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The concepts of corporate criminal liability and willful blindness: Theoretical and applicability challenges

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Abstract
Corporate criminal liability has attracted several researchers and has been a subject of discourse on the growth and development of the criminal justice system in many jurisdictions. Therefore there is no dearth of resources or previous studies that will highlight both the approach and theoretical framework for the formulation and enforcement of corporate criminal liability; particularly in the two dominant jurisdictions of the United Kingdom and the United States. Secondly, these studies have in recent times narrowed to willful blindness as either a form of intention or as its substitute in the determination of the approach to be taken in placing the ingredients for prosecution of natural persons and companies. Although the two dominant jurisdictions have divergent doctrines that allow them attribute intents and acts of natural person to companies; there seem to be no such divergence in the determination of willful blindness; whether as a substitute or another specie of intention.

Keywords: willful blindness, respondeat superior, alter ego, attribution, corporate

Introduction

This Paper is looking at willful blindness as a component of corporate criminal liability and is specific to the prosecution of companies for money laundering and terrorism financing offences in Nigeria; therefore the focus is on determination of the applicability of willful blindness in relation to these offences. This review of previous studies and researches will look at the different perspectives ; particularly as it applies to the three key theories of attribution that define the parametres of the concept as well as the approach to its enforcement.

V.S Khanna [1] looked at the standards of determining corporate criminal liability and raised questions on why the concept is even tenable. He stated that the primary basis of his study is to determine whether strict liability, mens rea and negligence are optimal standards for reviewing corporate wrongdoing [2]. In his conclusions none of the three standards he reviewed is either adequate or optimal enough as a standard for corporate criminal liability; rather he advocated for a composite liability regime that mixes the elements of strict liability, mens rea and negligence. Khanna based his recommendation on the fact that corporate criminal liability is a form of vicarious liability where the company becomes liable for the acts of its agents. He went further to assert that the respondeat superior doctrine is the vehicle that allows the imposition of criminal liability on companies where an agent commits a crime within the scope of his employment and with intent to benefit the company.

Khanna expressed concerns that because of the attribution methodology of determining corporate criminal liability companies are being held liable for almost all crimes and in his opinion the respondeat superior doctrine adopted in the United States has the broadest applicability of all the other methodologies [3]. Hence he advocated the composite liability methodology that narrows the span of the attribution principles as enshrined in the respondeat superior doctrine that drives the United States jurisdiction. In his view reliance on elements of strict liability and negligence through a composite liability approach will narrow the applicability of corporate criminal liability [4]. It is clear that the focus of Khanna's study is his concern that respondeat superior is rather expansive but he ironically restricted his composite liability approach to some vertically aligning tortious liability concepts that largely mirror the respondeat superior's pedigree before it was transplanted into criminal law by a Court.

Mihalis Diamantis [5] reviewed the application of corporate criminal liability and focused his study on developing 'an intuitive and workable theory of corporate mens rea' [6] that will replace rather than improve the respondeat superior approach in the United States. He stated that without a new theory the concept of corporate criminal liability will remain 'theoretically unjustified and increasingly self-undermining' [7]. Thus he advocated for a replacement theory that will not imply or be founded on an approach that insisted that companies must have mental states. Diamantis was emphatic that companies as fictional persons cannot have mental states and it will be excessive to transfer the mental state of a natural person to it through the attribution principles. He stated that there is a mechanism that can fulfil the role of a replacement of mens rea for companies and 'could readily be integrated into criminal procedure' [8].

Diamantis attempted to remedy the shortcomings of the respondeat superior doctrine by pushing through three approaches that can serve as the basis for determination of corporate criminal liability. First he recommended the Inner Circle approach [9] that can be deduced from the Model Penal Code and made references to its provisions that states that a company is liable when 'the commission of the offence was authorized…..by the Board of directors or by a high

management agent' [10]. He believes that this approach reflects the English Law position that relies on attributing the intents and acts of the 'directing mind' to the company. Thus by equating corporate officers with being the corporate nerve centre, the Inner Circle approach will not hold a company liable for the acts of low-level 'rogue' employees and this will ultimately put a stop to the 'overbreath of respondeat superior' [11].

Diamantis recommended the Collective Knowledge approach as the second departure from the respondeat superior doctrine, he states that this approach addresses some of the limitations of respondeat superior. Though he admitted that that 'the process of aggregating mental states can become complex' [12] and sometimes almost impossible to undertake. Another drawback he envisages is the possibility that the congregation of intentions within the company can conflict amongst themselves and this will leave the aggregation in limbo [13]. This part of Diamantis' study shows that when charting a new path a Researcher must avoid the pitfalls that may have warranted his study in the first place; this second approach seems infested with the uncertainties that he located in respondeat superior.

Diamantis propounded a third and final approach to replace respondeat superior and coined it corporate ethos [14]. He stated that sometimes crime is a predictable outcome of membership of certain organizations and as a result some theorists propose looking to corporate culture as a proxy for corporate intent [15]. This approach believes a company should only be convicted when the prosecution can prove beyond reasonable doubt that the corporate ethos encouraged agents and employees of the company to participate in criminal endeavours. He suggested a look at a company's hierarchy, its goals and policies, how it treats past offences, its efforts to educate its employees on compliance with the law and compensation scheme as indicators of its corporate ethos. He concluded that the current United States Sentencing Guidelines has incorporated elements of the corporate ethos approach in determining sentencing enhancements and mitigation for companies [16]. In fairness to Diamantis he also provided a drawback to this approach by stating that it is a much better measure of causation than of intent [17].

