

Articles

Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions

GREGORY M. GILCHRIST*

This is the second of two Articles on the expressive aspects of corporate criminal liability. The first Article argued that to justify imposing criminal liability on corporations we must refer to the expressive function of criminal liability. This Article considers the expressive function of actual corporate prosecutions and identifies aspects of corporate prosecutions that generate expressive costs rather than benefits. These are the expressive failures of corporate prosecutions. This Article identifies a number of these failures and introduces a model of perceived legitimacy and the expressive function of punishment that explains how expressive failures harm the legal system. Mere respondeat superior liability—holding corporations criminally liable where there is no basis to condemn the corporation qua corporation—is the most significant expressive failure. It is also the easiest to fix: Allow corporations a good-faith defense against criminal liability. Good faith defenses have been proposed before, but this is the first proposal based on the expressive impact of the defense. A good faith defense will limit the application of corporate criminal liability to those instances where there is a basis to condemn the corporation as a whole, thus realigning the expression inherent in criminal punishment with commonly held views about blaming corporations.

* Assistant Professor of Law, The University of Toledo College of Law. A.B., Stanford; J.D., Columbia. Thank you to the many people who have generously shared time and comments to make this Article better than it otherwise would have been, including the participants at the Central States Law Schools Association Annual Conference and at the 2012 ABA-AALS Criminal Justice Colloquium. In particular, I'd like to thank Miriam Baer, Kara Bruce, Shelley Cavalieri, Ben Davis, Jelani Exum, Peter Henning, Ken Kilbert, Susan Martyn, Steven Morrison, Ellen Podgor, Geoff Rapp, Michael Rich, Bill Richman, Erin Sheley, Joe Slater, Larry Solum, Glen Staszewski, and Lee Strang. I would also like to thank Dane Barca, Ian Kanig, Ramy Shweiky, and the entire staff of the *Hastings Law Journal* for their outstanding work on this and the preceding Article, *The Expressive Cost of Corporate Immunity*. Finally, I want to thank Beth Eisler, who taught me a great deal about teaching and learning, and about being a student and being a teacher.

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INTRODUCTION

The last decade has been a turbulent one for large corporations. In 2002, Big Five accounting firm Arthur Anderson collapsed following its conviction for obstruction of justice.¹ It was the era of the Enron, Tyco, Adelphia, and Worldcom scandals, to which Congress reacted with the Sarbanes-Oxley Act (“SOX”), increasing accounting oversight and corporate reporting requirements.² Nearly five years ago, we entered the global financial crisis.³ Lehman Brothers and Bear Stearns collapsed,⁴ AIG was rescued with \$85 billion in credit from the Federal Reserve Bank,⁵ and the United States became the majority owner of General Motors,⁶ giving a literal truth to Charles Wilson’s famous quote.⁷ Congress reacted with the Dodd-Frank Act, increasing regulation of financial institutions.⁸

Beyond SOX and Dodd-Frank, this span of ten years brought significant changes to the legal landscape confronting corporations. First, there has been a dramatic increase in enforcement of the Foreign

1. See Flynn McRoberts, *The Fall of Andersen*, CHI. TRIB., Sept. 1, 2002, at 1.1 (“[Arthur Andersen’s] felony conviction for obstructing a federal investigation into Enron Corp., its now-notorious client, cost Andersen the heart of its practice. It will continue with a tiny fraction of the 85,000 employees it spread across the globe just months ago.”).

2. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 94–95 (2007) (noting that Congress responded by enacting SOX after fraudulent accounting practices were revealed at a number of major corporations).

3. See John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1047 (2012) (“In 2008, Congress saw the nation’s largest financial institutions race like lemmings over the cliff and into insolvency.”).

4. Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 YALE J. ON REG. 257, 262 (2010) (“Bear Stearns was forced to sell itself to JPMorgan in March 2008 for a per share price equal to about a quarter of the January 2000 stock price. Lehman filed for bankruptcy in September 2008.”).

5. William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 943–45 (2009) (“AIG was on the verge of bankruptcy and had to be rescued by the United States government through an \$85 billion loan.”).

6. *In re Gen. Motors Corp.*, 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009) (“[Pursuant to its deal with GM, the U.S. Department of] Treasury will own 60.8% of New GM’s common stock on an undiluted basis. It also will own \$2.1 billion of New GM Series A Preferred Stock.”).

7. See *Hearing Before the S. Comm. on Armed Services*, 83rd Cong. 1 (1953) (statement of Charles E. Wilson, President, General Motors) (“I thought what was good for the country was good for General Motors and vice versa.”).

8. See Coffee, *supra* note 3, at 1020 (“The Dodd-Frank Act, enacted in 2010, followed an even greater financial collapse [than that preceding the enactment of Sarbanes-Oxley], one that threatened financial institutions on a global scale and brought the problem of systemic risk to the attention of a public already infuriated at financial institutions (and their highly compensated investment bankers) being bailed out at taxpayer expense.”).

Corrupt Practices Act (“FCPA”).⁹ As a result of aggressive enforcement and broad interpretation of jurisdictional requirements, nearly every corporation that conducts business across national lines has potential criminal exposure under the FCPA. And because the FCPA concerns even relatively insignificant conduct,¹⁰ there are seemingly endless sources of potential exposure for corporations.

Second, the Department of Justice increasingly relies on deferred prosecutions agreements (“DPAs”) and non-prosecution agreements (“NPAs”) to resolve criminal investigations.¹¹ This development provides a significant benefit to corporations that avoid being indicted and convicted, but it also effectively lowers the burden for prosecutors seeking to charge a corporation. Corporations have strong incentives to avoid indictment, and some may be willing to settle matters through DPAs and NPAs that they otherwise would have fought through trial.

Finally, whistleblower protections provided by SOX¹² and bounties provided by Dodd-Frank¹³ have increased corporate exposure to criminal liability by generating a significant new source of information—the corporate insider.¹⁴

The full impact of these changes is not yet known. One obvious trend, however, is that corporations will spend more money on compliance, investigations, remedial actions and resolving prosecutions. While corporations ought to be subject to criminal prosecution, the current state

9. 15 U.S.C. §§ 78dd-1 to -3 (2011). See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) (“[D]uring the past decade, enforcement agencies resurrected the FCPA from near legal extinction.”).

10. By its terms, the FCPA applies to “an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value,” and does not contain a *de minimis* exception. 15 U.S.C. § 78dd-1(a). The statute does exempt “reasonable and bona fide expenditure[s], such as travel and lodging expenses . . . directly related to— (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract.” *Id.* § 78dd-1(c)(2). However, the scope of this exception is unclear, and some companies have felt compelled to seek opinion releases from the Department of Justice before spending relatively modest amounts on travel and meals. See generally Foreign Corrupt Practices Act Review: Opinion Procedure Release No. 07-01 (Dep’t of Justice July 24, 2007).

11. See Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1432 (2009) (“Since the demise of Arthur Andersen in 2002, the number of DPAs and NPAs has increased substantially . . .”).

12. 18 U.S.C. § 1514A (2012).

13. See Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 74–75 (2012) (“In Dodd-Frank, however, whistleblowers not only receive protection from termination or adverse employment action but can also lay claim to financial bounties for bringing information to the Securities and Exchange Commission (SEC) that leads to successful securities enforcement actions.”).

14. “[S]ince the program was established in August 2011, about eight tips a day are flowing into the SEC.” *SEC Issues First Whistleblower Program Award*, SEC NEWS DIG., Aug. 21, 2012, at 1. While the program is still young, as the SEC makes significant and well-publicized bounty payments, awareness of and trust in the program is likely to increase, which should in turn generate higher numbers of whistleblowers.

of criminal prosecutions is problematic. The breadth of substantive criminal laws, the extensiveness of prosecutorial discretion, the aversion to risk on the part of corporations, and the heightened incentives to report wrongdoing can result in seemingly arbitrary enforcement.

Facing these developments, some have begun to call for changes to how and when corporations ought to be held criminally liable. The most prominent of these proposals is that corporations ought to be afforded a good faith defense to criminal liability. Presently, a corporation may be held criminally liable for any act of any corporate agent performed in the scope of agency and with the intent to benefit the corporation.¹⁵ A good faith defense would limit this near-strict-liability standard of respondeat superior. Academics have proposed the defense,¹⁶ practitioners have asked courts to adopt something like the defense,¹⁷ and lobbyists have urged Congress to enact the defense.¹⁸ The arguments offered in support of the good faith defense have generally concentrated on questions of fairness to the corporation, fairness to the law-abiding shareholders and employees of the corporation, or efficacy of deterrence. This Article presents a new rationale for the good faith defense: preserving the expressive efficacy of the criminal justice system and the legitimacy of the legal system.

I have previously argued that the practice of holding corporations criminally liable can only be justified by reference to the expressive aspect of criminal sanctions.¹⁹ Deterrence is the primary goal of corporate criminal liability, but deterrence can generally be achieved as effectively

15. *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481, 493 (1909).

16. See generally Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007) (presenting legal developments that further justify a good faith defense); see also Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WISC. L. REV. 609, 612 (2012) ("[A]n FCPA compliance defense will better incentivize more robust corporate compliance, reduce improper conduct, and thus advance the FCPA's objective of reducing bribery. An FCPA compliance defense will also increase public confidence in FCPA enforcement actions and allow the DOJ to better allocate its limited prosecutorial resources to cases involving corrupt business organizations and the individuals who actually engaged in the improper conduct."); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 676 (1995) ("A corporation should be able to defend against vicarious criminal liability by showing that it had a clear and effective policy for complying with the law in place at the time of the violation, and that the employee's acts violated that policy.").

17. See Brief for the Ass'n of Corporate Counsel et al. as Amici Curiae in Support of Appellant Urging Reversal, *United States v. Ionia Mgmt.*, 526 F. Supp. 2d 319 (2d Cir. 2008) (No. 07-5081-CR) (urging the Second Circuit to limit the principle of respondeat superior in determining corporate criminal liability).

18. See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 18-36 (2011) (statement of Michael B. Mukasey, former U.S. Attorney General, Partner, Debevoise & Plimpton LLP).

19. See generally Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (arguing that corporate criminal liability is best justified by reference to both deterrence and expressivism).

and less expensively by a regime of civil liability.²⁰ Holding corporations criminally liable can deter, but it is no better than holding them civilly liable because, at least in theory, there is no criminal penalty that could not also be imposed civilly. The justification for corporate criminal liability is therefore found in its expressive benefits and in the expressive costs of not subjecting corporations to criminal liability.

The problem is that corporate prosecutions often fail to serve a positive expressive function and sometimes serve a negative expressive function. As such, the practice of prosecuting corporations can undermine the expressive reason for allowing corporations to be prosecuted in the first place. In cases of what I call mere respondeat superior liability—where there is no clear basis on which to condemn the corporation as a whole for the wrongdoing—the application of criminal law is at odds with widely held norms and results in a negative expression that is harmful to the legal system as a whole.

This Article begins by identifying the value and potential costs of expressivism. While the expressive aspect of punishment serves various functions in a legal system, it can also undermine the perceived legitimacy of a legal system. This relationship between legal expression and perceived legitimacy is too often overlooked. Part I of this Article identifies relationships between expression, perceived legitimacy, and the acceptance of an obligation to obey the law by those subject to the law (the internal view). It concludes that expressivism is causally related to the perception of legitimacy and the internal view of law: This relation makes positive expression—and the avoidance of negative expression—important for the stability of the system. Whether the expression is positive or negative depends on normative factors that influence how legal expression is generated and understood. Certain procedural norms are particularly important in this regard, and Part I concludes by exploring those procedural norms.

Having identified the instrumental value of expressivism and developed a basic understanding of how legal actions are expressively understood, this Article turns to specific examples of corporate criminal prosecutions. Part II presents two different corporate prosecutions and identifies the expressive failures in each. The first, a case in which the corporation was convicted after trial, demonstrates the expressive failure of prosecuting corporations based on nothing more than respondeat superior liability. The second, a civil resolution to a criminal investigation, suffers from the same defect and also demonstrates other procedural expressive failures. Part II concludes by assessing the relative impact of negative expressions and by arguing that one negative expression in

20. *Id.* at 31–40.

particular—mere respondeat superior liability—is the most detrimental and the most easily remedied.

Part III briefly answers the well-founded, but ultimately misplaced, objection that too few people are aware of specific legal actions like the prosecution of a corporation for the expression to have a meaningful impact.

Finally, Part IV reviews the viability of concrete proposals to fix the respondeat superior standard of corporate liability, argues that a good faith defense is tenable, and explores the impact such a defense would have on corporate prosecutions and the expressive function of criminal liability. This Article concludes that a good faith defense to corporate criminal liability, while not devoid of problems, would remedy some expressive failures associated with corporate prosecutions to the benefit of the perception of legitimacy.

Corporations obviously dominate markets, but they also increasingly dominate various parts of our legal system.²¹ For this reason, it is particularly important that the legal governance of corporations not be burdened with an expressive flaw. This Article suggests a path toward expressive clarity in prosecuting corporations.

I. THE FUNCTIONAL SIGNIFICANCE OF EXPRESSION

Criminal law is distinctively expressive. Violations of criminal law result not only in hard treatment—prison, a fine, probation, et cetera—but also reprobation. A person found to have violated a criminal law is subject to a degree, and possibly a kind, of condemnation not present with civil liability or regulatory infractions. This reprobation or condemnation that accompanies punishment is the expressive aspect of criminal law (or at least the dominant one).

The expressive function of the criminal law is entrenched but not necessary. Indeed, as the distinction between criminal and civil laws becomes less clear, the unique expressive aspect of the criminal law may erode, and this would be a loss for the legal system. Expressivism in criminal law has many benefits: It serves to reify societal norms, and it can be used to shift societal norms. Additionally, expressivism serves as a tool of punishment: A penalty of some identified hard treatment is generally less severe than the same penalty accompanied by an expression of condemnation.

The expressive aspect of criminal law also informs people's perception of legitimacy. People make judgments about a legal system's

21. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 *BUFF. L. REV.* 1369, 1398–404 (2006) (demonstrating the increased presence and influence of corporations in the economy and the increasing role of corporations in the legal system).

legitimacy based on what they perceive to be the expression inherent in various legal actions. Perceived legitimacy matters, because when people believe a legal system to be legitimate, they accept an obligation to comply with the requirements of the legal system, and the system is accordingly more stable and more efficient than it would be were it to rely on force alone. How people perceive the expression in various legal actions, however, depends on the norms of the perceiver. If we want to understand the expressions people are likely to perceive in corporate prosecutions, we need to know more about the norms that tend to inform judgments about legal actions.

