

# Corporate Criminal Liability 2.0: Expansion Beyond Human Responsibility

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E L I L E D E R M A N \*

## ABSTRACT

Is corporate criminal liability expanding beyond that of human responsibility? Anglo-American law sought to make the scope of corporate criminal liability (but not corporate punishment), during its development in the 20th century, equal to that of humans in almost all infringements of the law. Since the late 1980s, and especially in the last decade, however, in certain areas, the scope of criminal liability that can be imposed on legal entities has exceeded that which can be imposed on humans. The purpose of this article is to describe these expansions and to analyze their legal-social background.

The article is divided into two main parts. The first part examines the two sources of the expansions. One source is the aggregation theory developed by the US judiciary and adopted, in part, by the federal courts. Aggregation makes possible the formation of the required mental element of an offence by assembling components of the required guilt from the minds of separate officers of the defendant corporation. The other source is the result of legislative developments in the UK, the *Bribery Act* of 2010 (sections 7–9) and the third part of the *Criminal Finance Act* of 2017 (sections 44–52), both of which impose unique criminal duties on corporate bodies, requiring them to prevent certain offences by those who are “associated with them.” Initiatives in the UK and in other jurisdictions appear to be following this path.

The second part follows the central modifications that constitute the legal-social background for the expansion of corporate criminal liability. It does not address the immediate reasons that stimulated the enactment of each of the concerned laws, but rather focuses on the general reasons that helped shape the expansion process. Two of the reasons examined are

internal to criminal theory: the approach of criminal law to group delinquency and the signs of withdrawal of English law from the foundations of the theory of the organs as the sole ground of corporate criminal law in *mens rea* offences. The third reason is external to criminal theory and has to do with the changes that corporate law has undergone in the economic and social spheres: corporate compliance, corporate good citizenship, and their implications for the extension of corporate criminal liability. In conclusion, the article reflects upon the possible direction in which criminal corporate liability may be heading.

## I. THE EMERGING TREND

The historical dispute between the Anglo-American and continental legal systems on whether to subject legal bodies to criminal liability was concluded with the capitulation of the latter. In late 1988, the European Council recommended that member states adopt the principle of subordinating all legal entities to the criminal system, allowing them to be held criminally liable.<sup>1</sup> The recommendation focused strictly on the principle and did not address secondary questions such as the nature of the recommended liability (criminal or administrative), its scope, or the model according to which it should be examined.<sup>2</sup> Even among countries that

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\* Professor of Law (Emeritus), Buchmann Faculty of Law, Tel Aviv Uni., Israel. I wish to thank Ariel H Slama, for dedicated research assistance. His talent and thoroughness are reflected in this article. I would also like to thank Brooke Mowatt, Student Editor of the Manitoba Law Journal, for her thorough and professional editing.

A lecture on this topic was delivered at the symposium on Corporate Criminal Liability at Stetson University College of Law, in February 2016 and was later published in "Corporate Criminal Liability: The Second Generation" (2016) 46:1 Stetson L Rev 71.

<sup>1</sup> Council of Europe, Committee of Ministers, *Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities*, Recommendation R (88)18, adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies (1988), online: <[www.ius.uzh.ch/dam/jcr:566125](http://www.ius.uzh.ch/dam/jcr:566125)> [perma.cc/AC95-PSQX]. For a state-by-state survey of several European countries on corporate criminal liability see Clifford Chance, *Corporate Criminal Liability* (2016), online (pdf): Clifford Chance <[www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/corporate-criminal-liability.pdf](http://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/corporate-criminal-liability.pdf)> [perma.cc/8KVV-7XSQ].

<sup>2</sup> For an overview of ongoing debates about corporate liability, including the European "search for appropriate mechanisms for holding corporations to account", see James Gobert & Ana-Maria Pascal, eds, *European Developments in Corporate Criminal Liability*, 1st ed (London & New York: Routledge, 2011) at 11-98. For a general analysis of the four basic models concerning the analysis of corporate criminal liability see Eli

follow the Anglo-American legal system, there is no consensus on these matters. The English theory of the organs of the corporation<sup>3</sup> differs in its basics and scope from the American doctrine of *respondeat superior*,<sup>4</sup> and both are inconsistent with the Australian corporate ethos or corporate culture theory adopted in 1995.<sup>5</sup>

Yet, ending one dispute on the matter of corporate criminal liability is often a prelude to other disagreements in the area. Unsettled issues remained in dispute even between jurisdictions that adopted the same basic legal approach and perception, for example, regarding the disagreement on

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Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity" (2000) 4:1 *Buff Crim L Rev* 641 at 642 [Lederman, "Corporate Criminal Liability"].

<sup>3</sup> For an analysis of the theory of the organs, see *Tesco Supermarkets Ltd v Natrass*, [1972] AC 153, [1971] 2 WLR 1166 (HL) (Eng) [*Tesco*]; *Bolton (HL) (Engineering) Co Ltd v TJ Graham & Sons Ltd*, [1957] 1 QB 159 at 172, [1956] 3 WLR 804 (CA); Leonard H Leigh, "The Criminal Liability of Corporations and Other Groups: A Comparative View" (1982) 80:7 *Mich L Rev* 1508; UK, Law Commission, *Criminal Liability of Corporations* (Working Paper No 44) (London: Her Majesty's Stationary Office, 1972); The American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Philadelphia, PA: ALI, 1985) (Chair: Norris Darrell & R Ammi Cutter) § 2.07(1)(c), online: <[www.legal-tools.org/doc/08d77d/pdf](http://www.legal-tools.org/doc/08d77d/pdf)> [perma.cc/GB4T-YPN8]. For an analysis of this section, see Kathleen F Brickey, "Rethinking Corporate Liability Under the Model Penal Code" (1987) 19:3 *Rutgers LJ* 593.

<sup>4</sup> For general analysis of the *respondeat superior* doctrine see "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions" (1979) 92:6 *Harv L Rev* 1227; H Lowell Brown, "Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents" (1995) 41:2 *Loy L Rev* 279; Kathleen F Brickey, "Corporate Criminal Accountability: A Brief History and an Observation" (1982) 60:2 *Wash ULQ* 393 [Brickey, "Corporate Criminal Accountability"].

<sup>5</sup> See *Criminal Code Act 1995* (Austl), 1995/12, s 12.3(6) [*Criminal Code*, Australia] where "corporate culture" is defined as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place." According to the statute, the fault element required by the offence may be established by proving that a corporate culture "directed, encouraged, tolerated or led to non-compliance with the relevant provision" or by "proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision". See *Criminal Code*, Australia, *supra* note 5, ss 12.3(2)(c)-(d). See generally, Jonathan Clough & Carmel Mulhern, *The Prosecution of Corporations* (South Melbourne, Vic: Oxford University Press, 2002) at 138; Olivia Dixon, "Corporate Criminal Liability: The Influence of Corporate Culture" in Justin O'Brien & George Gilligan, eds, *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (London: Hart, 2013) 251; Pamela H Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991) 75:4 *Minn L Rev* 1095.

how criminal liability is imposed on a legal entity (according to which model). This article expands on one facet of such a disagreement, which may result in controversy regarding criminal corporate liability.

For many years, one of the themes in the development of corporate criminal liability was achieving parity between the penal liability of a legal entity and that of a person, unless there was something in the subject matter or in the context that was inconsistent with such parity.<sup>6</sup> This was the case, at times, with the definition of “person” in the laws of interpretation.<sup>7</sup> Jurists have presented rape and bigamy as examples of such exceptions,<sup>8</sup> although this approach is questionable.<sup>9</sup>

In the last three decades, and in particular the last one, we have been witnessing some deviation from this line of thought. Cumulatively, these divergences suggest an inclination to move away from this approach.

I begin by presenting in a nutshell several situations, most of them the result of explicit legislation, others the product of creative judicial interpretation, in which the law finds it appropriate to deliberately impose broader criminal liability on corporations than can be imposed on human beings in identical circumstances. I am not referring to the relatively trivial cases of more severe levels of punishment imposed on corporations by virtue of explicit provision by the law<sup>10</sup> or to certain offences that are entirely in the domain of corporate activity, dealing with such matters as banking<sup>11</sup> and insurance.<sup>12</sup> These instances may be explained relatively easily by the enormous size and business volume of some of the entities, and by the fact that they have exclusive rights to operate in these specialized areas of activity.

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<sup>6</sup> See e.g. Emily J Barnet, “Hobby Lobby and the Dictionary Act” (2014) 124 Yale LJ Forum 11 (“the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

<sup>7</sup> See e.g. *Interpretation Law* 1981 (Isr) ss 2, 4; *Interpretation Ordinance (New Version)* 1967 (Isr) s 1, as repealed by *Interpretation Law* 1981; *Interpretation Act* (UK), 1978, s 19; *Interpretation Act*, RSC 1985, c I-21, s 33; *Interpretation Act* (NZ) 1999/85 RS 1, s 29.

<sup>8</sup> See e.g. Brickey, “Corporate Criminal Accountability”, *supra* note 4 at 410, 413–14; VS Khanna, “Corporate Criminal Liability: What Purpose Does It Serve?” (1996) 109:7 Harv L Rev 1477 at 1484.

<sup>9</sup> Sara Sun Beale & Adam G Safwat, “What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability” (2004) 8:1 Buff Crim L Rev 89 at 121.

<sup>10</sup> See e.g. *Traffic Ordinance (New Version)* 1967 (Isr) s 30(c); *Antitrust Law* 1988 (Isr), s 47(a).

<sup>11</sup> *Banking (Licensing) Law* 1981 (Isr) s 4.

<sup>12</sup> *Control of Financial Services (Insurance) Law* 1981 (Isr) s 15(a).

Next, I examine briefly the background factors that have made possible the expansion of the tendency of criminal law to reduce its reliance on the traditional pursuit of parity in criminal liability between corporations and humans.

The question remains whether this direction of development is appropriate and desirable. This important interdisciplinary issue and its implications exceed the scope of this work and deserve a separate in-depth discussion.

### **A. The Contribution of Case Law: Piecing Together Components**

In the course of the 1980s, US federal regulations on the prevention of money laundering expanded the requirements for banks to report to the authorities on transactions above a certain amount. The expanded obligation to report applied also to separate deposits and withdrawals within a certain period if the cumulative amount reached a total that required reporting. Informed (willful) infringement of the directive by the bank became a criminal offence.<sup>13</sup>

This was the case with the Bank of New England.<sup>14</sup> Because of a malfunction at one of the branches of the Bank, the new instructions were not transferred to the tellers. As a result, the tellers did not report deposits that were made to a certain account, together with a withdrawal that was made following the deposits, because the amount of each deposit did not require reporting. The tellers did not consider all the deposits into the account, or the withdrawal that followed, as a single transaction that required reporting. When it was consequently brought to justice, the bank argued that in the circumstances of the case, the mental element required for the offence was not present because no employee of the bank knowingly failed to report the transactions: the senior officials did not know that deposits or withdrawals requiring reporting had been made and the tellers who carried out the deposits or withdrawals did not know of the reporting obligation in these cases.

The argument of the bank was rejected. The District Court held the corporation criminally liable and ruled that the scope of the knowledge of the corporation includes “the totality of what all of the employees know

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<sup>13</sup> 31 USC § 5311-11 (1982); 31 CFR § 103.22 (1986).

<sup>14</sup> *United States v Bank of New England*, 821 F (2d) 844 (Mass Ct App 1987) [BNE].

within the scope of their employment. So, 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... [t]he [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>15</sup> The Appellate Court adopted this line of reasoning and concluded by saying: “[s]ince the bank had the compartmentalized structure common to all large corporations, the court’s collective knowledge instruction is not only proper but necessary.”<sup>16</sup>

This is not the place to address such intriguing questions as whether it was possible to examine the formation of the mental element required in light of the willful blindness doctrine<sup>17</sup> or what levels of the mental element can be established by combining components of the *mens rea*. Is it limited to offences of knowledge and recklessness, requiring only a rational or logical element of knowledge (consciousness), or does it cover also intent offences requiring, in addition, an emotional component of desire?<sup>18</sup> Other

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<sup>15</sup> *Ibid* at 855–56 (providing the trial judge’s explanation, which the court cited and agreed with, while indicating that “[t]he...[aggregation] 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* 2006:1 81 at 116–20 (providing an in-depth discussion of the landmark case establishing the collective knowledge theory and discussing its use, particularly in cases where it is difficult to find a single defendant whose thoughts and behaviors embody the elements of the offence).

<sup>16</sup> *BNE*, *supra* note 14 at 856.

<sup>17</sup> See e.g. Thomas A Hagemann & Joseph Grinstein, “The Mythology of Aggregate Corporate Knowledge: A Deconstruction” (1997) 65:2 *Geo Wash L Rev* 210 at 226–28; Justin C From, “Avoiding Not-So-Harmless Errors: The Appropriate Standards for Appellate Review of Willful-Blindness Jury Instructions” (2011) 97:1 *Iowa L Rev* 275. *Cf* Alexander F Sarch, “Beyond Willful Ignorance” (2017) 88:1 *U Colo L Rev* 97 at 140–69.

<sup>18</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”. See *McGee v Sentinel Offender Servs LLC*, 719 F (3d) 1236 at 1244–45 (Ga App Ct 2013); *United States v LBS Bank-New York Inc*, 757 F Supp 496 at 501, n 7 (Pa Dist Ct 1990); *Commonwealth v Life Centers of America Inc*, 926 NE (2d) 206 at 214–15 (Mass Sup Jud Ct 2010); *Commonwealth v Springfield Terminal Railway Company*, 80 Mass App Ct 22 at 706–07 (2011) [*Springfield*]; Brian Lewis & Steven Woodward, “Corporate Criminal Liability” (2014) 51:4 *Am Crim L Rev* 923 at 935–36; Stacey Neumann Vu, “Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent” (2004) 104:2 *Colum L Rev* 459 at 474–75. In American case law, however, mainly in civil cases, there was also a more far-reaching view. This view holds

researchers and myself have addressed these questions elsewhere.<sup>19</sup> The present discussion focuses only on the piecing together of the elements that comprise the *mens rea* of two or more humans to form the complete culpability of a corporate entity, which does not exist in any of these separate persons.<sup>20</sup>

There is no consensus about this doctrine of collective or aggregate knowledge at the state and federal levels in the US. Some courts have adopted the “piecing together” principle,<sup>21</sup> others expressed dislike for it.<sup>22</sup> The English Law Commission also explicitly opposed the idea in one of its reports<sup>23</sup> and a similar spirit emerges from the reports of other executive

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that collective intent can be combined in fraudulent securities offences: “To carry their burden of showing that a corporate defendant acted with scienter, plaintiffs in securities fraud cases need not prove that any one individual employee of a corporate defendant also acted with scienter. Proof of a corporation's collective knowledge and intent is sufficient...” (*In re WorldCom Inc Sec Litig*, 352 F Supp (2d) 472 at 497 (NY Dis Ct 2005) [*WorldCom*]). The combination option was sometimes noted in connection with rule 10b-5 (Employment of Manipulative and Deceptive Devices, Securities) of the *Exchange Act* of 1934, which requires “intent to deceive, manipulate, or defraud” (See *Ernst & Ernst v Hochfelder*, 425 US 185 at 193, n 12 (1976)). In this context, the combination means the addition of a false statement regarding a material fact given by one representative of the legal body, without the knowledge or recklessness that it is incorrect, with the knowledge of another representative of the legal body that this information is incorrect (*In re Take-Two Interactive Sec Litig*, 551 F Supp (2d) 247 at 281 (NY Dis Ct 2008)). Here too, however, the caution required in the act of combination is emphasized: “it is not enough to separately allege misstatements by some individuals and knowledge belonging to some others where there is no strong inference that, in fact, there was a connection between the two...” (*Silvercreek Mgmt v Citigroup Inc*, 248 F Supp (3d) 428 at 440 (NY Dis Ct 2017)).

<sup>19</sup> Lederman, “Corporate Criminal Liability”, *supra* note 2 at 644–47; Mihailis E Diamantis, “Corporate Criminal Minds” (2016) 91:5 *Notre Dame L Rev* 2049 at 2070–71.

<sup>20</sup> See e.g. Celia Wells, *Corporations and Criminal Responsibility* (Oxford: Oxford University Press, 2001) at 118; Abril & Olazábal, *supra* note 15 at 91–98, 114–21; VS Khanna, “Is the Notion of Corporate Fault a Faulty Notion: The Case of Corporate Mens Rea” (1999) 79:2 *BUL Rev* 355 at 371–75, 407–12.

<sup>21</sup> See e.g. *Miller v Holzmann*, 563 F Supp (2d) 54 at 99–101 (DC Cir 2008); *United States v Philip Morris USA Inc*, 449 F Supp (2d) 1 at 894 (DC Cir 2006); *WorldCom*, *supra* note 18 at 497.