It is Pamela H. Bucy that took the third approach of Diamantis to a height of clarity and provided a more reasonable justification of reliance on that approach to corporate criminal liability. Bucy's research [18] proposes a standard of corporate criminal liability that uses a new 'conceptual paradigm' [19] for identification and determination of provability of corporate intent. Corporate ethos approach assumes that each company has a distinct or identifiable personality coined as "ethos". Therefore the government can only convict under this standard if it can prove that the company's ethos encouraged agents to commit the crime under review. Secondly the central point of this approach is its assumption that a company possesses an identity that is independent of specific individuals who control or work for the company. Bucy also stated that this new standard offers four distinct advantages [20]. One, it provides the theoretical and practical framework that is a methodology for identifying and proving the intent of corporate actors. Two, corporate ethos standard distinguishes amongst different companies and does not lump them together. Three, corporate ethos rewards companies that make efforts to educate and motivate their employees to 'follow the letter and spirit of the law' [21]. Lastly, corporate ethos is practical, workable and provable.

Bucy provided an insight into why her study came up with a 'replacement' approach that departs from the respondeat superior approach. She stated that the critical weakness of the more traditional and established respondeat superior is that it fails to sufficiently analyze corporate intent but just attributes intents of natural persons to the company. She made reference to United States v Hilton Hotel Corporation [22], a case where a company's employee acted contrary to express corporate policy and yet the court still held the company liable; to her this exemplifies the failure to sufficiently analyze corporate intent [23]. This in her view is because respondeat superior focuses solely on individual corporate agents' intent and automatically imputes such intent to the company whether or not the company made efforts to avert its occurrence.

John Hasnas is not just critical of corporate criminal liability but believes there is 'no theoretical justification for it' [24]. He highlighted the fallacy of attributing moral responsibility to a company, he queried this by reviewing it against the most expansive concept of criminal responsibility. His query was: since companies have no limbs or a body with which to perform actions and no brains to think, how then can they commit crime? Curiously at this point he admitted that the United States Supreme Court may have answered this query in the New York Central case by importing the tort doctrine of respondeat superior into the criminal sphere. Yet Hasnas seems dissatisfied and opined that the respondeat superior approach violates the three main conditions of criminal responsibility. The first condition relates to the purpose of punishment under criminal law where criminal sanctions may be applied only where doing so will advance the legitimate purpose of punishment. Hasnas believes this condition cannot be meet when imposing criminal sanctions on companies because companies are only subject to financial sanctions and cannot be imprisoned. The second condition of criminal responsibility is that criminal sanction will be applied only when doing so does not create an unacceptable risk of prosecutorial error or abuse; this is to minimize punishing of innocent parties. Thus in his conclusion imposing criminal sanctions on companies for acts of its employees is rife with opportunities for such abuses. The last condition relates to public harm and states that criminal sanctions should only be applied only when it will address a public harm and not to protect private interests. Though he did not elaborate on what this last condition does to the sum total of his opinion; but it is clear that Hasnas does not see prosecution of companies as a strive to prevent public harm.

Hasnas almost contradicted himself because he provided two alternative approaches to the traditional respondeat superior approach; after stating that there is no theoretical justification to corporate criminal liability. First he advocated the use of the Model Penal Code in the United States because it mirrors the alter ego doctrine of the United Kingdom. Secondly he pushed for the adoption of Andrew Weismann [25] suggestion where he made a pitch that corporate criminal liability should only arise after the imposition of a 'carefully constructed limitation of corporate criminal liability' to those situations

where a company reasonably should have taken steps to detect and deter the criminal action of its employees. This second standard actually transfers the burden to proof that a company has not made adequate plans to control employees to the prosecution.

Hasnas got back to how he started his paper and ended on the same note. He concluded by stating that he still believed that even the alternatives to respondeat superior he provided are not theoretically justified [26]. This is because all of them will still constitute a form of vicarious liability in which some are punished for the wrongdoing of others. Hence he submitted that corporate criminal liability in any form has no place within a liberal criminal justice system [27].

George Skupski [28] took the path of Hasnas but changed course and push out a pragmatic approach that will 'repair' the respondeat superior approach. He stated that establishing the concept of corporate criminal liability using vicarious liability was flawed from the start and he criticized the New York Central case. According to him the strict respondeat superior approach was misguided and he gave two analogous reasons to support these conclusions. The first reason was that the court failed to appreciate the difference between civil and criminal laws; because while tort primarily aims to compensate a party for damages and deterrence can only be a byproduct of this aim, in criminal law deterrence is the main and primary aim of its punishment and sanctions. The second reason he proffered was that while tortious liability is commonly considered a cost of doing business, corporate criminal liability can lead to convictions that may culminate in winding up the company.

