.

Our analysis proceeds as follows: Part II sets forth the two standard deterrence theories, CDT and ELT, and explains how each rely on assumptions that

(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 choice maximizes her preferences. Ariel Rubinstein, *Lecture Notes*, *in* MICROECONOMIC THEORY: THE ECONOMIC AGENT 3–4 (2d ed. 2012).

28. Jonathan Macey, *Agency Theory and the Criminal Liability of Corporations*, 71 B.U. L. REV. 315, 319 (1991) (applying CDT to organizational misconduct); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 846 (1994) (same). *See generally* Polinsky & Shavell, *supra* note 26 (same); Arlen, *supra* note 26, at 692 (showing why corporate liability does not suffice to deter individual wrongdoers); Becker, *supra* note 24.

29. For economic analysis of law analyses of how to structure individual and corporate liability to deter corporate crime, see Arlen, *supra* note 3, at 160–77; Arlen, *supra* note 26, at 167–86 (explaining why optimal deterrence requires that both entities and individuals be liable for corporate misconduct). *See generally* Arlen & Kraakman, *supra* note 26; Polinsky & Shavell, *supra* note 26. For a discussion of why corporate criminal liability is needed, and civil corporate liability does not suffice, see Arlen, *supra* note 18.

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

31. *See infra* Section III.A. *See generally* Becker, *supra* note 24; Macey, *supra* note 28 (applying CDT to organizational misconduct); Arlen, *supra* note 28 (same); Polinsky & Shavell, *supra* note 26 (same); Arlen, *supra* note 26 (showing why corporate liability does not suffice to deter individual wrongdoers).

32. *See infra* Section III.A. *Compare* Arlen, *supra* note 28, *and* Arlen & Kraakman, *supra* note 26, *with* Polinsky & Shavell, *supra* note 26. For an example of criminal and civil enforcement policy designed to deter and remediate misconduct, see ALI, *Principles of Corporate Enforcement*, *supra* note 3.

33. *See generally* Becker, *supra* note 24 (assuming criminals are not risk preferers). CDT does not favor this policy if the marginal cost of increasing the expected sanction through enhanced sanctions exceeds the cost of using enforcement. In addition, some CDT analyses modify CDT to incorporate evidence that people regularly ignore low-probability events. *See, e.g.*, Arlen, *supra* note 3, at 6.

are inconsistent with empirical evidence emanating from psychology and experimental economics. Part III sets forth an Evidence-Based Deterrence Theory ("EDT") predicated on this evidence. EDT enables scholars to evaluate the law's ability to deter through expressive channels and sanctions. This Part identifies the factors that affect 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. Part IV 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 liability is vital to the law's ability to deter through expressive channels. Part V shows first that individual enforcement is essential to deterrence through expressive law, and second, why corporate liability for organizational misconduct needs to induce self-reporting and cooperation, consistent with CDT. Part VI explains why corporate liability is superior to broad liability imposed on managers through *respondeat superior*. Part VII concludes.

II. THE CHALLENGE TO CDT AND ELT FROM EMPIRICAL PSYCHOLOGY

Two deterrence theories dominate the existing debate over how criminal liability deters individuals from committing crime: CDT and ELT. Of the two, only one, CDT, has also been rigorously applied to organizational misconduct. This Part examines both CDT and ELT and shows how each relies on assumptions that are not supported by empirical evidence on decision-making. This Part first presents CDT and its policy conclusions for individual and corporate liability for organizational misconduct. It then shows how evidence from psychology undermines each of the foundational assumptions of this theory, thereby potentially invalidating its policy conclusions. It then discusses ELT, which incorporates two of the four central insights from empirical psychology. It next presents leading legal scholars' views on ELT's normative implications for criminal liability. It then shows that ELT is also inconsistent with existing empirical evidence because it fails to incorporate two important insights from psychology: (1) the dominant role and the nature of intuitive decision-making and (2) organizations' effects on their employees' decision-making.[34]

34. *See infra* Section II.C; MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 35–36 (2011). *But cf.* Feldman & Kaplan, *supra* note 11, at 96.

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.[35] 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.[36] CDT makes the following four assumptions about how the criminal law influences behavior. First, people are motivated solely by their own self-interest.[37] Second, they make decisions rationally, weighing the costs and benefits of each option.[38] They pick the option that maximizes their egoistic welfare, ignoring its effect on others or on norm compliance.[39] Third, criminal law only alters behavior through one channel: criminal sanctions.[40] Thus, criminal law can only deter by increasing the probability or magnitude of the criminal sanction.[41]

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, organizations can deter by changing their compensation and promotion policies to reduce employees' expected benefit from crime.[42] They can also 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

35. *See* Becker, *supra* note 24, at 180–85; *see also infra* note 40 (distinguishing CDT from general deterrence).

36. *See supra* notes 24–27 and accompanying text.

37. *See* Dau-Schmidt, *supra* note 20, at 1.

38. *See id.* at 5.

39. *See id.* at 4.

40. The assumptions of self-interested preferences and that the law deters solely through sanctions distinguishes CDT from "general deterrence theory" ("GDT"). Both are predicated on rational choice theory. GDT recognizes additional mechanisms through which the law can deter. For example, a criminal conviction imposes costs from reputational damage when it leads a wrongdoer's counterparties (*e.g.*, customers or employers) to refuse to deal with the wrongdoer or to 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); *see also* John Armour, Colin Mayer & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. QUANTITATIVE ANALYSIS 1429, 1429–30 (2017). *See generally* 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 87 (Jennifer Arlen ed., 2018) (discussing when corporate violators are likely to incur costs from reputational damage). 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 12, at 188–90, 197 (explicating the distinction between CDT and GDT).

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

42. Arlen & Kraakman, *supra* note 26, at 704.

cooperating with criminal enforcement authorities to help convict criminal employees.[43]

1. Optimal Individual and Corporate Liability for Organizational Misconduct

CDT analyses of criminal liability for organizational misconduct have evolved over time, but all begin with the foundational CDT framework expanded to recognize that employees directly commit organizational misconduct and not the company itself, which can only act through others.

Initial CDT analysis of corporate criminal liability assumed that the state (and the firm) could costlessly detect and sanction all organizational misconduct.[44] Accordingly, a government can deter all misconduct by ensuring that individual wrongdoers pay for the harm caused because employees commit corporate crime.[45] Corporate liability is not needed to deter employees. Individual criminal liability is better because the government can address employee solvency concerns by imposing both monetary sanctions and imprisonment.[46]

Subsequent CDT analyses focused on intentional misconduct that regularly escapes detection, such as fraud, corruption, money laundering, and off-label marketing.[47] These CDT analyses adjusted the framework to assume that (1) neither the state nor the firm can costlessly detect or sanction corporate misconduct; (2) the risk of detection is sufficiently low and the social costs of detection, investigation, and punishment are sufficiently high that the state cannot deter all organizational misconduct solely through the threat of individual sanctions;[48] and (3) the firm can detect and investigate misconduct by its employees more

43. *Id*. at 699; Arlen, *supra* note 28, at 859–60.

44. *See generally* Polinsky & Shavell, *supra* note 26. This model is a model of nonintentional crime in which employees must invest in "care" to avoid causing certain harms whose realization is automatically detected and subjects them to criminal liability. In this model, "misconduct" is defined as causing social harm (which could happen accidentally). In this framework, both firms and employees are strictly liable for all social harm caused.

45. *Id.*; *see* ALI, *Principles of Corporate Enforcement*, *supra* note 3, § 6.02. Early analyses recognizing that individual employees are the root cause of corporate misconduct include Arlen, *supra* note 28, at 834; Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 727 (1992); Macey, *supra* note 28, at 330; Polinsky & Shavell, *supra* note 26, at 239; Kornhauser, *supra* note 26, at 1345.

46. *See generally* Polinsky & Shavell, *supra* note 26; *supra* note 44. In this model, corporate liability is not needed to deter individuals, but it is needed to induce companies to select the optimal level of their harm-producing activities if employees do not internalize the full social cost of any harms that they cause due to asset insufficiency. *See supra* note 44.

47. In addition, these analyses assume that the state does not criminalize "harm" (*e.g.*, an economic loss), but instead enjoins particular conduct (*e.g.*, materially misleading statements) and criminalizes the deliberate violation of this injunction. For a discussion of why the distinction matters, see Arlen, *supra* note 26, at 144.

48. *See generally* Soltes, *supra* note 1.

cost-effectively than can the state.[49] These analyses also recognized that employees benefit from such misconduct indirectly through its impact on their expected compensation, job-security, and promotion prospects.[50]

These CDT analyses conclude that individual liability is vital to deterrence. Yet, unlike the earlier analysis, they find that the state cannot effectively deter unless it also holds companies liable for their employees' crimes.[51] To deter employees from knowingly violating the law, the government must ensure that employee wrongdoers face a material threat of sanction[52] and are subject to expected sanctions that exceed their expected benefit from misconduct.[53] Individual liability is essential, but not sufficient, because the government cannot optimally deter unless resources are spent to detect and investigate misconduct, and companies can detect and investigate misconduct more effectively and at lower social cost than the government.[54] Thus, to cost-effectively deter, the government needs companies to help it detect and investigate misconduct. Indeed, without corporate assistance, enforcement officials tend to detect only a small fraction of organizational misconduct,[55] yielding a probability of detection and

49. For formal models employing these assumptions, see Arlen, *supra* note 28; Arlen, *supra* note 26; and Arlen & Kraakman, *supra* note 26. For an informal analysis using this framework, see Arlen, *supra* note 3; Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323 (2017). For a discussion of why corporate liability must be criminal as opposed to civil, see Arlen, *supra* note 18. For alternative perspectives, see, for example, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887 (2022); Samuel W. Buell, *A Restatement of Corporate Criminal Liability's Theory and Research Agenda*, 47 J. CORP. L. 937 (2022); Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 922 (2022); Susana Aires de Sousa & William Laufer, *The State's Responsibility for Corporate Criminal Justice*, 47 J. CORP. L. 1109 (2022).

50. *See, e.g.*, Arlen & Carney, *supra* note 45 (discussing incentives to commit securities fraud).