<sup>22</sup> *Chaney v Dreyfus Serv Corp*, 595 F (3d) 219 at 241 (5th Cir Ct App 2010); *United States v Sci Applications Int'l Corp*, 626 F (3d) 1257 at 1274 (DC Cir 2010); *Aetos Corp v Tyson Foods Inc* (*In re Tyson Foods Inc Sec Litig*), 155 F Appx 53 at 57 (3rd Cir Ct App 2005); *Southland Sec Corp v Inspire Ins Solutions Inc*, 365 F (3d) 353 at 366 (5th Cir Ct App 2004).

<sup>23</sup> UK, Law Commission, *A Criminal Code for England and Wales* (Law Com No 177) (London: Her Majesty's Stationary Office, 1989) at para 30(2).

authorities.<sup>24</sup> Australia, by contrast, adopted partially the aggregation principle with regard to the mental state of negligence. According to this approach, if “no individual employee, agent or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).”<sup>25</sup> The Australian legal system assumes that “a series of minor failures by relevant officers of the company might add to a gross breach by the company of its duty of care but two innocent states of mind cannot be added together to produce a guilty state of mind. Any such doctrine could have no application in offenses requiring knowledge, intention or recklessness.”<sup>26</sup>

The idea of combining mental elements is living and breathing in the US, and to some extent in other jurisdictions. According to this approach, the formation of criminal intent by a legal entity, composed or assembled of parts that each reside in a different human consciousness, deviates in its scope and manner of design from the creation of *mens rea* in human beings.

## B. The Contribution of Legislation: The Duty to Prevent

The cases in which the legislators find it appropriate to expand the criminal liability that can be imposed on corporations to a higher degree than that which can be imposed on human beings have similar backgrounds. The degree of deviation is not necessarily identical in these various laws, but the manner of such deviation is fairly comparable.

One of the main reasons behind legislation that expands the liability of legal entities is the competition between them for international market shares and their willingness to bribe foreign government officials to gain business advantages.<sup>27</sup> This phenomenon is particularly common in trade

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<sup>24</sup> Israel, Ministry of Justice, *Penal Law Memorandum, Amendment: Criminal Liability of Corporations, Proposed s 23A(2)(b)*, Document 803-04-2010-000289 (Israel: Ministry of Justice, 2014), online: <[www.justice.gov.il/Publications/Articles/Pages/Memorandum2910.aspx](http://www.justice.gov.il/Publications/Articles/Pages/Memorandum2910.aspx)> [perma.cc/9XDX-U9YN] [Israel Ministry of Justice, *Criminal Liability of Corporations*].

<sup>25</sup> *Criminal Code*, Australia, *supra* note 5, s 12.4(2)(b).

<sup>26</sup> Dixon, *supra* note 5 at 5 [footnotes omitted]; Eric Colvin, “Corporate Personality and Criminal Liability” (1995) 6:1 *Crim LF* 1 at 23; JC Smith & Brian Hogan, *Criminal Law*, 7th ed (London: Butterworths, 1992) at 184.

<sup>27</sup> See generally “Helping Countries Combat Corruption: The Role of the World Bank” (September 1997) at 8–17, 48–62, online (pdf): The World Bank <[www1.worldbank.org](http://www1.worldbank.org)



with developing countries in Africa, but also in Central and Southern America, Asia, and elsewhere. The possibility of concealing, in several countries, bribes under various guises and presenting them as a recognized expense for tax purposes<sup>28</sup> further exacerbates the problem, legitimizes these actions, and harms competition.<sup>29</sup>

The US was first to prohibit bribery of foreign government officials under the *Foreign Corrupt Practices Act* of 1977.<sup>30</sup> The prohibition was enacted as a response to bribes paid by US corporations in foreign countries, which were revealed as part of the Watergate affair and the chain of investigations that followed.<sup>31</sup> Other countries, however, whose laws

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<sup>28</sup> Daniel Patrick Ashe, "The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the US Foreign Corrupt Practices Act" (2005) 73:6 Fordham L Rev 2897 at 2907, n 71; H Lowell Brown, "Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?" (2001) 26:2 NCJ Intl L & Com Reg 239 at 260, n 61; Julie B Nesbit, "Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy" (1998) 31:5 Vand J Transnat'l L 1273 at 1302. For a different approach, see *CrimA 6726/05 Hydrola Ltd v Income Tax Assessor Tel Aviv 1* (2008) at paras 11(5), 22 (of Justice Rubinstein decision) [*Hydrola Ltd*].

<sup>29</sup> *Hydrola Ltd*, *supra* note 28 at para 15(4); Ryan J Rohlfen, "Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws" (2012) U Chicago Legal F 151 at 152; Franklin A Gevurtz, "Commercial Bribery and the Sherman Act: The Case for Per Se Illegality" (1987) 42:2 U Miami L Rev 365 at 388; Jeffery Boles, "Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform" (2014) 51:1 Am Bus LJ 119 at 154.

<sup>30</sup> See generally Marie M Dalton, "Efficiency v Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act" (2006) 2 NY University JL & Bus 583; H Lowell Brown, "The Extraterritorial Reach of the US Government's Campaign Against International Bribery" (1999) 22:3 Hastings Intl & Comp L Rev 407; H Lowell Brown, "Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act" (1994) 12:2 Intl Tax & Bus Lawyer 260.

<sup>31</sup> Posadas, *supra* note 27 at 348–59; Rachel Brewster, "Enforcing the FCPA: International Resonance and Domestic Strategy" (2017) 103:8 Va L Rev 1611 at 1646; Philip M Nichols, "The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act" (2016) 53:1 Harv J on Legis 203 at 208–09. Some scholars argued, however, that the immorality of transnational bribery was insufficient to justify unilateral implementation of such a law. See e.g. Peter M German, "To Bribe or Not to Bribe: A Less Than Ethical Dilemma, Resolved?" (2002) 9:3 J Financial Crime 249 at 250; Leslie Holmes, "Good Guys, Bad Guys: Transnational Corporations, Rational Choice Theory and Power Crime" (2009) 51:3 Crime L & Soc Change 383 at 395–96.

prohibit such bribes, have not always enforced these laws.<sup>32</sup>

International organizations joined the fight. In 1999, the Organization for Economic Co-operation and Development (OECD), followed in 2005 by the United Nations, adopted treaties aimed at combating this type of corruption.<sup>33</sup> The treaties, which were ratified by many countries,<sup>34</sup> dealt explicitly with corporations, but did not discuss the details of liability that they proposed to impose.<sup>35</sup> In 2008, for example, Israel added Section 291A to its *Penal Code*, concerning the prohibition of bribing a foreign public official.<sup>36</sup> Legislatures and law enforcement agencies have been paying increasing attention to this issue, adopting administrative arrangements into the judicial system for terminating proceedings without a formal conviction (Deferred Prosecution Agreements – DPAs). These proceedings

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<sup>32</sup> Kari Lynn Diersen, “Foreign Corrupt Practices Act” (1999) 36:3 Am Crim L Rev 753 at 765–66, n 96. For example, the *Corruption of Foreign Public Officials Act*, SC 1998, c 34 is similar in considerable aspects to the American FCPA. But the CFPOA was largely ignored by Canadian federal officials for more than a decade (Paul Blyschak, Nancy Zagbayou & Olga Redko, “Corporate Liability for Foreign Corrupt Practices Under Canadian Law” (2014) 59:3 McGill LJ 655 at 657). This article by Blyschak, Zagbayou & Redko also discusses later Canadian decisions convicting corporations, like *Niko Resources (Canada) Limited* and *Griffith Int’l Energy Inc*, for bribery offences of foreign officials. On the implications of this situation for changes introduced into American law in those days. See Ashe, *supra* note 28 at 2906.

<sup>33</sup> OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, Adopted by the Negotiating Conference on 21 November 1997 (1997), online: <[www.oecd.org/daf/antibribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/antibribery/ConvCombatBribery_ENG.pdf)> [perma.cc/D4XR-J73Q]; United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, UNODCOR, 2003, 1, online: <[www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](http://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)> [perma.cc/Q8RX-ZJ2R].

<sup>34</sup> OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Ratification Status as of May 2018 (2018), online: <[www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf](http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf)> [perma.cc/NC5S-4264]; Office on Drugs and Crime, *Signature and Ratification Status*, UNODCOR, UN Doc A/58/422 (Status as of 6 February 2020), online: <[www.unodc.org/unodc/en/corruption/ratification-status.html](http://www.unodc.org/unodc/en/corruption/ratification-status.html)> [perma.cc/QS5C-PSQN].

<sup>35</sup> On these and other international initiatives to combat this corruption, see also Claudia J Dumas, “Combatting Corruption in the 21st Century: Bringing the Babel of Voices into Harmony” in Sam Muller et al, eds, *The Law of the Future and the Future of Law*, vol 2 (The Hague: Torkel Opsahl Academic EPublisher, 2012) 99, online: <[www.toaep.org/lotfs-pdf/1-muller-zouridis-frishman-kistemaker](http://www.toaep.org/lotfs-pdf/1-muller-zouridis-frishman-kistemaker)> [perma.cc/XJ63-WVEC].

<sup>36</sup> *Penal Law 1977 (Isr) s 291A [Penal Law]*; “Anti-Bribery and Corruption” (last visited 15 April 2019), online: ASHR’A: *The Israel Foreign Trade Risks Insurance Corporation Ltd* <[www.ashra.gov.il/eng/?CategoryID=859](http://www.ashra.gov.il/eng/?CategoryID=859)> [perma.cc/8AM2-77ZT].

are offered more often to corporations than to individuals<sup>37</sup> and the rulings and level of punishment in these arrangements are often quite severe. Fines imposed on defendants for bribery reached a record in the case brought by the US, Brazil, and Switzerland in December 2016 against Odebrecht, the largest construction firm in Latin America, and its petrochemical subsidiary, Braskem. The latter admitted to bribery of almost \$800 million and agreed to pay a record fine of at least \$3.5 billion.<sup>38</sup>

The same year, the US reached a record high, over \$2.4 billion, in fines imposed on legal entities for infringing the prohibition against bribery; in many other cases, fines imposed on offenders reached hundreds of millions of dollars.<sup>39</sup> Another means used by the enforcement authorities to prevent bribery was the appointment of a monitor who joined the internal control system of the corporation, as part of the DPA agreement of that entity with the authorities.<sup>40</sup> Such monitors “report to and take orders from prosecutors, and attend meetings with board members regarding the company's outstanding compliance issues.”<sup>41</sup> Other countries have also

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<sup>37</sup> See generally Mike Koehler, “Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement” (2015) 49:2 UC Davis L Rev 497; Andrea Amulic, “Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States” (2017) 116:1 Mich L Rev 123 at 124–27; “What Enforcement Tools are in the Armoury of Prosecutors in the US, UK and France?” (13 April 2018), online: Bryan, Cave, Leighton, Paisner <[www.bclplaw.com/en-US/insights/what-enforcement-tools-are-in-the-armoury-of-prosecutors-in-the-us-uk-and-france.html](http://www.bclplaw.com/en-US/insights/what-enforcement-tools-are-in-the-armoury-of-prosecutors-in-the-us-uk-and-france.html)> [perma.cc/279G-5SXX].

<sup>38</sup> US, Department of Justice, Office of Public Affairs, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (16-1515) (21 December 2016), online: <[www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve](http://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve)> [perma.cc/96FR-5HJR]; Linda Pressly, “The Largest Foreign Bribery Case in History”, *BBC News* (22 April 2018), online: <[www.bbc.com/news/business-43825294](http://www.bbc.com/news/business-43825294)> [perma.cc/X65C-AEUM].

<sup>39</sup> See “Foreign Corrupt Practices Act Clearinghouse: A Collaboration with Sullivan & Cromwell LLP” (last visited 15 April 2019), online: *Stanford Law School* <[fcpa.stanford.edu/statistics-top-ten.html](http://fcpa.stanford.edu/statistics-top-ten.html)> [perma.cc/2HRC-ZF53].

<sup>40</sup> US, Department of Justice, Criminal Division, Securities and Exchange Commission, Enforcement Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (14 November 2012), online: <[www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf](http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf)> [perma.cc/8J8Q-QDN7].

<sup>41</sup> Miriam Hechler Baer, “Governing Corporate Compliance” (2009) 50:4 Boston College L Rev 949 at 991 [footnotes omitted]. See also Vikramaditya Khanna & Timothy L Dickinson, “The Corporate Monitor: The New Corporate Czar.” (2007) 105:8 Mich L

adopted aggressive enforcement policies when bribing of foreign public officials was revealed.<sup>42</sup>

England was the first to break away from the conventional framework of the fight against bribery, with respect to corporations, by setting new boundaries and further expanding criminal liability.<sup>43</sup> The comprehensive *Bribery Act* of 2010 criminalizes both active and passive bribes (the paying or promising of bribes), and embraces also commercial (private sector) bribery.<sup>44</sup> The Act imposed a duty to prevent bribery only on corporations,

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Rev 1713 at 1718, 1724–25; Veronica Root, “The Monitor-‘Client’ Relationship” (2014) 100:3 Va L Rev 523 at 531–32 [Root, “Monitor-‘Client’ Relationship”]. See generally s 3(a) of this article.

<sup>42</sup> In Israel, for example, there have been allegations concerning senior Teva officials bribing government officials in Eastern European countries and rumors suggesting that IAI (Israel Aircraft Industries) personnel are bribing Indian government officials. See “Suspicion of bribery: The police have launched an investigation against Teva”, *Israel Today* (last visited 8 February 2017), online <[www.israelhayom.co.il/article/450493](http://www.israelhayom.co.il/article/450493)> [perma.cc/Q6SE-C253] (Hebrew); “This is how the Israeli bribery industry works in India”, *Mako* (27 October 2009), online: <[www.mako.co.il/tv-ilana](http://www.mako.co.il/tv-ilana)> [perma.cc/MQS2-75Q6] (Hebrew). There are also suspicions that Housing and Development (the largest construction company in Israel) is involved in bribing government officials in seven countries throughout Africa and Latin America to win infrastructure projects. See “Bribery in Housing and Development: A senior businesswomen has been interrogated”, *Walla News* (12 August 2018), online: <[news.walla.co.il/item/3180298](http://news.walla.co.il/item/3180298)> [perma.cc/428T-PT7U] (Hebrew). From the opposite direction, there has been suspicion of Tysenkrup bribing senior Israeli officials in the submarines order for the Israeli navy. See “Did officers get bribed by Tysenkrup?”, *Globes* (30 January 2017), online: <[www.globes.co.il/news/article.aspx?did=1001174452](http://www.globes.co.il/news/article.aspx?did=1001174452)> [perma.cc/672Q-J96K] (Hebrew). See also Siemens' bribery of IEC (Israel Electric Corporation) executives: “Siemens admitted bribes of some \$ 2.5 million to IEC executives”, *Yedioth Ahronoth* (2 May 2016), online: <[www.ynet.co.il/articles/0,7340,L4798230,00.html](http://www.ynet.co.il/articles/0,7340,L4798230,00.html)> [perma.cc/L3B6-4AV9] (Hebrew).

<sup>43</sup> For the recent history and background of the *Bribery Act 2010*, see generally Peter Alldrige, “The U.K. *Bribery Act*: ‘The Caffeinated Younger Sibling of the FCPA’” (2012) 73:5 Ohio St LJ 1181; Roman Tomasic, “The Financial Crisis and the Haphazard Pursuit of Financial Crime” (2011) 18:1 J Financial Crime 7. See also the House of Lords decision regarding the investigation of the sales of arms by BAE Systems to Saudi Arabia, *R (On the Application of Corner House Research) v Director of the Serious Fraud Office (BAE Systems plc, interested party)*, [2008] UKHL 60.

<sup>44</sup> *Bribery Act* (UK), 2010, ss 1–3, [Bribery Act]; Rahul Kohli, “Foreign Corrupt Practices Act” (2018) 55:4 Am Crim L Rev 1269 at 1307–08; Lee G Dunst, Michael S Diamant & Teresa R Kung, “Hot off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act’ (2011) 12:3 Bus L Intl 257. For a comparison of the anti-Bribery Legislation in the US and UK, see e.g. Sulaiman Balogun LLM, “A Comparison of the U.K. Bribery Act and the U.S. Foreign Corrupt Practices Act” (2 July 2013), online:

by enacting an independent criminal offence for a failure to prevent it.<sup>45</sup> In September 2017, the third part of the *Criminal Finances Act* was enacted in the UK. Many believe that it is at least partly the result of public pressure following the Swiss Leaks,<sup>46</sup> the Panama Papers,<sup>47</sup> and the expected

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*Scribd* <[www.scribd.com](http://www.scribd.com)> [[perma.cc/GU8F-BNX9](https://perma.cc/GU8F-BNX9)]; Isaac A Binkovitz, "Recent Changes in U.S. and U.K. Overseas Anti-Corruption Enforcement Under the FCPA and the U.K. Bribery Law: Private Equity Compliance" (2013) 3:1 *Mich Bus & Entrepreneurial L Rev* 75. For an analysis of private (or commercial) and public official bribery, see generally Jeffrey R Boles, "The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes" (2014) 35:4 *Mich J Intl L* 673 at 673, 711-12.

