



## Justifications for corporate criminal liability and the defence of corporate insanity

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### Abstract

Under current law in most common law jurisdictions, a company is criminally liable if its employee commits a crime within the scope of employment and ostensibly for the benefit of the company. The traditional justification for corporate criminal liability is that the state of mind of the employee is declared as the state of mind of the company. This vicarious basis of corporate criminal liability remains questionable as it obliterates the separate legal personality of the company and contradicts the principles that govern criminal liability. If a company is believed to possess a mind which is expressed in its employees, should the company not be eligible to raise the defence of insanity? This article critically examines the arguments for rethinking the justification for corporate criminal liability in light of the propositions for the defence of corporate insanity. The significant objective of this article is that it seeks to clarify the law on the justifications for corporate criminal liability and the defence of corporate insanity.

**Keywords:** Company law, corporate criminal liability, corporate insanity, criminal liability, vicarious liability, companies' employees

### Introduction

The legal construct of a company as a separate personality from its shareholders, directors and managers often presents complex, contentious, and even contradictory ramifications. As a "legal fiction", the independent personhood of a company plays well in the contexts of its capacity to own assets, enter contracts, and transact business in furtherance of the objectives for which it was formed. In those contexts, the attendant rights and obligations of the company and those it relates with – employees, contractors, and other entities – as a legal personality are clearly defined or conceptualized within established principles and precedents under civil law.

However, as a "legal fact" the personality of the company becomes equivocal and controversial where its action or conduct is called to question and examined within the context of criminal law, such as where it is held or to be held liable for a criminal act. The concept of corporate criminal liability exposes the inherent complexity and contradiction in the separate personality of a company. Under current law in most common law jurisdictions<sup>[1]</sup>, a company is criminally liable if its member or employee commits a crime within the scope of employment and ostensibly for the benefit of the company.

The concept of holding a company vicariously liable for the criminal conduct of its agents or employees proceeds on the dubious logic that a company is a person in law only and not a natural person, therefore, it can act only through its employees for whom it should be held liable. This vicarious basis of corporate criminal liability remains questionable as it obliterates the separate personality of the company<sup>[2]</sup>, and has been continuously challenged by legal scholars because it "flies in the face of the precepts that govern criminal liability"<sup>[3]</sup>. The vicarious liability approach focuses on the relationship between the company and its employees and sees the state of mind of the employees as the state of mind of the company.

A variant of this traditional approach is the "identification" doctrine under which the company is held liable for criminal conduct perpetrated by its senior employees on the ground that the state of mind of the senior employee is the state of mind of the company<sup>[4]</sup>. This implies that in addition to the criminal act of a senior employee, the wilful intent or guilty mind for the conduct is "identified" as that of the company. Thus, while the company is considered to not be a natural person, it is however treated as if it has a "conscience", a "soul to be damned" and a "body to be kicked"<sup>[5]</sup>. Indeed, under the prevailing corporate criminal liability which involves derivative liability of agents and senior employees of a company, punitive penal sanctions have been visited on many companies across common law jurisdictions<sup>[6]</sup>.

In procedural criminal law, any person accused of committing an offence is entitled to proffer a defence for the purpose of avoiding the punitive consequence prescribed for such offence. If a company is believed to possess a *mind* which is expressed in its agents and senior officers, should the company not be eligible to raise the defence of corporate insanity? The deterrent and retributive justifications for imposing penal sanctions on a company for a criminal conduct for which it is found culpable assume that the company had a *guilty mind*. The defence of insanity absolves a person accused of committing a crime if it is shown that at the time of committing the crime the person had a *diseased mind* which precluded the knowledge of the nature and quality of the criminal act.

The second part of this article critically examines whether companies are eligible to raise the defence of corporate insanity when charged for a criminal conduct. The legal grounds for such defence, and its implications for companies and all stakeholders are discussed with references to different common law jurisdictions. In the first part of the article, a serious attempt is made at exploring the concept of corporate criminal liability as currently based on the blame-worthiness of company employees and officers, rather than the company's own criminal act as a separate

personality. Arguments for rethinking the justifications for extant corporate criminal liability are examined in comparative contexts, and in light of the propositions for the defence of corporate insanity. The ultimate objective of this article is that it seeks to clarify the law on the justifications for corporate criminal liability and the defence of corporate insanity.

