

Parental Criminal Responsibility for the Misconduct of Their Children: A Consideration



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Abstract

This contribution examines the criminal responsibility that is imposed upon parents for the delinquent acts of their children. As South African law has been swayed by the legal philosophy of Anglo-American jurisprudence, a comparative analysis is undertaken with the United States of America, where this imposition has been addressed legislatively in both civil tort law and criminal law. The reasoning underlying the implementation of such specific legislation in the United States is that the common law principles are rooted on the principles of individualisation, which does not specifically cater for parental liability. These parental responsibility laws have been challenged constitutionally over the years in the United States, as critics argue that such laws interfere with the rights of parents to raise their children and are also a form of cruel punishment. Additional criticism submitted is that parental responsibility laws impose strict liability on parents. Further misgivings have also been voiced that many parents face challenges such as those of being a single parent or of suffering poverty, both of which will be exacerbated if fines are imposed, or if such parents are imprisoned for their child's misconduct. It will be shown that in the United States these laws have managed to withstand such challenges over many decades in both the fields of the law of tort and that of criminal law. Although the common law of tort provides for the liability of parents for their child's misconduct, the child's conduct must be specifically attributable to the parent's action or inaction. Tort parental responsibility legislation focuses not only on providing monetary compensation by parents where their children are unable to do so, but also aims to persuade parents to better supervise their children. At the opposite end of the spectrum, the focus of statutory criminalisation tends to remain on the criminal liability of parents for failing to protect others from the actions of their children resulting from a failure in supervision, as well as a prevention of juvenile delinquency. The South African law of delict is briefly contiguously considered in the context of parental responsibility laws. The concept of South African parental criminal responsibility law is then considered. It is proffered as a useful mechanism to regulate the misconduct of children currently falling outside the ambit of the criminal law.

Keywords

Parental responsibility; delinquent acts of children; law of delict; criminal law; comparative approach with the United States.

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1 Introduction

Parental responsibility for the delinquent acts of their children has long been recognised in the United States. Parents may be held civilly or criminally liable for their children's acts of juvenile delinquency.¹ Such envisaged crimes perpetrated by children include the causing of physical or psychological harm such as damage to property, bullying, assault, sexual assault, the infringement of dignity and privacy, gun-related offences, defamation, and even murder.²

Markel, Collins and Leib³ suggest that parental responsibility laws creating criminal and strict liability for parents when their children commit offences due

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¹ Lockwood 2000 *Golden Gate U L Rev* 506-509, 521 - 522. In many states, ordinances have been passed using vicarious or strict liability to hold parents liable for the misconduct of their children, which liability is founded solely on a parent's status. Sanctions and fines are imposed on parents in order to deal with bullying and other deviant behaviours. See paras 2.1-2.2 below.

² See in general Hanks *School Bullying* 3-32; Russo 2014 *Int'l J Educ L & Pol'y* 127; Neiman, Robers and Robers 2012 *JL & Educ* 605; *Byrd v Brandenburg* (1996 ND Ohio) 932 F Supp 198 (damage to property by firebombing a house). Bullying is also prohibited in anti-bullying statutes in the United States. Not only may schools be held liable for instances of bullying, which may take the form of physical or psychological harm, but so may the bullies and their parents. See *AP v Irvington Board of Education* No L001093-09 (NJ Sup Ct Law Div 2012); In *VB v Flemington-Raritan Regional Board of Education* No HNT-L-95-13 (NJ Sup Ct Mar 12 2014), VB was subjected to harassment and ridicule throughout his school career, which was reported to the school authorities, but no action was taken to stop such harassment. When sued, the school districts sought to include the bullies and their parents, as the latter had been informed of the bullying but had failed to take measures to prevent it. The New Jersey Superior Court ruled that parents could be held liable where they had failed to supervise their children and where such failure was wanton or wilful (*Mass Gen Laws Ann* ch71 §370 (a)). Also see in general Hanks *School Bullying* 3-32 for a detailed discussion of the various anti-bullying statutes regarding who qualifies as a perpetrator, the specific conduct that is prohibited, the consequences and impact on the victim, and criticism of the various statutory provisions. See in general Collier and Lantinga 2015 *J Glob Just & Pub Pol'y* 247, 253-254. *Ore Rev Stat* § 339.351(2); *SD Codified Laws* §13-32-15. See Swan 2015 *Duke LJ* 823 825, 840-841, 844; Anon 1972 *Val U L Rev* 332; Maute 1995 *Rutgers LJ* 431; Ebenstein 2000 *Cardozo Women's LJ* 1. In the Columbine incident, two high school students who were armed shot and killed 13 people at their high school and then killed themselves. Other examples of shootings at school include incidents at Kentucky, Mississippi and Arkansas (see the discussion at 1-3). See further Potgieter 2011 *Obiter* 197; Laas and Boezaart 2014 *PELJ* 2666; *S v Mshengu* 2009 2 SACR 316 (SCA) – a 13-year-old stabs a 14-year-old to death.

