

The Diffusion of Criminal Responsibility: a Cause for Concern?

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One of the prominent criticisms of the criminal law, particularly (but not exclusively) in academic circles, is that there is too much of it. It is claimed that legislatures are indulging in ‘overcriminalization’ – creating offences for expressive reasons (‘something ought to be done about this’), and generally using the criminal law when there is not sufficient reason to do so.¹ If the purpose of the institution of criminal law is to secure civil peace through the state monopoly of force by censuring people for serious wrongs,² then that purpose is being diluted by the many lesser crimes that are being created. I do not propose to pursue here the arguments that a separate, lower category of administrative offences should be introduced and that more use should be made of regulatory mechanisms.³ But it must be said that, even if we accept the claim of overcriminalization,⁴ this should not be to deny that there may be new forms of harm to be recognised, and new wrongs to be censured by conviction and sentence. We might conclude that the seriousness threshold of the criminal law is attained by some of these wrongs – I am thinking of offences such as people trafficking, modern slavery, child sexual exploitation and grooming, and domestic coercion.

In her recent monograph, the critical legal scholar Nicola Lacey argues that the history of criminal law in common law jurisdictions exhibits the influence of four different foundations for responsibility – responsibility based on capacity, responsibility based on character, outcome-responsibility and risk-responsibility. She shows how the influence of each has waxed and waned in different periods of history, and argues that, although ‘patterns of responsibility-attribution based on character, risk and outcome are gaining ground,’ there remains ‘a marked insistence on individual responsibility’.⁵ In this lecture I want to carry that analysis further in one particular realm of criminalization.

In part 1 I re-state some basic principles of the ‘standard doctrine’ of common law criminal law – what Lacey terms ‘capacity responsibility.’ Part 2 then contains a fairly brief account

¹ D. Husak, *Overcriminalization* (2008); A.P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs* (2011); R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo and V. Tadros (eds), *Criminalization: the Political Morality of the Criminal Law* (2014); L. McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’, in T. Crofts and A. Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (2015).

² L. Farmer, *Making the Modern Criminal Law* (2016), ch. 1, drawing on N. MacCormick, *Institutions of Law: an Essay in Legal Theory* (2007).

³ On which see A. Ashworth, ‘Positive Duties, Regulation and the Criminal Sanction’ (2017) 133 *L.Q.R.* 606.

⁴ For discussion of the difficulties of accepting the claim *tout court*, see N. Lacey, *In Search of Criminal Responsibility* (2016), pp. 99-106.

⁵ N. Lacey, *In Search of Criminal Responsibility* (2016), pp. 164-165.

of the now familiar story of the spread of preventive offences in the criminal law in recent years, which in Lacey's terms is to be seen as the burgeoning of risk-responsibility together with some elements of resurgence of character-responsibility. The remainder of the lecture then focuses on a rather less familiar development – the deepening of criminal liability by creating new forms of responsibility or extending old forms of liability. Whereas criminalization by creating new substantive offences may be regarded as the horizontal expansion of the criminal law, criminalization by extending the grounds of responsibility may be seen as a vertical expansion of the criminal law,⁶ in effect taking criminal responsibility to a new level. As the official U.K. guidance on the new offence of failing to prevent the criminal facilitation of tax evasion puts it: 'the new offence ... does not alter *what* is criminal, it simply focuses on *who* is held to account for acting contrary to the current criminal law.'⁷ This is one example of what I refer to as the diffusion of criminal responsibility – offences that take liability to a new level. In parts 4, 5 and 6 I gather together some examples of how this diffusion of liability works, and I begin to probe its justifications. In part 7 some conclusions are drawn about the directions in which the criminal law is expanding, and about the difficulties and dangers of this expansion. Part of the analysis here is socio-historical, seeking to chart movements in the criminal law; part of it is normative, asking questions about the justifications for recent changes in the forms of criminal responsibility.

1. Some Principles of Capacity Responsibility

Of particular importance for our analysis here is Lacey's assertion that, despite the rise of risk-responsibility and the resurgence of character-responsibility at the end of the twentieth century and the start of the twenty-first, 'capacity responsibility still occupied a secure role among core criminal offences (and a legitimating effect radiating more widely)'.⁸ In this model for responsibility, the standard form for a criminal offence is this: *conduct* causing a result, with *fault*. The conduct requirement stems from the standard doctrine that is described thus in the English textbook by Simester and Sullivan: 'it is a guiding principle of the law that defendants are liable according to what they do, not what others do and they fail to prevent.'⁹ Here the authors are identifying one aspect of the principle of individual autonomy (A), making the point that certain forms of criminal liability should be regarded as exceptions to the general principle. In particular, criminal liability for omissions and secondary liability should be seen in this light.

⁶ See also T. Crofts and A. Loughnan, 'Introduction' in T. Crofts and A. Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (2015), p.2: 'If criminalisation goes to the breadth of the criminal law, criminal responsibility might be said to relate to its depth.'

⁷ H.M. Revenue and Customs, *Tackling Tax Evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion* (Draft Government Guideline, October 2016), p. 4.

⁸ N. Lacey, *In Search of Criminal Responsibility* (2016), p. 147.

⁹ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), *Simester and Sullivan's Criminal Law* (6th ed., 2016), p. 15.

This principle of individual autonomy is founded on ‘the notion of an agent endowed with powers of understanding and self-control,’¹⁰ and it is a major feature of the doctrines of causation that prevail in the criminal law. The application of the principle of individual autonomy in causation (B) was set out thus by Lord Bingham:

‘The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act ... Thus D is not to be treated as causing V to act in a certain way if V makes an informed and voluntary decision to act in that way rather than another.’¹¹

A further aspect of the autonomy principle is that it requires proof of culpability as an element in criminal responsibility. This underlies the so-called ‘constitutional principle’ (C) that criminal offences should be interpreted as requiring proof of fault unless there are strong countervailing reasons. Thus:

‘The constitutional principle that *mens rea* is presumed to be required in order to establish criminal liability is a strong one. It is not to be displaced in the absence of clear statutory language or unmistakably necessary implication ... It is also undeniable that where the statutory offence is grave or “truly criminal” and carries a heavy penalty or substantial social stigma, the case is enhanced against implying that *mens rea* of any ingredient of the offence is not needed.’¹²

However strong the arguments in favour of such a principle may be,¹³ the facts are that many statutory offences have been interpreted as imposing strict (no-fault) liability, without discussion of the ‘constitutional principle’, and also that different considerations may apply to the many offences that can only be committed by companies. Overall, principle (C) may be an instance of the exceptions being more numerous than the applications of the rule, but we will not pursue those complexities here.

What has been described above is a cluster of three basic tenets which are integral to the capacity theory of responsibility and which flow from the principle of individual autonomy – (A) the principle that one is responsible for what one does and not for what others do and one fails to prevent, (B) the principle of causation that respects the acts of informed adults of sound mind, and (C) the presumption against criminal liability without fault. It is not

¹⁰ N. Lacey, *In Search of Criminal Responsibility* (2016), p. 27.

