

THE DIFFUSION OF CRIMINAL  
LIABILITY: A CAUSE FOR  
CONCERN?

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# 1. Over-criminalization?

- Too much criminal law?
- Should we introduce a lesser category of ‘administrative offences’?
- Not all new crimes are objectionable: new wrongs to respond to, such as people trafficking, modern slavery, domestic coercion, etc.
- That is ‘horizontal’ criminalization; my concern here is ‘vertical’ criminalization – we already have the inchoate offences (e.g. attempts and conspiracy) and complicity (e.g. aiding and abetting), but focus on new ways in which criminal liability has been diffused in recent years, taking criminal responsibility to a new level.

## 2. Three Tenets of Capacity Responsibility

- Traditional criminal law: *conduct* which *causes* a result, with *fault*.
- (A) The principle that one is responsible for what one does, and not for what others do and one fails to prevent: a principle articulated by Simester and Sullivan, who go on to state that the conduct requirement 'is a requirement of positive action by the defendant. Except occasionally, an omission will not do.'
- Underlying this is the principle of individual autonomy – respect for each individual's decisions. Thus:

### 3. Three Tenets (continued)

- (B) Lord Bingham: ‘The criminal law generally assumes the existence of free will ... 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.’ *Kennedy (No. 2)* (2007)
- (C) The presumption against criminal liability without fault:
- ‘The constitutional principle that *mens rea* is presumed to be required in order to establish criminal liability is a strong one ...’ Lord Kerr in *Brown* (2013) UKSC.

## 4. Preventive Criminal Laws: Pre-Inchoate Offences and Civil Preventive Orders

- Pre-inchoate offences as vertical extension of criminal law beyond the traditional inchoate offences of attempt, conspiracy and incitement: in Australia and U.K., new offences relating to terrorism and organized crime.
- E.g. glorifying terrorism; disseminating a terrorist publication reckless as to whether it encourages terrorism; and engaging in any conduct in preparation for giving effect to an intention to commit acts of terrorism.
- Also, crimes of possession; crimes of membership of organisations.
- Civil Preventive Orders: the ASBO and its successors, including Control Orders and TPIMs.

# 5. The New Generation of Omissions Offences

- *Failure to Report*: duties to report suspected money-laundering, to report financial offences related to terrorism, and to report information about acts of terrorism. Maximum sentence = 5 years
- *Failure to Prevent*: commercial organisation liable for failing to prevent bribery by an employee, agent or subsidiary; in Qld failure to take preventive measures in relation to sale of spray paint, and Australia-wide the 'officer offences'.
- *Failure to Protect*: duty of person responsible for a girl under 16 to take reasonable steps to protect her from genital mutilation; duty of member of household to take reasonable steps to protect a child or vulnerable person from serious physical harm by another member.

## 6. Justifiable Exceptions to Principle?

- This is RESPONSIBILIZATION: is it justified?
- Principle (A) against omissions offences: omissions intrude on autonomy more than negative prohibitions, and in general people should be able to give priority to their own interests.
- Clash between common law principle of autonomy/liberty, and the arguments that i) the state cannot cope alone with the tasks of preventing and controlling crime; ii) individuals or companies which are 'on the spot' (present); iii) if the interests at stake are vital ones; and iv) if the interruption of the individual's activities is minor and not physically demanding (e.g. duty to report).

# 7. Corporate Failure-to-Prevent Offences

- Model is s.7 Bribery Act 2010 (UK): if a person ‘associated’ with the company (employee, agent, subsidiary) commits a bribery offence, company is criminally liable unless it proves that it ‘had in place adequate procedures designed to prevent [associated persons] from undertaking such conduct.’
- Celia Wells: ‘ a corporation benefits from the wrongdoing of associated persons acting in pursuit of contractual or commercial advantage or tax limitation.’
- Good argument in favour of duty, but is it a good argument for criminalization? What about regulation with high fines? If crime, why the reverse burden of proof? Why no requirement of fault?



## 8. Extended Joint Criminal Enterprise

- Clash between *Jogee* [2016] UKSC 8 and *Miller* [2016] HCA 30
- 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 should render S liable for the additional crime committed by P?
- Should it be a test of 'awareness of a real risk', or should the law require that S intended P to commit the extra crime/knew he would?
- Effects of U.K. law until 2016: young men, disproportionately from racial minorities, convicted of murder and sentenced to life.

## 9. Right or Wrong?

- ‘Joining in a common purpose’ is a separate wrong (Andrew Simester)
- ‘Joint criminal enterprises are dynamic and often escalate ... S signs up to that dynamic character on an ongoing basis.’
- Should basic tenets of responsibility be discarded where 2 or more people join together in crime? Surely a minimum should be to require S to have influenced P in his commission of the extra crime?
- Even if joining a criminal enterprise is a distinct wrong, building liability for the extra crime (especially if murder) upon it is a form of constructive liability. Even if Simester is right, it should be a separate offence – e.g. ‘encouraging or assisting crime’, joining criminal group.

# 10. The Historical Perspective

- Pre-inchoate offences and civil preventive orders
- New generation of omissions offences -- failure to report, failure to prevent and failure to protect
- Rise of prevention, imposing duties that reduce risk of primary offences (but create a new layer of criminal liability)
- Controversy about extended joint criminal enterprise – constructive liability as a deterrent, but unfair and discriminatory?
- Nicola Lacey, *In Search of Criminal Responsibility* (2016), trend towards risk, character and outcome, but resilience of capacity.

# 11. The Normative Perspective

- Controversies surrounding corporate criminal liability and 'officer offences' in Australia
- Can 'responsibilization' be justified? Exception to principle (A) for some duties to report and duties to prevent? Too quick: keep existence of duty separate from appropriate sanction (regulatory or criminal?). Contradictory to make companies/officers into criminals?
- Proximity and presence as key, both to failure to report-prevent-protect and to extended joint enterprise liability?
- IF criminal sanction justifiable, must insist on principles A, B and C.