

# CORPORATE CRIMINAL LIABILITY: THE SECOND GENERATION

Eli Lederman\*

## I. GROWTH

The historical dispute between the Anglo-American and continental legal systems on whether to bind legal bodies to the apparatus of criminal law was concluded toward the end of the twentieth century with a clear advantage to the former. In 1988, the European Council recommended that member states adopt the Anglo-American approach,<sup>1</sup> which some states had already done. Nevertheless, there were issues that remained unsettled and in dispute, not only between the different legal systems, but even among countries that adopted the same basic legal system.<sup>2</sup> The two key-related unsettled issues were the model according to which criminal liability is imposed on corporations<sup>3</sup> and the extent of the liability. This brief Article focuses on one aspect of the extent of corporate criminal liability, comparing some facets of the directions in which the topic developed in Israel, the United States, and the United Kingdom.

American law, at both federal and state levels, chose the broadest and most encompassing model among the existing models—*respondere superior*—to cope with corporate criminal liability. The *respondere superior* theory is a variation of the common law vicarious liability

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\* © 2016, Eli Lederman. All rights reserved. Professor of Law (Emeritus), Buchmann Faculty of Law, Tel Aviv University, Israel. I wish to thank Adriana H. Foreman, Managing Editor at *Stetson Law Review*, for her thorough edits and assistance in the publication of this Article.

1. Council of Europe, Recommendation No. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities, at 6 (1988). For a European survey of corporate criminal liability in several European jurisdictions, see Clifford Chance, *Corporate Liability in Europe* (Jan. 2012), [www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate\\_Liability\\_in\\_Europe.pdf](http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf).

2. See generally JAMES GOBERT & ANA-MARIA PASCAL, EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY 24 (2011) (providing an overview of ongoing debates about corporate liability, including “the continued search for appropriate mechanisms for holding corporations to account”).

3. Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 642 (2000).

doctrine, which expands the boundaries of criminal liability and enables its imposition, under specified conditions, on principals or employers for the deeds of their agents or employees.<sup>4</sup> The courts broadened the scope of this doctrine, extending it to cases in which the employers or the principals are legal entities.<sup>5</sup> Over a century ago, the U.S. Supreme Court held that this expansion takes the doctrine “only a step farther . . . in the interest of public policy,” by supervising the behavior of corporate agents and employees.<sup>6</sup> The American corporate criminal model is unique because of the wide scope of its *respondeat superior* theory,<sup>7</sup> which turned into a general doctrine, similar to vicarious liability found in the law of torts and agency.<sup>8</sup>

According to this approach, a corporation is liable for the deeds of its agents, employees, and even independent contractors at times.<sup>9</sup> This liability stands regardless of the agent’s, employee’s, or independent contractor’s rank in the hierarchy of the corporation and the type of infringement,<sup>10</sup> as long as the cumulative conditions are met: (1) the agent acted in the course and within the scope of his employment,

4. For the basis and scope of the criminal vicarious liability doctrine in English law and traditional American law, see LEONARD H. LEIGH, *STRICT AND VICARIOUS LIABILITY: A STUDY IN ADMINISTRATIVE CRIMINAL LAW* (1982) (discussing the emergence of strict and vicarious liability, its defenses, and the principal issues with how the law is enforced in practice); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another: Development of the Doctrine of Respondeat Superior*, 43 HARV. L. REV. 689 (1930) (providing a broad discussion on the development of the doctrine of *respondeat superior* and vicarious liability).

5. See, e.g., *Tesco Stores Ltd. v. Brent London Borough Council*, 2 All E.R. 718 (1993) (determining that under the Video Recordings Act 1984, an offense may have been committed vicariously by an employee acting in the course of his employment); Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3, 5–6 (1984) (providing an example of the first known form of corporate criminal liability, where a local governmental unit, acting as a master, was held criminally liable for the local official’s, or servant’s, failure to maintain roads and waterways); CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 97–110 (1993) (addressing how the emergence of civil claims against corporations was motivated in part by the fact that “individual[s] at fault might not be suable or worth suing”).

6. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).

7. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1491–92 (2009).

8. For an analysis of the *respondeat superior* doctrine, see Note, *Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1246–51 (1979) (explaining how “[t]he doctrine of respondeat superior . . . predominates in the federal courts, offers the greatest deterrent strength and adopts the first theory of corporate blameworthiness”).

9. JAMES GOBERT & MAURICE PUNCH, *RETHINKING CORPORATE CRIME* 57 (2003). In this regard, see also *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) (explaining that the corporation is held liable not because it participates in the malice or fraud, but rather because the act is done for the benefit of the corporation); *United States v. Parfait Powder Puff Co., Inc.*, 163 F.2d 1008, 1009 (7th Cir. 1947) (discussing how a corporation may still be liable for an independent contractor’s actions because it acts within the powers that the parties had mutually agreed on).