¹¹ *Kennedy (No. 2)* [2007] UKHL 38, at [14]; followed by the High Court of Australia in *Burns v. R* [2012] HCA 35. See also C. Kutz, *Complicity: Ethics and Law for a Collective Age* (2000), p. 170: ‘When B acts voluntarily, uncoercedly and with reasonably complete information, we are very reluctant to say that A has caused B’s act.’ For some doubts about the principle, see G.R. Sullivan, ‘Doing without Complicity’ (2012) 2 *Journal of Commonwealth Criminal Law* 199, at pp. 220-222.

¹² *Brown* [2013] UKSC 43, per Lord Kerr at [26], applying *B v. Director of Public Prosecutions* [2000] 2 AC 428.

¹³ A. Ashworth, *Positive Obligations in Criminal Law* (2013), ch. 4; cf. A. Norrie, *Crime, Reason and History* (3rd ed., 2014), ch. 5.

suggested that these principles are beyond criticism or that they dominate the developing criminal law. They can be said to form part of the influential capacity theory of criminal responsibility that underlies much of the common law criminal law, but that theory also accepts that not all criminal offences follow the model of penalising conduct that causes a result with fault. Thus the common law has expanded the ambit of criminal liability by creating inchoate offences (attempts, conspiracies, incitement) so as to enable the authorities to step in before harm is caused, and also complicity (aiding, abetting etc), thus widening the net so as to criminalize those who give assistance or encouragement to lawbreakers. In recent times the law has gone further, as we shall now see.

2. The Rise in Preventive Uses of the Criminal Law

What Lacey refers to as risk-based responsibility has manifested itself in the rise of preventive uses of the criminal law. This is well-documented,¹⁴ but it is worth outlining here two particular developments -- the increases in pre-inchoate offences and in preventive orders.

Recent decades have seen the rapid expansion of what may be termed pre-inchoate offences or 'pre-crime'.¹⁵ In previous centuries the criminal law had extended itself vertically by means of the inchoate offences of attempt, conspiracy and incitement, largely on a crime prevention rationale.¹⁶ More recently it has deployed the same preventive rationale to support a further vertical extension in the shape of offences that criminalise earlier activities which are considerably more remote from the harm-to-be-prevented. For example, the Terrorism Act 2006 (U.K.) created three pre-inchoate offences – publishing a statement that is likely to be understood as an encouragement of terrorism, disseminating a terrorist publication reckless as whether it encourages terrorism, and engaging in any conduct in preparation for giving effect to an intention to commit acts of terrorism.¹⁷ Crimes of possession have a much longer history, but risk-based offences of possession (not requiring proof of any intention to commit a further crime) now feature in anti-terrorist legislation and elsewhere. Crimes of membership are a feature of recent anti-terrorist legislation in the U.K.¹⁸ and of legislation against gangs and organized crime in Australia.¹⁹

¹⁴ See, for example, P. Ramsay, *The Insecurity State* (2012); A. Ashworth and L. Zedner, *Preventive Justice* (2014); T. Tulich, R. Ananian-Welsh, S. Bronitt, and S. Murray (eds), *Regulating Preventive Justice* (2016); H. Carvalho, *The Preventive Turn in Criminal Law* (2017).

¹⁵ L. Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11 *Theoretical Criminology*.261.

¹⁶ S. Bronitt and B. McSherry, *Principles of Criminal Law* (4th ed., 2017), p. 457

¹⁷ For discussion, see Bronitt and McSherry, *Principles of Criminal Law* (4th ed., 2017), pp. 463ff, and more fully A. Lynch, N. McGarrity and G. Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (2015).

¹⁸ Such as the Terrorism Act 2000 (U.K.)

¹⁹ E.g. Criminal Organisation Act 2009 (Qld), Vicious Lawless Association Disestablishment Act 2013 (Qld); see A. Loughnan, 'The Legislation we had to have? The Crimes (Criminal Organisations) Control Act 2009 (NSW)' (2009) 20 *Current Issues in Criminal Justice* 457, and R. Ananian-Welsh, "'If at first you don't succeed ..."

The rationale for these pre-inchoate offences is largely preventive: law enforcement officers are able to step in at an early stage, before any or much harm has been done. However, the question is whether such pre-inchoate offences, which involve ‘push[ing] back the boundaries of responsibility-attribution in time,’²⁰ are compatible with basic tenets of criminal responsibility. An offence such as engaging in conduct in preparation for giving effect to an intent to commit terrorism does, at least, require proof of an intention to commit a terrorist act (thus satisfying principle (C)), but that cannot be said of many risk-based possession offences or of crimes of membership, which therefore fail to satisfy any of the basic tenets of criminal responsibility.

Turning to preventive orders, the most famous example was the English ASBO – the anti-social behaviour order, imposed on the subject by a magistrates’ court in civil proceedings if it was deemed necessary for the purpose of protecting people from further anti-social acts, specifying prohibited behaviour (such as entering part of a city or associating with certain persons), and providing a criminal offence of failing to comply with the specified conditions, with a maximum penalty of five years’ imprisonment.²¹ The ASBO has now been replaced by other orders, but it remains the basic model for over 20 preventive orders in English law,²² many of which are open to criticism: courts should not be able to create a personalized criminal code for someone in civil proceedings, with conviction not requiring proof of fault; crime-creating powers should not be delegated to courts, especially if courts may then attach a sentence of imprisonment to conduct that the legislature has decided is not imprisonable; the prohibitions in the order should not close off central aspects of normal life (shopping, living at home, travelling on public transport); and the sanction for breach of a prohibition should not be disproportionate.

Two further comments are apposite. First, some of the preventive orders are made in potentially very serious cases. In the U.K. a Serious Crime Prevention Order may only be made if the defendant has been involved in a crime classified as ‘serious’, and if the court has reasonable grounds to believe that an order would protect the public by preventing, restricting or disrupting the defendant’s involvement in serious crime. The Order may include appropriate prohibitions, and breach is a criminal offence with a maximum penalty of five years’ imprisonment. Another, slightly different example is the Australian Control Order, where a senior member of the Federal Police must request the Attorney-General’s consent to apply to the court for an Order.²³ Different again is the U.K.’s TPIM, which replaced the Control Order that restricted the activities of persons believed to be involved in terrorism.²⁴

Effectiveness and the evolution of preventive organised crime measures’, in Tulich et al, *Regulating Preventive Justice* (2016), at pp. 185-189.

²⁰ N. Lacey, *In Search of Criminal Responsibility* (2016), p. 48.

²¹ For detailed discussion, see A.P. Simester and A. von Hirsch, ‘Regulating Offensive Conduct through Two-Step Prohibitions’, in A. von Hirsch and A.P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (2006); P. Ramsay, *The Insecurity State* (2012), ch.4; and A. Ashworth and L. Zedner, *Preventive Justice* (2014), ch. 4.

²² A dozen are listed by Ashworth and Zedner, *Preventive Justice* (2014), pp. 75-76.

²³ See S. Donkin, ‘Amendments to the Australian terrorism control order scheme: a precautionary tale?’ in Tulich et al, *Regulating Preventive Justice* (2016), pp. 45-57.