### 1. Corporate criminal liability

The whole essence of criminal law is the issue of crime and punishment. A crime is an act or a conduct which the law mandates or prohibits upon pains of penal sanction. The law may expressly create a crime relating specifically to companies, such as the United Kingdom's Corporate Manslaughter and Corporate Homicide Act 2007, Bribery Act 2010, and Criminal Finances Act 2017, including Nigeria's Economic and Financial Crimes Commission Act 2004. Otherwise, as a person under the law a company may be the perpetrator of a crime. The old idea was that as a mere artificial person a company could not commit any crimes because the commission of a crime required the co-existence of *actus reus* (wrongful act) and *mens rea* (guilty mind)<sup>[7]</sup>. Lacking in physical presence, a company was also considered to be beyond the pains of criminal punishment such as imprisonment, penal labour, and probational sanctions.

Therefore, prior to the concept of corporate criminal liability the only means of subjecting companies to the ambit of criminal law was through statutory offences requiring strict liability for mere acts of omission. Besides the actual wrongful conduct, the commission of such offences did not require any guilty mind, and punishment was restricted only to fines hence the convictions of companies were straightforward under the statutes<sup>[8]</sup>. Aside statutory strict liability offences, every crime has a physical element or the wrongful act and a mental element or the guilty mind. While the physical element of a crime can be attributed quite easily to a company, as in strict liability offences, challenges do arise in relation to the mental element which is not so easy to impute on the company.

However, the traditional approach to corporate criminal liability in most common law jurisdictions focused on the relationship between the company and its employees, and formulated a legal fiction that the state of mind of the employees approximated to the state of mind of the company<sup>[9]</sup>. The implication is that the mental element of a crime committed by any of the company's employees or agents is imputed on the company in order to ground the company's liability for the crime. This form of vicarious criminal liability has its origins in the civil law of contract and employment where a principal and a master are vicariously liable for the conduct of their agents and servants while the latter are acting within the scope of their contract and employment respectively.

As a basis for corporate criminal liability, vicarious liability is a narrow concept since it is mainly used for statutory strict liability offences which are mostly regulatory offences for environmental and consumer protection<sup>[10]</sup>; it has limitations where it involves substantive crimes such as financial and economic crimes which require proof of not only the physical element but also the mental element. A variant of vicarious criminal liability that emerged from common law cases since the beginning of the last century is the "identification" doctrine. The import of this doctrine is

clear from the House of Lords judgement in the case of *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd*<sup>[11]</sup> where the doctrine originally emerged. For its topical relevance the ruling of Viscount Haldane in that case is worth quoting *in extenso*:

corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies, it may be so, that the person has an authority to co-ordinate with the board of directors given to him to coordinate under the articles of association. It must be upon true construction of that section in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable because his action is the very action of the company itself.

The above ruling introduced the "alter ego" and "controlling mind" concepts as measures of status or authority of companies' officers and employees for the purpose of determining the extent to which the companies are bound by the acts of such officers and employees<sup>[12]</sup>. In the subsequent decision of the House of Lords in *Tesco Supermarkets Ltd v Natrass*<sup>[13]</sup>, the identification doctrine as a basis for corporate criminal liability was firmly entrenched. *Tesco Supermarkets* clarified that a company would be directly liable for the wrongdoing of its agents or employees who are sufficiently senior to constitute its 'alter ego' or 'directing mind and will', such that the wrongful act and guilty mind of such agents or employees are the actions and guilty mind of the company itself.

Different common law jurisdictions have adopted this identification doctrine of corporate criminal liability, and relied on the cases of *Lennard's Carrying Company Ltd* and *Tesco Supermarkets* as authoritative precedence. For example, in the *Australian cases of Trade Practices Commission v Tubemakers of Australia Ltd*<sup>[14]</sup> and *Entwells Pty Ltd v National and General Insurance Co Ltd*<sup>[15]</sup>, the Australian Federal Court anchored its decisions on the identification doctrine as formulated in the UK. Australia has even reflected the doctrine in the amendment to its Criminal Code which now provides that; "where an employee, agent or officer of a body corporate, acting within the actual or apparent scope of their employment, or within their actual or apparent authority, commits the physical element of an offence, the physical element of the offence must be attributed also to the body corporate"<sup>[16]</sup>.

As it is in Australia so it is in Canada where the apex court decisions may even admit a wider class of persons as the 'alter ego' or 'directing mind and will' of the company. The emphasis in Canada appears to be less on the office held by the individual in question than the question of whether the individual is the directing mind and will in their area of responsibility. According to the Canadian Supreme Court in *The Rhone v The Peter A B Widener*<sup>[17]</sup>, the "key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy". This implies that junior employees whose role requires decision-making at the level in which they

operate could be regarded as directing mind and will of the company.