This Part first describes the relationship between expression, the perceived legitimacy of a legal system, and the acceptance of an obligation to comply with the law. It then identifies a set of norms that—while not universal—are widely shared and helpful in assessing how people are likely to perceive modern corporate prosecutions.

A. EXPRESSION, THE INTERNAL VIEW, AND PERCEIVED LEGITIMACY

1. *The Internal View Distinguishes Law from Mere Power*

There is a difference between the law and the bare assertion of power. It is the difference between a gunman ordering a person to hand over her purse under threat of death, and a legal system ordering a person to pay taxes under threat of prison. This insight is the starting point for H.L.A. Hart's inquiry into the concept of law.²²

Hart defines the internal view as the acceptance of an obligation to comply with authority for reasons other than fear of consequences for failure to do so or mere habit.²³ The fact that people subject to the law adopt an internal view distinguishes the law from mere power.²⁴ One might impose rules on others and generate compliance through force and threat of force alone; however, unless some people subject to the rules adopt an internal view toward the rules, the assertion of power cannot be considered law.²⁵ The distinction is important because law has more stability than the bare assertion of power.²⁶ People will (sometimes) obey

22. See H.L.A. HART, *THE CONCEPT OF LAW* 6–7 (2d ed. 1994).

23. *Id.* at 56–57.

24. *Id.* at 202–03.

25. *Id.* at 203.

26. Hart's inquiry into the concept of law should not be mistaken as a mere exercise in definition or labeling. One could disagree that the assertion of power, where no one subject to that assertion adopted an internal view, is not law. One might conclude that law includes even the mere assertion of power. That conclusion strikes me as relatively inconsequential. It would still remain the case that there is a meaningful difference between a command with which people comply *only* for fear of consequences and a command with which people comply, at least in part, because they accept an obligation to comply. This distinction seems like as good a place as any, and probably better than others, to draw the line between law and not-law. But the label is not the point, the distinction is.

laws even where there is no consequence for the failure to do so. Mere power does not induce the same sort of obligation as law.²⁷

Of course, not all people subject to the law need to adopt the internal view. Indeed, it will rarely, if ever, be the case that all people subject to rules adopt an internal view of those rules.²⁸ Some people will disagree with the rules and the authority of the system to impose rules. Others will perceive rules as inapplicable to themselves. Still others will give no thought to a possible duty to follow the rules other than recognizing the consequences of violating the rules and being detected. The fact that not all people subject to a legal system adopt the internal view does not render the legal system something less than law. Every system will have dissenters and contrarians. The requirement is not that every person subject to the rules adopt an internal view; it is that *some* people subject to the rules adopt an internal view.²⁹

The stability of the legal system is directly related to how many people adopt the internal view. A system in which very few people adopt the internal view will be less stable than one in which all people adopt the internal view because accepting an obligation to comply with the law generates its own reason to comply with the law apart from fear of sanctions.³⁰ The dichotomy between law and mere force is a spectrum. On one end of the spectrum, Hart's threatening gunman asserts more power. On the other end of the spectrum, the rules governing a small village, where all the villagers accept an independent obligation to comply with those rules, are law. Most legal systems will be somewhere between these extremes, but the less a legal system is reliant on force and the more it is supported by the internal view, the more efficient and stable that system will be. The internal view promotes stability because the accepted obligation to comply with the law is contrary to rebellion against or disregard of the law. It enhances efficiency because the law can rely, to some degree, on the accepted obligation to maintain compliance rather than enforcement. A well-functioning legal system will cause people to adopt the internal view.³¹

27. See HART, *supra* 22, at 82–83 (considering the example of a gunman, *A*, ordering another person, *B*, to hand over money by threatening to shoot *B* if he does not comply, and concluding that it would be misleading to say “*B* ‘had an obligation’ or a ‘duty’ to hand over the money”).

28. *Id.* at 201.

29. *See id.* at 202–03.

30. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (2006) (“According to the Chicago study, those who feel that they ‘ought’ to follow the dictates of authorities are more likely to do so.”). For more on Tyler’s Chicago Study, see *infra* text accompanying notes 93–108.

31. As Hart described it:

If the system is fair and caters genuinely for the vital interests of all those from whom it demands obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable. On the other hand, it may be a narrow and exclusive system run in the interests of the dominant group, and it may be made continually more repressive and

2. *The Internal View Can Be Caused by the Perception of Legitimacy*

Perceived legitimacy causes the internal view. By legitimacy, I mean the fact that the legal system has a moral right to govern as it does. People who perceive the legal system to be legitimate will adopt an internal view toward the law because to believe a legal system has a moral right to govern as it does is to accept an obligation to comply with the requirements of that legal system.

All legal systems purport to be legitimate.³² Laws restrict the liberty of the governed. Absent law, a person could kill, steal, or keep the fruits of her labor without systemic interference; law limits these freedoms systematically.³³ By purporting to be legitimate, law seeks to distinguish its authority from the mere assertion of power.

From a positivist perspective, a law may be evil and still be law.³⁴ There are, however, no legal systems that govern by purporting to be evil. A gang conceivably might do that (although I am unaware of any that do), and law-abiding members of society might say the gang was using force, or coercion, or intimidation to maintain compliance with its commands; but they would not call the gang's power "law."³⁵ Legal systems, whether good, or evil, or somewhere in between, will purport to be legitimate. Plainly, therefore, purporting to be legitimate is different than being legitimate.

The perception of legitimacy is also different than actual legitimacy. Just as a legal system purporting to be legitimate bears no necessary relation to its actual legitimacy, so too a person believing a law is legitimate bears no necessary relation to its actual legitimacy. This distinction between ways "legitimacy" is used is important. As Larry Solum has warned: "[O]ne should be very wary about deploying the idea of legitimacy. Because legitimacy has different senses and is

unstable with the latent threat of upheaval. Between these two extremes various combinations of these attitudes toward law are to be found, often in the same individual.

See HART, *supra* note 22, at 202.

32. See JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASONING* 4 (2009) ("[G]iven that legal institutions purport to impose and enforce duties on people, given that they take it upon themselves to deprive those who disregard their legally imposed standards of property and liberty (and sometimes of their life), it follows that those institutions take themselves to be legitimate, that is to have the moral right to act as they do (and that individuals who occupy positions of power and responsibility within legal institutions believe, or make it appear that they believe, that they do have such rights).").

33. Of course, absent other law, other, less systematic forces could also limit these freedoms, the most notable being the freedom of everyone else to kill, steal, or keep the fruits of their labor.

34. See *infra* note 45 and accompanying text.

35. See HART, *supra* note 22, at 82–83 (describing Hart's example of a gunman demanding money under threat of violence).

undertheorized, it is very easy to make claims about legitimacy that are ambiguous or theoretically unsound.”³⁶

Solum differentiates normative legitimacy (“making assertions about some aspect of the rightness or wrongness of some action or institution”)³⁷ from sociological legitimacy (descriptive statements about the beliefs people have about the legitimacy of an action or institution).³⁸ The question of normative legitimacy turns on whether a legal system has a moral right to govern as it does. This Article does not address normative legitimacy.

I take as a given that the relation between law and morality is contingent, not necessary³⁹ (that is, law can be understood without reference to morality⁴⁰). This positivist view is most prominently associated with Kelson,⁴¹ Hart,⁴² and Raz,⁴³ each of whom has written extensively on the distinction between law and morality. This is not to say that morality is not important to the positivist; morality is the primary basis on which to form judgments about legal systems and laws.⁴⁴ However, morality is not a necessary element of law. A law can be immoral and nonetheless be law, and a legal system can be evil and nonetheless be a legal system.⁴⁵ Brian Leiter has labeled this effort to distinguish between law and morality the “Demarcation Problem,” presenting a fascinating argument that the problem is unlikely to be solved and any solution would not matter much anyway.⁴⁶

36. See Lawrence B. Solum, *Legal Theory Lexicon: Legitimacy*, LEGAL THEORY BLOG (July 22, 2007, 5:31 PM), <http://lsolum.typepad.com/legaltheory/2007/07/legal-theory--4.html>; see also Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 213 (2012) (“[L]egitimacy is a term invoked so casually that it sometimes seems to signify little more than a vague aspiration.”).

37. Solum, *supra* note 36.

38. *Id.*

39. See RAZ, *supra* note 32, at 1 (“Theories of law tend to divide into those which think that, by its very nature, the law successfully reconciles the duality of morality and power, and those which think that its success in doing so is contingent . . .”). Raz captures positivism as the view that “the content of the law can be established without resort to moral considerations bearing on the desirability or otherwise of any human conduct, or of having any particular legal standards.” *Id.* at 4.

40. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in NATURAL LAW THEORY 158–60 (Robert P. George ed., 1992) (“According to [the positivist conception of law], law can be understood in terms of rules or standards whose authority derives from their provenance in some human source, sociologically defined, and which can be identified as law in terms of that provenance. Thus statements about what the law is . . . can be made without exercising moral or other evaluative judgment.”).

41. See generally HANS KELSON, *PURE THEORY OF LAW* (1970).

42. See generally HART, *supra* note 22.

43. See generally RAZ, *supra* note 32.

44. See *id.* at 1 (“I have suggested that it is essential to the law that it recognizes that its use of power is answerable to moral standards and claims to have reconciled power and morality. It may not live up to its own aspirations.”).

45. See *id.* at 4 (“[L]egal standards can fail to be morally sound, indeed they can be evil . . .”).

46. See Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 31 OXFORD J. LEGAL STUD. 663, 664 (2011). The problem is unlikely to be solved, according to Leiter,

This Article avoids the demarcation problem altogether by not inquiring into the conditions necessary to be law; it instead inquires into the conditions under which law functions well. The answer to the function question is—in the abstract—fairly simple: Law functions better when more people subject to the law perceive it as legitimate.

Accordingly, this Article relies on sociological legitimacy—or what I refer to as perceived legitimacy. Perceived legitimacy matters because if one perceives the legal system to be legitimate, one has reason to adopt the internal view (that is, one has reason to accept an obligation to comply with the commands of the legal system that she believes is legitimate).

It is true that one might accept an obligation to comply with the law for reasons *other than* perceiving the legal system to be legitimate, but these other reasons are less sturdy than believing in the legitimacy of the legal system. For example, a person might accept such an obligation because she was raised to believe that she should do so and she never had occasion to question that belief.⁴⁷ An obligation to comply premised on this sort of uninformed habit is weaker than an internal view predicated on a belief in the legitimacy of the legal system because it is unsupported by reason. Similarly, one might accept an obligation to comply with the law just because others appear to do so (that is, out of a desire to conform).⁴⁸ Unlike an obligation stemming from mere habit, the obligation based on a desire to conform *does* provide a reason to maintain the internal view. Assuming most people (or the people the subject wishes to conform with) obey the law, then for a subject who desires to conform, this desire and the behavior of others generate a reason to obey the law. Indeed, conformity-based obligation is a powerful and important force in maintaining stability of legal systems. After all, most people most of the time probably do not reflect on the relative legitimacy of the legal system

because “[a]rtefact concepts, even simple ones like ‘chair,’ are notoriously resistant to analyses in terms of their essential attributes.” *Id.* at 666–67. But even more interesting is the contention that we do not really care about the solution. Leiter notes that the practical reason to solve the demarcation problem is to determine what ought to be done in hard cases. *Id.* at 673. But solving the demarcation problem—whether from the perspective of positivism or from natural law—will not inform *what ought to be done*. *Id.* at 670. If moral validity is a necessary condition of law—the natural law view—and if moral obligation is not defeasible, then an immoral legal command is not law and need not be obeyed. *Id.* at 670–71. Likewise, however, if moral validity is not relevant to legal status—the positivist view—and if moral obligation is not defeasible, then an immoral command is law and still need not be obeyed. *Id.* at 676. The defeasibility or indefeasibility of moral obligations is the issue we care about, and the resolution of the demarcation problem would not shed any light on that question. *Id.* at 675 (“The idea that a putative solution to the Demarcation Problem gives us the answer [to the question of what ought to be done when the law and morality conflict] is an illusion.”).

47. See HART, *supra* note 22, at 203 (“[T]heir allegiance to the system may be based on . . . an unreflecting inherited or traditional attitude . . .”).

48. See *id.* (“[T]heir allegiance to the system may be based on . . . the mere wish to do as others do.”).

that governs them; laws may often be obeyed just because others are obeying the laws.

The limitation of an obligation predicated on the desire to conform is that it is contingent on the circumstantial factor that others comply with the law. Whereas a belief in the legitimacy of the legal system gives a reason to comply with the law that is related to the substance of the law, the desire to conform gives a reason to comply that is entirely contingent on the behavior of others.

To see why the perception of legitimacy is important to a well-functioning legal system, at least over time, it is worth further examining the difference between an internal view based on a desire to conform and one based on the perception of legitimacy. Conformity might be understood as the day-to-day rationale for the internal view. Legitimacy, in turn, would be the deeper rationale that is less routinely consulted. As such, legitimacy is particularly important at the extremes and in the long term. In a new legal system, there is no history of people conforming behavior to the command of that system, and the perception of legitimacy is important. Likewise, in times of crisis—where people are more likely to question the authority of the government—legitimacy is essential. Finally, any extremes in the degree of perceived legitimacy will also be important. Should a legal system appear particularly illegitimate, that would cause more people to consider their reasons for maintaining the internal view. Likewise, a particularly legitimate system (for example, a system that is “fair and caters genuinely for the vital interests of all those from whom it demands obedience”⁴⁹) generates powerful support for the internal view.

Similarly, over the long term, the perception of legitimacy is important. Conformity works so long as most people conform, but it does not really give an independent reason to obey. Over time, people will ask questions about whether and why the law deserves their obedience. Conformity will not answer these questions, but legitimacy (or the perception of legitimacy) will. To the extent people believe the law is legitimate, they have an independent reason to maintain the internal view.

It is worth noting that perceived legitimacy is defined purely as a sociological fact. A legal system is perceived as legitimate so long as the perceiver believes it has a moral right to govern as it does. The universe of principles that can inform the perception of legitimacy is not limited. One could believe a legal system is legitimate for any reason—good, bad, or nonsensical.⁵⁰ The perception of legitimacy, like the internal view, is

49. *Id.* at 202.

50. Someone may conclude the legal system is legitimate because it is the legal system that has been in place for over two hundred years. Another may conclude it is illegitimate because it has not yet been in place for at least five hundred years. Both of these are unusual views, but that fact does not

merely a fact about a person's beliefs. Accordingly, people may perceive a legal system to be legitimate even if the substance of that legal system were terribly unfair to many subjects.⁵¹ This is not a problem; it simply reflects the thinness of the definition of perceived legitimacy.