²⁴ For a similar Australian Control Order, see the Serious Organised Crime Legislation Amendment Act 2016 (Qld), s. 279.

The Terrorism Prevention and Investigation Measure differs from many other preventive orders in that it is imposed by a government minister (the Home Secretary) on the basis of a reasonable belief that the subject is involved in terrorism and that the order is necessary to protect the public from a risk of terrorism. The TPIM is then reviewed by a court, and the remaining features of the TPIM (various prohibitions, with a criminal offence for breach) are similar to other preventive orders. The independent reviewer makes annual reports to Parliament on the operation of TPIMs,²⁵ and the Counter-Terrorism and Security Act 2015 implemented many of his recommendations for change.²⁶

A second comment looks to the other end of the spectrum. One of the measures introduced in the wake of the abolition of the ASBO was the Public Spaces Protection Order.²⁷ This is an order made by a local authority, banning certain activities in designated public spaces if those activities are ‘likely to have a detrimental effect on the quality of life of those in the locality.’ On breach, a person is liable to a fixed penalty or to conviction with a maximum fine of £1,000. While this type of preventive order does not carry a maximum penalty as high as five years’ imprisonment, it does confer considerable discretion on local authorities (not courts) to decide when to make a PSPO, and considerable power on local authority officers and community support officers in the enforcement of the PSPO, effectively creating criminal offences for nuisance behaviour thought to impact on ‘quality of life.’

In Lacey’s terms, preventive orders and the criminal offences attached to them are examples of risk-based responsibility. What they do is to create personalized criminal codes for individuals, placing them under prohibitions that are enforced by the criminal law and often with the prospect of a substantial sentence on breach. The preventive order may render the individual subject to a criminal sanction for conduct that is perfectly lawful in others – using a trampoline in a back garden, entering part of a city, walking past a children’s playground, and so forth. In principle, it is not objectionable for the law to prohibit a convicted person from entering an area that creates a heightened risk of further harm to others, even though such a prohibition is a restraint on freedom of movement. That restraint requires justification, and in some cases the justification may be found in the seriousness of the harm-to-be-prevented and the enhanced risk presented by the defendant’s entering that area. However,

²⁵ *Third Report of the Independent Reviewer of the Terrorism Prevention and Investigation Measures Act 2011* (2015).

²⁶ It should be noted that some of the changes amounted to toughening the law, such as the power to require a TPIM subject to attend deradicalisation sessions, and the reintroduction of the controversial power to relocate a TPIM subject up to 200 miles away: <https://terrorismlegislationreviewer.independent.gov.uk/relocation-relocation-relocation/>

²⁷ Anti-Social Behaviour, Crime and Policing Act 2014 (U.K.), s. 59; see K.J. Brown, ‘The hyper-regulation of public space: the use and abuse of Public Spaces Protection Orders in England and Wales’, (2017) 37 *Legal Studies* 543, and L. Zedner, ‘Policing Civility in Public Spaces and the Exclusion of “Uncivil” Citizens’ [unpublished draft]; for Queensland, compare the Public Safety Order in s.267 of the Serious and Organized Crime Legislation Amendment Act 2016.

the aim should be to attain the preventive objectives by measures that are in conformity with basic tenets of criminal responsibility.²⁸

3. The Expansion of Omissions Liability

Having discussed the rise of pre-inchoate offences and preventive orders, we now move on to a distinct use of the criminal law for preventive purposes which demonstrates the diffusion of criminal responsibility -- the expansion of liability for omissions. This expansion is by way of exception to the tenet identified as principle (A) in part 1 above: that tenet was phrased as the principle that one is responsible for what one does and not for what others do and one fails to prevent. The same authors, Simester and Sullivan, also state the principle thus:

‘standard legal doctrine stipulates that the behaviour requirement [in the actus reus of a crime] is a requirement of positive action by the defendant. Except occasionally, an omission will not do.’²⁹

Simester and Sullivan offer two reasons for what amounts to a presumption against omissions offences – first, that omissions intrude on individual autonomy to a greater degree than the negative prohibitions typical of the criminal law (recall that the principle of individual autonomy underlies the three basic tenets identified above); secondly, and relatedly, that individuals are entitled to give priority to their own interests over those of others, in general and in principle. However, these reasons do not necessarily outweigh the argument that it is justifiable to require a not-too-demanding positive act if another person’s vital interests are at stake.³⁰

Three types of a new generation of omissions offences will be examined here – failure to report, failure to prevent, and failure to protect. English law contains many duties to report which are not backed by the criminal sanction, but it also criminalizes some *failures to report*. Three notable examples are the offences of failure by certain professionals to report suspected money-laundering,³¹ failure by certain employees to report suspected financial offences related to terrorism,³² and failure by any person to report information about acts of terrorism.³³ These offences mostly have a maximum sentence of five years’ imprisonment, a relatively high penalty when one considers that the offender is not the person who actually

²⁸ For further discussion, see G.R. Sullivan and I. Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (2012), A. Ashworth, L. Zedner and P. Tomlin (eds), *Prevention and the Limits of the Criminal Law* (2013) and T. Tulich, R. Ananian-Welsh, S. Bronitt and S. Murray (eds), *Regulating Preventive Justice* (2016).

²⁹ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), *Simester and Sullivan’s Criminal Law* (6th ed., 2016), p. 72.

³⁰ For further argument, see A. Ashworth, ‘Positive Duties, Regulation and the Criminal Sanction’ (2017) 133 *L.Q.R.* 606.

³¹ Various offences in the Proceeds of Crime Act 2002 (U.K.), ss. 330-331.

³² Various offences in the Terrorism Act 2000 (U.K.), ss. 19 and 21A.

³³ Two offences in the Terrorism Act 2000 (U.K.), s. 38B.

causes the harm that the criminal law is aiming to stop. A rather different style of failure-to-report offence is found in the Northern Territory, in the shape of an offence of failure to report to a police officer a belief on reasonable grounds that an act of domestic violence has occurred or is imminent, ‘effectively us[ing] the criminal law itself to co-opt the entire community into policing domestic violence.’³⁴

English law appears to be about to acquire a cluster of offences of *failure to prevent*. The model is the offence in the Bribery Act 2010, rendering a commercial organisation liable to conviction for failing to prevent bribery by an employee, agent or subsidiary, subject to a due diligence defence.³⁵ Similar offences are under consideration for other economic crimes.³⁶ The law of Queensland contains some similarly structured offences, such as that penalising failure to take prevention measures in relation to the sale of spray paint by employees to minors.³⁷ The law of Queensland also contains several examples of a slightly different strain of criminal liability, whereby when a corporation commits an offence against relevant regulations, the corporation’s executive officers commit the offence of failing to ensure that the corporation complies with its obligations, usually with a form of due diligence defence available.³⁸ Thus, whereas the English model diffuses responsibility by rendering the employer criminally liable for the acts of the employee or agent, the Queensland model diffuses responsibility by rendering the top employees criminally liable for the failures of the company. These uses of the criminal law will be discussed further in part 4 below.