³ Markel, Collins and Leib *Privilege or Punish* 112. For criticism of these aims, see the discussion at 113-118. Nicholas 2000 *Rutgers L Rev* 246 states that the purpose of parental laws is to curb juvenile delinquency and to provide compensation for property loss.

to a failure of parental supervision of their children were devised with the following aims in mind:

- a) to reduce crime;
- b) to establish norms that ensure that parents are actively involved in and monitor the behaviour of their children;⁴
- c) to provide an alternative means of obtaining restitution for victims.

As there is a dearth of information on this topic in South Africa, this note investigates the notion of parental responsibility for their child's conduct by adopting a comparative approach to the position in the United States, as both parental criminal responsibility and tort statutes already exist there and have survived decades of criticism.⁵ This note will also further investigate the validity and relevance of such criticism. The position in the South African law of delict is then very briefly considered, before delving in depth into the field of criminal law, as children's delinquent acts and the concomitant parental responsibilities are contiguous to both fields of law. The possibility of imposing parental criminal responsibility is thereafter considered in more depth under South African criminal law.

2 Parental responsibility, the law of tort, and criminal liability in the United States

Parental responsibility jurisprudence in the United States covers both tort law and criminal law and garnered attention as far back as four decades ago.⁶ The purpose of the (tort) statutes is not only to provide damages for victims, but also to "encourage parents to better supervise their children so as to prevent increased acts of juvenile delinquency".⁷ In juxtaposition, parental criminal liability statutes provide for omission liability as they essentially "impose an affirmative duty to prevent the delinquency of a child, whether the prohibition is 'failure to control' or 'omission of duty'" and a parent can therefore be held liable for passive conduct, where there is a failure on the parent's part to act and it is deemed that they should have acted to prevent

⁴ Various studies have indicated that a risk factor for youth offending may be linked to family life – Moen and Bezuidenhout 2016 *Servamus* 20; Da Costa, Spies and Coetzee 2014 *CARSA* 40; Harris and Bezuidenhout 2010 *CARSA* 30.

⁵ It should be noted that there are other countries such as the United Kingdom, Wales and Australia that also have parental responsibility laws in place for the delinquent acts of their children, and that these laws merit comprehensive discourse, but due to the critical focus of this note and length constraints they will not be dealt with here.

⁶ See Anon 1972 *Val U L Rev* 332; Swan 2015 *Duke LJ* 826.

⁷ Lockwood 2000 *Golden Gate U L Rev* 510.

their children's misconduct.⁸ The position dealing with the law of tort and criminal law will be addressed in the sections hereunder, followed by criticism of such statutes.

2.1 Parental responsibility and the law of tort

In the United States, in terms of the law of tort, parents can be held liable for civil damages where their children cause death or injury to other persons. This liability may be vicarious or based on negligence. As the values of the common law are founded on the principles of individualisation the common law made no allowance for parental liability for the tortious conduct of their children, unless such conduct was due to the action or inaction of the parents.⁹ Statutory intervention was therefore necessary. The purport of such legislation is considered to be twofold, namely: (a) to encourage parents to provide better supervision of their children, thus operating as a deterrent to "parental indifference"; and (b) to provide monetary compensation when children are unable to do so.¹⁰ As most children are incapable of effecting financial restitution for any harm they may cause, it is significant that all fifty States comprising the United States have passed parental liability statutes.¹¹ All these statutes impose parental liability to compensate victims of their children's tortious acts.

At the outset, one should bear in mind that in terms of the law of tort one is not under a general duty to prevent harm to other persons by controlling the actions of another. An exception exists, however, where a special relationship exists between the parties such as that between parent and child. Notwithstanding this exception, in order to hold a parent liable for the negligence of his or her child, it has to be shown that there was a legal duty on the parent to prevent harm to other persons,¹² that the parent knew or had reason to know that the minor child posed an "unreasonable risk of harm to another", and finally, that the parent failed to exercise control over the child to avoid the harm caused.¹³ The duty on a parent to warn others of his or her

⁸ Anon 1972 *Val U L Rev* 339; Maute 1995 *Rutgers LJ* 439. See in general Dressler *Understanding Criminal Law* 100, 108-109 for a discussion of the *Model Penal Code* provisions re omissions in §2.01(1) and at 105-108 for a discussion of common law principles relating to omissions and exceptions to the no-liability rule. The parental criminal liability statutes are statutes that were created to provide specifically for omissions by parents.

⁹ Nicholas 2000 *Rutgers L Rev* 223-224.

¹⁰ Lockwood 2000 *Golden Gate U L Rev* 509-510, 512.

¹¹ Bernstein 1994 *J Juv L* 81. Wellman, Brank and Hazen 2017 *Whittier J Child & Fam Advoc* 89.