10. *United States v. Josleyn*, 206 F.3d 144, 159 (1st Cir. 2000).

having the authority to act for the corporation with respect to the corporate business that was conducted criminally; and (2) the agent acted, at least in part, with the intent to advance the business interests of the corporation.<sup>11</sup> Occasionally, U.S. courts add a third condition: “(3) the criminal acts were authorized, tolerated, or ratified by corporate management.”<sup>12</sup> The Minnesota Supreme Court, which was responsible for this additional condition, acknowledged that such authorization was not expected to have been granted openly<sup>13</sup> and stated that the key factor should be whether “those in positions of . . . responsibility acted or failed to act in such a manner that the criminal activity reflects corporate policy.”<sup>14</sup> This last condition makes the doctrine of *respondeat superior* more similar to other theories of corporate liability.

In the American legal system, a due diligence defense is not common for legal bodies, although sentencing guidelines allow for mitigation of penalties when adequate compliance programs are shown to be in force.<sup>15</sup> Under the prevailing approach, a company may be held criminally responsible for the conduct of a low-level employee who acted contrary to corporate policy and to the adequate compliance program of its firm, into which the firm has invested time and expenses.<sup>16</sup> The courts have also upheld corporate criminal liability

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11. Pamela H. Bucy, *Civil Prosecution of Health Care Fraud*, 30 WAKE FOREST L. REV. 693, 754 (1995); see, e.g., Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL'Y REV. 367, 384–85 (2008) (stating that “[s]ome jurisdictions allow juries to use a business’s code of conduct when determining if an employee was acting to benefit the corporation”).

12. E.g., *State v. Christy Pontiac-GMC, Inc.*, 354 N.W.2d 17, 20 (Minn. 1984); *State v. Wohlsol, Inc.*, 670 N.W.2d 292, 297 (Minn. Ct. App. 2003).

13. *Christy Pontiac-GMC, Inc.*, 354 N.W.2d at 20.

14. *Id.*

15. *But cf.* Model Penal Code § 2.07(5) (1962). For available defenses to corporations in state law, see Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 124–42 (2006) (providing a discussion of each state’s policies on corporate criminal liability).

16. This approach has been criticized and suggestions for modification have been made. See generally Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731, 749–65 (1996) (stating that the problem with corporate employees complying with the law is fundamentally an agency problem, which calls for legally mandated compliance goals); Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007) (discussing “the consequences of not having a ‘good faith’ affirmative defense for corporate compliance”); Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996) (discussing how compliance programs are sometimes excluded from the jury, thus providing split authority on what criteria should actually be used to decide culpability).

when an agent has acted in violation of express instructions given to them.<sup>17</sup>

The full, practical potential of corporate criminal liability in the American system is revealed when statements made by powerful governmental echelons, about the assertive legal policy that law enforcement agencies should and intend to follow, are added to the existing legal provisions. Following the economic crises that the United States and other countries have encountered since 2008, politicians, senior officials, and directors of the federal Ministry of Justice, including the U.S. Attorney General, have stated that no entity or institution is “too big to jail.”<sup>18</sup> This is contrary to earlier arguments and concerns that criminal charges against large corporations will “have a negative impact on the national economy, perhaps world economy.”<sup>19</sup>

Countries that have adopted the Anglo-American legal system are approaching the issue of corporate criminal liability in a more restricted and cautious way than the American law. In England, until the middle of the twentieth century, this topic was addressed only within the limited framework of the two branches of criminal vicarious liability: (1) strict liability violations, which do not require a mental element and have to do mostly with regulatory public welfare offenses, and (2) a limited number of *mens rea* offenses, often having to do with regulatory and licensing issues, in which the delegation principle was used to impose criminal liability on a licensee for an act or omission committed by his employee or representative to whom he delegated his responsibilities.<sup>20</sup>

The theory of the organs of a corporation sprung up in English law at the beginning of the twentieth century, in the law of torts.<sup>21</sup> Only

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17. *E.g.*, *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

18. Court E. Golumbic & Albert D. Lichy, *The “Too Big to Jail” Effect and the Impact on the Justice Department’s Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1323–24 (2014); Alex B. Heller, Comment, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 782 (2015); Kevin Johnson, *U.S. to Banks: ‘No Such Thing as Too Big to Jail’*, USA TODAY (May 5, 2014, 6:40 PM EDT), <http://www.usatoday.com/story/news/nation/2014/05/05/holder-banks-investigation-jail/8716959/>.

19. Sarah Childress, *Holder: Big Banks’ Clout “Has an Inhibiting Impact” on Prosecutions*, PBS.ORG (Mar. 6, 2013), <http://www.pbs.org/wgbh/frontline/article/holder-big-banks-clout-has-an-inhibiting-impact-on-prosecutions/> (quoting the statement of Eric Holder, Att’y Gen. of the U.S., at the Senate Judiciary Committee Hearing, 113th Cong. (2013)).

