

CRIMINAL LAW (Law Moderations)

Preparatory work

Dr Gabrielle Watson

gabrielle.watson@law.ox.ac.uk

Please e-mail your answers to me by Monday of week 0, Michaelmas Term 2020

In a moment, you will be invited to read and answer questions on a) two academic articles, and b) the report of a case. Before you do so, you should do some preparatory reading, partly so as to begin to find your way around criminal law generally, and partly so as to understand the concepts that you will come across in the case, such as the difference between *actus reus* and *mens rea*.

So, please read **either**:

AP Simester, JR Spencer, F Stark, GR Sullivan, and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (2019, 7th edn, Hart/Bloomsbury)

ch 1 'Criminal law: definition and ambit'

ch 4 'Actus reus'

ch 5 'Mens rea'

Or:

J Herring, *Criminal Law: Texts, Cases, and Materials* (2020, 9th edn, OUP)

ch 1 'An introduction to criminal law'

ch 2 'Actus reus: the conduct element'

ch 3 'Mens rea: the mental element'

Task 1

Read the articles by Ashworth and Williams in the attached PDFs. Answer the following questions:

- a) What are the articles discussing?
- b) What is Ashworth's view on omissions? What arguments does he raise to support his view?
- c) What is Williams' view? What arguments does he use?
- d) Why does Williams disagree with Ashworth?
- e) Whose view do you find more compelling, and why?

Task 2

Turn to the case *Fagan v Commissioner of Metropolitan Police* [1969] 1 Q.B. 439.

Please read the report in the attached PDF. It is made up of the following parts:

Page 439F-G: **The keywords.** These give an idea of the legal topics(s) with which the case is concerned.

Pages 439G-440F: **The headnote.** This gives a summary of the facts of the case, and what the court decided, and why. It will be of interest to you, but bear in mind that it is only a summary, and can sometimes mislead, or omit something that you need to attend to – so you need to read the judgment(s) (see below) as well.

Pages 440F-442E: **The case's history,** i.e. the path by which it found itself in front of the court whose decision is now reported. This can matter occasionally, but more usually it can be skipped.

Pages 442F-443A: **Summaries of the arguments of counsel (the barristers) appearing for the two sides.** Again, these can be of interest, but it is usually fine to skim them – they should, in any case, be reflected in the shape of the judgment(s).

Pages 443B-446G: **The judgments.** In *Fagan v Commissioner of Metropolitan Police*, there is one main judgment (by James J); a second, very short, judgment, simply expressing agreement with the latter (by Lord Parker CJ), and a dissenting judgment (by Bridge J). This is typical enough, though other cases may have fewer judgments, or more. The judgment(s) are the crucial part of the report: they explain how the judges came to the conclusions they did, which is your key concern (it is called the '*ratio decidendi*'). So: compulsory reading.

Once you have read the report, please answer the following questions. They correspond to the sorts of things you should be trying to unearth every time you encounter a case. Plan your answers, and write as clearly and concisely as you can.

- a) With what offence was Mr Fagan charged?
- b) What was the outcome of the case (a) in the Magistrates' Court, and (b) in the Divisional Court of the Queen's Bench Division?
- c) What was the key difficulty that had to be resolved in the case?
- d) How does James J (with the agreement of Lord Parker CJ) respond to this difficulty?
- e) In what way does Bridge J consider James J to have gone wrong? And how does he respond to the difficulty?
- f) Do you see any flaws in the reasoning of James J and/or Bridge J?
- g) What do you regard as the correct analysis, and how would you have decided the case?

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Course of Study: **Criminal Law**

Name of Designated Person **Sandra Meredith**
authorising scanning:

Title of Work: **'The Scope of Criminal Liability for
Omissions' (1989) 105 *Law Quarterly
Review* 424**

Name of Author: **A Ashworth**

Name of Publisher: **Stevens and Sons**

ISBN/ISSN: **0023-933X**

Page numbers: **424-459**

THE SCOPE OF CRIMINAL LIABILITY FOR OMISSIONS

INTRODUCTION

ALTHOUGH the paradigm of criminal liability is a prohibition on the culpable doing of a certain act, all systems of criminal law seem to include offences of omission. Some will have been drafted expressly so as to penalise an omission, *e.g.* "failing to . . .", usually in the context of an undertaking or activity such as running a business or driving a motor vehicle. There may be other offences worded in a way which leaves open the possibility that they may be committed by omission as well as by acts. References to omissions should not, of course, be taken to imply that we may be said to omit to do everything that we do not do each day. The term "omission" is properly applied only to failure to do things which there is some kind of duty to do, or at least things which it is reasonable to expect a person to do (on the basis of some relationship or role).¹

What the scope of such duties should be is therefore a major question for the legislature when considering criminal law reform and for the courts when developing the common law or interpreting statutes. Two contrasting positions may be identified, the "conventional view" and the "social responsibility view." They are not polar opposites, and in a practical sense the difference between them is a matter of the extent of the duties recognised. But the two views do proceed from different theoretical foundations, and these are important when considering reasons for and against particular instances of criminal liability for omissions. What it is proposed to call the "conventional view"—though one cannot be sure how settled or how prevalent it is—maintains that the criminal law should be reluctant to impose liability for omissions except in clear and serious cases. It is accepted that there are many activities in modern society which must, to some extent, be regulated by criminal offences, of which some will properly be offences of omission; it is also accepted that citizens have duties to support the collective good by paying taxes, etc., and that such duties may be reinforced by offences of omission; but the distinctive argument is that our duties towards other individuals should be confined to duties towards those for whom we have voluntarily undertaken some responsibility. Whereas we owe negative duties (*e.g.* not to kill or injure) to all people, it is right that we should owe positive duties (*e.g.* to render assistance, to support) only to a circumscribed group of people with whom there exists a special

¹ See J. Feinberg, *Harm to Others* (1984), p.161.

relationship.² When supporters of the conventional view are pressed to justify this limitation, they might tend to argue that there is moral distinction between acts and omissions, maintaining that failure to perform an act with foreseen bad consequences is morally less bad than performing an act with the identical foreseen bad consequences.³ This view is shared by some judges, and it was stated forcefully by Phillimore L.J. in *Lowe* (1973)⁴:

"We think there is a clear distinction between an act of omission and an act of commission likely to cause harm. Whatever may be the position in regard to the latter it does not follow that the same is true of the former. In other words if I strike a child in a manner likely to cause harm, it is right that if the child dies I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate."

Now this passage concerns the law of manslaughter which, because it imposes constructive liability, introduces complexities of its own into the act-omission debate. But the passage is, at a more general level, a vigorous assertion of the conventional view of the different moral and legal status of acts and omissions. The fact that the passage was spoken in a case where there was clearly a duty, that of parent towards child, makes its sentiments all the more striking.

Adherents to the "social responsibility view" would draw attention to the co-operative elements in social life, and would argue that it may be fair to place citizens under obligations to render assistance to other individuals in certain situations. This does not commit them to the view that the criminal law should enforce general duties to help all persons at all times. But it leads them to doubt whether the existence of some relationship or voluntary undertaking should be regarded as a precondition of criminal omissions liability. And it may also lead them to attack the argument that there is a general moral distinction between failing to perform an act with foreseen bad consequences and performing an act with identical bad consequences. All types of offence vary in their seriousness, of course, and even if it were true that on the whole omissions are less culpable than acts, it would not follow that omissions are less suitable for criminal prohibition than acts.⁵ On the "social responsibility view," then, there is no reason to accept the limitation imposed on omissions liability by the "conventional view."

² J. Glover, *Causing Death and Saving Lives* (1977), p.134.

³ *Ibid.* p.92.

⁴ [1973] Q.B. 702 at p.709.

⁵ cf. E. Colvin, *Principles of Criminal Law* (1986), pp.26-27.

The differences between the two views, which will be explained in detail in sections 2 and 3 below, are not the only important issues when considering criminal liability for omissions. There is also the question of the proper ambit of the criminal sanction: criminal liability is too serious and too stigmatic to be imposed for every piece of anti-social behaviour, and there are certain spheres which may properly be left to moral obligation rather than bringing in the criminal law. Is this the case with those omissions which fall outside the relationships covered by the "conventional view"? Throughout the ensuing discussion it must be borne in mind that, even if the principles underlying the "conventional view" are found wanting, there are further issues to be resolved before concluding that criminal liability for omissions should be extended.⁶

In concentrating on arguments which ought to be considered when shaping this aspect of the criminal law, the discussion below is aimed at legislators, law reformers and scholars. In this context, it must be emphasised, the judges are included as legislators. Most of the rules of English law discussed below are judge-made, and even as more of the criminal law is cast into statutory form the judges will continue to have a creative role. Many statutes are ambiguous as to whether they apply only to acts, or to omissions as well as to acts. Courts could approach this question of "interpretation" through deep principles, such as the conventional view or the social responsibility view. The general approach, however, is a linguistic one which leads to the resolution of the issue by reference to the ordinary meaning of the words used in the statute. Whether the linguistic approach has been genuinely adopted or whether it has been used in order to conceal judgments on the appropriateness of punishment in a given type of case must remain a matter for speculation, as we shall see in section 5 below.