3. *Legal Expression Affects the Perception of Legitimacy*

"Expressivism" has been used to refer to many different ideas. I am using the term to refer to a theory of punishment that recognizes that punishment can only be properly understood in light of social values regarding the wrongdoing, the conviction, and the penalty.⁵² This is a relatively modest and uncontroversial claim.⁵³ The fact that law has an expressive aspect generates "the power of the law to marshal social opprobrium,"⁵⁴ and Mark Drumbl has suggested that this power can serve to "strengthen faith in rule of law among the general public."⁵⁵

Many scholars see this power as a beneficial consequence of a just legal system and thus attribute the expressive value of law to the perceived legitimacy of the law: Where the legal system is perceived as legitimate, legal actions will have an expressive function that can influence behavior.⁵⁶ This formulation is correct, but it is also incomplete. The expressive value of law can be positive *or* negative. A positive, or beneficial, expressive value of law exists where the law is perceived as morally legitimate. There can also be a negative, or harmful, expressive value of law where the law is perceived as morally illegitimate.⁵⁷

As a positive force, expression leverages respect for the law—or the law's political capital *qua* law—to influence substantive beliefs about an

change that each person would have a view about the legitimacy of the legal system.

51. See HART, *supra* note 22, at 200 (considering the example of slave-owning societies).

52. See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) ("The expressive theory of punishment says we can't identify criminal wrongdoing and punishment independently of their social meanings.").

53. Heidi Hurd has criticized a much stronger form of expressivism that purports to justify punishment. See Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 417 (describing the "expressivist, who maintains that punishment is justified if and only if it properly denounces or contradicts the social meaning of an offender's actions"). I do not claim that the expressive aspect of punishment justifies punishment; I claim only that the expressive aspect of punishment can and does have consequences, most directly for the perceived legitimacy of the legal system.

54. Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1536 (2009).

55. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173 (2007).

56. See Starr, *supra* note 54, at 1537 ("[T]he expressive value of law turns on its perceived moral legitimacy, without which it cannot effectively shape social norms.").

57. See Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 169 (2001) ("The message expressed by punishments, especially the moral message, is likely to be shaped in large part by the perceived legitimacy of the criminal justice system.").

issue.⁵⁸ Over time, if legal expressions of condemnation are decently aligned with society's values (that is, if the law tends to condemn conduct that society independently condemns), then the law earns a sort of expressive power to influence societal norms.⁵⁹ As a negative force, expression limits legal power; respect for the law is delicate, and should the legal expression stray too far from strongly and widely held norms, it risks undermining the perception of legitimacy and the internal view.

The theory that punishment has a distinctive expressive component is most strongly associated with Joel Feinberg.⁶⁰ Many scholars have distinguished prices from punishments by the relation between the amount of penalty and the harm caused.⁶¹ A price is meant to mirror the harm caused, and thus serves to internalize that cost to the actor; a punishment imposes significantly greater costs on the actor than the harm caused, and thus serves to dissuade the action altogether.⁶² Feinberg adds to this concept that the difference between punishment and pricing is not just one of degree, but of kind. Actions that are priced are acceptable (if the price is paid); actions that are punished are not acceptable (even if the punishment is imposed). Therefore, when someone is punished, that

58. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 457 (1997) ("If [the criminal law] earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor.").

59. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 17 (1990) (identifying shaping preferences as an important, if frequently ignored, purpose of criminal punishment); Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 190 (2007) (referencing "campaigns to prosecute 'dead-beat dads' or drunk drivers" as examples of the use of criminal law to shift societal norms); Robinson & Darley, *supra* note 58, at 457 ("[T]he criminal law's most important real-world effect may be its ability to assist in the building, shaping, and maintaining of . . . norms and moral principles.").

60. See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970) (identifying the "symbolic significance" and the "expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation" as distinctive aspects of punishment); see also Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.").

61. See, e.g., John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1991); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523–24 (1984). But see Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 204–05 (1996) ("[T]he prohibition-pricing distinction . . . fail[s] to account for the wide range of substantive differences between [criminal law and tort law].").

62. See Coffee, *supra* note 61, at 1876 ("The difference between a price and a sanction is at bottom the difference between, on one hand, a tax that brings private and public costs into balance by forcing the actor to internalize costs that the actor's conduct imposes on others and, on the other, a significantly discontinuous increase in the expected cost of the behavior that is intended to dissuade the actor from engaging in the activity at all.").

punishment carries an expressive component—a judgment against the person punished.

Feinberg specifically identifies the “reprobative symbolism of punishment” as the necessary expressive value.⁶³ Punishment is commonly understood as the imposition of some hardship, or deprivation of a privilege—what Feinberg labels the “hard treatment” aspect of punishment.⁶⁴ But hard treatment without some form of condemnation is not punishment.⁶⁵ For Feinberg, both hard treatment *and* reprobative symbolism are required for something to be punishment.⁶⁶ Thus, just as hard treatment without condemnation is not punishment, so too condemnation without hard treatment is not punishment.⁶⁷

But what really is this expression of condemnation? Legal systems, such as they are, do not really communicate. Who would be speaking? Would meaning be related to intention and, if so, whose intention? The judge communicates in imposing a punishment, but in doing so she speaks on behalf of, or as an element of, the legal system. It makes no sense to think of a legal system, as a whole, communicating. How would the legal system develop the intention to communicate?

The expression in punishment is best understood as a non-linguistic, symbolic expression.⁶⁸ It does not matter what is intended, or by whom; someone observing the legal action of punishing will witness the expression of reprobation. If she does not observe the expression of reprobation, she will not identify the act as punishment (instead, it would be something more like a fine, restitution, or remedy).

Joseph Raz touches on why we identify expressions in legal actions:

[T]he law makes certain claims for itself. Given that it is institutionalized, in that its norms can be changed and applied by institutions, and given that the institutions make certain statements and perform other speech

63. See FEINBERG, *supra* note 60, at 98.

64. *Id.*

65. Feinberg distinguishes “reprobation” from “resentment,” and uses “condemnation . . . as a kind of fusing of resentment and reprobation.” *Id.* at 101 (emphasis omitted). By resentment, Feinberg is referring to “the various vengeful attitudes,” and by reprobation, he refers to “the stern judgment of disapproval.” *Id.* I am less confident that the vengeful attitudes, or resentment, have a role in a legal system, and use the more general term, condemnation, to refer simply to reprobation, or “the stern judgment of disapproval.” For a fascinating argument that vengeful attitudes *do* have a critical role in a legal system, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 139–52 (1997).

66. FEINBERG, *supra* note 60, at 101.

67. *Id.*

68. Matthew Adler argues that expressivists must be arguing that there is a linguistic meaning in legal actions. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1384–85 (2000) (agreeing that legal actions have non-linguistic meanings, but suggesting that expressivists generally argue for a specifically linguistic meaning). Joel Feinberg, however, seems expressly to be describing a symbolic expression in punishment. See FEINBERG, *supra* note 60, at 98 (“Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.”).

acts in the course of their official actions, we can identify the presuppositions of those statements and actions.⁶⁹

Raz is interested in presuppositions that actually and necessarily exist. Thus, he considers the example of an institution purporting to grant a particular right and concludes that the institution necessarily presupposes it has the normative power to grant that right, in that way.⁷⁰ When the law imposes a punishment (understood as hard treatment and reprobation), the institution presupposes that the person being punished should be subject to reprobation. In this way, we can identify condemnation in the punishment: Condemnation accompanies the hard treatment where that hard treatment is labeled punishment. On the other hand, if someone witnessing or learning of the hard treatment believes it carries no reprobation, then he will not consider it punishment.

Bernard Harcourt notes that, as a descriptive matter, punishment may also express values other than reprobation, like racial or political values: “a message about who is in control and about who gets controlled.”⁷¹ This makes sense: Why would the symbolism inherent in meting out hard treatment to people be limited to reprobation? Imposing punishment may express any number of values.

The variable content of expression in punishment is related to the perceived legitimacy of the legal system. Where the law is not perceived as legitimate, the other types of expression identified by Harcourt may dominate.⁷² Punishment by what is perceived as an illegitimate authority will not be understood as expressing moral condemnation; it may be understood as expressing power, control, or will. Alternatively, it may be understood as expressing something more specific. For example, if a legal system disproportionately punishes black men for drug offenses, the punishment of an individual black man for a drug offense may primarily be understood—by one who questions the legitimacy of that legal system—as an expression of racial subjugation.⁷³

Therefore, although moral opprobrium is not the only expression generated by punishment, it is the archetypal one, and it ought to be the dominant one. Moreover, moral opprobrium can be distinguished from other forms of expression because it is the singular expression that must accompany punishment; its presence is part of what makes the hard treatment a punishment. Hard treatment that the law labels punishment may in fact fail to convey reprobation and, indeed, it may convey entirely

69. RAZ, *supra* note 32, at 2.

70. *Id.*

71. Harcourt, *supra* note 57, at 168.

72. *Id.* at 168 (“Punishment usually also communicates, importantly, political, cultural, racial and ideological messages.”).

73. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

unrelated expressions about power or race or politics. However, conveying reprobation is part of the function of punishment in a way none of these other expressions are.

B. THE NORMATIVE VALUES THAT INFLUENCE HOW LEGAL EXPRESSIONS ARE PERCEIVED

A legal system that is widely perceived as generating legitimate expression will be more stable and well functioning, but people subject to a legal system perceive legal expressions in accordance with their own morals or normative stance. People's norms matter to what expression they perceive and whether they perceive the legal system as legitimate. The calculation here is more nuanced than simply whether one agrees with the outcome. A person who believes narcotics are harmful and ought to be forbidden by the government may or may not identify positive expression when a person convicted of selling narcotics is sentenced to twenty years in prison for a repeat offense. Although the sentence is the end result of a general policy with which he agrees (criminalizing the sale of narcotics), he may disagree with the penalty itself, finding it either too harsh or not severe enough. Likewise, someone who believes the government has no role regulating what substances people put in their bodies may or may not find the expression inherent in the punishment legitimate. Though she disagrees with the general policy that results in the sentence, she may believe that the democratic process by which the penalty was established is a higher good than the liberty she would like to have preserved. Moreover, she may believe that all legitimately enacted and sufficiently publicized criminal laws ought to be obeyed, and that the defendant's failure to obey the drug laws—laws she substantively disagrees with—merits condemnation. The perception of legitimacy depends on alignment with moral values, but those moral values may relate to matters beyond the substance of the law at issue.

What norms affect views about legitimacy? The simplest answer is that any and all norms can. Any normative view held by any person subject to a legal system may be part of how that person assesses the legal system.⁷⁴ Given the plurality of moral perspectives in most societies, there is unlikely ever to be consensus as to the legitimacy of the legal system.⁷⁵ A person assessing legal actions and evaluating the legitimacy of those

74. Michael Walzer develops this idea more thoroughly, and more broadly than I need to, when he argues that "it is the meaning of goods that determines their movement." MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 8 (1983). "All distributions [of all goods] are just or unjust relative to the social meanings of the goods at stake." *Id.* at 9. As this Article is concerned with perceived, or sociological, legitimacy, my contention more modest than Walzer's: The distribution of punishment will be perceived as just or unjust relative to the social meanings attached to the punishment.

75. See *supra* text accompanying notes 28–29.

actions will do so according to her own normative values. By way of example, consider the range of possible reactions to the imposition of a \$1000 criminal fine (and no other penalty) on a person found guilty of insider trading by which he profited \$1000. An advocate for unfettered markets might see this as an unjustified deprivation of wealth from a person who earned access to superior information. A believer in modern securities regulations might see this as an inadequate deterrent for failing to account for the *ex ante* possibility of avoiding detection. Both views would be critical of the legal action, and each would perceive negative expression in the legal action, but those perceived expressions would be entirely different. The person who believed any penalty to be wrong might perceive expressions offensive to liberty and supportive of an undesirable positive equality. The person who believed the penalty inadequate might perceive the opposite: expressions offensive to equality and supportive of an undesirable negative liberty. More simply, the former would perceive legal condemnation of morally acceptable conduct; the latter would perceive tacit legal acceptance of morally condemnable conduct. Our normative values will determine how we interpret legal actions; expression in law is thus contingent on normative values.

At this point, one could be forgiven for asking: What's the use of this model if perceived legitimacy is determined by the set of all norms that exist among all people subject to a legal system? Given the breadth of possibility inherent in the fact that any normative view will influence the assessment of legitimacy for the person who holds it, I suggest that what ought to interest us is not every moral view, but rather those that are shared by many people. Insofar as the purpose of the inquiry is to assess the stability and efficiency of the legal system,⁷⁶ what matters is having more people perceive the system as more legitimate.⁷⁷ There is no more stable and efficient legal system than one in which all subjects perceive the law as maximally legitimate. From there it is a sliding scale of decreasing stability and efficiency, as fewer people perceive the law as maximally legitimate, and as more people perceive the law as less legitimate.

1. Substantive Norms and Procedural Norms

Normative values that inform people's perception of the legal system can be divided into substantive norms and procedural norms. In this Subpart, I argue that procedural norms matter more than substantive

76. As opposed to making a deontological claim about what Solum has labeled normative legitimacy. See *supra* text accompanying note 37.

77. Well, not quite. This is an oversimplification. What probably matters in practice is not merely having more people perceive greater legitimacy, but having more of the *right* people perceive greater legitimacy (i.e., to account for the fact that in any group some individuals have disproportionate influence on the thinking of others). For purposes of this Article, I ignore this nuance.

norms to people's assessment of legitimacy, and look to the work of Tom Tyler to identify widely shared procedural norms.

Substantive norms are those related to the conduct regulated by law. For example, the Foreign Corrupt Practices Act ("FCPA") makes it a crime to bribe foreign government officials.⁷⁸ One might—independent of the law—believe it is wrong to bribe foreign government officials. Alternatively, one might see nothing wrong with bribing government officials in other countries. Both views are substantive value judgments about the conduct regulated by the FCPA. The former is aligned with the law and the latter is not. Whether one takes one of these views—or some other more nuanced view about the moral value of bribing foreign officials⁷⁹—will influence how one perceives prosecutions and punishments of those who violate the FCPA.