Skupski, who was conducting a doctoral research on corporate criminal liability at the Case Western University criticized New York Central for having a 'troubling flaw' [29] due to its failure to consider conceptual alternatives to the broad respondeat superior before setting it as the standard for corporate criminal liability. He reviewed the adoption of the collective knowledge theory by the court in United States v Bank of New England [30] and stated that it is an indication of the recognition of the theory and its potentials; but still he concluded that the collective knowledge theory is simply inadequate 'to patch over the gaping hole in the respondeat superior standard' [31]. He critiqued even the adoption of the collective knowledge theory because it 'merely pieces together remnants of individual knowledge' [32].

Skupski analyzed a number of theories that have emerged in the shadow of the adoption of respondeat superior by the United States Supreme Court in 1909. First he analyzed the Proactive Corporate Fault theory which imposes liability where a company fails to make reasonable efforts to implement internal controls to prevent the commission of a crime. Here reasonable efforts refers to the development and implementation of safe guards to prevent the commission of a crime; and the delivery of a clear and convincing guide on how to avoid commission of crimes through conduct codes, ethics codes and compliance programmes. The second theory is the Reactive Corporate Fault theory that focuses on the company's reaction to any misconduct and this is measured by the reasonableness of its approach and reaction after one of its agents has committed a crime. The last theory he made references to is the corporate ethos theory that can only be applied after it is proved that a company's corporate culture encourages commission of crimes by its agents.

Skupski proposed a model that requires the adoption of the senior management as a group when evaluating the intents and acts that can be attributed to the company. He stated that the use of senior management's intention and acts as a proxy for the company is key because the senior management are vital to determination of corporate deviance. He explained that the senior management is a central force in corporate wrongdoing and their influence trickles down from the highest ranks into the lower ranks. The aim of senior management mens rea is to create a 'close estimation of the company's mental state' [33]. He concluded that this approximation of senior management's culpability with the determination of corporate criminal liability is a perfect assessment because this approximation bears the closest nexus to the will of the company.

Chijioke Okoli [34] conducted a study on the current perspective of corporate criminal liability in Nigeria and was of the opinion that criminal liability of companies is an 'often forgotten aspect of the law' [35] in Nigeria. He clarified the reasons for this conclusion and provided two basis for this; first the concept of distinct corporate personality remains a fiction to most Nigerians and secondly because companies are normally liable to white collar crimes there is a general lukewarm approach to imposing corporate criminal liability [36]. Okoli is of the firm belief that this apathy will soon change and he referred to Section 65 (1) (a) of the Companies and Allied Matters Act (CAMA) as the specific statutory authority that supports corporate criminal liability in Nigeria and he brought out the key condition set out in that Section. The condition was that the act that led to the offence must have been committed in the course of the usual manner of performance of the company's business. This condition is neither a mirror reflection of the respondeat superior doctrine (to which it has similarities) nor is it deducted from the alter ego doctrine (the English law approach that Nigerian case law has taken). Okoli made a clarification that throw light on the Section but still seems far off from the two main theories; he stated that to attribute acts of an agent or employee to the company, such an act must have been performed in the normal course of business [37].

Interestingly Okoli looked at Section 6 (1) (b) of CAMA that stated that 'a company cannot escape liability for acts undertaken in connection with its business merely because the business in question was not among the business authorized by its memorandum' [38]; this clearly shuts out the ultra vires rule from serving as a defence in corporate criminal liability in Nigeria. Hence when an act is committed in the course of business but not contained in the Object Clause 'but which the company engages in fact' the company will still be liable. This effectively suspends the ultra vires rule for the purposes of corporate criminal liability in Nigeria [39]. Okoli cited James v Mid-West Motors Limited [40] where the Nigerian Supreme Court held that once an agent is acting in the course of his employment in respect of his Principal's business the Principal will be liable and 'is immaterial that the actin question has even been expressly prohibited by the Company' [41].

Okoli went to the basics in his study of the current perspective of corporate criminal liability in Nigeria by determining

personhood of companies. He referred to Section 18 (1) of the Interpretation Act which defines a person as 'including anybody of persons corporate or incorporate', which invariably extended any reference to a 'person' in any law to include companies. He added that provisions of all legislations criminalizing certain conducts are applicable to natural persons and companies alike even in the absence of any express stipulation to that effect [42]. He used Section 515 of the Criminal Code as an illustration of this fact and made allusion to how it starts with 'every person who knowingly…' ; in his view this is a substantial extension of corporate criminal liability to any felony committed by agents in the normal course of doing business. Though he was always clear that corporate criminal liability may still not extend to offences such as perjury.

Okoli also sees Adeniji v The State [43] as the most exhaustive discussion of the concept of corporate criminal liability in Nigeria, especially as it concerns the individual liability of the officers of the company. In the case the Court came to a conclusion that the doctrine of "lifting the veil" has no application whatsoever in criminal proceedings because you can only attribute intent and act of natural persons to the company and not the other way round. In Okoli's opinion to lift the veil is too excessive and defeats the aims of corporate criminal liability. He also concluded that the major achievement of CAMA is the clarification it provided on corporate criminal liability, although he also admitted that its provisions essentially follow the principles evolved by case law [44]. The study by Okoli is not only narrow but it failed to provide any insight, whether historical or conceptual, of the evolution of corporate criminal liability. Therefore while he advertised that he will provide a current perspective on corporate criminal liability, he ended up pointing us to CAMA and its 'mystical' powers.