English criminal law has taken a variable approach towards omissions liability, favouring the conventional view in general but occasionally extending liability from an act to an omission where linguistic considerations appear to favour this. Before examining the contours of omissions liability in English law, it is necessary to confront the theoretical issues which underlie the difference between the conventional view and the social responsibility view. Since this cannot be undertaken satisfactorily as an abstract enterprise, the example which may be used as a focus of discussion is the duty to take reasonable steps to assist a person in peril, sometimes termed the duty of easy rescue. English law, following the conventional view, denies any such general duty; the social responsibility view, followed

⁶ See section 8, below.

in this respect by several European countries, would impose the duty. For example, several neighbours watch from their apartments as a young woman is beaten to death by an attacker, and no-one attempts to intervene or to call the police;⁷ or three healthy young people, all able to swim, make no attempt to rescue a stranger drowning in a river on a summer's day, nor do they take steps to alert the emergency services. The conventional view and the social responsibility view point to different resolutions of these problems. Let us explore the justifications for the two approaches.

2. THE CONVENTIONAL VIEW

The conventional view embodies a minimalist stance on criminal liability for omissions.⁸ It accepts that criminal law is the sharpest end of a legal structure which aims to ensure both that respect for social values is enforced and that essential social needs are provided for. It therefore accepts criminal liability for such omissions as non-payment of taxes. But it regards it as exceptional, and as requiring special justification, for the criminal law to impose duties to assist other individuals. Apart from special relationships (such as parent-child) and other voluntarily undertaken duties, there should be no criminally enforceable duties to assist others or to perform socially useful acts.

The main buttress is an argument from individual autonomy and liberty. Each person is regarded as an autonomous being, responsible for his or her own conduct. One aim of the law is to maximise individual liberty, so as to allow each individual to pursue a conception of the good life with as few constraints as possible. Constraints there must be, of course, in modern society: but freedom of action should be curtailed only so far as is necessary to restrain individuals from causing injury or loss to others. Setting these outer limits to freedom of action is, however, much more acceptable than requiring certain actions of a citizen, especially at times and in circumstances which may be inconvenient and may conflict with one's pursuit of one's personal goals. To impose a duty to do X at a certain time prevents the citizen from doing anything else at that time, whereas the conventional prohibitions of the criminal law leave the citizen free to do whatever else is wanted apart from the prohibited conduct. Moreover, the criminal law should recognise an individual's choices rather than allowing liability to be governed by chance, and the obligation to assist someone in peril may be thrust upon a chance

⁷ Some 38 people saw a woman being attacked and killed outside a New York apartment block in 1964, none of them intervening or calling the police until one person summoned the police after 30 minutes. For the collection of essays arising from the discussion of this case, see J. M. Ratcliff (ed.), *The Good Samaritan and the law* (1966).

⁸ Among its advocates might be numbered Lord Macaulay (below, n. 67) and George P. Fletcher, *Rethinking Criminal Law* (1978), pp.581-634.

passer-by, who may well prefer not to become involved at all. If I am driving to a concert 50 miles away which is to feature a soloist who is being heard for the last time in this country, should I be obliged to stop and render assistance to the victims of a road accident in which I was not involved, at the risk of missing part or the whole of the concert? It is no argument to say that such a journey is always open to the possibility of chance happenings, such as engine failure in the car, a road blocked by a fallen tree, and so on, because in the case of the accident victims I am physically free to drive on to my destination whereas the other happenings amount to physical prevention, and render me incapable of reaching my destination on time. Thus it is no argument to say that all arrangements are vulnerable to chance, since the law can strive to minimise its effect and to keep individual choice as wide as possible. There is a choice whether to stop and offer assistance or to continue on my way to the concert, but an offence requiring a citizen to stop and render assistance would effectively foreclose that choice, coercing me to sacrifice the pursuit of my own interests in favour of alleviating the misfortunes of others to whom I have not voluntarily assumed any duty. By its "chance" nature, the incidence of such a duty reduces the predictability of one's obligations and impinges on the liberty to pursue one's conception of the good life. On the conventional view, then, I deserve moral praise if I stop to assist the accident victims and thereby lose the opportunity to attend the (whole) concert, but it does not follow that I deserve blame if I do not stop. Praise may be appropriate for an act of "saintliness" going beyond duty,⁹ whereas the duties themselves require only the basic conditions of peaceful co-existence. Stopping to help is part of the morality of aspiration, not the morality of duty.

In thus equating individual autonomy with *negative* liberty (*i.e.* liberty not to do certain acts), the conventional view rejects broad duties to others as paternalistic, and as failing to respect each individual's right to self-determination. Any obligation to help others in peril begs the question of who is to decide what "peril" is. Individuals may choose to engage in amateur boxing or in motor cycle racing, knowing of the high risk of injury but deciding that it is worth the risk in order to enjoy the excitement of the sport. Are these boxers or motor cyclists "in peril"? Few would extend a citizen's obligation to intervene (where it exists) to these cases, probably because the individual's decision to engage in the sport may be assumed to be an informed and settled decision. Self-determination, a value closely entwined with individual autonomy, would be impaired

⁹ See J. O. Urmson, "Saints and Heroes" in *Moral Concepts*, J. Feinberg (ed.) (1969). This distinction is also used by R. Epstein to oppose legal liability: "A Theory of Strict Liability," (1973) 2*J. Legal Stud.* 151 at p.200.

by the intervention of others. But what about the person who decides to commit suicide¹⁰ and jumps from a bridge into the River Thames? Should the passing citizen be obliged to alert the emergency services or, if the conditions are favourable, to mount a rescue attempt? The passing citizen is unlikely to know about the potential suicide's state of mind. It is known that some attempts at suicide proceed from an unbalanced state of mind, and some are merely attempts to draw attention to the person's problems rather than to relinquish life.¹¹ On the conventional view these possibilities for paternalistic intervention should not be made the basis of any legal duty. If a citizen sees what appears to be an attempted suicide, the citizen's freedom from non-voluntary obligations together with the potential suicide's right to self-determination are sufficient to conclude the case against a duty to intervene.

A third argument looks to the social consequences of the opposite, "social responsibility" view. Its effect in requiring each citizen to offer assistance to others in peril might on the one hand reduce the autonomy and privacy of others in pursuing their own objectives and enjoyment, however dangerous it may appear to others, and might on the other hand make citizens into busybodies who believe that they must be constantly advising others to avoid risk and danger. In other words, it might be too intrusive and too onerous—both tendencies which go against the maximisation of liberty which is the keynote of the conventional view.

Fourthly, there is the argument that the "social responsibility" view is unpractical because it would require each of us to avert or alleviate large numbers of situations which we know about. One strand of this argument calls attention to the problem of setting limits to the individuals duties on the social responsibility view: must I sell my car and my house, live at subsistence level and devote all my surplus earnings and time to preventing so many people from "sleeping rough" in London, or to provide towards the relief of starvation in Africa? In what way do perils of these kinds differ materially from the accident victims or the person who jumps into the River Thames? A second strand of the argument is that the "social responsibility" view may lead to the inculcation of large numbers of people, *e.g.* all the members of a crowd who witness someone being beaten up by others. It is excesses of this nature, in the depth and breadth of the obligations imposed, which are seen as sufficient to condemn the "social responsibility" view as an unworkable moral or legal standard.

¹⁰ Suicide and attempted suicide are not criminal in this country (Suicide Act 1961), but remain criminal in some other jurisdictions.

¹¹ See the discussion by Glover, Chap.13.

A fifth argument draws strength from the principle of legality: it maintains that citizens are so unaccustomed to thinking in terms of legal duties to act (as distinct from the well-known prohibitions) that it is unfair to impose such burdens except in circumstances which are well-defined and well-publicised. Protagonists might add that few provisions on general liability for omissions attain these standards, and that the obligation to take reasonable steps to assist a person in peril is much too uncertain to meet these standards. The social consequence is likely to be that ignorance of the law is a frequent occurrence, which cannot be good either for society or for the individuals concerned. Wide conceptions of social responsibility must therefore be rejected as a basis for criminal legislation: the conventional view, with its few well-known and voluntarily assumed duties to others, is the preferable approach.

3. THE INDIVIDUALISM OF THE CONVENTIONAL VIEW DOUBTED

The arguments for the conventional view may appear strong and practical, but they depend on a narrow, individualistic conception of human life which should be rejected as a basis for morality and (although this raises further issues) as a basis for criminal liability. Let us look again at the arguments, in turn.

The first argument, based on individual autonomy and freedom, is altogether too pure. To the extent that the conventional view relies on "social fact" for some of its justifications, it is worth pointing out that rarely is individual autonomy promoted as a supreme value throughout a moral or legal system. For example, paternalistic considerations are taken to outweigh it when imposing a duty to wear a seat belt in the front seat of a car: this restricts individual liberty and self-determination, and it may be justified by reference to the known dangers of travelling without a seat-belt, combined with the relatively large benefit (in the social costs of health care) reaped from such a comparatively minor infringement of freedom of action. Systems of criminal law typically include a wide range of offences which impose duties to act, in relation to taxation, motoring and business activities. However, it is not necessary to turn "social fact" arguments against the conventional view, for its proclaimed principle of individual autonomy is itself unsatisfactory. If individual autonomy is truly a supreme value, then it requires social principles rather than this kind of isolationist individualism in order to secure its fulfilment. Individuals tend to place a high value on interpersonal contacts, relationships, mutual support and the fulfilment of obligations, and a society which values collective goals and collective goods may therefore provide a wider range of worthwhile opportunities for

individual development.¹² At the very least, then, there is no inherent logic in arguing from the ideal of individual autonomy to moral and legal principles which regard duties to other citizens *qua* fellow-citizens as *prima facie* objectionable and exceptional, for that neglects the importance of human interdependence to the realisation of individual autonomy. This is still a far cry from the utilitarian view, since that tends to aggregate people in its calculations and fails to respect each individual as an end in himself or herself. The counter-argument to the conventional view is thus that a duty to co-operate with or to assist others should not be ruled out *ab initio* by an asocial and falsely restricted view of individual autonomy. Moreover, the proposition is not that citizens should be permanently at the beck and call of one another, but that (at the very least) there is a strong case for going beyond the conventional view and, for example, creating a duty to assist a citizen whose life is in peril. This may not maximise the quantity of liberty left to individuals, but it increases the quality of social life.