51. *See* Arlen & Kraakman, *supra* note 26, at 706; Arlen, *supra* note 26, at 171.

52. This analysis incorporates an evidence-based assumption that deviates from classic CDT: that people ignore very small probability events. *See* Arlen, *supra* note 26, at 172; *see also* EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 99 (2016) (finding that the risk of sanction tends not to directly affect white-collar criminals' decisions, as it is too low to be salient). 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, e.g.*, Arlen, *supra* note 26; *see also* Arlen & Kraakman, *supra* note 26, at 699.

53. *See generally* Arlen, *supra* note 28 (setting forth optimal individual liability for misconduct society wants to deter absolutely). *See also* Becker, *supra* note 24, at 180 (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, 231 (1967) (explaining why a criminal's benefit from misconduct generally does not produce a social benefit).

54. *See generally* Arlen & Kraakman, *supra* note 26; Arlen, *supra* note 26.

55. *See* Arlen & Kraakman, *supra* note 26, at 692; *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); Alexander Dyck, Adair Morse & Luigi Zingales, *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 28, at 861; Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 273–74 (2014).

conviction that is too small to be material to employees and an expected sanction too low to optimally deter organizational misconduct.[56]

Companies thus can enhance deterrence by leveraging their superior ability to detect and investigate misconduct.[57] They can materially increase their employees' risk of punishment by assisting the government by self-reporting and fully cooperating. They can also deter by reducing their employees' benefit and increasing their expected costs from misconduct.[58] Corporations determine employees' benefit from organizational misconduct because employees usually commit crimes to increase their pay, job security, or status in the firm.[59]

Companies that are not criminally liable for their employees' misconduct, however, have little or no reason to undertake these costly measures to deter profitable misconduct.[60] Accordingly, these 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 from their employees' crimes.[61] These analyses also conclude that organizational liability should be structured to ensure that companies fare materially better if they self-

56. *See* Arlen & Kraakman, *supra* note 26, at 689; Arlen, *supra* note 26, at 144–45.

57. *See* Arlen, *supra* note 26, at 159; Arlen & Kraakman, *supra* note 26, at 693.

58. *See* Arlen & Kraakman, *supra* note 26, at 693; Arlen, *supra* note 26, at 159.

59. *See* Arlen & Kraakman, *supra* note 26, at 693; Arlen, *supra* note 26, at 159. Corporations also can deter by adopting prevention measures that make organizational misconduct more difficult or costly to commit. Arlen & Kraakman, *supra* note 26, at 693.

60. Arlen & Kraakman, *supra* note 26, at 698 n.27; Arlen, *supra* note 26, at 159.

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 26, at 1359; Polinsky & Shavell, *supra* note 26, at 240. 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 bear 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 26, 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*.

61. *See* Arlen & Kraakman, *supra* note 26, at 742; Arlen, *supra* note 26, at 169, 171.

For a discussion of why corporate liability must be criminal as opposed to civil, compare Arlen, *supra* note 18, with Khanna, *supra* note 49, at 1477, Miriam Baer, *Propping up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88, 89 (2018), Mihailis Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 515 (2018), and William Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1285 (2000).

report or fully cooperate than if they do not.[62] Prosecutors must use the evidence they obtain from companies to convict the individual wrongdoers.[63]

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.[64] Evidence that people do not respond to increased sanctions in the way CDT predicts provides an additional impetus for considering the implications of this evidence for deterrence.[65]

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.[66] Consequently, all else equal,[67] people prefer actions that either benefit,

62. *See, e.g.*, Arlen & Kraakman, *supra* note 26, at 711 n.55; Arlen, *supra* note 26, at 145. For a discussion of how to structure corporate liability to achieve these goals, see Arlen, *supra* note 3; ALI, *Principles of Corporate Enforcement*, *supra* note 3, § 6.02 cmt. c.

Optimal corporate liability may not optimally deter when managers, for personal benefit, fail to act in the companies' best interests. *See, e.g.*, Arlen & Kahan, *supra* note 49, at 328; *see also* Arlen & Carney, *supra* note 45, at 702 (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. *See* Arlen & Kahan, *supra* note 49. 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*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING ch. 3 (Jennifer Arlen ed., 2017); Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors*, 105 MICH. L. REV. 1677, 1687 (2007).

63. Arlen, *supra* note 28, at 861–62; Arlen & Kraakman, *supra* note 26, at 693. 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* 26, at 157–72. Second, companies cannot optimally sanction employees whose assets are less than the optimal sanction. Kornhauser, *supra* note 26, at 1349. Employees also are not deterred by the threat of termination if they expect to switch employers before the misconduct is detected, or they fear termination if they do not use crime to increase profits. Arlen, *supra* note 26, at 157–72; Arlen & Carney, *supra* note 45, at 702.

64. 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. REGUL. 480, 481 (2021).

65. For a discussion of empirical evidence undermining CDT's core assumption that increasing sanctions reduces misconduct, see FELDMAN, *supra* note 11, at 64–66, 69, 82–83; Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 JUST. Q. 173, 191, 204 (2006) (a review of studies shows perceived severity of punishment "plays virtually no role in explaining deviant/criminal conduct"). In addition, Eugene Soltes provides additional qualitative evidence, interviewing scores of white-collar criminals and finding little evidence that they weighted the expected risk of misconduct. SOLTES, *supra* note 52, at 98.

66. *See generally* sources cited *supra* note 20.

67. Whether such preferences dominate when satisfying them comes at the expense of self-interest is an issue that we discuss in Part III, *infra*.

or do not harm, others. They also care about behaving ethically and being perceived by others as both an ethical and good member of society.[68]

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.[69] 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.[70]

Scholars have focused on two expressive channels through which the law can influence potential wrongdoers: the social norm mechanism and the social harm mechanism.[71]

68. 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, *see* Karpoff & Lott, *supra* note 40, at 758, or causing a wrongdoer with other-regarding preferences to experience internal costs from harming others or violating a social norm.

69. *See, e.g.*, Cooter, *Good Citizens*, *supra* note 20, at 1583; Cooter, *Models of Morality*, *supra* note 20, at 910; Cooter, *Expressive Law*, *supra* note 20, at 585–86; Dau-Schmidt, *supra* note 20, at 2; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 992 (1995) [hereinafter Lessig, *Regulation*]; FELDMAN, *supra* note 11, at 105; Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2183 (1996) [hereinafter Lessig, *Social Norms*]; Kahan, *supra* note 20, at 350; McAdams, *Origin*, *supra* note 20, at 340; McAdams, *Focal Point Theory*, *supra* note 20, at 1651; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) [hereinafter Sunstein, *Expressive Function*]; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) [hereinafter Sunstein, *Social Norms*]; STOUT, *supra* note 20, at 228; *see also* Bilz & Nadler, *supra* note 20, at 241.

70. *See, e.g.*, Bilz & Nadler, *supra* note 20, at 250–53; BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE 7–9 (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 81–82 (discussing evidence that antilittering laws deter through expressive channels).

71. *See supra* note 69 and accompanying text. 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 ("[D]ifferent legal systems may affect not just the behavior of individuals, but who they are."); Cooter, *Good Citizens*, *supra* note 20, at 1590 (laws can cause people to change their moral values); Dau-Schmidt, *supra* note 20, at 2 (criminal law seeks to establishes new positive "norms of individual behavior by shaping the preferences of criminals and the population at large"); STOUT, *supra* note 20, at 228 ("[C]riminal law *changes what people want*, in the process shifting their behavior from purely selfish and asocial to unselfish and law-abiding."); Daphna Lewinsohn-Zamir, *The Importance of Being Earnest: Two Notions of Internalization*, 65 U. TORONTO L.J. 37, 38 (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 preferences involve the 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 12, at 176. The social norm and harm mechanisms can be reconciled with GDT when individuals are assumed to rely on deliberative decision-making. *See id.* The implications change once it is recognized that people rely on intuitive decision-making processes.

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.[72] A criminal law establishes a social norm when it enjoins conduct that the community previously accepted.[73] A criminal law enhances a social norm when it makes a preexisting social or ethical norm against enjoined conduct more salient.[74] 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.[75] Thus, they may comply with legal norms even if there is little risk of sanction.[76]

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.[77] This expression can deter people who care about others or about being perceived to care about others; it can also express society's view that any personal benefit of the misconduct does not justify imposing such costs.[78]

72. *See* Sunstein, *Expressive Function*, *supra* note 69, at 2022; Sunstein, *Social Norms*, *supra* note 69, at 964; McAdams, *Origin*, *supra* note 20, at 397–98; McAdams, *Focal Point Theory*, *supra* note 20, at 1714; *cf.* Ernst Fehr & Ivo Schurtenberger, *Normative Foundations of Human Cooperation*, 2 NATURE HUM. BEHAV. 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 LAW & CONTEMP. PROBS. 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).

73. 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. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–78dd-2 (1977).

74. *See supra* note 72 and accompanying text.

75. Considerable evidence supports this proposition. *See, e.g.*, Diana C. Robertson, Christian Voegtlin & Thomas Maak, *Business Ethics: The Promise of Neuroscience*, 144 J. BUS. ETHICS 679, 687 (2017); *see also* Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 1, 8 (Jennifer Arlen ed., 2018); Langevoort, *supra* note 11, at 946.

76. *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468–77 (1997); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1402 (2005); McAdams, *Origin*, *supra* note 20, at 383; 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 V.A. For a discussion of whether sanctions for noncompliance may instead crowd out intrinsic motivations to comply with a norm, see *infra* note 99 and accompanying text.

77. The law could express that conduct is excessively harmful to others or to the actor. *See, e.g.*, Kahan, *supra* note 20, at 350–51; Lessig, *Regulation*, *supra* note 69, at 1010; Lessig, *Social Norms*, *supra* note 69, at 2187. The effectiveness of this expression depends on whether people trust legislatures to enact laws in the social interest. *See* Bilz & Nadler, *supra* note 20, at 245–47 (discussing how lack of trust of government authorities can alter the impact of laws).

78. *See, e.g.*, Arlen & Kornhauser, *supra* note 12, at 198–202 (discussing the social harm mechanism). For example, traffic regulations setting speed limits near schools may alter people's beliefs about the danger to children of driving at speeds that would be acceptable in another location. *Id.* at 199–200.