20. P.T. Burns, *The Test of Vicarious Criminal Liability*, 1967 CRIM. L. REV. 702 (1967); Brent Fisse, *The Delegation Principle: Vicarious Liability in Regulatory Offences*, 10 CRIM. L.Q. 417, 422 (1967); Glanville Williams, *Mens Rea and Vicarious Responsibility*, 9 CUR. L. PRO. 57 (1956).

21. *Mousell Bros. Ltd. v. London & Nw. Ry., Co.*, [1917] 2 KB 836.

towards the end of World War II, probably because of the pressures of the war economy, was it expanded and developed into a general theory that regards the actions and thoughts of senior management, in the exercising of their power and authority, as the conduct and opinions of the corporate body itself. In other words, in their behavior and thoughts, the executive echelons obligate not only themselves as individuals, but also the legal entity they manage. The legal literature describes the organs as the *alter ego* of the corporation.<sup>22</sup> They are its “brain and nerve centre... [and] represent... the company, and control what it does.”<sup>23</sup>

Thirty years of British mandatory rule have left a deep mark on Israeli law, which is still influenced [by English law]. The criminal code of Israel was enacted by the British authority in the mid-1930s and reflects English common law, although many additions and amendments have been made to it in the course of almost seventy years of independent Israeli statehood. At the beginning of the 1960s, the Israeli Supreme Court stated that the topic of corporate criminal liability was still “in a process of clarification.”<sup>24</sup> Between the 1970s and the mid-1990s, the Court adopted the theory of the organs of the corporation<sup>25</sup> in some leading criminal cases, and toward the end of the century the issue received explicit attention in a specific section that was enacted and added to the criminal code.<sup>26</sup>

As a result, criminal liability can now be imposed in Israel on corporate bodies at two separate levels: (1) vicarious liability, for strict liability violations; and (2) direct liability, for *mens rea* and negligence offenses. Vicarious liability can be imposed on a person acting within the scope of his authority in the corporation for public welfare violations, production offenses, violations of workplace regulations, violations of sanitation regulations, environment offenses, etc.<sup>27</sup> Direct liability can be imposed if, under the circumstances, the perpetrator’s actions and state of mind, or his negligence, while committing the offense can be regarded as the action and the state of mind or

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22. *E.g.*, *Kent & Sussex Contractors Ltd.*, [1944] 1 K.B. 146; *R. v. I.C.R. Haulage Co. Ltd.*, [1944] 30 Cr. App. R. 31; *Moore v. L. Bresler Ltd.*, [1944] 2 K.B. 515.

23. *H. L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, 172 (Lord Denning L.J.). *See also* *Tesco Supermarkets, Ltd. v. Nattrass*, [1972] A.C. 153 at 171, 180–81, 187, 190–91 (explaining how a corporation has no mind and “must act through living persons,” thus, the individual’s “mind which directs his acts is the mind of the company”).

24. *Cri. App.* 252/1962 *Spher v. State* P.D. 17(3) 1905, 1910.

25. *E.g.*, *Cri. App.* 109/72 *State v. Paz & Sefa-On*, P.D. 28(1) 93; *Cri. App.* 3027/1990 *Modiem Constr. v. State*, 35(4) P.D. 364; *Cri. App.* 5734/1991 *Bank Leumi v. State*, P.D. 49(2) 4.

26. *Israel Penal Code 1977* § 23 (enacted 1995).

27. *Id.* § 23(a)(1).

negligence of the corporation based on his position, authority, and responsibilities in managing the corporate business.<sup>28</sup>

## II. MATURITY

Today's global economy remains a fertile ground for the continuing growth of commercial legal entities. Some of the characteristics of the new economy directly affect corporate criminal liability. For example, the rapidly growing levels of management, differing lines of responsibility, and the dissemination and fragmentation of information often cut across products, locations, and borders. Competition for market shares has also resulted in the establishment of new marketing and intermediary mechanisms.

The commercial world of large corporations has become more sophisticated, complex, aggressive, and competitive. This has often led to a negligent management culture or worse. Business regulations and corporate law are continuously developing principles of corporate governance to cope with these issues—shaping procedures and regulations that specify how public corporations should operate in the areas of internal control, supervision, and reporting. In this way, business regulations and the law of corporations contribute to the creation of an appropriate corporate policy and culture, and strengthen the infrastructure needed to encourage the ethical behavior of corporations in their business activities and in the arena of social responsibility.<sup>29</sup>

In parallel, and as part of a general trend to increase the level of control over corporate activity, criminal law is also expanding the scope of corporate criminal liability. The directions of the various legal systems development in this regard are not identical, but it appears that the target of the various systems' expansion is similar. The similar target involves strengthening the supervision over corporations and placing increased demands on those who control the activities of the legal entities, in order to lower the number of cases that "fall between the cracks" and prevent the imposition of criminal liability.

There are certain parallels between the trend to broaden corporate criminal liability in the United Kingdom and the

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28. *Id.* § 23(a)(2).

