A New Generation of Omissions Offences?

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In her recent monograph, Professor Nicola Lacey argues that the history of criminal law in common law jurisdictions exhibits the influence of four different foundations for responsibility – responsibility based on capacity, responsibility based on character, outcome-responsibility and risk-responsibility. She shows how the influence of each has waxed and waned in different periods of history, and argues that, although 'patterns of responsibility-attribution based on character, risk and outcome are gaining ground,' there remains 'a marked insistence on individual responsibility,' i.e. on what she terms 'capacity-responsibility'.[1] The aim of this article is to explore a little-discussed aspect of the phenomenon of risk-responsibility in the criminal law, looking into what is sometimes termed the 'preventive turn' in criminal law[2] and, in particular, focussing on a 'new generation' of omissions offences.

Part 1 contains a fairly brief account of the now familiar story of the spread of preventive offences in the criminal law in recent years, which in Lacey's terms is to be seen as the burgeoning of risk-responsibility together with some elements of resurgence of character-responsibility. Part 2 focuses on a rather less familiar development – the spread of criminal liability through a diffusion of responsibility. Whereas criminalization by creating new substantive offences may be regarded as the horizontal expansion of the criminal law, criminalization by extending the grounds of responsibility may be seen as a vertical expansion of the criminal law,[3] in effect taking criminal responsibility to a new level. Thus draft official guidance on the new offence of failing to prevent the criminal facilitation of tax evasion stated that 'the new offence … does not alter *what* is criminal, it simply focuses on *who* is held to account for acting contrary to the current criminal law.'[4] One might dispute the assertion that the new offence does not alter what is criminal. But the point being made is

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[1] N. Lacey, *In Search of Criminal Responsibility* (Oxford U.P., 2016), pp. 164-165.
[2] See further n. 5 below.
[3] See also T. Crofts and A. Loughnan, 'Introduction' in T. Crofts and A. Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford U.P., 2015), p.2: 'If criminalisation goes to the breadth of the criminal law, criminal responsibility might be said to relate to its depth.'
[4] H.M. Revenue and Customs, *Tackling Tax Evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion* (Draft Government Guideline, October 2016), p. 4.

that what we may call the base offence – say, tax evasion – is being added to: not only is that base offence surrounded by the inchoate offences, by the doctrine of complicity and by encouragement and assistance under the Serious Crime Act 2007, but there is also another level of liability, criminalizing a person's failure (in this case, a company's failure) to anticipate or respond to the base offence. This is one example of what is here termed a new generation of omissions offences, taking criminal responsibility to a new level, and this will be examined in more detail in parts 2 and 3 below.

1. The Rise in Preventive Uses of the Criminal Law

What Lacey refers to as risk-based responsibility has manifested itself in the rise of preventive uses of the criminal law. This movement is well-documented,[5] and among the examples are the endangerment offences in road traffic law (the offences introduced by the Road Safety Act 2006) and the fraud offences (in the Fraud Act 2006, discussed below). The focus here is on two particular developments -- the increases in pre-inchoate offences and in preventive orders.

Recent decades have seen the rapid expansion of what may be termed pre-inchoate offences or 'pre-crime'.[6] In previous centuries the criminal law had extended itself vertically by means of the inchoate offences of attempt, conspiracy and incitement, largely on a crime prevention rationale. More recently it has deployed the same preventive rationale to support a further vertical extension in the shape of offences that criminalise earlier activities which are considerably more remote from the harm-to-be-prevented. For example, the Terrorism Act 2006 created three pre-inchoate offences – publishing a statement that is likely to be understood as an encouragement of terrorism, disseminating a terrorist publication being reckless as whether it encourages terrorism, and engaging in any conduct in preparation for giving effect to an intention to commit acts of terrorism. Crimes of possession have a much longer history, but risk-based offences of possession (not requiring proof of any intention to commit a further crime) now feature in anti-terrorist legislation and elsewhere. Crimes of membership are also a feature of anti-terrorist legislation.[7]