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.[79]

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

CDT assumes that people make choices through a deliberative process that assesses and weighs the full costs and benefits of the available choices.[80] 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.[81] Deliberative decision-making is conscious and involves a weighing of costs and benefits that involves time and cognitive resources.[82] 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.[83] 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,[84] 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.[85] 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

79. 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 1590 (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).

80. *See supra* text accompanying note 40 (distinguishing CDT from general deterrence).

81. *See, e.g.*, KAHNEMAN, *supra* note 14, at 13; Camerer et al., *supra* note 14, at 21, 52 (people use multiple decision-making processes, both deliberative and nonconscious/intuitive); Camerer & Fehr, *supra* note 14, at 47 (same); *see also* Arlen & Talley, *supra* note 14, at *xxviii–xxxii* (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 14, at 20–21.

82. This weighing is often distorted in ways discussed below. *See infra* Part III.

83. *See* KAHNEMAN, *supra* note 14, at 127; Camerer et al., *supra* note 14, at 25–29, 42; Camerer & Fehr, *supra* note 14, at 50.

84. For an extensive discussion of the role of System 1, see KAHNEMAN, *supra* note 14, at 25; Camerer et al., *supra* note 14, 16–18. For a discussion of the role of intuitive decision-making when people are making ethical decisions within organizations, see, for example, BAZERMAN & TENBRUNSEL, *supra* note 34, at 152–63; FELDMAN, *supra* note 11, at 131–37; Langevoort, *supra* note 11.

85. *See infra* text accompanying notes 105–22.

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.[86]

Understanding intuitive decision-making is crucial to optimal deterrence through the criminal law's expressive channels because psychological studies find that social and ethical norms, and thus expressive law, influence behavior through these intuitive processes.[87] Psychological studies have also 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.[88] People experience guilt when they fail to conform to their own expectations for their behavior.[89] People experience shame when they disappoint the expectations and ethical norms of others whose views they value.[90] 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 actors it seeks to influence exist in a decision-making environment that supports or undermines deterrence through expressive law.

86. *Id.*

87. *See, e.g.*, Bibb Latane, *The Psychology of Social Impact*, 36 AM. PSYCH. 343, 354 (1981); FELDMAN, *supra* note 11, at 136–37; *see also* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgement*, 108 PSYCH. REV. 814, 814 (2001) (demonstrating people usually use System 1 to make decisions, but moral reason is a product of System 2).

88. 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 72, at 463; June Price Tangney & Jessica L. Tracy, *Self-Relevant Emotions*, *in* HANDBOOK OF SELF AND IDENTITY 446, 447 (Mark R. Leary & June Price Tangney eds., 2d ed. 2003); Jonathan Haidt, *The Moral Emotions*, *in* HANDBOOK OF AFFECTIVE SCIENCES 852, 859 (R. J. Davidson, K. R. Scherer, & H. H. Goldsmith eds. 2012); Jonathan Haidt & Selin Kesebir, *Morality*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 797, 804 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 2d ed. 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, at 383 (asserting discussing the role of esteem in triggering norm compliance).

89. 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, Scott T. Wolf, A. T. Panter & Chester A. Insko, *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 people's reaction to the conduct. *Id.*

90. *See id.*

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.[91] They thus affect organizational misconduct entirely by affecting the expected benefits from, and costs to, employees of committing misconduct.[92]

Evidence shows that laws also have the potential to deter through expressive channels designed to leverage people's social- or other-regarding preferences.[93] 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.[94] 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.[95]

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

Some legal scholars have developed a deterrence framework that incorporates two of these four insights. Specifically, legal scholars have relied on evidence that the law can deter through expressive channels to challenge the conclusions of CDT regarding individual criminal liability and, to a lesser degree, corporate liability.[96] 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.[97]

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

91. *See, e.g.*, Arlen, *supra* note 28, at 853; Arlen, *supra* note 26; Arlen & Kraakman, *supra* note 26, at 693; Kornhauser, *supra* note 26, at 1350; Polinsky & Shavell, *supra* note 26; *see also* Nuno Garoupa, *Corporate Criminal Liability and Organizational Incentives: A Managerial Perspective*, 21 MANAGERIAL & DECISION ECON. 243, 245 (2000).

92. *See supra* Section II.A.

93. *See* Tangney & Tracy, *supra* note 88, at 447.

94. *See infra* Section IV.A.

95. *See, e.g.*, *infra* Part V; BAZERMAN & TENBRUNSEL, *supra* note 34, at 103; FELDMAN, *supra* note 11, at 220; Langevoort, *supra* note 11, at 944; Langevoort, *supra* note 75, at 18. 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) and THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

96. *See, e.g.*, *supra* notes 25–30 and accompanying text.

97. *See, e.g.*, Dau-Schmidt, *supra* note 20, at 2; Kahan, *supra* note 20, at 351; *see also* Sunstein, *supra* note 20, at 1133; Bilz & Nadler, *supra* note 20, at 258; Cooter, *Good Citizens*, *supra* note 20, at 1578.

or ethical norm can deter by changing people's preferences so that they no longer want to engage in this misconduct.[98] 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.[99]

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.[100] Yet this approach assumes 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.[101]

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 can best deter by relying on companies to express ethical messages to their employees, and should not impose corporate liability because companies will adopt ethical messages on their own and the threat of corporate liability "crowds out" efforts companies otherwise would take to deter.[102] The premise of this claim, that companies will deter misconduct even when they profit from it and it's rarely detected, is not defended.

98. *See, e.g.*, Bilz & Nadler, *supra* note 20, at 241; Cooter, *Good Citizens*, *supra* note 20, at 1594; Sunstein, *supra* note 20, at 1137 ("[A] change in legal rules will produce a change preferences, and people will not attempt to circumvent the new rules."); *see also* Lewisohn-Zamir, *supra* note 71, at 39 (demonstrating 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 12, at 199–210.

99. *See* Bilz & Nadler, *supra* note 20, at 241; Cooter, *Good Citizens*, *supra* note 20, at 1601; Sunstein, *supra* note 20, at 1137; *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY AND COMPLIANCE 1–7 (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 LAW & SOC'Y REV. 549, 580 (1996) (same). These scholars also claim that sanctions may reduce the effectiveness of expressive law by crowding out people's pro-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. *See, e.g.*, BRUNO S. FREY, NOT JUST FOR THE MONEY 7–35 (Edward Elgar) (1997); Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 8–15 (2000) (the decision by a daycare 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 generally* Cherie Metcalf, Emily A. Satterhwaite, J. Shahar Dillbary & Brock Stoddard, *Is a Fine Still a Price? Replication as Robustness in Empirical Legal Studies*, 63 INT'L REV. L. & ECON. 1 (2020); Lewis Kornhauser, Yijia Lu & Stephan Tontrup, *Testing a Fine Is a Price in the Lab*, 63 INT'L REV. L. & ECON. 1 (2020).

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

101. *See id.* at 383.

102. *See* John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1010, 1017, 1020–21 (2022).

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

D. Limitations of ELT

Existing ELT 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. Although these analyses correctly recognize that people have other-regarding preferences and can potentially be influenced by the law's expressive channels,[103] they do not accurately capture how (and when) the law can deter through expressive channels for two reasons. First, they fail to recognize the central role of intuitive decision-making in driving choices. This is important because, as we shall show, evidence on intuitive decision-making reveals that we cannot assume that even a clear, well-known legal injunction automatically influences behavior. Instead, evidence reveals that the law's ability to deter effectively through expressive channels depends on a variety of factors that should be incorporated in any effort to determine optimal corporate and individual liability for organizational misconduct.

Existing ELT 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 on whether they are operating within an organizational decision-making environment that promotes or undermines norms.[104] 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. This suggests that the possibility of deterrence through expressive law, combined with the need to motivate corporations to enhance the effectiveness of expressive law, may increase, rather than decrease, the need for corporate liability for organizational misconduct, contrary to the claims of ELT scholars.

costs and focusing instead on measures designed to reform companies' internal organizational processes, structures, and characteristics to promote ethical conduct. Diamantis, *supra* note 61, at 548–57. For a discussion of why governments cannot optimally deter through a corporate regime predicated on optimal compliance, see *infra* Part 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'IMPRESSA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO 91, 91–112 (Stefano Manacorda and F. Centonze eds., 2018); Arlen & Kahan, *supra* note 49, at 361–64 (explaining why enforcement officials cannot reliably assess compliance *ex ante* independent before misconduct is detected).

103. *See supra* note 101 and accompanying text.

104. *Cf.* Diamantis, *supra* note 61, at 540–44.

III. EVIDENCE-BASED DETERRENCE THEORY AND CHALLENGES OF ORGANIZATIONAL MISCONDUCT

This Part 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 Part, 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 Parts 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 Part II, 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.[105]

Evidence shows that people use intuitive, nonconscious decision-making to make most choices.[106] 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.

105. 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, David A. Harrison & Linda Klebe Treviño, *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCH. 1, 23 (2010); *see also* Rebecca Stone, *Legal Design for the "Good Man"*, 102 VA. L. REV. 1767, 1828–30 (2016); FELDMAN, *supra* note 11, at 125–51; *cf.* Simon Gachter & Jonathan F. Schulz, *Intrinsic Honesty and the Prevalence of Rule Violations Across Societies*, 531 NATURE 496, 496–98 (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 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. Nevertheless, in any population there will be people who will comply with social and ethical norms at all costs or who, on the other hand, are purely egoistic and are not influenced by guilt and shame. This Article focuses on evidence of how most people respond.

106. *See supra* note 105 and accompanying text.

Empirical evidence shows that people are strongly motivated to comply with social or moral norms.[107] They want to perceive themselves and be perceived by others as moral and ethical; they try to avoid conduct likely to trigger guilt, shame, or disapproval.[108] 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.[109] 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.[110] 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.[111]

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.[112] These distortions enable people to make self-interested decisions without being aware that they have acted unethically.[113] Specifically, when faced with a decision, people tend rapidly to make

107. *See supra* note 105 and accompanying text.

108. *See supra* Section II.A; Haidt, *supra* note 87, at 814; *cf. supra* note 105 (on different personalities).