29. *See, e.g.*, BRIAN R. CHEFFINS, THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE II 550 (2011) (discussing how malfunctions among corporations is likely to breed due to the absence of an accountability structure and discipline); AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015) (discussing the needs for regulations and the various approaches).

recommendations to expand the scope of corporate criminal liability considered in Israel. It is unlikely, however, that following such expansions, the gaps between the United Kingdom and Israeli law on one hand, and American criminal law on the other will narrow considerably. The different methods used to expand these legal systems, combined with their distinctive directions, make comparison difficult. This is especially so in view of the dynamic nature of the law. Furthermore, in the last two decades, an approach seeking to expand corporate criminal liability, which emerged at the end of the twentieth century, is struggling for recognition and acceptance in the United States.<sup>30</sup>

The process, which may be regarded as a beginning to a second generation of corporate criminal liability within the concerned legal systems, started in the late 1980s. In the United Kingdom, it began with the enactment of the Corporate Manslaughter and Corporate Homicide Act of 2007, which came into force in 2008. The Act followed a consultation paper in 1994 of the Law Commission that reviewed the law of involuntary manslaughter and a recommendation in 1996 for the enactment of an offense of “corporate killing.”<sup>31</sup> The Act was intended to cope with incidents of death following corporate activities both internally (work accidents) and externally (product-related deaths of consumers or other third-party deaths as a result of the corporate activity).<sup>32</sup> For the first time, the law imposed direct liability on corporations without relying on the theory of the organs and on the identification principle, but instead by including liability for actions or omissions that do not necessarily originate in modes of behavior and thoughts of those who are the embodiment of the corporation.

According to the Act, an organization is guilty of corporate manslaughter “if the way in which its activities are managed or organised” by its senior management causes a death, and if this way “is a substantial element” in “a gross breach of a relevant duty of care

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30. See *infra* note 53, *et seq.* (referencing a case that provides an example of an instance where a corporation had willfulness to commit a crime because of the bank personnel’s failure to perform adequate procedures).

31. Law Commission, Consultation Paper No. 135, *Criminal Law: Involuntary Manslaughter* (1994); Law Commission Report No. 237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996), para. 8.3.5.

32. See, e.g., Department of Transport, *mv Herald of Free Enterprise: Formal Investigation*, Report of Court No. 8074, available at [https://assets.publishing.service.gov.uk/media/54c1704ce5274a15b6000025/FormalInvestigation\\_HeraldofFreeEnterprise-MSA1894.pdf](https://assets.publishing.service.gov.uk/media/54c1704ce5274a15b6000025/FormalInvestigation_HeraldofFreeEnterprise-MSA1894.pdf) (last visited Oct. 24, 2016) (referring to a ferry disaster in which almost two hundred workers lost their lives and explaining how this disaster, and other less traumatic incidents, encouraged the enactment of the act).

owed by the organisation to the deceased.”<sup>33</sup> The definition of senior management is not limited to organs; it includes individuals who “play significant roles in the making of decisions about how the whole or a substantial part of... [the corporation’s]... activities are to be managed or organised, or the actual managing or organising of... [such]... activities.”<sup>34</sup>

The Act significantly expands the list of individuals who obligate the corporation with their conduct and shifts the emphasis to the examination of working procedures, modes of supervision, and activity within the organization. If the failure in the procedures and modes constitutes a severe breach of the duty of care owed to the victim, and resulted in his death, it is a basis for imposing criminal liability on the legal entity.

The Act does not make corporate liability contingent upon malbehavior by a certain individual and appears to allow piecing together cumulative blame resulting from the conduct of various individuals.<sup>35</sup> However, the Act faces interpretation issues and has rarely been used by law enforcement authorities to date.<sup>36</sup>

The Bribery Act of 2010 expands the corporate liability of commercial entities in the United Kingdom in another direction by means of a new, independent offense that imposes criminal liability for failure to prevent bribery. This liability is created when a person associated with the corporation bribes another in order to obtain a business advantage for the corporation, and the corporation cannot prove that it had adequate procedures in place to prevent such conduct.<sup>37</sup> The offense is believed to reduce bribery and the damage caused by it.<sup>38</sup>

This offense is entirely disconnected from notions of attribution to, or identification between, the conduct of the organs of the legal entity and the elements of the offense, bribery. It is a direct strict liability omission of the corporation and conviction is not contingent

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33. Corporate Manslaughter and Corporate Homicide Act 2007, § 1(1) & (3).

34. *Id.* § 1(4)(c).

35. Alexandra Dobson, *The Corporate Manslaughter and Corporate Homicide Act 2007: A Symbolic Response*, 17 ASIA PAC. L. REV. 185, 192 (2009).

36. Sarah Field & Lucy Jones, *Is the Net of Corporate Criminal Liability Under the Corporate Homicide and Corporate Manslaughter Act 2007 Expanding?*, 36 BUS. L. REV. 216, 216–17 (2015), available at <https://www.researchgate.net/publication/285536833>

*\_Is the Net of Corporate Criminal Liability under the Corporate Homicide and Corporate Manslaughter Act 2007 Expanding* (last visited Oct. 24, 2016).