¹² See, for example, *Adams v Board of Sedgwick County Com'rs* 214 P 3d 1173 (Kan 2009).

¹³ "Parental Failure to Control Child" 45 *Amjur POF* 2d 549 §2 <http://www.westlaw.com>; Lockwood 2000 *Golden Gate U L Rev* 513-515; also see the examples discussed by Lockwood 2000 *Golden Gate U L Rev*, where parents were held liable for breaching

child's known proclivity towards certain dangerous behaviours is imposed in order to safeguard other persons from the conduct of the child.¹⁴ The parental duty imposed is that of reasonable care in terms of the reasonable-person test, which focuses on how the reasonable parent would have acted in the same circumstances.¹⁵ A final requirement to found parental tort liability is that of legal causation.¹⁶

To summarise, there are thus three requirements to found parental tort liability:¹⁷

- a) there must be a special relationship, such as that between parent and child, whereby a legal duty to control the child exists;
- b) the parent must have committed an act or an omission in failing in his or her duty to control the child;
- c) legal causation must be present.

For a parent to be successfully held liable for negligence under the law of tort, it must be alleged that the parent had knowledge of the "harmful propensity of the child" as a fact indicative of the foreseeability of harm, which knowledge is proven by the child's similar, prior harmful conduct.¹⁸

2.2 Parental responsibility and the criminal law

By 1997 seventeen States, including Utah where an ordinance had been adopted, already had legislative measures in place to hold parents criminally liable for a failure to supervise their children.¹⁹ These parental responsibility statutes specifically cater for parental criminal liability for their children's misconduct. Some examples where this is the case are Maryland²⁰, New

their duty to exercise reasonable care in controlling their children as far as the known dangerous tendencies such children might display (such as *Linder v Bidner* 270 NYS 2d 430 (NY 1966) for assaulting other children; *Howell v Hairston* 199 SE 2d 766 (SC 1973) for being a bully; *Parsons v Smithey* 504 P 2d 1272 (Ariz 1993) for pummelling and poking; *Warren v Glascoe* 852 So 2d 634 (Miss Ct App 2003).

¹⁴ Lockwood 2000 *Golden Gate U L Rev* 517-518.

¹⁵ "Parental Failure to Control Child" 45 *Amjur POF* 2d 549 §2 <http://www.westlaw.com>.

¹⁶ Lockwood 2000 *Golden Gate U L Rev* 520-521.

¹⁷ Lockwood 2000 *Golden Gate U L Rev* 520-521.

¹⁸ "Parental Failure to Control Child" 45 *Amjur POF* 2d 549 §3 <http://www.westlaw.com>.

¹⁹ Greenwood 1997 *J Contemp L* 401. Some examples of other states which impose parental criminal liability include New York (*NY Penal Law* § 260.10), New Jersey (*NJ Stat Ann* §33:1-81.1a), Alabama (*Ala Code* §12-15-13) and Oregon (*Ore Rev Stat* §163.577). The common law is based on principles of individualism and accordingly, parental criminal liability would not be permitted in terms of these principles. See Nicholas 2000 *Rutgers L Rev* 224.

²⁰ *Md Code* §11-604.

York²¹, Alabama²² and North Carolina.²³ The *United States Model Penal Code* (MPC)²⁴ recognises liability for omissions,²⁵ and most States have incorporated aspects of the MPC within their own statutes, leading to general acceptance that criminal liability is imposable in situations where there has been an omission or failure to act by a person who had a legal duty to do so.²⁶

A higher degree of fault is required in order to hold parents liable on the grounds of criminal negligence than the level of fault required for civil negligence.²⁷ Parental criminal liability may arise in a situation where failure to control the child's conduct is considered to be grossly or criminally negligent.²⁸ For example, a conviction for negligent involuntary manslaughter can result if a child causes the death of another. To hold a parent criminally liable for an act of murder committed by his or her child, the parent's failure to control must amount to extreme recklessness and be coupled with a causal connection between such a failure and the death of the third party.²⁹ What could be problematic however, is that it must first be proved that the parent had "specific knowledge" of the child's intended criminal conduct to be able to ascertain whether the failure to act to protect others was reckless or negligent.³⁰

As previously indicated, United States parental responsibility legislation may also include within its ambit, laws providing for liability for supplying weapons to a minor, or knowingly contributing to a minor's delinquency, or even civil liability actions. However, the focus for criminal law purposes tends to remain on the criminal liability of parents for the failure to supervise their children.³¹ Many States also have in place laws that are not only specific to parents but which also prohibit any adult from committing specific delineated acts or omissions that contribute to a minor's delinquency, as such acts or omissions can be viewed as a "proximate cause".³²

²¹ *NY Penal Law* §260.10(2).

²² *Ala Code* §12-15-13.

²³ *NC Gen Stat* §14-316.1.