Olatubuson and Alayinde [45] looked at criminal policy and stated that it must be formulated to repress criminal behaviour and the prevention of anti-social conducts. The objective of their research Paper was to examine Nigeria's criminal law policy in the light of competing concepts of morality. They looked at the traditional criminal policy approaches and concluded that the main aim of all the approaches is to link moral culpability and legal liability doctrines. They focused on articulating a change in policy approach to criminal policy and its conceptualizations; they completely neglected to look at the different factors, dimensions and forms of criminal liability that may have shed light on the challenges Nigeria's jurisprudence is facing. Sadly Olatubuson and Alayinde skipped the chance to elaborate on the concepts of criminal responsibility and legal liability as they affect Nigeria's approach to criminal law generally.

Elidiana Shkira [46] was worried that the difficulty in considering companies as 'persons' in determination of criminal sanctions is partially due to criminal law's focus on a guilty mind. She provided reasons why corporate criminal liability is important and a necessity in criminal law. First because the power of the company is greater than the power of the members; this certainly makes it logical to consider corporate accountability as more important than individual liabilities of members of the company. Secondly, recognizing that the company as a whole is criminally liable allows for more effective legal and moral sanctioning of wrongful corporate activity. This in many ways fosters the adoption of better standards, engender responsible corporate behaviour and a deterrence to future misconducts. Lastly by recognizing the separate legal personality of companies it opens up opportunities to deploy effective means of punishment and sanctioning.

Shkira focused her research on the United Kingdom and reviewed the different theories of corporate criminal liability and approaches under English Law. She analyzed the Agency theory, which is also known as the vicarious liability theory, which states that a company is liable vicariously for acts committed by its agents. She pointed out that under this theory there is no difference between the acts of either low level employees or high management officers [47]. The second is the Identification theory, which is also known as the alter ego doctrine, where a company can only be liable for an offence if the individual responsible is identified first. This theory determines that the company is directly liable for the identified individual's wrongful acts on the basis that such acts are also the acts of the company itself. This identification only becomes tenable after it is determined that the natural person is qualified as a 'directing mind' of the company as to make his acts that of the company. She rested her argument on the words of Viscount Haldane in the famous Lennard's Carrying case where he asked questions on who can really be determined as the 'directing mind and will' of the company as to conclude that he is 'the very ego and centre of the personality of the corporation'.

Shkira reviewed some civil law jurisdictions in Western Europe, such as Spain and Switzerland, both of whom adopted corporate criminal liability in 2003. She summarized her findings by asserting that it is obvious that the American model of corporate criminal liability is the most efficient and consistent one. Furthermore she commended the approaches in the United Kingdom and Germany because theory do not limit the list of crimes for which a company can be held criminally liable. Her review was both restrictive and narrow as it failed to look at other attribution approaches as well as create a foundation for future researches on possible convergence on not just the theories but also the conceptual baselines.

Abigail H. Lipmann [48] was of the opinion that corporate criminal liability raises theoretical questions because companies can only act through individuals and not independently. She believes that the corporate scandals in the United States led to increased outrage and culminated in the passage of the Sarbanes-Oxley Act in 2002 [49]. She provided the three elements required before a company can incur criminal liability. One that the employee acted in the scope and nature of employment. Two that the employee acted at least in part, to benefit the company. Three, that the intent and act of the employee can be imputed to the company [50]. But the heart of her study was on willful blindness as a form of mens rea for corporate criminal liability. She states that a company can be criminally liable for deliberately disregarding criminal activity and where such activity takes place the company can be held responsible through the willful blindness doctrine. She explained that the willful blindness doctrine is most often employed where a corporate agent becomes

suspicious of a criminal violation but deliberately took no action to mitigate or investigate potential criminal activity. She was emphatic that under the doctrine proof of either actual knowledge or conscious avoidance satisfies the knowledge requirement [51]. Lipmann referred to United States v Baxter International [52] where the court held that where a defendant willfully blinds himself to a fact then the court can held him liable as if he had constructive knowledge of the fact.

Lipmann's research was novel as it attempts to link willful blindness to corporate criminal liability by viewing them through different theories. She refers to collective knowledge as an aggregation of individual employee's knowledge for the purpose of creating the necessary guilty mind for the company. Thus the collective knowledge doctrine is the collection of all acts of employees operating within the scope of their employment. This same deductions will apply will determining whether a company was willfully blind as to warrant the aggregation of all the willful 'blinding' acts of its employees.

William Robert Thomas [53] believes corporate criminal liability was a myth before the courts overcame longstanding skeptical challenges to the possibility of attributing individual's acts to the company. Thomas believes corporate criminal liability has achieved a level of theoretical coherence and desirability as to make it an acceptable form of criminal liability. He further explained the absoluteness of the legal personhood of the company and states that using respondeat superior to attribute acts of others is a disregard to the main thrust of legal personhood. Therefore in his view relying on respondeat superior is under inclusive because it requires at least one employee to have the attitude in order for the attribution to take place. But in his view a company can hold that attitude without the need to attribute to it that of another. In conclusion he stated that the legal personhood of the company is an important ingredient of corporate criminal liability and companies should be regulated as persons not systems. Thomas recommended reforms to ensure that the concept of personhood is central to corporate criminal liability; although he shied away from making concrete and practical recommendations that will cure what he had discovered.