37. The Bribery Act, 2010, § 7(1)–(2).

38. The Law Commission, *Reforming Bribery*, § 7.38 (Law Com. 313, 2008).



upon the conviction of the person who paid the bribe.<sup>39</sup> The offense focuses on a management failure within the corporation to prevent the bribery—the lack of an internal prevention program or a flaw in the manner in which the corporation manages its activities. It is this omission that constitutes the criminal behavior of the corporation; the bribe paid by a person associated with it is a circumstantial element in the definition of the offense.

The definition of “association with the corporation” is quite extensive. It includes any person “who performs services for or on behalf” of the corporation, regardless of the capacity in which he acts: employee, agent, or subsidiary.<sup>40</sup> To determine whether a person performs services for or on behalf of a corporation, all the relevant circumstances are taken into account, not merely the nature of his relationship with the entity.<sup>41</sup> Certain aspects of this law bring the British approach close to the American *respondeat superior* doctrine.

The defense granted to the legal entity against the imposition of criminal liability, whenever it proves that it “had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct[,]”<sup>42</sup> raises many interpretative issues and leaves much room for judicial discretion. The problem has not been completely solved by instructing the Secretary of State to publish guidelines for recommended procedures,<sup>43</sup> or by their subsequent publication.<sup>44</sup> The guidelines amount to a few general instructions. It is hard to derive from them robust parameters that would fit all corporations because of the enormous variety of such entities and the need to take into consideration individual characteristics, such as size, structure, area and modes of operation, existing bribe prevention programs, and their ways of implementation. The guidelines refer to, among others, risk assessment, management commitment to preventing bribery, practical policies and procedures known to everyone in the organization, effective implementation of written policies and procedures, and effective monitoring mechanisms to

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39. The Bribery Act, 2010, § 7(3).

40. *Id.* § 8(1)–(2).

41. *Id.* § 8(4).

42. *Id.* § 7(2).

43. *Id.* § 9(1).

44. Ministry of Justice, *The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)*, available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (last visited Oct. 24, 2016).

ensure compliance. The judiciary will have to provide the particulars largely on a case-by-case basis.

Initiatives to expand the “failure to prevent” model and to develop new corporate criminal liability offenses to cover other economic crimes, such as fraud and money laundering, were recently placed on hold after the U.K. government announced that “there have been no prosecutions under the model Bribery Act offence . . . and there is little evidence of corporate economic wrongdoing going unpunished.”<sup>45</sup>

The pattern of the Bribery Act serves as a model for the Israeli Ministry of Justice in its present discussions on expanding corporate criminal liability. The similarity derives primarily from the fact that both countries have accepted the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>46</sup> and its Recommendations for Further Combating Bribery, including the assurance that legal entities cannot avoid responsibility by using agents or middlemen to do the bribing for them.<sup>47</sup> Both countries have also signed the United Nations Convention Against Corruption (Article 26, Liability of Legal Persons).<sup>48</sup>

The draft proposed by the working team of the Israeli Ministry of Justice is unique in its extent. It proposes the enactment of a separate offense that would impose a duty on a legal entity to exercise control and take reasonable steps to prevent the commission of a series of white-collar offenses “within the sphere of [its] activity . . . and the management of its business” being committed “by a party related to [the] legal person.”<sup>49</sup> The list includes money laundering, certain offenses of corruption, antitrust offenses, and securities law offenses.<sup>50</sup> The sweeping duty also applies to the prevention of offenses even if they did not benefit the entity and even if the party committing the

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45. Eduardo Reyes, *Moj Drops 'Failure to Prevent Economic Crime' Offence Plans*, LAW SOCIETY GAZETTE (Sept. 29, 2015), <http://www.lawgazette.co.uk/news/government-drops-plan-to-extend-corporate-criminal-liability/5051277.fullarticle> (last visited Oct. 24, 2016).

46. It was signed in December 1997 and came into force in February 1999. Organisation for Economic Co-operation and Development (OECD), *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD.ORG, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited Oct. 24, 2016).

47. The recommendation was adopted on November 26, 2009. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions Annex I(C)*, <http://www.oecd.org/daf/anti-bribery/44176910.pdf> (last visited Oct. 24, 2016).

48. It was signed on December 2002 and became effective on December 2005. United Nations, *United Nations Convention Against Corruption*, UNODC.ORG, [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) (last visited Oct. 24, 2016).

49. Draft Proposed Bill, Criminal Liability of Legal Persons, § 23A (State of Isr., Ministry of Justice, Council & Legis. Dep't, Jan. 27, 2014).