Alignment of substantive norms with the specific prohibitions of criminal law will obviously influence how people perceive prosecutions, but it will not generally explain the adoption of the internal view. This is perhaps counter-intuitive; after all, is not the primary criterion for whether one believes a law to be legitimate actually whether one normatively agrees with the purpose and function of the law? Probably not. In fact, were this the primary criterion for perceived legitimacy, complex modern legal systems would enjoy very little perception of legitimacy. The substantive normative scope of a legal system is simply too broad, diverse, and normatively inconsistent to satisfy many people in terms of agreement with the substantive norms promoted by the system. The federal criminal law addresses issues as diverse as speech,⁸⁰ firearms,⁸¹ narcotics,⁸² taxes,⁸³ water hyacinths,⁸⁴ family obligations,⁸⁵ odious motives,⁸⁶

78. 15 U.S.C. § 78dd-1 (2012).

79. For example, Andrew Spalding has argued that FCPA enforcement may not have the salutary effect on corruption sought by its supporters. Noting that increased FCPA enforcement of business in developing countries has the effect of reducing foreign direct investment in that country, see Andrew B. Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez Faire*, 59 UCLA L. REV. 354, 405 (2011) (summarizing empirical studies and concluding that the "latest empirical data suggests that antibribery legislation has a deterrent effect on investment in countries where bribery is perceived to be more prevalent"), Spalding suggests that the reduction of foreign direct investment by companies from countries with progressive anti-bribery legislation and enforcement threatens to limit constructive engagement, leaving a vacuum quickly occupied by more opportunistic nations, less concerned with the impact of bribery. *Id.* at 406–10. Therefore, according to Spalding, more aggressive FCPA enforcement could lead to more, not less, corruption.

80. See, e.g., 18 U.S.C. § 1001 (2011) ("Statements or entries generally").

81. See, e.g., *id.* § 922 ("Unlawful acts [of firearm possession]").

82. See, e.g., 21 U.S.C. § 841 (2011) ("Prohibited acts [of drug trafficking and manufacture]").

83. See, e.g., 26 U.S.C. § 7201 (2011) ("Attempt to evade or defeat tax").

84. See, e.g., 18 U.S.C. § 46 ("Transportation of water hyacinths").

85. See, e.g., *id.* § 228 ("Failure to pay legal child support obligations").

86. See, e.g., *id.* § 249 ("Hate crimes acts").

associations,⁸⁷ gambling,⁸⁸ obscenity,⁸⁹ commercial competition,⁹⁰ loyalty to country,⁹¹ and democracy.⁹² This is only a limited selection from the broad scope of federal criminal law, and yet the likelihood of any one person agreeing with each of these laws is low. Moreover, consider that “agreeing with each of these laws” entails not only the relatively simple question of whether the type of conduct ought to be permitted or not, but also the more nuanced matters such as drawing lines between legitimate and illegitimate conduct and identifying the appropriate penalty for violations. The fact is, people in a complex legal system will be accustomed to disagreeing with the substance of the law, but substantive disagreement does not undermine the perceived legitimacy of a legal system until it becomes a very strong and important substantive disagreement.

As Tom Tyler writes, describing these substantive norms as “personal morality”: “Unlike legitimacy, personal morality is double-edged. It may accord with the dictates of authorities and as a result help to promote compliance with the law, but on the other hand it may lead to resisting the law and legal authorities.”⁹³

Where the dictates of authorities become too contrary to one’s personal morality (on matters that are sufficiently important), the substance of those dictates will undermine the perception of legitimacy. Most of the time, however, people are willing to accept as legitimate laws of which they substantively disapprove.

Perceived legitimacy is therefore mostly influenced by procedural norms.⁹⁴ Procedural norms concern the fairness—or lack thereof—of legal procedures. Tyler has extensively studied procedural norms, specifically considering the relationships between people’s experience with the legal system, their attitudes toward the legal system and their relative compliance with laws.⁹⁵ The first thing to note about procedural norms is that, like substantive norms, they are neither universal⁹⁶ nor absolute.⁹⁷ Nonetheless, Tyler conducted extensive surveys of 1575

87. See, e.g., *id.* § 521 (“Criminal street gangs”).

88. See, e.g., *id.* § 1084 (“Transmission of wagering information; penalties”).

89. See, e.g., *id.* § 1461 (“Mailing obscene or crime-inciting matter”).

90. See, e.g., *id.* § 1832 (“Theft of trade secrets”).

91. See, e.g., *id.* § 2339A (“Providing material support to terrorists”).

92. See, e.g., *id.* § 201 (“Bribery of public officials and witnesses”).

93. TYLER, *supra* note 30, at 26.

94. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007) (“[P]eople are more interested in how fairly their case is handled than they are in whether they win . . . [N]umerous studies conducted over the last several decades have consistently found this to be true.”).

95. See TYLER, *supra* note 30.

96. See *id.* at 156 (“[T]he meaning of procedural justice changes in response to the nature of people’s experiences with legal authorities.”).

97. See *id.* (“[I]ndividuals do not have a single schema of fair procedure to apply in all situations.”).

randomly selected people in Chicago to get data on attitudes toward the legal system, including views on procedural justice and behavior relative to the legal system.⁹⁸ Of the 1575 people surveyed, a “randomly selected subset of 804 respondents was reinterviewed one year later.”⁹⁹ The data were analyzed for the full set of respondents to understand “the relationship between attitudes and behavior measured at one point in time,” while the subset of 804 respondents interviewed twice was analyzed “to examine the relationship between changes in attitudes and changes in behavior.”¹⁰⁰

Tyler concludes that procedural norms matter a great deal to assessments of legitimacy.¹⁰¹ Moreover, he was able to identify “different aspects of procedure [that] independently influenced judgments about whether the procedure was fair,”¹⁰² including:

- “a belief on the part of those involved that they had an opportunity to take part in the decision-making process”¹⁰³
- “judgments about the neutrality of the decision-making process”¹⁰⁴
- judgments about whether the decisionmakers are “honest and . . . reach their decisions based on objective information about the case”¹⁰⁵
- “being treated politely”¹⁰⁶
- “inferences about the motives of the authorities”¹⁰⁷
- “whether the procedures produce fair outcomes.”¹⁰⁸

Tyler’s approach is more detailed and nuanced than necessary for this Article: For example, the distinction between a decisionmaker’s neutrality, honesty, and motives are fine ones, and they may be difficult to parse in practice. But generally the results suggest tremendous practical utility. Tyler’s study gives us a set of criteria that are widely shared and that will tend to reflect on the fairness of a procedure. In the next Subpart, I

98. *Id.* at 8.

99. *Id.*

100. *Id.*

101. *See id.* at 107 (“The results of the Chicago study support the finding of earlier research that procedural justice is generally important [to perceptions of legitimacy].”). Tyler further found that procedural justice was *more* important when the experience assessed involved courts (as opposed to police), was in dispute, was voluntary, or had an unfavorable outcome; for experiences involving police, no dispute, involuntary contact, or favorable outcomes, procedural justice still mattered, but to a lesser degree. *See id.* at 105.

102. *Id.* at 163.

103. *Id.*

104. *Id.* at 163–64.

105. *Id.* at 164.

106. *Id.*

107. *Id.*

108. *Id.* This is a particularly interesting factor in that it is a sort of hybrid between the substantive, outcome-based norms and the procedural-based norms. Still, “[f]air outcomes are one thing that people expect from a fair procedure, and a procedure that consistently produces unfair outcomes will eventually be viewed as unfair itself.” *Id.*

consider how these criteria reflect on the current practice of prosecuting corporations.

2. *Normative Values That Inform Perceptions of Corporate Prosecutions*

Corporate prosecutions will be assessed against applicable substantive and procedural norms.¹⁰⁹ In the first instance, for any alleged criminal act, there will be substantive norms about that act itself. These types of norms were addressed above by considering the example of bribing foreign officials in violation of the FCPA.¹¹⁰ Some people will morally disapprove of the conduct that is the basis for the criminal charge, and others will not. These norms can be widely divergent without necessarily disrupting the internal view of law.¹¹¹

As addressed above,¹¹² procedural norms tend to dominate legitimacy assessments. Whether people perceive as fair the processes by which corporations are prosecuted, charged, convicted, and punished will influence their view of the legitimacy of prosecuting corporations generally. Of the values identified by Tyler and listed above,¹¹³ all would seem relevant to how corporate prosecutions are perceived except, perhaps, the concept of being treated politely (because it is unclear what it means to treat a corporation politely).¹¹⁴ The other values, however, do seem applicable to corporate prosecutions and will be considered in Part II in assessing how well the current practice of prosecuting corporations serves its expressive purpose.

II. TWO EXAMPLES OF CORPORATE PROSECUTIONS AS EXPRESSIVE FAILURES

Corporate prosecutions generate a number of expressions, including most simply that corporations—just like individuals—are forbidden from engaging in criminal conduct.¹¹⁵ Certain prosecutions, however, risk generating negative expressions that can undermine the perceived

109. *See supra* Part I.B.1.

110. *See* 15 U.S.C. § 78dd-1 (2011).

111. *See* TYLER, *supra* note 30, at 235 n.11 (“Research on the American political system has found that in general people have at least some reservoir of goodwill toward legal and political authorities, even if they are marginal members of society.”).

112. *See supra* text accompanying notes 94–108.

113. *See supra* text accompanying notes 103–108.

114. Of course, corporations act through real persons, even in their dealings with prosecutors, and politeness will matter to the people involved in those meetings. However, the public has little or no opportunity to observe the interaction between corporate representatives and law enforcement officials. Accordingly, the degree of politeness in these interactions is unlikely to influence perceptions of legitimacy (except, perhaps, for those few attorneys or corporate employees privy to the interaction).

115. *See generally* Gilchrist, *supra* note 19.

legitimacy of the legal system. In this Part, I consider two corporate prosecutions that have generated negative expression. Each failed, in different ways, to serve the expressive purpose that justifies holding corporations criminally liable in the first place, and neither is atypical. I did not select these cases because they are particularly noteworthy; rather, I selected them because they illustrate fairly common problems with corporate prosecutions. Both involve prosecutions of parent corporations for the actions of employees of subsidiaries. Beyond that, however, the prosecutions are quite different. One resulted in a trial and conviction of the corporation, the other in a civil resolution. Both illustrate particular problems with modern corporate prosecutions failing to align with the widely shared procedural norms identified in the preceding Subparts.¹¹⁶

A. THE PROSECUTION AND CONVICTION OF AML, INC.

1. *The Prosecution*

Automated Medical Laboratories, Inc. (“AML”) was a Miami-based corporation that owned and operated a number of medical businesses.¹¹⁷ Among these business were “eight commercial plasmapheresis centers” engaged in the collection and sale of plasma.¹¹⁸ One of those centers was separately incorporated as Richmond Plasma Corporation (“RPC”), a wholly owned subsidiary of AML.¹¹⁹ As with most medical businesses, the collection and sale of plasma is heavily regulated.¹²⁰ Following regulatory difficulties in 1977 and 1978, AML created “a special office for the specific purpose of assuring compliance with federal regulations at AML plasma centers.”¹²¹ Hugo Partucci was designated to run this compliance office.¹²² Partucci was employed by yet another wholly owned AML subsidiary, and he had worked since 1972 serving as the head of a number of different AML-owned plasmapheresis centers.¹²³ Notably, prior to being assigned to run the new compliance office, “Partucci was responsible for assuring compliance at RPC and at least two other plasma centers.”¹²⁴

116. *See supra* Part I.B.1–2.

117. *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 401 (4th Cir. 1985).

118. *Id.*

119. *Id.* at 400–01.

120. *Id.* at 400 n.1 (“Such facilities must register with and be licensed by the FDA. They are also required by Federal regulation to maintain extensive records regarding a variety of matters such as donor screening, equipment testing, and the collection, storage and disposition of plasma. The FDA is authorized to inspect plasmapheresis facilities and their records to ensure compliance with applicable regulations.”).

121. *Id.* at 401.

122. *Id.* at 400–01.

123. *Id.* at 401.

124. *Id.*

By late 1978, Partucci, accompanied by a few lower-level employees, had begun “periodic inspection at various AML centers to discover and correct any deficiencies in compliance with FDA regulations.”¹²⁵ Finding numerous regulatory deficiencies, particularly at RPC, compliance team members began instructing employees “to falsify and fabricate records to conceal these deficiencies.”¹²⁶ They did so at Partucci’s instruction.¹²⁷ Partucci was the highest level employee alleged to have any involvement in the fraudulent activity.

AML was convicted, and on appeal it argued that “the Government failed to prove the ‘element’ that its agents’ criminal acts were undertaken primarily to benefit AML.”¹²⁸ Moreover, AML had specific policies forbidding the exact conduct engaged in by Partucci and other lower-level employees; therefore, AML argued, the conduct was outside the scope of their employment.¹²⁹ The Fourth Circuit had little difficulty rejecting these arguments. The corporate policy argument was dismissed on the basis of prior precedent.¹³⁰ The Fourth Circuit was no more moved by the argument that there was insufficient evidence of intent to benefit AML. The court opined that “it would seem clear” Partucci’s actions were undertaken, at least in part, with intent to benefit AML, and noted that “it is not necessary for an agent’s actions to have actually benefited the corporate entity.”¹³¹

2. *The Expressive Problem: Mere Respondeat Superior Liability*

The AML case is interesting because it demonstrates how little is required for a corporation to be vicariously liable for the acts of its employees. The court’s analysis appears to be correct. AML was

^{125.} *Id.*

^{126.} *Id.*

^{127.} *Id.*

^{128.} *Id.* at 406.

^{129.} *Id.* at 407 (“[M]any of their actions were unlawful and contrary to corporate policy . . .”).

^{130.} *Id.* at 406 (“[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation even if . . . such acts were against corporate policy or express instructions.” (quoting *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983))).

^{131.} *Id.* at 407 (citing *Oil Monastery Co. v. United States*, 147 F.2d 905 (4th Cir. 1945)). This is not an unusual or surprising rule. Were corporations immune unless the crime redounded to their actual benefit, corporations would almost never be criminally liable. After all, the issue arises only when the perpetrators are caught; the calculus is thus inherently skewed away from actual benefit because of the inclusion of the costs of detection, investigation, defense, and criminal penalties. See *United States v. Ionia Mgmt.*, 526 F. Supp. 2d 319, 323 (D. Conn. 2007) (quoting *J.C.B. Super Mkts, Inc. v. United States*, 530 F.2d 1119, 1122 (2d Cir. 1976) (“The suggestion that the employee’s wrongful act did not advance the interests of the employer and therefore should not be imputed to it entirely overlooks the basic concept of respondeat superior. Presumably no tortious act by an agent redounds to the benefit of the principal where the latter is held responsible for the damage which results. Yet if this reasoning were followed no principal would ever be liable.”)).

challenging the sufficiency of the evidence on appeal following conviction. The question for the appellate court, accordingly, was only whether “the jury could rationally have reached a verdict of guilty beyond a reasonable doubt.”¹³² Given that it was possible that Partucci’s fraud would inure to the benefit of AML, it would not be unreasonable for a juror to conclude that he intended it to be so.¹³³ That conviction, however, tells us nothing about the degree to which AML itself should be condemned for the crime.