<sup>45</sup> *Bribery Act*, *supra* note 44, s 7.

<sup>46</sup> Banking information was leaked from over 100,000 customers' accounts with the Hong-Kong Shanghai Banking Corporation (HSBC), individuals and companies from more than 200 countries. The HSBC also held about \$102 billion in accounts for the Geneva branch of the Bank. The International Consortium of Investigative Journalists revealed that between 2005 and 2007, the Swiss arm of HSBC helped these customers carry out tax fraud scams amounting to about \$120 billion. The Bank branch allowed its customers to regularly withdraw from their accounts cash in foreign currencies that were not used in Switzerland. It also aggressively marketed programs that enabled its customers to avoid paying taxes, collaborated with some customers to hide undeclared accounts in their countries of origin, and even provided services to international criminals, businesspersons, and other high-risk individuals. Following the leak and an arrangement with the US enforcement authorities, the Bank changed some of its global procedures. See Justin O'Brien, "HSBC: Will the Sword of Damocles Fall?" (2015) 9:1 *L & Financial Markets Rev* 63; "The HSBC Files: What we Know so Far" *The Guardian* (11 February 2015), online: <[www.theguardian.com/news/2015/feb/11/the-hsbc-files-what-we-know-so-far](http://www.theguardian.com/news/2015/feb/11/the-hsbc-files-what-we-know-so-far)> [[perma.cc/GZW5-F3BX](https://perma.cc/GZW5-F3BX)].

<sup>47</sup> A collection of some 12 million documents relating to over 200,000 corporations from around the world, including nearly 40 years of activity by the Mossack Fonseca law firm, leaked in early 2016, containing information and clues about suspicious financial activities by many financiers and some politicians from around the world. The firm specialized in creating companies in countries that serve as tax havens, where laws made it possible to hide their shareholders, that is, the owners of the properties. The firm cooperated with large banks around the world. Activity was not reported in the countries where the corporations operated. It was also argued that the haven countries did not examine whether the money sources were legal or the result of tax evasion, money laundering, illicit connections (e.g. trade that violates sanctions imposed on countries), and even corruption such (e.g. bribery). The law firm stopped its activity. See Jake Bernstein, *Secrecy World: Inside the Panama Papers Investigation of Illicit Money Networks and the Global Elite* (New York: Henry Holt and Company, 2017). For a series of articles published by the *Süddeutsche Zeitung* on the Panama Papers see "Panama Papers: The Secrets of Dirty Money" (last visited 21 April 2019), online: *Süddeutsche Zeitung* <[panamapapers.sueddeutsche.de/en/](http://panamapapers.sueddeutsche.de/en/)> [[perma.cc/6KQ4-WZFF](https://perma.cc/6KQ4-WZFF)].

international tax reporting agreements.<sup>48</sup> The new law imposes criminal liability on a legal entity, as its legal predecessor, strictly on the grounds of non-prevention, for failing to prevent tax evasion facilitation.<sup>49</sup> This is the case when a person or a corporation associated with the legal entity (e.g. its service provider) enabled or assisted the evasion of tax by a third party, consciously or by turning a blind eye, in the course of acting for or on behalf of that entity.<sup>50</sup>

In both laws, the duty to prevent refers to “a person associated with [the corporation]” which is defined as “(a) an employee... (b) an agent... or (c) any person who performs services for or on behalf of [the corporation]...”<sup>51</sup> if such a person acted in his capacity at the time of committing the offence. This definition is quite broad. In addition to employees of the corporation, the definition encompasses independent contractors who committed the offences as agents, distributors, service providers, or suppliers of the corporation.<sup>52</sup> The degree of control of the legal entity over such persons is not always clear, even if the person acted as a service provider for the corporation. Borderline cases may arise when the court needs to determine whether someone is associated with the corporation by taking into account the nature of the relationship, as well as all of the relevant circumstances of the conduct.<sup>53</sup> It is also clear that the offence under consideration exceeds the limits of the criminal vicarious liability doctrine in English law for *mens rea* offences because it does not relate to questions of delegation, where such liability is at times recognized.<sup>54</sup>

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<sup>48</sup> Multilateral agreements between over 100 revenue authorities worldwide, creating an infrastructure and network for the automatic exchange of information regarding the offshore income and assets of their taxpayers. See OECD, *Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports* (last visited 22 April 2019), online: <[www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf](http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf)> [perma.cc/Z9EF-VB9L].

<sup>49</sup> Peter Alldridge, *Taxation and Criminal Justice* (Oxford, Oxford University Press, 2017) at 25–41.

<sup>50</sup> *Criminal Finances Act* (UK), 2017, ss 44–46 [CF Act].

<sup>51</sup> *Ibid*, ss 44(4)(a)–(c), 46(1)(a); *Bribery Act*, *supra* note 44, s 8(1).

<sup>52</sup> UK, Ministry of Justice, *The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organizations Can Put into Place to Prevent Persons Associated with them from Bribing* (Guide) (London, UK: Ministry of Justice, 2011) at nos 37–43, online: <[www.justice.gov.uk/pdf](http://www.justice.gov.uk/pdf)> [perma.cc/24AV-ATP] [Ministry of Justice, *The Bribery Act*].

<sup>53</sup> See generally Karl Laird, “The Criminal Finances Act 2017: An Introduction” (2017) *Crim L Rev* 915 at 932–33 [Laird, “Criminal Finances Act”].

<sup>54</sup> For vicarious criminal liability in general, see Francis Bowes Sayre, “Criminal Responsibility for the Acts of Another” (1930) 43:5 *Harv L Rev* 689 at 709–12; Leonard

Like bribery, facilitating tax evasion can occur anywhere in the world and can refer to local or foreign tax, as long as the accused entity has a UK nexus.<sup>55</sup> Therefore, English law formulated two complementary offences that are unique to legal entities: (a) the facilitation of internal tax evasion and (b) the facilitation of tax evasion outside the UK. The foreign offence is contingent on the fact that the evasion is a tax violation both in the location where the offence was committed and in the UK (dual criminality).<sup>56</sup> The liability imposed on the corporation for its omissions of non-prevention is strict (i.e., there is no need to prove criminal intent on its part).<sup>57</sup> Furthermore, it seems that the scope of corporate liability in relation to these offences is even broader than that of corporations in the US, within the limits of the *respondeat superior* doctrine, which is limited to the conduct of the employees of the legal entity or of its agents acting in the course of

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H Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law* (London: Sweet & Maxwell, 1982); JLI J Edwards, "Vicarious Liability in Criminal Law" (1951) 14:3 *Modern L Rev* 334. For the delegation principle, see JLI J Edwards, *Mens Rea in Statutory Offences* (London: Macmillan, 1955) at 238–40; Glanville Williams, "4 Mens Rea and Vicarious Responsibility" (1959) 9:1 *Current Leg Probs* 57.

<sup>55</sup> CF Act, *supra* note 50, ss 46(2), 48(1); *Bribery Act*, *supra* note 44, s 7(3)(b).

<sup>56</sup> CF Act, *supra* note 50, ss 45–46.

<sup>57</sup> The London Law Commission recommended to make this offence a negligent offence. See UK, Law Commission, *Reforming Bribery* (Law Com No 313) (London, UK: The Stationary Office, 2008), online: <[s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/04/lc313.pdf](https://www.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/04/lc313.pdf)> [perma.cc/J7WG-FTAT]. The recommendation was not adopted. See UK, HL, HC, Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill: First Report of Session 2008-09* (Cm 115-1/430-1, 2009) at 35, online: <[publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115i.pdf](http://publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115i.pdf)> [perma.cc/3SWC-CYWV].

The absence of a requirement from the corporation for awareness of the assistance by anyone associated with the legal body, primarily its employees, caused discontent among those who objected to the bill during the enactment process. English legislators did not change their position on this matter because they feared that the adoption of such a requirement would encourage the corporate administration to turn a blind eye to the acts of those associated with it. They also assumed that the absence of the requirement for awareness would, in any case, be mitigated by the requirement for a reasonable defence mechanism that would be available to the corporation. For reservations about the issue of awareness. See UK, HM Revenue and Customs, *Tackling Offshore Tax Evasion: A New Corporate Criminal Offence of Failure to Prevent the Facilitation of Tax Evasion* (Summary of Responses) (London, UK: HM Revenue and Customs, 2015), nos 3.74–3.77, online: <[www.gov.uk/government/organisations/hm-revenue-customs](http://www.gov.uk/government/organisations/hm-revenue-customs)> [perma.cc/2WTU-5E9L] [HM Revenue & Customs, *Offshore Tax Evasion*].

their employment.<sup>58</sup>

The defence provided by the laws encourages corporations to correctly assess the risks of bribing or facilitating tax evasion by those associated with them<sup>59</sup> while developing and promoting internal control mechanisms to prevent improper activities.<sup>60</sup> The defence against bribery requires that the legal entity prove, on the balance of probabilities, that it has taken adequate or reasonable measures to prevent associated persons from carrying out the offence in question or alternatively, with respect to tax evasion, that under the circumstances, it was unreasonable to expect the corporation “to have any prevention procedures in place.”<sup>61</sup> The terminology suggests an intention to grant discretion and leeway to the courts and the enforcement authorities in examining the facts and circumstances of the case.<sup>62</sup>

The different terminology used by the legislator to describe the precautionary measures required to exercise the defence in each of the two laws (adequate procedures in the *Bribery Act* and reasonable procedures in the *Criminal Finances Act*) raises a certain difficulty. Some consider the wording difference as merely a difference in terminology and a minor distinction.<sup>63</sup> Others argue that an in-depth analysis is needed for the nature

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<sup>58</sup> For the principles of the *respondeat superior* theory, see the references cited in footnote 4.

<sup>59</sup> For an assessment of the risk of being asked for a bribe see UK, Ministry of Justice and Department for Business, *Innovation & Skills, Insight into Awareness and Impact of the Bribery Act 2010 Among Small and Medium Sized Enterprises (SMEs) by IFF Research Ltd* (London, UK: Ministry of Justice and Department for Business, Innovation & Skills, 2015) at 3, 5-7, 24, online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf)> [perma.cc/D2RB-NZXP].

<sup>60</sup> Cf with the encouragement and reward, by the US Department of Justice, of corporations that adopt effective compliance programs, within the framework of the New Organizational Sentencing Guidelines: Brandon L Garrett, “Structural Reform Prosecution” (2007) 93:4 Va L Rev 853 at 897, nn 145, 157; Anna P Donovan, “Systems and Controls in Anti-Bribery and Corruption” in Iris Hse-Yu Chiu & Michael McKee, eds, *The Law on Corporate Governance in Banks* (Cheltenham, UK: Edward Edgar, 2015) 236 at 239.

<sup>61</sup> CF Act, *supra* note 50, ss 45(2)(b), 46(3)(b). See also *Bribery Act, supra* note 44, s 7(2).

<sup>62</sup> Gideon Sanitt, “Failure to Prevent Tax Evasion: The Corporate Offence” (last visited 21 April 2019), online: *MacFarlanes* <[www.macfarlanes.com/insights/2017/failure-to-prevent-tax-evasion-the-corporate-offence/](http://www.macfarlanes.com/insights/2017/failure-to-prevent-tax-evasion-the-corporate-offence/)> [perma.cc/9MXU-56QB].

<sup>63</sup> “Criminal Finances Act: A Guide for the Financial Services Sector” (6 November 2017), online: *Allen & Overy* <[www.allenoverly.com/en-gb/global/news-and-insights/publications/the-criminal-finances-act-a-guide-for-the-financial-services-sector](http://www.allenoverly.com/en-gb/global/news-and-insights/publications/the-criminal-finances-act-a-guide-for-the-financial-services-sector)> [perma.cc/TP65-XKCR].



of the measures required for the defence in each of the two laws because the changes in the text are not random and the legislator was fully aware of them. These jurists rank the levels of precaution required by the terms being used. Assuming that “reasonable” is softer and less decisive in its objective requirements than “adequate”, they conclude that the *Criminal Finances Act* provides a more flexible protection depending on the circumstances.<sup>64</sup>

The Ministry of Justice has issued guidelines concerning the procedures that corporations are expected to follow to secure the protection of the law from prosecution for failure to prevent these offences.<sup>65</sup> Such procedures have a functional aspect and, as a rule, they revolve around the need of legal bodies: (a) to assess the risks of involvement by associated persons in the payment of bribes and the facilitation of tax evasion, and to prioritize such risks after proper examination, without relying exclusively on past examinations carried out by the businesses in the concerned sector;<sup>66</sup> (b) to establish a clear and unequivocal policy on these issues; (c) to foster an atmosphere that emphasizes the commitment of employees and of management at all levels to avoid the payment of bribes or the facilitation of tax evasion; and (d) to inform those involved in labour and commercial relations with the legal body on the subject matter.

These steps, together with the establishment of a permanent mechanism that supervises the routine implementation of appropriate preventive actions, meet the requirement of adequate or reasonable procedures. But even if the legal body took these steps, the court must still determine whether or not, under the circumstances of the case, these are

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<sup>64</sup> See Adam Blakemore & Joseph Moreno, “UK Criminal Finances Act 2017 Commences with New Tax Evasion Offences, Anti-Money Laundering Rules, and Asset Forfeiture Provisions” (17 October 2017), online: *mondaq* <[www.mondaq.com/uk/Criminal-Law/637888/UK-Criminal-Finances-Act-2017-Commences-With-New-Tax-Evasion-Offences-Anti-Money-Laundering-Rules-And-Asset-Forfeiture-Provisions](http://www.mondaq.com/uk/Criminal-Law/637888/UK-Criminal-Finances-Act-2017-Commences-With-New-Tax-Evasion-Offences-Anti-Money-Laundering-Rules-And-Asset-Forfeiture-Provisions)> [perma.cc/9AME-7UA8]: “Although modelled on the Bribery Act, this defence does not go as far as the ‘adequate procedures’ defence, requiring only that organisations have ‘reasonable’ procedures in place, notwithstanding that these may not prevent every instance of non-compliance by an organisation’s associated persons”.

<sup>65</sup> Ministry of Justice, *The Bribery Act*, *supra* note 52; HM Revenue & Customs, *Offshore Tax Evasion*, *supra* note 57.

<sup>66</sup> HM Revenue & Customs, *Offshore Tax Evasion*, *supra* note 57 at 27 states, in this regard, that “merely applying old procedures tailored to a different type of risk... will not necessarily be an adequate response to tackle the risk”.

reasonable and adequate procedures.<sup>67</sup> The Ministry of Justice has listed financial services, tax consultants, and accounting services among the sectors that are at the forefront of the battle to prevent the payment of bribes and the facilitation to tax evasion.<sup>68</sup> To date, the two offences have been rarely litigated in court.<sup>69</sup>

The notion of imposing an obligation on the corporation to prevent the commission of offences by those involved in its business is gaining further traction these days. In Australia, a bill equivalent to the UK *Bribery Act* is on the verge of being passed. But, because the law in Australia does not address commercial bribery directly, the Australian bill is more limited in scope than its UK counterpart.<sup>70</sup> The bill proposes to impose absolute criminal liability on a legal body for its failure to prevent its associates from bribing foreign government officials.<sup>71</sup> At the same time, the corporation is granted protection against conviction for the offence if it can prove that it had

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<sup>67</sup> Cat Barker & Karen Elphick, Commonwealth (Austl), *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019*, No 99/19-20 (28 May 2020) [Barker & Elphick, *Crimes Legislation*].

<sup>68</sup> HM Revenue & Customs, *Offshore Tax Evasion*, *supra* note 57 at 16.

<sup>69</sup> In March 2018, for the first time, an interior design corporation in the UK was convicted for failing to prevent bribery under section 7 of the Act in question, not on the basis of an admission of guilt. The jury rejected the defendant's claim, according to which he is entitled to the protections specified in the law, arguing that the measures taken to prevent the bribe were not "adequate" under the provisions of the law for the exercise of the defence. See Jo Rickards & Tom Murray, "Failing to Prevent Bribery: A Legal Update for Commercial Organisations and the 'Adequate Procedures' Defence" (15 March 2018), online: *mondaq* <[www.mondaq.com/uk/white-collar-crime-anti-corruption-fraud/683082/failing-to-prevent-bribery-a-legal-update-for-commercial-organisations-and-the-adequate-procedures-defence](http://www.mondaq.com/uk/white-collar-crime-anti-corruption-fraud/683082/failing-to-prevent-bribery-a-legal-update-for-commercial-organisations-and-the-adequate-procedures-defence)> [perma.cc/8AYU-LB6B]; Omar Qureshi, Amy Wilkinson & Iskander Fernandez, "UK's First Considerations of the Bribery Act's Adequate Procedures Defence" (19 March 2018), online (blog): *FCPA Professor* <[fcpprofessor.com/](http://fcpprofessor.com/)> [perma.cc/DQ68-F6HH]. In the first trial of this charge in the UK, *Sweett Group Plc* (unpublished), the corporation, was convicted, in 2016, of failing to prevent bribery, based on its confession. See UK, Serious Fraud Office, *Sweett Group PLC Sentenced and Ordered to Pay £2.25 Million after Bribery Act Conviction* (New Release) (London, UK: SFO, 19 February 2016), online: <[www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2.3-million-after-bribery-act-conviction](http://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2.3-million-after-bribery-act-conviction)> [perma.cc/T6ML-2CSU].