²⁴ The *Model Penal Code* (MPC) is a 1962 text developed by the American Law Institute.
²⁵ MPC §201(3)(1962) (updated 1985).

²⁶ Lockwood 2000 *Golden Gate U L Rev* 523. Also see Hughes 1958 *Yale LJ* 599, where the author suggests a category of omission based on a status relationship between parties.

²⁷ Lockwood 2000 *Golden Gate U L Rev* 524.

²⁸ Lockwood 2000 *Golden Gate U L Rev* 525.

²⁹ Lockwood 2000 *Golden Gate U L Rev* 527.

³⁰ Lockwood 2000 *Golden Gate U L Rev* 529.

³¹ Markel, Collins and Leib *Privilege or Punish* 66. Also see Greenwood 1997 *J Contemp L* 415-418.

³² Markel, Collins and Leib *Privilege or Punish* 66. An example of such conduct would be to intentionally provide a minor with a weapon. The *Federal Juvenile Delinquency*

A specific statutory example in California is section 272 of the *California Penal Code* - a section aimed at criminalising parents' contributions to the delinquency of their children.³³ This statute provides for a misdemeanour which, upon conviction, can result in a fine or imprisonment or both, where a person "commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to fall within the provisions of the Welfare and Institutions Code".³⁴ This Code also incorporates acts performed by a child who refuses to obey the parent's reasonable orders, who is beyond the parent's control, who commits truancies or violates ordinances, or who violates any laws or perpetrates such crimes as murder, sexual offences, or other violent acts whilst using a firearm.³⁵ Section 272 of the *California Penal Code* places a specific duty on parents or legal guardians to "exercise reasonable care, supervision, protection, and control over their minor child".³⁶ This section, although containing no liability limits is not, however, aimed at holding those parents liable who are not aware of, or could not reasonably know of, their children's tendency to perpetrate criminal acts.³⁷

Weinstein³⁸ offers three interpretations of section 272 as a basis for criminal liability:

Act (18 USCA §§ 5032–5042) deals with juveniles who have violated United States laws. The purpose of this Act is to remove and divert such juvenile persons who have violated a law prior to their 18th birthday (or who committed such crimes before they were 18 years old but were charged only between the ages of 18 and 21 years), and which would have been considered crimes if such acts had been committed by an adult, into a different procedural system to avoid a prior criminal conviction and for the purposes of rehabilitation and treatment. See Kletter 47 *Am Jur* 2d §25 <http://www.westlaw.com>; *US v Male Juvenile ELC* 396 F 3d 458 (1st Cir 2005); 18 USCA §922(x). A child is a person who is under the age of 18, or who is under 21 but the delinquent act was committed prior to the age of 18, or a person who is under the age of 21 who committed a juvenile delinquent act after becoming 18 but was transferred to a juvenile court by another court. §2(1) of the *Model Juvenile Court Act* of 1899.

³³ A "delinquent act" refers to conduct that is designated as a crime by law, whether state or federal law or ordinances, but excludes less serious traffic offences, and a "delinquent child" refers to a child who has committed a delinquent act and who requires rehabilitation or treatment. §2(2) and (3) of the *Model Juvenile Court Act* of 1899.

³⁴ Sections 300, 601-602 of the *Welfare and Institutions Code*.

³⁵ Sections 601(a) and (b) and s 602 of the *California Penal Code*.

³⁶ Also see Greenwood 1997 *J Contemp L* 417; Weinstein 1991 *S Cal L Rev* 859 n 2. Also see Bernstein 1994 *J Juv L* 80.

³⁷ Weinstein 1991 *S Cal L Rev* 861.

³⁸ Weinstein 1991 *S Cal L Rev* 862. Also see Bernstein 1994 *J Juv L* 79.

- a) as a form of vicarious liability where the parent is held accountable without any personal blameworthiness;³⁹
- b) as a crime of omission which penalises parents for failing to properly control or supervise their children;
- c) as a form of strict liability.

He goes on to criticise the liability imposed in terms of section 272 and concludes that there are other methods better suited to holding parents criminally liable, such as: (1) accomplice liability for intentional acts which assist the child to perpetrate a crime; or (2) "actual knowledge of their children's prior misconduct" where parents could be held liable if the same type of misconduct occurs again within a short span of time; and (3) neglect laws which hold parents liable for being instrumental in the delinquency of their children.⁴⁰

2.3 Remarks and criticism

Parental responsibility statutes have been viewed as threats to ensure that parents control their children.⁴¹ However, such statutes have survived constitutional scrutiny and challenge. The criticism of this phenomenon will now be explored in greater depth.⁴²

In essence, much of the criticism that has been levelled at parental responsibility statutes is that many parents face such challenges as those of being single parents, or of being confronted with poverty and thus having to undertake multiple jobs, or of having limited access to educational or child-care facilities.⁴³ It is argued that when such circumstances exist, if those parents should be punished by having to pay fines or by being imprisoned,

³⁹ Bernstein is of the contrary view, that parental liability statutes are based more on direct liability than on vicarious liability owing to the parent's own negligence which is either the cause of or consists in allowing his or her child's wrongful act; Bernstein 1994 *J Juv L* 82.