In Nigeria, early cases from about the first half of the twentieth century fully adopted the vicarious criminal liability of companies where the act, intention, knowledge, or belief of an employee of the company is imputed on the company depending on the nature of the crime, the status or position of the employee and the relevant facts and circumstances of the case <sup>[18]</sup>. The Nigerian position is closely aligned with the United States' traditional approach to corporate criminal liability where a corporation is criminally liable for the illegal acts of officers, employees or agents, provided that it can be established that such persons acted within the scope of their duties, and for the intended benefit of the corporation.

The United States' approach is basically common law vicarious liability under the Latin maxim of *respondet superior* (*let the master answer*) which is in the nature of the relationship between principals and agents or masters and servants. Under the approach it is not only the employees' illegal actions that need to be within the scope of their duties in order to invoke corporate criminal liability. As held in the case of *US v Potter* <sup>[19]</sup>, it is sufficient that the employees commit an offence in the course of pursuing objectives or undertaking tasks which are authorised or required by virtue of their positions. In the *Potter's case* the general manager of a company paid bribes for political favours against the contrary instruction of the President of the company. The court held that the principal was liable for the acts of their agents "which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal".

The foundation for the expansive form of corporate criminal liability in the United States, reflective of the maxim *respondet superior*, was decisively laid in the landmark early twentieth century case of *New York Central & Hudson River Railroad v. United States* <sup>[20]</sup>. The case turned on the question whether Congress had the power to pass an Act which subjected companies to criminal punishment solely on the basis of their agents' conduct. The United States' Supreme Court answered the question in the affirmative and held; thus, "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable".

In contemporary times, some States in the Union have adopted the Model Penal Code which provided that a company can "be convicted of an offence if the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or a high managerial agent acting on behalf of the corporation within the scope of his office or employment" <sup>[21]</sup>. A "high managerial agent" as used in the provisions of the Code equates to senior officers and employees who are deemed to represent the "mind" and the "directing will" of the company under the "identification doctrine" of corporate criminal liability applicable in the UK, Canada, Nigeria, and Australia. In all these common law jurisdictions, corporate criminal liability involves imputing on the company the crimes of its agents and employees who acted in the course of performing their assigned duties, whether they acted in the interest of the company or not.

### 1.1 Is corporate criminal liability justified?

There does not appear to be a definite answer to the above question other than to determine whether corporate criminal liability is based on the wrongful conduct of persons acting on behalf of the company, or whether it arises as a result of the company's own wrong doing. It is also of contextual importance to determine when the state of mind of such persons, in terms of knowledge, negligence or recklessness, can be imputed on the company so as to declare that the company itself has the state of mind. Significantly, the crux of the above question is whether a company can commit a crime by itself and in its own capacity, or whether it must be derivative of the crimes of its employees in order for corporate criminal liability to be justified.

Corporate criminal liability as based on the criminal acts of companies' agents or employees is mainly justified on the principal/agent or master/servant legal relationship applicable under civil law. For instance, in the justification of vicarious criminal liability of companies Gobert argued that as an employer is responsible for selecting, training and supervising the employee, including placing the employee in a position where an offence can be committed, more so that the employee acts to benefit the company, the employer should be liable for the employee's crime <sup>[22]</sup>. There is a conceptual challenge of corporate criminal liability in establishing a clear nexus between the realities of the corporate form and the criminal law as developed in the context of natural persons and reflecting the psychology of human beings.

Robinson opines that companies can only ever act through human beings, yet the actions of their human agents or employees always occur within the matrix of corporate hierarchies, structures, policies and attitudes <sup>[23]</sup>. However, it is noted that the lack of justification of corporate criminal liability based on vicarious, derivative or imputed liability is that it fails to identify what exactly the company has done wrong to warrant the offence of a natural person being attributed to it. A company is an independent organic entity, and as such should be liable in its own right, directly and not derivatively, for the criminal consequences that arise out of the way that its business is conducted.

Gobert and Punch proposed a theory of criminal liability that captures the distinctive nature of corporate fault, which would lie in the company's failure to have put in place protective mechanisms that would have prevented harm from occurring <sup>[24]</sup>. It is for this failure that the company should bear responsibility, and not vicarious liability even where it has done all it could to prevent the crime. Thus, in theory vicarious criminal liability cannot be justified on the company's wrong doing as it has not done anything wrong. This is the reason that vicarious criminal liability originated in the context of strict liability offences which often do not require the person who is deemed to commit the offence to have actively been involved in the wrongful act and possessed a guilty mind when the act was done <sup>[25]</sup>.

