

Battle for our Souls:  
The Expressive Law Justification for Individual and Corporate Liability for Organizational  
Misconduct

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**Introduction**

Countries around the world are moving to reform their laws and practices governing whether and when organizations and their employees should be held liable for criminal misconduct committed by employees in the scope of their employment. The options span a wide spectrum. At one extreme, a regime might hold neither organizations nor employees criminally liable for organizational misconduct. At the other extreme, a regime might hold both organizations and employees criminally liable for all crimes committed by any employee within the scope of employment.<sup>1</sup>

Most current regimes fall somewhere between these extremes. The U.S. stands at the farthest extreme. Under federal law in the United States, companies can be held criminally liable for almost any crime committed by any employee in the scope of employment, through the doctrine of *respondeat superior* liability.<sup>2</sup> Employees committing misconduct within the scope of employment can be, and regularly are, held individually criminally liable as well.<sup>3</sup>

In contrast, in many countries organizations are not held criminally liable for crimes by their employees.<sup>4</sup> In others, organizations are only criminally liable for a subset of crimes, such as

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<sup>1</sup> Our description of a governing legal regime focuses on who is held criminally liable for conduct that the law has chosen to treat as a crime. We do not address the range of choices available to countries on what activities should be criminalized or what *mens rea* should be required before criminal liability can be imposed.

<sup>2</sup> *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). Employees act in the “scope of employment” when they undertake the tasks that they were hired to perform, even if, in committing the crime, they violated an organization’s policies or instructions not to violate the law. Moreover, an organization can be held liable even if it directed employees to comply with the law and adopted an effective compliance program. E.g., *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009); Potter, 463 F.3d at 25. Further, self-reporting and cooperation are not a defense to liability. See Department of Justice, U.S. Dep’t of Just. Just. Manual, § 9-28.800 (2019).

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<sup>4</sup> For an overview of corporate liability regimes around the world governing corruption see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT 8* (2016) [hereinafter *THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY*], <https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> [<https://perma.cc/QC5Y-VJZT>]. See generally Sara Sun Beale & Adam G. Safwat, *What Developments in Western*

those committed by senior management,<sup>5</sup> or by organizations that did not have an effective compliance program at the time of the misconduct.<sup>6</sup> As for employees, in some countries employees are not criminally liable for some crimes if the corporation is liable.<sup>7</sup> In many others, employees are liable in theory but generally are not actually indicted for crimes committed in the scope of employment.<sup>8</sup>

But change is in the air. Countries around the world, spurred on by both the OECD Working Group on Bribery and the U.S. success in obtaining substantial criminal fines from corporations, are expanding the scope of corporate liability for organizational misconduct.<sup>9</sup> Within the U.S., individual states also are considering reforms to their corporate liability regimes.

Two leading strands of scholarship provide guidance on the use of criminal law to deter misconduct: economic analysis of law and the literature on the expressive role of criminal law.<sup>10</sup>

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*Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004) (comparing corporate criminal liability in Western Europe and the United States);

<sup>5</sup> Many states have followed the Model Penal Code's lead, restricting corporate liability for crimes involving mens rea to XXXX. Both the U.K. and France restrict corporate criminal liability for most crimes to crimes by senior managers (those in the "directing mind of the firm"), although the U.K. did adopt a broader corporate criminal liability for the crime of failing to prevent foreign corruption. See Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, in RESEARCH HANDBOOK ON NEGOTIATED SETTLEMENTS (Abiola Makinwa & Tina Söreide eds., 2020) (discussing U.K. and French law on corporate criminal liability); See generally Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004) (comparing corporate criminal liability in Western Europe and the United States).

<sup>6</sup> See Organisation for Economic Co-operation and Development, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking* 9Report 8 (2016) [hereinafter *The Liability of Legal Persons for Foreign Bribery*, <https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>]. [Find chapter in Tina's book on Italy]. Some countries, such as Italy, only holds the organization liable if the crime resulted from the organization's failure to adopt an effective compliance program. In a similar vein, the Model Penal Code §2.07 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. American Law Institute, *Model Penal Code and Commentaries*, §2.07(5) (1985).

<sup>7</sup> [ChkChina].

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<sup>9</sup> The Organisation for Economic Co-operation and Development has played an influential role in persuading countries to adopt or expand the scope of organizational liability for one form of criminal misconduct: foreign bribery. Prior to the OECD convention on foreign bribery, few countries had laws holding organizations criminally liable for corruption or most other crimes. Following the convention, forty of the forty-one countries who are parties reformed their laws governing corporate liability to create or expand corporate its scope. See OECD, *THE LIABILITY OF LEGAL PERSONS*, *supra* note 6. In the last decade, the world has witnessed a second wave of reform, once again spurred in part by the OECD. This reform effort has included both expansions to the scope of corporate liability and the promulgation of legislation permitting deferred-prosecution agreements (DPAs) and other similar nontrial resolutions. See Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. Calif. L. Rev. 697, 700-701, 703-04 (2020); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 197-200 (2017).

<sup>10</sup> These two accounts, like all deterrence account relies on a model that specifies, implicitly or explicitly, three important elements: (1) the behavioral response of individual employees (their "psychology"), (2) the normative environment in which employees act and (3) the "pathway" through which law influences individual behavior. These two strands of scholarship target different pathways through which the law can influence behavior, and also rely on different (but compatible) assumption about human behavior.

Economic analysis of law typically relies on classical deterrence theory,<sup>11</sup> which assumes (1) narrowly self-interested, rational agents, who obey laws only if the expected cost of a violation exceeds the benefit of the crime, and (2) that legal rules deter primarily through the threatened sanctions. Economic analysis concludes that optimal deterrence requires both individual and corporation liability for organizational misconduct. Individual liability is needed because corporations generally lack the incentives and ability to deter individual wrongdoers on their own.<sup>12</sup> Corporate liability is needed to induce companies to prevent, detect, investigate and self-report misconduct, and also to assist enforcement officials by providing them information about the misconduct and those responsible for it.

Literature on the expressive role of law identifies an alternative channel through which the law can deter. This literature potentially challenges the conclusion that countries should strive to sanction individuals and companies for organizational misconduct. According to expressive law theory, criminal law influences behavior primarily by expressing society's view that the prohibited conduct is immoral or socially harmful; it deters by altering the social meaning of the prohibited conduct. Expressive law scholars have suggested two different "expressive" pathways through which the law can alter behavior. Under the "social norm" mechanism, a criminal law enjoining specific conduct deters by establishing or enhancing a social or moral norm against engaging in the prohibited conduct. The law's expression of this norm deters people who care about their social standing or their internal sense that they are a good person.<sup>13</sup> Under the "serious harm" mechanism, a criminal law prohibiting specific conduct deters by expressing view of the legislature—as a proxy for society—that the prohibited conduct causes unacceptable and serious harm. The signal provided about the seriousness of the harm to others deters because people tend to have strong other-regarding or prosocial preferences that lead them to care about not harming others.<sup>14</sup>

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<sup>11</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

<sup>12</sup> See *Infra* Section I.A; see Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON CRIMINAL LAW, at 167-172 (Keith Hylton & Alon Harel, ed., 2012) (explaining why optimal deterrence requires that both entities and individuals be liable for corporate misconduct); see also Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687 (1997).

<sup>13</sup> See, e.g., Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) [hereinafter McAdams, *Attitudinal Theory*]; see also Jennifer Arlen & Lewis Kornhauser, *Does the Law Change Preferences?*, 22 THEORETICAL INQUIRIES IN LAW 175 (2021) (symposium issue).

<sup>14</sup> The extensive literature analyzing the criminal laws' ability to alter behavior through expressive channels includes: Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 Duke L. J. 1 (1990); Daniel Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); see Oren Bar-Gill & Chaim Fershtman, *Law and Preferences*, 20 J. L., ECON. & ORGAN. 331 (2004); Robert Cooter, *Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000) [hereinafter Cooter, *Good Citizens*]; Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Robert Cooter, *Models of Morality in Law and Economics: Self-control and Self-Improvement for the Bad Man of Holmes*, 78 B.U. L. REV. 903 (1998); see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997) [hereinafter McAdams, *Origin*]; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649 (2001); McAdams, *Attitudinal*, *supra* note 13; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1136-37 (1986); LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2011); see also Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doran Teichman eds., 2014); Yuval Feldman & Yotam Kaplan, *Preferences Change & Behavioral Ethics: Can States Create Ethical*

Theory and evidence supports expressive law theorists' conclusion that the law can help deter misconduct through expressive law channels under some circumstances, potentially acting as an important complement to classical deterrence through enforcement and sanctions. Yet some leading scholars make a stronger argument for expressive law. They contend that governments should rely primarily on criminal laws' expressive channels to deter misconduct because they are more effective than, and impose lower social costs than, enforcement and sanctions.<sup>15</sup> This "strong view" of the expressive role of law conflicts with the conclusion of deterrence theory that both individuals and organizations should be criminally sanctioned for organizational misconduct.<sup>16</sup> Thus, to assess the optimal scope of individual and corporate liability for organizational misconduct we must assess whether the strong view of expressive law is valid as applied to organizational misconduct.

In this article, we provide the first analysis of whether the strong form of expressive law is valid as applied to organizational misconduct. The specific question we address is whether criminal laws can deter organizational misconduct through expressive pathways alone, without active efforts by enforcement officials to sanction individual or corporate wrongdoers. We conclude that governments cannot deter organizational misconduct without enforcement and sanctions against individuals and corporations. Thus, rather than providing an argument against individual and corporate enforcement, expressive law provides an additional argument in favor of holding both employees and corporations liable for organizational misconduct. Our conclusions also likely applies to enforcement of other types of criminal statutes as well.

The strong claim of the expressive law rests on two implicit assumptions. The first is that *unenforced* law can effectively express and establish a social norm that is sufficiently compelling to deter misconduct. This claim that criminal law can deter without enforcement against individuals rests on evidence that criminal laws have reduced socially harmful conduct even when there is little risk of sanction. The second is that the law is the primary source of social and moral

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*People?*, 22 THEORETICAL INQ. L. XX (2021) (explaining why promoting explicit ethical preferences does not necessarily lead to ethical behavior); Ariel Porat, *Changing People's Preferences by the State and the Law*, 22 THEORETICAL INQ. L. XX (2021) (discussing why it may be optimal to change preferences).

<sup>15</sup> *E.g.*, Bilz & Nadler, *supra* note 14, at 241; Cooter, *Do Good Laws*, *supra* note 14; Sunstein, *supra* note 14, at 1137 (if new legal rules can change preferences then people will not attempt to circumvent the new rules); see also Daphna Lewisohn-Zamir, *The Importance of Being Ernst: Two Notions of Internalization*, 65 U. TORONTO L. J. 37, 39 (2015) (law can influence the content of preferences); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & CONTEMP. PROBL. 23, 46 (1997) (to deter, people need to be induced to obey the law for reasons of conscience and conviction, and not out of fear of punishment); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY AND COMPLIANCE* (2009) (people often are motivated to comply with the law by morality and fairness, and not the threat of sanctions); Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 632 *Law & Society Rev.* 549 (1996)(same); but see Kahan, *supra* note 14, at 354-55, 378-82 (discussing the importance of sanctions).

Some scholars also resist sanctions on the grounds that sanctions can crowd out people's intrinsic motivations to avoid prohibited conduct. *E.g.*, BRUNO S FREY, *NOT JUST FOR THE MONEY* (1998); see U. Gneezy & A Rustichini, *A Fine is a Price*, 29 *J. LEGAL STUD.* 1 (2000) (the decision by a day care to impose a fine on parents who were late to pick up their children increased late pick-ups).

<sup>16</sup> Although this article focuses on the validity of the strong claim for expressive law, determining the optimal structure of liability to promote the expressive role of law is important even if expressive law and classical deterrence are complements. This is because enhancing expressive law also can help deter by raising people's perceived costs of misconduct.

norms that define people's decision making environment. This legal centralism assumption implies that corporate liability is not needed, assuming that individual expressive law deters. We consider each of these assumptions and conclusions in turn.

We first evaluate the assumption that criminal law can deter individuals from committing organizational misconduct without enforcement against or sanctions on individuals. Psychology literature enables us to explicate how laws expressing a social or ethical norm can cause people to automatically eschew the prohibited conduct even when there is little risk of sanction. This research reveals the people employ two different types of decision-making processes: deliberative and nonconscious, intuitive decision-making processes. They use the latter to make most decisions.<sup>17</sup> Emotions, including moral emotions such as guilt or shame, play an important role in these processes. Research establishing people's reliance on these automatic processes could support the strong form of expressive law if law's can establish a social or moral norm that causes employees people to anticipated guilt and shame should they violate the law even absent enforcement and sanctions.

We show that criminal laws generally cannot deter organizational misconduct<sup>18</sup> through expressive pathways alone absent enforcement and sanctions. We identify the conditions that support, or undermine, the criminal law's ability to deter misconduct that otherwise would be profitable by expressing a social or moral norm. Of particular importance, law cannot deter through expressive channels unless people were informed about the legal injunction and the injunction remains focal in their daily lives. Employees will tend to be unaware of laws prohibiting organizational misconduct that are never enforced.<sup>19</sup> Beyond this, we show that four characteristics of organizational misconduct undermine the criminal law's ability to induce people to automatically eschew misconduct: (1) employees tend to benefit substantially from the misconduct; (2) victims of the misconduct usually are strangers who are socially-distant from employees; (3) employees often have non-selfish justifications for the misconduct in the form of the benefit to the firm and fellow employees of the misconduct; and (4) employees who help cause misconduct often do so as part of a group decision-making process that enables them to spread responsibility in ways that negates guilt and shame over the violations. We show that individual enforcement and sanctions can help counter-act the impact of these factors, giving voice to criminal law's expressive messages in some circumstances. But their pernicious effect is sufficiently strong that individual enforcement and sanctions also are needed for classical deterrence reasons as well.

We evaluate the strong form's implication that organizational liability is not essential to deterrence. This claim rests on the assumption that law is primary institution establishing the social and moral norms that define people's decision making environment. Under that assumption, corporate liability would be superfluous, since employees' moral decision-making would be chiefly influenced by the law rather than by corporate interests or company policy. We show that

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<sup>18</sup> Our analysis also applies to other forms of misconduct, showing the importance of active enforcement against, and the imposition of material sanctions on, individuals who commit crimes, even when criminal laws have the ability to influence behavior through either the social norm or social harm mechanism.

<sup>19</sup> Organizations have little reason to train employees on prohibitions that are not enforced.

organizations are a primary determinant of their employees' perceived and experienced social and moral norms. In addition, organizations can and do act in host of ways that influence—and can undermine—whether employees intuitive decision-making processes lead them towards profitable misconduct or whether, instead, the law is able to deter them through expressive channels. We conclude that effective use of criminal law's expressive mechanisms requires that governments pursue active enforcement against, and impose sanctions on organizations in order to provide companies with a financial incentive to support, rather than undermine, criminal law's expressive messages.<sup>20</sup> Organizational liability also can deter through classical channels by inducing corporate self-reporting and cooperating so as to amplify the threat of individual enforcement.

Our analysis proceeds as follows. In Section 1, we present the classical deterrence analysis of why individuals and organizations should be held liable for organizational misconduct and the strong view of expressive law's challenge to this conclusion. Section 2 explicates the psychological underpinning of the strong form's claim that law's expressive channels can deter otherwise profitable misconduct. It then shows that organizational misconduct occurs in circumstances that preclude effective deterrence through expressive law absent individual enforcement. In Section 3, we examine corporate liability for on organizational misconduct. Leveraging the factors identified in Section 2 as vital to deterrence through expressive law, we show that organizations can, and regularly do, structure working conditions to undermine the law's ability to deter through expressive pathways. Thus, expressive law has little hope of influencing behavior by changing the social meaning of prohibited conduct unless organizations intervene to support the law's expressive message rather than undermining it. Accordingly, organizations must be liable for their employees' misconduct to provide them strong financial incentives to deter their employees' otherwise profitable but illegal conduct. We conclude that laws generally cannot deter through expressive channels unless both organization and individuals are held liable for organizational misconduct.

## I. Two Theories of Deterrence.

The Section presents the two leading theories of how law can deter misconduct, classical deterrence and expressive law, and discusses their implications for individual and organizational liability for organizational misconduct.

Both classical deterrence theory<sup>21</sup> and expressive law theory are theories of how agents behave in response to legal rules. They differ in the set of preferences that they attribute to agents. Classical deterrence theory assumes people are egocentrically self-interested. Expressive law, by contrast, assumes that people also want to be ethical and are social beings that care about their place in society. These different preferences produce different pathways of influence for legal rules. In classical deterrence theory, the law changes behavior by targeting people's preference

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<sup>20</sup> For a discussion of whether corporate liability must be criminal as opposed to civil, see, e.g., V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996); Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, J. CORP. LAW (Forthcoming)(symposium issue); [add others from symposium]

<sup>21</sup> Classical deterrence theory is narrower than general deterrence theory and focuses only on how government imposed sanctions influence behavior. See *infra* Section I.A.

to maximize their personal welfare. Criminal law deters by threatening people with sanctions for non-compliance with the legal rule. In expressive law theory, the law changes behavior by targeting people's preferences to be ethical and to conform to social norms. Criminal laws deter through by expressing society's view that the conduct is immoral or violative of social norms.

### A. Classical Deterrence Theory and Optimal Liability for Organizational Misconduct

Economic analysis of law scholars generally rely on classical deterrence theory to determine the optimal scope of individual and corporate liability for organizational misconduct. Classical deterrence theory assumes that individuals have narrowly self-interested preferences. They evaluate actions by comparing the financial consequences of an action on the basis of the effects on them. The individual chooses the option that best advances her interests as embodied in her (narrowly) self-interested preferences. Law influences behavior by first identifying, in the substantive legal rule, the undesirable conduct and then by setting a price on undertaking the proscribed conduct through the specification of the sanction.<sup>22</sup>

Classical deterrence theory has its roots in a seminal paper by Gary Becker.<sup>23</sup> Becker's analysis assumes the actor has narrowly self-interested preferences; she does not care about others or about norm compliance. The model also assumes that criminal laws only affect agents' welfare through one channel: the imposition of government-imposed sanctions.<sup>24</sup> Thus, in these models, the cost to an agent of engaging in misconduct depends entirely on the level of sanctions imposed by the government and the probability of enforcement. Civil and criminal law thus influence behavior by altering the individual's incentives to select particular options solely by altering the consequences of those choices in a particular way—through the threat that certain choices will lead to government-imposed sanctions (e.g., financial sanctions or imprisonment) or liability to private parties.<sup>25</sup>

Organizations must act through individual agents. Accordingly, it might appear that the state could optimally deter by relying entirely on individual liability. State-impose optimal sanctions could directly deter individual wrongdoers, assuming that expected optimal sanctions

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<sup>22</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

<sup>23</sup> Becker, *supra* note 22.