Weismann and Newman [54] had different ideas. They contended that where the government seeks to prosecute a company it should bear the burden of establishing as an additional element that the company failed to prevent the crime. This burden to prove that the company has not built effective mechanism to stop crime is in consonant with general criminal law precepts that places the burden of proof of each essential element of a crime on the government [55]. They believed that the rethinking of corporate criminal liability will benefit both the government and companies; by limiting it to those who have not taken reasonable measures to prevent criminality by their employees it will spur corporate action and streamline prosecutions of companies [56]. Therefore the reliance on a standard that is tied to whether a company has taken all reasonable steps to prevent and detect crime by its employees would strongly incentivize meaningful and necessary self-regulation. More so companies will benefit from a new corporate criminal liability standard that encourages effective compliance systems that will mitigate all the risks that may warrant prosecution.

Alexander Sarch [57] conducted an indepth research on willful blindness and its impact on determination of criminal culpability. He stated that the United States Supreme Court has endorsed willful ignorance and he cited Global Tech Appliance Incorporated v S.E.B SA [58] as a good illustration of that assertion. He referred to what he termed as 'restricted motive approach' and set out three elements that must be present before a willfully ignorant defendant can be deemed to have possessed the requisite knowledge. First element is that he was having suspicions about the fact of which knowledge is required; second element is that he deliberately refrained from investigating the matter and lastly he has a particular motive for remaining in ignorance. Sarch pointed at United States v Willis [59] where the court defined willful blindness in clear terms to mean 'deliberate indifference' [60] that is 'purposely contrived in order to have a defence' [61].

Sarch referred to the equal culpability thesis and stated that case law has gone beyond the scope of willful blindness because the courts are relying on an unrestricted approach that is over inclusive; because it allows willful ignorance to satisfy the knowledge element of the crime. Consequently he advocated for the use of the restricted version of the equal culpability thesis because it will not overreach or stretch willful ignorance to a level that will make its adoption reckless. He actually relied on the equal culpability thesis and stated that there are three main ways of defending this approach. First, under the thesis it is to argue that willful ignorance is just a subspecies of knowledge and performing an act based on it would always be as culpable as performing it with knowledge. Secondly it is to accept that willful ignorance is not a form of knowledge but nonetheless try to argue that acting in willful ignorance is always as culpable as acting with knowledge. Lastly it is to defend a restricted version of the thesis.

Robin Charlow [62] offers an argument that is similar to equal culpability thesis propagated by Sarch. Although similar her conclusion is that the willfully ignorant defendant is likely to have decided to avoid knowledge out of some 'corrupt motive'. She argued that the three elements of equal culpability thesis does not necessarily render one as culpable as a knowing wrongdoer. In fact she sets her own three elements, first is having good reason to believe that some fact exists that makes what one is doing wrong. Secondly being on the verge of believing such exists and lastly is purposely avoiding finding out the truth. She considered her idea of a corrupt motive as a key indicator of a plan to allow a crime to occur. Based on this Charlow concluded that with all the three factors she provided, it will be reasonable to conclude that the willfully ignorant actor will usually be about as malevolent as the knowing actor [63]. Sarch criticized her 'corrupt motive' approach as having speculative arguments which mostly appeals to intuition rather than a concrete element of determination of corporate criminal liability.

Daniel Luban [64] took a third road and strayed away from Charlow and Sarch. He offered a different approach that is based on three prototypical situations; each of which corresponds to a different level of culpability. The first one he called The Fox and it represents the willfully ignorant actor

who were he given full knowledge on what his action will cause and he suspects it will; would still go ahead and perform such acts. This character aims to do wrong and 'structures his own ignorance merely to prepare a defence' [65]. The second is The Unrighteous Ostrich who 'doesn't want to know she is doing wrong but will do it even if she knows' [66]. The last one is The Half-Righteous Ostrich who 'shields himself from guilty knowledge but would actually do the right thing if the shield was to fail' [67]. He contended that The Fox is as culpable as the purposeful actor; The Unrighteous Ostrich is as culpable as the knowing actor and The Hal-Righteous Ostrich is as bad as one who is reckless. He concluded that The Unrighteous Ostrich is 'precisely fitted for the common law equation of willful ignorance with knowledge' [68].

Jalal Hashim Sahlool conducted an indepth doctoral research [69] on corporate criminal liability and attempted a comparison between the legal systems in the United States and Saudi Arabia. Hence his research is key to our review because it is clear that Jalal intended that the main aim of his research is to 'develop a well-based, fair and unified standard for corporate criminal liability' [70] and he was focused on the United States and Saudi Arabia. Furthermore his research looked at the inadequacies of Saudi Arabia's approach to corporate criminal liability and he recommended a wholesale adoption of the United States' approach; his recommendation was hinged on his acceptance of the respondeat superior doctrine that drives the concept [71]. A review of his research direction will show it was restrictive as he seems taken by the respondeat superior doctrine and made several referral analysis of the aggregation theory (although he labelled it collective knowledge theory) [72]; he made no attempt to look at the comparative advantages of the alter ego doctrine that drives corporate criminal liability in the United Kingdom.