109. *See* Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERS. & SOC. PSYCH. 53, 59–61 (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 34, 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.

110. *See* BAZERMAN & TENBRUNSEL, *supra* note 34, at 35–36.

111. *See id.* 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 id.* at 66–69.

112. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 493–95 (1990).

113. *See, e.g.*, BAZERMAN & TENBRUNSEL, *supra* note 34, 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, 36–38 (1999); Cristina Bicchieri, Eugen Dimant & Silvia Sonderegger, *It's Not a Lie if You Believe the Norm Does Not Apply: Conditional Norm-Following and Belief Distortion*, 138 GAMES & ECON. BEHAV. 321 (2023) (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 R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 160, 160–61 (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, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MKTG. RSCH. 633, 645 (2008); *see also* DANIEL ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES 141–48 (2012); Kess van den Bos, Susanne L. Peters, D. Ramona Bobocel & Jan Fekke Ybema, *On Preferences and Doing the Right Thing: Satisfaction with Advantageous Inequity When Cognitive Processing Is Limited*, 42 J. EXPERIMENTAL SOC. PSYCH. 273, 282–83 (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. RSCH. 171, 181–82 (2004); FELDMAN, *supra* note 11, at 3, 35.

an intuitive decision that identifies, from the perspective of self-interest, their best course of action.[114] They subsequently undertake a conscious deliberation over the choice, weighing the potential perceived costs and benefits of each option.[115] This conscious deliberation, however, 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.[116] For example, people 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.[117] This biased uptake and analysis of information renders people "morally blind" to concerns

114. *See* FELDMAN, *supra* note 11, at 47.

115. *See id.* at 54.

116. *See* sources cited *supra* note 113; BAZERMAN & TENBRUNSEL, *supra* note 34, 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. DECISIONS PROCESSES 272, 275 (1996); *see* BAZERMAN & TENBRUNSEL, *supra* note 34, at 69–72; Langevoort, *supra* note 11, at 951–52; *cf.* Mina Cikara, Emile G. Bruneau, Jay Van Bavel & Rebecca Saxe, *Their Pain Gives Us Pleasure: How Intergroup Dynamics Shape Empathic Failures and Counter-Empathic Responses*, 55 J. EXPERIMENTAL SOC. PSYCH. 110 (2014) (hormonally-driven competitive arousal and egocentric biases also may combine to facilitate moral blindness); Jason Pierce, Gavin J. Kilduff, Adam D. Galinsky & Niro Sivanathan, *From Glue to Gasoline: How Competition Turns Perspective Takers Unethical*, 24 PSYCH. SCI. 1986, 1993 (2013).

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 PROCESSES 176, 176 (1992); Linda Babcock, George Lowenstein, Samuel Issacharoff & Colin Camerer, *Biased Judgements of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1338–39 (1995); *see also* Feldman & Kaplan, *supra* note 11, at 88; Eric L. Uhlmann, David A. Pizarro, David Tannenbaum & Peter H. Ditto, *The Motivated Use of Moral Principles*, 4 JUDGMENT & DECISION MAKING 476, 489 (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.*, Lisa L. Shu, Francesca Gino & Max H. Bazerman, *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY & SOC. PSYCH. BULL. 330, 336–39 (2011); *see* FELDMAN, *supra* note 11, at 47.

117. *See, e.g.*, Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RSCH. 189, 190–91 (2004); Bicchieri et al., *supra* note 113, at 37–38; Francesca Gino, Michael I. Norton & Roberto A. Weber, *Motivated Bayesians: Feeling Moral While Acting Egoistically*, 30 J. ECON. PERSPS. 189, 199–202 (2016); Kunda, *supra* note 112, at 490–91; David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCH. 418, 431–34 (1979) [hereinafter Messick & Sentis, *Fairness and Prejudice*]; David M. Messick & Keith Sentis, *Fairness, Preference, and Fairness Biases*, *in* EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES 70–87 (David M. Messick & Karen S. Cook eds., 1983) [hereinafter Messick & Sentis, *Fairness, Preference, and Fairness Biases*]; *see also* Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCH. 569, 578 (1988); Dolly Chugh, Max H. Bazerman & Mahzarin R. Banaji, *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74 (Don A. Moore, Daylian M. Cain, George Loewenstein & Max H. Bazerman eds., 2005) (discussing nondeliberative processes that enable good people to engage in unethical behavior without perceiving themselves to be unethical); Shu et al., *supra* note 116, 344–45; *cf.* David G. Rand, Joshua D. Greene & Martin A. Nowak, *Spontaneous Giving and Calculated Greed*, 489 NATURE 427, 427–29 (2012) (people in a competitive environment are more likely to behave competitively when using System 1). *See generally* BAZERMAN & TENBRUNSEL, *supra* note 34, at 37, 48–52.

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.[118]

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 benefits companies,[119] 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.[120] 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.[121] 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 will eschew the misconduct, notwithstanding motivated reasoning.[122]

Psychological studies enable us to identify the features of both organizational misconduct and employees' decision-making environment that predictably lead employees to pursue—or refrain from pursuing—self-interest by violating the law. To develop a framework that predicts when the law can deter through expressive channels, it is important to identify the factors that enable the law to establish a social or ethical norm and identify the circumstances that lead people to sacrifice personal benefit in order to comply with legal and social norms.

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.[123]

118. Messick & Sentis, *Fairness and Prejudice*, *supra* note 117, at 434; Messick & Sentis, *Fairness, Preference, and Fairness Biases*, *supra* note 117, at 70; *see* BAZERMAN & TENBRUNSEL, *supra* note 34, at 50, 66–72, 79; Bicchieri et al., *supra* note 113, at 38; *see also* Don A. Moore, Lloyd Tanlu & Max H. Bazerman, *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37, 47 (2010) (finding that people truly believe their own biased judgements and thus fail to recognize that their behavior is unethical).

119. *See* Arlen & Kraakman, *supra* note 26, at 688.

120. *See id.* at 693.

121. *See id.* at 757.

122. 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 113, at 161.

123. This discussion focuses on evidence about the factors that influence most people's choice between self-interest and legal/ethical compliance. For a discussion of personality differences, see *supra* note 105.

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 when an opportunity to engage in misconduct arises.[124] 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.[125] 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.[126] They are also more responsive to a threat of harm to people they know or to those in their immediate vicinity or same social group.[127] By contrast, they tend not to care deeply about harm to unidentified strangers, especially those who are socially or geographically distant from them.[128] 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.[129] Thus, in assessing deterrence through expressive law, one must ask whether the decision-making environment is structured to prime people to focus on self-interest and profit or, alternatively, on ethical concerns and duty to others.[130]

124. 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 113, at 161.

125. *See* SOLTES, *supra* note 52, at 124.

126. *See, e.g.*, Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26(1) J. RISK & UNCERTAINTY 5, 5 (2003) [hereinafter Small & Loewenstein, *Helping a Victim*]; Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punishment*, 18 J. BEHAV. DECISION MAKING 311, 312 (2005) [hereinafter Small & Loewenstein, *Devil*]; Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157, 158 (2005) [hereinafter Kogut & Ritov, *Identified Victim*]; Tehila Kogut & Ilana Ritov, *The Singularity Effect of Identified Victims in Separate and Joint Evaluations*, 97 ORG. BEHAV. & HUM. DECISION PROCESSES 106, 107 (2005) [hereinafter Kogut & Ritov, *Singularity Effect*]; Cialdini & Trost, *supra* note 113, at 159–60 (observing people feel less obligated to those they are in exchange relationships with, such as customers); *see also* SOLTES, *supra* note 52, at 123 (discussing how absence of clearly identified victims facilitates misconduct by white-collar criminals).

127. *See* Small & Loewenstein, *Devil*, *supra* note 126, at 317.

128. *See, e.g.*, Elizabeth Hoffman, Kevin McCabe & Vernon L. Smith, *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653. 659 (1996).

129. *See* Cialdini & Trost, *supra* note 113, at 161.

130. *See infra* Part IV.

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.[131]

Fifth, the law's ability to deter through expressive channels also depends on the ease with which people employing motivated reasoning can justify misconduct.[132] This in turn depends on whether people's decision-making environment provides an acceptable pro-social justification for the self-serving illegal behavior.[133] 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.[134]

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.[135] Compliance by others is the most salient demonstration of whether the society within which the employee operates views the legal injunction as a valid social or ethical norm.[136] Noncompliance by others enables employees to violate the law without shame, as shame is triggered by anticipated condemnation by others.[137] Studies show people do not condemn others for violating laws when violations are common and socially accepted.[138] Others' violations of the law may also 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.[139] 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.

131. *See infra* Subsection IV.C.2.

132. *See supra* notes 112–15 and accompanying text (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., *supra* note 117, at 190; Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. L. REV. 1205, 1207 (2020) (discussing how 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 coworkers).

133. *See* Bicchieri et al., *supra* note 113, at 2–3.

134. *See supra* text accompanying notes 127–28 (discussing the relevance of identified people and social and geographic distance).

135. 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 113, at 154; VAN ROOIJ & FINE, *supra* note 70, at 125–35 (finding perceived injunctive social norms depend critically on the perceived behavior of others); *see also* Fehr & Schurtenberger, *supra* note 72, at 463 (finding the formation and persistence of an injunctive norm depends on the anticipation that norm violations will be sanctioned).

136. *See* Fehr & Schurtenberger, *supra* note 72, at 458, 463.

137. *See id.*

138. *See id.* at 465.

139. *See* Cialdini & Trost, *supra* note 113, at 172.

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.[140] Indeed, they perceive the self-interested conduct of those around them as the dominant social norm.[141]

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.[142] Studies show that people only experience such emotions when, and to the extent that, they feel responsible for the decision that produced the outcome.[143] People's perception of the set of choices for which they are responsible, moreover, diverges from the set of choices that they objectively helped caused

140. *See* Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance from One's Moral Compass*, 119 ORG. BEHAV. & HUM. DECISION PROCESSES 15, 15, 23 (2012).

141. 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.*, *id.* at 15, 23 (finding 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).

142. *See supra* Subsection II.B.3. 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.