⁴⁰ Weinstein 1991 *S Cal L Rev* 901.

⁴¹ Lockwood 2000 *Golden Gate U L Rev* 550; Weinstein 1991 *S Cal L Rev* 900; Anon 1972 *Val U L Rev* 333.

⁴² Also see Lockwood 2000 *Golden Gate U L Rev* 530, 549; *General Insurance Company of America v Faulkner* 130 SE 2d 645 (NC 1963) (that it violates the right to equal protection and due process); *Watson v Gradzik* 373 A 2d 191 (Conn Super Ct 1977) 193 (that it violates fundamental rights to raise children and that parents have rights and responsibilities, ie the right to bear and raise children, on the one hand, but also the right, on the other hand, to ensure that they are raised in such a manner that other people's rights are also protected); also see Lockwood 2000 *Golden Gate U L Rev* 511; Bourdeau 59 *Am Jur 2d* §94 <http://www.westlaw.com>.

⁴³ Greenwood 1997 *J Contemp L* 430; Acton 1996 *J L & Pol'y* 322-323.

this would exacerbate their prevailing problems.⁴⁴ It has been suggested that, despite these misgivings, parental responsibility laws can be utilised effectively if they are combined with family- and preventative-support programmes, and are combined with "creative sentencing techniques" not only for the juvenile but also for the parents, which could include parenting classes or counselling and the imposition of probation for repeat offences.⁴⁵

Additional criticism noted is that the laws often create strict liability, as opposed to criminal negligence, for parents for actions beyond their control without they themselves performing a "voluntary action or omission with a culpable mind that warrants condemnation and punishment", and that such a parent or parents could themselves have been a victim or victims of the minor's misconduct.⁴⁶

Parental liability statutes have been challenged on the grounds of their being overly inclusive and for being vague, but have withstood constitutional scrutiny. Even section 272 of the *California Penal Code* has been declared constitutional.⁴⁷ In *Williams v Garcetti*, the court held that the provisions of section 272 are certain and comply with the *Constitution*, as they sufficiently subscribe to the limits of parental duties which have for a long period of time formed part of tort law (law of delict) and that the liability imposed is for conduct which is negligent and which conduct "grossly departs from the standard of care".⁴⁸ Critics have also further argued that parental responsibility laws are unconstitutional as they not only impose cruel punishment, but they also interfere with parental rights as far as raising their own children is concerned.⁴⁹

Notwithstanding all of the above argumentation and the varying constitutional challenges, parental responsibility laws have withstood the test of time, most

⁴⁴ Greenwood 1997 *J Contemp L* 430. Also see Ebenstein 2000 *Cardozo Women's LJ* 20-23, who mentions, *inter alia*, that the statutes may be over-broad and may also be vague, as they do not clearly delineate or provide guidance on what is expected of parents. The author prefers a negligence-based standard as opposed to one based on liability without fault.

⁴⁵ Greenwood 1997 *J Contemp L* 431, 434-435.

⁴⁶ Markel, Collins and Leib *Privilege or Punish* 113-114; Greenwood 1997 *J Contemp L* 429. Hughes 1958 *Yale LJ* 605-606 states that: "The concepts of *mens rea* and its sub-concepts, intention and recklessness, were constructed as generalizations of the instances of liability for offenses of commission. They cannot be fluently applied to offenses of omission, and it is a mistake to attempt to do so. The real concern should not be with the circumstances in which an omission may properly be described as intentional but with those circumstances in which an omission is excusable or ought to be excusable."

⁴⁷ *Williams v Garcetti* 20 Cal Rptr 341 (Cal 1993). Also see Greenwood 1997 *J Contemp L* 423.

⁴⁸ *Williams v Garcetti* 20 Cal Rptr 341 (Cal 1993) 345, 348.

⁴⁹ Weinstein 1991 *S Cal L Rev* 871-885.

probably because they strike a reasonable balance between parental rights and State interference.⁵⁰

3 Parental responsibility and the South African law of delict

Although parental criminal responsibility has been considered for decades in the United States, with its plethora of jurisprudence regulating the position, there is a paucity of similar consideration in South Africa. The general rule in the South African law of delict is that there is no vicarious parent-child obligation.⁵¹ A parent cannot therefore be held liable for the acts of his or her child unless there is an employer or employee relationship between them, or the parent intentionally uses the child as a "weapon" or agent, or unless the parent negligently fails to control the child.⁵² Vicarious liability does, however, have its underpinnings in policy considerations of both fairness and justice.⁵³ Potgieter⁵⁴ investigates a broader vicarious liability concept that encompasses parental liability for a child's delictual acts. He states in this regard:⁵⁵

... there is clear evidence that courts internationally are increasingly willing to consider widening the scope of vicarious liability in cases where changing public and legal policy considerations demand such an extension. This development opens the door for considering the expansion of vicarious liability to the parent-child relationship which calls for an original approach to the concept of vicarious liability in view of the novel nature of the category. The principal question should not be whether this relationship can be 'pressed into' a conventional relationship giving rise to vicarious liability, but whether, on the basis of fairness and justice, legal and public policy considerations now require parents to be vicariously liable for the delicts of their minor children.

