CORPORATE CRIMINAL LIABILITY, THE EXCEPTION NOT THE RULE

by

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For many years, corporate criminal liability has been the subject of debate by a multitude of legal scholars. While a debate raged on the appropriate approach to be followed when holding companies liable, others still pondered why we have corporate criminal liability in the first place given that alternatives exist to achieve the real purpose of corporate criminal liability. This dissertation will, firstly, look at the current approaches to criminal liability as well as the shortcomings of these approaches. Furthermore, this dissertation will investigate the primary purpose of corporate criminal liability and argue that there are alternative means of achieving the end that corporate criminal liability had envisaged. It will be argued that the most desirous point of departure will be to hold the directors personally (criminally and civilly) liable for crimes committed by them. It is submitted that it is the directors and not the company that should be subjected to punishment for the crimes that result from the directors' intentional or negligent misconduct. Furthermore, it is argued that if the current approaches to corporate criminal liability continue to be followed, shareholders will ultimately bear the financial burden when a company is found guilty of criminal liability, even in an instance where there is no direct link between them and the company. This dissertation considers appropriate circumstances where holding a company liable will be preferred as well as a suggested approach by which to hold companies responsible. It will also argue that when a company is criminally charged, it should be able to raise a defence in an instance where rogue agents commit crimes. Finally, brief consideration will be given to the appropriate sanction to be utilized when a company is found criminally liable.

Key words: Corporate criminal liability; directors; shareholders; punishment; deterrence; sanctions.

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1. Introduction

Corporate criminal liability has been the subject of much debate for many years by various authors such as Wilkinson, Farisani, Hill, Weissmann, Wheelwright, Khanna, Kraakman, Borg-Jorgenson, Van der Linde and many others. All have contributed fascinating views as to the appropriate theory of corporate criminal liability. However, it is evident from the literature that different schools of thought exist with regards to corporate criminal liability.

As a result, of the various views of the authors above, we are still in the midst of uncertainty with regards to the use and application of corporate criminal liability.[1] This is because different approaches to corporate criminal liability have been developed over the years, such as the approaches flowing from the derivative theory of corporate criminal liability as well as the organisational approach to corporate criminal liability.[2] However, these theories still do not answer with sufficient certainty the question of why we need corporate criminal liability at all.[3]

This dissertation will, firstly, examine the current approaches to corporate criminal liability. The reason for this examination is to highlight the characteristics of these approaches and to emphasize their flaws. I will, however, not argue in favour of any of the approaches of corporate criminal liability.

Secondly, and probably the focal point of this dissertation is to determine what corporate criminal liability envisage achieving. This envisaged goal of corporate criminal liability is of vital importance as it will give us an indication of whether we should hold a company or its decision makers liable.

This will thus trigger an investigation as to who the actual target of corporate criminal liability is, i.e., whose conduct do we wish to deter or punish with corporate criminal liability, the company, its agents or directors or shareholders? Once we have identified who the target of corporate criminal liability is, it would then be possible to determine the way forward.

Thirdly, the dissertation will examine alternative forms of liability, aside from corporate criminal liability. Here I will argue in favour of holding the directors personally (civilly or criminally) liable.

Fourthly, the dissertation will consider, which in my view is paramount, the circumstances under which corporate criminal liability will find appropriate application. In this regard, I am of the opinion that the current approaches are not efficiently formulated to address corporate crimes. I

[1]Tigar "It does the crime but not the time. Corporate criminal liability in Federal law" 1990 *American Journal of Criminal Law* 211 215 "It is difficult to prove that a particular theory of corporate criminal responsibility enhances compliance, redresses victim harm or deters others."

[2]The derivative theories are Respondeat superior, vicarious liability and the identification theory. The organisational theory is also known as the corporate culture approach.

[3]Khanna "Corporate criminal liability: what purpose does it serve?" 1996 *Harvard Law Review* 1477 1485.

thus propose a different approach by combining the thought processes of certain authors, tempered with my view on the matter.

Furthermore, I suggest that a general legislative provision be formulated in an attempt to encapsulate the essence of my approach. In addition to this, I also provide a defence which a company may raise against a claim of corporate criminal liability where the criminal conduct was committed by a rogue director, agent or employee.

Finally, albeit briefly, this dissertation will also consider the appropriate sanction to impose upon a company found to be criminally liable. The crux of this study is, thus, to argue against general corporate criminal liability, and by extension, the approaches used to perpetuate its application, and to hold that it should only apply to companies in limited instances where specific requirements are met.

2. Approaches to corporate criminal liability

I will now as an introductory note, discuss the manner in which South Africa, the United States of America, Australia and the United Kingdom with particular reference to England, regulate corporate criminal liability. Furthermore, I will briefly discuss the shortcomings of these respective approaches. The principle of vicarious liability is deeply rooted in the jurisprudence of American and South African law. However, these jurisdictions differ in their application of the principle of vicarious liability, and I view it necessary to discuss how vicarious liability applies differently in the two jurisdictions above.

2.1 Vicarious liability in South Africa

Corporate criminal liability in South Africa is based on the doctrine of vicarious liability which is codified in section 332(1) of the Criminal Procedure Act.[4] According to this provision any *commissio* performed by, or *omissio* of, a servant or director of the company in the exercise of his or her power or performance of his or her duties or in furthering or endeavouring to further the interest of the company, with or without a particular intention, shall be deemed to have been performed by the company or be the omission of the company.[5]According to Borg-Jorgensen and Van der Linde,[6] this section makes the company liable for acts and omission which are *intra vires* as well as *ultra vires,* by imputing the liability of an employee or director of the company. In this regard, the authors view that the section goes beyond the mere nominalist theory of vicarious liability.[7]

[4]51 of 1977.
[5] Borg-Jorgensen and Van der Linde "Corporate criminal liability in South Africa time for a change? (part 1)" 2011 *TSAR* 452 456.
[6] Borg-Jorgensen and Van der Linde (n 2) 452 456.
[7] Borg-Jorgensen and Van der Linde (n 2) 452 457.

The traditional theory of vicarious liability holds a company liable for acts or omissions of agents and employees within the scope of their employment or authority.[8] This does not mean that it is necessary for the agent to have some "instruction or authorization" to partake in the conduct.[9] English courts were reluctant to introduce the civil law concept of vicarious liability into the realm of criminal law as it was deemed to be unjust to punish and condemn an individual for the acts of another without first determining whether the first individual is culpable.[10] In *Mousel Bros Ltd v London and North-Western Railway Co*[11] it was held that a principal should not be held liable for the acts of his agent.[12]

Moreover, this approach to corporate criminal liability does not look at the rank of the individual whose conduct is imputed to the company.[13] Thus, the unlawful conduct of any company employee is sufficient to hold the company liable without a determination of the fault of the company.[14] In this regard, the seniority of the company agent is not a relevant factor to take into account when holding a company liable, unlike in the case of the identification theory.[15]

2.2 Shortcomings of vicarious liability

According to Wilkinson, the doctrine of vicarious liability is simultaneously too broad and too narrow[16], and I will give a brief insight into Wilkinson's view. It being narrow stems from the fact that the fault of the company is derived from the conduct of an individual employee or agent of the said company without an investigation as to the fault of the company itself.[17] Thus, the state is not burdened with proving the blameworthiness of the entity as it derives the blameworthiness of the company directly from its agents or employees, of any rank or office, and imputes it to the company.[18]