It is contended that strict liability which grounds corporate criminal liability is antithetical to the dual goals in the criminal law of deterrence and retribution. It is for such reason that criminal liability with respect to persons, as opposed to companies, generally eschews the notion of strict liability in favour of imposing criminal liability only where a person voluntarily commits or participates in the criminal act with the requisite personal state of mind. According to Weissmann and Newman, corporate criminal liability is not

justified where a company has effective policies and procedures to deter and detect criminal actions by its agents and employees <sup>[26]</sup>. Therefore, where it seeks to charge a company for the criminal conduct of its employees the public prosecutor should bear the burden of establishing that the corporation failed to have reasonably effective policies and procedures to prevent the conduct.

Proposals of new and different basis to justify corporate criminal liability other than vicarious imputation of crimes on companies have built up in relevant literature through the decades <sup>[27]</sup>. There have been proposals of a system that incorporates in some manner the company's compliance systems into an evaluation of the imposition of criminal liability and placing the burden on the government to establish the propriety of imputing liability on the company. For instance, in their treatise Fisse and Braithwaite proposed that criminal liability for the criminal conduct of agents and employees should be imputed on only companies that covered up such conduct <sup>[28]</sup>.

There is the proposal of a model of liability by Bucy which focuses on the acts or omissions of the company itself <sup>[29]</sup>. Under this model, rather than the company being liable for the criminal acts of its employees, it should only be liable if its "ethos" – culture, policies, practices, management or other characteristics encouraged or permitted criminal conduct by its agents and employees. The proposal of a new defence of "corporate consciousness" by Walsh and Pyrich would appear to be viable where a company has corporate culture which forbids and strongly discourages any misconduct by its agents and employees. According to Walsh and Pyrich, under a defence of "corporate consciousness" a company can establish by a preponderance of evidence that an employee's conduct is inconsistent with its corporate morality as reflected in its compliance program <sup>[30]</sup>.

The different proposals for the justification of corporate criminal liability are yet to be judicially affirmed or reflected in criminal statutes of the various common law jurisdictions. Therefore, the state of the law is that corporate criminal liability remains anchored on the concept of vicarious liability under which the wilful intents and guilty minds of companies' agents and employees who commit criminal acts are deemed as the wilful intents and the guilty minds of the companies. As Hart long noted, "liability to conviction for serious crimes is made dependent, not only on the offender having done those outward acts which the law forbids but on his having done them in a certain frame of mind or with a certain will" <sup>[31]</sup>. The next part of this article examines whether a company can claim a frame of mind which answers to the legal definition of insanity for the purpose of raising the insanity defence against corporate criminal liability.

## 2. The defence of corporate insanity

As noted in the preceding part of this article, corporate criminal liability rests on the fiction that companies possess "minds" or "intents" which are expressed in their agents and employees, and which can be culpable alongside a wrongful conduct to constitute a crime. The retributive and deterrent justifications for corporate criminal liability based on vicarious imputation of crimes are strongest when those minds or intents are well-ordered. In such cases wrongful acts are most likely to reflect malice, recklessness or negligence and sanctions are most likely to have their

intended preventive benefits. However, as Diamantis rhetorically questioned, "*what if a corporate defendant's mind is disordered?*" <sup>[32]</sup>.

In criminal law every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for their crimes until the contrary is proved. The defence of insanity is available to criminal defendants who are able to prove that at the time of committing the act they were labouring under a defect of reason or suffering from a disease of the mind as not to know the nature and quality of the act, or did not know that what they were doing was wrong <sup>[33]</sup>. The insanity defence was developed for criminal defendants whose mental state was so disordered to the extent that it prevented them from having legal capacity, and are therefore excused from criminal liability.

So far, no company is known to have pleaded the insanity defence against criminal liability, but the legal argument for its application to corporate defendants is easy to make out. According to Diamantis, since corporations are considered legal "persons" and can be convicted of most sorts of crime, criminal law must presume a fiction according to which corporations have minds capable of instantiating criminal *mens rea* <sup>[34]</sup>. Statutes codifying the insanity defence make it available to any "persons", which includes companies <sup>[35]</sup>. The key issue to be determined is whether companies can raise the defence of insanity and satisfy the substantive and procedural requirements.

Thus, in order to successfully prove corporate insanity, companies would need to show that the commission of the crime requires the co-existence of both physical and mental elements; and that they lacked the mental capacity because at the relevant time of commission of the crime, their reason ceased to have dominion over their minds and they reached a degree of insanity where criminal liability ceased, therefore accountability to the law for the purpose of punishment no longer existed <sup>[36]</sup>. Unlike the hitherto common law and statutory strict liability offences, most corporate crimes in contemporary economic, commercial, and financial contexts require a guilty mind or wilful intent of the criminal defendant.