<sup>24</sup> This assumption distinguishes classical deterrence from “general deterrence.” Classical deterrence theory only explores one of the mechanisms through which the law can influence behavior consistent with rational choice theory. “General deterrence theory” allows consideration of these other mechanisms as well. Reputational penalties are one of these mechanisms. Companies and people are potentially deterred from violating the law by the prospect that being sanctioned for misconduct will lead others—such as customers or employers—to refuse to deal with them, or do so on less favorable terms. *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 Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING ch. 11 (Jennifer Arlen ed., 2018) (discussing when corporate violators are likely to incur costs from reputational damage). In addition, rational choice theory accepts that people can have other-regarding and social preferences. See Arlen & Kornhauser, *supra* note 13. When people have other-regarding preferences, the law can deter, consistent with rational choice theory, by expressing that particular conduct causes serious harm to others, and more harm than people previously believed. *Id.*

<sup>25</sup> Becker, *supra* note 22; see A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984).

exceeds the benefit of the crime. Yet in practice individual liability is not sufficient for two reasons. First, individuals who commit organizational misconduct generally cannot pay to pay the optimal sanction,<sup>26</sup> and the state cannot optimally use imprisonment to ensure that crime does not pay because the risk to individual wrongdoers of being caught and sanctioned is too low to be material to them..<sup>27</sup> Second, when only individual wrongdoers are liable, employees generally will not be deterred by the threat of sanctions because the government, acting alone, detects and sanctions only a small portion. As a result, employees contemplating misconduct usually would face such a small risk of being caught and detected that it is not salient, and thus is not material to their decision-making.<sup>28</sup> In this situation, under pure individual liability individuals are not optimally deterred from criminal conduct.

Organizations can intervene to help deter. Moreover, they can reduce both of the problems plaguing individual enforcement. Organizations can deter directly by undertaking “prevention measures” designed to reduce employees’ incentives and ability to commit crimes. These include structuring compensation, promotion and retention policies to reduce employees’ incentives to achieve productivity targets through criminal conduct; compliance programs that make conduct less likely and more difficult to commit; and internal reporting system. Such actions also increase the deterrent effect of individual liability by reducing the net benefit to employees’ crime, thereby enhancing the government’s ability to ensure that crime does not pay.<sup>29</sup>

Organizations also can deter by increasing their employees’ risk of being sanctioned for misconduct—both private and government-imposed sanctions.<sup>30</sup> They can do this by implementing effective compliance programs and internal reporting systems designed to detect misconduct, coupled with internal retention policies favoring discipline (including termination) of wrongdoers. They also can ensure that employees’ face a salient and material risk of criminal sanctions by self-reporting detected misconduct to prosecutors and fully cooperating by providing evidence on both the full scope of the misconduct and also on the role of the individuals responsible for it. Optimal deterrence generally requires such corporate “policing” efforts because organizations can more effectively detect and investigate misconduct within them than can the government. Through corporate policing, organizations thus often can transform a non-salient risk of criminal sanction into a material risk that can deter.<sup>31</sup>

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<sup>26</sup> See Lewis Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982); 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).

<sup>27</sup> Arlen, *supra* note 11, at X. [get citation in blindspots] Also, the state is constrained in the prison sentences it can optimally impose for organizational misconduct by the high cost of prison, see Steve Shavell, XXX, and also marginal deterrence concerns. The state needs to reserve its longest prison sentences for violent crimes. This limits maximal sentences for most white collar crimes. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

<sup>28</sup> *Id.*; see Arlen, *supra* note; see also EUGENE F. SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* (2016) (finding that the risk of sanction tends not to be salient when white collar criminals are deciding whether to engage in misconduct).

<sup>29</sup> Arlen & Kraakman, *supra* note 12; Arlen, *supra* note 12.

<sup>30</sup> Arlen & Kraakman, *supra* note 12; Arlen, *supra* note 12.

<sup>31</sup> Arlen & Kraakman, *supra* note 12; see Arlen, *supra* note , at 164-65. Public enforcement detects only a small amount of the corporate misconduct that occurs. Companies’ internal systems detect, and are able to substantiate, far



Organizations will not undertake optimal prevention and policing if only employees are held liable for corporate misconduct, however, because companies regularly profit from their employees' misconduct and corporate prevention and policing are costly.<sup>32</sup> Accordingly, in order to induce companies to invest in prevention, and to self-report cooperate, and remediate, companies should be criminally liable for their employees crimes,<sup>33</sup> subject to an enforcement policy that provides material incentivizes to self-report and fully cooperate.<sup>34</sup> Thus, companies should be held liable for all their employees' crimes and subject to sanctions that ensure that they do not profit from, and indeed benefit from preventing, corporate misconduct. In addition, companies that self-report and fully cooperate should receive a settlement with terms that are sufficiently more favorable than those offered to firms that do not self-report or cooperate than the expected cost<sup>35</sup> of self-reporting and cooperating is less than the expected cost of failing to do so, even though the probability of being sanctioned is much higher if they self-report and cooperate.<sup>36</sup> The state can achieve this

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more misconduct. See, e.g., Arlen & Kraakman, *supra* note 12; Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 923–25 (2019) (providing evidence from several publicly held firms internal reporting systems that they detect manifold more misconduct than the government); Alexander Dyck, Alexander, Adair Morse, and Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FINANCE, 2213, 2214 (2010) (finding that the government rarely detects frauds and more are brought to light by the firm or its employees).

<sup>32</sup> Arlen & Kraakman, *supra* note 12; Arlen, *supra* note 12. If liability imposed on individuals resulted in corporations bearing the full cost of crime through wages to employees, the state would not need to impose corporate liability to induce corporations to prevent misconduct, although it still would need to do so to induce corporate policing, Arlen, *supra* note 12. Wages will reflect the social cost of harm when employees' expected fines equal the social cost of harm and employees' expected liability constitutes a cost to employee of working for the firm assuming that employees perform their tasks properly. See Kornhauser, *supra* note 26; Polinsky & Shavell, *supra* note 26. But this condition is rarely met for two reasons. First, employees usually cannot pay expected sanctions equal to the benefit to the organization of the misconduct or the harm caused. See, e.g., Arlen, *supra* note 12; see Kornhauser, *supra* note 26; Polinsky & Shavell, *supra* note; Arlen & Kraakman, *supra* note . Second, organizations usually will not increase wages to reflect their employees' expected liability for intentional misconduct because such misconduct is not an unavoidable cost to employees of working for the firm. Instead, employees can avoid the cost of this liability by complying with the law. Thus, to the extent that employees only risk criminal liability if they in fact engaged in knowing or intentional misconduct, organizations will not adjust wages to compensate for such liability. Arlen, *supra* note 12. Indeed, both corporate director and officer insurance and a firm's indemnification provisions do not cover liability for the cost of a judgement for deliberate criminal misconduct. See DGCL § 145. Accordingly, in order to ensure that organizations have an incentive to prevent such misconduct, liability must be imposed on them directly. Arlen, *supra* note 12, at 168-69.

Finally, even when firms do pay wages equal to the expected cost of crime, companies should be held criminally liable if they fail to self-report or fully cooperate in order to induce these activities. See Arlen, *supra* note 12, at X (discussing why corporate liability is needed even when companies bear the cost of crime).

<sup>33</sup> See *supra* note 20.

<sup>34</sup> Arlen & Kraakman, *supra* note 12; Arlen, *supra* note 12; see also ALI, Corporate Enforcement Policies, *supra* note (setting forth enforcement principles structured to achieve these goals).

<sup>35</sup> The expected cost of a fine, for example, is the actual fine multiplied by the probability that it is imposed. Thus the expected cost of a million dollar fine is only \$1000 if there is only a one in a thousand chance that the wrong will be detected and sanctioned.

<sup>36</sup> Arlen & Kraakman, *supra* note 12; Arlen, *supra* note 12; Arlen, *supra* note 5 (discussing how to structure organizational and individual liability to achieve these goals). The American Law Institute has now issues Principles for criminal, civil, and administrative enforcement against organizations and individuals for organizational misconduct that are structured to achieve these goals. ALI, Principles of Enforcement for Organizational Misconduct, *supra* note X.

goal by imposing criminal liability with high sanctions through respondeat superior and then adopting a presumption that organizations that self-report, cooperate and remediate either get a declination (following disgorgement of the benefit of the misconduct) or a deferred or non-prosecution agreement.<sup>37</sup> To deter, prosecutors must use the evidence they obtain to convict the individual wrongdoers.<sup>38</sup>

Thus, classical deterrence analysis supports the imposition of liability for organizational misconduct on both individual wrongdoers and on their organizational employers. This model assumes that criminal laws can only impose costs on wrongdoers through one channel: the imposition of government-imposed sanctions.<sup>39</sup> Thus, in these models, individuals will be motivated to commit profitable crimes and companies will not deter unless the government threatens them with sanctions.<sup>40</sup>

### **B. Expressive law and Optimal Liability for Organizational Misconduct**

Expressive law theorists argue that the criminal law primarily deters through means other than the threat of sanctions. Criminal law succeeds at this because individual preferences are not narrowly self-interested. Rather individuals value the welfare of others, how others' view them,

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<sup>37</sup> Arlen, *supra* note 12, at 167-172; see Arlen & Kraakman, *supra* note 12. For a discussion of how to structure liability to achieve these goals see Arlen, *supra* note 5; American Law Institute, *Criminal, Civil and Administrative Enforcement Against Individuals and Companies for Organizational Misconduct*, Chapter 6 in PRINCIPLES OF THE LAW OF COMPLIANCE AND ENFORCEMENT. For a discussion of how variation in countries' laws governing corporate investigations affects their ability to enhance deterrence by inducing corporations to detect, investigate, report and cooperate see Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Liability*, 93 S. CAL. L. REV. 697 (2020).

<sup>38</sup> Arlen, *Potentially Perverse Effects*, *supra* note 27; Arlen & Kraakman, *supra* note 12. Individual liability is needed, even when companies also are liable and thus motivated to sanction individual wrongdoers, because companies generally cannot optimally sanction employees for corporate crime. See Kornhauser, *supra* note 26 (showing circumstances where organizational liability induces companies to optimally sanction employees). First, most organizations that engage in misconduct are closely-held. Owners of closely-held corporations can maximize profits by enabling their organization's profitable misconduct while keeping the company thinly-capitalized in order to avoid bearing the optimal sanction. Arlen, *supra* note 12, at X. They thus do not have optimal incentives to punish employees who engage in profitable misconduct. In addition, organizations cannot impose optimal sanctions on individuals because employees often do not have sufficient assets to pay the optimal sanction and organizations cannot reach the future earnings of employees who have already switched employers. By contrast, the state can reach beyond current assets by imposing sanctions such as imprisonment, which both imposes direct costs on the wrongdoer and affects her future income. *Id.* Third, organizations will be unable to use sanctions such as termination to sanction wrongdoers if the wrongdoer finds alternative employment before the firm detects and sanctions them. Finally, organizations may fail to impose optimal sanctions on their employees as a result of agency costs. Agency costs are particularly likely to plague publicly-held organizations decisions to sanction senior managers implicated in misconduct, as they can influence the sanctioning decision while leaving shareholders to bear the costs of liability. Arlen, *supra* note 12, at 167-172.

<sup>39</sup> The assumption of narrow self-interest does not suffice to justify the imposition of sanctions to the extent that law could influence behavior through its potential to impose costs from reputational damage on those that violate the law, even if the law is not enforced. See *supra* note 24 (discussing reputational sanctions).

<sup>40</sup> Standard economic theory also has identified reputational sanctions as an important channel through which law can deter misconduct in ways that may not rely on the imposition of criminal sanctions. While this mechanism does not require the imposition of sanctions, for many crimes enforcement often is the channel through which news of misconduct reaches the public, thereby triggering reputational sanctions. See *supra* note 24.

and their own sense of being a good person.<sup>41</sup> Criminal law deters simply through the expressed condemnation of the conduct specified in the substantive law; this expression activates or acts through the agents prosocial and other non-self-interested preferences.<sup>42</sup> On standard accounts of expressive law, the sanction is not essential, and for some is irrelevant, to the efficacy of the condemnation expressed in the substantive law. Criminal law uses the channels of influence created by our social nature.<sup>43</sup>

### *1. Expressive Law: Social Norm and Social Harm Mechanisms*

The expressive law literature has focused on two pathways through which the law can deter by leveraging its power to express society's negative views about the prohibited criminal conduct.<sup>44</sup> First, a criminal law prohibiting specific conduct can express—or render more salient—society's view that the conduct is unethical or otherwise violates appropriate norms of social conduct (the social norm mechanism).<sup>45</sup> Criminal law (particularly common-law crimes), often

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<sup>41</sup> Expressive law arguments rely on internal costs resulting from acting ethically, immorally or contrary to social expectations, and thus are distinct from general deterrence. Under general deterrence, criminal law can deter, without any resort to other-regarding preferences, to the extent that it leads potential wrongdoers to anticipate that taking the prohibited conduct will lead others to be less willing to deal with the wrongdoer as a counter-party because they now view the wrongdoer as someone who presents an excessive risk of harming others. See *supra* note 24.

<sup>42</sup> The law's ability to express society's view of the harmfulness of the conduct also can deter. See discussion in *supra* note 22.

<sup>43</sup> See, e.g., Cooter, *supra* note 14; Cooter, *Models of Morality*, *supra* note 14; Cooter, *Expressive Law and Economics*, *supra* note 14; Kahan, *supra* note 14; Dau-Schmidt, *supra* note 14; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) [hereinafter Lessig, *Regulation of Social Meaning*]; Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996) [hereinafter Lessig, *Social Meaning and Social Norms*]; McAdams, *Origin, Development, and Regulation of Norms*, *supra* note 14; McAdams, *A Focal Point Theory*, *supra* note 14; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903 (1996); STOUT, *supra* note 14; see also Bilz & Nadler, *supra* note 14.

<sup>44</sup> Some scholars have suggested a third mechanism. They argue that the law can change people's preferences—it can, in other words, cause people who are not socially motivated to alter what they value and become socially-regarding or law-abiding people. E.g., Bar-Gill & Chaim Fershtman, *supra* note 14, at 332 (“different legal systems may affect not just the behavior of individuals, but who they are.”); Cooter, *Do Good Laws*, *supra* note (laws can cause people to change their moral values); Dau-Schmidt, *supra* note 14, at 2, 14 (criminal law seeks to establish new positive “norms of individual behavior by shaping the preferences of criminals and the public at large); Stout, *supra* note 14, at 228 (“criminal law changes *what people want*, in the process shifting their behavior from purely selfish and asocial to unselfish and law-abiding.”); Daphna Lewisohn-Zamir, *The Importance of Being Ernst: Two Notions of Internalization*, 65 U. TORONTO L. J. 37, 39 (2015) (law can influence the content of preferences).

We do not address this argument because in a prior article we engaged in a thorough analysis of the pathways through which the law is said to be able to achieve this change in preferences and found that these asserted mechanisms do not change underlying preferences, in the sense of changing who people are and what they value. Instead, expressive law uses our social nature to increase the cost of misconduct, in the ways identified above. See Arlen & Kornhauser, *supra* note 13.

<sup>45</sup> Sunstein, *Expressive Function*, *supra* note 43; Sunstein, *Social Norms*, *supra* note 43; see McAdams, *Origin*, *supra* note 14; McAdams, *Focal Point*, *supra* note 14. 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. See Lynch, *supra* note 15.

Scholars define norms in a variety of ways. Here we adopt the criteria set forth by Fehr and Schurtenberger who identify three crucial features of social norms. “First, a social norm establishes a normative standard of behavior that applies to a particular group and to a particular situation. Second, the norm is not defined in terms of group members' actual behavior nor in terms of their motives, their compliance or the conditions under which compliance occurs; it is

derive from or comport with basic intuitions or concepts of morality and ethics, and often express society's view that it is unethical or immoral to engage in the conduct. Second, a criminal law prohibiting specific conduct can express society (or the legislature's) conclusion that the law imposes unacceptably large harms on others or on the actor (the social harm mechanism).<sup>46</sup>

Under the social norm mechanism, criminal laws that enjoin specific conduct deemed to be unethical or otherwise contrary to good social behavior may influence behavior because people often have an aversion to being immoral, or to being perceived by others to be immoral.<sup>47</sup> This aversion to being immoral or to acting contrary to social norms can motivate them to comply with an injunctive norm established by the criminal law, for reasons independent of the threat of criminal sanctions.<sup>48</sup> Alternatively, and often relatedly, criminal laws may be perceived as either establishing that particular conduct is inconsistent with the social norms or expectations<sup>49</sup> or enhancing the salience of an existing social norm by designating a violation of the norm worthy of criminal sanctions.<sup>50</sup> This expression could lead people to comply with the law who are averse to disappointing the expectations of others,<sup>51</sup> or who evaluate actions in significant part on their perceived fairness.

Under social harm mechanism criminal laws can deter misconduct by expressing the legislatures', and in turn society's view, that the prohibited conduct causes unacceptably large harm to others—harm greater than citizens previously understood. When citizens trust the legislature to enact laws in the social interest, for example, a statute that subjects previously unregulated conduct to a criminal sanction may cause people to conclude that expected harms associated with the prohibited actions, to themselves or others, are greater than they otherwise would have expected.<sup>52</sup> Traffic regulations that set speed limits may alter peoples' beliefs about

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exclusively defined in terms of a normative behavioral standard, that is, how group members ought to behave. Third, this normative standard and its widely shared approval is commonly known by group members." Ernst Fehr & Ivo Schurtenberger, *Normative Foundations of Human Cooperation*, 2 NATURE & HUM. BEH. 458, 463 (2018).

<sup>46</sup> E.g., Kahan, *supra* note 14; Lessig, *Regulation of Social Meaning*, *supra* note 43; Lessig, *Social Norms*, *supra* note 43.

<sup>47</sup> Considerable evidence supports this proposition. See, e.g., Diana C. Robertson et al., *Business Ethics: The Promise of Neuroscience*, 144 J. BUS. ETHICS 679 (2017). See also Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, in THE RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING ch. 11 (Jennifer Arlen ed., 2018). See generally Donald Langevoort, *Culture of Compliance*, 54 AMER. CRIM. L. REV. 933, 946 (2017).

<sup>48</sup> Paul H. Robinson & John M. Darley, *Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Janice Nadler, *Flouting the Law*, 83 TX. L. REV. 1399 (2005). See also Bilz & Nadler, *supra* note 14, at 245; Porat, *supra* note 14, at [3 (in draft)].

<sup>49</sup> See, e.g., Cooter, *supra* note ; McAdams, *Attitudinal Theory*, *supra* note 14; Sunstein, *Social Norms*, *supra* note 43.

<sup>50</sup> The seriousness of norm violation might be communicated not only through the labelling but also through the size of the sanction. See *infra* Section II.D. In studies of social norms, this "pricing" effect may have paradoxical effects. The imposition of a fine for noncompliance with a norm, it is argued, may "crowd out" the agent's moral motivation; in the terms above, it reduces the cost of noncompliance or, phrased differently, it reduces the guilt or shame that arises from noncompliance. The choice of sanction for noncompliance might thus interact with the decision to label noncompliance as criminal. The choice of an "inappropriate" sanction might undermine rather than enhance the deterrent effect created by the labelling.

<sup>51</sup> See, e.g., McAdams, *Origin*, *supra* note 14.

<sup>52</sup> Bilz & Nadler, *supra* note 14 (discussing how lack of trust of government authorities can alter the impact of laws).

the set of speeds it is safe to drive in that location.<sup>53</sup> Environmental laws that prohibit depositing car batteries in household trash or pouring car oil down storm drains signal that these actions cause more harm to the environment than people might otherwise have thought. Laws prohibiting bribery of foreign officials or sexual harassment may lead people to conclude that such activities are more harmful than they would have otherwise believed, given their prevalence prior to the prohibition.<sup>54</sup> Laws that cause people to conclude that prohibited conduct is especially harmful to others can alter people's decisions to engage in the disfavored conduct to the extent that people are social animals who either care about not causing harm to others or care about not being perceived by others as someone who would knowingly risk harm to others.

While these two pathways are distinct, societies do tend to have social and moral norms against conduct that is socially harmful and/or harmful to others. Accordingly, throughout the rest of this article we will focus our discussion on the law's ability to influence behavior through social or moral norms and will not separately discuss the social harm mechanism.

