

POSITIVE DUTIES, REGULATION AND THE CRIMINAL SANCTION

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Recent years have seen significant increases in the number of positive duties (i.e. duties to take action, rather than simply duties to refrain) imposed by English law on individuals and organisations. Part I below gives examples of the new duties to report, to prevent and to protect, and their different enforcement mechanisms. Insofar as the criminal law is involved, some of these new developments may be said to indicate a movement away from English law's traditional reluctance to criminalise omissions.¹ Is it justifiable to use the criminal law in this way? Should there be greater reliance on alternative methods of enforcement?

I. The Rising Tide of Positive Duties of Citizenship

It is not contended that positive duties of citizenship are new, but rather that they are increasing significantly in number and call for justification. There are longstanding civic duties – such as that of serving on a jury when summoned² and that of attending court when required to give evidence as a witness,³ both enforced either through punishment for contempt of court or through discrete criminal offences – but our concern here lies with three related categories of positive duties: duties to report, duties to prevent, and duties to protect.

Duties to Report: among the duties to report crime there is a general duty of professionals to report child abuse,⁴ and a new duty of professionals to report suspected female genital mutilation.⁵ No method of enforcement is provided for these duties, but it can be assumed that professional disciplinary proceedings (e.g. in respect of doctors or other health workers)

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¹ On which, cf. A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 L.Q.R. 424, with G. Williams, "Criminal Omissions – the Conventional View" (1991) 107 L.Q.R. 86.

² Juries Act 1974, s. 20: failure to attend court when summoned is a summary offence, punishable with a fine, or is punishable as a contempt in the face of the court.

³ Criminal Procedure (Attendance of Witnesses) Act 1965, s.3: failure to attend when summoned as a witness is a summary offence, punishable with up to 3 months' imprisonment, or is punishable as a contempt.

⁴ Derived from the duty imposed by s. 11 of the Children Act 2004, on which see HM Government, *Working together to Safeguard Children* (www.gov.uk/government/uploads/attachment_data/file/415, March 2015).

⁵ Serious Crime Act 2015, s. 74.

could be taken where appropriate. Currently under consideration is whether there should be a specific duty on professionals to report child abuse and, if so, whether that should be enforced through professional discipline, regulation or the criminal law.⁶ A different kind of duty to report is that imposed on larger companies supplying goods or services, requiring them to prepare annually a Slavery and Human Trafficking Statement affirming that none of their employees falls within those categories, a duty enforceable by civil injunction.⁷ Much more powerful are the duty on professionals to report suspected money-laundering,⁸ duties on professionals to report suspected financial offences related to terrorism,⁹ and the duty on all persons to report information about acts of terrorism,¹⁰ mostly backed by criminal offences of failure to report with maximum prison sentences of five years.

Duties to Prevent: the most general duty to prevent is that imposed on institutions such as schools, universities, prisons and the police, to “have regard to the need to prevent people from being drawn into terrorism.”¹¹ No specific method of enforcement is provided, but the relevant inspectorates will surely assess compliance. A more direct and more powerful duty is that introduced by the Bribery Act 2010, whereby a commercial organisation is liable to conviction for failing to prevent bribery by an employee, agent or subsidiary.¹² This form of offence is under consideration for failure to prevent the facilitation of tax evasion,¹³ and when government ministers committed themselves to “cracking down” on fraud and on money-laundering, this kind of “failure to prevent” offence was again mentioned.¹⁴

Duties to Protect: while those failure-to-prevent offences focus on the role of commercial organisations, the failure-to-protect offences are aimed at individuals. Thus it is an offence for a person who is responsible for a girl under 16 to fail unreasonably to take sufficient steps to protect her from genital mutilation.¹⁵ Even more powerful is the duty imposed by the offence of failing to protect a child or vulnerable member of a household;¹⁶ this duty may require some physical intervention by the member of the household. Physical intervention

⁶ HM Government, *Reporting and Acting on Child Abuse: Consultation Document* (www.gov.uk/government/consultations/reporting_and_acting_on_child_abuse_and_neglect, July 2016).

⁷ Modern Slavery Act 2015, s. 54, on which see Home Office, *Transparency in Supply Chains etc: a Practical Guide* (www.gov.uk/government/uploads/system/uploads/attachment_data/file/471, 2015); also the duty of a certain public authorities to report suspected victims of slavery or human trafficking, in s. 52 of that Act. Landlords and employers also have a duty to check the immigration status of their tenants and employees, although the related offences do not adopt the “failure to ...” model: for landlords, see Immigration Act 2016, s.39, inserting s. 33A into the Immigration Act 2014; for employers, see Immigration Act 2016, s. 35, amending s. 21 of the Immigration, Asylum and Nationality Act 2006.

⁸ Proceeds of Crime Act 2002, ss. 330-331.

⁹ Terrorism Act 2000, ss. 19 and 21A.

¹⁰ Terrorism Act 2000, s. 38B.

¹¹ Counter-Terrorism and Security Act 2015, s. 26.

¹² Bribery Act 2010, s. 7, with a maximum sentence of an unlimited fine.

¹³ HMRC, *Tackling Tax Evasion: legislation and guidance for a corporate offence of failure to prevent the facilitation of tax evasion, summary of responses* (www.gov.uk/government/uploads/system/uploads/attachment_data/file/560 October 2016).

¹⁴ Former Prime Minister David Cameron, reported in *The Guardian*, 12 May 2016, and Attorney General Jeremy Wright, reported in *The Guardian*, 12 September 2016.

¹⁵ Female Genital Mutilation Act 2003, s. 3A (inserted by s. 72 of the Serious Crime Act 2015).

¹⁶ Domestic Violence, Crime and Victims Act 2004, s. 5; maximum sentence, 14 years’ imprisonment.

may also be required by the common law duty to assist a constable when requested and necessary.¹⁷

How should this expansion of what may loosely be called duties of citizenship be characterised? To what extent do these duties involve citizens in helping the state in the enforcement of the law, and to what extent do they involve the direct protection of the rights of others? Does the expansion of these duties represent a sharing of responsibilities between state and community, or is it an “off-loading” of state functions to others, or are these not truly state functions anyway? These and related questions will be discussed in Part II. In the remainder of the article, we examine the justifications for selecting particular methods of enforcing these duties. Thus in Part III we begin by examining some criteria for criminalization – the strongest of the enforcement mechanisms, and therefore the one that requires the most convincing justifications -- followed in Part IV by a discussion of the proper ambit of regulatory techniques. The framework established in Parts III and IV is then applied to positive duties of three different kinds. Part V examines duties to report offences, Part VI considers duties to participate in the institutions of justice, and Part VII looks into obligations to intervene personally. Some conclusions are drawn in Part VIII.

II. Whose Responsibility?

What is the basis for obligations such as the duty to report crime, and the duty to intervene physically? Matt Matravers argues that the institutions of criminal law and punishment are a necessary element of the contemporary post-industrial state, partly to give citizens assurance that others will observe the same constraints on the pursuit of their goals, partly to communicate the significance of the commitment to shared values, and partly to educate offenders so as to enhance their ability to engage with others in accordance with those values.¹⁸ A fourth function would be that of reinforcing core values by providing for the censure and punishment of those who violate them, for example through child abuse or enslavement. A central ingredient of a just society is that its members treat each other as moral equals who deserve equal respect – respect based on the simple fact that the others are persons.¹⁹ This conception of ourselves as free and equal moral agents is at the heart of modern theories of liberal constitutionalism.²⁰ Yet it cannot be an unbounded freedom, since it must be limited by the need to respect the rights of others and to support necessary institutions and public services. The criminal law is one of those basic political institutions, along with courts and a judicial system. There must also be recognition of the obligation to pay taxes in order to raise money for the provision of public services, including those

¹⁷ *Brown* (1841) Car. & M. 314.

¹⁸ See further M. Matravers, “Political Theory and the Criminal Law”, in R.A. Duff and S.P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 69.

¹⁹ See further C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006), ch. 1.

²⁰ For an example and further references, see M. Thorburn, “Criminal Law as Public Law”, in Duff and Green (eds), *Philosophical Foundations of Criminal Law* (2011), pp. 41-42 and ch. 2 *passim*, and A. Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014), ch. 3.

designed to protect and promote the autonomy of all, and particularly of those who are disadvantaged or vulnerable. One fundamental commitment here is the state's responsibility to provide a satisfactory level of emergency services, including fire, ambulance and police. While the historical origins of these services show early reliance on individual citizens rather than public provision, it is taken to be a mark of civilisation to move towards maintaining a professional police force that plays a major part in the prevention of crime, the investigation of offences, and the prosecution of offenders.²¹

To accept that the state should play a major part in crime prevention and related tasks still leaves room for some civic and crime-preventive obligations to be placed on individuals and organisations. Is the increasing tendency to impose such obligations justifiable? In the 1990s Pat O'Malley drew attention to "neo-liberal manoeuvres to responsabilize individuals and to take the state out of as much of social life as possible".²² However, much depends on the spirit in which these "manoeuvres" are executed and received: it is one thing to devolve responsibilities to willing individuals or organisations as part of a process of "enrolling" them in the prevention of illegal conduct,²³ and it is quite another thing to off-load tasks on to unenthusiastic recipients. Both those manoeuvres can be said to "responsibilize" individuals and organisations, although they only reduce the directness of the state's control and do not remove it. Thus the state still governs but does so at a greater distance, since ultimately "all governance is 'through' the implied threat of making resistance at some stage a 'crime'".²⁴ The two manoeuvres may be seen as the opposite ends of a spectrum. At one extreme we may imagine a "solidarity state" that takes a leading role in law enforcement but which imposes a wide range of duties on individuals and organisations, such as duties to report (suspected) crimes, duties to take steps to prevent crime (where possible without personal danger), duties to intervene physically to protect individuals (again, where possible without personal danger), and a duty to answer police questions and to co-operate with the police in the detection of crime. At the other extreme we may imagine an "individualist state" that keeps to itself the major role in law enforcement and does not impose preventive obligations on individuals but rather expects the police and other enforcement agencies to do the necessary work in protecting people from (criminal) harms,²⁵ except in circumstances of urgency when individuals have the right (permission) to use force in self-defence or defence of others. More broadly, priority is here given to the right to respect for their private life and the consequent liberty to pursue their own preferences, without the need to answer police questions or otherwise assist in law enforcement.