Clearly this study departs from the approach of Jalal and also relied on a more expansive look at different doctrinal and theoretical basis for determination of corporate criminal liability; but there are areas of convergence. Although the research outcome recommended a review of United States Sentencing Guidelines to accommodate corporate wrongdoers; he acknowledged that there is a hanging risks on companies that they will face prosecution if and when acts of its natural officers are attributed to them. In his view the companies must take this risk into consideration in building their compliance programmes even though 'an effective compliance program alone will not help a company avoid prosecution [73]. This study also acknowledges this risk but had a more expansive perspective and looks at the compliance programme as a mitigating tool rather than a checklisted mechanism to transfer liability or pass it somewhere else.

It is noteworthy that while Jalal's research is situated in a developing country like Nigeria and he was keen on working through the uncertainties of corporate criminal liabilities in such types of countries; he has left a wide gulf in his assessment of the doctrines and theoretical framework due to a singular reliance on a jurisdiction. The second challenge he faced was the Islamic form of legal system in Saudi Arabia; which will clearly hamper any attempt to transplant a common law concept. Lastly he was fixated on the adoption of the respondeat superior approach and failed to look at the impact the risks he identified will have on companies in that country.

Challenges and applicability of corporate criminal liability and willful blindness

An analysis of another research wills show the growing concern that corporate criminal liability is creating a new layer of risks for companies and an attendant strive to find a better approach built on sound theoretical foundations. Mustafa Ramadan Muftah conducted an analytical study of corporate criminal liability and the application of criminal law to companies and its management [74]. Mustafa looked at the theory of corporate personality as an impediment to corporate criminal liability and hence built his research on the theory of agency. He took the path of the United Kingdom and stated that although the agency theory crosses the rubicon in establishing the applicability of corporate criminal liability, it is the identification theory that provides the fuel that drives the actual enforcement of criminal law provisions to corporate defendants [75].

Although his research was indepth on corporate criminal liability but it focused on a dual lane approach that intermittently moves between the agency and identification theories; the inadequacy of this approach was that he dwelled on the intial challenges of accepting the inevitability of the application of the concept. Therefore the research spent a substantial part of its analysis looking at challenges that have been dealt with by pioneers such as V.S Khanna [76] and John Hasnas [77]; without looking at the contemporary issues around corporate criminal liability. It was apparent that Mustafa saw his research of corporate criminal liability as an end by itself rather than a seedling that will propel his review of its effect on traditional concepts such as corporate governance and internal policies within companies.

Spencer Fisher [78] seems to have an aim that is a direct opposite of Mustafa's research on corporate criminal liability and built a study that understood the risk factor in the existence or the mere acceptance of the concept by courts and regulators. Spencer looked at corporate criminal liability in the light of corporate scandals in the United States that precipitated the passage of the Sarbanes-Oxley Act in 2002. He believed the passage of the Act exposed companies to increased criminal liability, though he admitted that 'most of the investigation and prosecutions after its enactment focused on individual officers [79]' but he stated that the risks continues to hover above all companies. A second remarkable part of his study was his review of the agency theory and its two preconditions for application when attributing intents and acts of natural persons to the company using the respondeat superior doctrine. He stated that while relying on the agency theory the attribution is based 'on a fact-specific inquiry and is regardless of the agent's position within the company' [80]. It was quite clear that he is building his analysis based on the English law doctrine of alter ego because he closed this aspect of his argument by stating that 'the assignment of liability depends on the treatment of agents versus high managerial agents' [81]. This is an allusion to that principle that feeds the alter ego approach; and a dramatic departure from the United States' approach that relies more on the aggregation theory and the respondeat superior doctrine. In fact in his view the United States Model Penal Code is tailored towards the alter ego doctrine [82].

Spencer also had an expansive view of the applicability of

corporate criminal liability and he brought in willful blindness as a variation of how an agent's action or inactions can be attributed to the company. He states that companies can be criminally liable for 'deliberately disregarding criminal activity' and he made a reference to willful blindness in an instance where the agent of the company 'became suspicious of a criminal violation but deliberately took no action' [83]; in his view this was better captured in the case of *A.E Staley Manufacturing Company v Secretary of Labour* [84] where the court held that such blindness can be attributed to the company. This attribution, as with the main criminal liability, were built on the aggregation theory (which Spencer referred to as the collective knowledge theory), therefore to Spencer it entails 'aggregating individual employees' knowledge for the purpose of creating the necessary guilty intent for the company' [85]. Yet he failed to show how this aggregation will work for either the main corporate criminal liability concept or willful blindness; this leaves a desire for clarification.

It is almost certain that Spencer's research has provided a latch to push out further studies on the issues of corporate criminal liability and willful blindness but we cannot hurry to such conclusion because he failed to elaborate on how companies can effectively mitigate this risk. He merely referred to companies compliance programme as a mitigating factor that cannot prevent the commission of crimes because 'even the most diligent of corporate monitors may fail to prevent every violation' [86]. Though he concluded that such programmes should be considered as base minimum for mitigation of the criminal liability risk; he ended without providing a guide on a framework, whether contextually or theoretically.