The rationale for these pre-inchoate offences is largely preventive: they authorize law enforcement officers to step in at an even earlier stage than the inchoate offences, before any or much harm has been done. The same can be said for the significant number of substantive offences defined in the inchoate mode. Thus the major offences in ss. 2-4 of the Fraud Act 2006 criminalise the dishonest making of a false representation intending to make a gain or

[5] See, for example, G.R. Sullivan and I. Dennis (eds), *Seeking Security* (Hart Publishing, 2012); P. Ramsay, *The Insecurity State* (Oxford U.P., 2012); A. Ashworth and L. Zedner, *Preventive Justice* (Oxford U.P., 2014); T. Tulich, R. Ananian-Welsh, S. Bronitt, and S. Murray (eds), *Regulating Preventive Justice* (Federation Press, 2016); H. Carvalho, *The Preventive Turn in Criminal Law* (Oxford U.P., 2017).

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

[7] For details, see C.P. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford U.P., 3rd ed., 2014).

cause a loss, not the actual causing of a gain or loss;[8] and one consequence of this is to push back the inchoate offences, so as to penalise an attempt to make a false representation etc. Thus the effect of defining an offence in the inchoate mode is that it occupies the existential space that the crime of attempt would otherwise have occupied, but the crime of attempt still applies to that offence, with the result that a much wider preventive margin is cast round the original wrong.[9]

Another question arising from the pre-inchoate offences, such as those under the Terrorism Act 2006 which involve 'push[ing] back the boundaries of responsibility-attribution in time,'[10] is whether they are compatible with basic tenets of criminal responsibility. An offence such as engaging in conduct in preparation for giving effect to an intent to commit terrorism does, at least, require proof of an intention to commit a terrorist act, but even that cannot be said of many risk-based possession offences or of crimes of membership. These manifestations of what Lacey terms 'risk-responsibility' therefore diverge from what is generally thought to be a basic tenet of 'capacity-responsibility', for inchoate offences particularly, notably, the requirement of mens rea.

Turning to preventive orders, the most famous example was the ASBO – the anti-social behaviour order, imposed on the subject by a magistrates' court in civil proceedings if it was deemed necessary for the purpose of protecting people from further anti-social acts, specifying prohibited behaviour (such as entering part of a city or associating with certain persons), reinforced by a criminal offence of failing to comply with the specified conditions, with a maximum penalty of five years' imprisonment.[11] The ASBO itself has now been replaced by other orders, but it remains the basic model for over 20 preventive orders in English law.[12] These orders remain controversial, and criticisms of them include: i) that it is wrong to provide for a court in civil proceedings to create a personalized criminal code for someone, with conviction not requiring proof of fault; ii) that crime-creating powers should not be delegated to courts, especially if courts may then attach a sentence of imprisonment to conduct which, if the individual had not been subject to a preventive order, would not itself be imprisonable,[13] if criminal at all; iii) that the prohibitions in the order should not close off central aspects of normal life (shopping, living at home, travelling on public transport); and iv) that the sanction for breach of a prohibition should not be disproportionate. What is important in the present context is that the criminal sanction (in the shape of a crime of

[8] For another example of the use of the inchoate mode, see the offences under ss. 1 and 2 of the Bribery Act 2010.

[9] See further A. Ashworth, 'Defining Criminal Offences without Harm' in P.F. Smith (ed), *Criminal Law: Essays in Honour of J.C. Smith* (Butterworths, 1987); A. Ashworth and L. Zedner, *Preventive Justice* (2014), 96-98; and J. Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation', in G.R. Sullivan and I. Dennis (eds), *Seeking Security* (2012).

[10] N. Lacey, *In Search of Criminal Responsibility* (2016), p. 48.