²¹ See L. Zedner, "Policing before and after the Police: the Historical Antecedents of Contemporary Crime Control" (2006) 46 *B.J.Crim.* 78. For a vigorous insistence on keeping policing and other aspects of law enforcement and the administration of justice in the public sector, see J. Gardner, "Criminals in Uniform", in R.A. Duff et al, *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013), 102.

²² P. O'Malley, "Volatile and Contradictory Punishment", (1999) 3 *Theoretical Criminology* 175, at p. 180. It should be noted that O'Malley's principal target was the effect of privatizing criminal justice functions as a means of taking the state out of social life.

²³ On "enrolment", see J. Black, "Enrolling Actors in Regulatory Systems: Examples from the U.K. Financial Services Regulation", [2003] *Public Law* 63, at pp. 69-70.

²⁴ J. Simon, *Governing through Crime* (New York: Oxford University Press, 2007), at p. 14.

²⁵ See further Gardner, "Criminals in Uniform", at p. 106.

There is unlikely to be much enthusiasm for the adoption of either extreme: the “solidarity state” may be criticised as corrosive of the element of trust in social relations, with the duty to report (spy) on one’s neighbours often being linked to national socialism in 1940s Germany; the “individualist state”, on the other hand, is seen as lacking in basic social co-operation and also as failing to give adequate protection to (potential) victims of crime. If we accept the gist of these criticisms, what factors ought to be taken into account when deciding whether to impose a civic obligation on individuals or organisations? Four factors – seriousness, secrecy, professional responsibility and proximity – can be mentioned briefly at this stage, with fuller discussion to come in part V below. The *seriousness* of the potential harm is surely crucial to any duty to report. Thus the duty to report a homicide should be stronger than a duty to report a theft, reflecting the argument that, the more serious the potential harm, the more can justifiably be asked of people by way of assistance. The *secrecy* of the situation may add a further element to the justification: thus crimes in the family or in an institution such as a children’s home often take place in conditions of secrecy, and without a duty to report they may go unnoticed and the victims unprotected. Where there is a *professional responsibility*, as with the healthcare, education and child protection professions, this indicates that members of those professions ought to report reasonable suspicions of wrongdoing (particularly in respect of young or otherwise vulnerable people). And fourthly, the mere fact of a person’s *proximity* to the crimes or harms (together with the *ability* to take some preventive action) supplies a reason why a duty should fall on a particular individual or organisation rather than on a law enforcement agency. Obviously there will be countervailing arguments to be taken into account too: any duty should be limited to what a person may be expected to do without incurring personal danger, and fear of reprisals has to be weighed in the balance.

The “responsibilization” strategy that is apparent from part I of this article involves the state in bringing businesses, community agencies, and even individuals who can be said to have the possibility of reducing criminal opportunities, to realize “that the state alone is not, and cannot be, responsible for preventing and controlling crime”, and to make them “recognize that they have a responsibility in this regard”.²⁶ But these assertions by David Garland beg some important questions. Whether the state alone is responsible for crime prevention is the question under discussion, and we need to be precise about the grounds on which these non-state actors can be said to have civic obligations, such as duties to report. Garland claims that, in imposing duties of citizenship, governments are “seeking to re-negotiate the question of what is properly a state function and what is not”;²⁷ but the language of re-negotiation suggests a settled position that is undergoing revision, whereas the reality is much more contested. Are there elements of law enforcement that are “inherently governmental functions”,²⁸ or are there respects in which the public/private divide is open to debate? The prevailing position on law enforcement in what may loosely be termed Western democracies has changed from predominantly private (until the 19th century) to mainly public (with the advent of the professional police and other emergency services), followed by a rolling back

²⁶ D. Garland, *The Culture of Control* (New York: Oxford University Press, 2001), at p. 126.

²⁷ Garland, *The Culture of Control*, at p. 126.

²⁸ See the discussion of this American constitutional doctrine by Harel, *Why Law Matters*, at pp. 74-77

of public services and the re-emergence of private policing and wider duties of law enforcement.

Not all positive duties are (solely) duties of citizenship. If we recall the few duties of physical intervention,²⁹ they may be regarded both as public duties and as private personal duties. The argument here would be that in a just society each person should have a right of access to opportunities for self-respect. This means that each person has the right to basic material resources, and as a matter of justice each person has a duty to pay taxes that provide for the basic needs of the less well-off and for emergency services. Cecile Fabre takes this argument further by arguing that personal services (not just money) can be owed to the needy and the imperilled:³⁰ in other words, where a person is manifestly at risk of physical harm, other persons present have a duty to take steps to avert the danger, which duty may involve giving physical help. This is put forward as a moral duty towards the endangered person (or a duty of humanity), based on the principle of equal respect, on the primacy of the values of life and physical integrity, and on the existence of an imminent threat to them. Accepting that analysis, we may go on to ask how, if at all, the duty should be enforced – by simple legislation, by regulation, by the criminal sanction? In addition to those duties of humanity to other individuals, there are also what we have loosely termed duties of citizenship, owed to the state (or, in communitarian or associative theories, to the community or to citizens *qua* citizens)³¹ rather than directly to any individual – for example, the duty to attend court as a witness, the duty to serve as a juror when summoned, and so forth.³² Some duties have elements of both the civic and the personal – for example, the duty to assist a police constable when requested seems to be a civic duty but could also be seen as the right of an imperilled individual (the constable) to the personal services of a bystander in order to safeguard his right to life. Both the personal and the civic elements of obligations will be discussed below.

III. Criteria for Criminalization

It is widely accepted that there is no content-related definition of a crime. Thus Glanville Williams concluded that the only viable definition of crime is a procedural one: if prosecution, conviction and sentence may follow, it is a crime -- and not, for example, a regulation.³³ In terms of the criminalization debate, what calls for justification is a prohibition or obligation that is capable of being followed by criminal proceedings.

One principal function of the criminal law is to declare and to prohibit those wrongs that merit public censure or condemnation. The technique of the criminal law is to declare that

²⁹ Above, footnotes 16-17 and accompanying text.

³⁰ Fabre, *Whose body is it anyway?*, chs. 1 and 2.

³¹ R.A. Duff, "Responsibility, Citizenship and Criminal Law" in Duff and Green (eds), *Philosophical Foundations of Criminal Law* (2011), at pp. 138-140; see further J. Horton, *Political Obligation*, 2nd ed. (Basingstoke: Palgrave Macmillan, 2010).

³² See footnotes 2 and 3 above.

³³ G. Williams, 'The Definition of a Crime' [1955] *Current Legal Problems* 107; see also G. Lamond, 'What is a Crime?' (2007) 27 *Oxford J.L.S.* 609.

anyone who does a prohibited act or fails to do a required act is liable to be convicted and punished up to a designated maximum. The determination that a certain type of wrong is serious enough to justify the censure of the criminal law is a threshold decision: is it possible to find guidance within theories of criminal law in order to determine whether there are good arguments for creating a positive duty and criminalising the omission to carry it out? The criminalization debate has burgeoned in recent years. Our purpose here is not to review that debate, but rather to search for some general principles relevant to the present discussion. There are two forms of harm principle -- the first, that conduct should only be criminalized if it causes harm to others; and the second, that it is good reason to criminalize conduct that it will prevent harm to others.³⁴ It is a separate principle that the conduct to be criminalised must amount to a moral wrong.³⁵ The preferred position is that all three principles should be satisfied: a necessary condition for criminalization is that the conduct be a wrong that causes harm to others or that criminalizing it will prevent harm to others.³⁶

In the present discussion it is assumed that the relevant omissions are moral wrongs (including not only pre-moral wrongs but also moral wrongs that result from the legitimate exercise of political authority). Where the moral wrong is serious (in terms of the direct harm to victims), there is a strong case for criminalization in order publicly to mark and condemn the wrong.³⁷ Both elements have considerable indeterminacy. Thus, the seriousness of the moral wrong may be assessed by reviewing the harmfulness of the act or omission and the culpability involved. In determining the harmfulness of an omission, the interests at stake must be identified (e.g. the right to life, physical integrity), and the arguments for placing a duty on the individual must be clear and strong. The second element, whether the wrong “properly concerns the public” such that only the state should punish it, is manifestly opaque since it is difficult to be sure when the state has (or has not) the standing to prosecute for a particular type of violation in order to lead to conviction and punishment.³⁸ Weighty justifications need to be found in order to criminalize an omission that requires an individual to cease her or his chosen activity and to perform a public-regarding act;³⁹ but such a justification may be found if the interests at stake are vital ones (life, physical integrity),

³⁴ For analysis of the distinction between the two forms of principle, see R.A. Duff and S.E. Marshall, “Remote Harms’ and the Two Harm Principles”, in A.P. Simester, A. du Bois-Pedain and U. Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart Publishing, 2014).