Prior to the compliance inspections that led to fabricating records, Partucci was responsible for compliance with regulations at RCL.¹³⁴ Therefore, according to the appellate record, Partucci was responsible both for the regulatory failings that led to the cover-up and for the cover-up itself. Was the cover-up to protect AML or to protect Partucci?

The most obvious reason for Partucci to engage in a cover-up was to protect himself. It is entirely possible that no part of Partucci’s conduct was to benefit AML—it was to save his own hide. The Fourth Circuit did note that the intent to benefit rule would serve “to insulate the corporation from criminal liability for actions of its agents which be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.”¹³⁵ The court avoided this possibility by concentrating on the question of the scope of authority: “AML had specifically assigned to these individuals the responsibility for assuring compliance by its plasmapheresis centers with FDA regulations. In instructing other employees regarding compliance with applicable regulations, Partucci and the others were acting within the scope of their authority or certainly within their apparent authority.”¹³⁶

AML assigned Partucci to ensure compliance; by ordering fabrication and falsification of records, Partucci was—in a criminal and expressly forbidden manner—ensuring compliance. Had he not been caught, the cover-up presumably would have benefitted AML (because it would not have been subject to regulatory sanctions for non-compliance). That rationale was sufficient for the Fourth Circuit to conclude that it was clear Partucci acted to benefit AML.¹³⁷

132. See *United States v. Powell*, 469 U.S. 57, 67 (1984).

133. For example, personnel other than Partucci were involved in the falsification and fabrication. Perhaps the involvement of multiple employees convinced jurors that the conduct was done to benefit AML, not to protect Partucci. Moreover, the conduct continued after Partucci left the company, and this also could suggest that the conduct was not to protect Partucci (although, the continuation of fabrication and falsification seems just as likely explained by employees, having engaged in initial falsehoods, protecting themselves by continuing the falsehoods to avoid detection).

134. See *Automated Med. Labs.*, 770 F.2d at 401.

135. *Id.*

136. *Id.*

137. *Id.*

We might blame AML for negligence in selecting Partucci to run RCL and selecting him to head the compliance review.¹³⁸ But even that is probably a stretch. We have no information about whether or how AML conducted diligence on Partucci and his ability and integrity. We do not know if Partucci lied to AML to get these positions; we do not know if AML complied with or even exceeded the industry standard in vetting Partucci. We cannot really say, with the benefit of hindsight, much more than that AML choose poorly in hiring and appointing Partucci. But that is neither a controversial statement nor a helpful one: Senior officers at AML would almost surely agree, regardless of whether they share any blame in the wrongdoing.

One might question whether an entity can, in any reasonable sense, be blamed.¹³⁹ In *The Expressive Cost of Corporate Immunity*, I wrote that corporations deserve neither blame nor fairness.¹⁴⁰ Simply put, corporations do not deserve blame or fairness because they lack the capacities necessary for moral desert.¹⁴¹ They can, nevertheless, be blamed. Whereas desert is a distinctive moral concept strongly associated with blame, blame is sociological fact: One can blame or not blame—the reason or lack of reason for blaming does not change the fact of blaming. That said, blame can be silly or unreasonable, or it can be based in something sensible. Attribution of fault to a tree branch that falls on me can be real, though probably not reasonable. Attribution of fault to a corporation can be both real and reasonable because corporations—largely through their cultures,¹⁴² reporting structures, and incentive plans—influence the behavior of employees and agents.¹⁴³ Furthermore, in certain cases, the

138. Whether negligence is condemnable is a subject of lengthy and complex debate. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 149–57 (2009) (arguing that the carelessness that caused one to be unaware of the risk is a basis for culpability and thus negligence may be punished); Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. LEGAL STUD. 1, 16 (2010) (identifying a set of omissions avoidable but for a malfunction of rational capacities as negligence for which one can properly be held responsible). *But see* Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147, 165 (2011) (arguing that not all negligence is the result of unexercised capacity and thus blameworthy). I do not address this (exceedingly difficult) issue in this Article.

139. *See, e.g.*, Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1392 (2009) (arguing that blaming and punishing corporations is puerile).

140. *See generally* Gilchrist, *supra* note 19.

141. *See infra* text accompanying notes 151–157.

142. Ian B. Lee, *Corporate Criminal Responsibility as Team Member Responsibility*, 31 OXFORD J. LEGAL STUD. 755, 772 (2011) (describing corporations as teams and identifying positive and negative cultural values promoted by teams).

143. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 491 (2006) (“Institutions influence people in ways that sometimes make it rational to blame institutions for what people do.”); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 493 n.16 (2003) (“[M]anagement’s commitment to corporate ethics, organizational culture, and institutional incentive structure have been determined to significantly influence the level of organizational misconduct.”); *see also* Gilchrist, *supra* note 19, at 9–14.

failure to establish any clear culture on a particular topic (e.g., a corporation's failure to communicate to its agents and employees the value of compliance with environmental regulations) might be seen as an omission on the part of the corporation that negatively influenced (or failed to properly influence) an individual agent.

I previously introduced the example of Corporations Alpha and Beta, which had very different cultures regarding foreign bribery and corruption.¹⁴⁴ Corporation Alpha had a strong culture of compliance with U.S. law, including the FCPA, that included vigorous training and appropriate incentives to encourage compliance with the law.¹⁴⁵ Corporation Beta not only lacked that culture, but it also had a reporting and pay structure that clearly increased the risk people would violate the FCPA in order to benefit themselves within the corporation.¹⁴⁶ A culture of compliance is no guarantee of full compliance, so it remains possible that an employee of Alpha could violate the FCPA. However, were that to happen, people would likely be less condemning of Corporation Alpha (as a whole), than they would of Corporation Beta if one of its employees violated the same law in the same manner. Corporation Alpha was structured to avoid the wrongdoing; Corporation Beta was structured in a way that facilitated the wrongdoing. The latter is more likely to be condemned (although both could be held criminally liable).¹⁴⁷

In a case like AML, where there is no apparent reason to blame the company, the special expressive function of criminal sanctions is inactive at best. The prosecution against AML illustrates the extent to which the doctrine of respondeat superior can permit criminal liability that is entirely detached from meaningful culpability. Mere respondeat superior liability (that is, cases in which the acts of a single or few relatively low-level employees give rise to liability) can generate prosecutions unaccompanied by any meaningful condemnation of the corporation. While people might condemn the corporation if the corporate culture fostered an environment in which the law was more likely to be violated,¹⁴⁸ a corporation can be criminally liable without this cultural element.¹⁴⁹ In such a case, there is

144. See Gilchrist, *supra* note 19, at 11–14 (explaining the Corporations Alpha and Beta example).

145. See *id.*

146. See *id.*

147. See *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481, 495 (1909).

148. See Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1532 (2007) (“Companies can develop distinctive cultures (or an ethos) including values that are contrary to general norms, which they encourage their employees to flout.”); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123 (1991) (“Much of the voluminous business literature on corporate culture is premised on the notion that organizations have distinctive cultures.”); see also Gilchrist, *supra* note 19, pt. I (explaining why corporate culture is relevant to the degree of condemnation toward a corporation whose agents violate the law).

149. See *N.Y. Cent.*, 212 U.S. at 494 (“[I]mputing [the corporate agent’s] act to his employer and imposing penalties upon the corporation for which he is acting in the premises [can help control an

little or no reason to condemn the corporation qua corporation, and the criminal law is being used without any expressive aspect. Sara Beale points out that a safety valve exists:

In practical terms . . . the consequences of the respondeat superior doctrine are substantially mitigated by the Department of Justice's prosecutorial guidelines, which instruct federal prosecutors to consider factors that correlate with corporate fault, such as whether the wrongdoing in question was pervasive within the corporation, whether the corporation had a history of similar conduct, and whether the corporation had in place an active compliance program that was implemented in an effective manner.¹⁵⁰

While Beale is right to note that guidelines and prosecutorial discretion limit the application of respondeat superior liability, such liability nonetheless remains the rule, and the AML prosecution demonstrates that, at least sometimes, corporations are prosecuted for mere respondeat superior liability.

Where a legal system purports to “punish” a corporation by imposing hard treatment and the perceiver fails to see a reason to condemn the corporation, there is dissonance between the legal act and its expression. The legal system is saying this is punishment (that is, hard treatment plus reprobation), but the perceiver sees no reprobation because there is no basis for condemnation. People are unlikely to blame just because something is called punishment.¹⁵¹

This expressive dissonance might be resolved in a number of ways, and none of them are good for the perceived legitimacy of the legal system. First, people might begin to discount the law's assessment of what merits condemnation (that is, the law claims to be condemning this non-blameworthy person; therefore, I reject the law's assessment of what is blameworthy). A legal system that blames the non-blameworthy will be deemed less legitimate.¹⁵² It is, to return to Tyler's criteria, resorting to procedures that do not produce fair outcomes.¹⁵³

Second, people might come to believe that no condemnation accompanies the hard treatment and, accordingly, that the hard treatment is more like a fine than a punishment as defined by Feinberg.¹⁵⁴ At first, this alternative might seem better for maintaining the perceived legitimacy

agent].”).

150. Beale, *supra* note 148, at 1516–17 (footnotes omitted).

151. That is, except at the margins, where the perceived legitimacy of the law is strong and independent norms about the subject of the punishment are weak. It is in these cases that the expressive power of the law can be harnessed to shift societal norms.

152. TYLER, *supra* note 30, at 172 (“If people have an experience not characterized by fair procedures, their later compliance with the law will be based less strongly on the legitimacy of legal authorities. Therefore, not experiencing fair procedures undermines legitimacy.”).

153. *Id.* at 164.

154. See FEINBERG, *supra* note 60, at 96.

of the legal system because it does not involve a dissonance between the apparent intent of the law and the beliefs of the perceiver (i.e., the perceiver fails to identify any effort by the law to condemn, and this is consistent with her belief that there is no basis to condemn; rather, a redistributive, remedial, or incensing fine or tax is being imposed). However, failure to recognize condemnation in a criminal penalty has a different cost: It dilutes the meaning of criminal penalties. Where the criminal process is used to impose hard treatment devoid of reprobative value, the association between criminal sanction and reprobation is undermined because it is no longer the case that the imposition of criminal liability is something special, reserved for those whose action merits condemnation.¹⁵⁵

None of which is to suggest that there is not good reason to penalize AML; after all, AML is in the best position to prevent this sort of wrongdoing, and imposing a penalty will incentivize AML and similarly situated companies to use more care in appointing, training, and supervising compliance personnel. The FDA cannot actively monitor or audit every required record for every company. There must be consequences for companies that violate the regulations to induce companies subject to the regulations to apply resources toward compliance. Yet this straightforward deterrence can be achieved just as well, and more efficiently, through civil remedies without undermining the perceived legitimacy of the legal system or the expressive value of criminal law.¹⁵⁶

By imposing a criminal penalty on a company that people feel is not blameworthy, the legal system will either undermine its own legitimacy as people discount the law's commitment to fairness, or it will undermine the expressive function of criminal sanction as people dissociate criminal liability from blameworthiness. AML serves as an example of this risk.¹⁵⁷

155. John Coffee expressed this concern two decades ago, writing about the encroachment of substantive criminal law into matters traditionally left to civil law:

[T]he criminal law should not be overused. This position stems not only from the usual fairness considerations, but also from a sense (at least on my part) that overuse will impair the criminal law's nondeterrent functions. Recent scholarship has emphasized the criminal law's socializing role as a system for moral education. In similar terms, economists have viewed the criminal law as an instrument for shaping preferences as well as for imposing costs. This "preference-shaping" role posits that the criminal law can and should affect not simply the rational actor's perception of the costs of crime, but also the actor's perception of the benefits from crime. To perform this role, however, the criminal law's scope must be limited because society's capacity to focus censure and blame is among its scarcest resources.

Coffee, *supra* note 61, at 1877 (footnotes omitted).

156. See Gilchrist, *supra* note 19, at 41 n.237 (citing Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1532 (1996)).

157. I should add a few caveats here. First, it is possible—as a result of publicity or gossip around Miami—that the public had access to additional information (whether or not true) about AML that

B. THE PROSECUTION OF AND SETTLEMENT WITH JOHNSON & JOHNSON, INC.

1. *The Prosecution*

Pharmaceutical and medical device giant Johnson & Johnson (“J&J”) recently was prosecuted for violations of the FCPA.¹⁵⁸ The resolution of the investigation demonstrates another set of expressive problems that can and do arise from corporate prosecutions.

On April 8, 2011, the Department of Justice (“DOJ”) filed with the U.S. District Court for the District of Columbia a DPA it had entered into with J&J.¹⁵⁹ The agreement resolved the DOJ’s investigation of J&J and its subsidiaries for numerous violations of the FCPA.¹⁶⁰ The investigation concerned illegal payments to foreign officials through the United Nations Oil-for-Food Program in Iraq, in addition to payments in Greece, Poland, and Romania.¹⁶¹

Pursuant to the agreement, the DOJ filed a criminal information charging J&J subsidiary DePuy, Inc. with “conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, that is, to violate the Foreign Corrupt Practices Act of 1977.”¹⁶² J&J admitted that it was responsible for the acts violating the law as specified in the agreement, including those committed by its subsidiaries,¹⁶³ and agreed to pay a monetary penalty of \$21,400,000.¹⁶⁴ J&J also agreed to extensive auditing and reporting requirements to the DOJ.¹⁶⁵ In exchange, the DOJ agreed that if J&J complied with all its obligations under the agreement, after a period of three years the agreement would expire, the DOJ would dismiss with prejudice the information against DePuy, and the DOJ would pursue no further action against J&J or any of its subsidiaries for conduct covered by the agreement.¹⁶⁶

made it very comfortable with blaming the company. In that case, the expressive harms identified in this Part would not result; this Part is meant to demonstrate how respondeat superior can undermine perceived legitimacy, not to claim it invariably does so. Second, an expressive failure does not cripple a legal system. There will be expressive failures that cannot be remedied. I address some of these below. *See infra* Part II.C. The standard cannot be perfect expressive coherence, but perfect expressive coherence is the aspiration, and where there is an expressive failure that can be remedied, it ought to be. Finally, and related to the second point, one might question whether people really even notice these details. *See infra* Part III.