Secondly, it is too wide as the fault of the corporation is limited to an employee or agent of the company even when the fault of the corporation may be much deeper and much wider than the fault of a particular individual.[19] One of the most important criticisms against vicarious criminal

[8]Farisani "Corporate homicide: what can South Africa learn from recent developments in English Law?" 2009 *CILJSA* 210 212.
[9] Colvin "Corporate personality and criminal liability" 1995 *Criminal Law Forum* 1 7.
[10]Wilkinson "Corporate criminal liability- the move towards recognizing genuine corporate fault" 2003 *Canterbury Law Review* 142 149.
[11][1917] 2 KB 836.
[12]Wilkinson (n 10) 149.
[13]Wilkinson (n 10) 150.
[14]Wilkinson (n 10) 150.
[15]Farisani "The regulation of criminal liability in South Africa: A close look (part 1)" 2006 *Obiter* 263 265
[16]Wilkinson (n 10) 150.
[17]Colvin (n 9) 8 and Wilkinson (n 10) 150.
[18]Farisani (n 15) 26.
[19] Colvin (n 9) 8 and Wilkinson (n 10) 150.

liability is that some individuals (such as the shareholders) are inevitably punished for the wrongs of others.[20]

2.3 Corporate criminal liability in the United States of America: *Respondeat Superior* (let the master answer)

The approach that has been followed in the United States of America is similar to the South African model of vicarious liability. In terms of the doctrine of *respondeat superior*, the principal and agents are jointly and severally liable for the acts committed by agents and employees within the scope of their employment, whose conduct the company has a legal right to control.[21] It stems from the logic that a company is simply a legal and fictitious person that can only act through its agents and employees, for which it should be held responsible.[22]

According to Weissmann, this is a form of vicarious liability, which when applied within the criminal sphere, can have severe effects.[23] The doctrine of "vicarious corporate criminal liability" in America has seen convictions even in cases where the agent acted *ultra vires* and in direct violation and contradiction of the company's policies and rules.[24]

The successful application of this doctrine requires that three prerequisites should be met.[25] Firstly, an agent or employee, regardless of his rank within the company, must have committed an unlawful act with the requisite state of mind, and such state of mind will be imputed to the company.[26] However, the American theory of vicarious liability goes further than the South African theory. In America, this particular state of mind need not necessarily be vested in one individual, but can be found in a group of people who collectively have the required state of mind necessary for conviction.[27]

The second requirement that must be met is that the employee or agent must act within the scope or authority of his employment.[28] According to Weissmann, this requirement has become invisible due to its expensive interpretation.[29] Khanna is of the view that companies will be held liable even for those acts committed by employees and agents, from which they were forbidden.[30]

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[20]Hasnas "The centenary of a mistake: one hundred years of corporate criminal liability" 2009 *American Criminal Law Review* 1329 1358.
[21]Kraakman "vicarious liability and corporate civil liability" 1999 http://encyclo.findlaw.com/3400book.pdf (08-07-2015) 669 671.
[22]Weissmann "A new approach to corporate criminal liability" 2007 *American Criminal Law Review* 1319 1319.
[23]Weissmann (n 22) 1319.
[24]Weissmann (n 22) 1319.
[25]Khanna (n 3) 1489.
[26]De Maglie "Models of corporate criminal liability in comparative law" 2005 *Washington University Global Studies Law Review* 547 553.
[27]Khanna (n 3) 1489.
[28]Khanna (n 3) 1489.
[29]Wiessmann (n 22) 1320.
[30]Khanna (n 3) 1489.

The final requirement is that the employee's conduct must be in the furtherance of the company's interest.[31] Khanna, however, notes that it does not need to be shown that the company received a benefit from the unlawful conduct, the mere fact that the act was in the furtherance of the company's interest seems to be sufficient for liability, provided that the requirements above are met.[32] The American doctrine is similar to vicarious liability in South African law, however, there is a subtle difference in that the aggregation principle[33] forms part of the American jurisprudence.[34]

2.4 Shortcomings of *respondeat superior*

Respondeat superior suffers from the same shortcomings as the doctrine of vicarious liability as applied in South Africa. According to Weissmann, the application of *respondeat superior* gives prosecutors an unfair advantage over the company under investigation[35]in that it is much "easier to obtain a conviction if the prosecution does not need to prove a culpable mental state".[36] Furthermore, it seems, he is also of the view that the actions of a low ranking employee should not be sufficient enough to trigger criminal liability for the corporation.[37] Finally, much like the South African model of vicarious liability, the company is not left with a defense and is not able to show that it has policies in place to prevent the unlawful act.[38] Some scholars are of the view that corporate criminal liability, as expressed in *respondeat superior*, are contrary to the punishment purpose of criminal law because it relies on vicarious guilt rather than a personal fault.[39]

2.5 Corporate criminal liability in England: The Identification theory

According to the identification theory, the conduct of those individuals who are in control of the company is identified as the conduct of the company.[40] This theory does not impute the fault of every agent or employee on the company, but only the fault of a high ranking individual with general or specific authority over the company's affairs.[41] Also included within the scope of the

[31]Farisani (n 18) 265.
[32]Khanna (n 3) 1490.
[33]Wilkinson (n 10) 162. The principle of aggregation "could involve taking the commission of the *actus reus* by one individual and matching it with the *mens rea* of another, or, if the offence requires a particular level of knowledge or negligence, by aggregating the knowledge or negligence of a group of individuals".
[34] Lederman "Criminal law, perpetrator and corporation: Rethinking a complex triangle" *1985 Journal of criminal law and criminology* (*J. Crim. L. & Criminology*) 285 293.
[35]Weissmann (n 22) 1320. This is because a company's criminal liability can be triggered by the unlawful conduct of any individual. This advantage is enhanced by the fact that a criminal indictment can have harmful consequences for a corporation, such as a drop in the stick price of the company. Thus, a company will attempt to avoid a criminal trial.
[36]Levenson "Good faith defences: Reshaping strict liability crimes" 1993 *Cornell Law Review* 401 403.
[37]Weissmann (n 22) 1320.
[38]Weissmann (n 22) 1320.
[39] Wagner "Corporate Criminal Character" 2013 *Florida Law Review* 1293 1298.
[40] Wheelwright "Goodbye directing mind and will, hello management failure: A brief critique of some new models of corporate criminal liability" 2006 *Australian Journal of Corporate law* 1 3.
[41] Sullivan "Expressing corporate guilt" 1995 *Oxford Journal of Legal Studies* 281 282.

so-called "directing mind and will" [42] of the company is any official delegated by the board of directors who is capable of exercising unfettered power.[43]

The person who is regarded as being the "directing mind and will" of the company is not simply acting as a representative or agent of the company, but he or she is, for all intents and purposes, the company itself.[44] The basis of the identification theory is that where certain (high ranking) officers have acted with the required fault, that fault will be imputed to the company.[45] It is in this regard that the identification theory stems as a derivative model of corporate criminal liability. The wrongdoers themselves are identified as the corporation, thus, so the argument goes, the company is personally rather than vicariously liable. [46]

The identification theory is similar in effect to vicarious liability as both theories require the initiation of an offence by a natural person and imputes the liability of such person to the company.[47] Thus, Wheelwright points out that the identification theory may simply be a variation of the doctrine of vicarious liability.[48]

2.6 Shortcomings of the Identification theory

This theory will only be useful in companies with small management structures where the "directing mind and will" of the company is also those in charge of the general management functions of the company.[49] However, in companies with larger and more complex structures and hierarchies the identification theory will be largely ineffective.[50] The reason for this is that the board of directors is responsible for policy and decision making in the company, however the execution of day to day functions is often left to managers who are not necessarily deemed to be the "directing mind and will" of the company. This theory will also be problematic in large companies that have offices in various locations and countries each with its policy and procedures taking into account the relevant legal system of the jurisdiction in which they operate.