³⁵ M.S. Moore, “Liberty’s Constraints on What Should be Made Criminal”, in R.A. Duff et al, *Criminalization: the Political Morality of the Criminal Law* (Oxford: Oxford University Press, 2014) ; A. Simester and A. von Hirsch, *Crimes, Harms and Wrongs* (Oxford: Hart Publishing, 2011), ch. 2.

³⁶ For discussion, see L. Farmer, “Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalisation”, in Duff et al, *Criminalization: the Political Morality of the Criminal Law* (2014) .

³⁷ R.A. Duff, *Answering for Crime* (Oxford: Hart Publishing, 2007), ch. 4, as reformulated by A.Y.K. Lee, “Public Wrongs and the Criminal Law”, (2015) 9 *Criminal Law and Philosophy* 155.

³⁸ Compare the strictures of J. Edwards and A.P. Simester, ‘What’s Public about Crime?’ (2016) 36 *Oxford J.L.S.* 1 with the account of S.E. Marshall and R.A. Duff, ‘Criminalisation and Sharing Wrongs’ (1998) 11 *Canadian J. Law and Jurisprudence* 7, and that of Moore, “Liberty’s Constraints on What Should be Made Criminal”, at pp. 198-200.

³⁹ This is not true of all omissions offences, nor is it always a strong argument: cf. A.P. Simester, “Why Omissions are Special” (1995) 1 *Legal Theory* 311 and Moore, “Liberty’s Constraints on What Should be Made Criminal”, at p. 201, with A. Ashworth, *Positive Obligations in Criminal Law* (Oxford: Hart Publishing, 2013), at pp. 35-37.

especially if the interruption to the individual's planned activity is minor and not physically demanding. The principle of fair warning has a particular importance for offences of omission,⁴⁰ as have such matters as straightforward legislative drafting and vigorous public information (as elements of the rule of law).

Given that there is no clear determinant of those harmful wrongs that attain the required level of seriousness and appropriateness, we should turn briefly to one attempt to provide a pragmatic resolution within a particular institutional and political context.⁴¹ The English Law Commission recognised that “the choice between civil sanction or criminal penalty is determined in part by questions of degree”,⁴² and proposed that harm done or risked should be regarded as serious enough to warrant criminalization if “a) in some circumstances (not just extreme circumstances) an individual could justifiably be sent to prison for a first offence,” or “b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue and its consequences.”⁴³ Even if it were fruitful to decide the case for criminalization by reference to current English sentence levels, as a) seems to suppose, close study of English sentencing practice relating to the first prison sentence shows that it lacks coherence.⁴⁴ The problem of locating an appropriate threshold therefore remains.

If, applying the framework elaborated two paragraphs ago, there appears to be a strong case for the criminalization of a particular omission, there remain certain countervailing arguments (or “mediating principles”)⁴⁵ that must be brought into the determination. Two different clusters of countervailing arguments may be briefly considered here – eight substantive arguments, and five arguments of principle about the style and drafting of offences (which may affect the substance of any criminalization decision). The starting-point for all these arguments should be the right to liberty, and its instantiation in the principle of minimal criminalization – emphasizing the place of the criminal law as the state's most condemnatory response to wrongful behaviour, and implying that this form of state coercion should not be invoked unless no lesser form would be appropriate.⁴⁶ The word ‘appropriate’ is particularly important here: rather than suggesting that the criminal law should be regarded as a last resort or *ultima ratio*,⁴⁷ we should hold on to the notion that “the criminal law may be intrinsically,

⁴⁰ For discussion and references, see A. Ashworth and L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014), at pp. 113-114.

⁴¹ For an argument that questions of criminalization should not be tackled as if they are timeless and without location, but rather within a given institutional and cultural context, see Farmer, “Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalisation”.

⁴² Law Commission, *Criminal Law in Regulatory Contexts*, Consultation Paper No. 195 (London: the Stationery Office, 2010), para. 3.5.

⁴³ Law Commission, *Criminal Law in Regulatory Contexts*, para. 3.138.

⁴⁴ See the decisions discussed by A. Ashworth, *Sentencing and Criminal Justice*, 6th ed. (Cambridge: Cambridge University Press, 2015), at pp.310-316.

⁴⁵ Simester and von Hirsch, *Crimes, Harms and Wrongs*, ch. 11.

⁴⁶ J. Horder, *Ashworth's Principles of Criminal Law*, 8th ed. (Oxford: Oxford University Press, 2016), chapters 3 and 4.

⁴⁷ On which see N. Jareborg, “Criminalisation as Last Resort (*Ultima Ratio*)” (2005) 2 *Ohio State L.J.* 521.

rather than instrumentally, appropriate (or inappropriate) as a response to a perceived social problem.”⁴⁸

Once it is agreed that there is a sufficiently strong case for criminalizing an omission, at least eight substantive arguments against criminalization must be considered:

- i) *Conflict with the Right to Liberty*: some would argue, with Michael Moore, that individuals have the right to be “free of criminal legislation motivated by anything other than the prevention and punishment of wrongdoing.”⁴⁹ This would expand liberty by removing criminal laws punishing certain forms of consensual sexual activity, for example.
- ii) *Conflict with other Fundamental Rights*: a preliminary decision to criminalize conduct may conflict not only with the right to liberty but also with other fundamental rights, such as freedom of expression or the right to privacy.⁵⁰ There is no established mechanism for weighing conflicting fundamental rights: questions of degree abound, and cannot be pursued here.
- iii) *“De Minimis” and “Substantial Risk”*: some minor wrongs may be deemed unsuitable for criminalization by application of the maxim *de minimis non curat lex*.⁵¹ Doug Husak goes further and argues that, where the aim of criminalizing an omission is preventive, such an offence is justified only if it is designed to reduce a substantial risk – by which he means both that the harm to be avoided must be not insubstantial, and that the degree of risk that it will occur should be more than insubstantial.⁵²
- iv) *Unlikely to be Effective*: Husak also argues that it is only justifiable to criminalize an offence (here, an omission) on preventive grounds if the law is likely to be effective in reducing the probability of harm occurring.⁵³ This may depend on how the offence is likely to be enforced, a question also raised by the next counter-argument.
- v) *High Costs of Enforcement*: the financial and organisational costs of enforcing a particular new law must also be brought into the equation. This is especially so when the offence is typically committed without non-participant witnesses.⁵⁴ Moreover, account must be taken of the effect on resources: greater expenditure on enforcement may mean fewer resources for preventive and care services.

⁴⁸ Duff et al, ‘Introduction’, in Duff et al, *Criminalization: the Political Morality of the Criminal Law*, at p. 27; also Simester and von Hirsch, *Crimes, Harms and Wrongs*, at pp. 197-198.

⁴⁹ Moore, “Liberty’s Constraints on What Should be Made Criminal”, at pp. 194-195.

⁵⁰ Simester and von Hirsch, *Crimes, Harms and Wrongs*, at pp. 190-192; V. Tadros, “Criminalization and Regulation”, in R.A. Duff et al, *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010), at pp. 166-168.

⁵¹ D. Husak, “The De Minimis ‘Defence’ to Criminal Liability”, in Duff and Green, *Philosophical Foundations of Criminal Law* (2011).

⁵² D. Husak, *Overcriminalization* (New York: Oxford University Press, 2008), at p. 162; Husak does not refer specifically to omissions offences, but writes generally about criminalization.

⁵³ Husak, *Overcriminalization*, at pp. 163-164.

⁵⁴ Moore, “Liberty’s Constraints on What Should be Made Criminal”, at p. 203.

- vi) *Bringing the Law into Disrepute*: if a crime is unlikely to be enforced consistently, or likely to be enforced in a discriminatory way, this may not only breach a fundamental right (such as the right not to be discriminated against) but also have wider deleterious consequences, notably that of reducing respect for the criminal law.⁵⁵ This may have particular application to laws about which public opinion is divided.
- vii) *Probable Creation of Criminal Markets*: for some offences, attention should be paid to the probability that criminalization may create criminal markets, opening opportunities for organized crime. Well-known examples of this are drugs and prostitution.⁵⁶ More broadly, the possibility of detrimental consequences must be considered in all criminalization decisions.
- viii) *Requiring too much of Ordinary Citizens*: a particular concern relating to offences of omission is whether the law requires too much of the individual or organisation. If the law may require a person to intervene physically, or to take action that might divert him or her from other lawful activities, these are matters that should be taken into account in the criminalization decision.

Thus some of these substantive counter-arguments involve principled objections, while others depend on empirical evidence. Once each of these has been considered in relation to the proposed criminalization of an omission, attention should be paid to five arguments of principle about the drafting of offences, particularly those of omission. These will be numbered ix) to xiii).

- ix) *Presumption against Over-Inclusive Laws*: Husak argues for this presumption on the basis that it is wrong to pass a law whose “justificatory rationale applies to some but not all of the conduct it proscribes.”⁵⁷ In similar vein James Edwards condemns such laws as “ouster offences”, on the basis that they effectively oust the jurisdiction of the courts by excluding them from adjudicating on the true wrong.⁵⁸ Thus the drafting of an offence of omission should ensure that it penalizes the wrong that has been identified as sufficiently strong for criminalization, and only that wrong, not a mere proxy that renders the offence over-broad.
- x) *Compliance with Rule-of-Law Principles*: since the criminal law is intended to guide conduct, it should be as clear and certain as possible. This is particularly important in relation to offences of omission, which require a person to do a certain action in a given situation or to face punishment. Thus, offences of omission “ought to comply with rule-of-law values, such as maximum certainty of

⁵⁵ Moore, “Liberty’s Constraints on What Should be Made Criminal”, at p. 203; Simester and von Hirsch, *Crimes, Harms and Wrongs* (2011), at p. 200.