The second and third arguments for the conventional view establish, however, that limits must be set to the obligations to others if the ideal of individual autonomy is not to be submerged beneath a welter of duties imposed on each person. The resolution of these conflicts of theory and practice is no easy matter, but the "social responsibility" view would at least start from the assumption that duties to others are not necessarily alien to individual autonomy, and would have to reconcile this with the desirability of individuals safeguarding their own interests too. This dilemma, which also underlies the fourth argument for the conventional view, demonstrates the need for principled debate about the extent of social co-operation necessary to realise individual autonomy. Those who advocate "social responsibility" bear the heavy burden of formulating defensible and workable criteria for the imposition of duties to act. Indeed, as the fifth argument showed, attention is also necessary to the promulgation of such rules. In so far as it is true that people do not consider that they have legal duties to assist others, any legislation to introduce such duties must be phrased as precisely as possible, and must be supported by a programme of education and information. These represent considerable challenges for the "social responsibility" view on criminal liability for omissions.

4. SOCIAL RESPONSIBILITY AND OMISSIONS

The social responsibility view of omissions liability grows out of a communitarian social philosophy which stresses the necessary

¹² See J. Raz, *The Morality of Freedom* (1987), at pp.206-207, and N. Lacey, *State Punishment* (1988) at pp.172-181.

interrelationship between individual behaviour and collective goods. Individuals need others, or the actions of others, for a wide variety of tasks which assist each one of us to maximise the pursuit of our personal goals. A community or society may be regarded as a network of relationships which support one another by direct and indirect means.¹³ But the community also consists of individuals, each having certain basic rights (such as the right to life). It is therefore strongly arguable that each individual life should be valued both intrinsically and for its contribution (or potential contribution) to the community. It follows that there is a good case for encouraging co-operation at the minimal level of the duty to assist persons in peril, so long as the assistance does not endanger the person rendering it, and a case may be made for reinforcing this duty by the criminal sanction.¹⁴ (There are arguments for other duties too.) The argument does not rest on a simple utilitarian calculation of benefits, ensuring a net saving of lives with comparatively little inconvenience to other members of society. Nor does it rest on the prediction that both respect for the law and the level of social co-operation will be improved if the law encourages morally desirable conduct,¹⁵ although those would be beneficial consequences. The foundation of the argument is that a level of social co-operation and social responsibility is both good and necessary for the realisation of individual autonomy. What this requires is a general moral and legal recognition of people's vital interests. "Physical integrity . . . is necessary for the accomplishment of any human aim, and so is an appropriate subject for a system of mutually restraining duties."^{15a} Each member of society is valued intrinsically, and the value of one citizen's life is generally greater than the value of another citizen's temporary freedom. Thus it is the element of emergency which heightens the social responsibility in "rescue" cases, and which focusses other people's vital interests into a "deliberative priority", and it is immediacy to *me* that generates *my* obligation.¹⁶ The concepts of immediacy and the opportunity of help (usually because of physical nearness) can thus be used to generate, and to limit the scope of, the duty of assistance to those in peril.¹⁷ The duty might well be subject to other limitations too. It should only arise in "easy rescue" cases, where the assistance is unlikely to endanger the safety of the person

¹³ Raz, *op. cit.*, Chaps. 10 and 15.

¹⁴ The arguments do not solely concern the criminal law, for there is also the question of a rescuer's right to claim compensation for any loss suffered in the rescue: see generally, T. Honoré, "Law, Morals and Rescue" in his *Making Law Bind* (1987).

¹⁵ *cf.* Honoré, *ibid.* at p.268.

^{15a} E. J. Weinreb, "The Case for a Duty to Rescue," (1980) 90 Yale L.J. 247, at p.288.

¹⁶ B. Williams, *Ethics and the Limits of Philosophy* (1985), p.186; *cf.* also p.181.

¹⁷ *Ibid.* p.186, discussing the usual philosophical counter-arguments to the use of these criteria.

present.¹⁸ And the duty to render assistance must give way to the individual's right to self-determination: if a person wishes to be left to die, respect for that person's autonomy should prevent any duty of assistance from arising.¹⁹

The "social responsibility" view provides arguments for reinforcing certain social obligations in matters of life and death. But the means of reinforcement still have to be decided: the law may provide the rescuer with a right to recover damages from the person rescued, it may go further and create a criminal offence of failing to make reasonable efforts to assist, or it may go further still and create a duty the breach of which renders the citizen liable for the result which occurs (*e.g.* the death of someone who drowns). These alternatives will be discussed below.²⁰ There is also the question of how extensive the range of duties reinforced by the criminal law should be. Few modern systems of law are as reluctant to criminalise omissions as the "conventional view" supposes, for there are duties in relation to the payment of tax as well as the duties in relation to children, and, even if it is fair to regard the many duties connected with shipping, hazardous activities and commercial enterprises as not giving rise to "pure" omissions liability, the many duties related to use of the roads are surely integral to social life. If we spread out the whole canvas, as it were, we see a great variety of duty and non-duty situations which seem to conform to no pattern. The conventional view appears to hold sway in certain spheres, notably the absence of general duties to assist others in peril and to assist in law enforcement. But these are the very spheres in which the "social responsibility" view must prevail if it is to have the kind of application that its theoretical underpinnings require. Before going on to consider some specific applications of the criminal sanction, some remarks must be made about the analytical distinction between acts and omissions.

5. ACTS, OMISSIONS AND LANGUAGE

The omissions typically penalised in criminal law have a variety of contexts, and it is useful to distinguish three types—first, offences of failing to do certain required acts; secondly, hybrid act-omission offences; thirdly, offences phrased in terms of acts, for which omissions may suffice.

Modern systems of criminal law contain large numbers of offences of failure to do certain acts in the required circumstances. Many of

¹⁸ See the discussion of capacity in section 7, below.

¹⁹ There may be considerable practical difficulties in ascertaining whether a person "wishes to die": see the general discussion by Glover, *op. cit.*, Chaps. 13 and 14, and the discussion by Glanville Williams, *Textbook of Criminal Law* (2nd ed.), pp.262-268, of omissions and self-determination.

²⁰ Section 8, below.

these offences are part of the mechanism for controlling industrial, commercial and financial activities. Some of them are in a hybrid form which penalises the doing of an act unless accompanied by some other act or condition (e.g. driving without a licence or driving without due care and attention). Wherever the law requires a mistake to have been reasonable if it is to excuse, this also involves liability for an omission in the sense that a person would thus be convicted for failing to make appropriate enquiries before engaging in certain conduct.

The most important group of omissions offences here is the third. The key question is whether there is some analytical or other distinction which makes it appropriate to hold that certain offences cannot be committed by omission. In searching for an answer, there are conflicts to be resolved between ordinary language, statutory interpretation and legal principle. Can offences which penalise the damaging of property or the killing of another be fulfilled by omissions?

Clearly there must be a *duty* in existence before it is proper even to speak of an omission, so we will assume that in the given situation a duty has been established.²¹ How does the requirement of *voluntary* conduct apply to omissions? It may be suggested that, just as an action is not "voluntary" if it consists of an unconscious or uncontrollable movement, a failure to act when required (i.e. an omission) is not "voluntary" if the duty-bearer is incapable of doing what is required.²² This means physical incapacity, and does not rule out a wider defence of impossibility of compliance in appropriate cases.²³ Once it is established that there has been a voluntary omission to perform a duty, the next question is whether it can be said to have *caused* the result. There is considerable uncertainty over the relationship between causation and omissions.²⁴ If we say that an omission may only be regarded as having a result if that result followed the non-performance of a duty, the criterion of causation might appear to be submerged within the duty concept. Applied to existing English law, for example, it might be said that A caused the death of his child by making no effort to rescue him from drowning (in circumstances where that was possible), whereas B did not cause the death of a stranger by making no effort to rescue him (where

²¹ See section 6, below.

²² See H. L. A. Hart, *Punishment and Responsibility* (1968), pp.106 and 255-256.

²³ See section 7, below.