Evaristus Oshionebo conducted a similar research but has transnational companies as subject of his review of corporate conduct in relation to regulations and laws; though he conducted his research in North America his research was focused largely on Nigeria and partly on Ghana [87]. He believes that regulations and laws have been ineffective in controlling corporate conducts within Africa; particularly Nigeria and Ghana. He advocated a plural regulatory platform as a mechanism to checkmate excesses of companies who have been acting without regulatory control. He advocated a 'command-and-control' approach rather than a market based approach because there are 'structural and institutional deficiencies which undermines conventional state regulations' [88].

Evaristus approach is both narrow and simplistic. Therefore he was unable to build a contextual foundation or a theoretical backbone to an issue far beyond companies not being completely compliant with laws and regulations. Although his focus on companies that are based in Nigeria was a clear path that shows the regulatory challenges in Nigeria; but it cannot be a substitute to corporate responsibility. Secondly the outcome of his research shows a distancing from the main concept of corporate criminal liability to matters of what compliance requires and mandates for all companies. In his research outcome Evaristus kicked against compliance codes due to what he stated is their flexibility that permits review; he rather suggested the use of legal and statutory rules that are more binding because of their statutory origin. In fairness in admitted that the existence of a compliance programme within a company 'maybe considered by a court as an evidence of good intent' [89]. Although his research went deep into challenges companies face in meeting regulatory standards, his main focus was the weakness in the regulatory structures in Nigeria and Ghana.

It is becoming evident that contemporary Researchers have taken heed of the wide ranging risks companies are facing since the 20th Century when the issue of corporate criminal liability became an integral part of criminal law in most jurisdictions. This awareness has spurred the interest of regulators, corporate executives and academics; leading to studies on the nature of the risks, possible mitigations and in some instances extending to avoidance of these pitfalls altogether. V-Tsien Gaius Fan conducted an indepth and well researched study of this issue and attempted to design an anti-corruption counter strategy for the private sector [90]. In fact he referred to a compliance and ethics programme as 'a dominant strategy in curbing and controlling corruption in the private sector' [91].

V-Tsien provided an insight into what he discovered to be the inherent benefits of a comprehensive compliance programme in a company. First, it has an ability to emphasis and transmit aspirations reflected in various measures of firm value. Secondly, it has the ability to capitalize on collateral consequences reflected in various measures of firm value and lastly he stated that such a programme ensures the efficient use of financial and human resources as combined with a management system. These benefits he highlighted were further elaborated when he indicated that there are drawbacks to having a compliance programme. The first drawback is that it can lead to 'inadequate or overly harsh penalties' [92]; second drawback is that it can create difficulty in investigating and prosecuting wrongdoers through improper implementation. The last drawback is the high expenses in development, deployment and implementation of such compliance programme.

V-Tsien has provided a window through which we could view the direction of his research when he stated that the main aim of his study is to incorporate statistical data with the merger of the trio of institutional, criminological and business management theories [93]. In order to meet this daunting aim he proposed a multidisciplinary approach from the standpoint of criminology and institutional theory; he coined it "synthetic approach" [94]. Yet that was the point where his study confessed its inadequacies and seems to be making a pledge to leave rooms for more elaborate researches in the future. First he failed to isolate the nature of risks the counter strategy is aimed at mitigating or avoiding, hence there was a lack of focus on specifics that may warrant not just the research but the determination of the need to design any counter strategy. Secondly the researcher was unable to place the three theories he relied on as fulcrums for determination of corporate criminal liability; which should be the underlying reason a comprehensive strategy is required in the first place that may have led to any design of a counter strategy.

Todd Haugh [95] in his study was worried about the 'criminalization of compliance' because corporate compliance is becoming increasingly "criminalized"; as a result companies are now approaching compliance through criminal law lens. Haugh said that after decades of scandal-driven

legislative and regulatory changes, particularly in the United States, companies have adopted criminal law influenced and deterrence-based compliance to avoid criminal prosecutions and investigations. In his view the problem of approaching compliance through a criminal law lens is the possibility that the company will strive to avoid the risk rather than build a culture of compliance. Therefore it is not surprising that compliance has evolved into a document of avoidance and a mitigating attempt to push out the broad outlines of respondeat superior. The focus of Haugh's study is to close the gap of most previous studies that seemed bent on excavating the adverse impacts that a lack of legitimacy has on compliance effectiveness. This closure of gap focuses on the general connection between illegitimacy and ineffectiveness, rather than any possible connection between avoidance of criminal liability and development of an effective compliance programme by a company [96].

There have been several studies and researches on corporate criminal liability, its theoretical foundations and conceptual approaches over the last 100 years. These studies have focused on the acceptability and possible implementation approaches to corporate criminal liability; but those were mostly in the formative years. Currently corporate criminal liability has moved to a more advanced level and there is a need to change the direction of research and build on the existing studies.