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

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

[13] Note that, in respect of begging and soliciting for prostitution, Parliament had explicitly decided (in the Criminal Justice Act 1982) that they should not be imprisonable.

omission) is the chief means of enforcing most preventive orders: a criminal offence of failing to comply with the terms of the order, often with a maximum sentence of five years' imprisonment, is a normal element of such orders.[14]

2. The Expansion of Omissions Liability

Having discussed the rise of pre-inchoate offences and the offences attached to preventive orders, we now move on to a distinct use of the criminal law for preventive purposes which demonstrates the trend towards a diffusion of criminal responsibility -- the new generation of omissions offences. The background to this development is what is said to be a general approach that regards omissions offences as exceptional and as requiring special justification.[15] Some authors, such as Simester and Sullivan, phrase the general approach more strongly: that 'it is a guiding principle of the law that defendants are liable according to what they do, not what others do and they fail to prevent.'[16] The same authors also state the principle thus:

> 'standard legal doctrine stipulates that the behaviour requirement [in the actus reus of a crime] is a requirement of positive action by the defendant. Except occasionally, an omission will not do.'[17]

Simester and Sullivan offer two reasons for what amounts to a presumption against omissions offences – first, that omissions intrude on individual autonomy to a greater degree than the negative prohibitions typical of the criminal law; secondly, and relatedly, that individuals are entitled to give priority to their own interests over those of others, in general and in principle. However, these reasons are not in all instances weighty enough to prevail: it may be justifiable to require a not-too-demanding positive act if another person's vital interests are at stake,[18] and where a person undertakes a particular role or trade it may be justifiable to attach duties reinforced by criminal offences of failing to comply with certain requirements.[19]

Three types of a new generation of omissions offences will be examined here – failure to report, failure to prevent, and failure to protect. English law contains many duties to report

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[14] One of the very few exceptions is the anti-social behaviour injunction, in Part 1 of the Anti-Social Behaviour, Crime and Policing Act 2014, which is enforced through proceedings for contempt of court.

[15] E.g. D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* (14th ed., 2015), 72-73; cf. J. Horder, *Ashworth's Principles of Criminal Law* (Oxford U.P., 8th ed., 2016, 115-118.

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

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

[18] For further argument, see A. Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.* 606, at 608-617.

[19] One example of this is putting oneself forward for election as a member of parliament: for discussion of the regulatory provisions and omissions offences attached to the Political Parties Elections and Referendums Act 2000, see J. Horder, *Criminal Misconduct in Office: Law and Politics* (Oxford U.P., forthcoming, 2018), 179-185.

which are not backed by the criminal sanction,[20] but it also criminalizes some *failures to report*. Three notable examples are the offences of failure by certain professionals to report suspected money-laundering,[21] failure by certain employees to report suspected financial offences related to terrorism,[22] and failure by any person to report information about acts of terrorism.[23] These offences mostly have a maximum sentence of five years' imprisonment, which some regard as a relatively high penalty in view of the fact that the offender is not the person who actually causes the harm that the criminal law is aiming to stop.

English law appears to be about to acquire a cluster of offences of *failure to prevent.* The basic model is the offence in s. 7 of the Bribery Act 2010, rendering a commercial organisation liable to conviction for failing to prevent bribery by an employee, agent or subsidiary intended to benefit that organisation, subject to a due diligence defence. Similar in general but different in several details are the two offences introduced by the Criminal Finances Act 2017: failure to prevent the facilitation of a U.K. tax evasion offence (s. 45) and failure to prevent the facilitation of a foreign tax evasion offence (s. 46). The rise of corporate failure-to-prevent offences will be discussed further in part 3 below.

There is a somewhat longer line of offences that criminalise a company officer for consenting to or conniving at an offence committed by a company. An example of these 'officer offences' may be found in s. 187(1) of the Licensing Act 2003, which states that if an offence committed by a body corporate is shown to have been committed either with the consent or connivance of a company officer or to be attributable to any neglect on an officer's part, the officer is also guilty of the offence. This is in substance an offence of omission, and this form of criminalization can be found in several statutes.[24] Thus s. 18 of the Immigration Act 2016 empowers a court to impose a Labour Market Enforcement (LME) order where a company has committed a 'triggering offence'; s.27 of the Act creates an offence of failing without reasonable excuse to comply with an LME order; and s. 28 provides that if a company commits an offence under s. 27, any officer who connived at or consented to non-compliance or contributed through his or her own neglect is guilty of an offence. It is therefore apparent that, whereas the corporate failure-to-prevent offences extend criminal responsibility vertically by rendering the employer criminally liable for failing to stop the acts of the employee or agent, the officer offences further extend criminal responsibility vertically by rendering the top employees criminally liable for the failures of the company.