²⁴ See the discussions by E. Mack, "Bad Samaritanism and the Causation of Harm" (1980) 9 *Phil. and Pub. Affairs* 230; Feinberg, *op. cit.*, *supra*, n. 1, pp.165-185; H. L. A. Hart and A. M. Honoré, *Causation in the Law* (2nd ed., 1985), pp.127-128 and *passim*; Helen Beynon, "Causation, Omissions and Complicity" [1987] *Crim.L.R.* 539. And see now A. Leavens, "A Causation Approach to Omissions" (1988) 76 *Cal.L.R.* 547, for the argument that causation is preferable to duty as the criterion for omissions liability.

rescue was possible). On this view, both the duty relationship and the causal relationship are absent in the case of the drowning stranger. If one wishes to avoid this approach, then one must accept that the duty was present in the child case and not in the stranger case, and seek a concept of causation which assimilates the two cases. At the same time, this concept must avoid regarding all non-acting as a cause of all events or results which could have been averted by acting—otherwise, I could be said to cause people to sleep rough in London each night (since by selling my share of the house and car and devoting the proceeds to the relief of this problem I could alleviate it), and we would all be responsible for causing myriad misfortunes each day. In this way the argument returns to the duty-concept as the primary criterion, both because it establishes moral (if not strictly causal) responsibility and because it delineates in time and space the number of people who may be said to have omitted—although that may still be a large number on some occasions.²⁵ In other words, so long as we are satisfied that under certain circumstances an act and an omission are morally equivalent, then under those circumstances no separate causal enquiry is necessary, for a sufficiently close link exists.²⁶ Two subsidiary points about causation should also be made. First, those who regard the general “but for” standard of causation as applicable will find that it is much more demanding in omissions cases than in relation to acts, if the court must be satisfied beyond reasonable doubt that the result would not have occurred but for this defendant’s omission.²⁷ Secondly, the many offences of omission which take the form “failing to do x” make no reference to results and therefore side-step all problems of causation; but would “conventionalists” think them morally less objectionable?

Once we are satisfied that D’s voluntary omission “caused” the result, is there likely to be any difficulty over the fault element? Much depends on the requirement in the offence. If the offence requires intention, there may be no difficulty in holding that a person who knowingly fails to feed a young child intends to cause its death, but it may be awkward to describe a person who accidentally causes a fire and then knowingly fails to take any steps to extinguish it as intending to damage or destroy property. The latter example may involve a stretching of language, since the idea of intending a consequence is commonly linked to purposive action and is not easily

²⁵ See n. 7, above.

²⁶ This is the approach taken in the draft Criminal Code Bill, clause 17(1)(b): Law Commission, *A Criminal Code for England and Wales* (Law Com. No. 177, 1989). Compare the support by Feinberg, *op. cit. supra*, n. 1, pp.165–171 with F. M. Kamm, “Harming, Not Aiding and Positive Rights,” (1986) 15 *Phil. and Pub. Affairs* 3.

²⁷ *cf.* Glanville Williams, (1987) 7 *Legal Studies* at pp.106–107. The draft Criminal Code Bill (above, note 26) requires only an omission to do an act “which might prevent” the occurrence of the result: clause 17(1)(b).

associated with a deliberate omission. Yet it would be perfectly accurate to describe the person who knowingly allows the fire to spread as having awareness that the consequence (*i.e.* damage or destruction of property) was about to occur. Since "knowingly" and "intentionally" stand on the same level of culpability, as do "recklessness" and "reckless knowledge" at a lower level, one might argue that the slight awkwardness about "intention" should not be accorded any practical consequences in the law.

This, however, brings us to the major stumbling block. Although a strong case can be made for regarding omissions as analytically similar to (although not identical with) acts in terms of voluntariness, fault, and perhaps causation, there remains the problem of language. Here, as elsewhere, linguistic conventions and the principled approach are in conflict. The parent who deliberately fails to feed the young child causes its death, but can the parent be said to "kill" the child? The Law Commission has now decided that "kill" might be thought linguistically inappropriate in these cases and has re-drafted the homicide provisions of the draft Criminal Code Bill in terms of "causing death," so as to ensure that murder and manslaughter by omission remain offences.^{27a} This must be seen in the context of the Law Commission's general approach to omissions: the first draft code contained an express provision tending to limit omissions liability to established "duty-situations" and to offences which specify that they may be committed by omissions, but this was criticised as an unwarranted narrowing of the law since the courts have construed some offences as applying to omissions despite the absence of any "specifying" words.²⁸ The Law Commission accepts that there has been no thorough review of offences for which omissions should and should not be sufficient for conviction, and does not wish the Code to effect a narrowing of the present position. Its solution is to re-draft some offences (most notably, criminal damage) in terms of "causing" the result, in order both here and generally "to leave fully open to the courts the possibility of so construing the relevant (statutory) provisions as to impose liability for omissions."^{28a}

If the Code is unable to give any guidance, the issue will remain largely one of judicial interpretation. Linguistic convention and moral/social principles will continue their uneasy co-existence. One difficulty is that our language is replete with active verbs, even though there are situations in which one can bring about a result by

^{27a} Law Com. No. 177 (above, note 26), clauses 54 and 55, with commentary in volume 2, para. 7.13.

²⁸ Glanville Williams, "What should the Code do about omissions?" (1987) 7 *Legal Studies* 92, criticising *Codification of the Criminal Law: a Report to the Law Commission* (Law Com. No. 143, 1985), clause 20 and paras. 7.6-7.17.

^{28a} Law Com. No. 177 (above, note 26), para. 7.13.

physically doing nothing. "Usage still draws the line short of causing things to happen by doing nothing except letting events take their course without intervention."²⁹ Language leaves other conundrums, too. Whether we term certain events "acts" or "omissions" may be both flexible in practice and virtually insoluble in theory: for example, does a hospital nurse who decides not to replace an empty bag for a drip feed make an omission, whilst a nurse who switches off a ventilator commits an act? It would seem wrong that criminal liability or non-liability should turn on such fine points, which seem incapable of reflecting any substantial moral distinctions in a context where the preservation of life is generally paramount. However, judicial decisions in the medical sphere have shown some attachment to a distinction between allowing a patient to die and causing a patient's death.³⁰ The attraction of the supposed distinction is that it enables a court to exonerate a parent or doctor who is thought to have behaved justifiably in the circumstances by allowing the patient to die, without explicitly confronting the issue of justification. The distinction may, as Kennedy remarks, be regarded as "important as a social precept, while the desired end is accomplished."³¹ Yet the duty relationship is clear in those cases, and on normal principles both moral and legal responsibility would be established. The proper solution is not to warp the concepts of omission, duty, knowledge and causation, but to provide for such cases to be determined on new principles of justification. This would require the courts to be explicit about the grounds for exonerating doctors or nurses, rather than concealing the reasons behind the act/omission distinction.

In spheres unaffected by medical dilemmas, the courts have not found a consistent approach to conflicts between linguistic convention and general principle. Can a landowner be said to "cause polluting matter to enter a stream" by failing to notice that a crack had appeared in a settling tank, through which the pollutant escaped? Since this was held to be an offence of strict liability, the key question was whether the term "cause" embraces omissions. The Divisional Court said no, but there are other decisions in which "causing" has been held to cover omissions.³² Again, the offence of harassment of a residential occupier requires "an act calculated to

²⁹ Feinberg, *op. cit.*, *supra*, n. 1, p.180.

³⁰ e.g. *Re B (a Minor)* [1981] 1 W.L.R. 1421, and *Arthur* (1981) unreported, discussed by Helen Beynon, "Doctors as Murderers" [1982] *Crim.L.R.* 17; by P. D. G. Skegg, *Law, Ethics and Medicine* (Oxford, 1984) pp.128-131, 142 and 169-179; and by M. J. Gunn and J. C. Smith, "Arthur's Case and the Right to Life of a Down's Syndrome Child" [1985] *Crim.L.R.* 705, criticised by Ian M. Kennedy, *Treat me Right* (Oxford, 1988), pp.167-174.

³¹ Kennedy, *ibid.* p.169.

³² *Price v. Cromack* [1975] 1 W.L.R. 988. This case, and others cited in this paragraph, are discussed by Glanville Williams in "What should the Code do about omissions?" (1987) 7 *Legal Studies* 92.

interfere with the peace or comfort of the residential occupier," and the courts seem to have held in different cases that this does and that it does not cover an omission.³³ At one level it could be argued that where a statute requires "an act" this clearly excludes a mere omission; but, at the level of general principle, it could be said that the criminal law should generally ensure that acts and omissions (where there is a duty) are accorded equivalent treatment. Two reasons might be given for taking this approach. One would be the context of the offence and the mischief at which it is aimed: thus, it would hardly be justifiable to penalise landlords who harass tenants intentionally by acts of interference whilst not penalising those who harass tenants intentionally by withholding services or other entitlements from them. The second and more general reason would be that acts and omissions are morally on a similar level and should therefore be accorded equal treatment by the law unless a reason to the contrary appears. This proposition draws strength from the social responsibility view, and should not be set asunder by the accidents of linguistic usage or by conventions in drafting. It has been said that it is often a technicality of drafting as to whether an offence is framed in terms of omission or commission,³⁴ and there is at least one recent instance of a statute being drafted in terms which refer only to acts or positive conduct when the intention was to encompass omissions.³⁵ The result is that where statutes are equivocal or act-directed, the courts exercise a choice between the two interpretations, holding themselves to be limited by ordinary language in certain cases whilst adopting a broader approach in cases where, perhaps, the defendant is perceived as clearly deserving of punishment.³⁶ The argument here is that there should be recognition of a principle that criminal statutes should be interpreted so as to apply to omissions as well as to acts, where a relevant duty can be established, unless the context indicates otherwise. It would be unusual to have a strong principle which could override the wording of an Act in some circumstances,³⁷ but it would be easier to defend than allowing the law to continue its erratic course based on "ordinary language."

³³ *Yuthiwattana* (1984) 80 Cr.App.R. 55; cf. *Ahmad* (1987) 84 Cr.App.R. 64 on which see Law Com. No. 177, vol. 2, para. 8.53..

³⁴ Law Com. No. 89, *The Mental Element in Crime* (1978), p.39.

³⁵ See Criminal Attempts Act 1981, s.1(1), discussed by I. Dennis [1982] Crim.L.R. 7-8.