⁵⁶ Moore, “Liberty’s Constraints on What Should be Made Criminal”, at pp. 203-204.

⁵⁷ Husak, *Overcriminalization* (2008), at p. 154.

⁵⁸ J. Edwards, “Justice Denied: the Criminal Law and the Ouster of the Criminal Courts”, (2010) 30 *Oxford J.L.S.* 725; Simester and von Hirsch, *Crimes, Harms and Wrongs*, at pp. 206-207.

definition, fair warning and fair labelling”,⁵⁹ so as to indicate clearly the action that a person is required to take.

- xi) *A Culpability Requirement*: there should be no strict liability for criminal offences, whether an act or an omission is penalized. A fault requirement should be part of the definition of any wrong deemed to amount to an offence triable in a criminal court.⁶⁰ This and the next two requirements are controversial, but detailed arguments may be found elsewhere.⁶¹
- xii) *Presumption of Innocence*: this is the principle that the prosecution should bear the burden of proving guilt beyond reasonable doubt, and no onus of proving innocence should be imposed on the defendant.⁶² This could be regarded as a fundamental right (see ii above), since it finds a place in all human rights documents – such as Article 6(2) of the European Convention on Human Rights.
- xiii) *The Proportionality Principle*: the maximum penalty provided should be proportionate to the wrong and consistent with the principle of restraint in the use of custody.⁶³

This attempt to express the stages of the criminalization decision schematically will be employed in parts V, VI and VII below to deal with particular examples. The various factors will be referred to as factor v, factor xii, and so on.

Given the range of omissions offences discussed in part I of this article, the question of justifying their criminalization depends in part on conceptions of the criminal law’s function(s). Thus, if the question refers to the criminal law as presently constituted, it must be said that English criminal law has at least two major functions – one is to declare and prohibit those public wrongs that are serious enough to justify the censure of conviction and punishment (the “seriousness function”), and the other is to provide sanctions to reinforce a wide range of regulatory systems that are administrative or civil in nature (the “reinforcement function”).⁶⁴ However, our primary interest, in relation to omissions, lies in the normative question: what should the function(s) of the criminal law be? Should the criminal law be confined to its seriousness function? If the criminal law were thus reduced to a set of commands to citizens,⁶⁵ those commands would not necessarily constitute a list of the most

⁵⁹ Ashworth and Zedner, *Preventive Justice* (2014), at p. 114; Simester and von Hirsch, *Crimes, Harms and Wrongs*, at pp. 198-202.

⁶⁰ Ashworth, *Positive Obligations in Criminal Law*, ch.1; Simester and von Hirsch, *Crimes, Harms and Wrongs*, pp. 19-31; Law Commission, *Criminal Law in Regulatory Contexts* (2010), ch. 4.

⁶¹ Compare Ashworth, *Positive Obligations in Criminal Law*, ch. 4, and Husak, *Overcriminalization*, at p. 166, with J. Horder, “Bureaucratic ‘Criminal’ Law: Too Much of a Bad Thing?” in Duff et al, *Criminalization: the Political Morality of the Criminal Law* (2014), at p. 101.

⁶² A. Ashworth, “Four Threats to the Presumption of Innocence”, (2006) 10 *I.J.E.P.* 241.

⁶³ A. von Hirsch and A. Ashworth, *Proportionate Sentencing* (Oxford: Oxford University Press, 2005), chs. 2 and 9.

⁶⁴ For examples, see I. Paulus, *The Search for Pure Food: a Sociology of Legislation in Britain* (Oxford: Martin Robertson, 1974), P. Cartwright, *Consumer Protection and the Criminal Law* (Cambridge: Cambridge University Press, 2001), and more generally Law Commission, *Criminal Law in Regulatory Contexts* (2010).

⁶⁵ See P. Robinson, *Structure and Function in Criminal Law* (Oxford: Oxford University Press, 1997), Appendix A.

serious wrongs. Some wrongs may be serious enough to satisfy the threshold test but may be deemed unsuitable for criminalization as a result of applying one or more of the 13 counter-arguments set out above. Seriousness would be a necessary but not a sufficient condition for criminalization. Moreover, placing the emphasis on the seriousness function would leave the reinforcement function to be accomplished by other means. What other means might satisfy the requirements of fairness and justice?

IV. Criminalization and Regulation

This brings us to brief consideration of regulation as a legal technique. The criminal law itself could be said to be a method of regulation, since a broad definition of regulation is “the organised attempt to manage risks or behaviour in order to achieve a publicly stated objective or set of objectives.”⁶⁶ However, the focus here is on a narrower concept of regulation, in order to move towards the question whether regulation would be a more appropriate response to some breaches of duty. In principle, regulation is not intended to have the censuring or condemnatory force of criminalization and punishment, although it does aim to exert control over the activity to which it applies. Typically, there will be a framework of laws (often, secondary legislation) setting out what should and should not be done in the course of a given activity, with an appointed regulator and powers to impose penalties (usually, but not exclusively, financial). Records will be kept, but these are not criminal records.

In the present context, wider issues arising from the regulatory sphere need to be confronted. Part III of the Regulatory Enforcement and Sanctions Act 2008 provides for an expansion in the use of administrative sanctioning powers. The Act empowers the Secretary of State to authorise a regulatory authority to use the powers in Part III, which include fixed monetary penalties, discretionary requirements for payment and enforcement undertakings. The regulator is empowered to decide that an infraction has occurred, and then to propose a negotiated penalty settlement. The English Law Commission has given its support to a movement away from criminal sanctions for lesser wrongs, towards greater reliance on administrative penalties of the kind introduced by the 2008 Act.⁶⁷ The element of negotiation now institutionalised by the 2008 Act supports the compliance strategy long favoured by regulators,⁶⁸ rather than the punitive strategy characteristic of the criminal law. Even if Part III of the 2008 Act does lead to fewer criminal offences and less use of the criminal process – and there is no evidence of that yet – questions of fairness and justice are raised by its structure. As Karen Yeung has argued, Part III vests in the regulator the powers of investigating officer, prosecutor, judge and jury – thereby compromising constitutional

⁶⁶ The definition put forward by Julia Black at www.lse.ac.uk/collections/law/wps/WPS2014-24_Black.pdf

⁶⁷ Law Commission, *Criminal Law in Regulatory Contexts* (2010), part 3.

⁶⁸ See the classic study by K. Hawkins, *Law as Last Resort* (Oxford: Oxford University Press, 2002).

values, and conferring an extremely wide discretion.⁶⁹ Among the constitutional values compromised are those of the separation of powers, due process and impartial adjudication.

The Macrory Report (which prepared the ground for the 2008 Act) envisaged prevention as a primary purpose of the new regime of administrative sanctions, and included deterrence as one of the appropriate methods of prevention, in terms of the use of disincentives.⁷⁰ Some regulators, such as the Financial Conduct Authority, have unbounded powers in this respect. Thus the Financial Services and Markets Act 2000 provides that “if the Authority is satisfied that a person (a) is or has engaged in market abuse ... it may impose on him a penalty of such amount as it considers reasonable.”⁷¹ This is an extremely wide power, although it comes with procedural safeguards in the form of a requirement that the Authority should give notice if it decides to impose a penalty, and an opportunity for the alleged abuser to refer the matter to a tribunal. There is a strong argument that the imposition of administrative fines amounting to several million pounds for market abuse⁷² indicates that these are serious wrongs that ought to be dealt with by the criminal law and criminal process. If regulation is to operate without the involvement of a public prosecutor and a criminal court, as is normal, it ought surely to be confined to the imposition of only moderate penalties.⁷³ The web is tangled at this stage, however: the English criminal process itself fails to measure up to its own rhetoric through its widespread use of out-of-court penalties (with desiderata similar to those of Part III settlements),⁷⁴ the introduction of deferred prosecution agreements (involving considerable negotiation),⁷⁵ and the prominence of negotiated guilty pleas, confirming the wide gap between the descriptive and the normative.

On what basis should the choice between the criminal law paradigm and administrative (regulatory) enforcement be made? What we have termed the seriousness function remains important, in terms of communicating to people the kinds of wrong that deserve public censure through the criminal law. However, regulation is and is intended to be liberty-limiting, and indeed regulation is intended to be a form of control and not simply a pricing system which can be regarded as operating satisfactorily so long as all non-compliers pay the

⁶⁹ K. Yeung, “Better Regulation, Administrative Sanctions and Constitutional Values” (2013) 33 *Legal Studies* 312, at pp. 329-330.

⁷⁰ R. Macrory, *Regulatory Justice: Making Sanctions Effective* (London: Cabinet Office, 2006), p. 31.

⁷¹ Financial Services and Markets Act 2000, s. 123(1); cf. also the power to levy unlimited fines conferred by ss. 36-38 of the Competition Act 1998 and now, since the Enterprise and Regulatory Reform Act 2013, exercised by the Competition and Markets Authority. That Authority has the power to prosecute for criminal cartel activity as well as the power of administrative enforcement under the Competition Act.

⁷² The Financial Conduct Authority lists its “fines” at www.fca.org.uk/firms/being-regulated/enforcement/fines. For 2015 they include fines of £284m on Barclays Bank and £226m on Deutsche Bank, and fines of £650,000 and £450,000 on individuals.