The third example of the new generation of omissions liability is the offence of *failure to protect*. One U.K. example is where a person who is responsible for a girl under 16 fails unreasonably to take sufficient steps to protect her from genital mutilation.³⁹ Another example is where a member of a household fails to protect a child or vulnerable member of the household from death or serious physical harm at the hands of another member of that household.⁴⁰ The latter offence raises particularly difficult questions: it was devised to deal with cases of child abuse in which each parent alleged that the other caused the harm in their absence, but the danger is that it appears to require (usually) a woman to intervene physically even where she too has been subjected to violence or threats by the aggressor.⁴¹

The three types of omissions offence described above – failure to report, failure to prevent, and failure to protect – have been created against a background common law principle (A)

³⁴ J. Gans, *Modern Criminal Law of Australia* (2nd ed., 2017), p. 410, commenting on s. 124A of the Domestic and Family Violence Act 2007 (NT).

³⁵ Bribery Act 2010 (U.K.), s. 7; for a comparable formula imposing individual criminal liability, see s. 43R(4) of the Drugs Misuse Act 1986 (Qld).

³⁶ See part 4 below for further discussion.

³⁷ Summary Offences and Other Acts Amendment Act 2007 (Qld), s. 23

³⁸ Examples may be found in the Nuclear Facilities Prohibition Act 2007 (Qld) 2007, s. 22; the Water Fluoridation Act 2008 (Qld), s. 91; the Sustainable Planning Act 2009 (Qld), s. 611; and the Heavy Vehicle National Law Act 2012 (Qld), ss. 89 and 257.

³⁹ Female Genital Mutilation Act 2003 (U.K.), s. 3A (inserted by s. 72 of the Serious Crime Act 2015 (U.K.)).

⁴⁰ Domestic Violence, Crime and Victims Act 2004 (U.K.), s.5.

⁴¹ For further discussion, see J. Herring, ‘Familial Homicide, Failure to Protect and Domestic Violence: Who’s the Victim?’ [2007] Crim.L.R. 923, and Ashworth, ‘Positive Duties, Regulation and the Criminal Sanction’ (2017) 133 *L.Q.R.* 606, at pp. 628-629.

that is opposed to omissions liability. The offences create criminals where there were none before, by adding another layer of responsibility related to the basic wrong – a basic wrong that may be connected, as we have seen, with misconduct as diverse as money-laundering, terrorism, bribery, female genital mutilation or other forms of serious familial abuse. All these forms of misconduct are offences that are already surrounded at common law with the usual doctrines of complicity and the inchoate offences, but the new generation of omissions offences imposes criminal liability going beyond the standard doctrines. Unlike complicity and the inchoate offences, the new omissions offences have no general application. They apply selectively, reflecting the particular concerns of government and the legislature at given points in history – they do not proceed from a broad examination of whether there are good arguments for a general offence of failure to report a crime, or failure to prevent an offence from taking place.⁴²

What kinds of reason can be given to support this burgeoning of omissions offences, by way of exception to the general principle? The principal justification seems to lie in the belief (some would say, the realisation) that the tasks of preventing and controlling crime cannot be left to the state alone, if civil peace is to be assured at a reasonable level. This may be seen as a version of what leading criminologists such as Pat O'Malley and David Garland have termed 'responsibilization.'⁴³ They used the term chiefly to characterise the delegation of state responsibility for policing to local organizations. I propose to extend it to cover the imposition of responsibility for elements of law enforcement on individuals or companies that are in sufficient proximity to the wrongdoing or wrongdoer to be able to report or prevent an offence. Those tasks are not inherently governmental functions, especially when companies or individuals are suitably placed to help in crime prevention. However, this does leave the common law's stance on crime prevention in a state of ambivalence: on the one hand, it remains a basic common law principle that individuals are not obliged to answer police questions or to attend at a police station unless arrested, a principle that makes the task of the police in preventing and controlling crime more difficult;⁴⁴ on the other hand, exceptions to the principle against omissions offences may be justified for preventive purposes if the interests at stake are vital ones (life, physical integrity), if the person is on the scene, and if the interruption to the person's liberty to pursue her or his own planned activity is minor and not physically demanding. This argument will be taken up again in part 6 below.

4. Corporate Failure to Prevent Economic Crime

⁴² For discussion of these possibilities, see A. Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.* 606, at pp. 624-626.

⁴³ P. O'Malley, 'Volatile and Contradictory Punishment' (1999) 3 *Theoretical Criminology* 175, and D. Garland, *The Culture of Control* (2001), p. 126.

⁴⁴ *Rice v. Connolly* [1966] 2 Q.B. 414, discussed by A. Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.* 606, at p. 625.

In part 3 above the advent of a new form of corporate criminal liability was noted, in the shape of corporate failure-to-prevent offences. One of the significant political changes brought about in the last quarter of the twentieth century was the recognition that the activities or defaults of corporations can produce enormous harm (even loss of life) and, more especially, the growing acceptance that governments should take action against corporate harms, even to the extent of imposing criminal liability. The courts have played a part, by introducing the identification doctrine whereby a company could be held criminally liable if the relevant fault could be imputed to company officers who were the ‘directing mind and will’ of the company.⁴⁵ This doctrine has enabled the conviction of some companies, but its reach is limited by the fact that it is often difficult to establish that the senior company executives who qualify as the ‘directing mind and will’ of a company have the requisite knowledge or intention.⁴⁶ As a consequence, the doctrine is more effective at securing the criminal liability of small businesses than of larger corporations. In Australia the Commonwealth Criminal Code of 1995 broke away from the identification doctrine and made provision for fault to be established through other methods such as the aggregation of the knowledge of different company officers or proof of a ‘corporate culture’ that tolerated or led to non-compliance with the relevant provision. However, it seems that there has been a reluctance to adopt this broader approach in Australian state jurisdictions and for some federal regulatory regimes.⁴⁷ In the United Kingdom the principles of corporate criminal liability have now been altered for homicide: the Corporate Manslaughter and Corporate Homicide Act 2007 imposes liability where the way in which the organisation is run by its senior management is a substantial element in the breach of a relevant duty of care, and the Act allows the jury to take account of evidence of ‘attitudes, policies, systems or accepted practices within the organisation’ likely to have produced tolerance of failures to comply with duties.⁴⁸ However, this statute is confined to homicide, and for other offences the identification doctrine still seems to prevail.⁴⁹

Into this rather confusing patchwork of grounds for criminal liability comes the corporate failure-to-prevent model. The legislative origin of this model is section 7 of the Bribery Act 2010 (U.K.).⁵⁰ The conduct element of the offence is that a person ‘associated with’ a commercial organisation bribes another person – an ‘associated person’ being an employee,

⁴⁵ *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153.

⁴⁶ For extensive discussion, see C. Wells, *Corporations and Criminal Liability* (2nd ed., 2001), esp. ch. 5; see also Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (January 2017):

www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence pp. 12-17; Law Reform Commission of Ireland, *Regulatory Enforcement and Corporate Offences* (2016), Issue 7.

⁴⁷ J. Gans, *Modern Criminal Law of Australia* (2nd ed., 2017), pp. 294-295; S. Bronitt and B. McSherry, *Principles of Criminal Law* (2017), pp. 191ff; see also C. Wells, *Corporations and Criminal Liability* (2nd ed., 2001), pp.136-138.