³⁶ Compare *Ahmad*, above and *Price v. Cromack* [1975] 1 W.L.R. 988, with *Gibbins and Proctor* (1918) 13 Cr.App.R. 134, and possibly *Green v. Cross* (1910) 103 L.T. 379 and *Miller* (below n. 37).

³⁷ Leading works do, however, accept that "principles derived from legal policy" have significant weight in the process of statutory construction: see F.A.R. Bennion, *Statutory Interpretation* (1984), pp.285-295, and *Cross on Statutory Interpretation* (2nd ed., J. Bell and Sir G. Engle, 1987), Chap.2. Cf. the strangely worded section 2.01(3)(b) of the Model Penal Code, commented upon by P. Robinson, 1 *Criminal Law Defenses* (1984) p.444.

6. DUTY REQUIREMENTS

We turn now to some of the kinds of situation in which a duty requirement might be imposed, thereby giving rise to criminal liability for an omission. Some five groups of cases will be discussed, starting with those in which English law is relatively clear and moving towards more disputable cases.

(i) *Prior Dangerous Act*

The proposition here is that a person who inadvertently creates a potentially harmful situation by an act should have a duty to take steps to avert or minimise the effects of that act. An omission to do so should be the basis of criminal liability for the harm which results, so long as the defendant had the required fault element. The legally relevant time-frame is extended to include the earlier act. The facts of *Miller* (1983) illustrate this. When dozing in a bed at a house where he was squatting, D accidentally started the bed burning with his cigarette. He left the bed smouldering and moved to another room. The fire spread and engulfed the house. D admitted that he knew he had set the bed on fire: all he said was that he had nothing with which to put it out. He was convicted of recklessly damaging the house by fire. One way of explaining the decision, affirmed by the House of Lords, is to hold that starting the fire was D's act, that this act continued as the bed burned, and that when D realised this and knew that the fire might spread, this amounted to recklessness which combined with his continuing act so as to constitute the crime.³⁸ The decision may also be authority for the broader proposition that whenever a person creates the risk of harm by an act and subsequently realises this risk, there is a duty to take steps to avert or minimise that risk.³⁹ This may require personal action by D, or the summoning of the emergency services, or both. Where D created the risk intentionally in the first place there is clearly a duty to prevent it from materialising, and a mere renunciation of intention after the original act but before the prohibited result is insufficient to relieve D of liability.⁴⁰ The principal concern here, however, is where D was originally unaware of the risk or effect of his conduct. Where D inadvertently drove his car on to a policeman's foot and then deliberately refrained from moving it, this was held to be a continuing act rather than an act followed by an omission.⁴¹ Where D acquires property innocently and then, on discovering that it belongs to

³⁸ [1983] 2 A.C. 161; this approach was urged by Professor Glanville Williams at [1982] Crim.L.R. 773.

³⁹ The approach urged by Professor J. C. Smith at [1982] Crim.L.R. 527, and adopted in clause 23 of the draft Criminal Code Bill (Law Com. No. 177, above, note 26).

⁴⁰ On an analogy with *Becerra and Cooper* (1975) 62 Cr.App.R. 212.

⁴¹ *Fagan v. Metropolitan Police Commissioner* [1968] 1 Q.B. 439.

another, keeps it, English law makes D liable for theft.⁴² In *Miller*, as in these other two cases, it is the authorship of the original risk-creating act which justifies the imposition of the duty upon D. The passer-by who saw the fire would not, on this reasoning, have a duty to summon the fire brigade. The law is justified in imposing this duty on D because of his causal responsibility for the creation of the risk, because D is present at the time and (presumably) able to take action, and because D would be readily identifiable in such a situation as the person with the duty. On that basis this head of omissions liability might be brought within the conventional view; it would certainly be easy to bring it within the social responsibility view.

(ii) Relationship Duties

Section 1 of the Children and Young Persons Act 1933 creates an offence in each parent of wilfully neglecting a child in a manner likely to cause unnecessary suffering or injury to health. It would apply if the parent withholds food from the child, fails to call a doctor to the child when necessary, fails to rescue the child from shallow water, and so on. The key question is whether the duty imposed by this statutory provision applies more widely, so as to render the parent liable for more serious offences as well. The offence under the 1933 Act now carries a maximum sentence of 10 years' imprisonment.⁴³ Could it be said, for example, that a parent who fails to call medical attention to a child which subsequently dies should be liable for a homicide offence rather than simply for wilful neglect?

One possible objection is that this would be oppressive: Parliament has actively considered the maximum penalty for this kind of conduct and has set it at 10 years' imprisonment, and it would be unfair to use the offence as a basis for conviction of a more serious offence with a higher maximum penalty. This, however, begs the question whether the raising of the maximum penalty to 10 years was at all related to the possibility of a homicide conviction, where death ensues, and this seems unlikely.

A second objection, which will be felt throughout this article, arises from the offence of manslaughter at common law. In English law, manslaughter is a constructive crime: in other words, it constructs liability for a serious result upon the foundation of a less serious wrong, without requiring that D realised the risk of the serious result. In cases of manslaughter by omission the courts have pursued a rather unsteady course—in the case of *Lowe* (1973),⁴⁴ for example, denying that commission of the offence of wilful neglect was

⁴² Theft Act 1968, s.3(1).

⁴³ Criminal Justice Act 1988, s.45.

⁴⁴ Above, n. 3 and accompanying text.

necessarily an "unlawful act" for the purposes of manslaughter, whilst in *Stone and Dobinson* (1977)⁴⁵ maintaining that a duty towards a relative (*a fortiori* towards one's own dependent child) can form the basis for manslaughter conviction. The point to be made here is that this second objection is more an objection against the law of manslaughter and against constructive crime than against omissions liability based on relationship duties. The complaint, in other words, is that the courts occasionally make too much out of such a duty, and not that there is no justification for imposing the duty.

However, the objection just considered applies to cases where the parent(s) did not foresee that death or serious injury would be the result of their inaction. Would it be unfair to treat as liable for murder parents who failed to feed their child, causing its death, in full knowledge that death or really serious injury would result? It is thought that any objection based on lack of fair notice to citizens would be weak here: although it is plainly desirable that the law should announce such duties clearly, few citizens could claim to be taken by surprise if the law recognises a duty upon a parent to feed a dependent child. It is as much "common sense" as any legal provision, and is readily justified by the dependence of young children on their parents and on the known perils if proper care and food are not given. In *Gibbins and Proctor* (1918),⁴⁶ the courts regarded the parent's duty towards a young child as so self-evident as not to require analysis or authority. This decision was surely correct, in accepting that a conviction for murder by omission is perfectly proper so long as the parent is shown to have had the required mental element. It follows that it is hardly right to regard the offence of wilful neglect as the most serious offence that may be charged against a parent who neglects a child.

The relationship of parent to child is the strongest case for a general duty. How many other relationships should be treated in the same way is a matter for debate. A duty towards one's spouse might appear uncontroversial, but a duty towards one's parents begins to reach the boundaries of practicality and desirability for legal obligation. It is one thing to maintain that a person has a legal duty towards a parent who lives in the same house; it is another thing to argue that a person has a legal duty towards a parent who lives alone in the next street, or the next town, or many miles away. Thus with parents, as indeed with husband and wife (who may also be living apart), there

⁴⁵ [1977] Q.B. 354, discussed below at p.443, and applied to a police duty towards persons in their custody in *R. v. West London Coroner, ex p. Gray* [1987] 2 All E.R. 129.

⁴⁶ (1918) 13 Cr.App.R. 134.

should be a proximity requirement of living in the same household⁴⁷ before a legal duty is imposed.

The pragmatism of the "same household" limitation may be accepted, but it remains to decide what family relationships should be covered. If the duty were to extend to any member of the family living in the household, this would go against nineteenth century cases like *Smith* (1826)⁴⁸ which denied any duty towards a mentally disturbed adult brother and *Shepherd* (1862)⁴⁹ which denied any duty toward a daughter aged 18, but would tend to support the more modern cases such as *Chattaway* (1922)⁵⁰ which imposed a duty towards a daughter aged 25 and *Stone and Dobinson* (1977)⁵¹ which accepted a duty towards an elderly sister. Indeed, one might go further and inquire whether the family relationship should be accorded such significance, rather than simply membership of the same household. Would this mean that the house-owner whose lodger becomes ill has no duty to call for medical assistance? Would it also confirm the acquittal in the famous American case of *People v. Beardsley* (1907),⁵² where a woman who spent the weekend with D took an overdose of tablets and D, knowing that she was in a serious condition, simply arranged for her to be carried to another apartment, where she subsequently died? These are difficult cases, and they raise the question whether there is any defensible line which can be drawn short of a duty of common humanity owed to any person who is seen or known to be in need of urgent assistance—a form of legally-enforced social responsibility which might require anyone to spend time and money in helping any person who came destitute to his or her doorstep, and which would surely go too far beyond prevailing notions of legal obligation.

The "same household" criterion should be accepted as a pragmatic starting point, even though it is itself somewhat vague in its application. Its advantages are that it covers *de facto* relationships as well as those by marriage—for *de facto* relationships can be no less permanent and reciprocal—and that it extends to brothers, sisters, aunts and uncles in circumstances where their physical proximity to D is established. As with the cases of "prior dangerous act," it is the elements of presence and special relationship to the victims or event which indicate the citizen(s) with the duty. As it stands, the "member

⁴⁷ This was the criterion of restriction used in the former draft Criminal Code (Law Com. No. 143, clause 20), but such detailed provisions are excluded from the new draft Criminal Code Bill on the ground that they are too controversial and must remain for development at common law (Law Com. No. 177, vol. 2, para. 7.12); cf. Glanville Williams in (1987) 7 *Legal Studies* 101–103.