According to the legal definition of insanity, when applied to the corporate context, the first aspect is that a company may suffer from a defect of reason or a disease of the mind as not to know the nature and quality of a criminal act committed by its agents or employees. This aspect of the definition of insanity is about the legal imperative of being in control of oneself, of those under one's authority, and of situations and circumstances within one's control at the threshold of what is right and what is criminally wrong. Control is a condition precedent to criminal liability and criminal defendants who could not control their criminal acts at the material time they lost control cannot be held liable for the consequence of such acts. Therefore, criminal defendants who lack substantial capacity to conform their conduct to the requirements of the law can be described as legally insane.

Since under the concept of corporate criminal liability the conduct of the company and that of its employees is viewed as one and the same, any company that lacks the substantial capacity to control its employees to obey the law, and fails to know the nature or quality of its employees' acts can qualify for the defence of corporate insanity. An example of such companies is the type whose employees turned rogue and actively subverted otherwise effective compliance

programs put in place by the company to prevent the same criminal acts<sup>[37]</sup>.

The second aspect of the legal definition of insanity in the corporate context is that a company may suffer from a defect of reason or a disease of the mind as not to know that what its agent or employee was doing was wrong. Again, by the concept of corporate criminal liability, companies do and think whatever their employees do and think. Under this aspect, criminal defendants may be excused if they were unable to understand their conduct as wrongful. The rationale is that a person must be able to make meaningful moral judgments to qualify as a responsible agent. Otherwise, if the person lacks substantial capacity to appreciate the criminality of their conduct, then liability for such conduct may be excused.

The current law on corporate criminal liability which equates the employees with their corporate employers implies that companies only understand or appreciate things when their employees do. Therefore, companies whose employees fail to appreciate the criminality of their collective conduct may qualify as insane, such as where a company has a defective culture that distort the capacity of its employees to ethically assess their behavior. Within the corporate contextual meanings of both aspects of the legal definition of insanity, a company that operates or allows its business to be operated in such an irrational way that implicates criminal acts is eligible to be excused from liability.

Morse and Hoffman note that rationality is the philosophical touchstone of responsibility, as the structure of criminal law itself indicates<sup>[38]</sup>. Two decades earlier, Morse had opined that rationality is with reference to both the sensibleness of the actor's goals and the logic of the means chosen to achieve them. And that "we may ask whether, given the social context, any sense can be made of the actor's goals, whether any reasonable person could hold them, whether they are logically or empirically intelligible"<sup>[39]</sup>. Therefore, where a company's business is operated in a manner that is brazenly lawless, with audaciously unethical employees, such that it appears to defy basic rationality expected of such companies, then it is case of a company "labouring under a defect of reason or suffering from a disease of the mind", and to which the defence of corporate insanity should avail.

### 2.1. Justifications for the defence of corporate insanity

An underlying justification for corporate criminal liability is to visit penal sanction on companies, mostly in the form of fines, as a deterrence or retribution. The expected outcome is for the company to put its house in order by ensuring lawful and good business practices; which may be achieved through effective compliance programs that subject its agents and employees to legally acceptable standards of conduct. But the justification for the defence of corporate insanity is that there are some companies that do not deserve to be punished because the nature of their crimes and the manner of perpetration show they were not in control and lacked the organizational capacity to understand the perpetration of the criminal acts.

Insanity is legal term which is not defined in terms of natural brain abnormalities but as a defect that inhibits the mental capacity to be in full control of one's conduct and action. According to Justice Kaufman in the case of *United States v. Freeman*<sup>[40]</sup>, the defence of insanity is "the law's

conscientious efforts to place in a separate category people who cannot justly be held 'responsible' for their acts". There are organizational defects which may place a company in the category where it should not be held criminally liable and be punished. As referenced in the first part of this article, rogue employees who commit isolated and self-serving crimes, and corporate cultures so defective that they distort employees' capacity to reason ethically, are examples of such defects.

As Diamantis argued, attributing criminal liability to a company and subjecting it to punishment of fines may not lead to organizational change in the company where the rogue employee is an entrenched executive who is responsible for setting corporate policy<sup>[41]</sup>. If the rogue is a lower-level employee, there may be little more the company can do to prevent further rogues from appearing. It would also be the case where a company suffers from an entrenched and criminogenically defective corporate culture. Corporate culture is the touchstone by which employees gauge how to act; it relates to shared understandings, practices, and histories that bring some features of the work environment to social salience. Therefore, defective culture can silence valuable norms and normalize misconduct beyond the control of the company.