References

1. Khanna VS. Corporate Liability Standards: When Should Corporation be Held Criminally Liable? Am. Crim. L. Rev. 2000; 37:1239.
2. Ibid at 1243
3. Ibid at 1247
4. Ibid at 1249
5. Mihalis Diamantis. Corporate Criminal Minds Notre Dame Law Review. 2016; 91(5):2050.
6. Ibid at 2051
7. Ibid at 2058
8. Ibid at 2059
9. Ibid at 2068
10. General Provisions Section, Model Penal Code and Commentaries (Official Draft and Revised Comments) 1985
11. Ibid at 2069
12. Ibid at 2070
13. Ibid at 2071
14. This approach was first propounded by Pamela Bucy
15. Ibid at 2072
16. Ibid at 2073
17. Ibid at 2073
18. Pamela Bucy H. Corporate Ethos: A Standard for Imposing Corporate Criminal Liability Minn. L. Rev. 1991; 75:1095.
19. Ibid at 1095
20. Ibid at 1098
21. Ibid at 1098
22. (1972) 467 F.2d 1000
23. Ibid Bucy at 1099
24. John Hasnas. The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability Am. Crim. L. Rev. 2009, 1.
25. Andrew Weismann, David Newman. Rethinking Corporate Criminal liability Indian Law Journal. 2007; 82:411.
26. Ibid at 45
27. Ibid at 45
28. George Skupski, The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability Case Western Law Review. 2012; 62(1):262.
29. Ibid at 271
30. (1987) 821 F.2d 844
31. Ibid Skupski at 291
32. Ibid at 292
33. Ibid at 320
34. Chijioke Okoli. Criminal Liability of Companies in Nigeria : A Current Perspective Journal of African Law. 1994; 38(1):35.
35. Ibid at 35
36. Ibid at 36
37. Ibid at 37
38. Section 6 (1) (b) of CAMA
39. Ibid at 38
40. (1978) N.S.C.C 536
41. Per Aniagolu JSC at 542
42. Ibid Okoli at 39
43. (1992) 4 NWLR Pt 234 at 261
44. Ibid Okoli at 45
45. Adeniyi Olatubuson, Zacchaeus Alayinde. Towards Evolving Nigeria's Criminal Policy: The Challenges of Traditional and Modern Concepts US-China L. Rev. 2013; 10:288.
46. Elidiana Shkira. Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries. 2013. papers.ssrn.com
47. Ibid at 6
48. Abigail Lipmann H. Corporate Criminal Liability Am. Crim. L. Rev. 2009; 46:359.
49. Sarbanes-Oxley Act, Public Law No. 2002, 107-204.
50. Ibid Lipmann at 362
51. Ibid at 368
52. (2003) 345 F.2d 866
53. William Robert Thomas. How and Why Should the Criminal Law Punish Corporations? (2015) A PhD Thesis presented to the University of Michigan, United States
54. Andrew Weismann, David Newman. Rethinking Corporate Criminal liability Indian Law Journal. 2007; 82:411.
55. Ibid at 414
56. Ibid at 441
57. Alexander Sarch, Willful Ignorance, Culpability and the Criminal Law St. John's L. Rev. 2014; 88:1023.
58. (2011) 131, S.Ct, 2060
59. (2002) 277, F.2d, 1026
60. Ibid at 1029
61. Ibid at 1029
62. Robin Charlow. Willful Ignorant and Criminal Culpability. 1992; 70 Tex. L. Rev. 1351
63. Ibid at 1357

64. David Luban. Contrived Ignorance. Geo. L.J. 1999; 87:957.
65. Ibid at 960
66. Ibid at 961
67. Ibid at 961
68. Ibid at 966
69. His Final Thesis is titled: 'Corporate Criminal Liability: A Comparison between the Law in the United States and Saudi Arabia, presented to the University of Kansas, United States in 2013
70. Page 5 Ibid Jalal
71. Page 3 Ibid Jalal
72. Page 236 ibid Jalal
73. Page 189 ibid Jalal
74. Mustafa Ramadan Muftah. Corporate Criminal Liability: An Analytical Study of the Application of Criminal Law to Companies and to their Direct Management. a Doctorate Degree Thesis presented to the University of Edinburgh, United Kingdom. 1992.
75. Page 192 ibid Mustafa
76. Refer to Khanna on Footnote 1 in his Paper on the purpose for Corporate Criminal Liability
77. Refer to Hasnas on Footnote 74 in his Paper on the centenary of Corporate Criminal Liability
78. Fisher, Spencer R. Corporate Criminal Liability, The American Criminal Law Review. 2004; 41:367.
79. Ibid at 368 (he made references to Enron, Tyco International Limited and WorldCom Inc.)
80. Ibid at page 371
81. Ibid at page 372
82. Ibid at page 372
83. Ibid at page 376
84. (2002) 295 E.3d, 1341
85. Ibid Spencer at page 378
86. Ibid at page 389
87. Evaristus Oshionebo. Transnational Corporations in Africa's Extractive Industries: Challenges in the Regulation of Corporate Conduct, PhD Thesis presented to York University, Toronto, Canada. 2006.
88. Ibid at page 125
89. Ibid at page 296
90. V-Tsien Gaius Fan. Designing a Comprehensive Anti-Corruption Counter Strategy for the Private Sector, a PhD Thesis presented to the North Eastern University Boston, Massachusetts, United States. 2014.
91. Ibid at page 37
92. Ibid at page 56
93. Ibid at page 98
94. Ibid at page 187
95. Todd Haugh, The Criminalisation of Compliance Notre Dame Law Review. 2017; 92:1216.
96. Ibid at 1252