<sup>70</sup> Matt Fehon & Caroline Mackinnon, "Implications of the Proposed Amendments to Australia's Foreign Bribery Laws" (2017), online (pdf): *Governance in Practice* <[www.mcgrathnicol.com/app/uploads/2017-06-30\\_Implications-of-the-proposed-amendments-to-Australias-foreign-bribery-laws.pdf](http://www.mcgrathnicol.com/app/uploads/2017-06-30_Implications-of-the-proposed-amendments-to-Australias-foreign-bribery-laws.pdf)> [perma.cc/2LPM-T7T4].

<sup>71</sup> Barker & Elphick, *Crimes Legislation*, *supra* note 67 at 22. For the definition of a foreign public official see *Criminal Code*, Australia, *supra* note 5, s 70.1.

adequate procedures in place to prevent its commission.<sup>72</sup>

In a memorandum of the *Penal Code (Amendment - Criminal Liability of Corporations)*, circulated at the end of 2014, the Israeli Ministry of Justice proposed to further expand the scope of the obligation that legal bodies are subject to. The memorandum proposes that, in addition to preventing bribery (which does not include commercial bribery in its language), the legal body must also prevent offences within the realm of its activity and business conduct. Explicitly included in the range are offences of money laundering, as well as securities law and antitrust offences.<sup>73</sup>

The Israeli memorandum also imposes the duty of prevention with regard to individuals associated with the legal body, as is the case in UK law, providing a defence to the legal body against the charge of omission if the legal body can prove that it took reasonable measures to carry out this duty.<sup>74</sup> But the memorandum does not establish a separate, explicit protection clause. Instead, it creates an explicit and unique presumption of guilt, which transfers the burden of proof onto the defendant corporation, such that the corporation violated its duty unless it proves that it has taken all reasonable steps to fulfill it.<sup>75</sup> The mere fact that the corporation was not able to prove that it used all reasonable means to prevent the offence establishes the counter-presumption that the corporation is liable, by default, for the failure in question. In the UK, the result is apparently identical, despite the lack of a legal presumption in the law: the fault of the corporation is determined, *prima facie*, with proof of the elements of the offence by the prosecution, unless the corporation proves, according to the balance of evidence, that it took reasonable measures to prevent it.

Another law of similar nature, intended to impose criminal liability on corporations for failing to prevent economic crime, is going through the stages of UK legislation.<sup>76</sup> The Law, which was linked to the anti-corruption program,<sup>77</sup> was designed to deal with the phenomenon of corruption and

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<sup>72</sup> Barker & Elphick, *Crimes Legislation*, *supra* note 67 at 23–25.

<sup>73</sup> Israel Ministry of Justice, *Criminal Liability of Corporations*, *supra* note 24.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> UK, Ministry of Justice, *Corporate Liability for Economic Crime* (Cm 9370, 2017), online: <consult.justice.gov.uk/> [perma.cc/N5LB-MYVD] [Ministry of Justice, Corporate Liability].

<sup>77</sup> UK, HM Government, *UK Anti-Corruption Plan* (London, UK: 2014), online: <assets.publishing.service.gov.uk/government/uploads> [perma.cc/N64U-RRFH].

economic crimes such as money laundering, fraud,<sup>78</sup> and other offences.<sup>79</sup> A central argument of those who support this legislation is that a unified standard of corporate behaviour and a single measuring stick for enforcement should be created for all economic offences.<sup>80</sup> Although there are arguments in support of such an expansion,<sup>81</sup> those who oppose it claim that its imposition will weigh disproportionately on the business sector, when compared to the added efficiency inherent in it, by transferring to this sector the burden of evidence that it took reasonable measures to prevent such economic crimes.<sup>82</sup> The public debate on the issue continues. The legal advisor to the Conservative government in the UK expressed his opinion that the legislative process should continue expanding corporate criminal liability, arguing that “there is a strong case for the creation of a new corporate criminal offence of ‘failing to prevent economic crime’ and that it was time to set it in statute.”<sup>83</sup>

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<sup>78</sup> Ministry of Justice, *Corporate Liability*, *supra* note 76.

<sup>79</sup> For an opinion that the suggested law should impose a duty on corporations to prevent unauthorized access to their computerized systems and their use, or the use of the data stored on them for fraud, see Mark Fenhalls, “The Development and Future for ‘Failure to Prevent’ Offences” (2018), online: *Financier Worldwide* <[www.financierworldwide.com/the-development-and-future-for-failure-to-prevent-offences/#.XHRdzIgzZaT](http://www.financierworldwide.com/the-development-and-future-for-failure-to-prevent-offences/#.XHRdzIgzZaT)> [perma.cc/3E8V-KK8F].

<sup>80</sup> “CORE Submission to the Treasury Select Committee Economic Crime Inquiry” (last visited 22 April 2019), ss 2–3, online (pdf): CORE <[corporate-responsibility.org/wp-content/uploads/2018/05/CORE-TSC-Submission-on-Economic-Crime.pdf](http://corporate-responsibility.org/wp-content/uploads/2018/05/CORE-TSC-Submission-on-Economic-Crime.pdf)> [perma.cc/8JUF-QCK4].

<sup>81</sup> “Corporate Liability for Economic Crime: Submission from Transparency International UK” (2017), online: *Transparency International UK* <[www.transparency.org.uk/publications/ti-uk-submission-to-corporate-liability-for-economic-crime](http://www.transparency.org.uk/publications/ti-uk-submission-to-corporate-liability-for-economic-crime)> [perma.cc/6HNM-K4DX].

<sup>82</sup> “FSB Response to Corporate Liability for Economic Crime: Call for Evidence” (2017), online: FSB <[yeti.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-submission--corporate-liability-for-economic-crime--march-2017.pdf?sfvrsn=287ebc20\\_0](http://yeti.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-submission--corporate-liability-for-economic-crime--march-2017.pdf?sfvrsn=287ebc20_0)> [perma.cc/7WVR-A6P5]; Celia Wells, “Corporate Failure to Prevent Economic Crime: A Proposal” (2017) *Crim L Rev* 6:1 426 at 427; Sirajo Yakubu, *A Critical Appraisal of the Law and Practice Relating to Money Laundering in the USA and UK* (Doctoral Thesis, School of Advanced Study, University of London, 2017) [unpublished], online: <[sas-space.sas.ac.uk/6697/](http://sas-space.sas.ac.uk/6697/)> [perma.cc/NE49-DUP].

<sup>83</sup> Joe Watts, “Minister Says Time has Come for New Corporate Offence of ‘Failing to Prevent Economic Crime’”, *Independent* (18 March 2018), online: <[www.independent.co.uk](http://www.independent.co.uk)> [perma.cc/7V2B-WCBA]. See also David Green, *Address* (Speech delivered at the Pinsent Masons Regulatory Conference, 2014), London, UK: Serious Fraud Office, online: <[www.sfo.gov.uk/2014/10/23/david-green-cb-qc-speech-pinsent-masons-regulatory-conference/](http://www.sfo.gov.uk/2014/10/23/david-green-cb-qc-speech-pinsent-masons-regulatory-conference/)> [perma.cc/QEC9-HX3E].

This proposal does not mark the end of the road. The first steps toward expanding the trend and imposing similar prevention duties on corporations, in areas that deviate from economic delinquency and are related to social spheres, are currently taking shape. These steps were reflected in the recommendation of the Joint Human Rights Committee of the British Parliament, which, in 2017, proposed to consider imposing additional legal obligations on legal entities, including parent entities.<sup>84</sup> The goal of this proposal was to prevent violations of human rights in employment, such as child labour, in foreign countries.<sup>85</sup> But no such extension is currently being examined by the legislative authorities.<sup>86</sup> In light of this recommendation, in Australia, it was suggested to consider enacting an additional obligation for legal entities, regarding institutional failure, to prevent child sexual abuse.<sup>87</sup>

A certain formal similarity can be found in the structure of the duty and in the content of the defences that are available to the defendant, between the clauses of the duty of prevention discussed here and the obligations imposed in several legal systems by a group of offences in the areas of taxation, labour rights, environmental protection, etc. These clauses stipulate, in relatively similar terms, that when an offence was committed by a corporation, the senior management or the executive echelons of the management chain (manager, finance manager, other management entities) must also be charged, unless they prove that the offence was committed without their knowledge or that they took reasonable measures to prevent

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<sup>84</sup> UK, HL, HC, Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (Cm 153/443, 2017), online: <publications.parliament.uk/pa/jt201617.pdf> [perma.cc/8TBJ-EANM].

<sup>85</sup> *Ibid* at no 194: “The current criminal law regime makes prosecuting a company for criminal offences, especially those with operations across the world, very difficult, as the focus is on the identification of the directing mind of one individual, which is highly unlikely in many large companies. We welcome the Ministry of Justice’s current consultation on a new ‘failure to prevent’ offence for economic crimes. We regret that a range of other corporate crimes, for example use of child labour, were excluded from the consultation, and we urge the Ministry of Justice to consider a further consultation with a wider remit.”

<sup>86</sup> UK, HL, HC, Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability: Government Response to the Committee’s Sixth Report of Session 2016-17* (Cm 686, 2018) at 15–16, online: <publications.parliament.uk/pa/jt201719/jtselect/jtright/686/686.pdf> [perma.cc/EH68-4NGJ].

<sup>87</sup> Penny Crofts, “Criminalising Institutional Failures to Prevent, Identify or React to Child Sexual Abuse” (2017) 6:3 *Intl J for Crime, Justice & Soc Democracy* 104 at 116.

its commission.<sup>88</sup> Note that these offences, some of which are public welfare offences, deal primarily with the duties of the managerial staff. Such duties are not unique to corporations and are usually imposed on all employers. They correspond to the obligations imposed on individual employers, but in the case of corporations, the personal liability of the managers is added to the liability of the legal entity as yet another deterrent.<sup>89</sup> Control of meeting these obligations is entrusted to the employer (person or corporation) who is able, with relative ease, to order and supervise it through appropriate instructions. The offence of omission, however, which imposes on corporations a duty to prevent offences by associated persons, is not limited to such malfunctions alone.

The presumption is therefore that, in the areas of economic delinquency, there is a tendency by lawmakers to extend the criminal liability of corporations to cases and situations in which there is no parallel liability for human defendants. Indeed, there have been proposals to extend this duty to also include such areas as maintaining the rights of employees and their conditions of employment. The Ministry of Justice in Israel has gone farther, seeking to impose a general obligation on legal entities to prevent criminal conduct on the part of their associates in all areas of their activity.

A question arises whether others may be accused, as accomplices to the offence of non-prevention of crimes that are unique to corporations, based on the laws of complicity. Theoretically, this appears possible,<sup>90</sup> albeit problematic; in practice, this proposition loses meaning and raises some interpretive issues. First, the laws in question indicate the intention of the legislator to apply them explicitly to legal entities. The prosecution of another person for the offence derived from these laws is inconsistent with this intention. Moreover, in practice, the duty to prevent offences is

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<sup>88</sup> In Israel see e.g. *Youth Labour Law 1953* (Isr) s 38; *Employment of Women Law 1954* (Isr) s 15; *Dangerous Drugs Ordinance (New Version) 1973* (Isr) s 34; *Banking (Service to Customer) Law 1981* (Isr) s 11; *Income Tax Ordinance (New Version) 1961* (Isr) s 224(a).

<sup>89</sup> Eli Lederman, "Criminal Liability of Corporate Organs and Senior Officers of the Corporation" (1996) 5 *Plilim* (Israel J Crim Justice) 101 at 137. Lim Wen Ts'ai, "Corporations and the Devil's Dictionary: The Problem of Individual Responsibility for Corporate Crimes" (1990) 12:2/3 *Sydney L Rev* 311 at 344-45 noted that, with regard to the responsibility of senior management for corporate crimes, "there are areas in which it is felt that, because of the harm to society which may otherwise occur, higher levels of responsibility are imposed on individuals by the law than by morality."

<sup>90</sup> Laird, "Criminal Finances Act", *supra* note 53 at 938-39.

inherently intended to deal with situations in which the legal entity cannot be held liable for the offences of bribery or tax evasion under the laws of complicity.

These preventive duties also serve as an additional and complementary means of combatting the said corruption offences. If, in the circumstances of the case, there is an inciter or aider and abettor who acted intentionally or recklessly,<sup>91</sup> facilitating the commission of bribery or tax evasion offences, the need for such complementary means becomes superfluous; if, on one hand, the inciter or aider and abettor is an external person who is not part of the corporate organization, he may be directly accused of inciting or aiding and abetting in the granting of bribes or the evasion of taxes. On the other hand, if that person is an officer of the corporation, his behavior and state of mind may be attributed to the legal entity itself by virtue of the theory of the organs or by the *respondeat superior* theory. In this case, the legal entity itself becomes, in addition to that person, an inciter or aider and abettor of the commission of the offence of bribery or tax evasion. Even under these circumstances of direct involvement of the corporation in the offence committed by the principal offender, the means that the legal system grants by the duty to prevent the commission of the offences become equivalent to the duty prescribed by the laws of complicity and obviate the need for it. The uniqueness of these duties, imposed exclusively on corporations, is necessary in cases where a corporate officer assisted the illegal act of bribery or tax evasion without having the required *mens rea*. In these situations, it is impossible to resort to the law of complicity and the complementary duty to prevent these actions becomes apparent.

## II. JUSTIFICATIONS AND BACKGROUND FOR THE EXPANSION

### A. General

Three environmental factors, among others, serve as the basis and background for the expansion of corporate criminal liability: (a) norms of

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<sup>91</sup> For the judicial and academic analysis of, as well as debates on the precise elements of the accomplice's *mens rea* see e.g. Sherif Girgis, "The Mens Rea of Accomplice Liability: Supporting Intentions" (2013) 123:2 Yale LJ 460 at 468-43; John F Decker, "The Mental State Requirement for Accomplice Liability in American Criminal Law" (2008) 60:2 SCLR 237; Grace E Mueller, "The Mens Rea of Accomplice Liability" (1988) 61:6 S Cal L Rev 2169.

group responsibility, (b) signs of retreat from the requirements of the theory of organs, and (c) the development of theories of corporate governance and compliance. These factors belong to two different domains, although they overlap and intertwine to some degree. The first two are internal to the criminal domain; the third belongs to the broader social-legal circle. These three factors join other social-economic factors that provide special and immediate reasons for the enactment of the laws under discussion. These additional factors, like the fight against economic delinquency, the protection of fair commercial competition, and the struggle against black money, are not discussed in the present article.

As noted, the two factors belonging to the internal criminal domain that make possible the expansion of corporate criminal liability are (a) the very nature of penal law that provides an adequate ground for expanding group responsibility and (b) the practical difficulties of proving criminal intent based on the strict requirements of the theory of organs (which is one of the main methods of imposing liability on legal entities). To these two factors, it is possible to add a third that is not discussed in this article because it is a general phenomenon in penal law and not unique to legal bodies: the significant increase in the last decades of the category of criminal omissions,<sup>92</sup> which has traditionally been circumscribed and narrow.<sup>93</sup> Naturally, there has also been an increase in the active duties of corporations and together with them, the prevention obligations discussed above, which are unique to legal entities.

The factor belonging to the broader socio-legal domain concerns legal policy in general, in the wake of the development of legal-social-economic ideas that tend to expand corporate duties. This trend is rooted in the notion of corporate governance and its derivative, corporate compliance. Emerging attitudes and public expectations from corporations are affecting

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<sup>92</sup> Among those are issues like the duty to rescue, parental responsibility for minors' behaviour, failure to report, and other topics. See generally Melody J Stewart, "How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omissions Liability" (1998) 25:2 *Am J Crim L* 385; Ken Levy, "Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism" (2010) 44:3 *Ga L Rev* 607; Jeremy Waldron, "On the Road: Good Samaritans and Compelling Duties" (2000) 40:4 *Santa Clara L Rev* 1053; James Herbie DiFonzo, "Parental Responsibility for Juvenile Crime" (2001) 80:1 *Or L Rev* 1.

<sup>93</sup> See generally Graham Hughes, "Criminal Omissions" (1958) 67:4 *Yale LJ* 590; Otto Kirchheimer, "Criminal Omissions" (1942) 55:4 *Harv L Rev* 615; Andrew Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 *Law Q Rev* 424; Arthur Leavens, "A Causation Approach to Criminal Omissions" (1988) 76:3 *Cal L Rev* 547.



their social status and creating new norms of conduct and functioning for legal entities.