If such an approach is adopted in South Africa, parental responsibility obligations would come to the fore and even statutory measures specifically encompassing parental responsibility could be implemented.

4 Parental responsibility and the South African criminal law

Parental criminal liability has not been considered in the context of South African criminal law, except where a parent uses a child as a "weapon" to commit an act on the parent's behalf, thus rendering the parent liable as a perpetrator by the *qui facit per alium facit per se* rule (a person who performs

⁵⁰ Due Process Clause of the *Fourteenth Amendment to the United States Constitution* of 1868; Greenwood 1997 *J Contemp L* 426-427.

⁵¹ See Potgieter 2011 *Obiter* 189-192 for a discussion on the nature, origins and theories applicable to delictual vicarious liability.

⁵² Potgieter 2011 *Obiter* 193-194; Potgieter 2008 *THRHR* 331; *De Beer v Sergeant* 1976 1 SA 246 (T).

⁵³ Potgieter 2011 *Obiter* 194.

⁵⁴ Potgieter 2011 *Obiter* 193-203.

⁵⁵ Potgieter 2011 *Obiter* 196-197.

conduct through another does such an act himself/herself).⁵⁶

Children in South Africa who lack criminal capacity cannot be prosecuted. Criminal capacity is one of the general requirements, along with legality, conduct, the definitional elements of a crime, unlawfulness and culpability, which needs to be proven in order to be held criminally liable.⁵⁷ "Criminal capacity" refers to the ability to distinguish "between right and wrong at the commission of an alleged offence and to act in accordance with such an appreciation".⁵⁸ With the introduction of the *Child Justice Act 75* of 2008, a new minimum age for criminal capacity was introduced into South African jurisprudence.⁵⁹ The *Child Justice Act* provides, in section 7(1), that a child who commits a crime whilst under the age of ten years will not be deemed to have criminal capacity and thus will not be prosecuted. Although there is still a presumption of a lack of criminal capacity applicable to a child who is ten years or older but who is not 14 years old, in such a case section 11(1) provides that the State must prove beyond a reasonable doubt that the child had criminal capacity.⁶⁰

At present, under South African law there is no general duty to act positively to prevent harm from being caused to others. There are, however, exceptions where legal duties to act have been created based on the *boni mores* of society.⁶¹ One of these exceptions is where a special or protective

⁵⁶ Burchell *Principles of Criminal Law* 465-466.

⁵⁷ Snyman *Criminal Law* 32.

⁵⁸ Section 11(1) of the *Child Justice Act 75* of 2008. See Snyman *Criminal Law* 156-157, where he states that the "ability to appreciate wrongfulness" is also referred to as the "cognitive" mental function and the "ability to act in accordance with such an appreciation" as the "conative" mental function (Snyman *Criminal Law* 157); Burchell *Principles of Criminal Law* 247.

⁵⁹ *S v TS* 2015 1 SACR 489 (WCC).

⁶⁰ A "child" is defined in s 1 of the *Child Justice Act 75* of 2008 as a person who is under the age of 18 years, and, in some circumstances, as a person who is 18 years or older but under the age of 21 years in terms of s 4(2) of this Act. S 4(2) in essence refers to the commission of a crime by a person who is between 18 and 21 years and who committed the alleged offence before the person turned 18 (ie between the age of 10 and 18) for the purposes of "diversion" from the system. Diversion is the process whereby the matter is referred away from the formal court process, thereby leading to mitigation of the sentence or the application of a more rehabilitative punishment (s 1); Burchell *Principles of Criminal Law* 259 fn 27. An adult is a person who is 18 years or older but excludes a person referred to in s 4(2) in terms of the definitions (s 1). One can therefore group children into various categories:

- Children under ten years of age, who are irrebuttably presumed to lack criminal capacity.
- Children over ten years but who are younger than 14 years of age, who are rebuttably presumed to lack criminal capacity.
- Children over the age of 14 years, who are regarded in the same way as adults with regard to criminal capacity. See Burchell *Principles of Criminal Law* 255-259.