A further weakness of the identification theory is that the individuals that are said to be the "directing mind and will" of the company are typically senior officials, and it will have no application where an unlawful act is committed at the so-called "ground level".[51] Furthermore,

[42] *Lennard's Carrying Co Ltd v Asiatic Petroleum* Co Ltd [1915] AC 705.
[43] Wheelwright (n 40) 3.
[44] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 ER 127.
[45] Wilkinson (n 10) 151.
[46] Wilkinson (n 10) 151.
[47] Colvin (n 9) 13: "The simplest and most sensible explanation is that identification theory is a modified form of vicarious liability, under which the liability of a restricted range of personnel is imputed to a corporation".
[48] Wheelwright (n 40) 3.
[49] Wheelwright (n 40) 4.
[50] Wilkinson (n 10) 154.
[51] Wilkinson (n 10) 151.

the identification theory does not embody the principle of aggregation.[52] Thus, this theory fails to consider that the unlawful act of the company is not merely an individual decision but may lie in several individuals through policies and procedures.[53] The fact that this theory seeks to identify a person as the "directing mind and will" of the company in a given situation is misguided as this is virtually impossible in larger companies.[54]

2.7 Corporate criminal liability in Australia: based on organizational fault:

There is a new era of corporate criminal liability originating in Australia, which is focused on the "corporate culture" of the company.[55] This is the so-called realist theory of corporate criminal liability.[56] According to Hill, the Australian model of corporate criminal liability is a demonstration of the move toward recognising the concept of "corporate blameworthiness" in the sphere of criminal liability.[57] This principle is embodied in part 2.5 of the Australian Criminal Code of 1999 (hereinafter referred to as the Code).[58] The Code approaches corporate criminal liability from a realist view rather than a nominalist theory.[59] The essence of the code is that a company is capable of having an intent which stems from the "corporate culture" of the company in question.[60]

As the corporate culture of the company seems to be the basis of this radical theory introduced under the Code, its meaning merits attention. "Corporate culture" means "an attitude, policy, rule, course of conduct or practice existing within the company in which the relevant activities take place".[61] From this it is clear that one must, firstly, look at the relevant conduct complained of. Thereafter, there must be a determination of which department or at which level the activities which caused the conduct complained of took place.[62] Finally, it must be considered whether the company had sufficient policies and rules to deter, detect and prevent the conduct complained of.[63] If it can be proved that such policies, which embodies the "corporate culture" of the company,

[52] Borg-Jorgensen and Van der Linde "Corporate criminal liability in South Africa time for a change? (part 2)" 2011 *TSAR* 684 686.
[53] Borg-Jorgensen and van der Linde (n 52) 686 and Gobert "Corporate criminality - four models of corporate fault" 1994 *Legal studies* 393 395 http://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf (08-07-2015).
[54] Farisani (n 8) 222.
[55] Hill "Corporate criminal liability in Australia An evolving corporate governance technique" 2003 *Journal of Business Law* 1 6.
[56] Wilkinson (n 10) 173.
[57] Hill (n 55) 6.
[58] Wilkinson (n 10) 173.
[59] Wilkinson (n 10) 173.
[60] Wilkinson (n 10) 173.
[61] Wilkinson (n 10) 174.
[62] Wilkinson (n 10) 174.
[63] Hill (n 55) 6.

"encouraged tolerated, or at a minimum, did not discourage such conduct" the company will be found to be guilty based on the organizational policies.[64]

Therefore, the so-called "corporate culture" regime looks to investigate the role the procedures and policies within the organization played in the commission of any conduct.[65] It is therefore not a hierarchy or department specific, but seeks to target the way in which the company conducts its affairs and whether the company promotes of discouraging unscrupulous affairs at any level.

2.8 Shortcomings of corporate culture:

Difficulties arise in obtaining evidence of corporate culture as well as to determine the culture of the company at any given time.[66] Furthermore, the company may be held liable even where the entire company is compliant, but a single department or branch has permitted or failed to enforce its policies and procedures.[67] This is particularly relevant with large entities with disbursed operations and several branches, not only in the country of incorporation but also in other countries.[68]

Moreover, "the corporate culture" approach is flawed by the fact that it will work more efficiently in smaller companies. However, it seems that in larger companies with disbursed operations in various locations the application of this approach may encounter some complications.

3. Purpose of criminal law

To investigate the purpose of corporate criminal liability, it is necessary to establish the main goals or purposes of criminal law.

The primary objectives of criminal law are to deter and punish conduct that is unlawful.[69]According to Weissmann, criminal law is reserved for conduct that is deemed so gross that it warrants the severest punishment.[70] According to Khanna, the purpose of criminal law, which was not furthered by corporate criminal liability relating to crimes of intent, is the punishment of the moral blameworthiness of an individual.[71]

[64] Hill (n 55) 20; Wilkinson (n 10) 174.
[65] Wilkinson (n 10) 174.
[66] Allen Arthur Robinson "Corporate culture as a basis for the criminal liability of corporations" 2008 http//198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf 17 (08-07-2015).
[67] Allen Arthur Robinson (n 66) 17.
[68] Allen Arthur Robinson (n 66) 70.
[69] Weissmann (n 22) 1324.
[70]Hasnas (n 20) 1329.
[71]Khanna (n 3) 1485.

3.1 Deterrence as the aim of criminal law:

The purpose of deterrence is twofold namely general deterrence and specific deterrence.[72] The purpose of general deterrence refers to the effect of punishment of a particular individual on the larger part of society, especially those members who wish to engage in similar activities.[73] Thus, the essence of general deterrence seeks to have an exemplary effect, "obey the law or face the consequences". Specific deterrence refers to those situations where the law seeks to deter a particular individual from performing certain unlawful acts using incapacitation, through incarceration, of the individual.[74].

3.2 Punishment as the aim of criminal law:

Hasnas would limit the purpose of the criminal law to that of punishment: "[criminal] law is designed to punish".[75] As far as he is concerned the criminal law should not be influenced by civil law principles.[76] The author further states that there needs to be a component of moral blameworthiness for the criminal sanctions to have application.[77] Thus, he affirms that the purpose of criminal law, which according to him is punitive, limits its imposition to individuals who have the abovementioned moral blameworthiness.[78] Even if the rationale for punishment is deterrence, it is morally vulgar to punish innocent family members of the offender, even if doing so would have a tremendous deterrent effect.[79] Along with the punitive function, criminal law may still carry with it a retributive element.