## B. The Internal Arena: General Criminal Law Policy

### 1. Norms of Group Responsibility

On the theoretical level, the issue of corporate criminal liability has always been part of collective criminal liability, probably because a corporation is by nature a type of collective. The scope of liability of individual group members has consistently been exceptional and groundbreaking in the criminal sphere. For example, accomplice liability makes it possible to regard an individual as having committed a certain offence, even if he has not committed any of its *actus reus* elements.<sup>94</sup> The liability imposed by penal law on all the parties to an offence, following the commission of an additional offence by one of them, also extends the scope of the original offence and such persons may be liable for the commission of the additional offence, even if they did not foresee it.<sup>95</sup> The limits of liability under the law against organized crime in Israel are also exceptional in this regard. They include the liability of service providers to the organization, increasing the maximum punishment for the commission of offences within the framework of the organization, and involve the wide-scale forfeiture mechanism of the fruits of the crime.<sup>96</sup> Similarly, the law imposes liability on any conspirator for the criminal conduct of another conspirator, even if it was carried out without knowledge of the former, as long as that conduct was committed in the course of the criminal conspiracy and for the purpose of promoting it.<sup>97</sup> This liability was cancelled in Israeli

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<sup>94</sup> CrimA 2247/10 *Yemini v State of Israel*, 64(2) PD 666 at 697–98 (2011); CrimA 5206/98 *Abud v State of Israel*, 52(4) PD 185 at 189 (1998); CrimA 2796/95 *Plunim v State of Israel*, 51(3) PD 388 at 403 (1997).

<sup>95</sup> In Israel, see e.g. the analysis of s 34A to the *Penal Law*, its aspects, and the liability that is prescribed under it in CrimA35/89 *Lugasi v The State of Israel*, 46(1) PD 235 (1991); CrimA 4478/03 *Portnoy v State of Israel*, 59(1) PD 97 at 109–10 (2004); CrimA 4424/98 *Silgado v State of Israel*, 56(5) PD 529 (2002).

<sup>96</sup> *Combating Criminal Organizations Law 2003 (Isr)* ss 2–20.

<sup>97</sup> In Israel, see e.g. CrimA 196/75 *Ben-Shoshan v State of Israel*, 30(3) PD 215 (1976); CrimA 196/75 *Zekzer v State of Israel*, 32(1) PD 701 (1978). See also SZ Feller, “Criminal Liability Without Action, on the Basis of What?” (1974) 29 *The Attorney* 19 (Hebrew).

law,<sup>98</sup> but it is still alive in Anglo-American law.<sup>99</sup>

These expansions are related to the development of crime and its ramifications today. But their roots appear to lie in the primal fear of the criminal potential of the group, compared to the more limited capabilities of individual perpetrators. In a dark, isolated alley, we would rather find ourselves facing a single large threatening individual than a group of them.

The encounters of individuals with legal entities are at times associated with similar feelings of discomfort, apprehension, and a sense of being treated with disrespect. The cases discussed above dealt with the liability of members of the group, whereas this article deals with the liability of the group itself. But this is an inevitable built-in difference. The absence of a separate identity of the group, in the cases mentioned above, leaves individual members as the only possible objects of liability and punishment for the conduct. By contrast, the personification of the entity, which made it entitled to rights and obligations in the first place, makes it a direct target of the public's feelings and the systemic response of criminal law to group liability, in addition to the individuals who committed the illegal conduct. As noted, this response is consistently exceptional and groundbreaking in its scope.

Feelings of uneasiness towards corporations are particularly prominent in the US.<sup>100</sup> In most cases, a legal body is perceived as having greater power, means, interests, and sway than a single human being.<sup>101</sup> This is apparently why the *Penal Code* is willing to impose excessive liability (including restrictions, duties, and restraints) on corporations as well as on individuals in groups involved in criminal activity. Since the beginning of the 21st century, these basic feelings have been reinforced by various factors,

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<sup>98</sup> *Penal Law*, *supra* note 36, s 499(b).

<sup>99</sup> Rollin M Perkins, "The Act of One Conspirator" (1974) 26:2 *Hastings LJ* 337; Matthew A Pauley, "The Pinkerton Doctrine and Murder" (2005) 4:1 *Pierce L Rev* 1; Damon Porter, "Federal Criminal Conspiracy" (2017) 54:4 *Am Crim L Rev* 1307 at 1327–28.

<sup>100</sup> See generally Bourree Lam, "Quantifying Americans' Distrust of Corporations", *The Atlantic* (25 September 2014), online: <[www.theatlantic.com/business/archive/](http://www.theatlantic.com/business/archive/)> [perm a.cc/7B4N-TMDZ]; Jason E Adams, Scott Highhouse & Michael J Zickar, "Understanding General Distrust of Corporations" (2010) 13:1 *Corporate Reputation Rev* 38 at 38; "Incorporating the Republic: The Corporation in Antebellum Political Culture" (1989) 102:8 *Harv L Rev* 1883 at 1889–92; Paul J Larkin Jr, "Funding Favored Sons and Daughters: Nonprosecution Agreements and 'Extraordinary Restitution' in Environmental Criminal Cases" (2013) 47:1 *Loy LA L Rev* 1 at 5–6, n 6.

<sup>101</sup> Ross B Grantham, "The Legitimacy of the Company as a Source of (Private) Power" in Kit Barker et al, eds, *Private Law and Power* (Oxford: Hart Publishing, 2016) at 239.

including scandals of enormous economic scale involving giant legal organizations such as Enron, Worldcom, Tyco, Healthsouth, Freddie Mac, and American International Group (AIG).<sup>102</sup> The scandals were compounded by the financial crisis of 2008<sup>103</sup> and by the legal response of law enforcement agencies toward large corporations, which was relatively lenient.<sup>104</sup> Such a response often goes hand in hand with controversial insinuations that caution must be exercised when bringing criminal charges against these corporations because of possible negative effects on the American economy and perhaps the economies of other countries.<sup>105</sup>

<sup>102</sup> For details of these scandals, see e.g. “The 10 Worst Corporate Accounting Scandals of All Time” (last visited 22 April 2019), online: *Accounting Degree Review* <[www.accounting-degree.org/scandals/](http://www.accounting-degree.org/scandals/)> [perma.cc/4YUH-YYL7]; William W Bratton & Adam J Levitin, “A Transactional Genealogy of Scandal: From Michael Milken to Enron to Goldman Sachs” (2013) 86:4 S Cal L Rev 783; Arthur E Wilmarth Jr, “Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street” (2013) 81:4 U Cin L Rev U 1283.

<sup>103</sup> US, United States Senate Permanent Subcommittee on Investigations, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse: Majority and Minority Staff Report* (Washington, DC: The Commission, 2011), online: <[www.hsgac.senate.gov/imo/media/doc/PSI REPORT - Wall Street & the Financial Crisis-Anatomy of a Financial Collapse \(FINAL 5-10-11\).pdf](http://www.hsgac.senate.gov/imo/media/doc/PSI%20REPORT%20-%20Wall%20Street%20&%20the%20Financial%20Crisis-%20Anatomy%20of%20a%20Financial%20Collapse%20(FINAL%205-10-11).pdf)> [perma.cc/WV82-2YBS]; Jeff Madrick, *Age of Greed: The Triumph of Finance and the Decline of America, 1970 to the Present* (New York: Knopf Doubleday Publishing Group, 2011); Michael Lewis, *The Big Short: Inside the Doomsday Machine* (New York, NY: WW Norton & Co, 2010).

<sup>104</sup> E.g., the use of Voluntary Deferred Prosecution Agreements (DPA) between the prosecution and the defence, which serves as an alternative to adjudication, in which the government agrees to stop criminal action in exchange for the defendant agreeing to meet certain conditions and requirements. See the references cited in nn 148–53; Candace Zierdt & Ellen S Podgor, “Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing” (2007) 96:1 Ky LJ 1.

<sup>105</sup> For an examination of the relations between corporations and enforcement agencies, the matter of “too big to be jailed”, and the criticism of such attitudes, see generally Sarah Childress, “Holder: Big Banks' Clout 'Has an Inhibiting Impact' on Prosecutions” (6 March 2013), online: *PBS* <[www.pbs.org/wgbh/frontline/article/holder-big-banks-clout-has-an-inhibiting-impact-on-prosecutions](http://www.pbs.org/wgbh/frontline/article/holder-big-banks-clout-has-an-inhibiting-impact-on-prosecutions)> [perma.cc/69BG-A597]. Cf US S 2544, *Ending Too Big to Jail Act*, 115th Cong, 2018, s 4 (introduced 14 March 2018 but was not passed), online: <[www.govtrack.us/congress/bills/115/s2544](http://www.govtrack.us/congress/bills/115/s2544)> [perma.cc/L9UJ-XD82]; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise With Corporations* (Cambridge, USA: Harvard University Press, 2014); Nick Werle, “Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review” (2019) 128:5 Yale LJ 1366; Nicholas Ryder, “‘Too Scared to Prosecute and Too Scared to Jail?’ A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK” (2018) 82:3 J Crim L 245.

From a somewhat different perspective, the expansion of group criminal liability, including corporate liability, may be considered not as an outcome of the concerns and apprehensions of society, but as a result of the full absorption of the corporations into the social fabric. The imposition of increased liability, in this respect, stems from the shattering of the imaginary barrier in the attitude of policy makers and of the public towards legal entities. Nowadays, we come across corporations in every area and aspect of our lives, and they have become embedded in our everyday experience. They no longer appear as entities that must be separated by legal boundaries and the liability that can be imposed on human beings no longer sets a ceiling for the liability that can be imposed on corporations.

Because society recognizes the enormous strength and capabilities of corporations in the economic and social spheres, demands and expectations of them have also risen. Certain social institutions in the criminal sphere, such as the probation service, have adapted to the nature and character of corporations.<sup>106</sup> With the development of the notion of corporate social responsibility (CSR),<sup>107</sup> the expectations and demands of corporations in the area of criminal liability have come to occasionally exceed that which is required of human beings. In this sense, societal expectations and demands can be regarded as a desire on the part of society to harness corporations to the array of structures that contribute to maintaining the public security and welfare: that is, to turn corporations into assistants of law enforcement agencies.<sup>108</sup>

## *2. Retreat from the Strict Requirements of the Theory of Organs*

Another factor operating at the internal criminal level, which advocates for expanding the basis of corporate liability, concerns the apparent retreat from the traditional basis for the theory of organs. This theory is the foundation for imposing corporate criminal liability in the English legal

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<sup>106</sup> See generally Christopher A Wray, “Corporate Probation Under the New Organizational Sentencing Guidelines” (1992) 101:8 Yale LJ 2017; Marjorie H Levin, “Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?” (1984) 52:4 Fordham L Rev 637; David Bergman, “Corporate Sanctions and Corporate Probation” (1992) 142 New LJ 1312.

<sup>107</sup> See generally Gerlinde Berger-Walliser & Inara Scott, “Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening” (2018) 55:1 Am Bus LJ 167; Eric C Chaffee, “The Origins of Corporate Social Responsibility” (2017) 85:2 U Cin L Rev 347.

<sup>108</sup> See the closing paragraph of this work.

system and other systems that have adopted it.

The theory of organs stipulates the imposition of criminal liability on corporations for *mens rea* offences by proving the awareness of one of its senior executive officers, who is responsible for formulating policy, of the possibility of committing the offence.<sup>109</sup> Because of their status, these executives are considered to be the directing mind and will of the corporation, and are regarded as its organs or alter ego. By a process of identification or attribution, their *mens rea* is examined as the mental state of the corporation itself.<sup>110</sup> The theory faces a clear built-in hurdle: “it is impossible to find a company guilty unless its alter ego is identified.”<sup>111</sup> This difficulty increases as the corporation becomes larger and management gets more complex or decentralized.<sup>112</sup>

Legislation regarding the imposition of special obligations on corporations, to prevent the commission of offences by others (discussed *above*), as well as additional laws and rulings on the subject matter of corporate liability (mentioned *below*), may be the result of an inclination to allow a deviation and retreat from the theory of organs and the identification principle as the basis for imposing criminal liability on legal entities in *mens rea* offences. This approach holds that “[t]he identification principle is an inadequate model for attribution to a corporate of criminal liability. It is unfair in its application, unhelpful in its impact and it underpins a law of corporate liability that is unprincipled in scope.”<sup>113</sup> The

<sup>109</sup> Brent Fisse & John Braithwaite, *Corporations, Crime, and Accountability* (Cambridge, UK: Cambridge University Press, 1993) at 47 et seq; Amanda Pinto & Martin Evans, *Corporate Criminal Liability*, 3rd ed (London, UK: Sweet & Maxwell, 2013) 35–61.

<sup>110</sup> For the basis of the theory in the UK, see generally *Lennard’s Carrying Co Ltd v Asiatic Petroleum Ltd*, [1915] AC 705 at 713, 113 LT 195 (HL (Eng)); *Tesco*, *supra* note 3 at 170–71, 187–88, 190–91, 200–01; *R v Andrews Weatherfoil Ltd*, [1972] 1 WLR 118, [1972] 1 All ER 65 (CA CrimD). For acceptance of the basic characteristics of the theory by the Canadian Supreme Court, with certain expansions of the term “directing mind” of a corporation, see e.g. *R v Canadian Dredge & Dock Co*, [1985] 1 SCR 662 at 693, 19 DLR (4th) 314 [Dredge]. See also *Rhône v Peter AB Widener*, [1993] 1 SCR 497 at 520–26, 101 DLR (4th) 188 [Rhône].

<sup>111</sup> *Attorney General’s Reference (No 2 of 1999)*, [2000] 3 All ER 182 at 190, [2000] 3 WLR 195 (CA CrimD) [Attorney General’s Reference].

<sup>112</sup> Robert Buckland, Address (Speech delivered at the 35th Cambridge Symposium on Economic Crime, 2017), Cambridge, UK: Attorney General’s Office, online: <[www.gov.uk/government/speeches/solicitor-generals-speech-at-cambridge-symposium-on-economic-crime](http://www.gov.uk/government/speeches/solicitor-generals-speech-at-cambridge-symposium-on-economic-crime)> [perma.cc/V337-VR5S].

<sup>113</sup> Alun Milford, “Control Liability: Is It a Good Idea and Does It Work in Practice?” (Speech delivered at the Cambridge Symposium on Economic Crime, 2016), London,

connection between the retreat from the requirements and the widening of the scope of liability is quite clear, but the will to expand the liability is the cause of the retreat from the strict demands of the theory of organs, not the result of it. This is contrary to the situation previously discussed regarding criminal law policy, in which the general criminal perception of group liability enabled and caused the expansion of corporate liability.

In the last two decades, it is possible to find support, in both legislation and case law, for a line of reasoning that justifies imposing criminal liability on corporations on a wider basis than the theory of organs does. The new approach advocates the softening of the definitions that undergird the traditional theory, by expanding the group of characters whose behavior and state of mind may be identified as that of the legal body.

The *Corporate Manslaughter and Corporate Homicide Act* of 2007<sup>114</sup> imposes criminal liability on a corporation if the way in which its activities are organized result in the death of a person and amount to a gross breach of a duty of care owed by the legal entity to the deceased.

Not limiting the imposition of liability on the legal body to cases related to an act or omission of a directing mind and will is not coincidental.<sup>115</sup> Expanding the base of liability is one of the purposes of the law: “The new offense allows an organization's liability to be assessed on a wider basis, providing a more effective means of accountability for very serious management failings across the organisation.”<sup>116</sup> A somewhat similar basic

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UK: Serious Fraud Office, online: <[www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/](http://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/)> [perma.cc/5WKM-EWZD]. For a similar approach see also Camilla de Silva, “Corporate Criminal Liability, AI and DPAs” (Speech delivered at the Hebert Smith Freehills Corporate Crime Conference, 2018), London, UK: Serious Fraud Office, online: <[www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/](http://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/)> [perma.cc/KZT4-3TXK]; Jenny Barker, “Casting the Net Wider: The Ongoing Expansion of Corporate Criminal Liability Carries New Risks for Legal Advisors”, *The Law Society Gazette* (6 March 2017), online: <[www.lawgazette.co.uk/practice-points/casting-the-net-wider/5060050.article](http://www.lawgazette.co.uk/practice-points/casting-the-net-wider/5060050.article)> [perma.cc/MTB4-8KZJ].

<sup>114</sup> Paul Almond, *Corporate Manslaughter and Regulatory Reform* (London, UK: Palgrave Macmillan, 2013) at 30.

<sup>115</sup> Yet, the Law stipulates that an organization is guilty of an offence under this section only if the way in which its activities are managed or organized by its senior management is a substantial element in the breach of the relevant duty of care owed by the organization to the deceased. See *Corporate Manslaughter and Corporate Homicide Act* (UK), 2007, s 1(3).