## 2. *Challenge of Expressive Law for Individual and Corporate Liability*

Expressive law theories have potential implications for the debate over individual and corporate liability, depending on one's interpretation about the relationship between expressive law mechanisms and government-imposed sanctions.

Some scholars view expressive law and enforcement as complements—expressive law strengthens the deterrence available through government-imposed sanctions and enforcement and sanctions strengthen, and are essential to, the law's expressive message.<sup>55</sup> Under this view, expressive law would provide an additional reason to hold individuals liable for corporate misconduct. It also provides an additional justification for corporate liability, as we discuss in Section IV.

By contrast, leading scholars contend that expressive law is a substitute for deterrence through sanctions. According to this “strong” view of expressive law, the state can and should rely primarily on expressive mechanisms to deter misconduct, eschewing the use of enforcement and sanctions. Indeed, scholars claim that deterrence through this pathway is preferable to sanctions because it imposes lower social costs.<sup>56</sup> This claim rests on empirical evidence that criminal law can deter misconduct through expressive pathways without people consciously considering the threat of sanctions.<sup>57</sup> The strong form of expressive law claims that criminal laws that establish or

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<sup>53</sup> On a mountain road, a traffic sign with an arrow bent at right angles and the numeral 10 under it signals that continuing around the upcoming curve at speeds in excess of 10 mph is unsafe. Typically traffic regulations also change the environment in which the agent acts by imposing a sanction on speeds in excess of the posted limit.

<sup>54</sup> In addition, the law can influence people's beliefs about what other people will do, thereby facilitating coordination or cooperation. *See e.g.*, Cooter, *Good Citizens*, *supra* note 14, at 1586-88 (smoking bans in public facilities or workplaces and pooper-scooper laws show how the legal rule almost instantly shifts society from one equilibrium to another). This is likely to alter behavior to the extent the new equilibrium is viewed as a social or moral norm, and thus is discussed in Part III.C.

<sup>55</sup> *See* Kahan, *supra* note 14, at 354-55, 378-82 (discussing the importance of sanctions).

<sup>56</sup> *See* citations in note X *supra*.

<sup>57</sup> Some scholars who embrace the strong view take the position that the law can not only express social meaning but change people's underlying preferences—the law can change what we value and who we are at a fundamental level. *See* citations in *supra* note 15 & 44. We do not discuss this position in this article because, in a prior article, we

enhance a moral or social norm can deter without effective enforcement and the regular imposition of sanctions. It also rests on empirical evidence indicating that people do have a nonconscious or automatic tendency to comply with norms.<sup>58</sup> Accordingly, proponents of the strong form conclude that society should rely primarily on expressive law channels to deter individuals from engaging in misconduct, and should reduce, if not eliminate, its reliance on individual criminal sanctions because these impose substantial costs on society.<sup>59</sup>

If valid, this strong claim has implications for the debate over liability for organizational misconduct. A straight-forward application of this view to organizational misconduct would appear to imply that employees need not be sanctioned for their organizational misconduct because society can most cost-effectively deter them by relying on the criminal law's expressive channels, at least for crimes that either express social or moral norms or are premised on a finding that the prohibited conduct is excessively harmful. This would appear to suggest that, contrary to the conclusions of classical deterrence theory, U.S. authorities should abandon their current efforts to identify and convict individuals who engage in misconduct.<sup>60</sup> Instead, it should seek to deter instead through amplifying the law's expressive messaging.

Moreover, the conclusions that individuals can optimally deterred through expressive pathways, and that law is the vehicle for providing the needed expressive messages, would appear to imply that the U.S. need not impose criminal sanctions on organizations. Organizations act only through individuals.<sup>61</sup> If the state can most effectively deter individual wrongdoers through expressive channels, and if the laws is the main expression of social meaning,<sup>62</sup> as is implicitly assumed in this literature, then expressive law also should deter individuals from committing organizational misconduct as well. There is no need to hold corporations liable. In particular, if individuals can be deterred without government intervention, an important justification for corporate criminal liability—which its role in inducing self-reporting and cooperation-- appears to vanish. Consistent with this view, some scholars who oppose corporate criminal liability claim that it is not needed because absent the threat of corporate sanction we could rely on companies to deter, and enhance the law's expressive message through their own ethical messaging.<sup>63</sup>

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evaluated the claims made for how expressive law alters behavior and found that these mechanisms do not entail a fundamental change to people's underlying preferences. Arlen & Kornhauser, *supra* note 13.

<sup>58</sup> See *infra* Section II.B.

<sup>59</sup> *E.g.*, Bilz & Nadler, *supra* note 14, at 241; Cooter, *Do Good Laws*, *supra* note 14; Sunstein, *supra* note 14, at 1137 (if new legal rules can change preferences then people will not attempt to circumvent the new rules); *see also*. Lynch, *supra* note 15, at 46 (to deter, people need to be induced to obey the law for reasons of conscience and conviction, and not out of fear of punishment).

<sup>60</sup> See Justice Manual provisions on individual liability

<sup>61</sup> This observation leaves open two important questions for the criminal law. First, it takes no stand on the intention with which an agent acted. Second, it takes no stand on whether organizations can have intentions distinct from those of its agents or owners.

<sup>62</sup> Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503 (2000).

<sup>63</sup> John Hasnsas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, J. CORP. LAW (forthcoming 2022) [17, 20-21]. Mihailis Diamantis makes a related, albeit different claim. He recognizes the need for additional deterrence beyond the law's expressive message, and also the vital role companies can play in deterring misconduct. But he concludes that the state can best leverage companies' influence by eliminating corporate fines and other such costs and focusing instead on measures designed to reform companies' internal organizational

Accordingly, in order to assess the implications of expressive law for individual and corporate liability for organizational misconduct we must determine whether the strong version of expressive law is correct as applied to organizational misconduct. Specifically, we must assess whether individual enforcement and sanctions are vital to deterrence and whether corporate enforcement and sanctions are vital to deterrence. The strong form directly assumes away the former in concluding that the expressive law can deter effectively without effective enforcement and the regular imposition of sanctions. Corporate sanctions are rendered unnecessary by the strong form's implicit assumption that the criminal law—and not other institutions such as organizations—is the primary determinant of, and institution affecting, people's perceptions of the norms and ethics.

The next two sections show that neither of these assumptions hold in the case of organizational misconduct and show that criminal law cannot deter through expressive channels unless sanctions are imposed on individual wrongdoers and corporations for corporate misconduct.

## **II. Individual Criminal Sanctions Are Essential to Deterring Organizational Misconduct**

This Section examines the validity of the conclusion of the strong form of expressive law that individual enforcement and sanctions are not essential to deterrence, focusing on organization misconduct. This claim rests on two, often unstated, assumptions. The first people decide on legal compliance automatically, without deliberating over benefits and costs, such as sanctions, and that these automatic processes lead them to comply with legally-established (or enhanced) moral or ethical norms. The second is that the criminal law can effectively express its moral compunction against the prohibited misconduct without enforcement or sanctions.<sup>64</sup>

To assess the validity of the strong form's claim about individual sanctions, this section first employs the psychology literature to explicate the mental processes that lead people to automatically and intuitively comply with ethical or moral norms under some circumstances. We next examine whether the criminal law can effectively express an injunctive norm against organizational misconduct without enforcement and sanctions. We show that it cannot for several reasons. Finally, we evaluate whether a legal injunction against organizational misconduct is an effective deterrence against organizational misconduct absent sanctions. We should that it is not because four features of organizational misconduct undermine the law's ability to deter through expressive law: the personal benefit of the misconduct, the identity of the victims, the ability to justify the misconduct as benefiting the firm and fellow employees, and employees' ability to insulate themselves from guilt or shame through the group or diffuse nature of the decision-making process. We conclude that individual enforcement and sanctions are needed to help redress these

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processes, structures and characteristics to promote ethical conduct. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 548-57.

<sup>64</sup> By contrast, expressive law is not an effective substitute for sanctions if people consciously deliberate over whether to comply with the law and comply only when the benefit of misconduct is less than the expected costs (including the internal cost of norm compliance). In this situation, expressive law would not eliminate the need for individual sanctions for organizational misconduct because employees of organizations regularly can obtain substantial benefits from violating the law. See Arlen & Kraakman, *supra* note (discussing the personal benefit to employees of crime); see also Jennifer Arlen & William Carney, (discussing the benefit to managers of securities fraud). []

impediments to expressive law. But they also are needed to supplement it, as given this conditions criminal law cannot deter organizational misconduct through expressive channels alone.

### A. Psychological Underpinnings of the Strong Form of Expressive Law

Expressive law theories, as we understand them, rest on a theory of individual decision making that is more complex than that underlying rational choice theory with egoistic preferences. This complexity arises from two sources. First, expressive law assumes that individuals may have preferences that are not narrowly self-interested. The individual agent cares not only about her material self-interest, but also about the well-being of others, compliance with her obligations, and how she and others perceive her.<sup>65</sup> Second, expressive law assumes that people have social and other-regarding preferences. Thus, all else equal, they want to comply with social and moral norms.

The strong form of expressive law goes one step farther, however. Standard expressive law makes a modest claim that people take norms and ethics into account, along with other factors such as the benefit of the misconduct when deciding whether to commit a crime. The strong form of expressive law claims that laws that express or enhance a moral or social norm against the prohibited conduct can cause people to eschew conduct that otherwise would benefit them absent a risk of being sanctioned. The strong form thus views the law's normative message as a binding constraint that need not be supplemented by sanctions. Proponents of the strong version of expressive law ground their view on empirical evidence that adoption of certain laws has changed people's behavior even when there was little risk of enforcement.<sup>66</sup> Yet this empirical evidence is limited. It tends to involve legal requirements—such as seatbelt use or anti-littering—that people do not have strong financial incentives to violate. It also tends to involve people operating outside organizations. By contrast, people have material financial incentives to engage in organizational misconduct. Moreover, their conduct occurs within a social fabric—the organization—that should affect their perception of the dominant social or moral norms and their attentiveness to legally established norms. These features of organizational misconduct suggest that we cannot rely on existing empirical evidence to support application of the strong form of expressive law to organizational misconduct. We need to turn to psychology for guidance.

Proponents of the strong form have grounded their claim in a robust psychological explanation of why and when the legal establishment of a norm would compel compliance, trumping consideration of the personal benefit of misconduct.<sup>67</sup> Yet such a theory is needed if we are to determine the circumstances under which legally expressed norms will have such a powerful effect.

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<sup>65</sup> This list in the text is not exhaustive. For further discussion of the structure of these complex preferences, see Arlen and Kornhauser, *supra* note 13.

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<sup>67</sup> See Fehr & Schurtenberger, *supra* note 45. To the extent that the legal literature does specify a mechanism, it often relies on the simple assertion that the law changes people's underlying preferences. See citations *supra* note X. Yet analysis of both the mechanisms through which this literature claims the law expresses social condemnation and the requirements for changing people's underlying preferences shows that these expressive law channels do not change preferences. Arlen & Kornhauser, *supra* note 13. Other scholars have offered other theories. E.g., McAdams, *supra* note . But these theories also do not provide a robust explanation grounded in modern psychology, and do not enable us to determine whether and when expressive law lead people to comply even when financial self-interest favors noncompliance.



Psychology does provide a basis for concluding that expressive norms could strongly influence behavior—or even in some circumstances determine behavior—in the right circumstances. To understand why, we first need to identify the underlying psychological mechanism that would lead someone to experience unethical or anti-social behavior as costly.

### *1. How is Cost of Norm Violation Experienced: Guilt and Shame*

Scholars continue debate the internal mental processes that lead people to comply with injunctive norms. Some simply assume that people have a “taste” for complying with social or ethical norms without specifying its behavioral micro foundations. By contrast, experimental psychology and economics has sought to explicate the underlying mechanisms. This literature reveals that the social harm and social/moral norm mechanisms both operate through the internal costs—emotional costs—that people experience when anticipating taking actions that violate social or moral norms, or that cause harm to others.<sup>68</sup> These emotions—or their avoidance—motivate people to avoid unethical or illegal conduct.<sup>69</sup>

The two negative moral emotions that are triggered by—and thus operate to deter—unethical conduct are guilt and shame.<sup>70</sup> We refer to guilt as the negative emotion that people experience when they disappoint their own expectations of themselves: when they do not conform to the behavioral standards that comport with their own expectations, for example by acting unethically, unfairly, or contrary to a social norm. Shame is the negative emotion that people

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<sup>68</sup> The precise psychological mechanisms through which the establishment or enhancement of an ethical or social norm leads people to be averse to the illegal action often is not well specified. Yet a dominant explanation involves the role of guilt and shame. See Fehr & Schurtenberger, *supra* note 45, at 463. Guilt and shame are not the only psychological attitudes that play a role in norm-compliance. There is also esteem. On esteem, see McAdams, *Origin*, *supra* note 14; McAdams, *supra* note 14.

<sup>69</sup> J. P. Tangney, *Self-Relevant Emotions*, 384, 386, in HANDBOOK OF SELF AND IDENTITY ( J. P. Tangney & M. R. Leary ed 2003); see Jonathan Haidt, *The moral emotions*. 852, In HANDBOOK OF AFFECTIVE SCIENCES (2003) (R. J. Davidson, K. R. Scherer, & H. H. Goldsmith Eds. 2003); Jonathan Haidt, J., & Kesebir, S., *Morality*, 797 IN HANDBOOK OF SOCIAL PSYCHOLOGY (S. T. Fiske, D. T. Gilbert, & G. Lindzey Eds., 2010); cf. McAdams, *Attitudinal Theory*, *supra* note X, at 340 (people are motivated to comply with the law by their concern for avoiding disapproval by others in society).

<sup>70</sup> This Article focuses on evidence about what factors influence whether people on average are influenced by pro-social norms or evidence that conduct harms others. Nevertheless, it is worth noting that the criminal law’s expressive impact will depend on differences in people’s personality. Some people are more social-regarding, or influenced by guilt and shame than others. Some people are more moral than others. E.g., Kisk-Gephart, et al., *Bad apples, bad cases, and Bad Barrels, Meta-analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCH. X (2010); see Alex Raskolnikov, *Crimes and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569 (2006)(Differentiating between people based on their willingness to engage in tax evasion); Rebecca Stone, *Legal design for the “good man,”* VA. L. REV. (2016) (differentiates between people based on their motivation to comply with the law). ; see generally Feldman, *supra* note , at 125-151. Moreover, while some of these differences are innate, others are attributable to cultural differences in the society’s in which people were raised and live. E.g., Simon Gächter & J. F. Schultz, *Intrinsic Honesty and the Prevalence of Rule Violations Across Societies*, 531 NATURE 496 (2016); see generally YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES’ ABILITY TO REGULATE HUMAN BEHAVIOR*, 127, 137-140 (2018). Nevertheless, evidence supports the conclusion that there are common factors that influence ethical behavior across people and cultures. Even people identified in personality studies as a moral (or the proverbial good apple) may engage in misconduct if they can gain from misconduct without facing a salient risk of either legal consequences or internal consequences arising from harm to their self-image or standing in society. E.g., FELDMAN, *supra* note , at 127, 129. These are the circumstances law’s expressive channels seek to alter.

experience when they disappoint the expectations of others. People experience shame if they act unethically, immorally, or contrary to an established norm to the extent that they expect that others expected them to comply.<sup>71</sup>

Guilt or shame constitute internal costs of illegal conduct that the law can trigger by establishing or enhancing a moral or social norm. Thus, the law's expressive channels can provide people with an internal motivation to comply with a legal injunction without direct resort to sanctions to the extent that it establishes a salient norm, dominating others, that identifies the illegal conduct as violative of ethical and social norms.

### *2. Norm Compliance through Nonconscious Intuitive Decision-making*

Guilt and shame help explain why people may eschew illegal conduct for reasons beyond expected sanctions, but they do not suffice to support the strong claim for expressive law. To the extent that people deliberate rationally over whether to engage in misconduct, guilt and shame will simply be a cost to be weighed against the benefit of the misconduct. When organizational misconduct is profitable enough, as is often the case, deliberating employees may regularly conclude that the benefits are worth the costs. Sanctions are needed to tip the scales in favor of compliance.

The strong claim assumes that people do not undertake this type of deliberative cost benefit analysis, however. Instead, this claim rests on the premise that people simply intuitively and automatically tend to favor compliance with social and moral norms.

Psychologists who focus on decision-making processes have provided an evidence-based theory that supports this view that people do not deliberate over many, if not most, decisions. Evidence shows that people employ two, quite separate, forms of decision-making when making decisions: (1) conscious deliberative decision-making of the form captured by rational choice theory and (2) intuitive decision-making that tends to be nonconscious, instantaneous, and is often predicated on emotional reactions.<sup>72</sup> Professor Daniel Kahneman refers to our intuitive nonconscious processes as System 1 processes and our deliberative conscious processes as System 2 processes.<sup>73</sup> System 1 operates in one respect operates more simply and in another respect in a

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<sup>71</sup> Psychologists agree that guilt and shame are emotions that serve to regulate our behavior by triggering feelings of distress in response to personal transgressions. But they disagree about precisely how to distinguish between them. Taya R. Cohen, et al., *Introducing the GASP Scale, a New Measure of Guilt and Shame Proneness*, 100 J PERSON. & SOC. PSYCH. 947, 948 (2011). One accepted distinction views guilt as the private sense of having done something wrong or violated one's own conscience, whereas shame is the negative feeling arising from other's people's reaction to the conduct. Id. at 948.

<sup>72</sup> Strictly speaking, this reliance on dual track decision making is not part of expressive law theory but a different theory of behavior. We should understand classical deterrence theory as resting on two assumptions: agents have narrowly self-interested preferences and that they make decisions using system 2. Here we assume that expressive law theory rejects both assumptions. But we could reject each independently. One might understand Arlen & Kornhauser supra note 13 as rejecting the first premise of narrowly self-interested preferences and accepting the second premise that agents use system 2 in making decisions. That paper shows that standard RCT easily accommodates the broader preferences. We do not explore here the position that accepts premise 1 but assumes that agents deploy system 1 in their decisionmaking.

<sup>73</sup> DANIEL KAHNEMAN, THINKING FAST AND SLOW (2013). Other scholars who share the view that human decision-making results from a complex interaction between intuitive/nonconscious decision-making processes and deliberative/conscious decision-making processes include Colin F. Camerer, et al, "*Neuroeconomics*" *How Neuroscience Can Inform Economics*, 43 J. ECON. PERSP. 9 (2005) (articulating the view that people employ multiple

more complicated fashion. System 1 is simple as it relies on a relatively small set of simple heuristic decision rules. Each rule is easily understood and capable of quick deployment. Compliance with social and moral norms is one of these decision rules.

The strong form of expressive law is valid if people rely on System 1 in deciding whether to engage in misconduct<sup>74</sup> and norms and ethical concerns are the dominant drivers of System 1 decision-making. Experiment evidence suggests that people tend to rely on their intuitive System 1 processes to make most decisions. Full deliberation takes time and mental effort that employees often do not have. In this situation, people often resort to other decision-making processes that are more automatic, intuitive, emotional, and efficient.<sup>75</sup> An intuitive emotional reaction can lead to an instantaneous decision to eschew certain conduct before any deliberation over the costs and benefits of the conduct occurs.