143. 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, 179 (2015); Björn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility*, 79 REV. ECON. STUD. 67, 67 (2012) (finding 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, George Loewenstein & Roberto A. Weber, *Self-Interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship*, 100 AM. ECON. REV. 1826, 1826 (2010); Zachary Grossman & Regine Oexl, *Delegating to a Powerless Intermediary: Does It Reduce Punishment?*, 16 EXPERIMENTAL ECON. 306, 308 (2012); Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship Between Blame Shifting and Control*, 12 J. EMPIRICAL LEGAL STUD. 311, 334 (2015) (finding principals can evade blame by delegating conduct to others, even when agents are effectively powerless); Mary Steffel & Elanor F. Williams, *Delegating Decisions: Recruiting Others to Make Choices We Might Regret*, 44 J. CONSUMER RSCH. 1015, 1015–16 (2018); Marwa El Zein, Bahador Bahrami & Ralph Hertwig, *Shared Responsibility in Collective Decisions*, 3 NATURE HUM. BEHAV. 554, 555 (2019) (finding collective decision-making shields people from the psychological costs of negative outcomes by reducing both regret or self-blame and third-party blame); MARWA EL ZEIN & BAHADOR BAHRAMI, COLLECTIVE DECISIONS DIVERT REGRET AND RESPONSIBILITY AWAY FROM THE INDIVIDUAL 1 (2019); Adam Waytz & Liane Young, *The Group-Member Mind Trade-Off: Attributing Mind to Groups Versus Group Members*, 23 PSYCH. SCI. 77, 78 (2012) (finding the more a group appears to have a group mind the less others attribute responsibility to its individual members); Neeru Paharia, Karim S. Kassam, Joshua D. Greene & Max H. Bazerman, *Dirty Work, Clean Hands: The Moral Psychology of Indirect Agency*, 109 ORG. BEHAV. & HUM. DECISION PROCESSES 134 (2009); Marcel Zeelenberg, Wilco W. van Dijk & Antony S. R. Manstead, *Reconsidering the Relation Between Regret and Responsibility*, 74 ORG. BEHAV. & HUM. DECISION PROCESSES 254, 255 (1998); *cf.* Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 LAW & CONTEMP. PROBS. 1, 2, 5 (2012).

to occur.[144] 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.[145] By contrast, ELT assumes that people automatically respond to the law's expression.[146] By contrast, EDT reveals that deterrence depends on whether the law can establish a sufficiently salient injunctive norm to overcome the bias towards self-interest.[147] 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 whether organizational liability is structured to induce organizations 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 Section 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.[148] 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.

144. *See* Barbara A. Spellman, *Crediting Causality*, 126 J. EXPERIMENTAL PSYCH. 323, 346 (1997).

145. Arlen & Kornhauser, *supra* note 12, at 189.

146. *See infra* Section II.D.

147. *See infra* Part III.

148. For a discussion of the challenges of deterring organizational misconduct through individual sanctions alone, see Arlen & Kraakman, *supra* note 26, at 688, 695; Arlen, *supra* note 26, at 171.

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.[149] In many areas in which the law has been shown to deter through expressive channels, people obtain little, if any, financial benefit from the violation.[150] 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.[151] But employees who offend also obtain substantial benefits. These benefits include bonuses, promotions, and enhanced job security.[152] They may also gain greater social standing within the firm as a result of their actions to benefit the firm.[153] 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 does not, alone, create a prohibition that employees will necessarily know about and deem to be unethical.[154] 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 institutions that convey information about ethicality or legality—such as schools, religious institutions, and the TV news—usually discuss.[155] 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

149. *See supra* Section III.B.

150. *See* VAN ROOIJ & FINE, *supra* note 70, at 7–8, 81–82 (discussing the expressive effect of seatbelt laws and antilittering laws on seatbelt usage and littering, respectively).

151. *See* Arlen & Kraakman *supra* note 26, at 704.

152. *See id.*

153. *See id.*

154. This holds unless companies intervene to make it salient. *See infra* Part IV.

155. *See supra* Part II.

with laws requiring financial institutions to file Suspicious Activity Reports.[156] 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.[157] 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 creates 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 do not risk certain harm to identifiable people.[158] They also place far less weight on conduct that risks harm to people who are geographically, socially, or temporally distant.[159] Finally, some organizational misconduct, such as environmental violations, involves harm that may not occur for years.

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.[160] As these others are socially close, the other-regarding justification for the misconduct tends to be far more salient

156. *See, e.g.*, *Catholic Social Teaching & the Death Penalty*, CATH. MOBILIZING NETWORK, https://catholicsmobilizing.org/catholic-social-teaching-death-penalty (last visited Jan. 29, 2023) [https://perma.cc/4G49-UDGS]; *Sexual Assault & Sexual Harassment*, EQUAL RTS. ADVOCS., https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/ (last visited Jan. 29, 2023) [https://perma.cc/QX4Z-5TXY]

157. 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* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1.Yet long after the adoption of the FCPA, foreign bribery remained commonplace. Moreover, consistent with motivated reasoning, people regularly appeared to justify bribery on the grounds that it complies 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 enormous imposed sanctions that exceeded the benefit of corruption, for reasons that we explicate below.

158. *See* Hoffman et al., *supra* note 128, at 659.

159. *See supra* Section III.B.

160. *See* Arlen & Kraakman *supra* note 26, at 704.

than the harm caused by the misconduct.[161] Employees perceive themselves to be good actors because they are helping others.[162]

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.

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.[163] 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.[164] 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.[165] Finally, people deciding in a group, as through consensus or voting, tend not to view themselves as responsible for the collective decision.[166]

161. *See* BAZERMAN & TENBRUNSEL, *supra* note 34 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. Wiltermuth, *Cheating More When the Spoils Are Split*, 115 ORG. BEHAV. & HUM. DECISION PROCESSES 157, 159 (2011); Francesca Gino, Shahar Ayai & Dan Ariely, *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, 1153–54 (2009); *see also* Cialdini & Trost, *supra* note 113, 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); Nadler, *supra* note 132, at 1214 (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 Langes eds., 2016).

162. *See* Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCH. REV. 193, 194–95 (1999); FELDMAN, *supra* note 11, at 223.

163. *See* sources cited *supra* note 143.

164. *See* Spellman, *supra* note 144, at 323; *see* Arlen & Tontrup, *supra* note 143, at 152.

165. *See* Spellman, *supra* note 144, at 323; *see* Arlen & Tontrup, *supra* note 143, at 152.

166. For example, people do not anticipate regret over decisions that are the product of a majority vote. Indeed, people tend not to 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 143, at 162.

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.[167] Moreover, responsibility-sharing not only mutes guilt; it also mutes shame because other people tend not to view an actor who shared responsibility as primarily responsible for the unethical choice.[168]

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.

IV. OPTIMAL CORPORATE CRIMINAL LIABILITY FOR ORGANIZATIONAL MISCONDUCT

This Part employs EDT to show why corporate liability is a 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.[169]

The previous Part 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

Consistent with this, evidence shows that people tend to behave less ethically in groups than alone. *See* FELDMAN, *supra* note 11, at 4.

167. *See, e.g.*, Bartling & Fischbacher, *supra* note 143, at 68; Hamman et al., *supra* note 143, at 1828; Arlen & Tontrup, *supra* note 143, at 175. 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 143, at 69; Hamman et al., *supra* note 143, at 1843. Indeed, this result holds even if the decision-maker who had the choice set the agent's compensation to favor one choice over another. *See* Arlen & Tontrup, *supra* note 143, at 146. Delegation also can mute 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 144, at 323. 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 they do not fully consider either the potential consequences of the preferred choice or alternative options. BAZERMAN & TENBRUNSEL, *supra* note 34, at 15–16. People also can displace responsibility by blaming a superior who they believe ordered (directly or implicitly) the unlawful act. *See* FELDMAN, *supra* note 11, at 223–24.

168. *See generally* Paharia et al. *supra* note 143.

169. *See, e.g.*, Arlen & Kraakman, *supra* note 26, at 752–53; Arlen, *supra* note 26; *see also* Arlen & Kahan, *supra* note 49, at 347–52.

sufficiently salient and material injunctive social norm. This Part 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' pro-social 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.[170] Moreover, interventions that deter are expensive. Companies incur direct costs from compliance, training, and investigations.[171] They also incur indirect costs from reduced productivity from deterrence measures designed to mute employees' single-minded focus on profit.[172] 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.[173]

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.[174] Yet the law and legal institutions are not the primary arbiter of social and moral norms for

170. 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, at 925. And even less would be detected absent corporate liability designed to induce self-reporting. *See* Arlen & Kraakman, *supra* note 26, at 747. 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 only harms non-counterparties, such as environmental violations. *See* Alexander & Arlen, *supra* note 40, at 2. An organization also 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 id.*

171. *See* BAZERMAN & TENBRUNSEL, *supra* note 34, at 102.

172. *See generally id.*

173. *See supra* Section II.A.

174. *See supra* Subsection III.C.1.

employees. A host of other institutions shape perceptions about social norms and responses to the law's efforts to deter through expressed norms.[175]

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,[176] the law cannot reliably deter organizational misconduct through expressive channels unless several conditions are met. First, employees must know the 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.[177] 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.[178] Organizations determine whether these conditions are met.

Our society relies on corporations to teach their employees the relevant laws on organizational misconduct.[179] 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

175. *See* Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject for Study*, 7 LAW & 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.); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 474, 476 (2006); Diamantis, *supra* note 61, 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 61, at 89; Langevoort, *supra* note 11, at 963.

176. *See supra* Part II.

177. *See supra* Section III.B.

178. *See* Bilz & Nadler, *supra* note 20, at 254 (discussing how lack of trust in the legitimacy of government actions can undermine the law's ability to deter through expressive channels).

179. *See supra* Section III.B.

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.[180]

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;[181] 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.[182]

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.[183] Knowingly or unknowingly, organizations, even when publicly espousing "good business practices,"[184] negate the law's expressive message when they adopt compensation, promotion, and retention policies that prioritize employee performance over ethics and enable line managers to base performance reviews and salary determinations solely on objective measures of productivity.

180. *See supra* Section III.B.