<sup>116</sup> UK, Ministry of Justice, *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (London, UK: Ministry of Justice, 2007) at 3, online: <[www.gkstill.com/Support/](http://www.gkstill.com/Support/)>

attitude follows from section 21 of the *Criminal Justice and Courts Act 2015*, which imposes criminal liability on a care provider (a body corporate or unincorporated association that provides or arranges healthcare for adults or children, or social care for adults) if a person is ill-treated or willfully neglected while under the care of another “by virtue of being part of the care provider’s arrangements”, and if “the care provider’s activities are managed or organized in a way which amounts to a gross breach of a relevant duty of care owed by the care provider to the individual who is ill-treated.”<sup>117</sup>

This approach shifts the focus away from individualistic aspects, in the process of attributing corporate liability through a focused identification process, toward a more comprehensive and holistic examination that emphasizes the general mechanisms of supervision and control over the actions of the legal body. The *Criminal Justice and Courts Act* goes even further. Unlike the corporate manslaughter offence, the *Criminal Justice and Courts Act* does not require “senior management” to be directly involved in managing or organizing the care provider’s activities in a way that amounts to a gross breach of a duty of care owed by the care provider to the ill-treated individual.<sup>118</sup>

The requirements of the corporate manslaughter offence are higher and more restrictive than those of the *Criminal Justice and Courts Act* from another perspective as well. Under the former, in the case of death (manslaughter), the legal entity is charged with the result of the defect in supervision rather than with a separate and independent offence of a fault in the control mechanism, as in cases of ill-treatment or willful neglect under the latter. The former requires proof of a causal link between the negligent or reckless corporate act or omission and the fatal outcome. The second does not ask for such a “but for” causation and it is content with proof of some causal connection between the corporate breach of duty and the ill-treatment or willful neglect of the person in their care. In the wording of the law, it must be proven that “in the absence of the breach, the ill-treatment or willful neglect would not have occurred or would have been

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Links/Documents/2007-justice.pdf> [perma.cc/CKS9-M36S]. For a general analysis of the law see Almond, *supra* note 114.

<sup>117</sup> *Criminal Justice and Courts Act* (UK) 2015, s 21(1)(a)–(b) [*Criminal Justice*].

<sup>118</sup> Andrew Smith, “The Changing Face of Corporate Criminal Liability” (14 December 2015), online (blog): *Corkerbinning* <[www.corkerbinning.com/the-changing-face-of-corporate-criminal-liability/](http://www.corkerbinning.com/the-changing-face-of-corporate-criminal-liability/)> [perma.cc/U5WN-8FQ2].

less likely to occur.”<sup>119</sup> The waiver of the demand for involvement of senior management in the misconduct and the lowering of the demands regarding the causation linkage expand even more than the scope of corporate criminal liability under the *Criminal Justice and Courts Act*.

In case law as well, there is mention of a broad approach that does not adhere to the fundamental elements of the theory of organs in its traditional scope and interpretation. In a civil case, the Privy Council (the highest Court of Appeal for several British independent Commonwealth nations, the Crown Dependencies, and the British Overseas Territories) addressed the liability of an investment management company for breaches of the *New Zealand Securities Amendment Act* of 1988, following a failure of two of its investment officers to disclose to the Securities Commission that the entity has become a “substantial security holder” of another corporation.<sup>120</sup> In its decision, the Privy Council took a similar expansive approach to that of the court of appeal which relaxed the strict demand for the identification doctrine, in addition to the established assumption that “different persons may for different purposes satisfy the requirements of being the company’s directing mind and will.”<sup>121</sup> Therefore, Lord Hoffmann, who heard both cases, emphasized in the Privy Council’s decision that in cases “in which the court considers that the law was intended to apply to companies and that... insistence on the primary rules of attribution would in practice defeat that intention... the court must fashion a special rule of attribution for the particular substantive rule.”<sup>122</sup> Thus, the court must hold that the thoughts and actions of relatively low-level employees are capable of being attributed to the entity.<sup>123</sup> This process of attribution, which stretches the identification doctrine to include a wider range of corporate officers, is conducted “by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and

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<sup>119</sup> *Criminal Justice*, *supra* note 117, s 21(1)(c). See also Karl Laird, “Filling a Lacuna: The Care Worker and Care Provider Offences in the Criminal Justice and Courts Act 2015” (2016) 37:1 Stat L Rev 1.

<sup>120</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission*, [1995] 2 AC 500, [1995] 3 All ER 918 (PC) [*Meridian*].

<sup>121</sup> *El Ajou v Dollar Land Holding Plc* (1993), [1994] 2 All ER 685 at 706, [1994] 1 BLLC 464 (Ct App CivD).

<sup>122</sup> *Meridian*, *supra* note 120 at 924.

<sup>123</sup> Jock Gardiner, “Arendt and Corporate Culture: Instilling Thoughtfulness into the Commonwealth Criminal Code” (2018) *Austl J Corp L* (Lexis) 3 at 7.



policy.”<sup>124</sup> The policy-based approach should be handled with caution and each case should be examined on its merits. Lord Hoffmann added a clear warning to the decision, stating “their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company.”<sup>125</sup>

In the *Meridian* case, the starting point of the Court was that, if a law permits the imposition of liability on a legal entity but the primary rules on the subject do not allow this in the circumstances of the case, there is room for action to achieve the purpose of the enactment.<sup>126</sup> The judicial tool for achieving this goal is an expansive interpretation and addition to the existing rules. The ruling of the court, however, did not receive much support in subsequent judicial decisions.<sup>127</sup> This later ruling reiterates that the structure proposed in the *Meridian* case bears a residual and complementary character, restricted to special cases in which the usual principles cannot be applied. In other words, it is not possible to identify the factors that are the directing mind and will of the entity, and attribute their conduct and state of mind to the legal entity.<sup>128</sup> This issue is discussed in the legal literature,<sup>129</sup> at times in a critical way, because its implementation implies a possibly significant expansion of corporate criminal liability.<sup>130</sup> Note, however, that the *Meridian* case, like the *Corporate Manslaughter Act*, deflects the examination from an analytical-pragmatic analysis, in which the minds that direct the corporation are examined as its alter ego, with a view toward a more flexible and context-specific analysis of the attribution process.<sup>131</sup>

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<sup>124</sup> *Meridian*, *supra* note 120 at 924.

<sup>125</sup> *Ibid* at 928. See Duygu Damar, “Breaking the Liability Limits in Multimodal Transport” (2012) 36:2 Tul Mar LJ 659 at 682.

<sup>126</sup> *Meridian*, *supra* note 120 at 924, 927.

<sup>127</sup> See, however, in this context, *Bilta (UK) Ltd (in liq) v Nazir*, [2015] UKSC 23.

<sup>128</sup> *Attorney General’s Reference*, *supra* note 111 at 192. See also *R v St Regis Paper Co Ltd*, [2011] EWCA Crim 2527.

<sup>129</sup> *Gardiner*, *supra* note 123 at 21–22.

<sup>130</sup> Eilis Ferran, “Corporate Attribution and Directing Mind and Will” (2011) 127:1 Law Q Rev 239 at 245.

<sup>131</sup> Jennifer Hill, “Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?” (2003) Vanderbilt University Law School: Law and Economics Working Paper No 03-10 at 13; Jennifer Payne, “Corporate Attribution and the Lessons of *Meridian*” in Paul S Davies & Justine Pila, eds, *The Jurisprudence of Lord*

A similar trajectory, and in some respects, an even sharper and more decisive one, has been followed by Canadian law in recent decades. As noted, the Supreme Court of Canada adopted the main tenets of the identification theory, while exercising and expanding the corporate organ group.<sup>132</sup> This was merely the first step in the process, however. In 2004, the legislature redefined the concept of senior officers, whose behavior is identified as that of a legal body.<sup>133</sup> The first part of the definition addresses the traditional organs of the legal body: “a representative who plays an important role in the establishment of an organization's policies.” The second part extends the scope of the definition to include also a ranking in the body hierarchy, which “is responsible for managing an important aspect of the organization's activities.”<sup>134</sup> This lower threshold, which does not stipulate any affiliation with the corporate organ group in establishing corporate policy, greatly increases the group<sup>135</sup> and allows embedding an intermediate level in the corporate hierarchy as well.<sup>136</sup>

Contrary to the emerging approach in the UK, the Canadian provision is not limited to special events and exceptional circumstances that require its activation. Instead, it is general legislation that applies in all situations. Expanding the limits of corporate criminal liability according to the Canadian statutory approach, beyond that which takes shape in the UK, brings it significantly closer to the approach of the *respondeat superior* doctrine of American law, which derives from the vicarious liability theory. The Supreme Court of Canada and scholars regard this approach as a fair

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*Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Oxford: Hart Publishing, 2015) at 357.

<sup>132</sup> See *Dredge*, *supra* note 110; *Rhône*, *supra* note 110.

<sup>133</sup> See *Criminal Code*, RSC 1985, c C-46, s 2 [*Criminal Code*, Canada]: “senior officer means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities.”

<sup>134</sup> *Ibid.*

<sup>135</sup> Todd Archibald, Kenneth Jull & Kent Roach, “The Changed Face of Corporate Criminal Liability” (2004) 48:3 *Crim LQ* 367 at 371.

<sup>136</sup> Darcy L. MacPherson, “Reforming the Doctrine of Attribution: A Canadian Solution to British Concerns?” in Stephen Tully, ed, *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar, 2005) 194 at 202; Darcy L. MacPherson, “The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization” (2015) 45:1 *Alta L Rev* 171 at 191; Todd Archibald, Ken Jull & Ken Roach, “Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer” (2014) 60:3 *Crim LQ* 386 at 391, 403 [Archibald, Jull & Roach, “Myriad Complexity”].

and efficient model, which is a middle ground between 'directing mind' and vicarious liability.<sup>137</sup> From this perspective, the approach also includes a movement towards the theory that imposes an obligation on the legal body to prevent the commission of offences by its associates and even takes it a step closer to a comprehensive perspective that imposes a general duty of action on a legal entity, within the limits of its inclusive activities and potential capabilities.

One might underestimate the root of the change resulting from both the expansion of the imposition of a duty on the legal entity to prevent the commission of offences and the approach that reduces the need for the theory of organs in its strict, traditional form: by indicating that the core of the prohibitions (bribery, tax evasion, money laundering, etc.) has not altered because of these changes (assuming that the spirit of the Meridian ruling will be adopted by case law). The prohibitions remained as they had been before and it is only the list of those who are bound by it that has grown.<sup>138</sup> This argument, however, minimizes the implications of the change, especially in the public context. The identification of those who are obligated and the nature of the obligation have a significant influence on corporate conduct and the formulation of business culture, bearing considerable weight in determining the status and image of corporations in society.

## **C. The External Arena: Corporate Compliance, Corporate Social Responsibility, and their Implications for Corporate Criminal Liability**

### ***1. Corporate Compliance and Corporate Social Responsibility***

The second basis for the expansion of corporate criminal liability lies outside the criminal system, in the spirit and growing influence that corporate compliance and CSR are exerting on the corporate world. Corporate compliance is an internal mechanism of policies, rules, practices, and processes that corporations design to monitor the level of compliance

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<sup>137</sup> *Dredge*, *supra* note 110 at 701; Archibald, Jull & Roach, "Myriad Complexity", *supra* note 136 at 388.

<sup>138</sup> Anna Gaudoin, "Failure to Prevent: The Future of Corporate Criminal Liability" (29 January 2018), online: *WilmerHale* <[www.wilmerhale.com/en/insights/blogs](http://www.wilmerhale.com/en/insights/blogs)> [perma.cc/86PL-VJ9B].

with the law in real time.<sup>139</sup> There is no complete agreement among researchers about the primary causes for the development of corporate compliance programs since the second half of the 20th century. Many have traced it back to the prosecution of a group of heavy electric equipment companies for antitrust violations at the beginning of the 1960s<sup>140</sup> and the requirement, in the late 1970s, of the *Foreign Corrupt Practices Act* that corporations develop internal controls to prevent corruption.<sup>141</sup>

“The contemporary compliance function serves a core governance function”<sup>142</sup> that includes all the rules and constraints applying to corporate decision making,<sup>143</sup> namely, the cultural-organizational infrastructure upon which corporate conduct is based. Corporate compliance is also a vehicle for the development of the unique obligation of corporate criminal liability. The demand to promptly report misconduct and violations of the law to appropriate enforcement authorities, not merely to prevent and detect such events, has resulted in the revision of corporate compliance programs. The great contribution of compliance programs to law enforcement, both

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<sup>139</sup> Baer, *supra* note 41 at 958. See also Memorandum from Larry D Thompson, Deputy Attorney General to United States Attorneys, Heads of Department Component (20 January 2003) *Principles of Federal Prosecution of Business Organizations*, online: <[www.americanbar.org](http://www.americanbar.org)> [perma.cc/5STT-GB8G]; Andrew Weissmann, “A New Approach to Corporate Criminal Liability” (2007) 44:4 *Am Crim L Rev* 1319 at 1338–39.

<sup>140</sup> Cristie Ford & David Hess, “Can Corporate Monitorships Improve Corporate Compliance?” (2009) 34:3 *J Corp L* 679 at 689; Charles J Walsh & Alissa Pyrich, “Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?” (1995) 47:2 *Rutgers L Rev* 605 at 650; Harvey L Pitt & Karl A Groskaufmanis, “Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct” (1990) 78:5 *Geo LJ* 1559 at 1578; Joan TA Gabel, Nancy R Mansfield & Susan M Houghton, “Letter vs Spirit: The Evolution of Compliance into Ethics” (2009) 46:3 *Am Bus LJ* 453 at 457–58.

<sup>141</sup> 15 USC § 78m(b)(2)(A) (1988); Pitt & Groskaufmanis, *supra* note 140 at 1580–82; Baer, *supra* note 41 at 962; Walsh & Pyrich, *supra* note 140 at 653. For another approach as to the origins of corporate compliance see Ashoke S Talukdar, “The Voice of Reason: The Corporate Compliance Officer and the Regulated Corporate Environment” (2005) 6:3 *UC Davis Bus LJ* 45 at 47–49.

<sup>142</sup> Sean J Griffith, “Corporate Governance in an Era of Compliance” (2016) 57:6 *Wm & Mary L Rev* 2075 at 2078.

<sup>143</sup> Harwell Wells, “The Birth of Corporate Governance” (2010) 33:4 *Seattle UL Rev* 1247 at 1252; Tom Baker & Sean J Griffith, “Predicting Corporate Governance Risk: Evidence from the Directors’ and Officers’ Liability Insurance Market” (2007) 74:2 *U Chicago L Rev* 487 at 516.

preventively and, if necessary, investigatively,<sup>144</sup> explains the sweeping support of enforcement agencies for the adoption of effective compliance mechanisms. Government authorities are not satisfied, however, to leave the matter of compliance at the discretion of the legal entities, but exert pressure on them to create such programs, at least in some areas.<sup>145</sup>

At times, in certain areas, corporate compliance becomes a legal obligation. In Israel, for example, since 2011, the law has required trust fund and investment portfolio management corporations to establish corporate compliance programs and imposes financial sanctions for avoiding adoption or confirmation of the provision by the directorate, within a certain time limit.<sup>146</sup> In other instances, the pressure is more moderate. In the US, following the practices of the Department of Defense, the authorities demanded government contractors to have a business and ethical code as a condition for establishing commercial relations with them.<sup>147</sup>

Government agencies exert pressure on corporations to adopt effective compliance programs by offering them special incentives. In the US, the law allows reducing the penalty on a convicted corporation if it can prove that it has established an effective corporate compliance program, in an effort to reduce criminal activity.<sup>148</sup> In Israel, the existence of an effective corporate

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<sup>144</sup> Richard S Gruner, “Preventive Fault and Corporate Criminal Liability: Transforming Corporate Organizations into Private Policing Entities” in Henry N Pontell & Gilbert Geis, eds, *International Handbook of White-Collar and Corporate Crime* (New York, NY: Springer, 2007) 279 at 279.

<sup>145</sup> See e.g. Christopher S Decker, “Corporate Environmentalism and Environmental Statutory Permitting” (2003) 46:1 *JL & Econ* 103 at 113–14, 126; Ethan H Jessup, “Environmental Crimes and Corporate Liability: The Evolution of the Prosecution of ‘Green’ Crimes by Corporate Entities” (1999) 33:3 *New Eng L Rev* 721 at 729–30.

<sup>146</sup> The Minister of Finance is authorized to determine regulations for ensuring the proper and efficient operation of this legal internal machinery. See “Israel: Detailed Assessment of IOSCO Objectives and Principles of Securities Regulation” (2012) at 133, online (pdf): <[www.elibrary.imf.org/doc/IMF002/12747-9781475503180/12747-9781475503180/Other\\_formats/Source\\_PDF.pdf](http://www.elibrary.imf.org/doc/IMF002/12747-9781475503180/12747-9781475503180/Other_formats/Source_PDF.pdf)> [perma.cc/R2KW-E9S5].

<sup>147</sup> Larry D Thompson, “In-Sourcing Corporate Responsibility for Enforcement of the Foreign Corrupt Practices Act” (2014) 51:1 *Am Crim L Rev* 199 at 220–21; 48 CFR §§ 3.1003, 52.203–213 (2018).