158. *See* 15 U.S.C. §§ 78dd-1 to -3, 78ff (2012).

159. *See* Deferred Prosecution Agreement Between U.S. Dep’t of Justice and J&J (Jan. 14, 2011) [hereinafter Johnson & Johnson DPA].

160. *Id.* ¶ 2.a; *id.* at Attach. A.

161. *Id.* at Attach. A ¶¶ 1–101.

162. *Id.* ¶ 2.

163. *Id.* ¶ 2.a.

164. *Id.* ¶ 6.e.

165. *Id.* ¶ 11.

166. *Id.* ¶ 12.

In addition, the agreement specifically noted: “Were the Department to initiate a prosecution of J&J or one of its operating companies and obtain a conviction, instead of entering into this Agreement to defer prosecution, J&J could be subject to exclusion from participation in federal health care programs pursuant to 42 U.S.C. § 1320a-7(a).”¹⁶⁷

Section 1320a-7(a) provided that conviction for the charged violations would result in exclusion from participation in all federal health care programs.¹⁶⁸ Excluding a pharmaceutical and medical device company like J&J from Medicare, Medicaid, and all federal programs would have a catastrophic effect on the company, and might even give cause to fear for future viability.¹⁶⁹

The agreement also stated: “J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies.”¹⁷⁰

2. *The Expressive Problem: An Effective Compliance Program and the Use of Criminal Law to Penalize Negligence*

What expression was made through this prosecution of J&J?¹⁷¹ One positive expression is that FCPA violations will be aggressively investigated and prosecuted. The Statement of Facts included in the agreement describes real and persistent corruption. Over a period of eight years in Greece, DePuy paid over \$16 million to agents, “knowing that a significant portion was used to pay cash incentives to publicly-employed Greek [healthcare providers] to induce the purchase of DePuy products.”¹⁷² Equally troubling, senior executives at DePuy ordered changes to the way payments were made in an effort to cover up what they knew to be wrongful conduct.¹⁷³ Other subsidiaries made additional illegal payments.¹⁷⁴

167. *Id.* ¶ 4.j.

168. 42 U.S.C. § 1320a-7(a) (2012).

169. *See, e.g.*, Dan Levine, *Health Giant to Plead Case in D.C.*, THE RECORDER, Dec. 3, 2009, at 1 (“A felony conviction against Johnson & Johnson would lead to a big fine, but it would have enormous consequences beyond that. Under federal regulations, it would mean automatic exclusion from Medicare and Medicaid, which would be catastrophic for the company and would also deny millions of patients the range of drugs it offers.”); *see also* John Ashcroft et al., *Whistleblowers Cash in, Unwary Corporations Pay*, 40 HOFSTRA L. REV. 367, 374 (2011) (“[D]ebarment in federal programs [can be a] corporate life-threatening event for firms with a high percentage of government business such as defense contractors, medical device manufacturers, and pharmaceutical companies . . .”).

170. Johnson & Johnson DPA, *supra* note 159, ¶ 4.k.v.

171. In this Subpart, I am considering exclusively the prosecution of the parent company, Johnson & Johnson. The prosecution of DePuy, the subsidiary of J&J, does not present the same issues.

172. Johnson & Johnson DPA, *supra* note 159, at Attach. A ¶ 71.

173. *See id.* at Attach. A ¶ 40 (describing an email from the Vice President of Finance to another senior executive recommending methods of payment that would “pass the red face test”); *see also id.* at Attach. A. ¶ 45 (describing an email from the Vice President of Finance admonishing participants in the payment scheme for creating a written record of cash incentives “which cannot be mentioned in

That this conduct was investigated and prosecuted criminally at all expresses a commitment to exposing and punishing foreign bribery.

There are, however, a few other expressions that people might take from the prosecution. Although the wrongful conduct occurred almost exclusively within subsidiaries owned by J&J,¹⁷⁵ J&J itself was also prosecuted.¹⁷⁶ The prosecution threatened J&J not merely with the possibility of a conviction, but with the potentially existential threat of exclusion from federal healthcare programs.¹⁷⁷ Moreover, the DOJ conceded that J&J had a pre-existing and effective compliance program.¹⁷⁸ There is, therefore, an expression that while an effective compliance program can mitigate loss, it will not prevent prosecution.

More broadly, in light of the effective compliance program and the general lack of involvement by J&J employees outside of the named subsidiaries, there is an expression—similar to that criticized in the AML prosecution¹⁷⁹—that prosecutions are not tied to relative culpability.

Some corporations will have strong, positive, ethical cultures that influence individual agents favorably, like Corporation Alpha.¹⁸⁰ Others will lack this culture, or even promote a negative culture (for instance, favoring short-term gains at any cost) and influence individual agents negatively, like Corporation Beta.¹⁸¹ But an individual corporate agent might violate the law at either type of corporation. Malfeasance is less likely at the corporation with a strong, positive culture, but cultures are merely influences: they do not define or circumscribe behavior.

J&J, according to the agreement and accompanying Statement of Facts, is more like the hypothetical Corporation Alpha than Corporation Beta:¹⁸² For the most part the corporation worked as society wants corporations to work,¹⁸³ but things went wrong anyway.

J&J did agree that “the majority of the problematic operations globally resulted from insufficient implementation of the J&J compliance

written correspondence with DePuy International”).

174. See Johnson & Johnson DPA, *supra* note 159, at Attach. A ¶¶ 72–119.

175. After DePuy was acquired by J&J, the “senior executive in charge of DePuy at the time” became a senior executive at J&J, but he retained control of DePuy. *Id.* at Attach. A ¶ 17. There is no allegation that any other J&J personnel were involved in the wrongdoing. Indeed, in the one identified instance in which a J&J employee other than the DePuy executive learned of problematic conduct by an agent, the relationship with the agent was terminated within two months. *Id.* at Attach. A ¶¶ 31–32.

176. See *id.* ¶¶ 1, 6.d, 11.

177. See *supra* text accompanying notes 167–169.

178. Johnson & Johnson DPA, *supra* note 159, ¶ 4.k.v.

179. See *supra* Part II.A.2.

180. See *supra* text accompanying notes 144–147.

181. See *supra* text accompanying notes 144–147.

182. See *supra* text accompanying note 144.

183. This is evidenced by DOJ’s concession that J&J had a pre-existing compliance program that was effective. Johnson & Johnson DPA, *supra* note 159, ¶ 4.k.v.

and ethics program in acquired companies,” and that this failure rests squarely with J&J.¹⁸⁴ Still, J&J’s failure to sufficiently implement a compliance program in every new acquisition across a global company is quite different from—and less serious than—failures such as maintaining a culture that facilitated the wrongdoing or involvement of senior personnel in the wrongdoing. Failure to fully implement a compliance program quickly enough to prevent harm might merit condemnation if there was an indication that the compliance program was not fully implemented because the parent company knew that doing so would undermine the (illicit) profitability of subsidiaries. There is no allegation to that effect in J&J’s case. Rather, the gist of the agreement is that J&J was a generally good corporate citizen that negligently failed to properly control a few of its subsidiaries. It may make sense to penalize J&J for that negligence; it makes less sense to bring the opprobrium of criminal justice upon the company.¹⁸⁵

The expression of condemnation inherent in criminal liability is inconsistent with the position that this was an accident of oversight. Failure of oversight is negligent, and there are good reasons to penalize it; but invoking the expressively distinctive criminal law to do so risks the expressive dissonance that can undermine legitimacy or the evisceration of expression in criminal law that can undermine efficacy.¹⁸⁶

Here, it is worth noting a limitation to my conclusion. One might ask why we cannot sufficiently condemn a company for negligence such that criminal liability is expressively appropriate. The resolution of that issue is related to my conclusions: If criminal sanctions ought only apply where there is a basis to condemn the defendant, whether there is a basis to condemn the defendant for mere negligence will determine whether criminal sanctions ought to apply in instances of mere negligence. I have largely assumed that corporations ought not to be subjected to criminal liability for mere negligence.¹⁸⁷ As noted above, I have intentionally sidestepped the issue of whether criminal liability is ever appropriate in cases of mere negligence (that is, a single instance of negligence).¹⁸⁸ I did so for

184. *Id.*

185. *See supra* note 138.

186. *See supra* text accompanying notes 152–157.

187. By “mere negligence” I am speaking about criminal acts so attenuated from the corporation as a whole that to attribute them to the corporation doesn’t quite “fit.” This analysis, admittedly, involves a sort of personification of the corporation and attribution of mental states that, of course, are not actually applicable. Corporations qua corporations cannot really be said to be unreasonably unaware of an unjustifiable risk because corporations qua corporations lack awareness. Indeed, the DePuy personnel who authorized and paid bribes were agents of J&J. Accordingly, their knowledge might be attributed to J&J, and one might say J&J was actually aware of the wrongdoing. But this analysis begs the question; after all, whether we attribute that knowledge to J&J turns on whether we think J&J ought to be responsible.

188. *See supra* note 138.

two reasons: First, as a theoretical matter, this is a challenging question that merits its own article. Second, in most cases, negligence nets less condemnation than more direct wrongdoing—that is, there is generally a difference in the degree of condemnation for negligence and that for more direct misconduct. To apply criminal liability to corporate shortcomings like the failure to conduct diligence beyond that normally due risks diluting the expressive power of criminal sanctions.¹⁸⁹ On the other hand, whereas a single act of negligence does not elicit the degree of opprobrium typically associated with criminal sanctions, a pattern of negligence might. Patterns of negligence that can be attributed to a corporate culture, however, do not qualify as “mere negligence,” and may be the basis for criminal liability.¹⁹⁰

3. *Another Possible Expressive Problem: DPA and the Appearance of Coercion*

Another concern about the J&J resolution is that it generates the appearance of coercion. After all, J&J agreed to pay approximately \$21 million in civil penalties and to accept monitoring after being threatened with potentially company-jeopardizing exclusion from government programs.¹⁹¹ For some companies, just the prospect of indictment is a significant threat. The indictment itself can have a dramatic impact on share price¹⁹² or even the ability of the corporation to continue business as usual.¹⁹³ For J&J, the possibility of being excluded from federal health care programs is an additional threat of even greater magnitude. Threats like these—especially where they are memorialized in the settlement agreement—could suggest the resolution was effectively coerced.¹⁹⁴

189. See Coffee, *supra* note 61, at 1877 (“[O]veruse [of criminal law] will impair the criminal law’s nondeterrent functions . . .”).

190. See *infra* Part IV.

191. Johnson & Johnson DPA, *supra* note 159, ¶¶ 6, 11.

192. See Rapp, *supra* note 2, at 119–20 (noting that news of corporate fraud may result in a decrease in stock price “completely out of proportion to the ‘fundamental news’ that a disclosure conveys”); see also Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 n.7 (2008) (“For public companies, the share price is usually immediately affected [upon an indictment becoming public].”).

193. See *Interview with David Pitofsky, Partner, Goodwin Procter LLP, New York, New York, CORP. CRIME REP.*, Nov. 28, 2005 (“It may be that the market responds differently to criminal investigations and convictions than it used to, but upon the announcement of a criminal investigation, companies regularly lose half of their market value. If the price remains depressed long enough, the capital markets dry up, the ability to hire quality people dries up. The company’s oxygen supply is cut off.”).

194. See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 86–87 (2007) (“[S]o long as there is a hint of criminality by even a single lowly employee, the corporation’s counsel has no leverage and no bargaining power. Only the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded.”); Andrew Weissman & David

A coercive process, even without looking to the substance of allegations and resolution, would cause observers to question the fairness of the outcome,¹⁹⁵ simply because the process would suggest the outcome had more to do with risk assessment and risk tolerance than it did with the underlying fact of guilt or innocence.¹⁹⁶ Were the process to appear coercive, the damage to the legitimacy and expressive efficacy of the legal system would be severe.

C. THE VARIABLE SIGNIFICANCE OF EXPRESSIVE CONCERNS

The prosecutions of AML and J&J demonstrate at least two kinds of potential negative expression. There is the appearance of unfairness where criminal liability is applied to a non-blameworthy entity; both AML and J&J generate this problem to some degree. Additionally, J&J demonstrates the risks of more straightforward procedural unfairness. The appearance of a coerced resolution is incompatible with a fair process. In this Subpart, I suggest that the former is a far more serious problem in corporate prosecutions than the latter. While coerced resolutions would have an even more detrimental effect on legitimacy and expressive efficacy than blaming the non-blameworthy, there is less reason to worry about coercion in corporate prosecutions than about misapplication of criminal liability.

The coercion point can be overstated when it comes to corporations.¹⁹⁷ Corporations do fear indictment, but they do not simply roll over at the mention of possible criminal penalties.¹⁹⁸ It is not the case that corporations never proceed to trial: They do.¹⁹⁹

Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007) (“[A] corporation has little choice but to accede to the government’s demands.”).

195. TYLER, *supra* note 30, at 164. This is a particularly interesting factor in that it is a sort of hybrid between the substantive, outcome-based norms and the procedural-based norms. Still, “[f]air outcomes are one thing that people expect from a fair procedure, and a procedure that consistently produces unfair outcomes will eventually be viewed as unfair itself.” *Id.*

196. See Ellen S. Podgor, *White-Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2010) (“[O]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations.”).

197. Indeed, Sara Sun Beale aptly points out that coercive process is hardly unique to corporate prosecutions, and may even be a more significant problem in other kinds of cases. Beale, *supra* note 148, at 1523–29. I have previously addressed the risks of coercion in non-corporate cases. See Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011).

198. As Peter Henning writes:

The demise of Arthur Andersen after its conviction in 2002 for obstruction of justice is often used to “prove” the purported overwhelming power of prosecutors and the trembling fear of corporations who dare not risk going to trial under any circumstances lest they face near-certain destruction. However, there have been no other instances of a large firm suffering the same fate since then, even though other companies that have been charged with crimes and appear to have survived the ordeal, albeit quite a bit worse for wear.

Prosecutors wield significant power negotiating the resolution of corporate criminal prosecutions, but a brief review of Siemens' resolution of a multi-year investigation of foreign bribery suggests corporations are hardly helpless. The Siemens example is good because the wrongdoing was extensive and well established.²⁰⁰ If companies ever lack the ability to negotiate, Siemens during its FCPA investigation would be a decent example.