⁷³ Ashworth and Zedner, *Preventive Justice* (2014), ch. 5.4 and *passim*.

⁷⁴ N. Padfield, R. Morgan and M. Maguire, “Out of Court, Out of Sight? Criminal sanctions and non-judicial decision-making”, in M. Maguire, R. Morgan and R. Reiner (eds), *Oxford Handbook of Criminology*, 5th ed. (Oxford: Oxford University Press, 2012).

⁷⁵ *Deferred Prosecution Agreements: Code of Practice* (London: Crown Prosecution Service and Serious Fraud Office, 2014); for an example, see *Serious Fraud Office v. Standard Bank plc* [2016] *Lloyd's Reports* FC 91.

penalty.⁷⁶ Thus when the Law Commission proposed a retrenchment of the criminal law, they put their case on consequentialist grounds:

“Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure) is likely to do as much to secure appropriate levels of punishment and deterrence.”⁷⁷

Presumably this also applies in reverse. For example, the law formerly provided for the Home Office to impose a fine of up to £3,000 on a landlord who let premises to a tenant without checking on the tenant’s immigration status⁷⁸ -- not a criminal offence, but nonetheless a significant penalty, and open to Yeung’s criticisms. However, the Immigration Act 2016 makes negligent non-compliance with this duty a criminal offence with a maximum penalty of 5 years’ imprisonment.⁷⁹ How, if at all, can this leap from regulation to a serious criminal offence be justified? It is difficult enough to justify such a significant fine as part of the regulatory framework; it is a major step further to enforce it by means of criminal conviction and such a substantial maximum sentence.

It seems that, if the Home Office believed that a criminal offence with a maximum penalty of 5 years’ imprisonment would better “secure appropriate levels of punishment and deterrence” than the previous system of regulatory penalties, then on the Law Commission’s reasoning this is an argument in favour of criminalization – effectiveness appears to be more important than appropriateness.⁸⁰ This does not chime well with the Law Commission’s declaration that the criminal law should be reserved for “wrongdoers who deserve the stigma associated with criminal conviction, because they have engaged in seriously reprehensible conduct”. Indeed, this endorsement of the seriousness function is combined with residual reliance on the reinforcement function: the criminal law “should not be used as the *primary* means to promote regulatory objectives.”⁸¹

The Law Commission concluded that to follow the continental model by introducing an entirely new branch of law to deal with lesser wrongs, termed administrative offences or contraventions, would be “capable of generating as many problems as it solves”. The Commission evidently placed heavy reliance on the belief of regulators themselves that (residual) criminal offences were essential for proper enforcement, even if they were rarely brought to prosecution.⁸² Relevant as these views are, it is also important to take account of

⁷⁶ Tadros, “Criminalization and Regulation” (2010), at pp. 167-170.

⁷⁷ Law Commission, *Criminal Law in Regulatory Contexts* (2010), para. 3.139. The reference to civil penalties includes measures under the Regulatory Enforcement and Sanctions Act 2008, on which see the reservations in the text at footnotes 69-74 above.

⁷⁸ Immigration Act 2014, s. 22, with provisions for appeals in s. 30.

⁷⁹ Immigration Act 2016, s. 39 (see above, footnote 6).

⁸⁰ Law Commission, *Criminal Law in Regulatory Contexts* (2010), paras. 3.140-3.143; the Law Commission made other proposals on this topic, including that of requiring the courts to ensure that a regulator has issued a warning before resorting to prosecution for a criminal offence.

⁸¹ Law Commission, *Criminal Law in Regulatory Contexts* (2010), para. 3.137 (author’s italics).

⁸² Law Commission, *Criminal Law in Regulatory Contexts* (2010), paras. 3.21-3.37. The Commission was surely right to suggest that there would be fierce debate about the classification of several offences as either criminal or administrative,

the wide discretion exercised by law enforcement agencies, and the differences of approach adopted. Every year many pickpockets, shoplifters and other thieves are sent to prison for offences that yield a small fraction of the profits resulting from breaches of regulatory frameworks.⁸³ In principle, only serious wrongs (especially those involving violence, threats or sexual invasion) should be in the domain of the criminal law, and less serious wrongs that should be dealt with by regulation or some lesser form of sanction. The Law Commission's enquiry was welcome, but it failed to deal with the hard questions about why the different prosecution practices of the Crown Prosecution Service and the regulatory agencies should be allowed to persist, to what extent they are socially justifiable, what level of accountability the various agencies should have for their chosen enforcement policies, to what extent differences in enforcement policy in respect of companies and individuals are justifiable, and on what basis the power of certain regulators to levy enormous financial penalties without any judicial scrutiny can be justified.

This discussion of the functions of the criminal law has raised a range of fundamental and unresolved questions, without indicating firm criteria for assigning various omissive wrongs to the categories of "regulation" or "crime". The regulatory approach is preferable for non-serious wrongs, but only if it is used in conjunction with low or moderate financial penalties, and if the deficiencies of due process are made good. Criminalization is a significant step further, as argued in part III above. In order to engage more closely with the empirical detail, we now turn to three groups of situations in which a positive duty has been recognised – duties to report, duties to participate in the institutions of justice, and duties to intervene physically. What role, if any, should the criminal law play in relation to these obligations?

V. Duties to Report

Part I above listed several duties to report in English law, and noted that they are enforced in a wide range of ways – from professional discipline, to regulation, to serious criminal offences. On what grounds, if any, can these divergent enforcement mechanisms be justified? The question is a large one, and it will be tackled here by examining four groups of duties to report, relating to money-laundering, child abuse, terrorism, and a general duty to report serious offences.

As stated in part I, the duty to report suspected money-laundering falls only on persons working in the regulated (financial) sector who have reasonable grounds for knowing or suspecting that another person is involved in money-laundering. Whether this is rightly made the subject of a criminal offence rather than regulation depends on the view one takes about the seriousness of money-laundering. The criminal offence supports the regulatory system of requiring persons working in the regulated sector to make "suspicious activity reports". The regulatory system is designed to keep the financial markets stable, and to prevent organised criminals from flourishing. However, what is criminalised is the failure to make a report, not an intention to destabilise the financial system or to fund or support a criminal organisation

⁸³ Imprisonment may be less difficult to justify if the offence is committed against a vulnerable individual.

(factor ix). The culpability element (factor xi) is merely negligence. Even though this is the negligence of a trained professional, the maximum penalty of five years' imprisonment appears disproportionately high.

Also mentioned in part 1 above was the duty of any person working in a regulated profession to make an FGM notification to the police if the person discovers that an act of female genital mutilation appears to have been carried out on a girl aged under 18.⁸⁴ This provision says nothing about enforcement, which presumably remains a matter for the relevant professional body. This is in line with section 11 of the Children Act 2004, which places a general duty on a range of organisations and individual professionals to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. The duty applies to organisations supplying children's services, the NHS, the police, public health, sport, culture and leisure services, among others. Although the duty is created by criminal legislation, the criminal law is hardly involved.⁸⁵ enforcement is through detailed guidance for practitioners,⁸⁶ with professional discipline as the sanction.

Should there be a specific statutory duty to report child abuse or neglect, imposed on professionals working in the field? That is now the law in Wales,⁸⁷ and such a duty has also been imposed in almost every U.S. state and Australian state.⁸⁸ Is it sufficient for such a duty to be enforced through professional discipline, or should there be a regulatory system with fines, or is there a strong argument for criminalising failure to carry out the duty? The question was actively debated in relation to the reporting of child abuse in 2013-2014. Following various inquiries into failures by professionals, there was a call for a criminal offence of failing to report suspected child abuse.⁸⁹ The then Prime Minister (David Cameron) stated that the matter was under consideration, and a few months later the then Home Secretary (Theresa May) referred to it as "a very complex issue" and stated that there was "mixed evidence of its effectiveness."⁹⁰ Two years later a consultation document was

⁸⁴ S. 5B of the Female Genital Mutilation Act 2003, inserted by s. 74 of the Serious Crime Act 2015.

⁸⁵ It is an offence to fail to refer to the Disclosure and Barring Service any decision to remove a worker (paid or voluntary) on the ground of risk of harm to children: Safeguarding Vulnerable Groups Act 2006, ss. 35 and 38.

⁸⁶ HM Government, *Working Together to Safeguard Children* (www.gov.uk/government/uploads/system/uploads/attachment_data/file/419595/working_together_to_safeguard_children.pdf March 2015), detailing *inter alia* the responsibilities of the Local Safeguarding Children Boards; see also HM Government, *What to do if you're Worried a Child is Being Abused* (www.gov.uk/government/uploads/system/uploads/attachment_data/file/419604/what_to_do_if_you're_worried_a_child_is_being_abused.pdf March 2015), and General Medical Council, *0-18 Years: Guidance for All Doctors* (at www.gmc-uk.org).

⁸⁷ Social Services and Well-being (Wales) Act 2014, s. 130.

⁸⁸ US Child Welfare Information Gateway, *Mandatory Reporters and Child Abuse and Neglect* (www.childwelfare.gov/pibPDFs/manda.pdf, August 2015); Australian Institute of Family Studies, *Mandatory Reporting of Child Abuse and Neglect* (www.aifs.gov.au/cfca/publications/mandatory_reporting_child_abuse_and_neglect 2016).

⁸⁹ Keir Starmer Q.C., former Director of Public Prosecutions, in *The Daily Telegraph*, 4 November 2013.