3.3 Retribution as the aim of criminal law

"Retribution justifies imposing sanctions on those who have acted in a blameworthy manner".[80] Weissmann states that by punishing the wrongdoer for his or her reprehensible or immoral conduct, the criminal law still serves, albeit the extent is not determined, a retributive function.[81] However, Khanna holds that deterrence and not retribution is the goal which criminal liability, as well as civil liability, seeks to achieve.[82] According to Weissmann retribution is reserved for those who,

[72]Weissmann (n 22) 1320.
[73]Weissmann (n 22) 1325.
[74]Weissmann (n 22) 1325.
[75]Hasnas (n 20)1329.
[76]Hasnas (n 20) 1330.
[77]Hasnas (n 20) 1330.
[78]Hasnas (n 20) 1330.
[79] Steward "A pragmatic critique of corporate criminal theory Atrocity, commerce and accountability" 2012 http//www.corporatecrimereporter.com/wp-content/uploads/2012/10/stewart.pdf 17 (11-08-2015).
[80]Hasnas (n 20) 1339.
[81] Weismann (n 22) 1325.
[82]Khanna (n 3) 1494.

through their immoral acts, transgress the boundary of what is considered acceptable societal behaviour.[83]

Form the above it appears that the primary purposes of criminal law are to deter, punish and to seek retribution from the party who acted unlawfully. It will now be examined whether, and to what extent, the principles of criminal law, as it applies to individuals, will find application to the corporation as a legal person.

4. Purpose of corporate criminal liability

As seen above there are various approaches by which to hold a company liable, each as difficult to comprehend and accurately apply as the next. This section seeks to determine the aim of corporate criminal liability in an attempt to construct a logical and clear way to hold companies liable. Thus, this is an attempt to identify whose conduct corporate criminal liability attempts to punish or deter.

4.1 Whose conduct do we wish to deter?

According to Khanna, the aim of corporate criminal liability is the deterrence of the unlawful conduct rather than retribution.[84] She further states that corporate liability seeks to deter the unlawful acts or omissions of corporate managers and employees.[85] Thus, according to Khanna corporate liability has an indirect approach.[86] To a certain extent Weissmann agrees with Khanna by stating that the purpose of general deterrence could be useful in the sphere of corporate criminal conduct.[87] Here it is evident that both Khanna and Weissmann agree that, at least as far as deterrence is concerned, the target of corporate criminal liability is the agents, managers and directors of the company. Snyman states that one should punish the agents as they are the ones who physically commit the offence.[88]

When imposing corporate criminal liability, it is the shareholders who suffer a financial loss as a result of the company being subjected to punishment while the true perpetrators suffered no adverse legal consequences.[89] This is where vicarious liability falls short of being fair, by punishing the master even where the servants acted with his own intent and for own his benefit. By prosecuting the company rather than the agents who commit the offence, "individual

[83]Wiessmann (n 22) 1326.
[84]Khanna (n 3) 1494.
[85]Khanna (n 3) 1495.
[86]Khanna (n 3) 1495.
[87]Weissmann (n 22) 1325.
[88]Snyman *Criminal law* (2002) 563.
[89]Khanna (17) 1495.

accountability is displaced by corporate liability".[90] If we view companies as fictitious legal persons incapable of culpability "then the [intent] or gross negligence [necessary for criminal sanction] can only be that of one or more individuals connected with the company, i.e., directors".[91] Where the source of the blame cannot be ascertained it is inappropriate to assume that blame should lay with the company[92] and by extension the shareholders.

In large companies shareholders are not necessarily actively involved in the day to day activities of the company and have no knowledge of the behaviour of the agents, managers and directors who commit unlawful acts.[93] Thereby, making shareholders bear the financial consequence, by creating a deficit in their profits, of the acts of its rogue agents inevitably constitutes punishment of those who are innocent and unaware of the wrongdoing of corporate managers.[94] This is because shareholders will ultimately bear the financial consequences where a company is convicted.[95]

Beale disagrees with this notion because for her a company is more than just a fictional entity.[96] She is of the view that the injury suffered by innocent parties should be taken into account just as equally as the shareholder's interest.[97] Beale further argues that shareholders are not punished in their personal capacities but only to the extent of their shareholding.[98] Fisse and Braithwaite argue that a company possesses greater capacity to ensure that an unlawful act is avoided and on this premise a finding of corporate rather than individual negligence is justified.[99]

In this regard, I submit that authors overlooked two relevant points. Firstly, these shareholders had no intention to commit the crime, nor did they foresee that the corporate managers, whom they trust with their financial investment, would commit the crime. Shareholders are exposed to a variety of risks by placing their financial interest in the hands of directors. However, it is not logical to assume that one of these risks would be the criminal conduct of directs which amounts to a

[90]Fisse and Braithwaite "Allocation of responsibility for corporate crimes: Individualism, collectivism and accountability" 1986 *Sydney Law Review* 468 469.
[91]Sullivan (n 41) 283.
[92]Sullivan (n 41) 284.
[93]Mongalo "The myth of director appointment by shareholders and shareholder activism in listed companies" 2004 *TSAR* 96 96. The large number of shareholders of listed companies from various locations and even jurisdictions widens the gap between the ownership and control of a company. This might not necessarily be the case in small companies where the shareholders are also directors of the company. However, as will be argued below, in the case of smaller companies the company will not be held criminally liable instead the directors will be held personally liable.
[94]Hasnas (n 20)1339.
[95]Stessens "Corporate criminal liability: A comparative perspective" 1994 *International and Comparative Law Quarterly* 493 507.
[96] Beale "A response to the critic of criminal liability" 2009 *American Criminal Law Review* 1481 1482 According to Beale a company is a powerful and real actor whose conduct has a tremendous impact on individuals and society.
[97] Beale (n 96) 1485.
[98]Beale (n 96) 1485.
[99]Fisse and Braithwaite (n 90) 486.

decrease in their profits. Secondly, shareholders are powerless to monitor or control management especially in large companies.[100]

Closely linked to the purpose of deterrence is the purpose of punishment, I will now examine whether a company is capable of being punished. It seems that the target of corporate criminal liability is to deter the agent who commits the act, however, to reach its target corporate liability adversely affects the interest of innocent shareholders. Deterrence must, however, be achieved by punishing the wrongdoer with the aim to discourage others who wish to act in a similar manner.[101]

4.1.1 Can a company be punished?

It is relevant to determine whether a company as a separate and fictitious legal person is deserving of punishment.[102] Hasnas poses the question best "Are corporations morally responsible agents?"[103] Donaldson argues that companies are morally responsible agents[104] as they have the ability to use moral reasons in their decision-making as well as the ability to control their structure and rules.[105] In *United States v A & P Trucking Co,*[106] it was held that a company can be guilty of knowingly or willfully contravening the law. According to Colvin, there would be moral responsibility if the company failed to take reasonable steps to prevent unlawful conduct.[107] He further states that "there should also be criminal responsibility if the negligence were sufficiently severe".[108]

An important remark made by Hasnas is that criminal responsibility may be applied only if it were to advance a legitimate purpose of punishment.[109] Harming innocent shareholders, who have no direct influence or control of the company but are merely owners of shares, for the illicit acts of the company's agents or directs does not serve a legitimate purpose. Although the principal aim of punishment is deterrence, this objective should not be achieved at any cost, least of all by punishing the innocent.[110]

[100] Kennedy "Criminal sentences for corporations Alternative fining *mechanisms*" 1985 *California Law Review* 443 450.
[101]Hasnas (n 20) 1339.
[102]Hasnas (n 20) 1330.
[103]Hasnas (n 20) 1330.
[104]Hasnas (n 13) "Moral responsibility is a necessary condition for criminal punishment" and "indicates that one is deserving of punishment".
[105] Donaldson *Corporation and Morality* (1982) 30.
[106] 358 U.S. (1958).
[107] Colvin (n 9) 29.
[108] Colvin (n 9) 29.
[109]Hasnas (n 20) 1338.
[110]Hasnas (n 20) 1339.