⁴⁸ This statute is discussed in all English criminal law texts, but for a broad and perceptive overview, see C. Wells, ‘Corporate Criminal Liability: a Ten Year Review’ [2014] *Crim.L.R.* 849.

⁴⁹ Cf. Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 A.C. 500, suggesting that some forms of statutory language may justify a different approach: see A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), Simester and Sullivan’s *Criminal Law* (6th ed., 2016), pp. 281-289.

⁵⁰ The “corporate failure to prevent” model was devised by the Law Commission, *Reforming the Law of Bribery* (Law Com. No. 313, 2008); see paras. 6.100 – 6.101 on the fault requirement.

agent or subsidiary, or anyone else who performs services on behalf of the commercial organisation. There is no designated fault element, but it is a defence for the commercial organisation to prove that it ‘had in place adequate procedures designed to prevent [associated persons] from undertaking such conduct.’⁵¹ Thus this is an offence of omission (by failure to put adequate preventive procedures in place), subject to a due diligence defence. As an offence of omission not requiring proof of fault, it does not rely on the identification principle: all it needs is proof that the corporation failed to do a specified act.⁵²

The avowed purpose of corporate failure-to-prevent offences is to change corporate culture by giving companies an incentive to put preventive procedures into place, or, put in the language of the criminal law, by providing a deterrent against non-involvement and passivity on the part of companies in the face of economic crime. This is clearly a form of ‘responsibilization’, since it places a law enforcement burden on companies in respect of bribery and tax evasion facilitation offences – and, probably in the near future, other economic crimes.⁵³ Thus these corporate failure-to-prevent offences not only co-opt companies in a crime prevention role normally played by regulators or the police, but also insert a new layer of criminalization: is this justified? Celia Wells argues that offences on this model are justified because ‘a corporation benefits from the wrongdoing of associated persons acting in pursuit of contractual or commercial advantage or tax limitation.’⁵⁴ That may be a good reason for imposing on commercial organisations a duty to prevent such offences, but it does not follow that this duty should be reinforced by the criminal law. The first step should be to consider whether the option of ‘strengthening deterrents to misconduct through regulatory reform’ would be appropriate and effective.⁵⁵ The comparative effectiveness of (i) a regulatory regime with the regulator’s power to fine and (ii) criminalisation based on the ‘corporate failure-to-prevent model’ remains open to debate: the assumption is that the more severe (criminal) regime will have greater preventive effectiveness, but court fines may be lower than those imposed by regulators, for example.⁵⁶ Apart from the arguments about deterrence and prevention, there is the further question whether it is appropriate to invoke the criminal law here. Are offences such as bribery, tax evasion and fraud sufficiently serious wrongs to justify the imposition of this extra layer of criminal responsibility on companies that fail to take sufficient preventive measures? We may concede the point that the operations of the commercial organisation provide the context

⁵¹ The wording of the defence in s. 45(2) of the Criminal Finances Act 2017 (U.K.) differs slightly but not significantly from that in s. 7(2) of the Bribery Act 2010.

⁵² Company liability on this basis was established at an early stage: see *Birmingham and Gloucester Railway Co.* (1842) 3 Q.B. 223, holding that a corporation may be indicted for an offence of breach of a legal duty (in this case, failure to construct railway bridges as required by a statutory order).

⁵³ Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (January 2017); www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence; Law Reform Commission of Ireland, *Regulatory Enforcement and Corporate Offences* (2016), Issue 7.

⁵⁴ C. Wells, ‘Corporate Failure to Prevent Economic Crime – a Proposal’ [2017] Crim.L.R. 423, at p. 430.

⁵⁵ Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (January 2017); www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence, at p.16, and discussing the example of regulatory reform in the financial sector at p. 15.

⁵⁶ On which see C. Wells, ‘Corporate Failure to Prevent Economic Crime – a Proposal’, [2017] Crim.L.R. pp.432-435.

and the drivers for the commission by ‘associated persons’ of these economic crimes, and we may accept the argument that it is right to ‘responsibilize’ the company because its profit-based structure is the essential context for the economic crimes. But is this sufficient to justify taking the significant step from the imposition of a duty to the imposition of criminal liability, essentially for failure to have in place preventive procedures in place that are regarded as adequate? Moreover, if it is concluded that criminal liability can be justified, there are at least two further issues to be resolved. One is whether it is justifiable to impose on the company the burden of proving that its procedures were adequate. Reverse burdens of proof are contrary to the presumption of innocence and therefore objectionable if applied to individuals,⁵⁷ but it can be argued that corporate defendants are not at the same disadvantage in criminal proceedings as are individuals, and that it is therefore justifiable to place on them the burden of exculpation.⁵⁸ And finally, the maximum sentence should be proportionate to the seriousness of the wrong.

A separate example of the creation of a new layer of criminal responsibility is to be found in the ‘officer offences’ that were a growing feature of Australian laws in the last decade. In essence, such provisions make all executive officers of a company personally liable for the offence if their company is convicted of a negligent breach of regulations.⁵⁹ This was a major initiative to put pressure on corporations and their officers to promote law-abidance, but its failure to insist on proof of individual fault led to strong resistance and a concerted rearguard action. In 2012 the Council of Australian Governments drew up guidelines designed to tone down ‘officer offences’: even if each such offence could be justified by ‘compelling public policy’ and holding the company liable would not be sufficient to promote compliance, it must be shown that the officer ‘had the capacity to influence’ decisions related to the corporate offending and that there were steps that the officer could reasonably have been expected to take. It appears that across Australia the reception of these guidelines has been broadly favourable,⁶⁰ but they have not been followed in all respects, and some reverse burdens of proof on company officers have appeared.⁶¹ While it may be justifiable to convict corporations without insisting on the same principles as should apply to individuals, officer offences are problematic insofar as they provide for the conviction of individuals on the same basis as corporations, and without respect for principles A, B and C above and indeed the presumption of innocence.

⁵⁷ A. Gray, ‘Presumption of Innocence in Australia: a Threatened Species’, (2016) 40 Crim LJ 262.

⁵⁸ This general argument may be found, e.g. in B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (1993), arguing that prosecutorial energy and court time should not be expended on unravelling complex corporate structures, and that once the prosecution has established a case it should be for the company to satisfy the court that it has reacted appropriately to the wrongdoing.

⁵⁹ Examples in Queensland include the Nuclear Facilities Prohibition Act 2007 (Qld), s. 22; Clean Energy Act 2008 (Qld), s. 27; Transport (Rail Safety) Act 2010 (Qld), s.255.

⁶⁰ In relation to Queensland, see the Directors’ Liability Reform Amendment Act 2013 (Qld).

⁶¹ For discussion, see J. Gans, *Modern Criminal Law of Australia* (2nd ed., 2017), pp. 297-299.