50. *Id.* § 2(a).

offense did not intend to benefit the entity. As in U.K. law, a separate offense of “failure to prevent” is an intermediate legal solution. On one hand, it obviates the need to use the theory of the organs and the identification principle when these legal mechanisms are not suitable. On the other hand, it enables the imposition of indirect liability on the entity for an offense committed by an individual or entity affiliated with it, without blaming it for that offense, and imposing a reduced penalty on it on the grounds of the organization not having applied measures to prevent the offense.

The team also proposed the enactment of a presumption. According to this presumption, when someone related to the entity has committed one of the prohibited offenses, it will be held liable for breaching its duty of supervision, unless it can prove that it took reasonable measures to exercise this duty.<sup>51</sup> The transfer of the burden of proof onto the entity, which must show that it met its control obligations, is based on the assumption that the entity has the best access to information concerning its own actions.

The draft defined a “party related to a legal person’ . . . [as] an employee of the legal [entity], an officeholder [within the entity], or a person who provides services for the legal person, or on its behalf.”<sup>52</sup> The assumption is that the corporation can maintain effective control over these individuals or legal entities, directly or through appropriate contracts.

The draft raises doubts regarding the necessity, the extent, and the level of clarity of the “duty to prevent” provision. Is there a proven need to enact a provision that creates a general new regulatory regime for all legal entities? Even if there are certain areas that require such regulation, the provision should be limited to these areas. The restricted provision should order the establishment and operation of appropriate enforcement programs aimed at preventing the commission of specific offenses by individuals or entities affiliated with the corporations in question, as it has done in the United Kingdom with regard to bribery. Furthermore, even if the importance of the duty in question is clear, the way to implement it is elusive. It might be especially difficult for small corporations, with limited resources, to identify their structural weaknesses and build effective enforcement and prevention programs. Seemingly, central or government efforts

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51. *Id.* § 23A(2).

52. *Id.* § 23A(c).

and capabilities are required for such an undertaking, which involves professional trainings and sample programs.

The draft appears to be far from complete, and if it is eventually enacted, its scope will most likely be reduced as some sort of a test case. If so, there may be no justification for enacting the provision as an amendment to the general part of the criminal code. Rather, it should be enacted as a law that applies to a well-circumscribed arena or to a specified group of corporations.

The exceptions and deviations mentioned above, which allow the British and Israeli legal systems to widen the scope of corporate criminal liability by circumventing the basic requirements of the theory of the organs and its identification principle, may also, as a byproduct, narrow the gap between them and the *respondeat superior* theory. But certain trends in the American legal system move in the same expanding direction and as a result preserve the disparity between the legal systems regarding the possibility of imposing corporate criminal liability.

For example, according to the aggregation principle, presented in its clearest form in the *Bank of New England* case,<sup>53</sup> the knowledge of a given entity as far as the mental element of an offense is concerned

is the sum of the knowledge of all the employees. That is . . . the totality of what all of the employees know within the scope of their employment. [Therefore], if Employee A knows one facet of . . . [a legal] . . . reporting requirement, B knows another facet of it, and C a third facet of it, the [entity] knows them all. . . . The [entity] is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.<sup>54</sup>

Without elaborating the details of the collective knowledge issue, it is clear that courts were not eager to reject it categorically, despite judicial and academic attempts to soften the doctrine and limit it to situations of willful blindness or negligence of one of the employees of

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53. *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987).

54. *Id.* at 855 (providing the trial judge's explanation, which the court cited and agreed with); *see also id.* at 856 (indicating that "[t]he aggregate of those components constitutes the corporation's knowledge of a particular operation"). On the pioneering aspects of the concept of collective knowledge, see Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scierter*, 2006 COLUM. BUS. L. REV. 81, 116–20 (2006) (providing an in-depth discussion on the landmark case establishing collective knowledge theory and addressing its use, particularly in cases where it is difficult to find a single defendant whose thoughts and behaviors embody the elements of the offense).

the corporation.<sup>55</sup> On one occasion, in a tort case, Justice Scalia noted, “[W]e think it unnecessary in this case to decide what the background rule of agency law may be.”<sup>56</sup> The approach of federal and state courts toward this issue varies.<sup>57</sup> Generally, however, they tend to adopt the “piecing together” principle, at least with regard to the rational or logical element of *mens rea* (consciousness), contrary to the emotional component of *mens rea*, which refers to the emotions experienced toward the rational factor.<sup>58</sup> This is why it is easier to accept the term collective or aggregated knowledge than to comprehend and accept the notions “collective intent” and even “collective recklessness.”<sup>59</sup> Convicting a corporation by relying strictly on the collective intent or recklessness of its employees reduces the level of the offense in question from one of intent to one that does not require proof of will or indifference.

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55. *E.g.*, *Commonwealth v. Life Care Ctrs. of America, Inc.*, 926 N.E.2d 206, 212–13 (Mass. 2010); *Ginena v. Alaska Airlines, Inc.*, 2013 U.S. Dist. LEXIS 86162, at \*22–26 (D. Nev. June 19, 2013); Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 226–38 (1997).