The third example of the new generation of omissions liability is to be found in offences of *failure to protect*. One example is where a person who is responsible for a girl under 16 fails unreasonably to take sufficient steps to protect her from genital mutilation.[25] Another

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[20] Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.* 606, at 620-626; see particularly the discussion of the previous government's position on the criminalisation of failure by professionals to report suspected child abuse..

[21] Various offences in the Proceeds of Crime Act 2002, ss. 330-331.

[22] Various offences in the Terrorism Act 2000, ss. 19 and 21A.

[23] Two offences in the Terrorism Act 2000, s. 38B.

[24] E.g. s. 22(2) of the Immigration, Asylum and Nationality Act 2006, and s. 14 of the Bribery Act 2010. Cf. s. 18 of the Corporate Homicide and Corporate Manslaughter Act 2007, headed 'No individual liability.'

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

example is where a member of a household fails to protect a child or vulnerable member of the household from death or serious physical harm at the hands of another member of that household.[26] The latter offence raises particularly difficult questions: it was devised to deal with cases of child abuse in which each parent alleged that the other caused the harm in their absence, but the danger is that its terms appear to require (usually) a woman to intervene physically to protect a child or vulnerable adult even where she too has been subjected to violence or threats by the aggressor.[27]

The three types of omissions offence described above – failure to report, failure to prevent, and failure to protect – have been created against the background of what is claimed to be a common law presumption against omissions liability. The offences create criminals where there were none before, by adding another layer of responsibility related to the basic wrong – a basic wrong that may be connected, as we have seen, with misconduct as diverse as money-laundering, terrorism, bribery, and female genital mutilation or other forms of serious familial abuse. All these forms of misconduct are offences that are already surrounded at common law with the usual doctrines of complicity, the inchoate offences and encouragement and assistance under the Serious Crime Act 2007, but the new generation of omissions offences imposes criminal liability going beyond the standard doctrines. However, unlike those standard doctrines, the new omissions offences have no general application. They apply selectively, reflecting the particular concerns of government and the legislature at given points in history: they do not proceed from a broad examination of whether there are good arguments for a general offence of failure to report a crime, or of failure to prevent an offence from taking place,[28] or of 'consent or connivance' to a corporate offence.

3. Corporate Failure to Prevent Economic Crime

One of the significant political changes brought about in the last quarter of the twentieth century was the recognition that the activities or defaults of corporations can produce enormous harm (even loss of life) and, more especially, the growing acceptance that governments should take action against corporate harms, even to the extent of imposing criminal liability. The courts have played a part, by introducing the identification doctrine whereby a company could be held criminally liable if the relevant fault could be imputed to company officers who were the 'directing mind and will' of the company.[29] This doctrine has enabled the conviction of some companies, but its reach is limited by the fact that it is often difficult to establish that the senior company executives who qualify as the 'directing

[26] Domestic Violence, Crime and Victims Act 2004, s.5.
[27] For further discussion, see J. Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] Crim.L.R. 923, and Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.* 606, at pp. 628-629.
[28] For discussion of these possibilities, see A. Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.* 606, at pp. 624-626.
[29] *Tesco Supermarkets Ltd v. Nattrass* [1972] A.C. 153.

mind and will' of a company have the requisite knowledge or intention.[30] As a consequence, the doctrine is more effective at securing the criminal liability of small businesses than of larger corporations. A decade ago the principles of corporate criminal liability were altered for homicide: the Corporate Manslaughter and Corporate Homicide Act 2007 imposes liability where the way in which the organisation is run by its senior management is a substantial element in the breach of a relevant duty of care, and the Act allows the jury to take account of evidence of 'attitudes, policies, systems or accepted practices within the organisation' likely to have produced tolerance of failures to comply with duties.[31] However, this statute is confined to homicide, and for other offences the identification doctrine still seems to prevail.[32]