Indeed, often people often make choices relying entirely on System 1 processes even when they perceive themselves to be deliberating. This happens because people regularly make the actual choice using System 1 and then subsequently seek facts and arguments to justify the choice they have already made.<sup>76</sup> This subsequent search for evidence and arguments does not result in a genuine weighing of the costs and benefits of the choice because, having already identified their intuitively preferred choices, people tend to focus their quest for facts that support their intuitive choice; in considering arguments, arguments favorable to that choice are more salient. Thus, even when they consciously deliberate over the costs and benefits of different choices, the actual choice is often driven by System 1, and thus was determined by their initial instinct about what is the right choice.<sup>77</sup>

A preponderance of evidence from social psychology suggests that social norms influence behavior through nonconscious or intuitive processes.<sup>78</sup> Thus, under the right circumstances,

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decision-making processes, both conscious and deliberative and nonconscious and intuitive); Leda Cosmides & John Tooby, *Evolutionary Psychology, Moral Heuristics and the Law*, Chapter 9 in *HEURISTICS AND THE LAW* (G. Gigerenzer & Christoph Engel eds., 2006); Colin F. Camerer & Ernst Fehr, *When Does “Economic Man” Dominate Social Behavior?*, 311 *SCIENCE* 47 (2006); see also Jennifer Arlen & Eric Talley, *Introduction to Experimental Law and Economics*, in *EXPERIMENTAL LAW AND ECONOMICS* (Jennifer Arlen & Eric Talley ed., 2008) (discussing the multiple-process theories of decision-making and their implications for experimental law and economics).

<sup>74</sup> See *infra* text accompanying notes X-X (discussing guilt and shame). In contrast with classical deterrence, System 2 need not be egoistic. See *supra* note X. People do tend to have other-regarding preferences and will consider the welfare of those they care about, and, to a lesser degree strangers, when making a decision. Accordingly, a person using System 2 to decide whether to engage in misconduct weighs the benefit of the misconduct against its perceived and salient expected costs, including the risk of criminal sanction, reputational cost, and the internal psychological cost of behaving unethically or harming others. If the benefit of misconduct is great enough, and the cost of detection (and thus reputational sanctions low enough), people employing System 2 processes will engage in misconduct absent a threat of sufficient sanctions.

<sup>75</sup> For an extensive discussion of the role of System 1 see KAHNEMAN, *supra* note 73; Camerer et al., *supra* note 73. For a discussion of the role of System 1 when people are making ethical decisions within organizations, see, e.g., MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* (2011).

<sup>76</sup> See *infra* XXXX

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<sup>78</sup> See, e.g., B. Latane, *The Psychology of Social Impact*, 36 *AMERICAN PSYCHOLOGIST* 343 (1981); [cite Cialdini] see FELDMAN, *supra* note [book], at 111; see also Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A*

criminal laws that establish that particular conduct is contrary to a social or moral norms or is excessively harmful to others can influence people's behavior by causing them to intuitively eschew conduct that would trigger guilt or shame, without their engaging in any conscious deliberation over the sanctions that the law would impose should they engage in the prohibited conduct.<sup>79</sup>

Consequently, the strong form of expressive law has a claim to validity in the theoretically possible situation where the law establishes or enhances a strong moral or normative norm even without enforcement or sanctions, and that norm is the dominant trigger of system 1 processes in this context.<sup>80</sup> The next two parts examine each of these claims in turn and shows that they do not hold. The first part shows that the state cannot effectively express its condemnation in a way that is both heard and is salient at the moment when employees are presented with opportunities to engage in misconduct without regular enforcement against individuals with substantial sanctions. The next part shows that even when the law does express its condemnation, this message will not suffice to deter employees from engaging in organizational misconduct because the circumstances of organizational misconduct undermine the law's ability to deter through people's automatic processing. We then show that sanctions can reduce, but not eliminate these issues. Enforcement and sanctions are thus needed not only to enable criminal law to deter through expressive channels but to supplement it, since these pathways will not suffice.

### ***B. Can Law Express a Salient Norm without Enforcement and Sanctions***

In this part we show that the law needs to supplement adoption of a law with active enforcement and sanctions in order to express its social and moral message in a way that will be salient to employees who are presented with an opportunity to engage in misconduct. We find that three considerations bear on whether the law will be perceived as establishing a social or moral norm: (1) whether the state has ensured that employees were made aware of the legal prohibition when it was adopted; (2) whether the state has ensured that the law is foremost in employees' minds when presented with opportunities to engage in misconduct; and (3) whether employees are surrounded by others who are complying with, and thus affirming, the law as a social norm. We show that the law cannot reliably satisfy most of these without active individual enforcement and sanctions.

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*Social Intuitionist Approach to Moral Judgement*, 108 PSYCH. REV. 814 (2001) (people usually use System 1 to make decisions but moral reason is a product of System 2).

<sup>79</sup> XXX. Eugene Soltes interviewed many people convicted of white collar crimes. Most recounted not being consciously aware of the ethical or legal risks of their choices at the moment that they were deciding to commit the crime. SOLTES, *supra* note 28.

<sup>80</sup> We focus on System 1 for two reasons. First, System 1 is the only system that would support the claim of the strong view that adherence is automatic and does not result from cost-benefit analysis. Second, the majority view among psychologists is that System 1 plays the leading role in unethical behavior. Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, 213, 220, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND LAW (Eyal Zamir & Dorian Teichman, 2014).

### 1. *The Law Must Establish a Salient Norm*

In order to deter through its expressive channels, people need to be aware the legal prohibition,<sup>81</sup> and need to perceive this prohibition as either expressing an ethical norm or a social norm. In addition, people must expect others to comply and to expect compliance of from others. Compliance by others serves to confirm that the law expresses a social norm. Other people's expectation of compliance is the precondition for potential violations to anticipate experiencing shame should they violate the law.

Many criminal laws govern conduct that are so obviously unethical that people will assume they are illegal even if they have not been told about the legal prohibition. Murder and theft are examples of such conduct. But many laws governing business organizations prohibit conduct that is not obviously unethical. Moreover, they often cover conduct that was commonplace prior to (and even after) the law's adoption. Indeed, often laws criminalizing business conduct often seek to transform the perception of the conduct, whether within the affected industry alone or more generally. Thus, in order for the law to establish an ethical or legal norm the state needs to ensure that people learn that what conduct is prohibited. People also need to understand the contours of the prohibition.<sup>82</sup>

The enactment of a law often is communicated to the public. But, subsequent to the law's enactment, the state must act to keep the legal prohibition in the public's consciousness. Thus, to achieve its expressive aims it is important to do more than enact a law. Measures must be taken both to educate the relevant population of the law's requirements and to ensure that the law's prohibitions are salient.

In addition, the state must signal that the law expresses ethical or social norms that are important to the society. Societies have many laws. Some express norms of conduct to which the society is genuinely committed. But others do not—the society no longer shares the normative commitments that justified the adoption of the law.

In order to express a norm that is publicly known and salient, criminal laws not only need to be adopted but they also need to be enforced, and individual wrongdoers need to be sanctioned. Enforcement against individuals operates to inform the public about the existence of the legal

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<sup>81</sup> The law cannot deter through its expressive channels unless people are aware of the law's prohibition even when the conduct violates an ethical norm. When the conduct the law seeks to prohibit also violates an ethical norm, then that norm, and not the law itself, operates (imperfectly) to deter misconduct if people are unaware of the law. For the law itself provide additional deterrence through its ability to express condemnation, people need to know that the ethical norm has been expressed as a law.

Legal expression of an ethical norm can have an additional deterrent effect to the extent that either the law signals that society writ large condemns this behavior (thereby enhancing the anticipated shame of the conduct) or people have norms favoring compliance with the law (thereby enhancing guilt and shame over the misconduct).

<sup>82</sup> Many laws governing business organizations delineate the boundary between legal and illegal conduct in ways that would not be obvious to an ordinary person. See Benjamin van Rooij, *Homo Jurisiducus: Questioning Legal Assumptions About Behavior*. For example, while an average person might believe that it is unethical or immoral for public officials to receive payments in return for using their public office to benefit the person giving them the payment, in the U.S., federal law prohibits such payments to foreign officials, Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (FCPA), , while allowing U.S. federal officials to seek and receive substantial payments in return for agreeing to use the influence afforded them by their public office to benefit the payer under a host of circumstances.

prohibition and to keep it fresh in people's minds. It also can operate to render information they receive from their organizational employers more salient.

Enforcement and sanctions are also how the government effectively and publicly communicate which legally-protected interests are most important. A legally-established injunctive norm that is not enforced is less likely to be perceived as a genuine norm.<sup>83</sup> Indeed, nonenforcement is one way the government deal with laws that fall out of step with current social norms.<sup>84</sup> Similarly, evidence suggests people predicate their perceptions of the immorality of a prohibited act on the sanctions imposed for its violation.<sup>85</sup> This suggests that enforcement and sanctions are two of the three essential tools—in addition to the enactment of the law itself—that express society's view of the magnitude of the social breach associated with violating the law.<sup>86</sup>

For example, consider laws prohibiting bribery of foreign officials. While many people have long considered this conduct to be unethical—and certainly it violates fundamental tenets of agency law—bribery was a commonplace and accepted activity in the U.S. and around the world. The adoption of the Foreign Corrupt Practices Act (FCPA) and the OECD Convention on Foreign Bribery expressed a broad view that such conduct is both illegal and unethical, with the aim of transforming a commonplace activity into conduct both that many people condemn and that potential bribe payers eschew. Yet long after the adoption of the FCPA, foreign bribery remained common place.<sup>87</sup> Moreover, consistent with motivated reasoning, people regularly appeared to justify it as simply complying with local culture. Attitudes towards foreign corruption appeared change, however, after the U.S. and other countries started\* actively enforcing laws against foreign corruption. This enforcement was well-publicized and helped express societies' commitment to their condemnation of this misconduct.

## 2. *The Law Needs to be Salient When the Opportunity to Violate Arises*

The law also needs to be salient at the moment when the opportunity to violate arises.<sup>88</sup> Salience at the moment the opportunity to violate the law arises is important because most situations implicate a variety of norms, both social and personal. These norms will usually include

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<sup>83</sup> See Kahan, *supra* note 14.

<sup>84</sup> For example, the transformation in society's view about the social harm from recreational cannabis use was expressed in a shift in enforcement resources away from such crimes, even though it remains a federal crime. Thus, society's ability to use adoption of a law to establish an influential injunctive norm unless government authorities—specifically enforcement authorities—treat the legal injunction as a norm warranting enforcement and devote resources to doing so.

<sup>85</sup> 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 J. P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE at p. 58 (1975); Kahan, *supra* note 14; see Raymond Paternoster, et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?* 17 LAW & SOCIETY REV. 457 (1983)

<sup>86</sup> See FELDMAN, *supra* note 70, at 82.

<sup>87</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (FCPA). See *supra* note 9 (discussing how the OECD convention induced a change in laws governing bribery around the world and also a change in practices).

<sup>88</sup> 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 Robert B. Cialdini & Melanie Trost, *Social Influence: Social Norms, Conformity and Compliance*, Chapter 21 (1998) at p. 161 in XXX.

the personal norm of self-interest, which tends to dominate over other norms in system 1 processing.<sup>89</sup> To establish a norm that would dominate over self-interest, the injunctive norm must be activated and salient at the moment of choice.<sup>90</sup> To do this, the law needs to speak with a resonant voice.

The simple adoption of a law prohibiting organizational misconduct is unlikely to establish legal injunctive norm that is activated and salient for employees presented with opportunities to engage in misconduct years later that would benefit them and their firms. Motivated reasoning not only distorts people's assessment of facts, it also affects their memory. People recall factors that support their decisions and tend not to recall facts that do not. Presented with potential for profit, the law recedes into the shadows.<sup>91</sup>

On-going and regular sanctions and enforcement serve to make legal injunctions salient at the moment of choice. Indeed, sanctions and enforcement are among the most effective tools for activating norms.<sup>92</sup> Active enforcement—that is reported in the press and discussed by employees—renders legal injunctive norms more effective.

By contract, an injunctive norm is unlikely to be salient if the actor has not observed any affirmation—by society or those around her—of the injunctive norm's important in the years since she originally learned about the norm. Laws that are adopted but never enforced will tend to recede into the background. People's nonconscious intuitive processes will focus on more immediate concerns—such as self-interest and/or taking actions to profit the organization.

### 3. *Compliance by Others at the Firm*

Legal injunctions are unlikely to deter misconduct unless they create an equilibrium where most employees at the firm are perceived as complying with the law. Expressive laws affect our System 1 processes through their ability to trigger guilt and shame. Both people's anticipation of guilt and their anticipation of shame will depend on whether they observe others violating the law. Other's behavior impacts shame because people only anticipate and social condemnation from violating legal injunctions that also are socially accepted and complied with.<sup>93</sup> By contrast, when

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<sup>89</sup> See D.A. Moore

<sup>90</sup> See Cialdini & Trost, *supra* note 88, at 161; Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANNU. REV. PSYCHOL. 591, 596-97 (2004) (people's actions are relatively unaffected by normative information unless it is highlighted prominently in the person's consciousness).

<sup>91</sup> People are more inclined to remember information that supports their preferred position, which enables them to view the outcome that favors them as the fair outcome. Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGAN. BEHAV. & HUMAN DEC. PROCESSES 176 (1992); Babcock et al., *Biased Judgements of Fairness in Bargaining*, 85 AMER. ECON. REV. 1337 (1995); see also Feldman, *Behavioral Ethics*, *supra* note 80, at 217; E.L. Uhlmann, et al., *The Motivated Use of Moral Principles*, 4, *Judgement and Decision Making* 476 (2009). Also, people regularly misremember both what they did and what they were told to do when misremembering allows them to believe than they acted ethically. E.g., Shu et al., *supra* note 110; see Feldman, *supra* note 70, at 47.

<sup>92</sup> See Cialdini & Trost, *supra* note 88, at 161 (priming people with stories of people who were punished renders an injunctive norm more effective).

<sup>93</sup> 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 88, at p. 154; see also Fehr & XX (discussing the importance of the anticipation of sanctions by others in society to the formation and persistence of an injunctive norm).

people generally are violating the law, this signals that the legal injunction is not a social norm. Violations will not trigger social condemnation. Other's violation of the law also may lead people to not experience guilt over failing to comply because people frequently predicate their correctness of their own actions on the conduct of others.<sup>94</sup> Others' decisions to violate the law provides moral cover to those seeking to engage in profitable misconduct while maintaining their self-perception of being an ethical person.

The people whose behavior is most salient—and thus will largely determine their beliefs about whether the prohibited conduct violates accepted conceptions of ethics or social norms are the people they observe in their daily lives—facing the same choices.<sup>95</sup> 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 indeed may even approve of—their illegal conduct.<sup>96</sup> Indeed they perceive the self-interested conduct of those around them as the dominant social norm<sup>97</sup>

Groups within firms thus can converge on one of two equilibriums which do not produce guilt or shame: (1) general compliance with the law or (2) general non-compliance. Absent sanctions, there is a material risk that the group will tend towards non-compliance. Organizational misconduct not only indirectly benefits the person who commits it, but it also often indirectly benefits all of the members of the employee's immediate group by enhancing that group's results. This mutes employees' anticipated shame over violating the law. Members of a group that benefitted from misconduct tend not to sanction or otherwise express condemnation of people who engage in illegal conduct.<sup>98</sup> Beyond this, evidence shows that people who anticipate being presented with a personally profitable opportunity to violate the law will strategically distort their beliefs about whether most others are complying in order to justify their own violation.<sup>99</sup> These initial violations will of course create ideal preconditions for subsequent violations by other employees.

Accordingly, given both the regular opportunities and strong financial incentives that many employees have to engage in organizational misconduct, combined with both motivated reasoning and employees' expectation that co-workers will not condemn them if the misconduct is perceived as benefitting the firm, it is possible for an organization to have a local culture in which employees engage in that is accepted in their local society and thus do not anticipate shame or guilt. To ensure that the equilibrium within each organization promotes compliance, instead of misconduct, in the face of strong financial incentives to engage in misconduct the law must both enhance each employee's incentives to comply and also lead others to conclude that misconduct

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<sup>94</sup> See Cialdini & Trost, *supra* note 88, at p. 172.

<sup>95</sup> E.g., Cialdini & Trost, *supra* note 88, at p. 154-58.

<sup>96</sup> BAZERMAN & TENBRUNSEL, *supra* note 7575, at 81.

<sup>97</sup> TIMUR KURAN PRIVATE TRUTHS, PUBLIC LIES (1995). People also feel more social obligation to those with whom they are in a long-term relationship. Thus, the view of such people towards the norm the law seeks to establish is likely to matter more than statements emanating from those who promulgated the law. E.g., Cialdini & Trost, *supra* note 88, at pp. 159-60.

<sup>98</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at 79-91.

<sup>99</sup> Cristina Bicchieri et al, *It's Not a Lie if You Believe the Norm Does not Apply: Conditional Norm Following with Strategic Beliefs*, (Jan 2020 working paper).



does not benefit the firm. Individuals enforcement and sanctions help with the former; corporate sanctions are needed to achieve the latter, as discussed in the next section.

Sanctions are particularly important for employees in jobs that attract people who are less likely than others to be other-regarding. Personality differences lead some people not to experience guilt or shame that an average person would experience from violating a social or ethical norm.<sup>100</sup> Some businesses—and jobs within in a business—attract people who are motivated primarily by financial self-interest and do not have a strong moral compass. Expressive law will have little effect on such people. When such people comprise a significant portion of a local community within the firm, their regular non-compliance will infect others by sending the signal that the legal injunction is not a socially-accepted norm. Enforcement and sanctions are particularly important in this situation because they target what these people care about: their self-interest. Using sanctions to induce by the egoistic creates the social environment that enables expressive law to be effective.

### ***C. Impediments to Deterring Organizational Misconduct Through Expressive Law***

The preceding part shows that active enforcement and sanctions are needed to help effectuate expressive law. Yet this analysis does not answer whether enforcement needs to occur with sufficient frequency and to be of a sufficiently large magnitude to deter, independent of law's expressive channels. This part shows that classical deterrence sanctions are vital because organizational misconduct is characterized by four features that undermine the criminal law's ability to deter through expressive channels. We should that enforcement and sanctions can act as a counterweight, thereby enhancing the effectiveness of expressive law. Yet they also are needed as a substitute for it, as these features present an omnipresent risk of undermining expressive law's effectiveness, absent other interventions, such as organizational liability.

#### ***1. Personal Benefit of Crime***

Expressive law theories rest on the assumption that people's intuitive decisions are driven primarily by a desire to comply with social or moral norms. People's nonconscious processes do include concern for what is ethical and moral and also for avoiding conduct likely to trigger social disapproval.<sup>101</sup> Yet while such concerns can influence behavior, the evidence shows that people's nonconscious processes are primarily driven by self-interest. Specifically, the greater and more salient are the gains from unethical conduct, the more likely it is that people will violate an ethical norm in pursuit of self-interest.<sup>102</sup> One reason self-interest dominates is that it ethical choices

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<sup>100</sup> People differ substantially in their basic morality and trustworthiness. Emma Levin et al, *Who is Trustworthy? Predicting Trustworth Intentions and Behavior*, 115 J. PERSON. & SOC. PSYCH. 468 (2018) (people high in guilt-proneness are more likely to be trustworthy; situational factors also are relevant); Taya R. Cohen, et al, *Moral Character in the Workplace*, 107 J. PERSON. & SOC. PSCY 943 (2014) (employees differ materially in their moral character; those with low moral character are more likely to engage in unethical and illegal conduct).