It also needs to be pointed out that even an effective corporate culture may not guarantee that companies' employees would eschew criminal conduct. Rogue employees may not be amenable to the best corporate culture compliance program if they are self-motivated to subvert it and indulge in criminal acts. A plethora of literature on corporate criminal liability confirms that "every company faces a risk of rogue employees"<sup>[42]</sup>; that "no compliance program can ever prevent all criminal activities by companies' employees"<sup>[43]</sup>; and that "companies cannot monitor their employees perfectly, so there is always a chance that some misconduct will go undetected, especially by motivated rogues"<sup>[44]</sup>.

However, a robust corporate culture compliance program has been argued as adequate to constitute a defence against corporate criminal liability. According to Walsh and Pyrich, a company with such robust compliance program "lacks the culpable mental state necessary to hold it responsible for a criminal action"<sup>[45]</sup>. In the words of Brown, "corporations with robust compliance programs lack organizational culpability"<sup>[46]</sup>. Kowal opines that "companies should not be held criminally responsible for conduct that their best compliance efforts were unable to prevent"<sup>[47]</sup>. And the United States' Model Penal Code provided that it "shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission"<sup>[48]</sup>.

The defence of corporate insanity can be justified where "insanity", as a legal term, is translated into the corporate context to show how a company may be incapacitated, and how such incapacity should constitute a defence to corporate criminal liability. Instructively, while a successful corporate insanity defence would result in an acquittal of the company, it would not imply that the company is free without any consequences; the company is not declared free to continue business as usual so as to injure new victims with impunity. In personal cases where the defence of insanity is upheld the defendant, though acquitted, is not released into the society to commit more crimes but

confined to mental health facilities for medical observation and close supervision.

Accordingly, where the defence of corporate insanity is successful the company would have to be subjected to close monitoring and supervision by the appropriate regulatory agencies of government. For example, a notable consequence for companies found culpable in the aftermath of the global financial crisis was the dissolution of their board of directors, sacking of Chief Executive Officers, and replacement of senior management cadre of the companies [49]. Thus, the consequential changes to a company acquitted of criminal liability on the successful plea of the defence of insanity are more likely to prevent further misconduct and to enhance its business operations, accountability, and profitability for its shareholders and the society at large.

The attendant re-organization and restructuring of such companies differ in essential respects than where a company is held criminally liable and convicted after prosecution. In most common law jurisdictions, the consequence of corporate conviction is like a death sentence because statutory provisions require that such companies be compulsorily dissolved and wound up under the court's supervision. The dissolution and winding up of a company that may be thriving, but for a criminal liability that is vicariously imputed on it, can have devastating effects on the lives of its innocent shareholders, employees, agents, contractors, and other stakeholders, including the host communities. Above all, victims of the corporate misconduct may not have the opportunity of full restitution as the company ceases to exist.

### Conclusion

The justification for corporate criminal liability does not have anchors outside the civil law doctrines governing principal/agent and master/servant relationship. When considered outside those doctrines, one can concede to the argument of Fischel and Sykes that the doctrine of "corporate criminal liability has developed without any theoretical justification" [50].

Without any jurisprudential basis in criminal law, corporate criminal liability is unnecessary and unwarranted in a legal system with appropriate civil remedies. Its borrowed justification of the *respondeat superior* doctrine under civil law is antithetical to the core principles of criminal law. Hence, in practical application corporate criminal liability often produces unintended results such as the dissolution and winding up of otherwise flourishing companies.

If corporate criminal liability would continue to apply, however, its basis of attributing to companies the wilful intents or guilty minds of their employees provides justification for the defence of corporate insanity. The *respondeat superior* basis of corporate criminal liability is able to create contrary control incentives for employees due to its creation of constructive strict liability. This effect is best exemplified in cases where a rogue employee acts contrary to corporate policies and well-intentioned efforts to control employees' conduct within ethical compliance programs of the company.

The insanity defence provides room for companies in this circumstance to argue that they lack the substantial capacity to control their employees. It would thereby put the criminal law in its proper position where it cannot be applied to punish companies for not doing that which is not reasonably possible. It is noteworthy that the defence of corporate

insanity does not imply that every company should escape liability for their crimes. Rather, liability should attach appropriately according to the firm principles of criminal law, not the convenient doctrines of civil law.