5. Criminal Complicity and Extended Joint Enterprise

In this lecture I have been focussing on new forms of criminal responsibility, but my interest also includes the extension of old forms of liability. The doctrines of criminal complicity are well known across the common law world. There are four varieties (aiding, abetting, counselling and procuring), and the fault element required of an accomplice is an intention to do the acts intended to aid, abet, counsel or procure the principal offender, coupled with knowledge of the essential matters of the principal's offence.⁶² The ambit of the law of complicity has been expanded judicially in recent decades,⁶³ but the most spectacular developments have taken place in respect of what is termed 'extended joint enterprise liability', 'common unlawful purpose liability' or 'parasitic accessorial liability.'⁶⁴

Thus we arrive at a site of major disagreement between the judiciary in Australia and in England and Wales – extended joint criminal enterprise liability. In a judgment that will be referred to here as *Jogee*⁶⁵ the U.K. Supreme Court held that this doctrine no longer forms part of English law because it was based on a misunderstanding of the law in an earlier decision. In a judgment that will be referred to here as *Miller*⁶⁶ the High Court of Australia upheld the doctrine and declined to adopt the same interpretation of the authorities as the Supreme Court. This clash leaves us with the fascinating historical question whether or not the Privy Council took a wrong turn in 1984 when it decided the appeal in *Chan Wing-Siu v. R.*,⁶⁷ but my concern here is less with the development of the law than with the normative justifications for holding a person liable on grounds of extended joint enterprise.

If two people, S and P, agree to commit a particular criminal offence (say, robbery) and during its commission P goes beyond the agreement and kills the victim, what circumstances would properly render S liable in relation to the additional crime committed by P? As a matter of law the Supreme Court in *Jogee* held that there is no specific doctrine applicable to those facts (joint enterprise having no sound basis in English law), and that the question should be answered on the basis of ordinary principles of complicity (aiding and abetting, counselling or procuring). The High Court in *Miller* agrees with the Privy Council in *Chan Wing-Siu* that there is a separate wrong in cases of extended joint criminal enterprise, which consists of embarking on a joint criminal enterprise with awareness of a real risk that a more serious crime might be committed in the course of the agreed robbery. So long as it can be established that S knew there was a real risk that P would go further than agreed, that is

⁶² *Johnson v. Youden* [1950] 1 K.B. 544; for commentary, see J. Horder, *Ashworth's Principles of Criminal Law* (8th ed., 2016), pp. 444-447.

⁶³ See the discussion by G.R. Sullivan, 'Doing without Complicity' [2012] 2 *Journal of Commonwealth Criminal Law* 199, concluding at p. 231 that 'in the last two decades, true or direct complicity has become ever more expansive.'

⁶⁴ When Sullivan wrote in 2012 (last note), he stated that 'parasitic accessory liability has grown like knotweed' (p. 231). That was before the decisions next to be discussed.

⁶⁵ *R v. Jogee* [2016] UKSC 8, *R v. Ruddock* [2016] UKSC 7.

⁶⁶ *Miller v. the Queen, Smith v. the Queen, Presley v. DPP for South Australia* [2016] HCA 30; the same view has been taken by the Hong Kong Court of Final Appeal in *HKSAR v. Chan Kam Shing* [2016] HKCFA 87.

⁶⁷ [1985] AC 168; for a detailed examination of the historical precedents, see F. Stark, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Law Reform, Not Common Law Housekeeping' [2016] *Camb LJ* 550.

sufficient to hold S liable for the more serious crime committed by P, often murder. *Jogee* rejects this proposition because it grounds liability on awareness of a mere possibility (not even a probability, let alone intent) that the additional crime be committed, and because it does so for crimes such as murder that require the actual perpetrator to have had a form of intention, i.e. at least an intent to cause really serious harm. The latter reason is criticised by Andrew Simester as an unfounded search for symmetry:⁶⁸ he argues (i) that joint enterprise liability has a different actus reus from murder (or whatever further substantive offence has been committed by P), that being ‘joining in a common purpose’, (ii) that this actus reus is unlawful in its own right, and (iii) that as long as S is present when the further offence is committed, he may be held liable for that offence. Elaborating on the nature of this wrong, Simester follows Lord Steyn in asserting that:

‘joint criminal enterprises are dynamic and often escalate. Unlike aiding/abetting scenarios, S signs up to that dynamic character on an ongoing basis. As such, common unlawful purpose doctrine responds to contingencies of scope, which is really what matters here, rather than contingencies of S’s intention. It allows the common law to accommodate fast-moving developments, provided they occur in the pursuance and within the foreseen scope of the criminal enterprise (in which S has a non-contingent intention to engage), and in the presence of S. Moreover, as Lord Steyn also noted, the doctrine allows the courts to overcome at least some of the traditional evidential difficulties associated with group wrongdoing.’⁶⁹

This passage does not persuade. Its starting-point is close to the rather overblown assertion that ‘the law has a particular hostility to criminal groups’⁷⁰ – which certainly does not provide a reason why basic principles of responsibility should be jettisoned whenever two or more persons are involved. Are the evidential difficulties a good enough reason for departing from and extending the normal principles of criminal liability? It is one thing to argue that ‘the actus reus [sc. of joining a criminal enterprise] is unlawful in its own right’, or alternatively is ‘independently criminal’;⁷¹ but it is quite another thing to present this as a reason for convicting S of murder, or whatever extra substantive offence P went on to commit. It is legitimate to ask whether S exerted any influence on P in relation to the additional crime P committed or, to adapt the Swedish law, whether S ‘induced’ P to commit the additional crime.⁷² Knowledge of a ‘real risk’ plus a (loose) form of physical presence should not be accepted as sufficient for S’s liability for the additional crime – particularly when many of the actions are spontaneous and (young) people, disproportionately from racial

⁶⁸ A.P. Simester, ‘Accessory Liability and Common Unlawful Purposes’, (2017) 133 *LQR* 73, at 88-89.

⁶⁹ Simester, *ibid.*, at 89, drawing on Lord Steyn in *Powell and English* [1999] AC 1, at p. 14.

⁷⁰ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), *Simester and Sullivan’s Criminal Law* (6th ed., 2016), p.249.

⁷¹ *Ibid.*

⁷² A. du Bois-Pedain, ‘Violent Dynamics: Exploring Responsibility-Attribution for Harms Inflicted during Spontaneous Group Violence’, (2016) 6 (4) *Onati Socio-Legal Series* 1053, esp. at pp. 1070-1075.

minorities, are convicted of murder on grounds of extended joint enterprise liability essentially for being in the wrong place at the wrong time.⁷³

Taken at its highest, Simester's reasoning supports convicting S of conspiracy to rob plus either an offence of joining a criminal enterprise or perhaps an offence on the model of 'encouraging or assisting crime'.⁷⁴ If joint enterprise is to be used as a basis for convicting S of a substantive offence committed by P but not agreed to by S (only knowingly risked), then in principle the law should require a high fault element in relation to that substantive offence. To rely on the fact that S joined P in a criminal enterprise as a sufficient or even as a significant reason for convicting S in relation to P's further offence is 'too insubstantial a moral and legal basis for justifying' S's liability.⁷⁵ In fact it is to endorse constructive liability: a lesser actus reus (joining a criminal enterprise) is being used to support conviction for a further and more serious offence, without a fault element that comes close to the requirements of that further offence.⁷⁶ This is an example of 'outcome-responsibility' being allowed to overcome the cluster of general principles of 'capacity-responsibility' posited in part 1 above: the arguments for allowing this run far into moral philosophy and its controversial concept of 'moral luck'.⁷⁷ Simester appears to be conscious of the extension of (departure from) general principles inherent in his argument, when he concedes that joint enterprise liability could have been 'tweaked' by the Supreme Court in *Jogee* rather than abolished:

'by requiring that S foresaw P's further crime as *probable*; or by limiting convictions to cases where S was certain that the collateral offence would be committed by P in the event of particular, foreseen circumstances.'⁷⁸

This brings back into focus the relationship between S's act in joining a criminal enterprise and P's commission of a further crime. Whatever the challenges that group offences pose to criminal law, evidence and procedure, basic principles of criminal responsibility should not be pushed aside in order to convict S of the further offence committed by P. The aim should be to produce a law of complicity that is 'sensitive to individual differences in the scale and

⁷³ Note the empirical research discussed by B. Crewe, A. Liebling, N. Padfield and G. Virgo, 'Joint Enterprise: the Implications of an Unfair and Unclear Law' [2015] *Crim.L.R.* 252, at pp. 264 and 268.

⁷⁴ Serious Crime Act 2007 (U.K.), part 2; see also the offence of participation in the activities of an organised crime group, s. 45 of the Serious Crime Act 2015 (maximum sentence, 5 years' imprisonment), discussed by P. Jarvis and R. Earis, 'Participating in the Activities of an Organised Crime Group: the New Offence' [2015] *Crim.L.R.* 766.

⁷⁵ J. Horder, *Ashworth's Principles of Criminal Law* (8th ed., 2016), p. 449.

⁷⁶ Cf. J. Gans, *Modern Criminal Law of Australia* (2nd ed., 2017), p. 312: 'The aberrantly low threshold for criminal responsibility imposed by the doctrines extending joint commission and complicity could be justified on the basis that it is limited to situations where the defendant and the offender have agreed to do something.' For arguments against constructive liability, and specifically against the idea that S's agreement with P constitutes a 'change of normative position' that may suffice to ground S's liability for P's extra crime, see A. Ashworth, *Positive Obligations in Criminal Law* (2013), ch. 5.

⁷⁷ For debate on the proper place of moral luck in the criminal law, see A. Ashworth, 'Taking the Consequences', and R.A. Duff, 'Acting, Trying and Criminal Liability', in S.Shute, J. Horder and J. Gardner (eds), *Action and Value in Criminal Law* (1993).

⁷⁸ A.P. Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 *L.Q.R.* at p. 89.

scope of participation’,⁷⁹ and it is not helpful to start with an expostulation about the law’s hostility to criminal groups.⁸⁰ If the doctrine of extended joint criminal enterprise is to be retained – and recall that the major recent *demarches* have come in judicial decisions, not legislation -- it should either be constituted as a separate offence for a separate wrong, drafted somewhat in the manner of the English laws on assisting and encouraging an offence (although without the terrible legislative complexity⁸¹) or, if it is to be retained as part of the doctrine of complicity, there must be insistence on proof of S’s agreement (express or implied) that if P gets into a position in which he decides to commit an additional offence (e.g. to kill), he should go ahead. It should not be enough, for liability for the additional offence, that S has joined a criminal enterprise and has thereby ‘signed up to the dynamic character’ that renders S liable for any subsequent events.

6. Prevention, Risk and the Diffusion of Criminal Liability

At the beginning of this essay I set out the broad lines of Nicola Lacey’s four bases for responsibility that, on her analysis, have played and continue to play a part in the development of the criminal law – capacity, character, risk and outcome. In part 1 some tenets of responsibility that underlie the capacity theory in common law criminal law were sketched. In these closing comments, I first draw together some recent trends from the socio-historical perspective, and then move on to a normative critique of those trends.

The emphasis here has been on the rise of risk-based responsibility in recent years. Part 2 gave a brief account of the expansion of criminal liability grounded in the prevention of risk, focussing on pre-inchoate offences (which may be said to expand criminal responsibility vertically) and on preventive orders reinforced by criminal offences of failing to comply with the conditions (which operate as personal criminal codes for the individual subjects, often casting a kind of *cordon sanitaire* round particular locations or persons).⁸² Part 3 moved on to the less familiar territory of offences of failure to report, failure to prevent and failure to protect. This new generation of omissions offences has the effect of ‘responsibilizing’ individuals or companies by placing them under a duty to take certain actions for preventive reasons. Some of the duties are enforced by regulation, but in several instances the duty is enforced through the criminal law. The question of enforcement was particularly important in part 4, where the focus was on failure-to-prevent offences committed by corporations. These are strict liability offences with a due diligence defence and often a reverse burden of proof, designed to apply pressure to companies to put preventive measures in place – in effect, transferring a limited policing function from the state to the corporations themselves.

⁷⁹ C. Kutz, *Complicity: Ethics and Law for a Collective Age* (2000), p. 253.

⁸⁰ Above, n. 70.

⁸¹ Serious Crime Act 2007 (U.K.), Part 2.

⁸² For elaboration, see Ashworth and Zedner, *Preventive Justice* (2014), pp. 92-94.

While the rise of preventive or risk-based offences has been the focus of this lecture, it is not claimed that this is the sole or even main trend in contemporary criminal law. Lacey demonstrates that there has been a resurgence of character responsibility, not merely in terms of criminal offences and defences but also in respect of proof (evidence of bad character) and sentencing (indeterminate detention premised on a finding of dangerousness).⁸³ Furthermore, there have also been legislative developments based on outcome-responsibility (regulatory offences with strict liability, and driving offences based on outcome). However, in part 5 a recent example of ambivalence towards outcome-responsibility was noted: while the last three decades had seen the judicial development of the doctrine of extended joint criminal enterprise, the U.K. Supreme Court called an abrupt halt to these developments in English law in 2016. Outcome-responsibility was displaced as the rationale for liability in favour of capacity-responsibility, and the traditional four categories of complicity liability were re-affirmed – although not in Australia or Hong Kong, where liability based on extended joint criminal enterprise remains part of the common law of crime.

This, then, is the recent historical perspective – the growth of pre-inchoate offences and of preventive orders, the emergence of offences of failure to report, prevent or protect (especially corporate failure-to-prevent offences, and also officer offences in Australia), and the ongoing controversy over extended joint enterprise liability. These developments underscore Lacey’s analysis, demonstrating the struggle between different bases for criminal responsibility. They also show that, whereas the talk of overcriminalization tends to assume that this means horizontal expansion of the criminal law by adding new substantive offences, many of the significant developments may be seen as vertical extensions of the criminal law – in effect, adding (or, in respect of joint enterprise in England and Wales, subtracting) extra layers of criminal responsibility.