Into this rather confusing patchwork of grounds for criminal liability comes the corporate failure-to-prevent model. The legislative origin of this model is section 7 of the Bribery Act 2010.[33] The conduct element of the offence is that a person 'associated with' a commercial organisation bribes another person – an 'associated person' being an employee, agent or subsidiary, or anyone else who performs services on behalf of the commercial organisation. There is no designated fault element, but it must be proved that the bribe was paid with the intention of obtaining or retaining corporate business. It is a defence for the commercial organisation to prove that it 'had in place adequate procedures designed to prevent [associated persons] from undertaking such conduct.' Thus this is an offence of omission (by failure to put adequate preventive procedures in place), subject to a due diligence defence. As an offence of omission not requiring proof of fault, it does not rely on the identification doctrine: all it needs is proof that the corporation failed to do (or prevent) a specified act.[34]

Although reference was made above to the corporate failure-to-prevent model, there are variations among the new offences which render it more accurate to refer to 'models'. Thus the offence in s. 45 of the Criminal Finances Act 2017 is committed by a body corporate if an 'associated person' commits a U.K. tax evasion facilitation offence when acting in the capacity of a person associated with the company.[35] This time the definition of a 'person associated' turns on the capacity in which the person was acting, rather than on the formal

[30] For extensive discussion, see C. Wells, *Corporations and Criminal Liability* (2nd ed., 2001), esp. ch. 5; see also Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (January 2017): www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence pp. 12-17; Law Reform Commission of Ireland, *Regulatory Enforcement and Corporate Offences* (2016), Issue 7.

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

[32] Cf. Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 A.C. 500, suggesting that some forms of statutory language may justify a different approach: see A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), Simester and Sullivan's *Criminal Law* (6th ed., 2016), pp. 281-289; D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* (14th ed., 2015), 296-300.

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

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

[35] For detailed analysis, see K. Laird, 'The Criminal Finances Act 2017 – an Introduction' [2017] Crim.L.R. 915, at 930-935.

position held. This offence does not require proof that the associated person was intending to benefit the corporation. Also, the s. 45 offence is committed if the associated person *facilitates* a U.K. tax evasion offence: the concept of facilitation is inchoate in nature, criminalizing the failure to prevent an associated person from facilitating an offence committed by another person, and therefore this offence bites at an earlier stage than the bribery failure-to-prevent offence, which criminalizes the failure to stop an employee from committing the substantive offence of bribery. There are also some smaller differences between the s. 45 offence and that in s. 46 of the same Act, which creates the offence of failing to prevent the facilitation of foreign tax evasion.[36] The government has shown some interest in creating similar offences for corporate failure to prevent fraud and money-laundering, without specifying precisely which model would be adopted.[37]

The avowed purpose of corporate failure-to-prevent offences is to change corporate culture by giving companies an incentive to put preventive procedures into place, or, in the language of the criminal law, by providing a deterrent against non-involvement and passivity on the part of companies in the face of economic crime. This places a law enforcement burden on companies in respect of bribery and tax evasion facilitation offences. Thus these corporate failure-to-prevent offences not only co-opt companies in a crime prevention role normally left to regulators or the police, but also insert a new layer of criminalization. Is this justified? Celia Wells argues that offences on this model are justified because 'a corporation benefits from the wrongdoing of associated persons acting in pursuit of contractual or commercial advantage or tax limitation.'[38] That may be a good reason for imposing on commercial organisations a duty to prevent such offences, but it does not follow that this duty should be reinforced by the criminal law. The first step should be to consider whether the option of 'strengthening deterrents to misconduct through regulatory reform' would be appropriate and effective.[39] The comparative effectiveness of (i) a regulatory regime with the regulator's power to fine and (ii) criminalisation based on the 'corporate failure-to-prevent model' remains open to debate: the assumption is that the more severe (criminal) regime will have greater preventive effectiveness, but court fines may be lower than those imposed by regulators, for example.[40] Apart from the arguments about deterrence and prevention, there is the further question whether it is appropriate to invoke the criminal law here. Are offences such as bribery, tax evasion and fraud sufficiently serious wrongs to justify the imposition of this extra layer of criminal responsibility on companies that fail to take sufficient preventive measures? We may concede the point that the operations of the commercial organisation provide the context and the drivers for the commission by 'associated persons' of these economic crimes, and we may accept the argument that it is right to impose a preventive duty

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[36] For details, see Laird, 'The Criminal Finances Act 2017 – an Introduction' [2017] Crim.L.R. 915, at 935-937.