4.1.2 Violation of Constitutional rights

As seen above corporate criminal liability seeks to deter the agents and directors of a company from committing future corporate crimes, by inevitably punishing innocent shareholders. However, the Anglo-American legal system was designed to minimize the risk of punishing the innocent to deter the guilty.[111]

According to Borg-Jorgensen and Van der Linde holding a company liable for the crimes committed by its agents without proving the blameworthiness of the company itself and not leaving the company with a defense flies in the face of the constitutional principles of the right to have a fair trial and the right to be presumed innocent.[112] I agree with the authors. However, I submit that it is not the respective rights of the company that is being violated but the rights of the shareholder, since the shareholders are ultimately punished for the unlawful acts of the company's directors and agents. Constitutional protections provided in Anglo-American systems, albeit differing to some extent, create an inherent bias towards the accused.[113] Hasnas further states that these protections are in place to protect citizens against the abuse of power by state officials. [114]

4.1.3 Retribution:

As retribution is one of the aims of criminal law, it is important to consider whether, and how, the construct of corporate criminal liability achieves this principle of criminal law. "Retribution is the process of requiting evil with evil in which harm is to impose on a wrongdoer in recompense for or in the dissipation of the harm that has been done".[115] Many scholars view deterrence as the primary goal of corporate criminal liability and do not regard retribution as a proper objective.[116] According to De Maglie it is possible for corporate criminal liability to achieve its goal of retribution.[117] The author justifies this by stating that as a company has more financial resources than the agent that committed the offence it would be best for the company to be the compensator.[118] This again confuses the target of corporate criminal liability. If we understand retribution to mean meeting evil with evil, but the agent who commits the evil is not given his deserved punishment, then the goal of retribution is not truly achieved. Moreover, retribution requires an investigation into what the company did or did not do that gives rise to the sanction.[119]

[111]Hasnas (n 20)1335. Constitutional privileges recognized in Anglo-American legal systems such as the right to be presumed innocent, the prosecutorial burden of proof and to prove every element of the crime beyond a reasonable doubt are principles that seek to minimize that risk.
[112] Borg-Jorgensen and Van der Linde (n 2) 458.
[113]Hasnas (n 20) 1335.
[114]Hasnsa (n 20) 1335.
[115]Hasnas (n 20) 1336.
[116] Wagner (n 39) 1302.
[117] De Maglie (n 26) 563.
[118] De Maglie (n 26) 563.
[119]Weissmann (n 22) 1326.

According to Weissmann, the only thing the company has done wrong is hiring the individual who committed the crime which, by itself, is not sufficient reason to punish the company.[120]

The underlying principle of corporate criminal liability, it would seem, is deterrence as the other elements of criminal law cannot accurately be reflected in corporate criminal liability.[121] It has been seen that corporate criminal liability seeks to deter the wrongful actions of the agents and employees of the company at any level, as they are the actual perpetrators. Corporate criminal liability cannot be seen to deter the action of shareholders as they do not assume any control over the company.[122] Furthermore, it seems to be illogical to punish the shareholders of the company with the intention of deterring its agents and directors from committing wrongful acts. The argument that shareholders would be better watchdogs also does not hold any water as shareholders in large companies may not necessarily be involved in the day-today functioning of the company.[123] Moreover, and perhaps the most important principle, criminal law does not seek to punish innocent individuals to deter wrongdoers. Punishment is one of the aims of criminal law, but it must not be achieved at all cost, especially not at the expense of the innocent.[124] Take the following illustration: a five year old boy fatally kills another boy with a hammer. Would his parents now have to be criminally punished, for this act? I think not. In this illustration, the parents did not commit the criminal act, but the boy lacks criminal capacity. One cannot then simply hold the parents liable for the criminal act of the boy. As it seems that corporate criminal liability is not the appropriate remedy, the next step is to determine the appropriate alternative.

5. Alternatives to Corporate Criminal Liability:

As has been examined, corporate criminal liability does not satisfy the purposes of the criminal law which are deterrence by means of punishment, however punishing the innocent to deter the wrongdoers goes beyond the purpose of criminal law. It has been noted above that the true target of corporate criminal liability is the agent or employee of the company who commits the unlawful act. The question that now arises is how to punish the wrongdoers.

5.1 Corporate civil liability:

According to Khanna, corporate criminal liability is not an ideal method by which to influence corporate behaviour.[125] The author points out that corporate civil liability is the preferable option.[126] The very essence of the derivative theories of corporate criminal liability stems from

[120]Weissmann (n 22) 1327.
[121]Khanna (n 3) 1494 and Weismann (n 22) 1325.
[122]Fisch "Criminalization of corporate law: The impact on shareholders and other constituents" 2007 *University of Pennsylvania Law School* 91 93.
[123]Sepinwall "Guilty by proxy expanding the boundaries of responsibilities in the face of corporate crime" 2012 *Hastings Law Review* 411 450.
[124]Hasnas (n 20) 1339.
[125]Khanna (n 3) 1478.
[126]Khanna (n 3) 1521.

civil liability such as vicarious liability (followed in South Africa), *respondeat superior* (followed in America) and the identification theory approach (followed in England).[127]

As noted by Khanna, the dominant purpose of corporate criminal liability is deterring corporate misconduct and corporate civil liability shares this purpose.[128] However criminal liability is looked at from a vertical point of view in a sense that the state regulates the conduct of its citizen. Civil liability, however, is considered from a horizontal perspective, where persons are on the same footing and justice is done between them. A further benefit of corporate civil liability is that the damages paid will go to the account of the aggrieved party whereas with corporate criminal liability the fine payable will be paid over to the state.