56. *Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011).

57. *See, e.g.*, *Miller v. Holzmann*, 563 F. Supp. 2d 54, 99–101 (D.D.C. 2008) (indicating that the collective knowledge imputation has been applied in the civil context and the court’s instruction to use the doctrine was proper); *United States v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 1, 894 (D.D.C. 2006) (holding that plaintiffs involved in securities fraud cases must only prove that a corporation had the collective knowledge or intent); *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) (explaining that corporations compartmentalize knowledge by subdividing operations and specific duties into smaller components, thus the aggregate of those components constitutes the company’s knowledge of an operation); *Commonwealth v. Springfield Terminal Ry. Co.*, 951 N.E.2d 696, 706 (Mass. App. Ct. 2011) (holding that a plaintiff can meet its burden of showing a corporation’s mere knowledge by aggregating the intent of the corporation’s agents or employees). *But cf.* *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 241 (5th Cir. 2010) (rejecting the collective knowledge doctrine by requiring that the state of mind exist in at least one individual, rather than imputing it on the basis of general agency principles); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) (finding it inappropriate to apply the collective knowledge doctrine because it imposes liability, damages, and civil penalties for knowledge that is inconsistent with the False Claims Act); *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (finding it appropriate to look only at the state of mind of the individual corporate official rather than the collective knowledge of all employees); Draft Proposed Bill, *Criminal Liability of Legal Persons* § 23A (State of Isr. Ministry of Justice, Council & Legis. Dep’t, Jan. 27, 2014) (holding a corporation criminally responsible if an offense is committed by an individual with administrative authority in connection to the corporation’s functions).

58. *Lederman, supra* note 3, at 644–47.

59. *E.g.*, *McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236, 1244–45 (11th Cir. 2013); *United States v. LBS Bank-N.Y., Inc.*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990); *Commonwealth v. Springfield Terminal Ry. Co.*, 951 N.E.2d 696, 706–07 (Mass. App. Ct. 2011); Brian Lewis & Steven Woodward, *Corporate Criminal Liability*, 51 AM. CRIM. L. REV. 923, 935–36 (2014); Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 474–75 (2004); NTSB Bar Association, *Aviation Professionals and the Threat of Criminal Liability—How Do We Maximize Aviation Safety?*, 67 J. AIR L. & COM. 875, 920 (2002).

### III. OUTCOME

It is questionable whether we can find a substantive common ground for comparing the development of the American and the United Kingdom-Israeli approaches to corporate criminal liability. It is clear that each system is trying to respond in its own way to economic and social changes and to changes in the size, structure, and modes of operation of modern legal entities. These changes reflect internal decentralization of authority and knowledge and often the involvement of external elements in the commercial competition and the struggle for market share.

The outcomes of the changes discussed above have an important common denominator—if the changes are fully adopted, the scope of corporate criminal liability will grow to a point where it will exceed the liability of individuals under the same circumstances. This means that criminal liability may be imposed on entities in situations where it could not be imposed on humans.

According to the basic principles of criminal law, one cannot assemble pieces of ordinary information from various individuals into an aggregate that acquires a criminal aspect, that is, *mens rea*, even if the individuals in question are close to one another and form an intimate unit, like a family. Similarly, under normal circumstances, one cannot require an individual to take affirmative steps to prevent another from committing an offense, even if he suspects the other's criminal intentions. The general assumption of criminal law is that every person is responsible for his own behavior. At common law, even parents are usually not liable for their minor children's independent criminal conduct.<sup>60</sup> States and cities, generally, have some form of criminal parental responsibility laws. They point mostly to the parents' omission to exercise reasonable care, supervision, and control over their child.<sup>61</sup> In a relatively far-reaching move, some criminal law systems require individuals to report to the police whenever they have clear knowledge of someone's intention to commit a crime.<sup>62</sup> But even

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60. Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 639 (1997); Toni Weinstein, Note, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859, 865 (1991).

61. Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibilities Laws Do Not Fit Within Our Understanding of Justice*, 66 FORDHAM L. REV. 1029, 1041 (1997).

62. See, e.g., § 262 of Israel Criminal Law. Cri. Ap.; 3417/99 Har-Shefi v. State of Israel, 55(2) PD 735, 9 [2001] (Isr.): "This offense of neglect to prevent a felony is a unique and special offense. Consistent with its uniqueness are the many discussions regarding [its scope,] and not a small

this uncommon provision makes clear knowledge a prerequisite, and a simple phone call is all that is required from the person in the know.

Initially, in order to bring corporations under the sway of criminal law, legal systems equalized their status to that of humans. Since the last decades of the twentieth century and under the influence of socio-economic developments, however, the same systems are trying to create a broader framework under which criminal liability can be imposed on legal entities even in circumstances when it cannot be imposed on humans.