Moving from the descriptive to the prescriptive, we return to the three tenets of capacity theory, set out in part 1 above. These tenets appear to have only a residual role in the development of the criminal law, and it is relatively rare that they are used as a sword to puncture potential developments. Of the few examples of their use as a sword, one is the U.K. Supreme Court’s abolition of the doctrine of joint criminal enterprise (or parasitic accessory liability), where there was insistence on a powerful version of principle (C) so as to require intention and knowledge as elements in all forms of complicity;⁸⁴ another example would be those decisions in which the courts have relied upon the so-called constitutional principle that *mens rea* is presumed to be required unless there are strong contra-indications;⁸⁵ a third example would be the Australian retrenchment in relation to ‘officer offences.’ While the principle of individual autonomy may be susceptible to claims that many members of society labour under a ‘structural disadvantage’ that reduces their practical autonomy,⁸⁶ the principle’s role in narrowing the ambit of criminal liability in accordance with rule-of-law values⁸⁷ must be conceded. It may be true that (over-)optimism about the

⁸³ Lacey, *In Search of Criminal Responsibility* (2016), ch. 5.

⁸⁴ See the discussion of *Jogee* [2016] UKSC 8 in part 5 above.

⁸⁵ E.g. *Brown* [2013] UKSC 43, n. 14 above.

⁸⁶ N. Lacey, *In Search of Criminal Responsibility* (2016), pp. 164-165.

⁸⁷ For further references, see A. Ashworth, *Positive Obligations in Criminal Law* (2013), ch. 4.

control of risk is driving many new instances of criminalization, as Lacey suggests, but the three examples above show that capacity responsibility has some life left in it.⁸⁸

When the new generation of omissions offences was examined in parts 3 and 4 above, it was noted that they defy the presumption against omissions offences (A), constituting an exception to what Simester and Sullivan describe as the ‘standard legal doctrine’ that the *actus reus* of a crime must require positive action by the defendant, and that ‘except occasionally, an omission will not do.’⁸⁹ Indeed, the new generation of omissions offences stands in direct contradiction to Simester and Sullivan’s injunction that people should be ‘liable according to what they do, not what others do and they fail to prevent.’⁹⁰ The normative debate therefore moves to the question whether there are special justifications for creating omissions offences of this kind – in effect, introducing a new layer of responsibility, and creating criminals where there were none before. One argument mentioned above was that the state cannot guarantee an acceptable level of civil peace without transferring some of the responsibility to individuals or to companies in the situations that give rise to the new omissions offences (failure to report, to prevent or to protect). This is phrased as an empirical question (whether or not the state can in practice guarantee an acceptable level of civil peace), whereas it is really a political question that raises issues such as public expenditure on policing and respect for individuals’ right to a private life. But, even if a strong case for this kind of ‘responsibilization’ is conceded – and that requires much more exploration and debate than is possible here⁹¹ – it would only yield a justification for imposing a duty, and would not conclude the question whether it should be reinforced by regulatory or by criminal sanctions. This is particularly important in relation to the corporate failure-to-prevent offences discussed in part 4 above: it is true that companies operate in order to yield a profit, and that companies would probably benefit from the wrongdoing of what the legislation terms ‘associated persons.’ That strengthens the case for imposing a duty, but does not conclude the question whether reinforcement should be by means of regulation or the criminal law. Another argument in favour of imposing a duty in these circumstances would be that the situation requires relatively little of the individual, in terms of reporting or taking steps to prevent (although this does not apply to failure-to-protect situations, which may require some physical intervention). But, even if this is true of offences by individuals, it is not true of corporate failure-to-prevent offences. There the whole objective is to persuade companies to devise systems to prevent offending by ‘associated persons,’ an important but time- and money-consuming task.

The relationship between corporations and the criminal law remains strongly contested, not least because the institutions of the criminal law generally find it much more difficult to

⁸⁸ N. Lacey, *In Search of Criminal Responsibility* (2016), p. 173.

⁸⁹ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), *Simester and Sullivan’s Criminal Law* (6th ed., 2016), p. 72, quoted at n. 29 above.

⁹⁰ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), *Simester and Sullivan’s Criminal Law* (6th ed., 2016), p. 15, quoted at n. 9 above.

⁹¹ One under-discussed element is presence: being present is a *sine qua non* of the new omissions offences, and also a reason for imposing the duty on a particular individual or corporation. But how powerful a reason should presence be in favour of extended joint enterprise liability? See Simester, ‘Accessory Liability and Common Unlawful Purposes’, (2017) 133 *L.Q.R.* 73, at p. 89.

prosecute and try companies than individuals.⁹² What I have sought to suggest in this lecture is that many countries may not be able to cope satisfactorily with crime without requiring some contribution from individuals and companies. This indicates that a responsabilization strategy should be supported, but only if it is focussed correctly on the most serious offences or on those that are particularly difficult to bring to light, and only if it is brought to bear on those on whom a duty can fairly be laid. Thus we should assuredly go back to the beginning and ask whether it is right to have omissions offences in relation to money-laundering but not murder, female genital mutilation but not other forms of child abuse, bribery and tax offences rather than, say, pollution offences, and so forth.

We have described a criminal law that is increasingly reliant specifically on omissions offences and more broadly on preventive offences and strategies: it deploys these types of offence in order to devolve elements of the enforcement or policing function to companies and individuals. In Australia the ‘officer offences’ go further and make company officials liable for failing to prevent the company from committing offences, a further layer of responsibility that seems unfair unless the relevant individuals have the power to influence the company decisions for which they are liable to be held responsible, i.e. compliance with the principle of individual autonomy that underlies capacity-responsibility at common law. The Australian debate about officer offences is a good example of the broader questions I wish to raise for discussion. Is it justifiable to ‘responsibilize’ individuals and companies by imposing on them duties to report, prevent or protect? If they are proximate to the primary wrong, I think there is a strong argument in favour of imposing such a duty. Is it justifiable to go further and to invoke the criminal law, on the model of the new generation of omissions offences? I harbour more doubts about this, and would like to see preference given to regulatory sanctions. Indeed, some may regard it as contradictory to create this further layer of criminal responsibility in the hope of reducing the primary form of offending. Similar questions may be raised about officer offences: it may be right to impose preventive duties on officers who have the capacity to influence decision-making in the company, but is it justifiable to make the officers into criminals rather than to deploy regulatory sanctions? Running through these new offences is one single thread – that the law is trying to induce individuals or companies that are proximate to the primary offending to take some action to prevent that offending (through a duty to report, to prevent or to protect). This thread also runs through the controversies over extended joint enterprise liability: this renders the secondary party co-responsible for the further offence committed by the principal (unless the former completes an effective withdrawal), and it requires only that the secondary party be aware that there is a real risk that the principal may commit such an offence. The U.K. Supreme Court regards this as insufficient and espouses the principle of individual autonomy; the High Court of Australia and the Hong Kong Court of Final Appeal regard the secondary party’s decision to join the criminal enterprise as significant enough to justify use of the broader ‘real risk’ test. This is constructive criminal liability and, in my view, inconsistent

⁹² See above, n. 58, and S. Bronitt, ‘Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements’, in T. Tulich, R. Ananian-Welsh, S. Bronitt and S. Murray (eds), *Regulating Preventive Justice* (2016), pp. 216-218

with the principle of individual autonomy – the principle that ought to underpin criminal liability.