181. *See, e.g.*, Neil M. Barofsky, Matthew D. Cipolla & Erin R. Schrantz, *Changing Corporate Culture*, *in* THE GUIDE TO MONITORSHIPS 14 (Anthony S. Barkow, Neil M. Barofsky & Thomas J. Perrelli eds. 2019) (middle managers in effect set the cultural tone experienced by employees).

182. *Cf.* STOUT, *supra* note 20, at 219–20. 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.

183. *See supra* Section III.B.

184. Organizations' public statements of culture are often at odds with the informal corporate culture that guides their employees' behavior. *Cf.* Ann E. Tenbrunsel, Kristin Smith-Crowe & Elizabeth E. Umphress, *Building Houses on Rocks: The Role of Ethical Infrastructure in Organizations*, 16 SOC. JUST. RSCH. 285, 288 (2003); *see* BAZERMAN & TENBRUNSEL, *supra* note 34, at 103–04, 114–15. Organizations that allow informal cultures that promote profit over misconduct, in effect, express their view that legal compliance is not a priority.

Through these actions, employees learn that the dominant authority at their companies values outcomes over all else, including legal compliance.[185] The recurrent drumbeat of this message pushes profit to the forefront and relegates legal injunctions and ethics to the shadows.[186]

Companies also can also 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.[187]

C. Organizations Determine the Salience of the Legal Injunction

Organizations not only educate employees about the law but also control most of the features of employees' decision-making environment, which determines 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

185. *See, e.g.*, BAZERMAN & TENBRUNSEL, *supra* note 34, at 104, 117, 119; Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS 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 underperforming 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 U. L. REV. 413, 430–34 (2020) (finding that employees in units with unaddressed ethical allegations are less likely to internally report misconduct and, potentially, more likely to engage in it).

186. 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 ANN. REV. PSYCH. 591, 596 (2004); *see also* Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, *in* RESEARCH IN ORGANIZATIONAL BEHAVIOR 1, 7 (B. M. Staw & R. M. Kramer eds., 2003) (noting how subordinates follow their supervisors instructions even if it would lead to an unethical or illegal act); Arthur P. Brief, Robert T. Buttram, Jodi D. Elliott, Robin M. Reizenstein & Richard L. McCline, *Releasing the Beast: A Study of Compliance with Orders to Use Race as a Selection Criterion*, 51 J. SOC. ISSUES 177, 179 (1995) (applying subordinate obedience to argue that subordinates will take race into account with job applications at the direction of a superior even though the practice is illegal and considered unethical).

187. *See* VAN ROOIJ & FINE, *supra* note 70, at 39–40 (discussing how deterrence depends on the perceived risk of punishment which in turn requires that enforcement be effectively and regularly communicated to potential wrongdoers).

salient norm that can overcome employees' self-interested motivations for misconduct.[188] 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.[189] Second, organizations regularly undermine expressive law by structuring employees' tasks to curtail their attention to ethics.[190] Third, organizations regularly provide employees with pro-social justifications for violating the law.[191] Finally, companies' internal disciplinary policies and practices determine whether employees exist in a local culture that supports or ignores the law's injunctions.[192]

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.[193] Organizations are the direct beneficiaries of crimes such as corruption, securities fraud, environmental violations, price-fixing, and corporate fraud.[194] 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.[195]

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.[196] Psychology finds that employees primarily rely on intuitive decision-making, which treats self-interest as the primary objective. Self-interest triggers

188. *See, e.g.*, Charles W. L. Hill, Patricia C. Kelley, Bradley R. Agle, Michael A. Hitt & Robert E. Hoskisson, *An Empirical Examination of the Causes of Corporate Wrongdoing in the United States*, 45 HUM. RELS. 1055, 1056 (1992).

189. *See* Arlen & Kraakman, *supra* note 26, at 702, 752.

190. *See, e.g.*, *id.* at 710; BAZERMAN & TENBRUNSEL, *supra* note 34, at 117, 119.

191. *See, e.g.*, Arlen & Kraakman, *supra* note 26, at 704; SOLTES, *supra* note 52, at 169–70, 197.

192. *See* Arlen & Kraakman, *supra* note 26, at 702.

193. Arlen, *supra* note 26, at 144, 164–65 (noting how organizations directly impact employees' expected benefit from misconduct).

194. *See, e.g.*, *id.* (noting the indirect employee benefits from misconduct due to the increase in firm profits that are then shared by employees).

195. *See* Macey, *supra* note 28, at 322, 324 (concluding the corporate crime is an agency cost); Arlen, *supra* note 26, at 144 (noting how organizations directly impact employees' expected benefit from misconduct); Arlen & Kraakman, *supra* note 26 (same); *see also* Arlen & Carney, *supra* note 45, at 692, 702, 726 (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. *See* Hill et al., *supra* note 188, at 1062; John R. Lott, Jr. & Tim C. Opler, *Testing Whether Predatory Commitments Are Credible*, 69 J. BUS. 339, 343, 348–49 (1996); Mark A. Cohen and Sally S. Simpson, *The Origins of Corporate Criminality: Rational Individual and Organizational Actors*, *in* DEBATING CORPORATE CRIME 33, 39, 44–45 (William S. Lofquist, Mark A. Cohen, & Gary A. Rabe, eds., 1997).

196. *See, e.g.*, Becker, *supra* note 24, at 201, 202.

motivated reasoning, which enables employees to violate the law without experiencing guilt or shame.[197]

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.[198] 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.[199]

2. Control over Job Structure: Time Pressure, Targeted Goals, and Multitasking

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.[200] By contrast, deliberative processes, when activated and dominant, place greater weight on other-regarding moral concerns.[201] 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.[202]

197. *See supra* Section III.B; sources cited *supra* note 113.

198. *See, e.g.*, Maryam Kouchaki, Kristin Smith-Crowe, Arthur P. Brief & Carlos Sousa, *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORG. BEHAV. & HUM. DECISION PROCESSES 53, 54 (2013).

199. 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. *See id.* at 54, 59; *see also* Qing Yang et al., *Diverging Effects of Clean Versus Dirty Money on Attitudes, Values, and Interpersonal Behavior*, 104 J. PERSONALITY & SOC. PSYCH. 473, 473 (2013); Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 214, 216 (Eyal Zamir & Doran Teichman eds., 2014).

200. *See supra* text accompanying notes 109–20 (discussing motivated reasoning and self-interest); Moore & Loewenstein, *supra* note 117, at 189, 194; *see also* Francesca Gino, Maurice E. Schweitzer, Nicole L. Mead & Dan Ariely, *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORG. BEHAV. & HUM. DECISION PROCESSES 191, 192 (2011) (finding that the level of control needed to behave ethically exceeds the level needed to take a self-interested unethical act); *cf.* Rand et al., *supra* note 117, at 427 (people in a competitive environment are more likely to be competitive, as opposed to cooperative, when they use System 1 reasoning).

201. KAHNEMAN, *supra* note 14, at 21, 369.

202. Full deliberation takes time and mental effort, which is why intuitive decision-making tends to dominate. BAZERMAN & TENBRUNSEL, *supra* note 34, at 50–51; *see* Nicole L. Mead, Roy F. Baumeister, Francesca Gino, Maurice E. Schweitzer & Dan Ariely, *Too Tired to Tell the Truth: Self-Control Resource Depletion and Dishonesty*, 45 J. EXPERIMENTAL SOC. PSYCH. 594, 594–97 (2009). Placing people under time pressure or other cognitive burdens increases their propensity to engage in misconduct. *See, e.g.*, Shaul Shalvi, Ori Eldar & Yoella Bereby-Meyer, *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCH. SCI. 1264, 1264, 1268 (2012);

Companies further suppress ethical considerations by subdividing 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 on that objective, without considering whether their actions are illegal or unethical.[203] The tunnel-vision problem is exacerbated when employees are also required to make multiple distinct decisions in a limited amount of time.[204] Employees under this cognitive strain rely on intuitive decision-making processes, which lead them to prioritize self-interest and achieving their employer's objectives, morally blind and deaf to ethicality and the exhortations of expressive law.[205]

3. Provision of an Alternative Pro-Social Norm

Empirical studies show that employees are more likely to commit crimes if they can justify their conduct as benefiting others.[206] This justification amplifies the negative effect of motivated reasoning[207] by enabling employees to benefit from organizational misconduct while telling themselves that they are acting to benefit others and thus are ethical.[208]

Organizations regularly provide employees such pro-social justifications. For example, they frequently predicate employees' compensation on the performance of their unit or the firm.[209] As a result, an employee acting to benefit herself by boosting her unit's performance also benefits her coworkers.[210] Companies also regularly enhance the salience of such other-regarding motivations

Nils C. Köbis, Bruno Verschuere, Yoella Bereby-Meyer, David Rand & Shaul Shalvi, *Intuitive Honesty Versus Dishonesty: Meta-Analytic Evidence*, 14 PERSPS. ON PSYCH. SCI. 778, 779, 792 (2019); Brian C. Gunia, Long Wang, Li Huang Insead, Jiunwen Wang & J. Keith Munighan, *Contemplation and Conversation: Subtle Influences on Moral Decision Making*, 55 ACAD. MGMT. J. 13, 16, 28 (2013); *see also* Mead et al., *supra*, at 594–97; FELDMAN, *supra* note 11, at 45–46 (discussing the evidence).

203. 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 34, at 107–08. Moreover, motivated reasoning leads people to favor outcomes the firm rewards and to dismiss considerations against their preferred choice. *Cf.* SOLTES, *supra* note 52, at 149–50. 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 52, at 149–54; BAZERMAN & TENBRUNSEL, *supra* note 34, at 104, 109.

204. FELDMAN, *supra* note 11, at 4, 17.

205. *See supra* note 203 and accompanying text.

206. *See, e.g.*, Gino et al., *supra* note 161, at 285; Nadler, *supra* note 132, at 1207, 1215–16.

207. *See supra* note 111 and accompanying text (discussing the conflict between the "want self" and more deliberative "should self").