Criminal law, on occasion, expands the scope of liability in special circumstances. Theoretically, it is possible to find some points of similarity between the development of corporate criminal liability and the socio-cultural background that may have contributed to the evolution of extended penal liability of topics, such as criminal conspiracy and the law of complicity. These doctrines allow the imposition of widened penal liability on non-perpetrators for their ties with the party that committed the offense. Thus, an accomplice is responsible for the perpetrator's act,<sup>63</sup> and following a judicially created rule, every conspirator is liable for the criminal act performed by other conspirators in the course of the conspiracy and for its furtherance.<sup>64</sup>

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amount of criticism has [been leveled at] it." (*Justice M. Cheshin*). Cf. 18 U.S.C. § 4 (2012). Misprision of felony which requires affirmative concealment, "[t]he mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C.A. § 4." *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977).

63. See, e.g., 18 U.S.C. § 2(a) (2012) (criminalizing an individual as a principal, if he or she "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission"); Accessories and Abettors Act 1861 § 8 (U.K.) (punishing those who aid and abet a crime as a principal offender); ISRAEL CRIMINAL CODE 1977 §§ 31–32 (explaining that any person who assists in making a commission possible is an accessory to the crime and will receive half the penalty set in place for the main offense); FLA. STAT. § 777.011 (2016) (criminalizing an individual who "aids, abets, counsels, hires, or otherwise procures such an offense" even if "he or she is or is not actually or constructively present at the commission of such offense"); K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY (1991) (discussing the theories of complicity and the scope of an accessory's role). On the common law of complicity, see Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930) (addressing the development of criminal law as it relates to complicity and vicarious liability).

64. See, e.g., *Pinkerton v. United States*, 328 U.S. 640, 643–44 (1946) (finding it possible to attribute foreseeable acts of one co-conspirator, committed in furtherance of the conspiracy, to other conspirators); *United States v. Rawlings*, 341 F.3d 657, 659 (7th Cir. 2003) (convicting a defendant of conspiracy to commit armed bank robbery despite the fact that he did not know his companions were going to rob a bank or use guns until he actually drove to the alley); *United States v. Tilton*, 610 F.2d 302, 309 (5th Cir. 1980) (explaining how a "party to a continuing conspiracy can be held responsible for the substantive offenses committed by the co-conspirators if acts were committed in furtherance of a conspiracy"); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 6 (1992) (stating that liability for conspiracy is based on a negligence standard that has been applied in a large number of prosecutions); Jens David Ohlin, *Group Think: The Law of Conspiracy*

There is a social basis for these expanding rules of liability: in general, society may be more concerned with criminal groups than it is with individuals. Whenever individuals join together for an unlawful purpose, the threat to the public order increases, and with it the determination of society to prevent such illicit cooperation. Society does so by imposing stricter liability on each individual, not only for his own illegal acts, but also for those of his partners as they jointly advance their criminal goal.<sup>65</sup> Corporate criminal liability may be perceived from a similar perspective. There is concern that the growing economic, social, and political power of legal entities also poses an increased threat to public order. Lawmakers may believe that one way of coping with this risk is to require corporations to establish (or to strengthen existing) supervision procedures and prevention plans within the corporate structures that are aimed at preventing employees and agents from approaching the boundaries of legality. At times, lawmakers go one step further and impose a separate obligation on corporations, requiring them to take affirmative measures to prevent those who are affiliated with the corporation from committing certain offenses as part of their activity for the legal entity and impose liability for breaching this duty.

This action, however, reaches further. Contrary to accomplice liability and the *Pinkerton* doctrine, the enlargements of corporate criminal liability are not necessarily based on a common illegal ground where all participants play a role, as in cases of complicity and conspiracy. This common illegal stage “softens” the deviation from the regular formula of criminal liability and provides some justification for imposing liability for conduct that an accomplice or conspirator has not committed and for a state of mind he lacked. As in similar cases, the extensions of corporate criminal responsibility raise the question whether or not the marginal expansion of their utility for criminal justice exceeds the cost of deviating from the primary rules of criminal liability.<sup>66</sup>

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*and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 185 (2008) (stating that the wrongful act of a perpetrator can be attributed to “his fellow conspirators because the act was causally produced by the collective intention of the group”); Jesse Winograd, *Federal Criminal Conspiracy*, 41 AM. CRIM. L. REV. 611, 624 (2004) (referring to *Pinkerton* and the theory that “the reasonably foreseeable overt acts of one co-conspirator committed in furtherance of the conspiracy are attributable to the other conspirators”).

65. One commentator referred to this liability as “Extra Punishment for Group Activity.” See Neal K. Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1371 (2003) (stating that penalties for conspirators are primarily used to deter “a potential new member of the group”).

66. The cancelation of the doctrine of mutual responsibility of conspirators in Israel, following the repeal of Section 499(2) of the Israel Criminal Code in 1995 highlights this



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quandary. Many jurists have strongly criticized the doctrine. George P. Fletcher stated, “[I]t is patently absurd to think of conspirators controlling each other’s acts.” GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 663 (1978).