⁹⁰ For reports of parliamentary discussions, see *Child Protection: Duties to report concerns* (London: House of Commons Library, SN/SP/6793, September 2014).

published,⁹¹ considering the arguments for and against a reporting requirement or a duty to take appropriate action where a professional has “reasonable cause to suspect” child abuse or neglect. A range of possible sanctions is considered, from professional discipline to regulation by the Disclosure and Barring Service and to criminal offences for individuals and for organisations.⁹² For a criminal offence the starting point must be to ask whether there is a sufficiently serious wrong to justify the criminal sanction rather than merely professional discipline. This issue of seriousness dissolves into questions about harm and culpability. The degree of harm to vulnerable people (young children) is potentially very high, ranging from sexual abuse to physical violence, including female genital mutilation.⁹³ Of the two possible duties considered in the Government’s consultation (a duty to report, and a duty to take appropriate action), the former is a one-off obligation, whereas the latter also requires an organisation to reach a professional judgment about the action that ought to be taken. If the aim is to prevent the serious harm of the abuse and neglect of children, there is a strong case for creating a culture that enables the early detection of cases that might otherwise go unnoticed by imposing a duty on professionals who are trained to recognise such abuse.⁹⁴

There is some evidence that mandatory reporting laws produce increased reporting (factor iv), and that there are results both desirable (more serious cases are discovered) and less desirable (factor v: increased numbers of reports that turn out to be unsubstantiated, consuming the scarce resources of children’s services on investigations rather than remedial work).⁹⁵ However, more recent evidence from Australia suggests that reporting rates may decline after an initial surge, and that a higher proportion of reports are substantiated.⁹⁶ Moreover, a comparison of two jurisdictions with similar populations in 2010 (Ireland, with no statutory duty; the state of Victoria, with mandatory reporting) found that the latter had twice as many reports and more than four times as many substantiated cases.⁹⁷

⁹¹ HM Government, *Reporting and Acting on Child Abuse: Consultation Document*

(www.gov.uk/government/consultations/reporting_and_acting_on_child_abuse_and_neglect July 2016)

⁹² HM Government, *Reporting and Acting on Child Abuse: Consultation Document: Supporting Annexes*, Annex C.

⁹³ Whether there should be a separate duty relating to FGM is open to debate: the Royal College of Paediatrics and Child Health, *Home Office consultation – Introducing mandatory reporting for female genital mutilation* (www.rcpch.ac.uk/publications January 2015) argues that the duty to report FGM should remain integrated into the general (section 11) duty, and that there should be no suggestion of a “hierarchy of abuse” that treats some types of child abuse as inherently more serious than others.

⁹⁴ The Government’s consultation raises the question whether the duty should extend to reporting abuse or neglect of vulnerable adults: HM Government, *Reporting and Acting on Child Abuse: Consultation Document* (www.gov.uk/government/consultations/reporting_and_acting_on_child_abuse_and_neglect July 2016)

⁹⁵ *Child Protection: Duties to report concerns* (London: House of Commons Library, SN/SP/6793, September 2014); Australian Institute of Family Studies, *Mandatory Reporting of Child Abuse and Neglect* (at www.aifs.gov.au/cfca/publications/mandatory_reporting_child_abuse_and_neglect, 2016).

⁹⁶ The complexities are well drawn out by B. Mathews, “Exploring the Contested Role of Mandatory Reporting Laws in the Identification of Severe Child Abuse and Neglect”, in M. Freeman (ed), *Law and Childhood Studies: Current Legal Issues volume 14* (Oxford: Oxford U.P., 2012).

⁹⁷ B. Mathews, “Mandatory Reporting Laws and the Identification of Child Abuse and Neglect”, (2014) 3 *Social Sciences* 460.

Whereas the duty to report money-laundering is somewhat remote from the ultimate harm, the duty to report suspected child abuse is proximate to the actual wrong and may therefore be thought to provide a stronger *prima facie* case for regulation or criminalization. Most US states have a criminal offence of failure by a professional to report child abuse, but it is usually an offence of “knowingly or wilfully” failing to report,⁹⁸ which is certainly more appropriate (factor x) than an offence of negligence if a substantial fine or even imprisonment is being considered. Continuing to assess the criminalization factors, there are no significant counter-arguments from liberty (factor i) or from other fundamental rights (factor ii), since the right to privacy in the home cannot be allowed to outweigh a child’s right to be free from physical harm. Also, the offence is designed to prevent a substantial risk of harm (factor iii). Turning to the second group of factors, it may be argued that use of the term “child abuse” would not give fair warning (factor x) and may be over-broad (factor ix), but that is contestable. The main empirical doubts derive from factors iv and v, given the inconclusive evidence from other jurisdictions that have introduced such an offence.

In view of this uncertainty, and the absence of a preponderance of supporting arguments,⁹⁹ the general duty on professionals to report child abuse should not be converted into a criminal offence at this stage. A statutory duty to report and a statutory duty to take appropriate action, enforced by professional discipline, should be sufficient: this is the law in Wales, and in England so far as reporting FGM is concerned. However, there may be some discrete and manifestly serious failures that might nevertheless justify criminalization. English law has recognised one such situation: failure of a household member to take steps to protect a child or vulnerable adult in that household from serious physical harm.¹⁰⁰ Arguably, the seriousness of the potential harm and the difficulty of otherwise detecting the offence and protecting the child or vulnerable person outweigh any concerns about over-reporting, and justify imposing the duty on members of the household, not just professionals. Another such situation may arise from the tendency of institutions for children to attempt to deal with suspected abuse within the institution: the NSPCC has argued in favour of a duty on professionals to report suspected child abuse within an institution to some external authority, thereby removing the option of dealing with allegations or suspicions “in-house”.¹⁰¹ In favour of this mandatory reporting duty is the difficulty of otherwise detecting offences within institutions, linked to the possibility that allegations will not be pursued vigorously if kept within the institution and likely to tarnish the institution’s reputation. This duty might appropriately be enforced through regulation by the Disclosure and Barring Service; if a criminal offence of failure to report is considered, it should be enforced through financial penalties. It should not necessarily carry a sentence of imprisonment, let alone the five year maximum that appears to be the norm.

⁹⁸ US Child Welfare Information Gateway, *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect* (www.childwelfare.gov/topics/systemwide/laws-policies/statutes/report 2016).

⁹⁹ See the review of evidence in HM Government, *Reporting and Acting on Child Abuse: Consultation Document: Supporting annexes*, Annex D.

¹⁰⁰ Domestic Violence, Crime and Victims Act 2004, s.5, discussed in Part VII below.

¹⁰¹ NSPCC, *Strengthening Duties on Professionals to Report Child Abuse* (www.nspcc.org.uk/services-and-resources, August 2014).

A third type of reporting duty, already listed in part I, is the duty to report information about acts of terrorism. Section 38B of the Terrorism Act 2000 makes it an offence to fail to disclose information which D “knows or believes might be of material assistance (a) in preventing the commission by another person of an act of terrorism, or (b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.” Section 38B thus creates two offences, one relating to the prevention of future acts of terrorism and one relating to terrorist acts that have already occurred (albeit that this may include acts of preparation, encouragement or assistance). The fault element of these offences is knowledge or belief (suspicion is not enough), but the knowledge or belief need only be as to a *possibility* of material assistance (“might be”). The conduct element is a failure to disclose the relevant information to a constable as soon as is practicable. Section 38B(4) provides that it is a defence for P to prove that there was a reasonable excuse for not making the disclosure, but appellate decisions make it clear that family ties, however close, cannot amount to a reasonable excuse.¹⁰²

How strong is the case for criminalization? The offence conflicts with the right to privacy (factor ii), in the sense that it applies as between family members; but presumably the prevention of serious harms, including death, is regarded as outweighing this right. These cases may be assumed to present a risk of substantial harm (factor iii), although the definition of terrorism is unduly broad.¹⁰³ Whether the existence of these offences is likely to reduce the probability of acts of terrorism being perpetrated (factor iv) is difficult to say, and Clive Walker’s research suggests that the offences are used by the police largely as threats against associates and family members during the investigation phase.¹⁰⁴ As for the offences themselves, the culpability requirement (factor xi) is relatively low, since it penalizes knowledge or belief that the information ‘might be of material assistance’. Finally, there is debate about whether the proportionality principle (factor xiii) is fulfilled, since the maximum sentence is five years. Acts of terrorism often and rightly receive much longer sentences than this, but it is important to recall that the essence of the section 38B offence is failure to disclose information. The harm that disclosure of the information would have prevented should be one determinant of sentence, but that should be scaled down according to the culpability of the non-discloser. The non-discloser is not the terrorist, and someone who assists or encourages a terrorist act should be charged with a different offence.

The case for criminalizing a failure to disclose information is much stronger where it may have the effect of preventing an impending act of terrorism by another. As long as the term “act of terrorism” is re-drafted so as to confine the offence to serious cases involving the risk of death or injury,¹⁰⁵ the balance of reasons favours criminalization. But failure to disclose information after the event is a lesser wrong – even though it may be argued that the

¹⁰² *Abdul Sherif* [2008] EWCA Crim 2653; [2009] 2 Cr. App. R. (S.) 235, particularly at [45]; *Esayas Girma* [2009] EWCA Crim 912; [2010] 1 Cr. App. R. (S.) 172.

¹⁰³ C. Walker, “Conscripting the Public in Terrorism Policing: Towards Safer Communities or a Police State?” [2010] Crim.L.R. 441, at p. 456.

¹⁰⁴ Walker, “Conscripting the Public in Terrorism Policing” [2010] Crim.L.R. 441, at p.