<sup>101</sup> See supra Section 1 X; Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgement*, 108 PSYCH. REV. 814 (2001); cf. supra note [ ] [on different personalities]

<sup>102</sup> Don A. Moore & George Loewenstein, *Self-interest, automaticity, and the psychology of conflict of interest*, 17 SOC. JUSTICE RES. 189 (2004) (self-interest is automatic, viscerally compelling, and often unconscious); BAZERMAN & TENBRUNSEL, supra note 75, at 69; see generally O Sezer, et al., *Ethical Blind Spots: Explaining Unintentional*

appear to implicate our controlled processes and it takes more cognitive energy to be reflective enough and to exert sufficient will power to make an ethical choice when it is personally costly.<sup>103</sup> Or, to rephrase, in the nonconscious tug-of-war between a person's "want-self" and their "should (or ethical) self," our want-self tends to dominate when we benefit materially from being unethical.<sup>104</sup>

This evidence bears directly on the applicability of the strong form of expressive law to corporate misconduct because organizational misconduct tends to be enormously profitable. The gains to companies can be enormous and their risk of detection and sanction continues to be low.<sup>105</sup> Employees also can benefit from the bonuses, promotions, and higher-social standing conferred on people whose actions benefit the firm.<sup>106</sup> Thus, employees contemplating misconduct often face substantial incentives to violate the law.

Self-interest has a powerful pernicious impact on people's instincts for prosocial behavior because our decision-making processes are structured in ways that enable us to pursue self-interest while retaining the conviction that we are good and ethical.<sup>107</sup> People do this through processes called "motivated reasoning" which enables "ethical cleansing."<sup>108</sup> Specifically, when faced with a choice, people tend to use System 1 to unconsciously and rapidly make an intuitive decision about what is the best course of action. They generally focusing on self-interest when they do so. Having made that choice, they will often subsequently appear to deliberating over the choice, weighing of costs and benefits of the deliberative choice. But this post-decision deliberation is not objective.<sup>109</sup> Instead people tend to suppress consideration of factors that do not support their preferred choice and focus on justifications for their choice. These justifications often include prosocial justifications that enable them to make the self-interested decision without feeling

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*Unethical Behavior*, 6 CURRENT OPINION IN PSYCHOLOGY 77 (2015) (discussing the literature); N. Epley and E. M. Caruso, *Egocentric Ethics*, 17 SOC. JUSTICE RES. 543 (2004).

<sup>103</sup> BAZERMAN & TENBRUNSEL, *supra* note 75; see Moore & Loewenstein, *supra* note [144 Automaticity]; N. Mead et. al, *Too Tired to Tell the Truth: Self-control Resource Depletion and Dishonesty*, 45 J. EXPER. SOC. PSYCH. 594 (2009); Francesca Gino, et al, *Unable to Resist Temptation: How Self-control Depletion Promotes Unethical Behavior*, 115 ORGAN. BEHAV. & HUM. DEC. PROC. 191 (2011) (finding that the level of control needed to behave ethically exceeds the level needed to take a self-interested unethical act); see also STOUT, *supra* note 14, at 116 (people are more likely to act unselfishly when it does not cost them too much).

<sup>104</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at [chap 2 note 26]. Professors Bazerman and Tenbrunsel conclude that this results from the on-going internal conflict between people's "want self" and more deliberative "should self." Their research suggests that the want self often dominates at the moment of the decision—particular if the decisionmaker is under time pressure—and the should self dominates after the decision, coming in to justify it. See BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 4 at n. 5].

<sup>105</sup> See *supra* note 31.

<sup>106</sup> See Arlen & Kraakman, *supra* note 12.

<sup>107</sup> Selfish instincts are particularly likely to drive the choice if the employee is motivated to engage in the misconduct by the desire to avoid a loss—for example, termination for poor performance. Scott Rick & George Loewenstein, *Hypermotivation*, 45 J. MARKETING, RES. 645 (2008); see Donald Langevoort, *Cultures of Compliance*, 54 AM. CR. L. REV. 933, 952 (2017).

<sup>108</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at 69; Tenbrunsel and Messick.; Cialdini & Trost, *supra* note 88, at 160 (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); see also Kess van den Bos et al, *On Preferences and Doing the Right Thing: Satisfaction with Advantageous Inequity When Cognitive Processing is Limited*, 42 J. EXP. SOC PSYCH. 272 (2006) (people are more likely to prefer unequitable allocations that benefit themselves when cognitive processing is limited).

<sup>109</sup> See *supra* note 110; see BAZERMAN & TENBRUNSEL, *supra* note 75, at 50-52.

unethical.<sup>110</sup> This enables people to pursue self-interest without perceiving themselves as acting inappropriately. Indeed, afterwards they often continue to view themselves as ethical.

Motivated reasoning occurs because people are strongly motivated to pursue self-interest, care about their self-perception as being a good person, and seek convergence between the actions they want to take and their perception of themselves. In order to achieve these objective, people tend to intuitively and nonconsciously employ mental processes that enable them to avoid a conflict between their self-interest and their internal sense of being an ethical person.<sup>111</sup> In order to do so, people nonconsciously adjust reality to support their preferred choices, masking its unethical nature. Accordingly, having selected the self-interested choice through their System 1 processes, they subsequently undertake a conscious deliberation over the choice. But when they do so, the deliberative process is distorted by nonconscious processes that bias the assessment of the choices in favor of the preferred choice. People will nonconsciously focus on information that supports their presumptively preferred choice and ignore information that runs counter to their preferred choice, including that it is unethical or illegal.<sup>112</sup> This bias in information processing

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<sup>110</sup> See, e.g., Moore & Loewenstein, *Automaticity*, *supra* note [144]; Francesca Gino et al., *Motivated Bayesians: Feeling Moral While Acting Egoistically*, 30 J. ECON PERSPEC. 189 (2016); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990); D. M. Messick & K.P. Sentis, *Fairness and Preference*, J. Exper. Soc. Psych. 418 (1979); D. M. Messick & K.P. Sentis, *Fairness, Preference, and Fairness Bias*, in EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES (D.M. Messick & K.S. Cook ed, 1983); see generally BAZERMAN & TENBRUNSEL, *supra* note 75, at [chap 2 note 26, Chap 3 at no 20-22]; see also Jonathan Baron & J. C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCH. 569 (1988); Shavi, et. al, *supra* note 182; D. Chugh et al., *Bounded Ethicality as a Psychological Behavior to Recognizing Conflicts of Interest*, 74-95 in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE AND PUBLIC POLICY (David A. Moore, et al., eds, 2005) (discussing nondeliberative processes that enable good people to engage in unethical behavior without perceiving themselves to be unethical); L Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 330 (2011); Bicchieri et al, *supra* note [152] (experimental evidence shows people may choose to strategically entertain beliefs that justify evading pro-social behavior that imposes costs on them); cf. D. G. Rand et. al, *Spontaneous Giving and Calculated Greed*, 489 NATURE 427 (2012) (people in a competitive environment are more likely to be competitive, as opposed to cooperative, when they use System 1 reasoning).

Moreover, people making such decisions do not recognize that they are biased by personal interest, even when they are informed that financial interest tends to bias decision-making. People tend to believe that others may fall prey to biased decision-making, but that they themselves do not. D.T. Miller & R.K. Ratner, *The Disparity between the Actual and Assumed Power of Self-interest*, 74 J. Personality & Soc. Psych. 53 (1998). People also tend to predict that they will behave more ethically in making a choice than they do. At the moment of prediction, people clearly see the ethical aspect of a given decision. Yet at the time of the decision, “ethical fading” occurs; people tend to focus on making the best business decision. BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 4 around note 10]. This divergence between self-predicted and actual behavior has implications for experimental studies that rely on people’s self-reports on how they would act when choosing between a self-interested and an ethical or fair choice.

<sup>111</sup> See, e.g., D. M. Bersoff, *Why Good People Sometimes do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 PERSON. & SOC. PSYCH. BULLETIN 28 (1999); N. Mazar, et al, *The Dishonesty of Honest People: A Theory of Self-concept Maintenance*, 45 J. MARKETING RES. 633 (2008); DANIEL ARIELY, *THE HONEST TRUTH ABOUT DISHONEST: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012)

<sup>112</sup> See citations in *supra* note 110; e.g., BAZERMAN & TENBRUNSEL, *supra* note 75, 72-73.

One reason ethical fading may occur is that System 1 responses focused on self-interest usually dominate at the time we make the decision. Such mechanisms may be hardwired to increase our chance of survival. George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 Organ. Behav. & Hum. Dec. Processes 272 (1996); see BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 4 around note 10]. In addition, hormonally-driven competitive arousal and egocentric biases may combine to facilitate moral blindness. E.g., Mina Cikara et al., *Their Pain Gives Us*

enables people to make a choice that favors self-interest without being consciously aware of the ethical cost of the decision,<sup>113</sup> thereby avoiding any anticipated guilt or shame.<sup>114</sup>

Motivated reasoning can impede the law's ability to alter behavior through expressive channels because people engaging in organizational misconduct often have ample opportunities to find justifications for actions that violate the law.<sup>115</sup> When presented with such opportunities, they are likely to focus on the benefits of their actions to their company, to their fellow employees, and to their family, and may suppress that the action is illegal. They may be able to not perceive themselves to be violating the law because they do not retrieve it from their memory.<sup>116</sup> Or they may focus on signals that the prohibited conduct is not contrary to a social norm. Such signals include other employees decisions to violate the law, the state's lack of commitment to enforcing this law, signals from their employer that the norm is not an ethical norm, and an alternative prosocial norm that is served by the self-interested conduct, as discussed below.<sup>117</sup>

## 2. Socially-Distant Victims

Another feature of organizational misconduct weighs against the strong form of expressive law: the nature of the harm corporate criminal laws seeks to prevent. Evidence reveals that injunctive norms have particular force when they are designed to prevent substantial harm to identifiable persons, especially if they are proximate to the actor geographically or socially. By contrast, injunctive norms are much weaker—and more easily overlooked by a person engaging in motivated reasoning—if the potential harm from the misconduct is either only probabilistic or would befall unidentified people who are distant either socially or geographically or are in a nonreciprocal relationship, as is the case with customers.<sup>118</sup> Most corporate misconduct—such as corruption, environmental, antitrust—involves harms that as dispersed across people who are unknown to the actor. Norms against such harms tend not to supplant self-interest as the dominant

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*Pleasure: How Intergroup Dynamics Shape Empathic Failure and Counter-Empathic Responses*, 55 J. Exp. Soc. Psychol. 110 (2014); Jason Pierce et al., *From Glue to Gasoline: How Competition Turns Perspective Takers Unethical*, 24 PSYCHO. SCI. 1986 (2013); see Langevoort, *supra* note , at 951-52.

<sup>113</sup> D. M. Messick & K.P. Sentis, Fairness and Preference, 15 J. EXPER. SOC. PSYCH. 418 (1979); D. M. Messick & K.P. Sentis, *Fairness, Preference, and Fairness Biases*, in EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES, (D.M. Messick & K.S. Cook, 1983); see Bazerman & Tenbrunsel, *supra* note 75, at 50, 66-72, 79; see Bicchieri et al, *supra* note [152]; see also Don A. Moore, et al., *Conflict of Interest and the Intrusion of Bias*, 5 JUDGEMENT AND DECISION MAKING 37 (2010) (people tend to truly believe their biased judgements not recognizing that their behavior is ethically problematic).

<sup>114</sup> See Don A. Moore, *Conflict of Interest and the Intrusion of Bias*, 5 JUDGEMENT & DECISION MAKING 37 (2010) (finding that people truly believe their own biased judgements and thus fail to recognize that their behavior is unethical).

<sup>115</sup> Regular personally-beneficial opportunities to violate the law presents a challenge for expressive law because the level of self-control needed to behave ethically has been found to be much higher than the level needed to behave unethically, and self-control can deplete with both over-work or repeated challenges. See Gino, et al. *supra* note 103.

<sup>116</sup> See *infra* note X [memory] and text accompany notes X-X.

<sup>117</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at (see notes 14 & 15 to Chapt 4 of BS). Moreover, this tendency towards moral blindness is supported by distortions in how we remember our choices. People tend to remember information that supports their self-image and forget information that does not. We are motivated to view ourselves as good people and thus selectively remember times we did the right thing and tend to “forget” or not remember the other times. BAZERMAN & TENBRUNSEL, *supra* note 75, at 73.

<sup>118</sup> XXX cite Eugene's book; Cialdini & Trost, *supra* note 88, at 159-160 (people less obligation to those they are in exchange relationships with, such as customers).

trigger of people's System 1 choices. This suggests that expressive law is unlikely to be effective absent individual liability that is imposed with sufficient likelihood and magnitude to cause wrongdoers to conclude that crime does not pay.

### 3. *Countervailing Social Norm Justifying Violation*

People's ability to employ motivated reasoning to justify engaging in organizational misconduct without experiencing guilt or shame also is enhanced by the fact that organizational misconduct often provides them a pro-social benefit to others from the misconduct that they can use to justify it: specifically, the benefit to the firm or the unit for which they work.

As previously discussed, people who benefit from misconduct will nonconsciously seek out, and render salient, arguments for why their self-interested choice benefits others, and thus can be viewed as a moral choice because it has a moral purpose.<sup>119</sup> This prosocial justification is accorded considerable weight, whereas the legal injunction is left in the shadow, in order to enable the actor to pursue a self-interested choice without doing damage to their self-perception of being a good person.<sup>120</sup> Motivated reasoning will often enable the actor to use an alternative prosocial goal to justify the violation to herself even when objectively it would not operate as a legitimate justification for the misconduct.

Indeed, evidence shows that people nonconsciously strategically chose to entertain beliefs that justify evading costly pro-social behavior. These beliefs, referred to as motivated beliefs, enable people "to feel moral while acting egoistically."<sup>121</sup> Motivated beliefs can most easily take root in environments where there is an acceptable justification for the self-serving behavior.<sup>122</sup>

Accordingly, because organizational misconduct benefits the firm, and may also benefit the unit for which an employee works, expressive law is unlikely to be effective absent sanctions because both self-interest and the alternative prosocial norm of helping the firm will tend to be the

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<sup>119</sup> See A. Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSON. & SOC. PSYCH. REV. 193 (1999); Feldman, *supra* note 80, at 223.

<sup>120</sup> See BAZERMAN & TENBRUNSEL, *supra* note 75, at 74, 98. A person inclined to cheat in order to benefit themselves will find it easier to rationalize if they can point to benefits to others as those prove they are not acting selfishly. Scott S. Wilreermuth, *Cheating More When Spoils Are Split*, 115 ORGAN. BEHAV. & HUM. 157, 159 (2011); Francesca Gino et al, *Self-serving altruism? The Lure of Unethical Actions that Benefit Others*, 93 J. ECON. BEHAV. & ORG. 285, 289 (2013); Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 PSYCHOL. SCI. 1153 (2009); ; see also Cialdini & Trost, *supra* note 88, at 160 (people have a basic need to evaluate themselves positively and employ a variety of defensive maneuvers to maintain self-esteem and self-worth while pursuing self-interest); Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. L. REV. 1205, 1214 (2020) (when we act unethically we resolve the contradiction between our behavior and our self-interest by being blind to our 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); Nina Mazu, et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633 (2008).

<sup>121</sup> Gino, et al, *Motivated Bayesians*, *supra* note [152].

<sup>122</sup> See Bicchieri, et al, *supra* note [152];

focal points for System 1 guiding the employee towards misconduct.<sup>123</sup> A competing prosocial justification for the legal violation also is particularly likely to dominate over the social meanings associate with the legal injunction in situations where the legal injunction is designed either to protect people who are socially distant from the actor or to protect people from a risk of harm that is not guaranteed to occur, whereas the violating the norm would provide an immediate benefit to specific people who are socially or physically close to the actor.<sup>124</sup> Such norms are less effective people tend to feel more concern for specific victims than statistical ones and also feel more concern for identified victims who are socially or geographically proximate than for those who are distant from them.<sup>125</sup>

#### 4. Shared Responsibility for the Misconduct

In order for expressive law deters through people's intuitive decision-making processes people need to experience anticipated guilt or shame when violating the law. Guilt and shame are the intuitive response through which people's desire to be, or to be perceived to be, a good person alters their behavior.<sup>126</sup>

Yet people committing misconduct within organizations often can do so without experiencing guilt or shame, even when they are ethical people. Studies have shown that on average people do not experience negative emotions, such as guilt or shame, over their outcomes of their choices when they shared responsibility for the decision with others.<sup>127</sup> The reason is that

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<sup>123</sup> Nadler, *supra* note 120, at 1207 (corruption is difficult to deter through expressive law because people can rationalize it through the benefits the corrupt deal provides to the firm or others within the firm, enabling them to cheat without feeling selfish).

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26(1) J. RISK & UNCER. 5 (2003); Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punitiveness*, 18 J. BEHAV. DECISION MAKING, 311 (2005); T. Kogut & L. Ritov, *The Identified Victim Effect: An Identified Group or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157 (2005); T. Kogut & L. Ritov, *The Singularity Effect of Identified Victims in Separate and Joint Evaluation*, 97 ORGAN. BEHAV. & HUMAN DEC. PROCESSES 106 (2005); see also SOLTES, *supra* note 28 (discussing how the absence of clear identified victims facilitates misconduct by white collar criminals).

<sup>126</sup> See *supra* Section 3.4. There are potentially other explanations for why people respond to norms. For example, some attribute it to people's taste for behaving fairly. This can be incorporated into the view that people feel guilt to the extent that people experience negative emotions when they act contrary to their own expectation of themselves that they be fair. In addition, as discussed below, the literature on fairness reveals that responsibility for the decision also helps determine whether people will be averse to an unfair decision.

<sup>127</sup> The literature on the link between responsibility and disutility from 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 the experience of disutility over anticipate regret, guilt, shame or unfairness aversion associated with the choice include: Jennifer Arlen & Stephan Tontrup, *Does the Endowment Effect Justify Legal Intervention? The Debiasing Effect of Institutions*, 44. J. LEGAL STUD. 143 (2015); Björn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility*, 79 REV. ECON. STUD. 67 (2012) (principals can shift responsibility, and thus blame, for unfair decisions by delegating to agents even when they retain significant control over the agent's decision [ch]); John R. Hamman, et al, *Self-Interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship*, 100 AMER. ECON. REV. 1826 (2010); Zachary Grossman & Regine Oexl, *Delegating to a Powerless Intermediary: Does it Reduce Punishment?*, 16 EXPERIMENTAL ECONOMICS 306 (2012); Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship between Blame Shifting and Control*, 12 J. EMP. LEGAL STUD. 311 (2015) (principals can evade blame by delegating conduct to others, even when agents are effectively powerless); M. Steffel & E.F. Williams, *Delegating Decisions: Recruiting Others to Make Choices We*

people only blame themselves of choice that they feel they were responsible for making. But people are motivated not to feel responsible for choices that could trigger negative emotions. Thus, people's internal views of when they are responsible enables them to not feel responsible for all the choices they make that produce negative outcomes.<sup>128</sup> Of particular importance, studies show that people tend not to perceive themselves as to be responsible for a decision that could produce guilt, shame or regret, if they shared responsibility for making the decision with others. Specifically, people who takes the first step towards a choice that is actually made by someone else, people whose choices resulted from group deliberation, and those that were following instructions usually will not anticipate guilt or shame because they do not view themselves as responsible for decision.<sup>129</sup> As a result, even when expressive law can establish a salient moral or social norm, this norm will not deter organizational misconduct to the extent that people who violate the law act within a group that mutes the anticipated guilt or shame that would otherwise deter them. Consistent with this, evidence shows that people tend to behave less ethically in groups than alone.<sup>130</sup>

Not only does responsibility-sharing mute guilt and shame, but the evidence shows that people presented with profitable opportunities that could trigger negative emotions—such as regret, guilt or shame—can and do strategically structure the decision-making process to enable

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*Might Regret*, 44 J. CONSUMER RES. 1015 (2018); Marwa El Zein, Bahador Bahrami, & Ralph Hertwig, *Shared Responsibility in Collective Decisions*, NATURE HUM. BEH. (April 2019) (collective decision-making shields people from the psychological costs of negative outcomes by reducing both regret (self-blame) and third-party blame); Marwa El Zein & Bahador Bahrami, *Collective Decisions Divert Regret and Responsibility Away from the Individual*, XXX; see also Waytz, A. & Young, L. 23 PSYCHOL. SCI. 77–85 (2012); A-K Newheiser, et al, 48 J. F. J. EXP. SOC. PSYCHOL. 931–936 (2012) (multiple people causing punishment-worth conduct are less likely to be viewed as responsible for, and to be punished for, the conduct); Max H. Bazerman, et al, *Dirty Work, Clean Hands: the Moral Psychology of Indirect Agency*, 109 ORGAN. BEHAV. & HUM. DECISION PROCESSES 134 (2009); Marcel Zeelenberg, et. al, *Reconsidering the Relation between Regret and Responsibility*, 74 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 254 (1998); cf. Janice Nadler, *Blaming as Social Process: The Influence of Character and Moral Emotion on Blame*, 75 L. & CONTEMP. PROB. 1 (2012).