⁴⁸ (1826) 2 C. & P. 449.

⁴⁹ (1862) 9 Cox C.C. 123.

⁵⁰ (1922) 17 Cr.App.R. 7.

⁵¹ [1977] Q.B. 354.

⁵² (1907) 113 N.W. 1128 (Michigan).

of the same household" criterion would impose no obligation on Mr. Beardsley towards his weekend paramour, or on the host towards the dinner guest or the "friend" staying overnight. An exception should probably be made for a tenant, lodger or other paying guest. This would bring further borderline problems. However, some persons lying outside the "same household" limitation might come within one of the other categories, such as the one to be considered next.

(iii) *Undertaken Duties*

Should a duty be held to exist for the purposes of criminal liability if D has assumed a responsibility or undertaken a contractual duty, the non-fulfilment of which leads to V suffering harm? The question brings together a number of slightly different situations. Perhaps the clearest case is where D has entered into a contract with V to do certain things for V, and a breach of this contract results in V suffering death or injury. A less clear case is where D's contract is with a third party, such as an employer, who pays D to do certain acts, and as a result of non-performance of this contract V suffers harm: it is a general principle of contract that a third party has no enforceable right under a contract between two others, although in situations of this kind D might have a duty of care in tort towards persons such as V. The most doubtful of the cases is where D allows V to occupy a room in the house free of charge, or where D offers help to V in the form of taking food to her or washing her. The English case of *Stone and Dobinson* (1977)⁵³ raised these issues poignantly. S and D allowed S's sister to stay with them as a lodger. The sister developed anorexia nervosa, stayed in her room and became very ill. S and D made some ineffectual attempts to find her doctor. The sister subsequently died. The Court of Appeal upheld the defendants' convictions for manslaughter. It was held that S had a duty because the sister was occupying a room in his house and was a blood relative. D was held to have "undertaken the duty of trying to wash her, of taking such food to her as she required, . . ." So it seems that the Court of Appeal held that by giving assistance to S's sister D undertook to continue this assistance, or at least to notify the medical or social services if she ceased to do so. The implication is that if she had done nothing she would have had no duty of this kind (although she may have had a duty towards the sister as a member of the household, a point which is undecided). It is unclear whether D would have been held to have undertaken this kind of duty if the sister had been living alone in the next house, and as she fell ill D had started to take food to her, etc.

⁵³ [1977] Q.B. 354.

Many of the cases on undertaken duties involve the law of manslaughter, which is a constructive crime, and it might be clearer if the issue is approached through the law of murder. Take the facts of two well-known cases. In *Instan* (1893)⁵⁴ D lived at her elderly aunt's house, the aunt giving her money to pay for food for them both. The aunt became ill and helpless, but D failed to summon medical help or to give her food and the aunt died. In *Pittwood* (1902)⁵⁵ D was employed as a gatekeeper at a railway crossing. One day he neglected his duty and a person who was using the crossing was killed by a train. In *Pittwood* the judge stated that the decision was "governed by" *Instan*, without referring to the fact that in *Instan* D's contractual duty was owed to the victim whereas in *Pittwood* it was owed to the employer rather than to the victim. The assumption here, as in most of the English cases, was that a contractual duty *per se* is a sufficient basis for criminal liability for an omission, no matter to whom it is owed. If we assume that in both these cases the defendant refrained from fulfilling the duty with the purpose of causing the death of the victim, should there be a conviction for murder? Are these cases like *Gibbins and Proctor*,⁵⁶ where the parent deliberately failed to ensure that the child was fed and was convicted of murder? There is a difference: the parent's duty towards a dependent child is well-known and indisputable, whereas the relevance of the other duties to the criminal law is less certain and less clear.

What conditions would have to be fulfilled if these contractual duties were to be admitted as sufficient to ground criminal liability? First, the lack of fair warning to citizens would need to be remedied. The law would need to state clearly that any contractual duty which is then breached may be accepted as a basis for omissions liability in criminal law. That, however, is a matter of procedural fairness. The substantive issue is whether, secondly, it is right to place such great significance upon a mere contractual duty. Can this kind of "constructive" reasoning be justified? One strand of justification which would differentiate contractual situations from a general obligation arising from "common humanity" is that D is present or able to be present, and has an identifiable role in preventing the occurrence of harm. In other words, at least the contract serves to distinguish D from casual callers and passers-by. A further justification might be that D has both the capacity and the authority to prevent the harm, and indeed may be the only person in this position. This was probably true in *Pittwood*, where D was better able to prevent the harm than any passer-by, who indeed might commit trespass by

⁵⁴ [1893] 1 Q.B. 450.

⁵⁵ (1902) 19 T.L.R. 37.

⁵⁶ (1918) 13 Cr.App.R. 134.

entering on to railway property in order to close the crossing gates. Thirdly, the essence of the duty in these cases is closely linked to the prevention of harm. In *Pittwood* this was the very point of employing D. In *Instan* the duty to obtain and prepare food for the aunt was clearly aimed at her continued well-being. In both types of case the dire consequences of failing to fulfil the duty were obvious: this is not to suggest that the mental element for murder does not have to be proved, but rather to make the point that the duty itself should have been known to be a serious one, different entirely from a contract to do the aunt's washing or to supply the railway with paint. Thus undertakings related to welfare and safety would be a more appropriate basis for criminal liability than contracts or undertakings generally—a kind of "scope of risk" principle. The question should not be focused on the existence of a binding contract, but rather on whether the defendant has assumed responsibility for the health and welfare of the victim. A fourth argument, which relates specifically to the "assumed duty" cases like *Dobinson*⁵⁷ but also to the contractual cases, is that there may be an analogy with estoppel. If D had not acted as she did in assisting V, then V might more quickly have come to the notice of others. If D had not accepted V into the house, V would have had the opportunity to find other lodgings or to seek help from the social services. It may therefore be possible to say, in some cases, that by the acts of kindness D has contributed to concealing V's condition of dependency from those who might otherwise make provision for V. Similarly in *Instan*, if D had not agreed to live with her aunt and obtain the food, the aunt might have made other arrangements for her own care.

In suggesting these four possible reasons for regarding voluntarily undertaken welfare-orientated duties as sufficient to form the basis of criminal liability, it has been argued that if an omission to perform such a duty is combined with an intention to cause death or serious injury there would be a *prima facie* case of murder. No reference has been made to the law of manslaughter, and there might be a separate case for creating a specific offence of recklessly causing harm by failing to fulfil an undertaken duty, with a commensurate maximum penalty. The arguments above owe more to the social responsibility view than to the conventional view, but it may be a manifestation of the confusion behind the conventional view that its adherents have long accepted the breach of a contractual duty as a sufficient ground for omissions liability without examining its claims.

(iv) *Duties of Ownership or Control of Property*

Should the owner of a house or a car bear a special responsibility for actions committed in his or her presence and on or with that

⁵⁷ Above, n. 53 and accompanying text.

property? English law has generally answered this question in the affirmative, but the way in which it has imposed liability on the owner is rather different from the approaches hitherto considered. The approach is to convict the property owner as an accomplice to the offence committed by another in his or her presence and on or with the property. Thus in *Tuck v. Robson* (1971)⁵⁸ D was a publican who failed to intervene to prevent customers on his premises from drinking after hours. He was convicted of aiding and abetting their offence. In *DuCros v. Lambourne* (1907)⁵⁹ D was the owner of and a passenger in a car being driven by another, and failed to say or do anything to dissuade the driver from committing the offences she was committing. He was convicted of aiding and abetting her offences. The offences in both these cases were "victimless" crimes, and therefore the legal issue is slightly different from that considered in the previous paragraphs.⁶⁰ D is not being held liable for causing a result, but is being held liable as a party to an offence which he or she took no steps to prevent. In effect, a property owner is being co-opted as a police officer in relation to his or her own property, or at least being given extra duties to help in preventing crime. Is this justified?

In a sense this might appear to be antithetical to any right of privacy. As a property owner D is being required to carry out actions in the privacy of the home or the car. However, this privacy argument cannot be pursued far in the criminal law, when the safety of others or their property is an issue. The major criminal offences may be committed on private property no less than in public places, and some criminal codes, for example, go so far as to penalise a failure to guard a dangerous excavation on one's land.⁶¹ The English law of complicity reaches further, grounding criminal liability in property ownership coupled with a failure of the property owner to prevent or dissuade other persons from committing an offence. Nor can it be said, as in the contractual cases in the previous section, that the owner has voluntarily assumed responsibility for the acts of anyone he allows on his property; as a matter of fact, this is rarely likely to be true. The strongest submission is that the ownership of

⁵⁸ [1970] 1 W.L.R. 741.

⁵⁹ [1907] 1 K.B. 40.

⁶⁰ *cf.* the discussion by Devlin J., in *N.C.B. v. Gamble* [1959] 1 Q.B. 11, of the duty of a shopkeeper not to sell an article if he or she knows that the purchaser intends to use it in a certain crime. The doctrine seems to be confined to property, not persons, under one's "control," and so the employer who declined to instruct his employees to cease rioting was not liable for riot in *Atkinson* (1869) 11 Cox C.C. 332.