⁶¹ Burchell *Principles of Criminal Law* 74-82. Examples include prior conduct, statute, common law, a special or protective relationship, a contractual relationship, control of

relationship exists, such as in the case of a parent in respect of a child. However, the duty entails the prevention of harm being caused to the child⁶² and not in preventing the child from causing harm to another. It is the State that has been held to have a protective duty to protect the public from such harm.⁶³ There is no imposition upon parents in terms of the specific protective-relationship exception, excepting the prevention of harm to their children or spouses.⁶⁴ This raises the question of whether parents can be held criminally liable for failing to prevent harm to others where they know their children pose a danger to others. Apart from a person being held liable for the control of a dangerous thing or animal, this specific context has not been judicially considered. As Burchell⁶⁵ states:

It would appear that the control of a potentially dangerous situation, as opposed to a thing or animal, is not sufficient to create common-law liability since this would unjustifiably extend the scope of legal duties and impose a general duty on a person to inform the authorities of the commission of a crime or to rescue a drowning person.

At a stretch, one could perhaps establish a tentative link based on the "risk created by bringing a child into the world" with the legal duty to prevent harm espoused in the exception relating to prior conduct (a previous positive act).⁶⁶ Thus it could ostensibly be argued that there was a previous positive act which brings with it the risk of harm,⁶⁷ and that an omission to prevent harm can lead to liability. But it is doubtful whether such an interpretation of the common law position would find acceptance. Notwithstanding, the *Constitution of the Republic of South Africa, 1996* does give courts the power

a potentially dangerous thing or animal, and public office; Snyman *Criminal Law* 59-60.

⁶² Burchell *Principles of Criminal Law* 80.

⁶³ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

⁶⁴ Burchell *Principles of Criminal Law* 80.

⁶⁵ Burchell *Principles of Criminal Law* 78.

⁶⁶ See on prior conduct Snyman *Criminal Law* 60, Burchell *Principles of Criminal Law* 77. By analogy, see the discussion of Potgieter 2011 *Obiter* 189, 197-202, where Potgieter is also of the view that the (delictual) liability of parents in terms of the parent-child relationship can be based on a number of policy considerations, which include the following: "[t]he risk created by bringing a child into the world, the fact that the parent rather than the impecunious child is usually better suited to pay for (or to distribute through insurance) the loss caused by the child, the notion that possible liability for a child's conduct may cause the parent to instruct, control, supervise, guide and discipline the child more thoroughly regarding potentially damage-causing behaviour. Naturally the existence of a parent-child relationship should not without further ado give rise to parental liability, just as an employment relationship in itself does not constitute vicarious liability: prerequisites must be satisfied for liability to follow".

⁶⁷ Potgieter 2011 *Obiter* 197. Potgieter discusses this example in the context of the risk theory in the law of delict.

to develop the common law in accordance with considerations of justice.⁶⁸ In interpreting what may be included under the exceptions of prior conduct or a special or protective relationship, caution would have to be exercised that a new offence is not created, but rather that the existing law is interpreted and applied. A failure to do so would be unconstitutional and be a violation of the principles of legality pertaining specifically to the *ius certum*, *ius acceptum* and *ius strictum* principles.⁶⁹ Arguably, the categories of prior conduct and special relationship are not closed categories and are determined on the basis of the legal convictions of society.⁷⁰ The legal convictions are determined by considering the values encapsulated in the *Constitution of the Republic of South Africa*, 1996, and are ever evolving in accordance with society's perception of "justice or equity".⁷¹ Conduct, whether by an act or omission, which is at variance with the legal convictions of society is considered unlawful.⁷² It is significant that the rights to freedom and security of the person are entrenched in the Bill of Rights and provide that everyone has the rights to life (section 11), to human dignity (section 10), to be free of all forms of violence from public or private sources (section 12(1)(c)), not to be treated in a cruel or degrading manner (section 12(1)(e)), and to bodily and psychological integrity (section 12(2)).

As far as vicarious liability in South African criminal law is concerned, there is no general rule that a person will be held liable for a crime which they did not personally commit, albeit there are limited statutory exceptions that do impose such a liability, such as an employer's liability for the acts of an employee - notwithstanding this lack of general acceptance, however, the view is still expressed that such a liability can be extended to members of the perpetrators' family.⁷³

Owing to the varying circumstances and types of crimes children may commit, ranging from gun violence to assault, bullying, sexual offences and even murder, it is submitted that common law liability for omissions may not be capable of being developed to adequately accommodate all the varying circumstances without legal uncertainty ensuing and risking the violation of

⁶⁸ Section 173 of the *Constitution of the Republic of South Africa*, 1996. See Potgieter 2011 *Obiter* 189, 202.

⁶⁹ See Snyman *Criminal Law* 36-49 for a discussion of the principle of legality and the fact that conduct must be "recognised by the law as a crime, in clear terms, before the conduct took place; without the court having to stretch the meaning of the words" (Snyman *Criminal Law* 36); s 35(3)(l) of the *Constitution of the Republic of South Africa*, 1996. See in general *Masiya v Director of Public Prosecutions* 2007 2 SACR 435 (CC).

⁷⁰ Snyman *Criminal Law* 59.

⁷¹ Snyman *Criminal Law* 98.