<sup>128</sup> Barbara A. Spellman, *Crediting Causality*, 126 J. EXP. PSYCHOLOGY: GENERAL 323 (1997); See citations in note 127 *supra*.

<sup>129</sup> For example, people do not anticipate regret over decisions that are the product of a majority vote. Indeed, people do not feel responsible for a choice that results from a vote even when the decision-maker retained the right to make a choice contrary to the vote after it was taken. Arlen & Tontrup, *supra* note , at 162.

Similarly, people tend not to perceive themselves to be responsible if they delegated the decision to an agent, even if they incentivized the agent to make the personally-beneficial but unethical choice. Bartling & Fischbacher, *supra* note 127; Hamman, et al., *supra* note 127; see Arlen & Tontrup, *supra* note 127. Delegation can mute perceived responsibility even when, objectively, the person delegating was ultimately responsible for the decision and indeed employed the delegation to permit an action that otherwise would produce guilt or shame. Delegation is effective because people do not attribute responsibility to all the people involved in making a particular choice. Add citation Instead, people attribute the greatest responsibility to the last affirmative action in the causal chain, even when preceded by affirmative actions favoring the choice or followed by subsequent inaction. See Spellman, *supra* note 128. Group decision-making also can promote unethical decisions in other ways. There is evidence that people deciding collectively tend to engage in Groupthink—their strong preference for unanimity can lead them not to fully interrogate the legitimacy of the choice they are making, and thus do not identify or fully consider either the potential consequences of the preferred choice or alternative options. BAZERMAN & TENBRUNSEL, *supra* note 75.

People also can displace responsibility by blaming a superior who they believe ordered (directly or implicitly) the unlawful act. See Feldman, *supra* note 80, at 223.

<sup>130</sup> See FELDMAN, *supra* note 70, at 4.

them to share responsibility, thereby muting the negative emotions.<sup>131</sup> Moreover, responsibility sharing not only mutes the actor's guilt it also causes others to not view the actor as primarily responsibility, thereby muting social condemnation and shame. This result holds even when the actor is a principal who could foresee or even control the agent.<sup>132</sup>

#### **D. Implications for Individual Enforcement and Sanctions**

The preceding analysis reveals that individual liability that is actively enforced and imposes substantial sanctions is essential to the law's ability to deter organizational misconduct.<sup>133</sup> First, individual liability is needed to enable criminal law to deter through expressive channels. In addition, individual liability is needed to deter through classical deterrence channels, as expressive law alone is unlikely to be sufficient given the structural impediments to its effective use in the context of organizational misconduct.

##### *1. Individual Enforcement and Sanctions Enables Deterrence Through Expressive Law*

Active individual enforcement and material sanctions are needed to enable expressive law to establish a salient norm that is capable of deterring through System 1 processes for several reasons. To deter through System 1, the law's expressive norm needs to be focal. Organizational misconduct presents multiple hurdles to this goal: employees' benefit will motivate them to focus on that and also on the alternative prosocial justifications for the misconduct; the social harm from this misconduct usually will not be salient because victims tends to be socially and geographically distant; laws governing organizational misconduct are often complex and not front and center in everyday life; and individuals can avoid guilt and shame by hiding within group decision-making processes. Thus, enforcement and sanctions also are needed to mute these impediments in order to create an environment where the expressed norm can be focal.

First, individual enforcement and sanctions often are needed to help make employees aware the law. Enforcement and sanctions also convey society's commitment to the legal prohibition. Individual criminal liability is important to society's ability to convey this message because the

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<sup>131</sup> E.g. Bartling & Fischbacher, supra note 127; Hamman, et al., supra note 127; Arlen & Tontrup, supra note 127.

For example, evidence shows that research subjects given money that they can share with others will use agents to structure the decision-making environment to enable them to retain an unfair allocation without either perceiving themselves to be unfair or being blamed by others for being unfair. Instead of choosing an unfair allocation themselves, dictators (in the ultimatum game) prefer to delegate their decision to a second subject who they anticipate will make the beneficial but unfair decision. The decision-maker who delegates does not feel responsible for, and thus does not experience a psychological cost from, making the unfair decision. Moreover, the decision-maker does not feel responsible, and is not deemed by others to be responsible, even if she delegates the decision to the agent fully knowing that the agent will act in her financial best interests, and thus will chose to be unfair. Björn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility*, 79 REV. ECON. STUD. 67 (2012); [add more recent articles]; Hamman, et al, supra note 127.

<sup>132</sup> Neeru Paharia, et al. *Dirty Work, Clean Hands: The Moral Psychology of Indirect Agency*, 109 ORGAN. BEHAV. & HUMAN DEC. PROCESSES 134 (2009).

<sup>133</sup> We focus on individual liability for organization misconduct but our conclusions apply to other forms of misconduct, showing the importance of active enforcement against, and the imposition of material sanctions on, individuals who commit crimes, even when criminal laws have the ability to influence behavior through either the social norm or social harm mechanism.



social meaning of criminal laws is determined by the confluence of the content of the law and society's commitment to its enforcement and decisions regarding the appropriate sanctions.<sup>134</sup> When a law is promulgated but never enforced it sends the message that the executive or enforcement authorities either do not view the legal injunction as a legitimate expressions of shared norms or beliefs or do not view it as a priority.<sup>135</sup> Individual enforcement and sanction expresses society's view that the misconduct was a material violation of the social compact, and worthy of sanction.

In addition, sanctions and regular active enforcement keep the legal injunction fresh in people's minds, helping to render it salient when opportunities to violate arise. Laws that are adopted but not enforced will tend to recede into the shadows, much like parental injunctions whose violation never results in consequences.

Individual enforcement and sanctions also can reduce the pernicious effect of motivated reasoning by targeting employees' expected benefit from misconduct. Enforcement that occurs with sufficient frequency and imposes substantial sanctions can produce an expected sanction that exceeds employees expected benefit from the misconduct. This can reduce or eliminate their self-interested incentives to violate the law, thereby removing the distorting effect of motivated reasoning.

Individual enforcement also can mute motivated reasoning by expressing society's view that the misconduct cannot be justified by the desire to benefit the firm. This can undercut people's ability to justify misconduct through moral licensing. It also should enhance anticipated shame by indicating that others will not embrace such self-interested justifications.<sup>136</sup>

Effective enforcement and sanctions that leads employees to conclude crime does not pay also enhances expressive law through their effects on other employees, including those who are motivated purely by egoistic concerns. Evidence that an employee's compliance depends on whether her immediate group complies implies that expressive law is not effective unless it can create an equilibrium where the group as a whole complies. This means muting fellow employees' incentives to engage in motivated reasoning. It also requires using tool to deter those who are egoistic if they comprise a substantial portion of the group. Effective individual enforcement and sanctions have the capacity to do both.

Finally, active enforcement may be needed to ensure that employees engaging in misconduct anticipate guilt and shame even when their conduct occurs within a group. Active enforcement that occurs regularly, and receives adequate publicity, can express society's view about who within the firm is responsible—legally and morally—for misconduct. Public identification of employees as wrongdoers—even when they were following orders, focused on

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<sup>134</sup> See *supra* Section 2.A.1.

<sup>135</sup> Paternoster et al have shown that perceived punishment is a significant predictor of an act's perceived morality. Paternoster, et al, [see Feldman 153-54; 69]; For evidence that punishment changes the social meaning of behavior, operating a material component of the criminal law's expressive channels see J. P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE at p. 58 (1975); see also Kahan, *supra* note 14.

<sup>136</sup> See also Nadler, *supra* note 120, 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).

making profit, or concluded that the ultimate decision was for someone higher to make—can help render people’s individual responsibility more salient. While people are inclined, when able, to shift responsibility to others, active enforcement serves as a public reminder of precisely who the law—and society—deems to be responsible for organizational misconduct. It would serve to regularly remind people that the law—and others in society—will deem them to be responsible for any misconduct they participate in. This may also enhance their own sense that they are responsible.

Thus, rather than crowding out expressive law, in the context of organizational misconduct, individual enforcement and sanctions are likely to be essential enablers of the criminal law’s ability to deter through expressive channels.

### *2. Individual Enforcement and Sanctions as a Substitute for Expressive Law*

Individual enforcement and sanctions are not only needed to operationalize the expressive force of law. They also are needed to supplement or substitute for it—providing deterrence in those situations where deterrence through expressive law does not suffice. Criminal law’s expressive message often will not be sufficient to deter individuals from engaging in organizational misconduct because organizational misconduct has multiple attributes that undermine the expressive force of law, as discussed above. Given this, in order to deter it is important to also deter through classical deterrence channels. Sanctions and enforcement can deter through System 1 if they enforcement occurs with sufficient regularity, and imposes sufficiently large sanctions, that employees’ self-interested assessment of potential misconduct leads them to conclude that crime threatens their welfare instead of enhancing it. Sanctions and enforcement also can deter through System 2 if enforcement is sufficiently active and produces sufficiently large sanctions to lead employees to conclude that the expected costs of misconduct exceed its benefits.

Thus, contrary to the view of the proponents of the strong form of expressive law, individual enforcement and sanctions are vital to deterring organizational misconduct. They also will tend to be insufficient in and of themselves. The central problem is that enforcement authorities, left to their own resources, cannot to detect and successfully enforce misconduct with sufficient regularity to create a risk of enforcement that is salient to employees presented with an opportunity to engage in misconduct.<sup>137</sup> When, by contrast, enforcement occurs as rarely as a lightning strike, people will not take it into account in their decision-making through System 1 or System 2, and the law cannot deter effectively. Deterrence thus will tend to require additional tools, including, as discussed below, organizational liability.

## **III. Why Organizational Liability Is Vital to Deterrence Through Expressive Law**

In this Section we evaluate whether the strong form of expressive law presents a challenge to the conclusion from classical deterrence theory that organizational liability is vital to deterrence. The strong form of expressive law appears to imply that organizational liability is not needed because the strong form assumes the law can deter individuals through expressive channels alone. Even individual deterrence through expressive channels requires individual sanctions, as shown in

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<sup>137</sup> See *supra* note X and text accompanying notes X-X.

Section II, deterrence aimed at individuals should suffice. Classical deterrence theorists have shown that this conclusion is not correct as applied to deterrence through classical channels.<sup>138</sup> Yet the question remains whether corporate liability also is essential to the law's ability to deter organizational misconduct through expressive channels.<sup>139</sup> This section shows that it is.

The conclusion of the strong form that organizational liability is not an essential component of deterrence through expressive law rests on the implicit assumption that the law is the dominant institution affecting employees' perceptions of whether the enjoined conduct violates a social norm. This Section shows that this premise is not correct. The law and legal institutions are not the primary arbiter of social and moral norms for employees. In the gulf between the law and the people it seeks to influence are a host of other institutions that influence behavior.<sup>140</sup> The most prevalent and dominant of these institutions in most people's daily lives are the organization that employs them.

Corporate employers define the environment in which employees make decisions in what that can undermine or enhance the law's ability to deter misconduct through expressive channels. Organizations create internal cultures, are employees' primary source of information about legal and ethical requirements, they set goals for employees, and define their immediate social groups. Organizations use this influence to affect the law's ability to deter through expressive channels in three distinct ways. First, organizations directly affect the law's ability to reach employees to communicate that the legal injunction expresses an accepted social or moral norm. Second, organizations substantially influence whether this expressed norm can deter through their influence over whether the norm is sufficiently focal in their employees to dominate self-interest should an opportunity to engage in misconduct arise.<sup>141</sup> Third, and related, organizations substantially influence when norms can deter by affecting whether employees contemplating misconduct will attribute sufficient responsibility for misconduct to themselves that they anticipate guilt or shame from actions that lead to misconduct.

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<sup>138</sup> See *Supra* Section I.A.

<sup>139</sup> We need to evaluate whether expressive law provides an independent justification for organizational liability to enable us to deter whether organizational liability only needs to be structured to serve classical deterrence goals—inducing corporate prevention and policing—or also needs to promote deterrence through expressive law. This question is important because classical deterrence does not suffice to deter organizational misconduct, given the resources society currently devotes to enforcement of organizational misconduct. As a result, even with organizational liability ostensibly structured to encourage corporate self-reporting, most employees face too low a risk of being sanctioned for the threat of sanctions alone to deter. Criminal law can be more effective when it also can leverage expressive law channels. Thus, the question arises whether organizational liability is vital to the law's ability to deter through expressive channels as well.

<sup>140</sup> See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject for Study*, 7 *LAW & SOCIETY REVIEW* 719, 721 (1973); STOUT, *supra* note , at 170 (corporations influence how people behave. Employees who spend their days focused on making profits over other goals will tend to emulate this behavior); Buell, *Blaming Function*, *supra* note ; Diamantis, *supra* note 63, at 540 (corporate culture can have a significant effect on how people behave); Mihailis Diamantis, *Law's Missing Account of Corporate Character*, 17 *GEORGETOWN J. LAW & PUB. POL'Y* 865, 874 (2019) (same); see also Max Weber, *ON LAW IN ECONOMY AND SOCIETY*, 38 (Max Rheinstein ed, 1954); Miriam Baer, ; Langevoort, *supra* note .

<sup>141</sup> They also affect it through their influence over whether employees are channeled into more deliberative System 2 decision-making that is primed to focus on moral considerations.

We conclude that organizations' impact on expressive law's effectiveness provides an additional argument for holding organizations liable for their employees' misconduct. Because organizations can profit from employee misconduct, and efforts to deter them are costly, organizations will promote misconduct—directly or indirectly—and will not spend resources needed to enhance the expressive effect of the criminal law unless they face sufficient liability to ensure that they are more profitable when employees eschew misconduct.

### **A. Organizations Affect Employees' Perception that the Law Expresses a Social Norm**

Some laws governing organizational misconduct, such as fraud, enjoin conduct that is obviously unethical. But many others enjoin conduct that was apparently accepted within the business community prior to the law—as is the case with laws prohibiting corruption and insider trading. These laws thus seek to express and establish a norm that would otherwise be the social norm in that community.<sup>142</sup> Such criminal laws can only succeed in deterring through the establishment of a new injunctive norm if employees learn about the legal injunction, can identify the specific conduct that the law seeks to prohibit, and believe the legal injunction expresses a value social or ethical norm.

Organizations are vital to each facet of this process. Employees often do not learn about laws prohibiting organizational misconduct directly from legal institutions.<sup>143</sup> Moreover, to be effective, employees need to know not only that a law exists, they need to understand precisely what conduct the law enjoins. This is a challenge for organizational misconduct because these laws often create legal injunctions whose contours do not align with popular ethical understandings of the topic.<sup>144</sup> Moreover, many of these laws do not clearly define what conduct is illegal but instead often are vague and ambiguous.<sup>145</sup> This ambiguity undermines law's expressive messages because

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<sup>142</sup> Insider trading; corruption etc For example, the currency transaction reporting requirements of the Bank Secrecy Act require financial institutions to report all cash transactions exceeding \$10,000. This criminal law does not appear to coincide with ethical or social norms.

Similarly, many environmental laws seeking to prohibit the dumping of certain toxic chemicals regulated conduct that, prior to the law, people did not perceive as being particularly harmful. For example, people regularly put lead batteries into landfills, disposed of dry cleaning fluids, changed the oil in their cars and disposed of it at home without perceiving themselves to be causing material harm.

<sup>143</sup> As previously discussed, legal institutions can use enforcement and sanctions to communicate laws to the public, see *supra* text accompanying notes X-X, but this is not sufficient to ensure that laws are widely-known and understood. For example, how many people can identify which chemicals are covered by environmental laws—even though they may use and need to dispose of such chemicals at home.

<sup>144</sup> For example, consider domestic corruption. People who believe corruption is unethical would likely conclude that it is unethical for a public servant to sell their ability to influence decisions for personal profit. See also Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (2016). Yet U.S. federal law on domestic corruption permits corporations to provide massive corporate campaign contributions and lobbying expenditures that unambiguously influence legislatures. Moreover, under federal law it is lawful to pay federal and state legislators and Governors to exert their influence on a firm's behalf through acts other than taking an official act. *U.S. v. McDonnell*.

<sup>145</sup> See Samuel Buell, *The Upside of Overbreadth*, 83 NYU L. REV. 1491 (2008).

people's capacity for moral blindness is enhanced when the law is sufficiently ambiguous to enable people to conclude their conduct is not illegal.<sup>146</sup>

Organizations directly communicate with employees about their obligations. They can use this direct access to support expressive law by educating employees about the law and providing clear guidelines for their behavior, or they can remain silent or even signal that the law is invalid.

Organizations also directly affect the salience of the law's expressive message in how the legal injunction is initially conveyed. An employee's employer is an important voice of authority in her life; employees' perceptions of the validity of a norm are influenced by their organization's expressions of about whether the law is an invalid interfering regulation or a valid expression of social or moral norms. Moreover, the organization's expression is likely to dominate over that of legal institutions because people presented with competing voices of authority will tend to focus on the one that is most proximate—that is located within a person's "in group" or social circle.<sup>147</sup> This is particularly likely if that voice is encouraging people to take actions that align with their self-interest.<sup>148</sup>

They also affect its salience by whether they provide employees with regular reminders about the legal injunction. A legal injunction is unlikely to be salient in organizations that provide either no or ineffectual annual training that is not accompanied by regular and repeated reminders about the importance of legal compliance and ethics. Salience requires repeated and salient reminders about ethical obligations incorporated into employees' lived experiences within their firms.

Of particular importance, organizations support or undermine laws expressive messages through the messages that line managers provide to those under them about what conduct is expected and rewarded. Employees are not primarily directly influenced by a firm's "tone from the top" or its compliance program. Instead, they place primary weight on expressions by their immediate supervisors. The most salient expressions are those that directly affect the employees' welfare.<sup>149</sup> Thus, employees' perception of whether compliance with the legal injunction is a primary goal will depend on the relative priority their direct managers give to compliance, as opposed to profit, in their daily interactions and during their performance reviews.<sup>150</sup> Wittingly or

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

<sup>147</sup> Experimental evidence suggests that people appear to have an instinct for obedience to authority. This instinct obviously can be leveraged by expressive law. But not all voices of authority have equal impact. People tend to follow those respected authorities that are the most immediate to them—that are part of their "in group." Stout, *supra* note 14, at 220. For many people, the authority that is most proximate and that defines their daily world is their corporate employer. Within the corporate employer, the voice that tends to matter most is their immediate manager.