Khanna's argument overlooks the fact that corporate civil liability will also have the effect that the shareholders will still bear the financial burden if found civilly liable.[129] Beale argues that there is no fundamental difference between corporate civil liability and corporate criminal liability as both have the effect of reducing the shareholders equity.[130] It is thus submitted that corporate civil liability should not be regard as the way forward as the civil damages that are paid to the aggrieved party will still come out of the shareholders' pockets. Furthermore, as shareholders are not the intended targets of corporate criminal liability they should in the same manner also not be saddled with the financial consequences where the company is found civilly liable.[131]

5.2 Personal Liability of Directors

Through much development of the law, it has now become trite that directors owe a duty to the company to act in good faith and the best interest of the company.[132] This duty applies to all directors for any company conducting business in a sound legal system. It must be stressed that this duty is owed to the company and not to the shareholders of the company, regardless of whether shareholders have appointed such directors.[133] However, directors also have their own financial and career goals and the pursuit of these objectives may place the wealth of shareholders at risk by subjecting the company to fines and penalties. [134]

[127]Hasnas (n 20)1337. Arlen and Kraakman "Controlling corporate misconduct an analysis of the corporate criminal liability regimes" *New York University Law Review* 687 690.
[128]Khanna (n 3) 1495.
[129] Beale (n 96) 1485.
[130] Beale (n 96) 1485.
[131]Hasnas (n 20) 1339 notes that by inadvertently punishing shareholders one is punishing those that are personally innocent, for the unlawful act of the true perpetrators (directors and agents).
[132] McLennan "Duties of care and skill of company directors and their liability for negligence" 1996 *SAMLJ* 94 94.
[133] Van der Linde "Personal liability of directors for corporate fault" 2008 *SAMLJ* 439 440.
[134]Humbach "Director Liability for corporate crimes: Lawyers as safe havens?" 2010 *New York Law School Law Review* 437 440. Arlen "The potentially perverse effects of corporate criminal liability" 1994 *Journal of Legal Studies* 833. 134 "[Directors] are rational self-interested utility maximizers who commit crimes in order to benefit themselves. In pursuit of his own interest a [director] may commit a crime that incidentally benefits the company, but this is not its purpose".

Directors and senior company agents are in charge of decision making as well as monitoring and preventing unlawful conduct within the company.[135] It is for this reason that the court in Tesco[136] referred to the directors of a company as the "alter ego" or the "directing mind and will of the company".[137]At common law, directors had virtually unfettered powers in running companies.[138]At present section 66 of the Companies Act[139] expressly places the management of the company under the control of the board of directors.[140] Even the Tax Administration Act (from now on TAA)[141] subjects a senior director to penalties for the company's defaults.[142] Therefore, the liability of directors is not derivative, but it is based on their personal fault.[143]

Directors and agents should not escape criminal or civil liability for their wrongful acts by hiding behind the principle of agency.[144] Directors and senior officials can be held criminally or civilly liable even where a crime was committed in an attempt to benefit the company.[145] Directors can also not hide behind the principle of limited liability as this principle applies only to shareholders and not to directors and company agents.[146] Bilchitz states that "directors can be held liable for human rights violations…as they are the practical decision makers in the company".[147] Liability for human rights violations should be limited to directors who knew of the violation or has a direct link to the violation.[148] Furthermore, it is a well-developed rule of common law that where two or more directors acted together, they must be held jointly and severally liable for their actions.[149]

[135]Humbach (n 132) 441; McLennan (n 132) 98.
[136] See n 44.
[137] Wilkinson (n 10) 142 154.
[138]Mongalo (n 91) 96.
[139] Act 28 of 2008.
[140] S 66(1) "The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."
[141] Act 28 of 2011.
[142] Section 246(5) of the TAA provides that "A public officer is responsible for all acts, matters, or things that the public officer's company must do under a tax Act, and in case of default, the public officer is subject to penalties for the company's defaults" and s 246(2) of the TAA provides that public officer of the company is a person who is a senior official of the company and is approved by SARS.
[143] Anderson "Directors' liability for corporate faults and defaults: An international comparison" *2009 Pacific Rim Law and Policy Journal* 1 7.
[144]Gerding "Directors personal liability for corporate fault" 302.
310.http//papers.ssrn.com/sol3/papers.cfm?abstract_id=1501789 (16-11-2015)
[145]Petrin "The curious case of directors' and officer's liability for supervision and management: Exploring the intersection between corporate and tort law" 2010 *American University law Review* 1661 1668.
[146]Anderson (n 143) 35.
[147]Bilchitz "Corporate law and the Constitution: Towards binding human rights responsibilities for corporations" 2008 *SALJ* 754 782.
[148]Bilchitz (n 147) 782.
[149] Van der Linde (n 133) 443. Sections 77(6) of the Companies Act also provides for the joint and several liabilities of directors for wrongful acts.

The criminal or civil liability of a director must, however, be subjected to the participation[150] of the director in the unlawful act, and such participation must be substantially direct.[151] Participation can take the form of voting in favour of a resolution which has harmful consequences or where the director was heavily involved in the implementation of a decision or undertaking by the board.[152] Directors would also be liable if they knew or reasonably should have known that some harmful condition under their supervision would cause harm to another but they negligently failed to avoid the causing of the harm.[153]

It is submitted that the preferred approach to the regulation of corporate crimes and misconduct should be the personal liability of directors. Directors should only be held liable to the extent of their participation as mentioned above. Where two or more directors are complicit they should be held jointly and severally liable.

6. When Will Corporate Criminal Liability Be Appropriate?

Corporate criminal liability should be approached with caution[154] and used sparingly. This form of liability must only be considered when it is socially desirable[155].

According to Khanna and some commentators like Mann[156] corporate criminal liability has four characteristics[157] which differentiate it from corporate civil liability. Given Khanna, one must be mindful of these characteristics in examining the liability of a corporation and the possible sanctions.

Furthermore, Weissmann states that by the principle of retribution there must be a determination as to what act the company did or fail to do that justifies imposing liability and a criminal sanction for it.[158] Thus, if the *commissio* or *ommissio* is of a serious nature or it is evident that it is common practice in the corporation to condone or encourage unlawful acts from which the corporation benefitted it might warrant the application of corporate criminal liability. In this case, the

[150] Anderson (n 143) 35. Participation is one of the tests used in order to determine whether a company director or officer is liable for a criminal or delictual act.
[151]Gerding (n 144) 311. In *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Company Inc* [1978] 89 DLR (3d) 195 the court noted that the liability of a director depends on whether he deliberately, knowingly or willfully participated in the tortious act. This point refers to intentional crimes or delicts.
[152]Petrin (n 145) 1668.
[153]Petrin (n 145) 1668.
[154]Khanna (n 3) 1477 1492.
[155]Khanna (n 3) 1477 1493.
[156] Kenneth Mann "Punitive civil sanctions: The middleground between criminal and civil law" 1992 *Yale Law Journal* 1795 1813.
[157]Khanna (n 3) Khanna indicates that corporate criminal liability "has strong procedural protections, it has powerful enforcement mechanisms; it has severe and unique sanctions, such as stigma and it can send a much stronger message than its counterpart, corporate civil liability".
[158]Weissmann (22) 1327.

shareholders are still deemed to be innocent, but the rights of the victims of corporate decision making (i.e., when a decision of the board caused death or grievous harm to others) outweigh the right of shareholders to enjoy the full extent of their profits. There must, of course, be an investigation into the act and cause which leads to the death of or harm to the victim, as will be discussed below, and if it is found that the decision making or lack of corporate supervision amounted to such death or harm the company must be held liable, and the shareholders must, inevitably, be saddled with the financial burden based on moral consciousness. This is simply a balancing test, the right to life and bodily integrity (of the innocent victims) outweighs the rights of (innocent) shareholders to earn a profit.