But here is what happened: In 2008, the DOJ announced that it had resolved its investigation of Siemens for violations of the FCPA with “the largest monetary sanction ever imposed in an FCPA case since the act was passed by Congress in 1977.”²⁰¹ Siemens incurred fines to the DOJ, the Securities Exchange Commission and German authorities totaling about \$1.6 billion.²⁰² This is a very large sum, of course, but it was imposed to penalize a “pattern of bribery . . . unprecedented in scale and geographic reach . . . involv[ing] more than \$1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the Americas.”²⁰³ Because these bribes affected “thousands of contracts over many years,” the DOJ conceded it could not calculate the amount Siemens profited from the bribes.²⁰⁴

For purposes of applying the sentencing guidelines, the government and Siemens agreed on an estimated loss amount of \$805.5 million.²⁰⁵ But this is surely a woefully inadequate figure. Siemens paid over \$1.4 billion in bribes that affected thousands of contracts. It is inconceivable Siemens engaged in the largest bribery scheme ever detected because it *lost* money doing so. If Siemens paid \$1.4 billion in bribes, it is almost certain Siemens earned more than \$1.4 billion in contracts as a result. Moreover, unless there was an exceedingly low profit margin on the bribes, Siemens earned more than \$1.6 billion, the total amount it was fined, as a result of its crimes. Yet the total benefits of bribery likely exceed even these direct benefits. For example, the benefit of earning a single contract can extend far beyond the value of the contract simply by establishing relationships,

Henning, *supra* note 11, at 1418–19.

199. *Id.* at 1419 (citing, by way of example, W.R. Grace & Co. taking an environmental case to trial and winning).

200. See Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> (“Today’s filings make clear that for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens . . .”).

201. *Id.*

202. *Id.*

203. *Id.*

204. See Department’s Sentencing Memorandum at 13, *United States v. Siemens Aktiengesellschaft*, (D.D.C. Dec. 12, 2008), available at <http://www.justice.gov/opa/documents/siemens-sentencing-memo.pdf>.

205. *Id.*

trust, and goodwill that can influence future contracts. Barring an inconceivably ill-managed and self-defeating course of conduct, Siemens' crime—even after accounting for the largest fine in the history of FCPA enforcement—almost surely paid.²⁰⁶ That it did so is a tribute, at least in part, to Siemens' ability to negotiate, notwithstanding the credible threat of indictment wielded by prosecutors.²⁰⁷

The appearance of coercion is always a concern, and it raises real risks of undermining legitimacy that vary dramatically from basic norms about procedural fairness.²⁰⁸ However, there are probably more reasons to worry about the appearance of coercion with prosecutions of individuals than of corporations.²⁰⁹ As Beale argues, individual defendants—who waive all trial rights and plead guilty at a rate greater than 95%, face additional risks such as mandatory minimum sentences, might lack the resources to hire retained counsel, and are often incarcerated pre-trial—present at least as great (and almost certainly more troubling) an appearance of coercion than does a major corporation resolving a criminal investigation through a civil fine.²¹⁰

Even if one concludes there is some appearance of coercion in the way criminal investigations are resolved, not every expressive cost can be eliminated. The resolution of criminal investigations through civil fines is an example of a legal action with some expressive cost that is, all things considered, worth the cost. Consider the alternatives. Putting aside the constitutional concerns with requiring prosecutors to pursue criminal resolution to criminal investigations,²¹¹ the outcome would be impractical

206. Mark Mendelsohn, then-Deputy Fraud Section Chief, has argued against this claim citing to collateral consequences such as the cost of the investigation, a \$100 million World Bank fine, and the expense of replacing its board of directors. *See* Skip Kaltenheuser, *Anti-Corruption—US Leads the Way*, INT'L BAR NEWS (Feb. 2010), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21F61C45-0318-41F6-89F8-3E8C01EC57B1>. This argument strikes me as unpersuasive both because it still fails to identify enough additional costs to make clear that Siemens' conduct did not benefit the company in the long run, and also because the costs of defense and remedial actions are never considered part of the punishment in other contexts.

207. Mike Koehler suggests another factor that likely added to Siemens' leverage:

Siemens is a major U.S. government contractor and its diverse business units have contracts with a wide range of U.S. government agencies, including Department of Defense, Department of the Air Force, Department of the Army, Department of Transportation, Department of Health and Human Services, Department of Energy, Department of Commerce, Department of Housing and Urban Development, and the General Services Administration. The DOJ stated specifically in its sentencing memorandum that it chose to resolve the Siemens matter the way it did to avoid “collateral consequences” that could have resulted from criminal FCPA anti-bribery charges including the “risk of debarment and exclusion from government contracts.”

Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L. L. 907, 996 (2010) (footnote omitted).

208. *See supra* Part II.B.3.

209. *See* Podgor, *supra* note 196 (giving examples of individuals charged with white collar crimes).

210. Beale, *supra* note 148, at 1525–29.

211. *See* *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (holding that

and undesirable. Under such a rule, a prosecutor would be required, upon investigating a company for potential criminal wrongdoing, to resolve the matter either with a declination or a prosecution. This would result in less deterrence of wrongful conduct, if only because of the resource restraints on proceeding to trial on every matter. Similarly, any rule forbidding prosecutors from mentioning the possibility of debarment or exclusion would be inconsequential, at best. If there is a risk of debarment or exclusion, it is in the company's interest to know that and, in all but the most outlandish cases, the company will know that. That is why corporations employ lawyers. Accordingly, to the extent that the possibility of exclusion or debarment drives a settlement, it would do so whether or not the prosecutor mentioned it.

Therefore, on the one hand, although there may be some expressive cost to the way in which settlements are negotiated—as suggested by the J&J prosecution—the cost is highly susceptible to being overstated, and the possible remedies appear even less desirable. On the other hand, the cost of imposing criminal liability absent blameworthiness, as in cases of mere respondeat superior liability, generates a rather plain expressive cost and little benefit that could not as well be achieved by other means without the expressive cost. In Part IV, I address revisions to the corporate liability standard that could fix this problem. First, however, I consider a possible objection to the reality of expressive costs.

III. DO PEOPLE REALLY NOTICE?

How many people are really aware of the way in which the J&J settlement was secured? How many people even know whether it is a criminal or civil resolution? How many people care?

The answer is, probably not many.

So does any of this matter? If people don't know about the details of these prosecutions, does it matter how they are secured?

People observe legal actions as expressions by the legal system. Punishment without basis for condemnation generates an expressive dissonance (that is, the legal system is expressing condemnation while the observer sees no basis to condemn). This dissonance must be resolved, and the resolution entails either harm to the legitimacy of the legal system or harm to the expressive efficacy of criminal law.

But if there is no observer, then none of this matters. Unseen legal actions have no functional expression.

Still, it does matter how these prosecutions are carried out. It is true that with any one prosecution, few people will be aware of the sort of details that would be likely to influence perceptions about the legitimacy

the decision to investigate or prosecute an offense rests with the prosecutor).

of the process. However, the fact that the audience is small should not give leave to ignore basic principles of fairness altogether. Over time, expressively negative conduct will have a cumulative impact on perceptions of the legal system. Perhaps in one case that influence applies to a few officers and employees of a corporation, and maybe outside counsel and a few family members, but in the sum of cases even this limited awareness of negative expression in the legal system will grow.

This does-it-really-matter question raises a related issue: How big of a problem is the expressive dissonance in corporate prosecutions? Beale argues that the disconnect between the perception of blameworthiness and the application of criminal law is not unique to corporate criminal liability; rather, it is endemic to our legal system.²¹² For example, in many jurisdictions the limited scope of the insanity defense will permit convictions of defendants in cases where all parties agree the defendant lacked the capacity to control his conduct as result of mental disease.²¹³ She also gives the examples of accomplice liability and strict- or near-strict-liability weapons and immigration offenses as cases where criminal law applies notwithstanding the absence of a reason to condemn.²¹⁴

Beale is plainly correct that the problem of expressive dissonance is not unique to corporate criminal law—it exists elsewhere. She further concludes that, given the relative paucity of corporate prosecutions and the less severe consequences faced by convicted corporations when compared to individuals, flaws in the corporate criminal law present less urgency than the issues of insanity, accomplice liability, and strict liability or status offenses.²¹⁵

I am sympathetic to this assessment, and yet maintain that corporate criminal liability presents an especially significant expressive problem because of the role of corporations in our society and legal system. Marc Galanter presents a compelling overview of the expanding role of corporations in society.²¹⁶ He marshals evidence that the corporate sphere has grown, the legal sphere has grown, and the corporate influence over

212. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1482, 1488 (2009).

213. *Id.* at 1488–89. This is particularly interesting in light of Michael Moore’s work identifying necessary capacities for desert through application of the insanity defense. *See* MOORE, *supra* note 65, at 595. Moore’s approach, which strikes me as a good one, is to take the insanity defense as a baseline for lacking desert, and from that identify the capacities the insane lack that are necessary for desert. *Id.*; *see also* Gilchrist, *supra* note 19, pt. II.B.1; Beale’s observation suggests that while insanity may remain a fair baseline for lack of desert, the absence of legal insanity—even without another excuse—does not imply desert.

214. Beale, *supra* note 212, at 1489.

215. *Id.* at 1490 (“[I]f we have to triage, and give priority to only a few of these issues, neither the number of cases nor the severity of the sanctions would place corporate criminal liability at the top of my list for reform.”).

216. Galanter, *supra* note 21, at 1375–87.

the legal sphere has also grown.²¹⁷ Corporations consume ever-increasing legal resources and, as frequent and repeat participants in legal actions, corporations play a significant role defining the substance of the law.²¹⁸ This importance of corporations to our legal system is difficult to overstate. Legal expressions in corporate prosecutions may, therefore, generate disproportionate impact compared to legal expressions in individual prosecutions. To be sure, this is not always the case. Furthermore, Beale's point about the sheer numbers remains correct—there is simply a lot more expression through prosecutions of individuals than through prosecution of corporations. But the expression in corporation prosecutions may be particularly pronounced simply because the outsized presence—legal, financial, and social—of the corporate defendant.

There is, however, another concern about whether corporations deserve blame: What if there is a widespread anti-corporate sentiment that all corporations deserve blame, even where we cannot identify the normal hallmarks of blameworthiness such as culture, policies, or leadership involvement? If enough people sufficiently dislike corporations, would they not perceive a legal system that attacks corporations even absent the indicia of blame as more, rather than less, legitimate? Put differently, could a widespread and strong anti-corporate sentiment cause people to perceive legitimacy in condemning corporations even where there is not an immediate basis to do so? Perhaps there is not a good reason to blame J&J for something beyond negligence for the failures at the recently acquired DePuy, but were enough people sufficiently anti-corporate, they might see a basis to blame large corporations simply because they are large corporations. As such, the legal system that prosecutes more large corporations would be perceived as more legitimate, without regard for whether there is a reason to blame the corporation in the particular instance.

While there is at least a significant minority of the population that holds strongly negative views of large corporations,²¹⁹ I will cautiously say that—although I do not have empirical support for this position—I think the condemnation of corporations through prosecutions without regard for culpability would inure to the detriment of the perception of

217. *Id.* at 1387–98.

218. *Id.* at 1389 (“Two recent studies of federal court litigation suggest that organizational litigants win more frequently and lose less often than do individuals.”). In a system reliant on precedent and stare decisis, frequent wins amount to more favorable law.

219. See, e.g., Colin Moynihan, *185 Arrested on Occupy Wall St. Anniversary*, N.Y. TIMES (Sept. 17, 2012, 8:00 AM), <http://cityroom.blogs.nytimes.com/2012/09/17/protests-near-stock-exchange-on-occupy-wall-st-anniversary> (describing the arrest of 185 people at the New York Stock Exchange during a protest against an “unfair economic system that benefited the rich and corporations at the expense of ordinary citizens”).

legitimacy. Criminal law exists to systemically punish wrongful conduct. The use of criminal law to attack the unpopular—even if said use is popular in the short run—is not sustainable. While indiscriminate prosecution of corporations might be popular in the short run during a time of widespread anger against corporations, it is so contrary to the rule of law that it would be bound, at least over time, to undermine the perceived legitimacy of the legal system. Mob rule might be popular, but it remains mob rule and unlikely to be confused with legitimate law. Therefore, even if there were widespread anti-corporate sentiment, and even if unprincipled anti-corporate prosecutions were popular, these corporations would be unlikely to increase the perception of legitimacy and would probably, over time, decrease that perception.²²⁰

A legal system that acts to generate expressions consistent with widely held norms will be better functioning and more stable than one that does not do so. Therefore, where avoidable expressive dissonance is identified, it ought to be eliminated, unless the cost of doing so is too great. In this case, as I argue in the next Part, the remedy seems relatively simple.

IV. LIMITING CORPORATE CRIMINAL LIABILITY

The AML and J&J prosecutions suggest that a respondeat superior standard for criminal liability is too broad. In both cases, the corporations were subject to criminal prosecution absent a reason to blame the corporation qua corporation.²²¹ People blame corporations when corporations, through policies, culture, or leadership, influenced the wrongdoing.²²² To limit the costs to legitimacy and expression described above,²²³ criminal liability should attach to corporations only where corporate policies or culture influenced the wrongdoing.

This proposal is not easy to implement in practice. Pamela Bucy has proposed a corporate ethos standard of liability, pursuant to which a corporation would be criminal liable only where “there exists a corporate ethos that encouraged the particular criminal conduct at issue.”²²⁴ This seems both correct and impractical. Bucy acknowledges the challenges posed in implementing the standard and presents a thorough defense of

220. Again, I do not have empirical support for this conclusion (hence, I offer it cautiously). While the conclusion makes sense to me, this might be an area for further empirical research.

221. As noted above, in each case there may be reason to blame the corporation for omissions (e.g., failure to conduct more due diligence or failure to quickly implement compliance programs after acquiring a company). But that is a lesser sort of blame than is typically associated with criminal sanctions. *See supra* text accompanying notes 187–190.

222. *See* Gilchrist, *The Expressive Cost*, *supra* note 19, at 9–14; *see also supra* text accompanying notes 144–179.

223. *See supra* text accompanying notes 152–155.

224. Bucy, *supra* note 148, at 1128.

the standard in the face of those challenges.²²⁵ Still, as Samuel Buell concludes, “[i]t is extremely difficult to see what trial and appellate review of enterprise cases would look like under such legal rules.”²²⁶ No one has presented a functioning model for a culture- or policy-based standard of corporate liability.

A. PRECLUDING LIABILITY WHERE THERE WAS AN EFFECTIVE COMPLIANCE PROGRAM

A more manageable standard would be to preclude criminal liability for corporations that have an effective compliance program.²²⁷ Such a rule could be implemented by adding “an additional element to criminal liability that requires the prosecution to prove that a corporation lacks ‘effective policies and procedures to deter and detect criminal actions by their employees.’”²²⁸ Alternatively, it could be implemented with an affirmative good faith defense.²²⁹ If companies were only held liable where it could be proven that the company lacked effective policies to prevent the wrongdoing, there would be a basis to blame the company. The expressive failures identified in this Article would be, for the most part, avoided.