### References

1. In the United Kingdom the case of *TESCO Super Market v Natrass* (1972) AC 153 firmly established common law criminal corporate liability based on the criminal acts of the company employees. This position of the law is reflected in Australia, Canada, Nigeria, and South Africa. Similarly, in the United States the doctrine of *respondeat superior* which makes a master liable for the action of their servant applies to corporate criminal liability. See generally, Bucy, Pamela H., (1991). "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability", *Minnesota Law Review*. 2048.
2. See Mihailis E Diamantis. *The Corporate Insanity Defense*, 111 *J. Crim. L. & Criminology* 1; Peter R. Reilly, (2015). *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, *BYU L. REV.* 307, 320–22; Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, (2009). 46 *AM. CRIM. L. REV.* 1359, 1367, 2021.
3. Weissmann Andrew, Newman David. "Rethinking Criminal Corporate Liability," *Indiana Law Journal*, 2007; 82(2):412.
4. Allens Arthur Robinson. *Corporate Culture' as a Basis for The Criminal Liability of Corporations*, *Business and Human Rights Resource Center*. Available at, 2008. <https://media.business-humanrights.org/media/documents/f764.pdf>. Accessed 18 June 2023.
5. At the time corporate criminal liability was thought to be an aberration, Baron Thurlow had questioned rhetorically; "Did you ever expect a corporation to have a conscience when, it has no soul to be damned and no body to be kicked". Cited in Rupert Cross, Philip Asterley Jones, and Richard Card, (1980). *Introduction to Criminal Law*, (9th ed. London, Butterworth) p.107. See also Clarkson C.M.W., (1996). *Kicking Corporate Bodies and Damning Their Souls*. *Modern Law Review* 59.
6. See the following precedent cases in the different common law jurisdictions. See precedent cases: in the UK, the case of *TESCO Super Market v Natrass* (1972) AC 153; in Australia, the case of *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719; in Canada, the case of *Dredge and Dock Co. v. The Queen* [1985] 1 S.C.R. 662; the United States, the case of *New York Central & Hudson River Railroad v. United States* 212 U.S. 481 (1909); and in Nigeria, the case of *Nigerian, D.P.P. Western Nigeria v Associated Press of Nig. Ltd & Anor* [1959] W.R.N.L.R. 247.
7. Smith, Hogan. *Criminal Law Cases and Materials* (6th ed. Butterworth) p. 24-33; A company may now be held liable even for the offence of unlawfully killing a human being. See the *United Kingdom Corporate Manslaughter and Corporate Homicide Act, 2010*. However, in all criminal acts for which a company may

- be held liable, the punishment of imprisonment remains impossible, 1996.
8. In 18th century Britain, convictions of companies for strict liability offences were mainly under statutes that aimed at protecting the welfare of the people and protecting the environment from the activities of companies. See for example, the cases of *R v Birmingham and Gloucester Railway Company Ltd* (1842) 3 QB 231; *R v North of England Railway Company Ltd* (1864) 9 QB 315; *Parker v Alder* [1899] 1 QB 20; Descendants of such statutes in modern times are those mostly targeted at oil and gas companies and other minerals mining companies whose activities have potentially deleterious effects on the natural environment and its human and animal inhabitants. See for example, the Environmental statutes of the different common law jurisdictions.
  9. Allens Arthur Robinson. *Corporate Culture' as a Basis for The Criminal Liability of Corporations*, op. cit, 2008.
  10. Ali Shalchi. *Corporate criminal liability in England and Wales*. House of Commons Library, Research Briefing, 2022, 8.
  11. [1915] AC 705.
  12. Prior to the case of *Tesco Supermarkets Ltd v Nattrass* (discussed below), Lord Denning had opined in the case of *HL Bolton Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159 that; “Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company and is treated by law as such”.
  13. [1972] AC 153.
  14. (1983) 47 ALR 719
  15. (1990-91) 5 ACSR 424
  16. See, *Criminal Code Amendment (Application) Act*, 2000, 12(2).
  17. 1 SCR 497. At, 1993, 526.
  18. See the judgment of Stable, JC in *R v ICR Haulage Company Ltd* [1944] K.B 551; See also the cases of *R.v African Press* [1957] W.R.N.L.R. 1; and *Inspector General of Police v Mandilas and Karaberis and Anor* [1958] W.R.N.L. R. 147.
  19. 463 F 3d 9 (1st Cir, 2006)
  20. 212 U.S. 481 (1909).
  21. See American Law Institute, *Model Penal Code* (1981 revision), Section 2.07(1)(c).
  22. James Gobert. 'Corporate Criminality: Four Models of Fault' (1994) 14 *Legal Studies* 393-410, at, 1994, 395.
  23. Allens Arthur Robinson. *Corporate Culture' as a Basis for The Criminal Liability of Corporations*, op. cit, 2008.
  24. James Gobert, Maurice Punch. *Rethinking Corporate Crime* (2003) 59, at p. 63; See also Mark Pieth, (2006). 'Article 2 – The Responsibility of Legal Persons' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2006) 9; Available at: <<https://www.oecd.org>> Accessed 20 June 2023.
  25. Ali Shalchi. *Corporate criminal liability in England and Wales*. House of Commons Library, Research Briefing, 2022, 7-8.
  26. Weissmann Andrew, Newman David. "Rethinking Criminal Corporate Liability," *Indiana Law Journal*,2007:82(2):414.
  27. See Kathleen F. Brickey, (1988). *Rethinking Corporate Liability Under the Model Penal Code*,19 *Rutger Law Journal*, 593; Brent Fisse, (1991). 'Criminal Law: The Attribution of Criminal Liability to Corporations: A Statutory Model', 13 *Sydney Law Review*, 277; Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review*, 1095; Jennifer Arlen, (1994). *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *Journal of Legal Studies*, 833; H. Lowell Brown, (1995). *Vicarious Criminal Liability of Corporation for the Acts of Their Employees and Agents*, 41 *Loy. L. REv.* 279, 324.
  28. Brent Fisse, John Braithwaite. *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 *SYDNEY L. Rev.*,1988:468:504-07.
  29. Pamela H Bucy. *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 *MINN. L. REv.* 1095; A decade earlier the author had proposed a standard of liability which would enable a company to rebut the presumption of criminal liability under the *respondeat superior* doctrine by proving that it exercised due diligence in the conduct of its affairs. See Pamela H. Bucy, (1979). *Developments in the Law-Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 *Harvard Law Review*, 1227, 1241-58; See Richard S. Gruner & Louis M. Brown, (1996). *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 *J. Corporate Law*, 731, 749-65, who also recommended a due diligence defence to corporate criminal liability, 1991.
  30. Charles J Walsh, Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?* 47 *Rutgers Law Review*,1995:605:689.
  31. HLA Hart. *Punishment and Responsibility*, 1968, 187.
  32. Mihailis E Diamantis. *The Corporate Insanity Defense*, 111 *J. Crim. L. & Criminology* 1. (Emphasis is mine), 2021.
  33. This definition of insanity from the Insanity Rules as formulated by the House of Lords in the phenomenal *M'Naghten's Case* 1843 10 C & F 200 is adopted in the criminal statutes across common law jurisdictions. It is a legal definition of insanity but in 1954 the United States simplified the definition in light of the medical meaning of the term. In the case of *Durham v U.S* 214 F2d862 (1954) a United States Appeal Court held that; “An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect”. Note that in both the original definition in the M'Naghten's Rules and its United States' simplification, the import of the insanity defence is that mental incapacity of a criminal defendant excuses them from criminal liability.
  34. Mihailis E Diamantis. *The Corporate Insanity Defense*, op.cit, 2021, 23.