208. *See supra* Subsection III.C.3; *supra* notes 113, 117; *see also* SOLTES, *supra* note 52, at 169–74, 197 (many executives committing securities fraud felt as though they were helping others, the firm, and the shareholders); FELDMAN, *supra* note 11, at 51–52 (discussing moral licensing and moral justification).

209. *See supra* note 199 and accompanying text.

210. For example, bribery that enables the firm to make a big sale or an 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.

through interventions designed to promote service to the firm and one's immediate team as a dominant local social norm.[211]

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.[212] 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.[213] 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.[214] Negation of anticipated shame eliminates expressive law's most important channel of influence.[215]

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 countervailing considerations.[216] Thus, corporations that promote loyalty to the firm and fellow employees in effect enable misconduct by providing the fuel needed 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 because 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;[217] they tend not to care deeply about statistical lives or people who are distant socially, geographically, or temporally.[218] Coworkers are proximate in time and space and tend to be in a similar

211. Priming employees to focus primarily on productivity also promotes misconduct by promoting financial considerations over ethical ones. *See supra* note 199 and accompanying text.

212. *See* BAZERMAN & TENBRUNSEL, *supra* note 34, at 72–76; *see also* FELDMAN, *supra* note 11, at 150–51. 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 coworkers).

213. *See, e.g.*, Gino et al., *supra* note 161, at 289.

214. *See, e.g.*, BAZERMAN & TENBRUNSEL, *supra* note 34, at 86.

215. *See supra* text accompanying notes 114–18 (discussing motivated reasoning and moral blindness).

216. *See supra* text accompanying notes 113–24.

217. *See supra* Subsection III.B.

218. *See* Small & Loewenstein, *Helping a Victim*, *supra* note 126, at 6; Kogut & Ritov, *Identified Victim*, *supra* note 126, at 157–58; Kogut & Ritov, *Singularity Effect*, *supra* note 126, at 106. 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. *See* BAZERMAN & TENBRUNSEL, *supra* note 34, at 94–99.

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.[219]

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[220] and enables employees to commit self-interested crimes without guilt, suffused with the warm glow of having acted to benefit others.[221]

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.[222] 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.[223] 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.[224] They undermine the law's expressive effect when they do not sanction those that engage in misconduct or do so without informing other employees.[225]

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

219. *See* SOLTES, *supra* note 52, at 115–30.

220. *See* Nadler, *supra* note 132, at 1215; Gino et al., *supra* note 161, at 289; Gino & Pierce, *supra* note 161. 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. *See, e.g.*, John Angus D. Hildreth, Francesco Gino & Max Bazerman, *Blind Loyalty? When Group Loyalty Makes Us See Evil or Engage in It*, 132 ORG. BEHAV. & HUM. DECISION PROCESSES 16, 16–17 (2016); Ori Weisel & Shaul Shalvi, *The Collaborative Roots of Corruption*, 112 PROC. NAT'L ACAD. SCI. 10651 (2015); *see* Langevoort, *supra* note 11, at 947.

221. *See, e.g.*, BAZERMAN & TENBRUNSEL, *supra* note 34, at 72–76; SOLTES, *supra* note 52, at 169–70 (the availability of pro-social justifications facilitates misconduct); *id.* at 197 (many executives committing securities fraud can feel as though they were helping others, the firm and the shareholders); FELDMAN, *supra* note 11, at 51–52 (discussing moral licensing and moral justification).

222. *See, e.g.*, Cialdini & Trost, *supra* note 113, 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 coworkers).

223. *See* Fehr & Schurtenberger, *supra* note 72, 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.

224. *See* Arlen & Kraakman, *supra* note 26, at 707; *see also* Soltes, *supra* note 1, at 931 (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, at 718.

225. 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 26, at 706.

regularly behave unethically without guilt or shame.[226] 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 norm.[227] They will not experience shame because people do not anticipate social condemnation when violations are commonplace and unsanctioned.[228]

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.[229] 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.[230] 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.[231] 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. In this context, the whole team will focus on the assigned objective and is unlikely to experience guilt or shame over satisfying that objective by violating the law.[232]

226. *See supra* text accompanying notes 181–84. *See generally* Soltes, *supra* note 1 (employees in units with unaddressed ethical allegations are more likely to engage in misconduct).

227. *See* Cialdini & Trost, *supra* note 113, at 171–72; VAN ROOIJ & FINE, *supra* note 70, at 101 (people are more likely to violate the law when doing so is normal); Robert B. Cialdini, *Crafting Normative Measures to Protect the Environment*, 12 CURRENT DIRECTIONS PSYCH. SCI. 105, 105 (2003); Robert B. Cialdini, *Descriptive Social Norms as Underappreciated Sources of Social Control*, 72 PSYCHOMETRIKA 263, 263 (2007); Robert B. Cialdini et al., *Managing Social Norms for Persuasive Impact*, 1 SOC. INFLUENCE 3, 3 (2006); Bicchieri et al., *supra* note 113, at 37–38.

228. *See* Fehr & Schurtenberger, *supra* note 72, at 458; 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).

229. *See supra* text accompanying notes 164–68. Max H. Bazerman & Ann Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV., Apr. 2011 ("Managers routinely delegate unethical behaviors to others, and not always consciously.").

230. 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 167; Bazerman & Tenbrunsel, *supra* note 229 ("Managers routinely delegate unethical behaviors to others, and not always consciously.").

231. *See* BAZERMAN & TENBRUNSEL, *supra* note 34, at 16.

232. *See supra* text accompanying notes 203–05.

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, however, absent legal intervention. They regularly profit from misconduct while the actions needed to deter misconduct are costly.[233] 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 pro-social norms, the establishment of goal-specific teams, and placing large demands on employees.[234]

Accordingly, corporate liability must ensure that companies are better off when employees comply with the law.[235] 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 would eliminate corporations' incentives to use their authority over employees' decision-making environment to negate the law's ability to deter through expressive pathways.[236]

Corporate liability structured to remove companies' profit from misconduct also helps deter through expressive channels through its effect on managers and employees. As previously 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.[237] 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 remove employees' pro-social justification for misconduct.

233. *See* Arlen & Kraakman, *supra* note 26, at 690–91.

234. *See supra* Section IV.C.

235. For a discussion of why criminal liability imposed on individual employees will not provide companies with optimal incentives to deter misconduct, see *supra* note 60; *see* Arlen, *supra* note 26, at 167.
Absent corporate liability, companies are not adequately deterred by their expected cost from reputational damage should their employees' misconduct be detected. *See supra* note 170.

236. 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 II.A; Arlen & Kraakman, *supra* note 26, at 706; Arlen, *supra* note 26, at 170–71.

237. *See, e.g.*, Gino et al., *supra* note 161, at 289.

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 also helps explicate[238] why corporate criminal liability should not be restricted to companies that had an ineffective compliance program, as some scholars recommend[239] and some states and countries have done.[240]

The claim that companies with an effective compliance program should not be liable is predicated on the view that the compliance program is the main vehicle through which companies influence their employees' likelihood of misconduct. This is not the case. As the present analysis shows, companies materially affect their employees' likelihood of misconduct in a host of other ways that can lead employees to engage in misconduct even in companies that ostensibly have adopted apparently effective ethical policies and compliance procedures. To deter effectively, governments need to induce companies to take the risk of misconduct into account when structuring all their internal operations that affect employees' likelihood of misconduct.

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 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

238. 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 and exists along a continuum. *See* ALI, *Principles of Corporate Enforcement*, *supra* note 3, § 6.03. 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 ongoing misconduct, which in effect eliminates the compliance defense for most material crimes. *See generally* Arlen, *supra* note 102; Arlen & Kraakman, *supra* note 26, at 770; Arlen & Kahan, *supra* note 49, at 323. 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 26, at 185.

239. *See, e.g.*, Laufer & Strudler, *supra* note 61, at 1286, 1297; Harvey L. Pitt & Karl Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduc*t, 71 B.U. L. REV. 447, 452 (1991) (advocating elimination of corporate liability altogether for organizations with employees that violate compliance programs); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1322 (2007); *see also* William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 689–726 (1994) (suggesting how corporate culpability and liability may be reconceptualized as constructive fault); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 689 (1995).

240. *See* Arlen & Kraakman, *supra* note 26, at 728–29; Arlen, *supra* note 26, at 177–97.

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.[241]

Governments cannot optimally deter by replacing broad corporate liability with a rule that requires companies to take optimal actions with respect to every feature of the corporate decision-making environment that materially influences the likelihood of crime, insulating companies from liability if they do so. As this Part 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.[242] 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 can also use their internal reporting systems to assess the effectiveness of their systems and can identify specific individuals who either are particularly effective at inducing ethical behavior or are undermining corporate culture.

V. INDIVIDUAL LIABILITY AND IMPORTANCE OF INDUCING CORPORATE POLICING

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,[243] but it is not sufficient. This Part 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.[244] 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 Part also shows that achieving this latter goal requires both active enforcement against individuals and the adoption of a corporate liability regime that incentivizes companies to detect, investigate, self-report, and fully cooperate. The

241. For additional CDT-based arguments against a compliance defense, see generally Arlen & Kraakman, *supra* note 26, at 687–88; Arlen, *supra* note 102.

242. *See* Arlen & Kraakman, *supra* note 26, at 728–29 (making a similar point about effective compliance); *see also* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 285 (1986) (negligence liability can lead to excessive or ineffective care if the legal decision-makers err in their assessment about what constitutes optimal care).

243. *See* Arlen & Kraakman, *supra* note 26, at 754; Arlen, *supra* note 26, at 178.

244. *See supra* Section IV.A.