⁶¹ Canadian Criminal Code, s.242, discussed in Law Reform Commission of Canada, Working Paper 46, *Omissions, Negligence and Endangering* (1985). See also P. Robinson, 1 *Criminal Law Defenses* p.446 (1984). On similar situations of duty and omissions liability in tort, see Lord Goff in *Smith v. Littlewoods Organisation Ltd.* [1987] A.C. 241 at pp.273-274 and B. S. Markesinis, *ante*, p.104.

property carries certain responsibilities, and that the interest in privacy should bring a reciprocal responsibility for some minimal law enforcement in the private sphere. It is doubtful whether this is really enough to do more than expose the "ownership" category as a pragmatic compromise by those wedded to the "conventional view" who see that its individualism is not always appropriate; some conventionalists may wish to dispense with this category altogether.

(v) *Citizenship Duties*

If the English decisions which impose a duty on property-owners stem from a realisation of the shortcomings of the "conventional view" on omissions, then they may be seen as a rather subdued recognition of the need to impose certain duties on citizens as members of a community. A kind of citizenship duty to assist others seems to be well accepted as part of the international law of the sea: a ship is obliged to render assistance to another ship in peril,⁶² and this naturally takes priority over the ship's general liberty to pursue its lawful voyage. The case for general citizenship duties has been put by Bentham, Mill and others since,⁶³ but is it essentially a utilitarian argument or does it comport with an acceptable version of liberalism? The questions are at their most poignant in relation to the duty of intervening to prevent harm or to prevent crime. Should a person who comes across a man raping a woman have a duty to take steps towards law enforcement, or should that person be free to walk away or even to stay and watch the commission of the offence?⁶⁴ Should a person who comes across a youngster hitting an old woman in the street and tugging at her handbag be free to pass by on the other side? Should a person who sees another fall into a river be free to walk on, without taking any steps towards a possible rescue?

The analysis should involve capacity, liberty and social obligation. Limitations on individual capacity should be taken seriously: the law should not require more of a person than can be given in the situation which obtains. Any duty should be so worded as to make it clear that the person is obliged only to take such steps as are reasonable in the circumstances and which lie within his or her power.⁶⁵ This is closely connected to the point about liberty, for there is surely insufficient justification for obliging a person to place herself

⁶² International Convention for the Safety of Life at Sea, 1929; Merchant Shipping Act 1894, s.422.

⁶³ e.g. J. S. Mill, *On Liberty*, Introduction; F. Bohlen, (1908) 56 U.Pa.L.R. 215, 316.

⁶⁴ cf. *Clarkson* [1971] 1 W.L.R. 1402.

⁶⁵ Most legal systems which impose citizenship duties include a qualification such as "a person who is capable of preventing, without personal risk . . ."; a similar limitation is found in the draft Criminal Code's provision on supervening fault, ". . . he fails to do what he can reasonably be expected to do" (Law Com. No. 177, clause 23(b)). See also the defence of impossibility, below, section 7.

or himself in danger. The law should stop at that. The reference to the surrounding circumstances is not concerned only with the dangers of fire, deep water, etc.; it also covers the dangers thought to be present in the area where the peril arises, dangers which may have been great on the robber-infested road to Jericho at the time of the "good Samaritan" incident and which may be considerable nowadays in parts of New York, London and other major cities.

Even without those risks it is an incursion on a person's freedom if there is to be a requirement to call the police, or to try to intervene physically (if that can be done without risk to the intervener). But this is where the argument must move on to the relationship between liberty and social obligation. On the "social responsibility" view there are arguments for imposing certain obligations on individuals as citizens. These arguments are not founded on a simple benefit/burden calculation, that whoever takes the benefits of living in a certain society must in fairness expect to have to submit to its burdens. Such an approach leaves many unanswered questions about the quantum of burden which must be borne in order to have access to certain benefits. The reasoning is rather that the imposition of certain minimal duties shows a concern for the rights of other members of the community and therefore for the community itself, and so tends to promote the maximisation of liberty. However, the idea of maximum liberty relates to each individual as a member of the community rather than to each individual in isolation. Thus an apparent diminution of the freedom of one citizen (by requiring that citizen to take reasonable steps to prevent a harm or to call the emergency services) may be justifiable by reference to the augmentation of the freedom of another citizen (who is under attack or otherwise in danger), and such justification is in the context of striving towards a community in which the liberty of each and all can be maximised.

Once the case for imposing some citizenship duties is made out, there remain difficult questions about the proper extent and scope of these duties. Duties towards the collective good such as the duty to pay taxes may be established fairly easily, but duties towards other individuals who are strangers require further justification. It is thought that the arguments above establish the case for a duty to take steps to save other citizens in peril. It is true that this duty must be hedged about with qualifications, so as to ensure that the obligations are neither too dangerous nor too onerous for the citizen upon whom they fall. Article 63 of the French *Code Pénal*, for example, penalises (i) a person who voluntarily neglects to prevent a serious crime or offence against the person, if that crime could be prevented without personal risk or risk to others, and (ii) a person who voluntarily neglects to give, to a person in peril, assistance which could be

rendered without personal risk or risk to others. This article was added to the *Code Pénal* in 1945, after many years of debate between those who supported the Napoleonic code's policy of leaving such duties to the conscience of each citizen, and those who pointed with regret to the growing neglect of these duties in practice. "The excesses of individualism were met with arguments from 'social solidarity' and with a call for the legislature to intervene to criminalise, in the most gross cases, the systematic egotism of an increasing number of citizens."⁶⁶ It will be noticed that both limbs of article 63 incorporate safeguards against requiring too much, thereby dealing with some of Lord Macaulay's oft-cited reservations about offences of this kind.⁶⁷

Further questions arise as to whether there should be a general duty to take steps to prevent crime or to notify the police about crimes: the French law refers to "serious crimes," and the question is whether there should be a duty on a citizen who sees another shopper stealing goods from a supermarket, and also whether there should be an obligation in relation to the so-called victimless crimes like drug dealing, driving with excess alcohol, and so forth. Indeed, the offence of driving with excess alcohol is supported by an offence of refusing to supply a specimen of breath when lawfully requested by a police officer, an offence of omission which requires a citizen to assist in the enforcement of the law against herself or himself. It is not difficult to construct prima facie arguments for imposing duties to assist. Whether the criminal law should yield to those arguments then depends on such factors as the significance of the interests which would be upheld by such a duty (*i.e.* the argument is stronger where a citizen's life is at stake than when property of small value is concerned), the actual impact of such duties on the liberty of citizens (how much sacrifice and how often would the obligations demand?), and consequential effects on social life such as the possibility of turning citizens into busybodies, creating vigilantes and other possible changes. These arguments are pursued in the concluding section below.

7. CAPACITY AND IMPOSSIBILITY

Where criminal liability is based on an omission of some kind, principles of fairness demand that a person should not be liable to

⁶⁶ R. Merle and A. Vitu, *Traité de Droit Criminel: Droit Pénal Spécial*, by A. Vitu (Cujas, Paris, 1982), p.1457 (my translation).

⁶⁷ Macaulay, "Notes on the Indian Penal Code" in *Works*, vol. 7, p.497. Under the French provision, a person may be acquitted if he or she does not think that the victim is in peril, but may be convicted unless the personal risk involved in intervening is certain, serious and imminent. The law "does not require heroism but does condemn indifference": Vitu, *op. cit.*, p.1463. Similar offences from 22 jurisdictions, translated into English, are appended to an article by Feldbrugge at (1966) 14 *Am.J.Comp.L.* 655-657.

conviction unless it was possible for him or her to do what was required. In recognition of this, a qualification is often included in the wording of the offence, either by special words (e.g. in the French example in the previous paragraph, "if the crime could be prevented without personal risk") or by the general phrase "without reasonable excuse." The American Model Penal Code provides, in section 2.01(1), that a person is not liable for an omission unless he or she was "physically capable" of the required act. Where the law has been developed judicially there has also been recognition of the limits of human capacity: in several nineteenth century cases, the duty to care for others was expressed to be subject to the availability of the means to do so.⁶⁸ What this amounts to is a defence of impossibility: no person should be liable to conviction if he or she was unable to fulfil the duty imposed by the law.

Conceptually this defence has no direct counterpart among offences of commission. It does not assert that the omission was involuntary (although there can be involuntary omissions),⁶⁹ but rather goes directly to the rationale of not being able to do otherwise. In offences of commission it is assumed that persons who are not mentally disordered were able to avoid doing what they did. There cannot be a parallel assumption for offences of omission, since being able to do what is required may be a question of physical capacity which has no connection with the mental condition of the person concerned.⁷⁰ However, the impossibility may be relative rather than absolute, and the defence may have a stronger flavour of justification than excuse in cases where the person omitted to act in order to avoid harming an even greater interest.⁷¹ The defence of impossibility should also be subject to the doctrine of prior fault, so that if D voluntarily placed himself or herself in a position where compliance with the duty was impossible the defence would be unavailable. Two New Zealand decisions on the offence of remaining in New Zealand after the expiry of an entry permit show how this well-established limitation on the principle⁷² may operate. In *Tifaga v. Ministry of Labour* (1980)⁷³ D could not afford the air fare necessary to leave the country because he had spent too much money. It was impossible for him to leave by the due date, but the court refused to allow the defence because the

⁶⁸ e.g. *Hogan* (1851) 5 Cox C.C. 255, *Chandler* (1855) 6 Cox C.C. 519, and *Bubb and Hook* (1850) 4 Cox C.C. 455, discussed by Ann Smart at (1987) 103 L.Q.R. at pp.535-537.