<sup>148</sup> See *infra* Section 2.B.2.

<sup>149</sup> See *infra* Section 2.B.2;

<sup>150</sup> See, e.g., Neil Barofsky, et al, *Changing Corporate Culture*, in GUIDE TO MONITORSHIPS (2d 2020) (middle managers in effect set the cultural tone experienced by employees). Organizations' public statements of culture are often at odds with the informal corporate culture that actually guides their employees' behavior. Ann E. Tenbrunsel et. al, *Building Houses On Rocks: The Role of Ethical Infrastructure in the Ethical Effectiveness of Organizations*, 16 Soc. Justice Research 285, 288 (2003); see BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 6 not 6 & 27].

unwittingly, organizations undermine the expressive power of the law to the extent that their managers base performance reviews and salary determinations solely on objective measures of productivity because this approach sends a strong signal to employees that the organization values outcomes over all else—including legal compliance.<sup>151</sup> The recurrent drumbeat of this message, pushes profit to the forefront and relegates the legal injunction and ethics to the shadows.<sup>152</sup>

The pernicious effect of the organizational culture on employees' perceived social norms is enhanced in organizations that target discipline and termination at poorly performing employees, and that look the other way when high-performing employees violate legal or ethical norms.<sup>153</sup> Through such actions organizations communicate that the dominate authority in employees' lives does not view the legal injunction as a compelling social or ethical norm to guide behavior.

### **B. Organizations' Affect Whether the Legal Injunction is Focal**

Organizations, intentionally or not, also can undermine the law's ability to alter behavior through expressive channels through their ability to provide employees with both salient motivations and justifications for misconduct that can mute employees' perception of the legal norm. As previously discussed, people use System 1 processes to make most decisions and these processes are primarily motivated by self-interest, absent an alternative dominant focal norm. Self-interest tends to be the focal norm because it gives rise to motivated reasoning which promotes consideration of alternative prosocial justifications for the misconduct, and mutes recognition of the social harm from the misconduct. Organizations directly affect their employees' likelihood of misconduct through the incentives they provide employees to engage in misconduct, the alternative prosocial justifications they inculcate in employees, their impact on the culture of employees' immediate group, and their impact on whether profit and production are focal concerns for employees or whether instead employees are repeatedly encouraged to focus on ethics and legality and given time to deliberate.

#### *1. Employees' Benefit from the misconduct*

Organizations determine employees' incentives to engage in misconduct through the way they structure their compensation, retention and promotion policies.<sup>154</sup> Employees generally do

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Organizations that allow such informal cultures to persist that do not support legal compliance have, in effect, expressed their view that legal compliance is not a priority.

<sup>151</sup> BAZERMAN & TENBRUNSEL, *supra* note 75; Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS UNIV. L. REV. 421, 474 (2017) (companies communicate what is most important to them through their incentive systems).

<sup>152</sup> Indeed, organization's regular exhortations to focus on profits and outcomes can undercut the impact of expressive law through the very mental processes that expressive law seeks to leverage—people's tendency to defer to instructions from and the expectations of those in authority. See (one of people's prevailing norms of obedience to authority). See Cialdini & Goldstein, *supra* note [137]; see also B. E. Ashford & V Anand, *The normalization of corruption in organizations*. In RESEARCH IN ORGANIZATIONAL BEHAVIOR (B.M. Staw & RM Kramer, 2003) (subordinates follow their supervisors instructions even if it would lead to an unethical or illegal act); Brief, et al, *Releasing the beast: a study of compliance with orders to use race as a selection criterion*, 51 J. SOC. ISSUES 177 (1995) (same);

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<sup>154</sup> Arlen, *supra* note 12, at X (organizations directly impact employees' expected benefit from misconduct).

not benefit directly from organizational misconduct. Instead, organizational misconduct—such as corruption, securities fraud, environmental violations, price fixing and corporate fraud—directly benefits the corporation. Employees’ benefit through the effect that their profit-enhancing actions have on their expected compensation, expected job tenure, and likelihood of promotion.<sup>155</sup>

Organizations that predicate compensation, retention and promotion on employees’ output or contributions to sale provide their employees with high-powered incentives to enhance corporate profits. But they also provide them with strong incentives to engage in misconduct.<sup>156</sup> This personal benefit mutes the expressive message of the criminal law because, as previously explained, employees who benefit personally from misconduct tend to focus on this benefit in making decisions. They unconsciously and automatically<sup>157</sup> focus on facts that justify their self-interested choice and ignore information that does not support that choice, leaving them morally blind to the ethical implications of their choice.<sup>158</sup> Indeed, people who make self-interested illegal or unethical harm-producing choices in a moment of moral blindness tend not to later recognize, and internalize the psychological cost of, their poor behavior. Thus, they can engage in such conduct repeatedly.<sup>159</sup>

Organizations regularly further undermine expressive law through their supervisors’ regular exhortations to employees to increase results or profits. Firms that focus their employees’ attention on productivity or financial success prime employees to focus on financial benefits.<sup>160</sup> This priming renders employees’ own self-interest salient and mutes the law’s expressive message.

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<sup>155</sup> See Jonathan Macey, (concluding the corporate crime is an agency cost); Arlen, *supra* note 27 (same); see also Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 ILL. L. REV. 691 (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).

<sup>156</sup> 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. C. Hill, P. Kelley, B. Agle, M. Hitt, R. Hoskisson, *An Empirical Examination of the Causes of Corporate Wrongdoing in the United States*, 45 HUMAN BEHAV. 1055 (1993); John Lott and T. Opler, *Testing Whether Predatory Commitments Are Credible*, 69 J. BUS. 339-382 (1996); see Mark Cohen and Sally Simpson, *The Origins of Corporate Criminality: Rational Individual and Organizational Actors*, in Lofquist, W., Cohen, M., Rabe, G. DEBATING CORPORATE CRIME: AN INTERDISCIPLINARY EXAMINATION OF THE CAUSES AND CONTROL OF CORPORATE MISCONDUCT (1997);

<sup>157</sup> See Moore & Loewenstein, *supra* note ; N. Epley & E. M. Caruso, *Egocentric Ethics*, 17 SOC. JUSTICE RES. 171 (2004).

<sup>158</sup> See *supra* text accompanying notes X-x; see, e.g., BAZERMAN & TENBRUNSEL, *supra* note 75, [Chap 3 at no 22]; ARIELY, *supra* note ; Bicchieri et al, *supra* note [152] (experimental evidence shows people may choose to strategically entertain beliefs that justify evading pro-social behavior that imposes costs on them); Gino et al, *Motivated Bayesians*, *supra* note [152], at 191-93; Kunda, *supra* note 110; Linda Babcock, et. al, *Biased Judgements of Fairness in Bargaining*, 85 Amer. Econ. Rev. 1337 (1995); see also FELDMAN, *supra* note 70, at 3, 35; Langevoort, *supra* note , at 954 (the research on conflicts of interest generally finds that conflicts are resolved cognitively (and organizationally) in favor of self-interest).

Beyond the direct effect of self-interest, 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. M Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 Organizational Behavior and Human Decision Processes 53 (2013).

<sup>159</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 4 around note 15].

<sup>160</sup> See Q. Yang, et al, *Diverging Effects of Clean versus Dirty Money on Attitudes, Values, and Interpersonal Behavior*, 104 J. Personality & Soc. Psych. 473 (2013); Feldman, *supra* note [book chapter] at 216.

Companies that create a culture that gives primacy to financial success also undermines the criminal law's ability to deter through expressive channels by causing employees not to anticipate being condemned by others should they violate the law. Companies often predicate employees' compensation on the success of the team or unit. Employees whose financial welfare depends on the success of a unit thus benefit when other employees engage in profitable misconduct. Bribery that enables the firm to make a big sale, accounting fraud that boosts reported profits, and other corporate crimes 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. Employees who benefit from misconduct have been shown to exhibit motivated blindness to the profitable misconduct of others. They do not sanction, and are not expected by wrongdoers to sanction, such legal violations. The negation of anticipated shame negates one of expressive laws important channels of influence.<sup>161</sup>

## *2. Provision of an Alternative Prosocial Norm*

Criminal law's expressed norms are unlikely to be salient to employees who benefit personally from misconduct when employees can tell themselves they are taking the self-interested action to benefit others.

Organizations regularly provide employees just the prosocial justification they want. Many organizations create a culture that treat serving the firm or the "team" as a dominant local social norm. Organizations that emphasize employees' social obligations to the financial welfare of the firm or the team provide their employees with a prosocial justification for violating the law, thereby enabling employees to violate the law without the anticipated guilt or shame that would normally accompany illegal or unethical conduct.<sup>162</sup>

Such local pro-social justifications for profitable but illegal misconduct tend to dominate other norms—such as those emanating from the law—for two reasons. First is motivated reasoning. People who can benefit from making an unethical choice tend to focus on any available prosocial justification for their self-interested choice and ignore counter-veiling considerations.<sup>163</sup> Employees ability to focus on this pro-social justification—on the good that their actions do for others—enables them to be morally blind to the unethical nature of their decisions, and avoid the anticipated guilt or shame that could normally accompany an unethical illegal act.<sup>164</sup>

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<sup>161</sup> See *supra* text accompanying notes X-Y for a discussion of moral blindness.

<sup>162</sup> Bazerman & Tenbrunsel conclude that this results from the on-going internal conflict between people's "want self" and more deliberative "should self." Their research suggests that the want self often dominates at the moment of the decision—particular if the decisionmaker is under time pressure—and the should self dominates after the decision, coming in to justify it. BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 4 at n. 5]. Thus, corporations that both impose tough performance targets (with material consequences) and promote the pro-social norm of serving your "team" (or co-workers) thus undermine ethical decision-making by providing a strong motivation for favoring profit over ethics/law, and an alternative view of "fairness"—concern for your fellow workers—to be used to justify the choice.

This divergence between predicted and actual decisions has implications for experimental studies that rely on predicated and not actual behavior.

<sup>163</sup> See *supra* text accompanying notes X-X.

<sup>164</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 4 around note 15]. In other words, this justification provides employees moral "wobble-room" by providing people with a pro-social justification for their self-interested behavior. See *supra* text accompanying notes [2a3]; see also Feldman, *supra* note 80, at 230.



Second, the pro-social justification provided by the organization are more salient for employees than the legal injunction against organizational misconduct because the organization's norm benefits people close to the employees whereas injunctions against organizational misconduct are designed to benefit strangers. People care most about people who are proximate to them—either spatially (e.g. at the same firm) or socially.<sup>165</sup> Co-workers are proximate in time and space and also tend to be in a similar social group. By contrast, laws governing organizational misconduct often are intended to prohibit conduct that either creates an unacceptable risk of harm to a group without causing definite harm to an identifiable victim, or that harms people who are socially, temporally, or geographically distant from the employee.<sup>166</sup> People do not care about statistical lives or people who are distinct socially, geographically or temporally as much as they are about helping people they know who are socially proximate.<sup>167</sup> Thus, companies that emphasize serving the team thus simultaneously leverage people's natural inclination to benefit those closest to them in pursuit of profit and enhance moral blindness creating a strong, salient, pro-social norm favoring profitable misconduct.<sup>168</sup> As a result, employees can engage in misconduct without undermining their positive self-image by focusing on the socially beneficial impact of their decision to those around them. They can violate the law free from guilt and shame, and suffused with the warm glow of having worked hard to benefit others.<sup>169</sup> Criminal laws expressive voice is, in effect, largely drowned out by the confluence of self-interest and the competing prosocial justification.

### *3. Impact on whether employees' immediate social community is adhering to the norm*

People tend to use the actions of others, particularly those who are similar to them, as the standard of comparison against which to evaluate the correctness of their own actions.<sup>170</sup> People

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<sup>165</sup> See supra text accompanying notes X - X.

<sup>166</sup> SOLTES, supra note 28, at Chapter 7.

<sup>167</sup> Small & Loewenstein, *Helping a Victim*, supra note 125; Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group or Just a Single Individual*, 18 J. BEHAV. DEC. MAKING 157 (2005); Tehila Kogut & Ilana Ritov, *The Singularity Effect in Identified Victims in Separate and Joint Evaluation*, 97 ORGAN. BEHAV. & HUM. DEC. PROCESSES 106 (2005). People are able to ignore their own unethical behavior in engaging in illegal conduct likely to harm others in the future because both engage in motivated ex post justifications of their behavior and tend to judge the ethics of a choice based on whether harm follows, rather than the ethics of the choice itself. BAZERMAN & TENBRUNSEL, supra note 75, at [Chap 4 or 5 at note 18].

<sup>168</sup> See Nadler, supra note , at 1215; Gino et al., supra note 120, at 289; Gino & Pierce, supra note 120. Indeed, there is considerable evidence that corporate cultures that create a strong norm of internal loyalty and bonding can significantly increase employees' willingness to make choices benefit the team at the expense of harming outsiders. E.g., John Hildreth et al., *Blind Loyalty: When Group Loyalty Makes Us See Evil or Engage in It*, 132 ORG. BEHAV. & HUM. DECISION PROCESSES, 16, 16-17 (2016); Ori Weisel & Saul Shalvi, *The Collaborative Roots of Corruption*, 112 PROCEEDINGS OF THE NAT'L ACAD. SCI. 10651 (2015); see Langevoort, supra note , at 947.

<sup>169</sup> E.g., BAZERMAN & TENBRUNSEL, supra note 75; see SOLTES, supra note 28, at 169-70 (discussing how people can easily engage in otherwise unethical behavior, when they have a prosocial justification for it, such as the benefit to those around them of their conduct); see also id. at 197 (many executives committing securities fraud felt as though they were helping others, the firm and the shareholders); See Feldman, supra note , at 51-2 (discussing moral licensing and moral justification).

<sup>170</sup> See Cialdini & Trost, supra note 88, at 171-172; Benjamin van Rooij, *Homo Juridicus: Questioning Legal Assumptions About Behavior*, working paper (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 IN PSYCHOLOGICAL SCIENCE (2003); Robert B. Cialdini, *Descriptive Social Norms as Underappreciated Sources of*

also need to expect that others will punish those who do not conform.<sup>171</sup> In assessing whether others respect the legal norm, the “others” that matter most are those who are psychologically close to them.<sup>172</sup> Thus, employees focus on whether their immediate managers expected compliance and their co-workers are complying.<sup>173</sup> Organizations that prime employees generally to achieve productivity goals at any cost are more likely to create an environment where many employees violate the law.<sup>174</sup> This environment will also lead employees not to condemn their peers who violate the law in quest for profit for the firm. When employees conclude that the legal prohibition is not followed, they tend not to experience it as a social norm.<sup>175</sup>

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. When norm violators are not sanctioned, fairness and other pro-social norms rapidly decay—and indeed can vanish—over time.<sup>176</sup> Employers also are the most visible source of potential discipline and sanctions in most employees’ lives. Governments detect only a fraction of the misconduct that firms detect.<sup>177</sup> Thus, organizations can mute or enhance the criminal law’s ability to deter through expressive channels through their decisions of whether to sanction those that engage in misconduct.<sup>178</sup>

#### 4. Muting Deliberation through time pressure and multi-tasking

Companies can amplify the blinding effect of self-interest by placing such large decision-making burdens on their employees that they cannot possibly fully deliberate over all the tasks assigned to them. Given the self-interest’s focal role to System 1 processes,<sup>179</sup> inducing ethical

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*Social Control*, 72 PSYCHOMETRIKA (2007); Robert B. Cialdini et al., *Managing Social Norms for Persuasive Impact* 1 SOCIAL INFLUENCE (2007); Bicchieri et al, *supra* note [152].

<sup>171</sup> Fehr & Schurtenberger, *supra* note 45; STOUT, *supra* note 14, 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).

<sup>172</sup> Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance from One’s Moral Compass*, 119 ORGAN. BEHAV. & HUM. DEC. 15 (2012); Cialdini & Trost, *supra* note 88, at 152-54, 166 (people care most about the social approval of those with whom they have a long term relationship and those with whom they are in an interdependent relationship, such as co-workers); see Gino et. al, *supra* note 173.

<sup>173</sup> F. Gino & Ariely (2009) (the effect of an unethical group norm on people’s inclination to engage in dishonest behavior strongly depends on the salience of the group identity); Feldman, *supra* note (chapter), at 225 (people use unethical behavior of others to justify their own ethical missteps); see Barkan et al (2012); Epley & Dunning (2000); see Celia Moore, et al., *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 PERSON. PSYCH. 1 (2012); Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCH. SCI. 393 (2009).

<sup>174</sup> See *supra* text accompanying notes X-X.

<sup>175</sup> See *supra* Section 2;

<sup>176</sup> See Fehr & Schurtenberger, *supra* note 45, at 463. Employer-imposed sanctions are essential to the establishment of an effective norm even when states impose individual liability because corporations are more effective at detecting their employees’ misconduct and responding to it immediately.

<sup>177</sup> Soltes, *supra* note [article].

<sup>178</sup> As it happens, a company’s decision not to discipline or self-report will also undermine the law’s ability to deter by undermining the expected cost to employees of violating the law. Indeed, employees who are aware of regular misconduct that is never punished may conclude that there is no material risk of punishment. In this case, rational employees would not be deterred by the threat of legal sanctions. See Arlen & Kraakman, *supra* note 12.

<sup>179</sup> See *supra* text accompanying notes X –X (discussing motivated reasoning and self-interest); see Moore & Loewenstein, *Self-interest, Automaticity*, *supra* note X; Shavi, et. al, *supra* note 182; see also Gino, et al, *Unable to*

behavior often requires interventions designed to prime System 1 towards ethical choices as well as those that push people to engage their deliberative System 2 processes, where moral decisions tend to reside.<sup>180</sup> People who are able to deliberate have opportunities to recognize that the actions they want to take is unethical and illegal. But full deliberation takes time and mental effort that employees often do not have.<sup>181</sup>

Organizations regularly structure their employees jobs to preclude the reflection needed to bring ethical concerns to the forefront. Corporations regularly induce their employees to rely on automatic intuitive decision-making processes, which focus on self-interest and corporate profits, by requiring employees to follow orders blindly or achieve favorable results at all costs. They do so by placing them under constant time pressure or requiring them to multi-task continually, thereby impairing their ability to fully deliberate over a choice with sufficient attention to recognize the ethical costs of their preferred course of action.<sup>182</sup> Thus, through simply choices about job structure, companies advertently or inadvertently promote misconduct by muting the behavioral influence of criminal law's expressive channels.

Companies also undermine criminal law's ability to deter through expressive channels through the way they structure the tasks they want their employees to accomplish. A company can assign a given objective—for example, producing a high-powered diesel car—to a team of employees who are responsible as a unit for every aspect of the job, including ensuring compliance with the law. More commonly, however, companies divide an objective up into distinct subunits; each employee is assigned only specific sub-task with a narrow particular goal or objective (e.g., engineering or sales objectives). People who are assigned a narrow task—with a specific objective—focus on the narrow objective assigned. They do not fully deliberate over all the ramifications of their actions, such as ethical or legal compliance.<sup>183</sup> Employees are particularly likely to employ tunnel visions when they are expected to make multiple decisions in a limited amount of time. As a result, employees will tend to focus on self-interest and how to achieve the firm's narrow objective, without even considering facts that would enable them to recognize that their actions would violate the law.<sup>184</sup> In serving the firm they may make decisions that violate the law without experiencing any disutility anticipated guilt or shame because they are not attentive

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*Resist Temptation*, *supra* note X (finding that the level of control needed to behave ethically exceeds the level needed to take a self-interested unethical act); cf. D. G. Rand et. al, *Spontaneous Giving and Calculated Greed*, 489 NATURE 427 (2012) (people in a competitive environment are more likely to be competitive, as opposed to cooperative, when they use System 1 reasoning).