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.[245]

A. Vital Role of Individual Liability

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

1. Individual Liability as a Counterweight to Self-Interest

EDT reveals that individuals' incentives to commit misconduct stand as the primary impediment to deterrence either through traditional sanctions or through the law's expressive channels.[246] Thus, criminal law cannot effectively deter when individuals expect to 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.[247]

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.[248] 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.[249] EDT reaches a different result because evidence on intuitive decision-making finds that people tend to ignore a threat of

245. *See* Arlen, *supra* note 26, at 178; Arlen & Kraakman, *supra* note 26, at 689.
246. *See supra* Part IV.
247. *See supra* note 63 and accompanying text.
248. *See supra* Section IV.C.
249. *See supra* Section II.A.

sanction unless the risk of sanction is sufficiently great to be salient.[250] In addition, enforcement authorities and firms need to ensure that enforcement is kept fresh in employees' minds.[251] 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.[252]

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 it 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.[253]

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.[254] People often predicate their perceptions of the immorality of a prohibited act on the sanctions imposed for its violation.[255] Criminal laws that are not enforced tend not to be perceived as reflecting a genuine norm.[256] Societies often indicate that a legal injunction is no longer important through nonenforcement.[257] 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

250. VAN ROOIJ & FINE, *supra* note 70, 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%. *Id.*

251. *See* Cialdini & Trost, *supra* note 113, at 161 (priming people with stories of people who were punished renders an injunctive norm more effective).

252. *Id.*

253. Thus, contrary to the views of some expressive law scholars, *see supra* text accompanying notes 96–102, enforcement is not rendered unnecessary by expressive law but is instead essential to the law's ability to deter through expressive channels. *See* Kahan, *supra* note 20, at 363.

254. *See supra* note 101 and accompanying text.

255. 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.*, JACK P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE 58 (1975); Kahan, *supra* note 20, at 351; Raymond Paternoster, Linda E. Saltzman, Gordon P. Waldo & Theodore G. Chiricos, *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 LAW & SOC. REV. 457, 472 (1983) (perceived punishment is a significant predictor of an act's perceived morality); *see also* FELDMAN, *supra* note 11, at 153–54, 169.

256. *See* Kahan, *supra* note 20, at 380.

257. *See id.* at 370.

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.[258] They can also counteract motivated reasoning by reducing employees' "moral wiggle room."[259] Laws prohibiting organizational misconduct tend to be too broad or technical to clearly communicate the boundaries of the prohibited conduct.[260] The resulting uncertainty provides employees motivated by self-interest with moral wiggle room to conclude that their conduct is lawful.[261] Enforcement of these laws in criminal courts, and the publicity that surrounds such cases, operates to clarify and publicly communicate the legal prohibition.[262]

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

258. *See also* Nadler, *supra* note 132, 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).

259. *Id.* at 1210.

260. *See, e.g.*, Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1534 (2008); VAN ROOIJ & FINE, *supra* note 70, at 189. 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 134–35 (2014). 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, 579 U.S. 550, 567–69 (2016).

261. Legal ambiguity can provide a source of "moral wiggle room." *See* Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INST. & THEORETICAL ECON. 137, 146 (2014); Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 995–97 (2009); Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and the Ambiguity of Legal Norms: An Experimental Analysis of the Rule Versus Standard Dilemma*, 4 REV. L. & ECON. 81, 89 (2008).

262. *See supra* Section III.B (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, *see* 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.

is shared by multiple employees.[263] 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, under pressure from supervisors to maximize profits, focused on other objectives, or part of a team that collectively caused the violation.[264] 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.[265] 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 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.[266]

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 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.

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.[267] 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.[268]

263. *See supra* notes 202–05.

264. *See supra* notes 202–05.

265. *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.

266. *Cf.* Becker, *supra* note 24, at 191–93.

267. *See* Arlen & Kraakman, *supra* note 26, at 695–96, 699; Arlen, *supra* note 26, at 144–45.

268. For a discussion of how to structure liability to achieve this goal, see Arlen, *supra* note 26.

C. Implications for CDT and Empirical Challenges to Deterrence Theory

Our analysis thus supports the core conclusions of CDT that companies should be liable for their employees' misconduct, that corporate liability should be structured to induce corporate self-reporting and cooperation, and that individuals must also be held liable. Yet it also supports an important modification to the policy recommendations of CDT.

CDT concludes that individual liability can deter as long as the expected sanction—defined as the probability of sanction multiplied by the sanction employees expect to bear (pf)—exceeds employees' expected benefit from misconduct, even if the likelihood of sanction is very small.[269] Given the high cost of enforcement, CDT scholars regularly encourage governments to achieve the designed expected sanction through high fines that are rarely imposed.[270] By contrast, we conclude that governments cannot rely on a low probability/high sanction approach to deterrence because individuals presented with an opportunity to profit from misconduct tend to ignore low probability risks, especially if they are not repeatedly reminded of the risk. Accordingly, we conclude that in order to deter through either sanctions or expressive channels, enforcement authorities must ensure that potential wrongdoers have a sufficiently high probability of sanction—of which individuals are regularly reminded—to ensure that the threat of sanction is salient at the moment that employees are presented with an opportunity to engage in profitable misconduct.

In turn, our analysis suggests that empirical tests of deterrence that fail to support the conclusions of CDT with respect to the impact of increased sanctions should not be deemed as a more general refutation of deterrence theory to the extent that sanctions are rarely imposed. Empirical analysis should focus on the impact of threatened sanctions that are salient and imposed with a high probability.

VI. 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.[271] This alternative warrants consideration because corporate liability falls on shareholders, whereas managers and directors control the firm's internal operations.

269. *See supra* Section II.A.

270. *See, e.g.*, Becker, *supra* note 24.

271. 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.

In this Part we show that our EDT framework helps us elucidate why senior manager *respondeat superior* liability is not an adequate substitute for corporate liability.[272] It also shows that there currently exist mechanisms that can 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 managers[273] 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.[274] With few exceptions, such liability has generally been restricted to controlling shareholders of closely held companies who also control the firm's daily operations.[275]

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.

We do not consider negligence liability for directors and senior managers because, as previously discussed, EDT analysis reveals that optimal deterrence requires interdependent 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. 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 widespread embrace of the Business Judgement Rule, which insulates directors from liability for inadequate substantive due care as long as they acted in good faith. *Compare* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), *with* Stone v. Ritter, 911 A.2d 362, 373 (Del. 2006). Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors*, 105 MICH. L. REV. 1677, 1686–87 (2007). For a further discussion of the limits of managerial negligence liability, see Buell, *supra* note 61; Hamdani & Kraakman, *supra* note 62.

272. This Part only discusses whether managerial liability should *replace* corporate liability and should be imposed through *respondeat superior*. It does not discuss whether directors or officers also should face liability based on their knowing contribution to the misconduct or their failure to exercise good-faith oversight over the firm's compliance function. For a discussion of directors' oversight liability, see Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under Caremark: Using Information-Acquisition Duties in the Public Interest*, RESEARCH HANDBOOK ON CORPORATE LIABILITY (Martin Petrin & Christian Witting eds., forthcoming 2023).

273. *See, e.g.*, United States v. Park, 421 U.S. 658, 672–73 (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. *See, e.g.*, *id*.; United States v. Dotterweich, 320 U.S. 277, 282–83 (1943); United States v. DeCoster, 828 F.3d 626, 634 (8th Cir. 2016).

274. *DeCoster*, 828 F.3d at 634.

275. *See Park*, 421 U.S. at 670.

Part V 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 imposed on those who violate the law, self-reporting and cooperation, salience of ethics in employees' day-to-day lives, and the salience of 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 balance appropriately the quest for profit with the need to deter misconduct when making the plethora of decisions that affect both compliance and productivity.[276]

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 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.

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 overinvest in efforts to deter crime because managers would directly benefit from the resulting deterrence, whereas the cost of their actions—both direct and through reduced productivity—would fall disproportionately on nonmanagement shareholders.[277] 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

276. *See* Arlen & Kraakman, *supra* note 26, at 690–91 (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).

277. Managers' stock and stock options would counteract this to some degree. But nevertheless, a material threat of criminal sanction that could result in managers going to prison and/or being unable to obtain other positions or to serve on corporate boards would likely incentivize managers to spend excessive corporate resources to deter misconduct.

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.[278] 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.[279] Criminal sanctions are particularly likely to raise these concerns because of the expected impact on an officer's future career prospect of a criminal conviction for a business crime.

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

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, policymakers 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.[280] 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.[281] The modern cases have enhanced the threat of this liability for firms whose activities are subject to regulations designed to protect the

278. *See* PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION AND MANAGEMENT 200–03 (1991) (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).

279. *See id.*

280. *See, e.g.*, Arlen & Kahan, *supra* note 49, at 379 (discussing agency costs affecting compliance); Arlen & Carney, *supra* note 45, at 715 (explaining why nonculpable managers may benefit from not intervening to stop other executives' securities fraud).

281. *See, e.g.*, *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019); *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *25 (Del. Ch. 2021).

public welfare,[282] thereby enhancing directors' (and officers') incentives to give serious attention to compliance.[283]

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 nonprosecution agreement) are expected to fully remediate both the harm caused by the misconduct and its root causes.[284] 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.[285]

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.[286]

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* liability 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, have strong incentives 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.

VII. CONCLUSION

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

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 should also be held liable through *respondeat superior* liability designed to ensure both that crime does not pay and that companies are strongly motived to self-report detected misconduct and fully cooperate with enforcement authorities.[287] Yet many legal scholars have con-

282. *See* Arlen, *supra* note 272.
283. *Id.*
284. ALI, *Principles of Corporate Enforcement*, *supra* note 3, § 6.07.
285. *Id.*
286. *See* Arlen & Kahan, *supra* note 49, at 337–38.
287. *See supra* Section VI.A; Arlen & Kraakman, *supra* note 26, at 729; Arlen, *supra* note 26, at 178.

tested 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.[288]

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. Existing scholarship, however, draws the wrong conclusions from these insights because the analyses employed 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, which recognizes (1) that people have both egoistic motivations and other-regarding ones; (2) that the law affects behavior through both sanctions and expressive channels; (3) that people employ two different decision-making processes but rely primarily on intuitive decision-making; and (4) that organizations affect employees' actions through both incentives and through how 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 must also 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 efficacy of expressive law faces substantial obstacles. The profit to each individual employee, and to the firm, from misconduct combined with people's rejection of personal responsibility and organizations' conventional approach to structuring their internal environments, undermine 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 is also 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 American Law Institute's Model Penal Code,[289] and many countries have taken the wrong approach to organizational liability by restricting corporate liability either to crimes caused

288. *See supra* Section II.C.

289. MODEL PENAL CODE § 2.07 (AM. L. INST. 1962).

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.[290]

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.

290. *See generally* Arlen, *supra* note 3.