<sup>148</sup> US, United States Sentencing Commission: *Guidelines Manual 2016* (§ 3E1.1) (Washington, DC: USSC, 2016), § 8C2.5(f), online: <[www.ussc.gov/sites/default/files/pdf/>](http://www.ussc.gov/sites/default/files/pdf/>) [perma.cc/YKT2-L56X]; Blake Weiner et al, “Corporate Criminal Liability” (2018) 55:4 *Am Crim L Rev* 961 at 966; Claire A Hill, “Caremark as Soft Law” (2018) 90:4 *Temp L Rev* 681 at 687.

compliance program and a culture of cooperation with the enforcement authority can serve as a consideration in the recommendations, of the securities authority, to the prosecution of whether to initiate administrative or criminal proceedings for certain corporate securities violations.<sup>149</sup>

The most concrete expression of pressure from the authorities is the application of tools and concepts from the plea-bargaining world to compliance programs. Entities that have failed to uphold the law and have been prosecuted, or those under suspicion and investigation, are highly vulnerable. The authorities often take advantage of this situation to increase the pressure on corporations and demand improved internal control and supervision mechanisms. Pretrial Diversion Agreements (PDAs) are compromises that soften or nullify, in full or in part, the measures the authorities take against such corporations in exchange for, among others, the establishment or consolidation of an effective compliance mechanism.

In the UK, a law enacted in 2013 allows certain enforcement authorities to sign PDAs concerning charges of bribery and fraud.<sup>150</sup> The public has an interest in the formation of such agreements and in their substantive terms, and they are subject to judicial approval. PDAs can postpone the hearing in the indictment of a corporate entity in exchange for its agreement to several terms; primarily accepting a financial penalty, paying compensation, and committing to full cooperation with the authorities. Such cooperation includes the maintenance of an internal compliance mechanism designed to prevent, locate, and report to the enforcement agency any legal violations in the activities of the corporation.<sup>151</sup> If the corporate entity meets its obligations during the period of postponement and pays the fines and compensations, if any have been imposed, the charges are not brought before the court.

American law has gone even further in its incentives and actions.<sup>152</sup>

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<sup>149</sup> Zvi Gaggbay, *Administrative Enforcement in Israeli Securities Laws* (Tel Aviv, Israel: Borsi, 2012) at 512. See, in this connection, *Securities Law 1968* (Isr), s 52(65).

<sup>150</sup> *Crime and Courts Act* (UK), 2013, s 45.

<sup>151</sup> UK, Serious Fraud Office, *Deferred Prosecution Agreements* (Guide) (London, UK: SFO, last visited 14 April 2019), online: <[www.sfo.gov.uk](http://www.sfo.gov.uk)> [perma.cc/UJ9J-TTT7]. Regarding the level of cooperation expected from an entity in a DPA agreement, see de Silva, *supra* note 113.

<sup>152</sup> For an empirical analytical review of the American approach to pretrial agreements, see generally Cindy R Alexander & Mark A Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements" (2015) 52:3 *Am Crim L Rev* 537.

First, under appropriate circumstances, it also makes use of Non-Prosecution Agreements (NPAs), refraining from filing charges if the legal entity admits to the wrongdoing, waives a limitation claim against such charges, pays a fine or compensation, and obligates itself to comply with the program and cooperate with the authority. NPAs are similar to DPAs, but they are not reviewed by a court because of the early stage in which they are agreed upon. If the corporate entity breaches the agreement, the prosecutors can restart the case and use the admissions that are part of the NPA in the proceedings.<sup>153</sup>

In the US, the use of non-prosecutions and deferred prosecutions has increasingly resulted in the appointment of corporate monitors, at the expense of the corporation. Monitors are individuals of public stature, with knowledge and experience in the field in which the corporation is active, appointed for a defined period, and agreed upon by the investigating authority and the corporation involved in the improper conduct.<sup>154</sup> The corporate monitor plays a dual role: (a) ensures, supervises, and reports to the enforcement authority on the degree of compliance and fulfillment of the terms and obligations assumed by the corporation as part of the non-prosecution or deferred prosecution,<sup>155</sup> and (b) serves as a supervisor, responsible for initiating changes and improvements in the internal control system of the legal entity, to prevent conflicts with the law during his tenure.<sup>156</sup> Recently, Canada has also adopted the main aspects of the US approach.<sup>157</sup> In the words of Justice Rakoff, the corporate monitor plays the

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<sup>153</sup> Jennifer Arlen & Marcel Kahan, "Corporate Governance Regulation Through Non-Prosecution" (2017) 84 U Chicago L Rev 323 at 336, n 42. For the admission by the corporation to wrongdoing, see e.g. Brandon L Garrett, "Corporate Confessions" (2008) 30:3 Cardozo L Rev 917 at 922.

<sup>154</sup> See generally, Khanna & Dickinson, *supra* note 41.

<sup>155</sup> Thomas F O'Neil III & Brendan T Kennedy, "Answering to A Higher Authority: Sovereign-Mandated Oversight in the Board Room and the C-Suite" (2012) 17 Fordham J Corp & Fin L 299 at 310; Ford & Hess, *supra* note 140 at 683, 692.

<sup>156</sup> *SEC v WorldCom Inc*, 273 F Supp (2d) 431 at 432 (NY Dist Ct 2003) [SEC]; Khanna & Dickinson, *supra* note 41 at 1720; Peter Spivack & Sujit Raman, "Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements" (2008) 45:2 Am Crim L Rev 159.

<sup>157</sup> The Canadian version of these agreements, referred to in the Criminal Code as a "Remediation Agreement Regime", came into force in 2018. See Canada, Department of Justice, *Remediation Agreements and Orders to Address Corporate Crime* (Backgrounder) (last modified 11 September 2018), online: <[www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html](http://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html)> [perma.cc/GZ

2P-8AAT]. The purpose of the agreements is, among others, to create “incentives for corporations to self-report and encourage stronger corporate compliance”. See Public Services and Procurement Canada, *Canada to Enhance its Toolkit to Address Corporate Wrongdoing* (News Release) (27 March 2018), online: <[www.canada.ca/en/public-services-procurement/news](http://www.canada.ca/en/public-services-procurement/news)> [perma.cc/5JPT-NAF8]. See *Criminal Code*, Canada, *supra* note 133, s 715.34(3)(c) (the Canadian regime may also include the nomination of an independent monitor, whose duty is “to verify and report to the prosecutor on the organization’s compliance with the obligation referred to in paragraph (a), or any other obligation in the agreement identified by the prosecutor...”). See also Glen Jennings & Matthew Doak, “Canada Moves Forward with a Remediation Agreement Regime” (21 September 2018), online: *mondaq* <[www.mondaq.com/canada/white-collar-crime-anti-corruption-fraud/738578/canada-moves-forward-with-a-remediation-agreement-regime](http://www.mondaq.com/canada/white-collar-crime-anti-corruption-fraud/738578/canada-moves-forward-with-a-remediation-agreement-regime)> [perma.cc/VV2N-X7LW]. Indeed, the use of DPAs conceals certain deficiencies and the potential to exert inappropriate pressure, political by nature, interfering with prosecutorial independence in the matter. A prime example is the unfolding scandal concerning the Canadian Prime Minister, Justin Trudeau.<sup>(i)</sup> It has been argued that Trudeau attempted to entice former Attorney General, Jody Wilson-Raybould, to enter into a DPA with the construction and engineering giant, SNC-Lavalin,<sup>(ii)</sup> and even forgo the prosecution of that corporation, which is based in an area considered to be his political stronghold.<sup>(iii)</sup> The Federal Ethics Commissioner of Canada, Mario Dion, found that, with respect to the Prime Minister’s conduct, partisan political interests were improperly put to the Attorney General for consideration in the matter,” and thus amounted to an infringement under section 9 of the Conflict of Interest act.<sup>(iv)</sup>

- (i) For a detailed description of the affair see e.g. Mark Gollom, “What you Need to Know About the SNC-Lavalin Affair”, *CBC News* (13 February 2019), online: <[www.cbc.ca/news](http://www.cbc.ca/news)> [perma.cc/WCR3-Q66W].
- (ii) Sukanya Pillay, “SNC-Lavalin: Deferred Prosecution Deals Aren’t Get-Out-of-Jail Free Cards”, *The Conversation* (18 March 2019), online: <[theconversation.com/snc-lavalin-deferred-prosecution-deals-arent-get-out-of-jail-free-cards-113095](http://theconversation.com/snc-lavalin-deferred-prosecution-deals-arent-get-out-of-jail-free-cards-113095)> [perma.cc/9NJH-NN5W].
- (iii) Adrian Wyld, “PMO Pressed Wilson-Raybould to Abandon Prosecution of SNC-Lavalin; Trudeau Denies His Office ‘Directed’ Her” *The Globe and Mail* (7 February 2019), online: <[www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/](http://www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/)> [perma.cc/9N9E-2JM8] (last visited 22 November 2019). For a transcript of the opening remarks by former Attorney General, Jody Wilson-Raybould, before the House of Commons Justice Committee see “Jody Wilson-Raybould’s Testimony: Read the Full Transcript of Her Opening Remarks”, *Global News* (28 February 2019), online: <[globalnews.ca/news/5006450/jody-wilson-raybould-testimony-transcript/](http://globalnews.ca/news/5006450/jody-wilson-raybould-testimony-transcript/)> [perma.cc/U82Z-74E2].
- (iv) Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report* (last modified 13 August 2019), online: <[ciecccie.parl.gc.ca/en/investigations-enquetes/Pages/TrudeauIIReport-RapportTrudeauII.aspx](http://ciecccie.parl.gc.ca/en/investigations-enquetes/Pages/TrudeauIIReport-RapportTrudeauII.aspx)> [perma.cc/AF9J-YJUX].



role of a watchdog,<sup>158</sup> watching, supervising, and reporting to the enforcement authority as its representative, despite being paid by the corporation.<sup>159</sup> From a different perspective, the appointment represents the outsourcing or delegation of a supervisory function from the enforcement authorities to an entity that, strictly speaking, is not part of the internal corporate hierarchy, to assist in achieving the objectives of correction, enforcement, and compliance with the law on the part of the corporation. Even if the corporate monitor is not directly involved in determining corporate policy, as the representative of the enforcing authority, he has an influence, however slight and indirect, over the manner in which the corporation operates. The presence of the monitor imposes more conservative conduct in the way the corporation manages its chain of supervision and execution. It results in more cautious management, with wider margins of security and fewer risks. The ensuing prudent management has some weaknesses, together with its advantages. To some extent, it deters the legal entity from a more assertive and imaginative mode of operation, which could lead to greater innovation.

Such similar considerations, coupled with the pro-business atmosphere currently prevailing in the US administration and economic considerations relating to the high cost of monitors, may have led the authorities to reconsider their strong support for the corporate monitoring institution.<sup>160</sup> Although the enforcement authorities have not yet announced a change in their approach, they have recently shown greater willingness to forgo the demand to nominate corporate monitors in non-prosecution or deferred prosecution agreements, in favour of self-evaluation and reporting requirements. This is evident from an analysis of the cases processed in the past year.<sup>161</sup> The Gibson Dunn 2018 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements report

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<sup>158</sup> SEC, *supra* note 156 at 432.

<sup>159</sup> On the active role of the corporate monitors' activity, see e.g. Root, "Monitor-'Client' Relationship", *supra* note 41 at 526–27, 540: "A portion of a monitor's role is as a partner to the corporation in its efforts to ensure long-term compliance".

<sup>160</sup> For additional doubts on the functioning of corporate monitors, see e.g. Lawrence A Cunningham, "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform" (2014) 66:1 Fla L Rev 1 at 68–69.

<sup>161</sup> "2018 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements" (10 July 2018), online (pdf): *Gibson Dunn* <[gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf](http://gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf)> [perma.cc/HYA7-C6W5].

suggested that “these agreements support a view that the stronger and more robust an existing compliance program, and the swifter and more dramatic a company's remediation of identified compliance gaps and misconduct, the more likely DOJ will look favorably upon self-reporting, rather than a corporate monitor.”<sup>162</sup>

Concurrently with the tendency to curtail direct involvement in the regulation and supervision of the activity of the corporation in points where it meets the law, the long-standing incentives given to corporations are being increased to strengthen their cooperation with the enforcement authorities on their own initiative. The goal of achieving compliance with the law and cooperation with its enforcers remains the same. The way to achieve it, however, does not necessarily require the direct involvement of a representative within the corporate hierarchy, but rather relies on preserving control over compliance with the law at the executive levels and providing management with the right incentives for doing so.

More than two decades ago, discussing the alleviations granted by the Sentencing Guidelines for Organizations in calculating the penalties imposed on corporations that establish an effective compliance program,<sup>163</sup> Chancellor Allen noted that the guidelines constitute “powerful incentives for corporations... to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to make prompt, voluntary remedial efforts.”<sup>164</sup> A similar spirit of encouragement to formulate effective corporate compliance programs, with familiar incentives to facilitate the stages of investigation, prosecution, and punishment, is also evident in statements by senior law enforcement officials who propose that corporations adopt such programs as a condition for future negotiations and plea bargaining.<sup>165</sup> As part of these incentives, scholars have also suggested granting some form of

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<sup>162</sup> *Ibid* at 10.

<sup>163</sup> Kevin B Huff, “The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach” (1996) 96:5 Colum L Rev 1252. *Re Caremark Int'l*, 698 A (2d) 959 at 969 (Del Ct Ch 1996).

<sup>165</sup> In the US, see US, Department of Justice, Criminal Division, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (20530) (Washington, DC: DOJ, 2016), online: <[www.justice.gov/](http://www.justice.gov/)> [perma.cc/GS28-BHR6]; Veronica Root, “Coordinating Compliance Incentives” (2017) 102:4 Cornell L Rev 1003 at 1014; Geoffrey P Miller, “The Compliance Function: An Overview” (2014) New York University School of Law Research Paper No 14-36, online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2527621](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621)> [perma.cc/TE9H-6YDA]. In the UK see de Silva, *supra* note 113.

protection, in whole or in part, to prosecuted corporations that adopt such programs.<sup>166</sup> Compliance mechanisms will not eradicate the phenomenon of delinquency by corporations,<sup>167</sup> but it is reasonable to assume that these mechanisms can reduce, to some degree, the scope of illegal activity by these entities.<sup>168</sup>

Corporate compliance, initially conceived as part of the corporate governance environment, is now firmly attached to “the concurrent intensification of organizational criminal liability.”<sup>169</sup> As such, corporate compliance serves, at times, as the basis for enforcing wider obligations on legal entities than those that can be imposed on individuals under similar circumstances and can be regarded as a form of probation, so that both mechanisms can be used against corporations.<sup>170</sup> The goals of corporate compliance and probation are similar, as both are applied mostly *ex ante* to prevent future misconduct and their focus on past misconduct is much reduced.

Corporate compliance seeks to achieve its objectives by using two basic and partially overlapping actions: (a) internally supervising and self-policing the activities of the entity and its constituents and (b) reporting illegal findings to the enforcement authorities.<sup>171</sup> The aims, and the means to achieve them, are identical with those of probation, but the intensity of the efforts invested in achieving these aims is not. As part of corporate structure, the corporate compliance mechanism is more integrated with the corporate management and operation and involved in functions such as internal control and audits. Consequently, its inspection is continuous, tighter, and more extensive than that of probation. Since the enactment of the *Sarbanes-*

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<sup>166</sup> See generally Ellen S Podgor, “A New Corporate World Mandates a ‘Good Faith’ Affirmative Defense” (2007) 44:4 Am Crim L Rev 1537; Peter J Henning, “Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act” (2012) 73:5 Ohio St LJ 883; Andrew Weissman & David Newman, “Rethinking Corporate Criminal Liability” (2007) 82 Ind LJ 411 at 450–51. Cf Walsh & Pyrich, *supra* note 140 at 661–62.

<sup>167</sup> Lauren Verseman, “Corporate Social Responsibility: Are Franchises off the Hook, or Can a Treaty Catch Them?” (2017) 16:1 Wash U Global Study L Rev 221 at 235, n 83.

<sup>168</sup> Walsh & Pyrich, *supra* note 140 at 661.

<sup>169</sup> Cunningham, *supra* note 160 at 14.

<sup>170</sup> See the sources cited, n 106. On court-ordered corporate probation see also, Root, “Monitor-‘Client’ Relationship”, *supra* note 41 at 538–41.

<sup>171</sup> See US, Securities and Exchange Commission, Division of Enforcement, *Enforcement Manual* (Washington DC: Securities and Exchange Commission, 2017), online: <[www.sec.gov/divisions/enforce/enforcementmanual.pdf](http://www.sec.gov/divisions/enforce/enforcementmanual.pdf)> [perma.cc/92UE-8S2D].