¹⁰⁵ Walker, “Conscripting the Public in Terrorism Policing” [2010] Crim.L.R. 441, at p.456.

perpetrator may repeat the crime – and it falls to be considered along with general duty to disclose information about offenders.

Is a failure to report a serious crime sufficiently wrong to justify the censure of the criminal law? To help answer this question we have an unusual resource – the former common law offence of misprision of felony. According to Blackstone, the essence of the offence was “the concealment of a felony of which a man knows, but never assented to.”¹⁰⁶ Silence was not enough: there must be concealment, but if the non-discloser assented to the offence, a different charge (such as complicity) should be brought. Since in most cases in which misprision might be relevant the person would have been present during or immediately after the commission of the felony, he or she would usually know the identity of the felon. But it seems that the essence of misprision lay in the failure to report the commission of the felony, not failure to identify the felon. However, this and many other elements were never clarified at common law,¹⁰⁷ and were disputed even until the offence was abolished by the Criminal Law Act 1967.¹⁰⁸

The abolition was prompted by the Seventh Report of the Criminal Law Revision Committee, which offered four arguments against the preservation of the offence.¹⁰⁹ First, its application to all felonies meant that it covered some minor crimes, such as small thefts, which is inappropriate.¹¹⁰ Secondly, the offence did not include a requirement that the omission to report was dishonest. Thirdly, there was no defence or exception for offences committed by near relatives. And fourthly, the idea of a crime of failing to answer police questions was inappropriate in modern society, and yet in some cases this would be the substance of the charge. If the privilege against self-incrimination and right of silence are to mean anything, they ought to stand in the way of such an offence.

Are these compelling arguments? The first two arguments can be conceded, and remedies readily found by limiting the offence to *knowing or dishonest* failures to disclose information about *serious* offences (although the vagueness of the term “serious” is problematic, factor xi). The third argument, calling for a “family” exception, runs quickly into disputed territory. The recommendation was that a family exception should be provided for a general offence of failure to disclose information about any felony, and this is the position in some (but not all) jurisdictions that have a general offence.¹¹¹ The English offence of failure to disclose information in section 38B of the Terrorism Act 2000 provides no “family”

¹⁰⁶ 4 Bla. Comm. (London: Revived Apollo Press, 1813) 110.

¹⁰⁷ For analyses of the history, compare the House of Lords in *Sykes v. D.P.P.* [1962] A.C. 528 with P.R. Glazebrook, “Misprision of Felony – Shadow or Phantom?” (1964) 8 *Am. J. Legal Hist.* 189, 283.

¹⁰⁸ Glazebrook, “Misprision of Felony – Shadow or Phantom?” (1964); see also J.F. Stephen, *Digest of the Criminal Law*, 4th ed., (London: Macmillan, 1887), at p. 372, criticizing the offence as “extremely vague”.

¹⁰⁹ Criminal Law Revision Committee, *Seventh Report – Felonies and Misdemeanours*, Cmnd 2659, (London: H.M.S.O., 1965), [39-42].

¹¹⁰ One of the criticisms advanced by Glanville Williams, *Criminal Law: the General Part*, 1st ed. (London: Stevens, 1953), at p. 236.

¹¹¹ For an informative discussion of this and many related points, see M. Gur-Arye, ‘A Failure to Prevent Crime – Should it be Criminal?’ (2001) 20 *Criminal Justice Ethics* 1, at p.10.

exception and, as noted above,¹¹² the Court of Appeal has declined to find that family ties constitute a reasonable excuse for non-disclosure. However, that offence relates to acts of terrorism (and, as argued earlier, should be confined to serious acts of terrorism), and it is notable that German law's offences of failure to disclose credible information about the planning or commission of a crime have a family exception, but that exception is inapplicable if the offence is murder, genocide or certain terrorist offences.¹¹³ On this approach, family ties count for something, but not when the information relates to offences which are potentially very serious.

The fourth argument against the old offence of misprision of felony was that it conflicted with some basic liberties in English law. It does not chime well with the doctrine in *Rice v. Connolly*,¹¹⁴ where it was held that at common law a citizen is entitled to refuse to answer a question put by a police officer unless the person is being interviewed under caution. This doctrine makes the work of the police harder, but at common law there is no legal duty to assist the police in their enquiries (or to accompany an officer to the police station) unless there is a specific legislative power. These principles stand alongside procedural rights such as the right of silence, the privilege against self-incrimination and the presumption of innocence, all of which can be said to respect the autonomy of the individual even if they render the task of law enforcement more difficult.

How stands the argument for criminalizing failure to disclose information about a serious crime? Clearly it conflicts with some basic liberties (factor ii), but in serious cases involving imminent death or serious harm those liberties might be outweighed by values of life and physical integrity. Indeed, it would seem illogical that there is no duty to report homicide or rape, but there is a duty to report money-laundering. Any new offence of this kind must be confined to cases of substantial risk (factors iii and viii), but it may still be uncertain whether such offences will have a practical impact in more than a few cases (factor iv). Moreover, there may be a danger of inconsistent enforcement, bringing the law into disrepute (factor v). There remains a doubt about whether the offence could be made to comply with rule-of-law standards (factor ix) if it relies on a concept such as "serious offences": German law resorts to listing the offences to which it applies, thereby promoting rule-of-law values but raising the prospect of a much longer list in English law.¹¹⁵ Finally, the proportionality principle requires a commensurate maximum penalty, consistent with the principle of restraint: the wrong is a failure to carry out a civic duty of disclosing information, but the importance of doing so depends on the seriousness of the crime to which the information relates. Thus the harm factor is at one remove, as it were, and the culpability (knowingly or dishonestly) must be assessed in relation to that (discounted) harm.¹¹⁶

¹¹² Above, footnote 102.

¹¹³ M. Bohlander (tr.), *The German Criminal Code* (Oxford: Hart Publishing, 2008), s. 139(3).

¹¹⁴ [1966] 2 Q.B. 414.

¹¹⁵ See, e.g., the lengthy list in Schedule 15B to the Criminal Justice Act 2003,

¹¹⁶ The Criminal Law Act 1967, s.4 (assisting offenders), provides graduated maximum sentences according to the penalty level of the offence committed by the offender assisted.

VI. Duties to Participate in the Institutions of Justice

In English law there is an obligation to attend court as a witness if summoned to do so, and a duty to serve on a jury if summoned (and if none of the excusing conditions apply).¹¹⁷ Duties of this kind are sometimes said to derive from “the principle of compulsory process”:¹¹⁸ their content varies from jurisdiction to jurisdiction, as a matter of legal culture, and in English law they may be enforced either as contempt in the face of the court or as summary offences.¹¹⁹ It is a political decision whether to involve individuals in the administration of criminal justice. In England and Wales it has historical roots as a form of community involvement and an instantiation of the right to “trial by one’s peers” for serious offences. The performance of “compulsory process” duties requires personal service of the individual. It is not simply a question of paying taxes in order to secure a working criminal justice system, but rather a personal obligation to participate in the process of justice when required to do so. There are two exceptions to the principle of compulsory process for witnesses in English law – legal professional privilege (not discussed here) and spousal immunity. English law excuses a spouse or civil partner from being a compellable witness in order not to jeopardise the “special status of marriage” by forcing one partner to testify against the other.¹²⁰ However, there is an exception to that exception, where the trial involves an assault on the spouse or civil partner or on a person under 16, or a sexual offence against a person under 16.¹²¹

The fundamental issue here is whether this “compulsory process” needs to be supported by criminal offences and by the doctrine of contempt of court, for which imprisonment is a possibility. A witness or juror who goes on holiday and thus fails to attend court when required is a wrongdoer, but is the wrongdoing serious enough to justify significant deprivation of liberty? Should the non-attendance be a regulatory matter, dealt with by a fine? Is the gravamen of the wrong the defiance of the order of the court, or the causing of economic and emotional consequences arising from the need to postpone court hearings and re-arrange schedules for courts, lawyers, victims and other witnesses? Whether punishment for contempt is likely to succeed in reducing the likelihood of people disobeying court orders is difficult to say; whether imprisonment rather than a fine or regulatory penalty is more consistent with the degree of wrongdoing remains to be established. The punishment proportionate to a deliberate contempt would obviously be significantly higher than that proportionate to a careless omission.

¹¹⁷ See footnotes 2 and 3 above.

¹¹⁸ P. Roberts and A. Zuckerman, *Criminal Evidence*, 2nd ed. (Oxford: Oxford University Press, 2010), at p. 307.

¹¹⁹ Loss of liberty may result: for detailed analysis, see D. Eady and A.T.H. Smith, *Arldige, Eady and Smith on Contempt*, 4th ed. (London: Sweet and Maxwell, 2011), Ch. 10 parts VII and VI.

¹²⁰ *Hoskyn v. Commissioner of Police for the Metropolis* [1979] A.C. 474, per Lord Salmon at p. 495.

¹²¹ Police and Criminal Evidence Act 1984, s. 80(3). The various provisions leave the law in an incoherent state: the immunity applies to a spouse but not a long-term partner, sister, brother, parent or child; and it does not apply to a spouse alleged to have kissed a 15 year-old but does apply to a spouse alleged to have committed murder or rape of anyone over 16: see further Roberts and Zuckerman, *Criminal Evidence* (2010), at pp. 314-317.