One potential problem with the good faith defense is that a standard of “effective policies and procedures” would need to be established. There are models for such a standard. Both the *U.S. Sentencing Guidelines*²³⁰ and the *U.S. Attorneys’ Manual*²³¹ identify aspects of effective compliance programs. Section 9-28.000 of the *U.S. Attorneys’ Manual* provides guidelines for prosecution of business entities and includes the existence of an effective compliance program among the relevant factors.

The Manual notes that “the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees,” and that it “has no formulaic requirements regarding corporate compliance programs.”²³² These are important points:

225. *Id.* at 1176–82.

226. Buell, *supra* note 143, at 528.

227. The Chamber of Commerce has been lobbying to implement such a rule in specific legislation. See ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT II (2010) (urging implementation of a compliance defense to the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*).

228. Brief for the Ass’n of Corporate Counsel et al. as Amici Curiae in Support of Appellant Urging Reversal, *supra* note 17, at 23 (quoting Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411 (2007)).

229. See *supra* note 16.

230. U.S. SENTENCING GUIDELINES § 8B2.1 (2011).

231. See U.S. ATTORNEYS’ MANUAL 9-28.800 (2008).

232. See *id.*

Efficacy in compliance will vary by industry, organizational structure, size, and many other factors, just as do the elements of efficacy for business success. Accordingly, the DOJ eschews a singular compliance formula, opting instead to identify factors that ought to be considered in assessing whether a company had an effective compliance program.²³³ Overarching considerations include “whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.”²³⁴ More specifically, prosecutors are encouraged to inquire on a case-by-case basis:

- Is the corporation’s compliance program well designed?
- Is the program being applied earnestly and in good faith?
- Does the corporation’s compliance program work?²³⁵

Relevant factors include:

[T]he comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.²³⁶

Additionally, prosecutors should consider how quickly the company disclosed wrongdoing, the independence of directors, and the independence and reporting chains for auditing entities.

Those seeking a precisely defined standard will not be satisfied by this model, but as I will argue in the next Subpart, a precisely defined standard is not necessary. Precision of definition is at odds with the basic premise that compliance programs are not one-size-fits-all: An effective compliance program for a mid-size technology company may look very different than an effective compliance program for a large pharmaceutical company. The DOJ’s non-exhaustive list of factors is a good starting point for defining a standard of effective policies and procedures.

B. IS THERE A MANAGEABLE STANDARD?

One concern about a good faith defense is whether such a standard is specific enough to properly guide a jury. Bucy responds to this anticipated objection to her ethos proposal by noting that fuzzy legal

²³³. *See id.*

²³⁴. *See id.*

²³⁵. *See id.*

²³⁶. *See id.*

standards exist throughout the law.²³⁷ Fact-finders are routinely asked to use their judgment in applying vague standards.

To take just one example, consider the vagueness and complexity of jury instructions in a trial alleging a conspiracy to fix prices in violation of the Sherman Act.²³⁸ In such a case, the jurors will be instructed—among other things—that to find the defendant guilty they must find, beyond a reasonable doubt:

First, that the conspiracy the defendant is charged with participating in actually existed during the time alleged in the indictment;

Second, that the defendant knowingly joined this conspiracy;

Third, that the defendant joined the conspiracy with the intent to unreasonably restrain competition; and

Fourth, that the conspiracy concerned goods or services in interstate (or foreign) commerce.²³⁹

The instructions for each element, in turn, are quite complex. For example, regarding the first element—the existence of an agreement—jurors will be told that the agreement itself is the crime.²⁴⁰ They will then be told that it does not matter if the agreement is carried out, or fails, or even is inconsistently followed.²⁴¹ Indeed, even were it proven that the parties to the alleged agreement cheated on each other—in plain contradiction of the alleged terms of the alleged agreement—that does not mean there was no agreement.²⁴²

None of which is incorrect as a matter of law, of course. The point is, how difficult must this be to parse in practice? Jurors will be expected, based on circumstantial evidence about meeting locations, telephone calls, and market conduct, to discern whether there was an actual meeting of minds between competitors about their intent to restrain competition. The complexity of this one element can then be compounded multifold by the introduction of a conscious parallelism instruction. Pursuant to that instruction, jurors will be told—again, correctly—that similarity “of business practices *or even the fact that the defendants may have charged identical prices for the same goods and services* does not automatically establish a conspiracy because such practices may be consistent with ordinary competitive behavior in a free and open market.”²⁴³ They will also

237. See Bucy, *supra* note 148, at 1178–79 (offering the example of the difficulty of identifying mens rea from necessarily circumstantial evidence).

238. See 15 U.S.C. § 1 (2012).

239. 3 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL 58-68 (2010) (Instruction 58-44).

240. *Id.* at 58-70 (Instruction 58-45).

241. *Id.*

242. *Id.*

243. *Id.* at 58-79 (Instruction 58-49) (emphasis added).

be told that this “is true even if they did so *knowing that others were following similar practices*.”²⁴⁴

As a result, there could be a price fixing case in which jurors are entrusted to discern, on the basis of circumstantial evidence, whether two competitors consciously agreed to fix prices (illegal), or whether they each, independently and rationally, learned each other’s prices and, independently and rationally, set their own prices at the same level (legal). The epistemological challenge here is daunting. Indeed, it is so daunting that I fear this example demonstrates that sometimes we ask juries to do too much. But the fact remains that, compared to the challenge of discerning whether two people agreed or instead acted independently as you would expect them to act as business persons—where those two things can look identical—the challenge of evaluating the efficacy of a compliance program is not really so great.

Jury instructions could reflect a flexible standard like that set forth in the U.S. Attorneys’ Manual.²⁴⁵ Jurors should be asked to consider the efficacy of the program as a whole. Instructions should explain that no compliance program is perfect and that the mere fact that a violation occurs does not mean that a compliance program is not effective. Instructions should also point out that the structure of effective compliance programs varies by company, industry, and other factors. Finally, instructions could identify, in general terms, a list of factors that should be considered in evaluating compliance programs. To the extent that the assessment of a compliance program raises questions about industry standards and best practices, these issues are routinely presented to juries through expert testimony. Under these conditions, a finder of fact—as well as a federal prosecutor—should be able to assess a compliance program.

C. THE RISK OF INCENTIVIZING COSMETIC COMPLIANCE

Another concern is the prospect of promoting “cosmetic compliance.”²⁴⁶ Kimberly Krawiec has drawn attention to this issue.²⁴⁷ Structuring, managing, and auditing compliance programs is a massive industry,²⁴⁸ and yet the empirical data do not support the efficacy of these programs.²⁴⁹ Giving corporations a complete defense for having a

244. *Id.* (emphasis added).

245. *See supra* Part IV.A.

246. *See generally* Krawiec, *supra* note 143.

247. *See generally id.*

248. *Id.* at 488 (“[T]he ethics and compliance consulting business—already a multi-billion dollar industry—has seen a surge in demand.”).

249. *Id.* at 490 n.11 (“[T]he poor empirical showing of internal compliance structures as a means of deterring organizational misconduct should cause more skepticism than evidenced in the legal and management literature”). On the other hand, Miriam Baer suggests that the “sheer size of the

particular type of program risks the inefficiency of bolstering demand for legally prophylactic but otherwise ineffective compliance programs, without an accompanying reduction in criminality.²⁵⁰ It also risks under-detering corporate crime by shielding criminal conduct from prosecution so long as there is a “window-dressing” of compliance efforts, however ineffectual.²⁵¹

These risks seem both real and largely avoidable so long as we are willing to entrust juries to discern between cosmetic programs and effective programs. Jurors could be instructed, for example, that there is no single ideal compliance program, and that the question for the jurors is whether the corporation’s program was an effective one. Given that by the time jurors are considering this question they would have already found a violation of criminal law by an agent of the corporation, the jurors would also need to be instructed that efficacy is not the same as capability of preventing all wrongdoing. An effective compliance program may nonetheless fail in some instances; indeed, no system is failsafe. The jury’s job would be to determine whether the corporation’s compliance program was implemented in good faith, whether it was structured adequately, given the risks faced by the corporation, and whether its existence should absolve the corporation of the wrongdoing committed by its employees. To address Krawiec’s concern, the jury should also be instructed expressly that having spent a lot of money on establishing a compliance program does not mean it is an effective program and that a strong paper program that is not adequately funded, implemented, or respected by corporate policies and leadership is not an effective compliance program.

None of this suggests that discerning between an effective program and a cosmetic program would be easy for jurors, but it does not seem more difficult than many tasks we regularly entrust to jurors.

D. THE LIKELY EFFECTS OF AN EFFECTIVE COMPLIANCE PROGRAM STANDARD

Federal prosecutors are already instructed to take into account whether a company has an effective compliance program in determining whether to charge the corporation, but they are also expressly instructed that “the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct

compliance industry, which includes multiple American Lawyer 100 firms who proudly trumpet their assistance on their websites, severely undercuts the notion that corporations and compliance providers are engaged in a concerted, bad-faith attempt at intentional window-dressing.” Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 952 (2009).

250. See generally Krawiec, *supra* note 143.

251. *Id.* at 491 (“[A] growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms, and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability.”).

undertaken by its officers, directors, employees, or agents.”²⁵² So the first effect of establishing a complete defense based on an effective compliance program would be to allow the mere existence of an effective compliance program to preclude liability. The second effect would be to shift the role of assessing the compliance program from the prosecutor to the jury. This latter effect is the most important.

The standard for corporate criminal liability remains respondeat superior.²⁵³ Accordingly, “a corporation may be held criminally responsible for [criminal] violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.”²⁵⁴ A prosecutor will consider the efficacy of a compliance program in deciding whether to charge a corporation, but once the corporation is charged, the compliance program becomes irrelevant to the question of guilt.

Jurors, being asked whether the corporation is guilty of the crime charged, *should* be asked to assess whether there is a basis to blame the corporation qua corporation. One way to do this would be to ask the jurors to make findings about whether the corporate culture or a particular policy induced the wrongful conduct.²⁵⁵ While in the abstract this is a promising idea, I have difficulty seeing how it would work in practice. On the other hand, a corporation that has a truly effective compliance program will generally have a culture that dissuades criminal conduct, and jurors could be asked to assess the efficacy of the compliance program according to standards like those in the U.S. Attorney’s Manual. The overlap may not be perfect, but a truly effective compliance program will be part of the corporate culture, and the fact that it is effective means it will, more often than not, inform employees faced with difficult decisions.

We should want jurors to consider the efficacy of a corporate compliance program, because doing so will significantly align with questions about whether there is a reason to blame the corporation for the wrongful conduct. Moving questions about the efficacy of compliance efforts to the jury would—to some degree—realign corporate criminal

252. U.S. ATTORNEYS’ MANUAL 9-28.800 (2008).

253. One might propose that instead of creating a good faith defense, we should add an element that the prosecution must establish the absence of an effective compliance program. This is only a small distinction, as its impact is really just to shift the burden of proof. However, a good faith defense would seem to be the better option, because adding an element requires the prosecution to prove a negative at the standard of beyond a reasonable doubt, and also because the defendant corporation has the best access to the information about its good faith efforts and/or compliance program.

254. *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983).

255. *See Bucy, supra* note 148, at 1128.

liability with the expression of condemnation that ought to accompany criminal sanctions.²⁵⁶

The other obvious impact of precluding liability where there is an effective compliance program would be the reduction in the number of corporate criminal prosecutions. The new standard would make convictions harder to secure; corporations would have less incentive to accept negotiated resolutions where they had a strong compliance defense; prosecutors would need to marshal resources to those cases they felt they could prove beyond a reasonable doubt. There is nothing wrong with this, unless it leads to under-enforcement, which it need not do.

As discussed above, there was probably good reason to penalize AML and J&J for the wrongdoing, even if those corporations were not themselves blameworthy.²⁵⁷ Each corporation was in the best position to avoid the wrongful conduct and failed to do so. AML should have better vetted or supervised Partucci. J&J should have better or more quickly implemented its compliance programs when it acquired DePuy. Such failures may not merit the condemnation of criminal sanctions, but they ought to be corrected. Civil penalties—which might look very similar if not identical to the penalties secured through criminal prosecution—ought to be imposed. The difference would be the civil penalties would not purport to be criminal. They would not carry the assertion that their imposition merits opprobrium. Therefore, by avoiding that expression of condemnation in cases where there is no basis for condemnation, civil penalties would avoid the expressive dissonance that undermines legitimacy and dilutes expressive efficacy.

CONCLUSION

Where the law deviates too far from strongly held norms, it risks generating expressions at odds with those norms. This creates a dissonance between personal morality and legal commands. Where the dissonance is too great, one of two things must happen: the law will be perceived as less legitimate, or violation of the law will cease to be perceived as a basis for condemnation, eroding the distinctive expression associated with criminal liability. Either resolution undermines the legitimacy of the law, the persistence of the internal view, and eventually, the stability of the legal system. Expressive problems are of real concern, and my hope is that the expressive model that I have begun to develop in this Article will help evaluate other rules and legal actions beyond corporate prosecutions.

256. The limitation “to some degree” is important. This change would do nothing about substantive questions regarding what types of wrongdoing and harm are appropriately dealt with through criminal law. *See* Coffee, *supra* note 61, at 1877. But the types of expressive failures identified in the AML and J&J examples above would be addressed by this change.

257. *See supra* text accompanying notes 155, 184–185.

People blame corporations when there is a reason to do so. But the legal standard for holding corporations criminally liable is too broad in that it can apply criminal liability even where there is no basis to condemn the entity. This application of criminal punishment without a basis for condemnation generates expressive dissonance: The legal system is applying condemnation when there is no basis for condemnation. The call for abandoning the respondeat superior standard of liability is a good one that can best be achieved by implementing a good faith defense. It is not without problems, but the challenges are surmountable and the benefits are worth it.

John Coffee once suggested that “society’s capacity to focus censure and blame is among its scarcest resources.”²⁵⁸ To watch the news today is to question this assertion: There seems to be more than enough blame to go around. But Coffee’s point is right. Criminal law is not about blaming in the way cable television is; it is about a measured and methodical process by which blame is *focused*. Preserving the expressive function of criminal law is important for the criminal law, it is important for the perceived legitimacy and continued stability of the legal system, and it is important for a well-functioning society generally.

258. See Coffee, *supra* note 61, at 1877.