35. Section 18 of the Interpretation Act, originally made at the beginning of the twentieth century in 1901 defines “persons” to include any body of persons corporate or un-incorporate. This definition remains applicable in common law jurisdictions though re-enacted by the various national legislations in their Companies Acts and Criminal Codes.
36. See *Hotema v. United States* 186 U.S,1902:413:416.
37. Mihailis E Diamantis. *The Corporate Insanity Defense*, op. cit, 2021, 15.
38. Stephen J Morse, Morris B Hoffman. *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & Criminology,2007:1071:1117.
39. Stephen J Morse. *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777: 783, 1985, 787.
40. 357 F.2d 606, 615 (2d Cir. 1966).
41. Mihailis E Diamantis. *The Corporate Insanity Defense*, op.cit, 2021, 30.
42. George R Skupski. *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 Case W. Res. L. Rev,2011:263:277.
43. H Lowell Brown. *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 *loy. L. rev*,1995:279:327–28.
44. Larry D Thompson. *Principles of Federal Prosecution of Business Organizations*, United States Department of Justice. Available at: Department of Justice (.gov), 2003. [https://www.justice.gov.mcnyulty\\_memo.pdf](https://www.justice.gov.mcnyulty_memo.pdf). Accessed 15 July 2023.
45. Charles J Walsh, Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?* 47 RUTGERS L. REV. 605, 689.
46. H Lowell Brown. *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, op. cit, 1995, 28.
47. Steven M Kowal. *Vicarious Corporate Liability: Judges Should Credit Diligent Compliance When Evaluating Criminal Intent*, 24 *wash. Legal found*,2009:1:4.
48. See section 2.07(5).
49. See Campbell JL. *The U.S. financial crisis: Lessons for theories of institutional complementarity*. *Socio-Economic Review*, 9, 211-234; *The Senior Supervisor Group*, (2019). *Risk Management Lessons from the Global Banking Crisis of 2008*. Available at, 2011. <https://www.sec.gov/news/press/2009/report102109.pdf> . Accessed 10 July 2023.
50. Daniel R Fischel, Alan O Sykes. *Corporate Crime*, 25 J. legal stud,1996:319:320.