[37] Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (January 2017): www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence

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

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

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

on the company because its profit-based structure is the essential context for the economic crimes. But is this sufficient to justify taking the significant step from the imposition of a duty to the imposition of criminal liability, essentially for failure to have in place preventive procedures that are regarded as adequate? Moreover, if it is concluded that criminal liability can be justified, there are at least two further issues to be resolved. One is whether it is justifiable to impose on the company the burden of proving that its procedures were adequate. Reverse burdens of proof are contrary to the presumption of innocence and therefore objectionable if applied to individuals, but it can be argued that corporate defendants are not at the same disadvantage in criminal proceedings as are individuals, and that it is therefore justifiable to place on them the burden of exculpation.[41] And finally, the maximum sentence should be proportionate to the seriousness of the wrong of failure to prevent the base crime (and not of the base crime itself).

4. Prevention, Risk and the Diffusion of Criminal Liability

This, then, is the recent historical perspective – the growth of pre-inchoate offences and of preventive orders, and the emergence of offences of failure to report, prevent or protect (especially corporate failure-to-prevent offences, and also officer offences). These developments underscore Lacey's analysis, demonstrating the rise of risk-based responsibility and the continuing struggle between different bases for criminal responsibility. They also show that, whereas talk of overcriminalization tends to assume that this means horizontal expansion of the criminal law by adding new substantive offences, many of the developments discussed above may be seen as vertical extensions of the criminal law – in effect, adding extra layers of criminal responsibility, as it were, piled on top of the basic wrong.

It was also noted that many of these new offences are crimes of omission. This means that the presumption against omissions offences, formulated strongly in Simester and Sullivan's text,[42] does not seem to have much weight in contemporary criminal law-making. Moving to the normative level, the question is whether people *should* only be 'liable according to what they do, not what others do and they fail to prevent,' as Simester and Sullivan claim.[43] The normative debate therefore turns on whether there are special justifications for creating omissions offences of this kind – in effect, introducing a new layer of responsibility, and creating criminals where there were none before. What kinds of reason can be given to

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[41] Cf. Laird, 'The Criminal Finances Act 2017 – an Introduction' [2017] Crim.L.R. 915, at 934-935, and also J. Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?', in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, and V. Tadros (eds), *Criminalization: the Political Morality of the Criminal Law* (Oxford U.P., 2014), 123. More generally see, e.g., B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (1993), arguing that prosecutorial energy and court time should not be expended on unravelling complex corporate structures, and that once the prosecution has established a case it should be for the company to satisfy the court that it has reacted appropriately to the wrongdoing.

[42] See text at notes 14-15 above.

[43] A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G. Virgo (eds), Simester and Sullivan's *Criminal Law* (6th ed., 2016), p. 15, quoted at n. 13 above.

support this burgeoning of omissions offences? The principal justification seems to lie in the belief (some would say, the realisation) that the tasks of preventing and controlling crime cannot be left to the state alone, if civil peace is to be assured at a reasonable level. This is phrased as an empirical issue (whether or not the state can in practice guarantee an acceptable level of civil peace), whereas it is really a political question that raises issues such as public expenditure on policing and respect for individuals' right to a private life. Relevant to this is a version of what leading criminologists such as Pat O'Malley and David Garland have termed 'responsibilization.'[44] They used the term chiefly to characterise the delegation of state responsibility for policing to local organizations. I employ it here in an extended sense, to cover the imposition of responsibility for elements of law enforcement on individuals or companies, particularly where they are in sufficient proximity to the wrongdoing or wrongdoer to be able to report or prevent an offence. Whether those tasks are inherently governmental functions is debatable, especially when companies or individuals are suitably placed to help in crime prevention. It is probably right to draw a distinction between companies and individuals.[45] The profit motive probably supplies a stronger reason for imposing duties to prevent on companies, although account must also be taken of the cost of commissioning and putting in place sufficient safeguards against different forms of offending. Turning to individuals, the common law's stance on the applicable crime prevention duties seems to be in a state of ambivalence: on the one hand, it remains a basic common law principle that individuals are not obliged to answer police questions or to attend at a police station unless arrested, a principle that privileges individual liberty over crime control and makes the task of the police more difficult;[46] on the other hand, exceptions to the presumption against omissions offences may be justified for preventive purposes if the interests at stake are vital ones (life, physical integrity), if the person is proximate and suitably placed, and if the interruption to the person's liberty to pursue her or his own planned activity is minor and not physically demanding.