VII. Duty to Intervene Physically in order to Prevent Harm

Further-reaching than all the various duties to report or to disclose information is the duty to make some physical interposition. The ancient rule in *Brown*¹²² places great demands on the individual, upholding a duty to go to the assistance of a constable if such assistance is necessary and is requested, and provided the assistance could be rendered “without any physical impossibility or lawful excuse.” Despite the qualifications upon this duty, the fact remains that members of the public may be required to place themselves in a position of physical danger. This duty surely demands too much of the ordinary citizen: requiring a member of the public to summon assistance for the constable is one thing, but requiring physical intervention and providing for criminal conviction if the duty is unfulfilled are steps too far. The *Brown* rule should be abrogated as a historical relic unsuited to the modern day:¹²³ either it should be converted into a duty to call for assistance, or at the very least it should be subjected to a broader exception along the lines of continental European “easy rescue” offences, which do not require rescuers to place themselves in personal danger.¹²⁴

If this critique of the *Brown* rule is accepted, does it argue against the imposition of any other duty on a private individual to engage physically? Freedom from physical harm is a fundamental element of individual autonomy, and protection from physical harm should be accorded high value by the state’s agencies. Is it therefore not contradictory to require a citizen to become involved in a physically dangerous situation? Even if this is cast as a case of the use of justifiable force in defence of another, should it not be treated as permissible rather than obligatory?¹²⁵ A difficult example here is the obligation of a member of a household, who was or ought to have been aware of the risk of serious harm being caused to a young or vulnerable member of that household, to “take such steps as he could reasonably have been expected to take to protect” the young or vulnerable person from the risk.¹²⁶ In many situations that obligation will be discharged by telephoning the police or social services in order to produce an authoritative intervention. But in some situations this statutory duty will require an individual to make some immediate physical intervention with a view to protecting the young or vulnerable victim. Does this, like the *Brown* rule, stand in contradiction to the state’s duty to protect individuals from physical harm? English law resolves the apparent contradiction in “failure to protect” cases by giving priority to the safety of the young or vulnerable victim over that of the presumably capable duty-holder. But there is a naivete about this, because the person acting violently towards the child or vulnerable

¹²² (1841) Car & M 314.

¹²³ It was endorsed by the House of Lords in *R (Laporte) v. Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 A.C. 105, at [83] per Lord Rodger and at [123] per Lord Brown, although without much analysis or discussion.

¹²⁴ E.g. the provision in s. 323c of the German Criminal Code, “without substantial danger to himself”, in Bohlander, *The German Criminal Code* (2008).

¹²⁵ On which see Horder, *Ashworth’s Principles of Criminal Law* (2015), at pp. 130-146.

¹²⁶ Domestic Violence, Crime and Victims Act 2004, s. 5.

party might be a powerful bully and the other individual present may be physically over-awed or even threatened by him.¹²⁷ Thus Jonathan Herring has argued that the “failure to protect” offence is flawed, insofar as it focusses attention on the member of the household rather than the perpetrator of the violence, neglects the fact that many of those caught by this offence will be women who have themselves been subjected to domestic violence by the perpetrator, and ignores the obligations of the state in respect of child protection.¹²⁸ Accepting the thrust of these criticisms, the obligation imposed by the ‘failure to protect’ offence ought to be subject to an exception to the effect that the individual is not required by law to place herself or himself in physical danger. However, broadening the exception in this way should not be allowed to undermine the obligation to protect the young or vulnerable in this situation: the personal and civic obligation to give one’s services is surely right in principle, and where it can be fulfilled without incurring personal danger the duty should arise. Otherwise, and at the very least, there should be an obligation to summon assistance from the police or social services as soon as possible.

This is not the place to set out the arguments for and against a general duty of easy rescue, requiring an individual to take steps to assist a person in peril insofar as that is possible without endangering herself or himself.¹²⁹ However, there is one specific situation in which the arguments for a duty to take positive steps seem especially strong: this is where a person is found in imminent and obvious danger of death, e.g. lying in the road and in danger of being run over by passing traffic.¹³⁰ It should not matter what the cause of the incident is (e.g. whether the person is drunk, or has tripped and suffered a bang on the head) when life is in danger. The minimum required in this situation might be to position one’s vehicle so as to shield the prone individual, assuming this can be executed safely, and then to call the emergency services and await their arrival. Once again, the imminent danger to another person’s life should ground the justification for the personal obligation and duty of citizenship that both arise in this situation.

VIII. Conclusions

¹²⁷ Without the fear being so great as to satisfy the narrow defence of duress in English law.

¹²⁸ J. Herring, “Familial Homicide, Failure to Protect and Domestic Violence: Who’s the Victim?” [2007] Crim.L.R. 923.

¹²⁹ See further Ashworth, “The Scope of Criminal Liability for Omissions” (1989) 105 L.Q.R. 424, and Fabre, *Who’s Body is it Anyway?* (2006), ch. 2.

¹³⁰ For two such cases in recent years where several drivers did not stop, leaving the prone individual to be killed by another vehicle, see reports of the deaths of Augustine Carnell at www.bbc.co.uk/news/uk-england-kent-27411753 and of Louise Wolstenholme in *The Times*, 4 February 2016, 6. A slightly different but still troubling case is that of Becky Morgan, who went with a drunken Michael Bowditch to Ramsgate harbour, she fell into the sea while fooling around, she had told him that she could not swim, and he took no action to summon help or to throw a lifebelt to her, but just remained as she drowned. Bowditch pleaded guilty to manslaughter and was sentenced to five and a half years’ imprisonment. The grounds for the plea are not clear: www.kentonline.co.uk/thanet/news/man-admits-killing-teen-girl-119541

When in 2015 Parliament imposed a new duty on professionals to report suspected female genital mutilation, it made no provision for enforcement.¹³¹ The assumption is that this duty will be enforced through professional discipline. The imposition of a specific duty on professionals to report all forms of child abuse is now under consideration, and three possible modes of enforcement have been put forward – professional discipline, regulation (probably by the Disclosure and Barring Service), or a criminal offence.¹³² Although in recent years Parliament has created some failure-to-report, failure-to-prevent and failure-to-protect offences without full discussion of the alternatives, this Government consultation offers much detail on the arguments for and against a duty, as well as consideration of graduated forms of enforcement.

Perhaps more controversial is the style of offence in s. 7 of the Bribery Act 2010, committed when a commercial organisation fails to prevent bribery by an employee, agent or subsidiary. It now seems possible that this model might be used as the basis for offences of failure to prevent the facilitation of tax evasion, and failure to prevent fraud and/or money-laundering. Such offences would involve placing on companies an obligation to demonstrate that they have effective systems for the prevention of these kinds of crime. Applying the criteria in Part III, any decision to criminalize would turn on the seriousness of the crimes to be prevented and on the fact that they may be committed in conditions of secrecy (i.e. behind the closed doors of a company).

In Part II it was argued that it is an “inherently governmental function” to provide the institutions of criminal justice (police, prosecutors, courts, correctional services and prisons), but that the current re-adjustment of the State’s responsibilities – in the shape of a movement towards a “solidarity state” that places some responsibility on individuals and organisations to take preventive action – is a move in the right direction. It cannot be criticised for requiring people to spy on their neighbours, so long as the criteria are applied consistently. It was argued in Part III that four factors should be taken into account when deciding whether one of these positive duties should be imposed – the seriousness of the potential harm, the secrecy of the context in which the potential harm occurs, the professional responsibility of those with reason to suspect wrongdoing, and the proximity of those persons (together with the ability to take some preventive action). Duties to report require less of citizens than duties to prevent, and duties to prevent may require less than duties to protect: while it was argued above that it would be wrong to require too much of individuals (e.g. by way of physical engagement), it was also argued that where the four factors are present there is a *prima facie* case for imposing a positive duty.

Turning to enforcement, is there a compelling reason to do more than declare the duty in legislation and to leave enforcement to professional discipline? That is what Parliament has decided in respect of the duty to notify suspected female genital mutilation, and in respect of the duty on professionals in Wales to report child abuse and neglect.¹³³ It was argued in Part III above that enforcement should be by way of the least intrusive appropriate sanction – “least intrusive” because sanctions should not be disproportionate to the wrong involved, but

¹³¹ Serious Crime Act 2015, s. 74.

¹³² As explained in the text in Part V above, the Government has also consulted on whether the duty to report should extend to the abuse of vulnerable adults, and on whether organisations should be placed under a duty to take appropriate action.

¹³³ Serious Crime Act 2015, s. 74; Social Services and Well-being (Wales) Act 2014, s. 130.

“appropriate” because the wrongs themselves may be so serious as to justify resort to regulation or even to criminalization. Brief consideration of regulation in Part IV included the argument that regulatory sanctions often fail to respect due process and yet may involve substantial financial penalties. It was concluded that, in principle, regulation should be used only in conjunction with low or moderate penalties. A framework for assessing whether a positive duty should be enforced through the criminal sanction was set out in Part III: essentially, the four factors above (seriousness, secrecy, professional responsibility, and proximity) should assist in determining the strength of the case for criminalizing failure to discharge a positive obligation, and then the countervailing or mediating factors should be considered.¹³⁴ It was argued in Part V that this framework would support a duty to report serious crimes, and that this might include the serious abuse of children or vulnerable adults but that the justifications for including all money-laundering require careful consideration. All these “failure to ...” offences are crimes of omission; but if the interests at stake are vital and the disruption of an individual’s plans not great, there is a good case for placing a preventive responsibility on the individual (or organisation, as the case may be).

¹³⁴ Note that the reasoning is different where an offence can only be committed by a company (as in s. 7 of the Bribery Act 2010). Imprisonment is not an option. So long as it can be shown that it is not unreasonable to expect companies to have effective systems of prevention, the criminal sanctions of fines, remedial orders and publicity orders may be justifiable.