⁷² Snyman *Criminal Law* 98.

⁷³ Burchell *Principles of Criminal Law* 439-440, 442. See in general Snyman *Criminal Law* 242.

the legality principle. Instead, it is advocated that to regulate parental responsibility, statutes should be created which are tailor-made to suit these specific circumstances and which clearly circumscribe the exact circumstances in which parents may be held liable for their children's acts – in the same way that the parental responsibility statutes have been fashioned in the United States. In the United States the common law was not developed. Instead, statutes were promulgated which have endured and been held to be constitutionally justifiable.

5 Conclusion

Some might be of the opinion that parents should not be punished for the acts of their children, as they would already have suffered and been punished enough, but as Lockwood⁷⁴ states:

This idea, however, does not conform to notions for imposing criminal liability, which are deterrence and retribution. These purposes are achieved by punishing the undesirable behaviour of failing to control children and failing in the duty to protect others. Thus, exempting parental conduct from criminal punishment would not serve to deter bad behaviour and, in fact, may promote continued lack of supervision since there is no likelihood of criminal liability.

Some suggested measures to address instances of parental criminal responsibility include community service, probation, counselling, a civil restraining order restricting contact between the perpetrator and victim, which, if violated, could lead to criminal punishment for contempt of court, and so on.⁷⁵ An alternate avenue is for parents to be referred to a diversion programme involving parenting classes which, should they not attend them, would lead to criminal prosecution.⁷⁶

For the purposes of legal certainty in all its guises, it is submitted that it is better to clearly circumscribe the scope and liability of parental responsibility by statute. South African law has largely been influenced by the legal philosophy of Anglo-American jurisprudence and our current legislators can draw a wealth of knowledge from judicial developments in this area in the United States.⁷⁷ It is of significance that the United States has not attempted

⁷⁴ Lockwood 2000 *Golden Gate U L Rev* 552. Nicholas 2000 *Rutgers L Rev* 246 has a contrasting view that only criminal conduct which is undertaken at the parent's direction should found criminal liability.

⁷⁵ Collier and Lantinga 2015 *J Glob Just & Pub Pol'y* 247, 255. For an alternate view that restorative justice should be considered, see Duncan 2011 *New Eng J on Crim & Civ Confinement* 269. The author suggests that restorative-justice principles should be included in statutes that deal for example with bullying, as this could be considered a better alternative to criminal or civil sanctions in the long term and also involves a healing process between the perpetrator, the victim and the community.

⁷⁶ Lockwood 2000 *Golden Gate U L Rev* 550. Also see para 2.3 above.

⁷⁷ Burchell "Saga of Snitches and Whistleblowers" 10.

to develop the common law to accommodate parental responsibility liability for omissions, but instead has enacted clearly defined statutes dealing with parental responsibility both in the realms of criminal law and the law of tort. It is recommended that this approach be adopted in South Africa as it will clearly delineate what is expected of parents, and in addition, because proving a causal connection between parents' conduct (whether acts or omissions) and their children's delinquent acts may be difficult in terms of the common law legal duties concerning omissions. The imposition of statutory duties and responsibilities on parents will largely negate this problem whilst hopefully improving parental supervision and simultaneously providing a compensation avenue for victims of children's delinquent acts.

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List of Abbreviations

Ala Code	Alabama Code
Am Jur	American Jurisprudence
Amjur POF	American Jurisprudence Proof of Facts
Cardozo Women's LJ	Cardozo Women's Law Journal
CARSA	Child Abuse Research in South Africa
Duke LJ	Duke Law Journal
Golden Gate U L Rev	Golden Gate University Law Review
Int'l J Educ L & Pol'y	International Journal for Education Law and Policy
J Contemp L	Journal of Contemporary Law
J Glob Just & Pub Pol'y	Journal of Global Justice and Public Policy
J Juv L	Journal of Juvenile Law
J L & Educ	Journal of Law and Education
J L & Pol'y	Journal of Law and Policy
Md Code	Maryland Code
Mass Gen Laws Ann	Massachusetts General Laws Annotated
MPC	United States Model Penal Code
NC Gen Stat	North Carolina General Assembly General Statute
New Eng J on Crim & Civ Confinement	New England Journal on Criminal and Civil Confinement
NJ Stat Ann	New Jersey Statutes Annotated
NY Penal Law	New York Penal Law
Ore Rev Stat	Oregon Revised Statutes
PELJ	Potchefstroom Electronic Law Journal
Rutgers LJ	Rutgers Law Journal
Rutgers L Rev	Rutgers Law Review
S Cal L Rev	Southern California Law Review
SD Codified Laws	South Dakota Codified Laws

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
USCA	United States Code Annotated
Val U L Rev	Valparaiso University Law Review
Whittier J Child & Fam Advoc	Whittier Journal of Child and Family Advocacy
Yale LJ	Yale Law Journal