<sup>180</sup> KAHNEMAN, *supra* note 73.

<sup>181</sup> BAZERMAN & TENBRUNSEL, *supra* note 75, at [Chap 2 at note 24]; see N. Mead et. al, *Too Tired to Tell the Truth: Self-control Resource Depletion and Dishonesty*, 45 J. EXPER. SOC. PSYCH. 594 (2009).

<sup>182</sup> Evidence shows that placing people under time pressure or other cognitive burdens increases their propensity to engage in misconduct. E.g., Saul Shalvi et al, *Honesty Requires Time (and lack of Justification)*, 23 PSYCH. SCI. 1264 (2012) (people put under time pressure tend to be more dishonest); N Kobis, et al., *Honesty Requires Time: A Meta-Analysis* (working paper); B Gunia, et al., *Contemplation and Conversation: Subtle Influences on Moral Decision Making*, 55 J. Academic Management 13 (2012); see also N. Mead, et al., *Too Tired to Tell the Truth: Self-control resource depletion and dishonesty*, 45 J. Exp. Psych. 594 (2009); see generally Feldman, *supra* note 70, at 45-46 (discussing the evidence)..

<sup>183</sup> KAHNEMAN, *supra* note 73.

<sup>184</sup> FELDMAN, *supra* note , at 17.

to—conscious of—that aspect of the decisions they are making.<sup>185</sup> Indeed, they often will perceive themselves to be a good person acting on behalf of others because then only had sufficient time to attend to the impact of their decision on the people immediately around them.<sup>186</sup>

### C. Organizations Mute Employees' Guilt/Shame Over Violations

Finally, organizations can undermine the criminal law's ability to influence employees through expressive channels by structuring employees' jobs in ways that enable employees to mute guilt and shame by sharing responsibility for the decision with others. As a result, employees who an objective observer would deem to be responsible for the violation would not perceive themselves to be responsible for—and blameworthy for—the resulting legal violation. As a result, criminal laws cannot effectively deter employees by expressing a social or moral norm.<sup>187</sup>

Many companies undermine employees' perceived responsibility by structuring tasks in a way that divides up responsibility for the project into small subunits, assigning each employee a specific small part of the ultimate task that they are to focus on (e.g., engineering, marketing, or sales), to the exclusion of other considerations, such as legality or morality. In this situation, employees will focus on the specific task, without allocating mental attention to considering legality, even when the illegality would be obvious to a third-party.<sup>188</sup> With their task narrowly defined, employees will tend to conclude that ethics and compliance is someone else's responsibility and not their problem. This structure undermines expressive law because companies rarely embed within teams an employee whose primary job is to ensure legal compliance. As a result, the team can make decisions that cause a violation of the law without any member of the team perceiving herself to be responsible for, and thus blameworthy for, the violation because that consideration fell outside their remit.<sup>189</sup> Thus, the whole team will not be motivated by anticipated guilt or shame to ensure a legal violation does not occur.<sup>190</sup>

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<sup>185</sup> They may blindly violate the law even when, with 20/20 hindsight, the legal violation is obvious to others. But at the moment the employee is making the decision, they are so focused on their assigned goal, and face so many demands on their time and attention, that they do not look beyond the task at hand to notice the legal or ethical implications. See, e.g., SOLTES, *supra* note 28, at 152-54; BAZERMAN & TENBRUNSEL, *supra* note 75.

<sup>186</sup> Targeted goals are so effective at muting ethical considerations because people engage in motivated reasoning. Having identified the choice that serves that goal, they tend to seek to rationalize that choice, as opposed to fully evaluate it, when considering alternatives. Specifically, they tend to dismiss information that suggests the initial choice might be wrong. See citations in note [95]; SOLTES, *supra* note 28, at 149-150. Thus, employees under pressure to produce results can be expected to select the choice that achieves that goal, and not seek out or adequately consider, evidence that the planned actions could lead to harm-producing legal violations.

<sup>187</sup> Max E. Bazerman & Ann Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV. (April 2011) (Managers routinely delegate unethical behaviors to others, and not always consciously).

<sup>188</sup> Employees provided one dimensional goals tend to focus narrowly on achieving that objective and do not notice the other dimensions of the decision they need to make, including being blind to its ethical dimension. 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 75, at [Chap 6 note 14]. Moreover, if the goal correlates with self-interest, they will engage in motivated reasoning to pursue the goal, justifying it afterwards on more normative or ethical grounds. See *infra* Section X and note Y.

<sup>189</sup> See BAZERMAN & TENBRUNSEL, *supra* note 75, at 16.

<sup>190</sup> Companies also can use delegation to enable them to profit from arguably unethical decisions without the shame or stigma that would otherwise result by outsourcing the task. Consider, for example, Merck's decision to sell

### D. Implications for Organizational Liability for Misconduct

Accordingly, organizations can, and do, intervene in a host of ways to undermine the criminal law's ability to deter through expressive channels. Thus, in order to deter through expressive law, the law needs to motivate organizations to structure their internal operations to dissuade employees from conducting misconduct that could profit the firm. Organizations must be held liable for their employees' misconduct.

Absent organizational liability and effective enforcement, organizations expect to profit from their employees' crimes.<sup>191</sup> Accordingly, absent liability, profit-seeking organizations have strong incentives to structure compensation, promotion, and retention policies to induce employees to pursue profit, regardless of the risk of a legal violation.<sup>192</sup> They also benefit from using the other techniques discussed above to undermine the expressive effect of law.<sup>193</sup> Expressive law thus cannot rely on individual liability alone because organizations can negate the law's ability to use individual liability to deter employees.<sup>194</sup> Thus, in order to deter through expressive channels the law needs to motivate organizations to deter misconduct, rather than facilitating it, the state needs

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two cancer drugs to a small company, Ovation, and yet continue to produce those drugs for sale by that small company. Following the sale, Ovation raised the price of each by at least 1,000%, as it had with other drugs. This no doubt enabled Merck to sell its drugs to Ovation for more than it previously sold them, without its decision-makers experiencing the guilt (or being blamed for) the financial hardship to the seriously ill patients. See BAZERMAN & TENBRUNSEL, *supra* note , at [Ethical Breakdowns].

<sup>191</sup> See *infra* Section 4.A.1 (discussing market forces).

<sup>192</sup> See *infra* note 195 (discussing reputational damage costs).

<sup>193</sup> Organizations often are the primary channel through which employees learn about the law, they control whether employees have strong personal motivations to violate the law, they materially influence whether employees operate in a social context surrounded by other employees who neither respect the law themselves nor think ill of those that violate it, they can increase or reduce the law's salience through how they structure tasks and decision-making within the firm, and they can undermine expressive law through interventions that enable employees to promote profitably illegal conduct without experiencing themselves to be responsible for the crime.

<sup>194</sup> Supplementing expressive individual liability with individual liability structured to deter through expressive channels also will not suffice because generally face too low a risk of detection for this threat to be salient unless organizational liability is imposed and structured to induce firms to detect, investigate, self-report and cooperate with respect to misconduct. See *supra* Section 1.A; Arlen, *supra* note 12.

to hold companies liable for their employees' misconduct,<sup>195</sup> and subject to sufficiently large sanctions to ensure that they are better off when employees do not engage in misconduct.<sup>196</sup>

Organizational liability also is needed to enable criminal law to effectively deter individuals through expressive channels for an additional reason. Given the substantial benefit to employees of organizational misconduct, criminal laws cannot effectively deter them unless employees face a material risk of being detected and sanctioned should they engage in

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<sup>195</sup> Organizational liability is needed to ensure that organizations do not expected to profit from their employees' crimes because market forces alone cannot be relied on to remove the benefit to organizations of corporate crime, even when liability is imposed on individuals. Individual liability does not provide companies with optimal incentives for three reasons, as explicated in Section 1A, *supra*. First, companies do not internalize the full social cost of harm if the state cannot impose optimal sanctions on employees, as a result of asset constraints and other factors. Second, companies also do not internalize their employees' expected liability for intentional and avoidable misconduct. Finally, organization's heightened wage to employees associated with employee liability will not induce organizations to act to help the government detect and prosecute individual wrongdoers, as is essential to optimal deterrence. See *id.*; Arlen, *supra* note 12.

Nor will reputational sanctions suffice to ensure that organizations do not expect to profit from misconduct, absent corporate liability. Economic analysis of reputational sanctions finds that organizations only expect to incur costs from damage to their reputations as a result of their employees' misconduct when their counter-parties—e.g., customers and suppliers—learn about the misconduct and conclude, based on the facts of the misconduct, that the organizations presents a heightened risk of harming them in the future. But absent corporate liability, counter-parties are less likely to learn about the misconduct than they are when optimal corporate liability is imposed because optimal corporate liability enhances the government's ability to detect misconduct. Corporate sanctions also increases the publicity given to the misconduct.

Moreover, organizational misconduct often does not impose substantial reputational costs. Both economic theory and evidence reveals that counter-parties only refuse to deal with the firm on favorable terms when the misconduct harmed similar counter-parties, thereby providing a signal that the organization might harm them in the future. They do not adjust if the firm engaged in misconduct that does not harm counter-parties, such as environmental misconduct. *E.g.*, Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 *J.L. & Econ.* 757 (1993). Moreover, even when misconduct harmed other counter-parties, the organization will suffer little damage if most counter-parties conclude that the facts of the misconduct do not signal that they are at risk. Thus, counter-parties may not respond negatively if the misconduct involved a units of the firm that is distinct from the units with whom a counter-party does not business or if, subsequent to the misconduct, the organization undertook internal reforms (or was subjected to government-imposed reforms) that appear to materially reduce the risk of future misconduct. See Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in *Research Handbook on Corporate Crime and Financial Misdealing* ch. 11 (Jennifer Arlen ed., 2018). Finally, reputational costs will not induce corporate self-reporting and cooperation which is important to the law's ability to provide the salient risk of individual enforcement needed to deter employees through expressive channels. See Arlen, *supra* note 12.

<sup>196</sup> Organizations observing that a law is not enforced may simply ignore it altogether—neither instructing employees not to violate it nor indicating its purposes. For example, the Foreign Corrupt Practices Act lay largely dormant from its enactment in 1977 until the Department of Justice started actively to enforce it around 2006. During this period of dormancy, companies facilitated bribery by making cash available for such purposes. *E.g.*, Kevin Davis, XXXX. Employees of firms that treated corruption as an acceptable business practice may well have been unaware that the conduct was illegal. They also would be unlikely to internalize the information Congress (and the SEC) intended to signal about the social harms associated with foreign corruption. Similarly, the ability of sexual harassment or anti-discrimination laws to alter people's beliefs about the seriousness of the harm caused by such conduct has regularly been undermined by managers who either violate such laws themselves, speak dismissively of the legal restrictions, or tolerate misconduct by—and even promote—employees who otherwise are productive. Thus, criminal laws cannot effectively alter people's beliefs about the harmfulness of their conduct to the extent that corporations either fail to inform employees about the law and its goals or managers explicitly or implicitly dismiss the goals of the law as insignificant or otherwise unworthy of respect.

misconduct.<sup>197</sup> As previously discussed, enforcement authorities can most effectively create this risk by inducing organizations to detect, investigate and self-report misconduct and cooperate with authorities by providing evidence about the misconduct and those responsible. To induce organizations to undertake this conduct, enforcement authorities must impose liability on organizations for their employees' misconduct and structure it to provide adequate incentives to them to self-report and cooperate.<sup>198</sup> Organizational liability that is structured to induce organizations to detect, investigate, self-report and cooperate with respect to misconduct thus also is needed to enable individual criminal law to deter through expressive channels by increasingly the likelihood of individuals facing a salient risk of enforcement that negates their expected benefit of misconduct.

Finally, organizational liability also helps deter through expressive channels through its effect managers and other employees' response to the misconduct. As previously discussed, other employees are unlikely to condemn misconduct that benefits the organizations and thus themselves. Expressive law falls on fallow soil when the people closest to a potential wrongdoer stand to gain from her misconduct—with no risk of liability being imposed on the firm—because this removes one of the most powerful channels for expressive law: the anticipation that others around you will disapprove of your misconduct and socially sanction you for it.<sup>199</sup> Organizational liability structured to ensure that companies do not profit from misconduct can change managers' and other employees' approach to wrongdoers. Managers and employees will disapprove of, and not condone, misconduct that is likely to hurt the firm. This enhances anticipated shame. Employees also will experience more guilt because they cannot justify their misconduct using the prosocial justification that it benefits the firm and their team. Thus, in order to induce organizations to intervene optimally to deter misconduct, and to support, rather than undermine criminal law's expressive impact, and to enhance the likelihood that supervisors and co-workers will treat criminal conduct as worthy of condemnation, the law must hold organizations liable to ensure that they do not profit from crime and are motivated to self-report and cooperate.<sup>200</sup>

### *1. Individual Liability for Organizational Misconduct*

The preceding analysis does the question of whether the state could rely entirely on organizational liability, eschewing individual liability for organizational misconduct. Organizational liability alone is not sufficient for several reasons.

First, deterring organizational misconduct depends on effective use of classical deterrence and expressive law against individuals. While criminal law cannot effectively deter through expressive channels if companies work against them, companies alone are unlikely to be able to do so if the state signals its lack of support for the law's normative injunction by failing to sanction people who violate the law. Given motivated reasoning, employees are likely to interpret a

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<sup>197</sup> See *supra* Section II.D.

<sup>198</sup> See Arlen, *supra* note ; Arlen & Kraakman, *supra* note ; Arlen, [perverse effects].

<sup>199</sup> See *supra* text accompanying notes -161.

<sup>200</sup> These goals are consistent with the requirements for optimal corporate liability that results from optimal deterrence theory. E.g., Arlen & Kraakman, *supra* note ; Arlen, *supra* note 12[Hylton]; Arlen *supra* note [Tina]

government's decision to sanction organizations, and not employees, as expressing the state's view that employees who engage in organizational misconduct are not to blame. Employees with the potential to profit from misconduct will be motivated to embrace this interpretation, sheltering their positive self-image behind the idea that society does not view them as responsible for unethical conduct: they were following orders, or under pressure from supervisors to maximize profits, focused on other objectives, or part of a team that collectively caused the violation. They are thus unlikely to anticipate guilt or shame when engaging in the misconduct.

In addition, under pure organizational liability society cannot readily express that an individual violated the social compact, and is a worthy candidate for social opprobrium absent individual liability, because when only organizations are held liable the identity of the individuals responsible for the misconduct may never become known or publicized.<sup>201</sup> Thus, even if an individual considering misconduct anticipated feeling guilt—notwithstanding the counter-veiling forces discussed above—she would be unlikely to anticipate shame because the people in her community would be unlikely to learn that she was responsible for the crime.

Moreover, individual liability is vital because individual deterrence depends on muting employees' expected personal benefit from misconduct. Companies can reduce the pernicious incentives they create to engage in misconduct, but, those that seek to profit cannot do so without providing employees with incentives to benefit the firm. These incentives will inevitably reward some misconduct. Nor can companies remove this incentive by threatening to fire employees who violate the law. Many employees driven to commit crimes often do so in extremis: they have been underperforming and view the misconduct as their best hope saving their jobs. Employees who face a high risk of termination if they do *not* violate the law are not deterred by the risk of termination for engaging in misconduct, unless their risk of detection and sanction is higher than their risk of termination if they do not violate the law.<sup>202</sup> Moreover, employees often can strategically avoid this sanctions by using the positive performance produced by the misconduct to obtain new employment before this misconduct is detected.<sup>203</sup> Individual liability is needed to ensure that the cost to employees of misconduct exceed the benefits no matter where they go.

Finally, the state cannot rely on organizations to punish individuals because organizations also do not have optimal incentives to pursue sanctions against individuals because the benefit to the organization of its enforcement is less than the social benefit of enforcement. The social benefit of sanctions includes both specific and general deterrence. The organization can achieve specific deterrence by firing the employee. It need not go to court to litigate. Moreover, the organization only gets the general deterrence benefit of the impact of enforcement on its own employees; society benefits from the general deterrence provided to all people who could engage in the misconduct.

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<sup>201</sup> See U.S. Department of Justice, Justice Manual XXX (providing that individuals who have not be 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 redress this because organizations tend to try to keep their disciplinary actions confidential and unpublicized.

<sup>202</sup> Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 Ill. L. Rev. 691 (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).

<sup>203</sup> See Arlen, *supra* note 12. For an example of an employee who committed a massive crime at one firm and then leveraged his resulting success to obtain a new job see XXXX The Spider Network.



Finally, the benefit to the organization of sanctions will be less than the benefit to the state because the organization is less effective at imposing sanctions than the state. The state can impose more punitive sanctions. In addition, the expressive impact of the state's sanctions can be expected to be larger.

Moreover, organizations do not have optimal incentives to sanction employees if they do not bear optimal sanctions. Most corporations that engage in organizational misconduct are closely-held and are asset constrained. Thus, governments cannot use the threat of fines to provide them with optimal incentives to deter misconduct.<sup>204</sup> Thus, the state needs to aim sanctions directly at employees.

## 5. Conclusion

Criminal law can potentially deter organizational misconduct through both classical deterrence channels and by expressing society's condemnation of the misconduct. Scholars espousing the strong view of expressive law conclude that the law can rely primarily on these expressive pathways, eschewing active enforcement against both individuals and organizations.

We show that this conclusion is not correct. Instead we find that recognition of criminal law's expressive pathways provides an additional justification for both individual and corporate liability for organizational misconduct. Individual liability is needed to enable the criminal law to overcome the features of organizational misconduct that tend to negate the criminal law's capacity to deter through expressive channels. It also is needed to enable classical deterrence to supplement expressive law, given all the impediments to expressive law's effectiveness. Organizational liability also is needed to enhance expressive law by operating to dissuade organizations from employing the host of techniques available to them to mute the effect of the law's expressive message on their employees. Organizational liability also is needed to enhance classical deterrence by inducing corporate self-reporting and cooperation.

Our analysis not only shows that individual and corporate liability are vital, but also reveals the form that organizational liability should take. In particular, it demonstrates why countries seeking to limit liability to misconduct for which the company is casually responsible fail in this task when they restrict corporate liability to crimes by senior managers or require a finding that the organization did not have an effective compliance program. Companies' directors and senior managers promote misconduct in a variety of ways beyond their direct involvement in the misconduct. Moreover, these measures will have a powerful effect on employee misconduct even if the firm ostensibly adopts effective procedures governing compliance. Compliance tends to reside beyond the daily experience of most employees and can be circumvented. The organizational actions discussed above define employees' daily work lives and will have a more powerful effect in either deterring misconduct or leading them astray. Thus, broad organizational liability that requires discouragement of all profit of misconduct is needed to ensure organizations want to deter misconduct, coupled with enhanced negative consequences for firms that do not self-

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<sup>204</sup> See Arlen, *supra* note [Hylton], at ; Mark Cohen, XXX

report or cooperate designed to induce them to help enforcement authorities detect and sanction individuals for their misconduct.<sup>205</sup>

Accordingly, both classical deterrence and expressive law support the conclusion that individuals and organizations need to be liable for organizational misconduct, and subject to sufficiently active and substantial enforcement to lead each to conclude that crime does not pay.

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<sup>205</sup> For a detailed discussion of how this structure of corporate criminal liability deters misconduct see, e.g., Arlen & Kraakman, *supra* note ; Arlen, *supra* note ; Arlen, *supra* note .