Oxley Act in 2002, corporate compliance has intensified.<sup>172</sup>

Probation is initiated only following legal proceedings, whereas corporate compliance can be voluntarily activated, which enforcement authorities strongly encourage. There are also indications that the efficiency of corporate compliance is much appreciated by law enforcement agencies. Senior law enforcement agents expressed the view that they may renounce the demand, in legal proceedings, to impose probation on legal entities “that can demonstrate [that] they have adopted or strengthened existing compliance programs.”<sup>173</sup>

The importance of corporate compliance is also apparent in the shift of emphasis from external to internal supervision and control. This is especially significant “[g]iven the complex, far-reaching, and often decentralized nature of the modern publicly held firm[s],”<sup>174</sup> on one hand, and the difficulties revealed in the capacities of the enforcement authorities to supervise them, on the other. Under these circumstances, the assistance of the legal entities themselves is vital for achieving compliance.<sup>175</sup> Such assistance is provided by insiders who have close knowledge and contact with the supervised area. The necessity for such assistance intensifies in investigations of fraud and other white-collar crimes, typical of corporate

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<sup>172</sup> On the impact, significance, and analysis of this Act, see generally, Wilma H Fletcher & Theodore N Plette, *The Sarbanes-Oxley Act, Implementation, Significance and Impact* (New York, NY: Nova Publishers, 2008); Edward F Greene, Leslie N Silverman & David M Becker, *The Sarbanes-Oxley Act: Analysis and Practice* (New York, NY: Aspen Publishers, 2003).

<sup>173</sup> Brent Snyder, *Compliance is a Culture, Not Just a Policy* (Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Workshop, 9 September 2014), Washington, DC: US Department of Justice, online: <[www.justice.gov/atr/file/517796/download](http://www.justice.gov/atr/file/517796/download)> [perma.cc/7LT6-2BVE]. See also Mark L Krotoski, “DOJ Warning About Corporate Compliance Programs, Probation, and External Compliance Monitors” (7 November 2014), online: *JD Supra* <[www.jdsupra.com/legalnews/doj-warning-about-corporate-compliance-p-66501/](http://www.jdsupra.com/legalnews/doj-warning-about-corporate-compliance-p-66501/)> [perma.cc/5G26-YK5B].

<sup>174</sup> Jennifer Arlen, “Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms” in Anthony S Barkow & Rachel E Barkow, eds, *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York & London: New York University Press, 2011) 62 at 70.

<sup>175</sup> *Ibid* at 70–71. See also “Summary: Developments in White Collar Criminal Law and the Culture of Waiver” (2009) 14 Berkeley J Crim L 199 at 201 [“White Collar Criminal Law”].

crime, which often pose severe tracing problems.<sup>176</sup>

The social-legal movement of CSR or good corporate citizenship has been evolving in parallel with the emerging structures of corporate compliance.<sup>177</sup> Some define CSR generally as “the responsibility of enterprises for their impacts on society.”<sup>178</sup> Others prefer to regard it as the “continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.”<sup>179</sup> Some regard CSR and good corporate citizenship as alternative terms for the same subject matter,<sup>180</sup> whereas others distinguish between the two, emphasizing that corporate citizenship is having “more connotations of privileges... rather than duties, as connoted by the term ‘corporate social responsibility’”.<sup>181</sup>

Both terms refer to activities within the corporate “inner community” and for it (e.g. on behalf of the workforce), as well as activities exceeding that range. Each term also may apply to mandatory activities or include also voluntary contributions. For the purpose of this article, it is sufficient to determine that, according to a common view, voluntary activity of the

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<sup>176</sup> See “White Collar Criminal Law”, *supra* note 175; Samuel W Buell, “Criminal Procedure Within the Firm” (2007) 59:6 Stan L Rev 1613 at 1627.

<sup>177</sup> Firuza S Madrakhimova, “Evolution of the Concept and Definition of Corporate Social Responsibility” (2013) 8:2 Global Conference on Bus & Fin Proceedings 113 at 113–14, online: <[www.academia.edu/5366859/Evolution\\_of\\_The\\_Concept\\_and\\_Definition\\_of\\_Corporate\\_Social\\_Responsibility](http://www.academia.edu/5366859/Evolution_of_The_Concept_and_Definition_of_Corporate_Social_Responsibility)> [perma.cc/5QL8-M5LQ].

<sup>178</sup> EC, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, [2011] OJ, Com 681/1 at 6, online: <[www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2011\)0681\\_/com\\_com\(2011\)0681\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf)> [perma.cc/5669-8K53].

<sup>179</sup> Richard Holme & Philip Watts, *Corporate Social Responsibility: Making Good Business Sense* (Conches-Geneva, Switzerland: World Business Council for Sustainable Development, 2000) at 8, online: <[www.ceads.org.ar/downloads/Making%20good%20business%20sense.pdf](http://www.ceads.org.ar/downloads/Making%20good%20business%20sense.pdf)> [perma.cc/4DFB-XM3T].

<sup>180</sup> William L Thomas, “Rio’s Unfinished Business: American Enterprise and the Journey Toward Environmentally Sustainable Globalization” (2002) 32:8 Environmental L Reporter 10873 at 10879. See also Stacy L Hawkins, “A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality” (2012) 2:1 Columbia J Race & L 75 at 79; Catherine Lee & John D Skrentny, “Race Categorization and the Regulation of Business and Science” (2010) 44:3/4 Law & Soc’y Rev 617 at 622.

<sup>181</sup> See e.g. Cynthia A Williams, “A Tale of Two Trajectories” (2006) 75:3 Fordham L Rev 1629 at 1633, n 18.

corporate entity, especially for society at large, is a key area common to both concepts.<sup>182</sup> The social concerns for corporate business operations and interactions are, at times, referred to as “beyond compliance.”<sup>183</sup> Often, these actions focus on the relations of the corporation with the community, its ethical behavior, and its philanthropic contribution to society, in consideration for the permission to operate within it.<sup>184</sup>

The idea of promoting social goals through commercial corporations is also an answer to the purely capitalist approach, focused on maximizing profit. Assigning commercial legal entities an additional task in the social arena means giving a supplementary dimension of social sensitivity to their essence and redefining their purpose.<sup>185</sup> Their goal may be defined as achieving financial profit, in addition to advancing social ends. At times, these objectives can be integrated.<sup>186</sup>

It is evident that the development of the CSR doctrine, like that of corporate governance, is pointing to a growing intensification of the social presence of corporate bodies in modern life and it grows out of the same legal-social ground that produces the inclination to impose expanded criminal liability on them, exceeding human responsibility.

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<sup>182</sup> Including the mandatory element part of the description of the terms blurs the boundary between them and corporate compliance. For the inclusion of the element of duty in the traditional approach of corporate social responsibility, see Berger-Walliser & Scott, *supra* note 107 at 202–06; Dirk Matten & Andrew Crane, “Corporate Citizenship: Toward an Extended Theoretical Conceptualization” (2005) 30:1 *Academy Management Rev* 166 at 167.

<sup>183</sup> For the use of this and similar terms in this sense, see e.g. Paul R Portney, “The (Not So) New Corporate Social Responsibility: An Empirical Perspective” (2008) 2:2 *Rev Environmental Economics & Policy* 261 at 261–65, 273, online: <academic.oup.com> [perma.cc/V7CS-4FUH]; Cynthia Estlund, “Just the Facts: The Case for Workplace Transparency” (2011) 63:2 *Stan L Rev* 351 at 360; Larry E Ribstein, “Delayering the Corporation” 2012:2 *Wis L Rev* 305 at 326–27.

<sup>184</sup> For possible utilitarian reasons for such activities, see Portney, *supra* note 183 at 273; Carol Liao, “A Canadian Model of Corporate Governance” (2014) 37:2 *Dalhousie LJ* 559 at 575.

<sup>185</sup> See on this topic Michael E Porter & Mark R Kramer, “Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth” (2011) 89:1/2 *Harvard Bus Rev* 62. Porter & Kramer believed that “the concept of shared value – which focuses on the connections between societal and economic progress – has the power to unleash the next wave of global growth”.

<sup>186</sup> For example, in such areas as professional training or the employment of disabled people.

## 2. *Implications for Corporate Criminal Liability*

Together, corporate compliance and CSR (or good corporate citizenship) form a continuum of corporate commitments, partly mandatory and partly voluntary. This structure may support the approach that imagines corporations, especially the most powerful among them, as personalities that, in some respects, act as private governments.<sup>187</sup> The description of some aspects of globalization as a process in which large corporations accumulate significant strength at the expense of the state perhaps reaches too far.<sup>188</sup> But there seems to be no doubt that the enforcement authorities are gradually transferring certain policing powers to corporations. The transfer process and the continuum of commitments are closely intertwined, and, at times, it is unclear which one is the cause of the other. The two apparently nurture one another. The process involves three gradually evolving stages and serves as the background that enables and, to some extent, encourages the extension of criminal corporate liability. The three stages are corporate compliance, administrative orders, and criminal liability.

### i. Corporate Compliance

At first, the delegation of powers from the enforcement authorities was similar to a focused process, limited and narrow in scope, which could be described as a continuation of the development of corporate compliance. The enforcement authorities recognize that the complex enforcement work often requires assistance from agents, ordinarily not engaged in enforcement, including collaborators and assistants. Such assistance is especially effective where agents enjoy the advantage of familiarity and contact with the supervised area and, where possible, the ability to influence its operation. This is the reason why enforcement authorities encourage the establishment of corporate compliance monitoring mechanisms, while providing incentives and benefits to legal entities that do so.<sup>189</sup>

### ii. Administrative Orders

In time, the enforcement authorities started to coerce corporations, to

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<sup>187</sup> Roman Tomasic, "Corporations as Private Governments in the Shadow of the State: The Boundaries of Autonomy" (2014) 29:3 *Austl J Corp L* 275. See also Arthur Selwyn Miller, *The Modern Corporate State: Private Governments and the American Constitution* (Connecticut, US: Greenwood Press, 1976) at 127.

<sup>188</sup> For an analysis of such a theory, see generally Tomasic, *supra* note 187.

<sup>189</sup> See the references cited in nn 156–64, 167–71.

some degree, to cooperate in monitoring their own compliance. The duty imposed in Israel on firms operating in the capital market, by means of administrative orders, to assist the authorities in preventing money laundering and financing terrorism is an example of this stage of administrative enforcement, which is semi-criminal in nature. This financial regulation requires those authorized to engage in the capital market to verify the identity of their customers and examine the sources of the funds in transactions.<sup>190</sup> Almost all actors in the financial industry (banks, financial services, insurers, provident funds, stock exchange members) are licensed businesses and most of them are legal entities.<sup>191</sup> In addition to these obligations, these entities also bear a special obligation to report to the competent enforcement authority on any deposit, receipt, withdrawal, payment, conversion, or transfer of funds above a certain amount and any action that deviates from customary patterns.<sup>192</sup> The sanction for violations of the orders is administrative: the imposition of financial sanctions by a committee whose decisions can be appealed to the courts.<sup>193</sup>

### iii. Criminal Liability

In a further expansion of the policing duties imposed on corporations, ordinary criminal liability was imposed on legal entities to prevent the offences discussed above.<sup>194</sup> Liability for omission has been called indirect liability.<sup>195</sup> The “lack of directness” is expressed not only in the distance of active involvement from the activity, which is characteristic of all omissions, but also in the low level of guilt required to impose liability on corporations

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<sup>190</sup> For some aspects of the Know Your Customer (KYC) rules see e.g. JC Sharman, *The Money Laundry: Regulating Criminal Finance in The Global Economy* (Ithaca, US: Cornell University Press, 2011) at 11–12, 17–28, 70–71, 176–77; Dan Ryan, “FinCEN: Know Your Customer Requirements” (7 February 2016), online: *Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu> [perma.cc/D4CQ-LWQZ].

<sup>191</sup> See the references cited in nn 11–12; *Control of Financial Services (Regulated Financial Services) Law 2016* (Isr) ss 16, 25(b); *Control of Financial Services (Provident Funds) Law 2005* (Isr) s 4.

<sup>192</sup> See e.g. *Prohibition on Money Laundering Law 2000* (Isr) s 7(b); *Prohibition on Money Laundering (The Banking Corporations’ Requirement Regarding Identification, Reporting, and Record-Keeping for the Prevention of Money Laundering and the Financing of Terrorism) Order 2001* (Isr) ss 10(b)–13.

<sup>193</sup> *Prohibition on Money Laundering Law 2000* (Isr) ss 12–20; *Prohibition on Money Laundering (Financial Sanction) 2001* (Isr).

<sup>194</sup> See s A of this article.

<sup>195</sup> Liz Campbell, “Corporate Liability and the Criminalisation of Failure” (2018) 12:2 L & Financial Markets Rev 57.



for the said omissions.<sup>196</sup>

Thus, the expansion of corporate compliance, which is becoming the favourite tool of law enforcement agencies, complements the good corporate citizenship idea and establishes a trend that views corporations as an effective tool for enforcing the law. The contributions that corporations make to law-enforcement agencies are the cause for the tendency to extend this range of assistance to additional areas.

### III. THINKING ALOUD

There is apparently no single, general cause for expanding the criminal liability of legal entities beyond the personal responsibility of human beings. This phenomenon is apparently the result of several background factors discussed in this paper and a series of individual factors that are outside of our scope. Their cumulative influence contributed to the creation of an appropriate legal-social environment that enabled its development.

It is possible to examine the process that motivates the expansion of criminal liability of legal entities beyond that of human liability from two different angles. One way to approach this examination is to view the expansion as an additional, gradual burden imposed by governments on corporations, by coercing them through threats and incentives, to assist the authorities in enforcing the law. This is the stick and carrot concept<sup>197</sup> that results in cooperation through criminalization.<sup>198</sup> This line of reasoning preserves the former, independent and separate status of the enforcement authorities and legal entities. Taking this reasoning to the extreme, an

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<sup>196</sup> See the references cited in nn 57–58 and accompanying text.

<sup>197</sup> US, United States Sentencing Commission, *Corporate Crime in America: Strengthening the 'Good Citizen' Corporation: Proceedings of the Second Symposium on Crime and Punishment* (Washington, DC: USSC, 1995), online: <[www.uscc.gov/sites/default/files/pdf/training/organizational-guidelinespecial-reports](http://www.uscc.gov/sites/default/files/pdf/training/organizational-guidelinespecial-reports)> [perma.cc/65YY-AQ4Q]; Michelle M Harner, "Corporate Control and the Need for Meaningful Board Accountability" (2010) 94:3 Minn L Rev 541 at 545, 598. See also "The Federal Sentencing Guidelines for Organizations at Twenty Years: A Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs" (2012), online (pdf): Ethics Resource Center <[www.theagc.org/docs/f12.10.pdf](http://www.theagc.org/docs/f12.10.pdf)> [perma.cc/589N-388Y].

<sup>198</sup> Campbell, *supra* note 195 at 39, n 151. Campbell cites Garry Gray, "The Regulation of Corporate Violations: Punishment, Compliance, and the Blurring of Responsibility" (2006) 46 Br J Crim 875 for a similar trend in the area of workplace health and safety, where the regulation of corporate violations has moved to "regulation through individual responsibility".

inspector, on behalf of the enforcement authority, is integrated in the corporate hierarchy, with the function to promote compliance with the law, within the framework of self-policing by the legal entity, and report violations to the enforcement authorities. This strategy, taken to the extreme, has given the enforcement authorities a permanent and active representation in the management of the corporation (corporate monitor).<sup>199</sup>

Another angle of observation reflects a different line of reasoning and strategy. From this point of view as well, the objective remains to increase criminal enforcement among legal entities. But, in contrast with the previous reasoning, this approach seeks to bring the corporations closer to the government and enforcement agencies, slightly blurring the lines of separation between them. According to this approach, which presupposes the caring or responsible attitude of legal entities (“responsibilization” strategy)<sup>200</sup> and the goodwill that underlies the ideas of CSR or good corporate citizenship,<sup>201</sup> the government authority grants (or delegates) enforcement powers, in certain areas, also to corporations,<sup>202</sup> without forfeiting the possibility of exercising them itself, and requires corporations to carry out this task by means of a criminal threat. Thus, the volunteering aspect is losing ground in favor of a more compulsory approach, perhaps because of the fear that the scope of voluntary assistance is not sufficient. Under the threat of prosecution, the corporation, in certain areas, turns into a messenger or agent and, to some extent, into an executive arm of the government enforcement authority.

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<sup>199</sup> On the issues of corporate monitoring and self-evaluation and reporting, see the references cited in nn 154–64 accompanying text.

<sup>200</sup> See e.g. David Garland, “The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society” (1996) 36:4 *Brit J Crim* 445 at 452, 454 (discussing the emergence of a new mechanism of crime control with the assistance of various non-state agencies. The “primary concern [of this strategy] is to devolve responsibility for crime prevention on to agencies, organizations and individuals which are quite outside the state and to persuade them to act appropriately.” This strategy makes the law enforcement agencies more powerful, “with an extended capacity for action and influence.”

<sup>201</sup> See the references cited in nn 177–86 and accompanying text.

<sup>202</sup> See Kenneth A Bamberger, “Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State” (2006) 56:2 *Duke LJ* 377 at 381.