One can look to the UK Corporate Manslaughter and Corporate Homicide Act 2007 (hereinafter referred to as the corporate manslaughter act) as an example as to when corporate criminal liability can be imputed to a company. In terms of section 1(1) of the Corporate Manslaughter Act a [company] will be "guilty of an offence if the way in which its activities are managed or organized causes a person's death and amounts to a gross breach of a relevant duty of care[159] owed by the [company] to the deceased". Furthermore, the way which in a company's senior managers managed or organized the activities of the company is a substantial element of the breached referred to in terms of the Corporate Manslaughter Act.[160] This element indicates that the liability for corporate manslaughter is based on the corporate culture of the organization rather than the directing mind of a particular individual.[161]

In terms of section 1(1) of the Corporate Manslaughter Act the breach of the relevant conduct must be gross. In terms of section 1(4)(b) the violation of duty is gross "if the conduct alleged of amount to a breach of duty far below what can reasonably be expected of the organisation in the circumstances". This flagrant violation must have been the cause of the person's death.[162] The "but for" test will be used to show that management failure had resulted in the death of the individual.[163]

In the event where senior managers organized and managed the company in a manner that does not grossly breach a duty, it owes to its employees or persons incidental to the conduct of its activities, which causes death or serious injury the company cannot be said to be liable. According

[159] A "relevant duty of care", in relation to an organisation, means any of the following duties owed by it under the law of negligence— (a) a duty owed to its employees or to other persons working for the organisation or performing services for it; (b) a duty owed as occupier of premises; (c) a duty owed in connection with— (i) the supply by the organisation of goods or services (whether for consideration or not), (ii) the carrying on by the organisation of any construction or maintenance operations, (iii) the carrying on by the organisation of any other activity on a commercial basis, or (iv) the use or keeping by the organisation of any plant, vehicle or other thing; (d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible".

[160] Section 1(3) of the Corporate Manslaughter Act.

[161] Taylor and Mackenzie "Staying focused on the big picture: should Australia legislate for corporate manslaughter based on the UK model?" https//eprints.usq.edu.au/22471/3/Taylor_Mackenzie_CLJ_v37_AV.pdf (09-12-2015) 6.

[162] Taylor and Mackenzie (n 161) 6.

[163] Ministry of Justice "*A guide to the Corporate Manslaughter and Corporate Homicide Act 2007*" http//www.hseni.gov.uk/guidetomanslaughterhomicide07.pdf (09-12-2015) 14.

to Weissmann where a company has employed such mechanisms it has in itself satisfied the goals of criminal law.[164]

In view of the aforementioned, I am of the opinion that corporate criminal liability should not be the norm but the exception and it that should only be applied where management failure has caused the death or serious injury of a victim. This liability should run concurrently with the directors' personal liability. The directors should in no way escape liability because the company is held liable. I concede that the view that the company should only be kept accountable in rare circumstance is radical. However, it is difficult for one to turn a blind eye to the right of life and the right to bodily integrity and when weighed up against the financial interest of shareholders it difficult if not impossible to reconcile life and profits.

6.1 Approach to the liability of corporate crimes:

I submit that directors should be held personally, jointly and severally liable for the commission of corporate crimes and delicts. Any criminal sanction or compensation award for such offences and delicts should be imposed on the directors and not indirectly on innocent shareholders. Liability should only be placed on directors if the all the elements of a delict (in a civil suit) or a crime (in the case of a criminal suit) is proved. In a civil case, the liability of directors must be determined on a balance of probabilities and in a criminal case liability must be established beyond a reasonable doubt. Thus, all the substantive elements of criminal[165] and civil law must be proved, and all the procedural requirements must be adhered to. The personal liability of directors for corporate crimes must thus be regarded as the norm. Corporate criminal liability will, however, find application when certain conditions are met in limited circumstances. It will thus function as an exception to the personal liability of directors, but it will not substitute the personal liability of directors. The method for holding companies liable is based on the Corporate Manslaughter Act.

Firstly, the directors and senior agents of the company must have been grossly negligent in the management of the company's business[166] or there must have been a gross abdication of duties on the part of directors and senior agents. Secondly, the company should have owed a duty to the victim.[167] This duty may be based on employment or the incidental assumption of responsibility based on the nature of the company's business.[168] Finally, the way in which the directors and senior agents managed the company must result in a breach of the relevant duty and cause the death or

[164] Weissmann (n 22) 1319.
[165] ICC *Elements of crimes* http//legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf (09-12-2015) see 111 for the general elements of a crime.
[166] See section 1(3) of the corporate manslaughter act.
[167] See section 1(3) read with section 2 of the corporate manslaughter act.
[168]Section 1(3) of the corporate manslaughter act. Also see Taylor and Mackenzie (n 161) 15.

serious injury to the victim.[169] These are the primary factors to take into account when determining whether corporate criminal liability should be applied.

These factors should also be tempered by other factors. Firstly, the directors and senior agents must have acted within the scope of their authority. Where the directors and senior officers acted *ultra vires*, they should be held personally liable for such acts.[170] Secondly, directors and senior officers, in the execution of their management, must have reasonably foreseen that their negligent management would cause harm. If the directors did not manage the company in a negligent manner, but rather took every reasonable step to ensure the safety of others, it will be difficult to conclude that the company should be held criminally liable.[171] Thirdly the victim should not have been at fault, i.e., the victim should not be the cause of the death or physical injury.

6.2 A "good faith" affirmative defence available to a company when rogue agents cause the death of or physical injury:

Podgor argues in favour of a "good faith" affirmative defence.[172] The author states that it is "important to protect law abiding employees, shareholders and the corporate entity from the [consequences] of being held criminally liable when good faith efforts have been made to constrain rogue employees".[173]

Levenson states that "defendants could prove beyond reasonable doubt that they operated under an honest and reasonable mistake of fact because they took affirmative steps to comply with the law but were misled in their efforts".[174] Here Levenson confirms Weissmann's approach, that where a company has done all that the law has required of the company it has in itself satisfied the goals of criminal law.[175] Levenson, however, takes her approach a step further. The author would introduce *mens rea* as an "element that [the accused company] must disprove for an acquittal".[176] In my view, this is a form of a reverse *onus*[177] which is a sound approach as prosecutors will not have access to the relevant information to prove the *mens rea* of a company.[178] Thus placing a

[169] Section 1(1) read with section 1(3) and section 2 of the corporate manslaughter act.
[170] Raghuvanshi and Vaidya "Applicability of doctrine of ultra vires on companies" 2010 http//papers.ssrn.com/sol3/papers.cfm?abstract_id=1558971 15 "a company may be held liable for torts or crimes" committed in pursuance of its stated objects but should not be liable for acts entirely outside its objects".
[171]Hasnas (n 20) 1356 and Weissmann (n 22) 1326 "Imposition of corporate liability where a corporation has taken all reasonable steps to deter and detect the criminal conduct of its employee furthers none of the goals of the criminal law".
[172]Podgor "A new corporate world mandates a 'good faith' affirmative defence" 2007 *American Criminal Law Review* 1537 1537: "A defence offered to [companies] that present "good faith" efforts to achieve compliance with.
[173]Podgor (n 172) 1538.
[174]Levenson (n 32) 405.
[175]Weissmann (n 3) 1326.
[176]Levenson (n 32) 405.
[177]*R v Swart* [1988] 2 SCR 443 a provision can be seen to create a reverse onus where it requires the accused to prove or disprove any element of an offense.
[178] Gray "Constitutionally protecting the presumption of innocence" 2012 *University of Tasmania Law Review* 131 131.

reasonable burden on the company to demonstrate that it has conducted its business and management in a manner that falls within the limits of the law cannot be seen to be unfair.