Even if a strong case for this kind of 'responsibilization' is conceded – and there is room for much more debate about that – it would only yield a justification for imposing a duty, and would not conclude the question whether it should be reinforced by regulatory or by criminal sanctions. So far as individuals are concerned, the argument in favour of imposing a duty may be strong if the situation requires relatively little of the individual, in terms of reporting or taking preventive steps. The question then is whether the wrong of failing to carry out the duty is serious enough for criminalization, or whether a regulatory response (such as professional discipline) would be sufficient.[47] Turning to the corporate failure-to-prevent offences discussed in part 3 above, it is true that companies operate in order to yield a profit,

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

[45] J. Horder, , 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?', in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, and V. Tadros (eds), *Criminalization: the Political Morality of the Criminal Law* (Oxford U.P., 2014), 130-131.

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

[47] For fuller discussion, see Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *L.Q.R.*606, at 620-626.

and that companies would probably benefit from the wrongdoing of what the legislation terms 'associated persons.' That strengthens the case for imposing a duty, but does not conclude the question whether reinforcement should be by means of regulation or the criminal law.[48] The whole objective of corporate failure-to-prevent offences is to persuade companies to devise systems to prevent offending by 'associated persons,' a time- and money-consuming task but certainly an important one.

The relationship between corporations and the criminal law remains strongly contested, not least because the institutions of the criminal law generally find it much more difficult to prosecute and try companies than individuals.[49] The suggestion here is that we may not be able to cope satisfactorily with crime without requiring some contribution from individuals and companies. This indicates that a responsibilization strategy should be supported, but only if it is focussed on the most serious wrongs or on those that are particularly difficult to bring to light, and only if it is brought to bear on those on whom a duty can fairly be laid. Thus:

a) In terms of the types of offence to which the responsibilization strategy should apply, we should assuredly go back to the beginning and ask whether it is right to have omissions offences in relation to money-laundering but not murder, female genital mutilation but not other forms of child abuse, bribery and tax offences rather than, say, offences of wounding, and so forth. Alternatively, should the new generation of omissions offences remain in the special part of the criminal law, or is there a case for transferring them to the general part?
b) In terms of the locus of responsibility, a duty to report, prevent or protect should only be imposed on individuals if they are present or proximate, and have the ability to carry out that duty easily and without personal danger. Corporate failure-to-prevent offences may require considerable expenditure on devising systems of accountability and supervision, but this may be a fair burden to impose on a company aiming to make profits.
c) In respect of the new generation of omissions offences, however, it must not be forgotten that it is someone else who is committing the base offence. Whether the duty is to report, to prevent or to protect, and whether the duty is imposed on an individual or a company, it may be described as a secondary duty because it derives from the actual or potential offending behaviour of another. This is another reason for questioning whether there should be criminal liability attached to the new duties or whether a form of regulatory liability should be sufficient.

[48] Relevant from the company's point of view may be Deferred Prosecution Agreements under Sch. 17 of the Crime and Courts Act 2013, which are available in response to prosecution for certain types of offence. See, e.g., M. Bisgrove and M. Weekes, 'Deferred Prosecution Agreements: a Practical Consideration' [2014] Crim.L.R. 416, and S. Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements', in T. Tulich, R. Ananian-Welsh, S. Bronitt and S. Murray (eds), *Regulating Preventive Justice* (2016), pp. 216-218

[49] See the references in n. 41 above.