In *Burlington Industries Inc v Ellerth*[179] the court formulated a good faith defence within the civil law realm that can easily be applied in the corporate criminal context. The formula is as follows: "the [company] exercised reasonable care to prevent and correct promptly any [illicit behaviour] and that the [victim] unreasonably failed to take advantage of any preventative or corrective opportunities provided by the company or to prevent the harm otherwise."[180]

6.3 Proposed provision for holding companies criminally liable:

1) Where the directors and/or senior agents of the company, acting within the scope of their employment, managed the business and affairs of the company:
   a) In a manner which in conducive to criminal activity; or
   b) In a manner which is grossly negligent; and
   c) Such management causes death or serious injury to a victim, to which the company owes a duty

the company will be held criminally liable for the death or injury caused to the victim.

6.4 Affirmative defence available to companies in cases where rogue directors commit criminal conduct:

1. Where a company under criminal prosecution can prove that
   a) It took affirmative steps to comply with the law but were misled in their efforts; and
   b) It exercised reasonable care to prevent and correct promptly any illicit behaviour

The company will not be held criminally liable as it disproved a necessary element of a crime, namely *mens rea* as well as showing that it was not negligent in the conduct of its activities.

According to this approach to corporate criminal liability, the company will only be held liable where the company was used to further criminal activities or where the gross negligence of senior management amount to the death or serious injury of an individual. The reason I propose that directors should be acting within the scope of their employment is that directors might sometimes

[179] 524 US 742 (1998).
[180] See (n 178)

further their financial interest at the expense of the company and to the detriment of an unsuspecting and innocent third party.[181]

As submitted previously, corporate criminal liability should not be the norm and should only be applicable when strict conditions are met. These conditions are the death or serious injury to an individual. The reason for this requirement is simply a balance of interest. On the one hand, we have the profit impairment of shareholders. On the other hand, we have the loss of life or physical impairment of an individual. When weighing these interests, I believe that loss of life and severe physical disability should trump the financial interest of the shareholders.

7. Appropriate Sanction Applicable to Corporate Criminal Liability:

The purpose of sanctions as it applies to a company is important considering that we are not dealing with an individual but with a legal person. Where a company is found to be criminally liable on the bases of the approach above one still needs to determine the appropriate sanction or combination of sanctions that will be most effective.[182] Whatever punishment is imposed on the accused a reduction of criminal conduct and an increase in public safety is the desired result.[183]

Where corporate crimes are committed, the individual is usually imprisoned, and the corporate entity is sanctioned with a fine.[184] Du Toit points out that it is necessary to widen the scope of criminal penalties, beyond a mere fine as a form of punishment.[185] There is, however, alternative sanctions available at the court's disposal. These include: "an equity fine, which would see the allocation of some of the shares of the corporation to a public entity or some like the group, corporate probation, community service orders, the introduction of internal corporate compliance programs, what has been called enforced corporate responsive adjustment, and adverse publicity orders".[186]

With regards to punishment, Laufer and Walt state that "the imposition of harm must be appropriately expressive" to constitute punishment.[187] They further state that if the sanction "ceases to express condemnation the imposition of harm cannot constitute punishment.[188] Thus, the sanction must be expressed in such a way so as to condemn the unlawful conduct and

[181]Narine "Whistleblowers and rogues: An urgent call for an affirmative defence to corporate criminal liability" 2012 *Catholic University Law Review* 41 44.
[182]Tomasic "Sanctioning corporate crimes and is conduct Beyond draconian and decriminalization solutions" 1992 *Australian Journal of Corporate Law* 82 84.
[183]Tait "The effectiveness of criminal sanctions a natural experiment report 33/96-7 to the criminology research council" 2001 http//criminologyresearchcouncil.gov.au/reports/33-96-7.pdf page 2.
[184]Tomasic "Corporate crime and corporations law enforcement strategies in Australia" 1993 Centre for National Corporate Law Research Discussion Paper 1/93 8.
[185] Du Toit "Sentencing the corporate offender in South Africa: A comparative approach" 2012 *SACJ* 235 241.
[186]Tomasic (n 182) 92.
[187]Laufer and Walt "Why personhood doesn't matter: Corporate criminal liability and sanctions" 1990 *American Journal of Criminal Law* 263 282.
[188]Laufer and Walt (n 187) 283 and Tomasic (n 182) 95.

simultaneously inflict harm on the company.[189] If this is achieved, then the function of punishment will be fulfilled.[190]

However in my view, a fine should always be the general point of departure when sentencing a company. The fine should be punitive in nature but should be capped at a specific amount, taking into account the seriousness of the contravention, the nature of the company itself as well as the interest of the victim or victims of the particular offence.[191] Thus, the fine should not be disproportionate to the crime itself.

8. Conclusion

This dissertation started off with a look at the current theories of corporate criminal liability and their shortcomings. We saw that these theories are insufficient for the regulation of corporate crimes. Furthermore, as repeatedly stated in this dissertation and by Khanna, [192] none of the authors arguing in favour of these theories can answer the question as to why we have corporate criminal liability at all. Hasnas goes as far as hinting that corporate criminal liability is a mistake that many authors and legislatures have legitimised by merely repeating it.[193] Moreover, scholars such as Beale and Friedman, who argue in favour of corporate criminal liability as the norm clearly overlooked the fact that criminal law is reserved for punishing the guilty, and not the innocent to deter the guilty.

I believe that at the core of the debate of corporate criminal liability is the confusion as to who the target of corporate criminal liability is. In other words, whose conduct do we wish to deter. Here it was argued that it is the directors', agents' and servants' conduct that should be deterred as they may attempt to further their interest at the company's expense. If we were to hold the company liable every time the directors and agents contravened the law this would not deter the directors. Instead, they would perpetuate corporate crimes, to further their interest, knowing that the company will be held liable.

I also examined the impact that corporate criminal liability will have on innocent shareholders and their constitutional rights. As shareholders are the ultimate bearers of any financial penalty imposed upon the company, depriving them of their right to be heard and to be presumed innocent may raise constitutional issues.

The next step was then to determine when corporate criminal liability will be an appropriate remedy. I argued that corporate criminal liability should not operate as the norm in any jurisdiction, but it can, however, serve as an exception to the personal liability of directors or senior managers

[189]Laufer and Walt (n 187) 283.
[190]Laufer and Walt (n 187) 283.
[191]Du Toit (n 185) 242.
[192]Khanna (n 3) 1493.
[193]Hasnas (n 20) 1329 where he compares corporate criminal liability to jazz music.

who caused the unlawful act. In this regard, various factors would have to be taken into account to determine whether it is just and equitable to hold the company criminally liable.

I further argued that the company should be able to raise an affirmative defence in criminal proceedings against it, so as to cure the imbalance of power the state has in criminal proceedings against the company. The defence, however, includes a reverse onus in the sense that the company has to disprove an element of the crime, i.e., *mens rea* to be acquitted.

I submit that corporate criminal liability should be reserved for instance where the ill management of the company's business caused the death or serious injury to another, with a fine as the criminal sanction.

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