⁶⁹ See n. 22, above.

⁷⁰ e.g. where a non-swimmer is confronted in an isolated place with someone drowning in a river. Cf. also the "diminished" capacity of the defendants in *Stone and Dobinson* (above, n. 53).

⁷¹ See Paul H. Robinson, 1 *Criminal Law Defenses* pp.449-453 (1984), for discussion of these points and a proposed formulation.

⁷² See *The Generous* (1818) 2 Dods. 322, discussed by Smart in (1987) 103 L.Q.R. at pp.532-533 and 558-559.

⁷³ [1980] 2 N.Z.L.R. 235.

impossibility had been brought about by D's own fault. In *Finau v. Ministry of Labour* (1984)⁷⁴ the airline refused to accept D as a passenger because she was at an advanced stage of pregnancy, and the court allowed her a defence of impossibility for so long as she was in that condition. Similarly, a person who was in prison or in hospital at the time of the expiry of the permit might be allowed the defence, unless the hospitalisation was shown to be part of a plan to remain in defiance of the law.

8. THE SCOPE AND EFFECT OF DUTIES

It has been argued here that the restrictive approach of Anglo-American law to criminal liability for omissions is overdone, and that the "conventional view" needs thorough re-appraisal. In supporting the "social responsibility" view, however, it has not been argued that omissions liability should be assimilated to liability for acts. There remain some theoretical and practical reasons why criminal liability for omissions should be given a slightly different structure than liability for acts, and why omissions liability should not be available for every offence. It is important to be clear what these reasons are. The linguistic argument is not one of them: it is true that some verbs are generally understood to cover acts and not omissions, but the vagaries of linguistic convention should be subordinated to the principle that omissions (where a duty is established) may be no less culpable than acts. Nor is the appeal of the "conventional view" to individual rights a good reason even for the liberal, since its narrow conception of individual autonomy is an unsatisfactory foundation for the modern law. It must be accepted that omissions liability does constitute a greater restraint on individual freedom than ordinary criminal prohibitions, since "the former cuts off all act alternatives except one, while the latter cuts off only one act alternative."⁷⁵ The justification for this restraint on "negative liberty" must be found in the relationship between the individual and the community: where the restriction is not substantial and the contribution to social well-being (in terms of co-operation and opportunities for self-development) may be significant, there is a case for recognising a duty to act. It is then necessary to consider whether there is a sufficiently strong case for imposing criminal liability, as distinct from a moral/social duty or civil liability in damages. In deciding this question, not only is there the issue of whether the duty is close enough to the foundations of community life to justify criminalisation, but there are other issues such as (i) whether the duty can be made compatible with the principle of legality, which requires fair and specific warning to

⁷⁴ [1984] 2 N.Z.L.R. 396.

⁷⁵ N. Jareborg, *Essays in Criminal Law* (1988), p.54; see above pp.427-428.

citizens of their duties, (ii) the possible impact of wider omissions liability on the quality of social life, in so far as it might be as unsettling for community life as the new duties would be supportive of it, and (iii) the possible impact of the prevailing conditions of social life upon the imposition of new duties, in so far as the dangers of attack in certain localities may invariably make it hazardous to go to the rescue of another. The last two issues are empirical: it might be said in general terms that (ii) has had little destructive impact in other European countries which have long had wider omissions liability, and that (iii) might well be a problem in certain inner city areas but not in other parts of the country.

With these criteria in mind, tentative conclusions will be suggested in the two distinct but related issues of the scope of criminal law duties and their effects, in terms of the form and level of liability.

(A) *The Scope of the Duties*

Collective duties such as the payment of taxes are relatively uncontroversial, but how much further might the criminal law properly go? No attempt has been made here to deal with all the duties to act imposed by English criminal law. For example, nothing has been said about the existence and scope of duties relating to property crimes, such as duty of candour or a duty to correct misapprehensions in situations which might be thought to involve deception.⁷⁶ The focus has been upon possible duties relating to the physical safety of others, but there has also been reference to "failing" offences. Most of these statutory "failing" offences form part of legislative schemes for regulating various undertakings and activities. Where these schemes concern business, commercial or financial activities it is fair to assume that citizens involved in these activities will acquaint themselves with their duties, and so any problems with the principle of legality are likely to be minimal. Such problems might be greater in practice with an activity which involves a high proportion of all citizens, such as the road traffic offence of failing to report an accident, but in theory these duties should be learnt as part and parcel of the activity.

If we move from these "failing" offences to the other extreme, the question is whether all offences of commission should be capable of being committed by omission. Setting aside the random and unprincipled objections deriving from linguistic convention, is there any reason why omissions liability should not be co-extensive with liability for acts? It is here that a significant break with the common

⁷⁶ See *Commissioner of Police for the Metropolis v. Charles* [1977] A.C. 177 and the discussion by A. T. H. Smith, "The Idea of Criminal Deception" [1982] Crim.L.R. 721. In some of these cases the criminal courts have imposed liability where the civil courts recognise no duty, but cf. *Cornish v. Midland Bank Plc* [1985] 3 All E.R. 513.

law tradition should be considered. That tradition, as we have seen in section 6 above, has been to develop narrow categories of duty, some of them of questionable firmness as foundations for liability for serious offences. The argument for the "social responsibility" view of omissions begins from the duties of a citizen as citizen. There should be a general duty where (a) there is a threat of harm to another citizen who is in sudden peril, and has not voluntarily entered that condition, and (b) a citizen is in a position to prevent the harm or its continuance or to take steps towards the enforcement of the law (as by summoning the police or the emergency services). So long as the definition makes allowances for the capabilities of the citizen in the circumstances, it is submitted that there is a strong case for introducing a general offence of failing to take reasonable steps to alleviate such peril. Other countries offer a range of slightly differing models for such an offence.⁷⁷ Should the law then go further and impose a duty on a citizen to take reasonable steps to enforce the law when an offence is seen, *e.g.* by calling the police to an offence which is witnessed? This would not be such a novel duty, since there is the precedent of the duty to report a road accident in which one has been involved,⁷⁸ and the question is raised by the English decisions which impose liability on property owners for offences committed in their presence on or with their property. Such decisions seem to affirm that it is socially inadequate that all citizens in all circumstances should be able to stand by and take no action when an offence is committed in their presence. But from this negative proposition the English courts seem to have stumbled to a strange compromise. Property owners do indeed have power and authority over the use of their property, but that does not yield a *duty* to exercise the authority to prevent crime—which is that for which we seek justification. The arguments for singling out property owners and leaving other citizens with no such duties are weak.⁷⁹ English law does contain other scattered duties to assist in law enforcement, but they disclose no pattern. Mere presence at the scene of a crime, such as a prize fight,⁸⁰ riot,⁸¹ or rape,⁸² without giving any encouragement to the perpetrators but also without taking any steps to prevent the offence or to call the police, does not attract criminal liability. However, if a citizen is called upon by a police officer to assist in law enforcement, and if it was reasonably necessary for the officer to call for assistance,

⁷⁷ See nn. 66 and 67 above; this is not to make light of the problems of satisfactory drafting.

⁷⁸ Road Traffic Act 1972, s.25(4).

⁷⁹ See the discussion in section 6(iv) above.

⁸⁰ *Coney* (1882) Q.B.D. 534; indeed Hawkins J. said (at p.557) that "it is no criminal offence to stand by, a mere passive spectator of a crime, even of murder."

⁸¹ *Atkinson* (1869) 11 Cox C.C. 332, above, n. 60.

⁸² *Clarkson* [1970] 1 W.L.R. 1402, above, n. 64.

the citizen commits a common law offence in failing to give assistance unless there was physical impossibility or lawful excuse.⁸³

How strong would be the objections to creating a general duty to take reasonable steps towards law enforcement? Such a duty might be onerous in some cases, since it might require a citizen to desist from the lawful pursuit of some personal goal and to seek a telephone, or to walk or drive some distance. This would require some considerable changes in social habits, as is evidenced by the well-documented "reluctance to get involved" of many citizens,⁸⁴ and therefore ample publicity would be required if citizens were to have fair warning of this change in their obligations. But if crime and victimisation are to be taken seriously, this is surely not a great sacrifice to require of citizens. Like the duty to assist those in peril, it is an unambiguous recognition of each citizen's obligations towards other citizens and towards the community as a whole. It need not be taken to require personal intervention by the citizen, unless that can be done with no unreasonable risk, for law enforcement "is the special responsibility of skilled professionals we support with our funds,"⁸⁵ and there may be situations or localities where it is dangerous to attempt any personal intervention. The duty to assist a police officer in the prevention or suppression of crime might be rather too demanding, and seems to have been rarely invoked in modern times.⁸⁶ The lesser duty to take reasonable steps towards law enforcement, so long as it is qualified by reference to physical possibility and the absence of reasonable excuse, ought surely to be recognised. The qualifications should be such as to make it clear that, even if the law requires heroism where the life of oneself or others is under deliberate threat from someone, no heroism is required by this offence and it should be applied with sympathy for any fears about personal danger experienced by a person who fails to intervene.⁸⁷

Both these proposed duties, to assist those in peril and to assist in law enforcement, would require some limitations when translated into criminal offences. If the law were to penalise only failure to make reasonable efforts, this might appear fair to citizens in that its

⁸³ *Brown* (1841) Car. & M. 314.

⁸⁴ See, for example, Law Com. No. 123, *Offences relating to Public Order* (1983), para. 3.31; Criminal Law Revision Committee, 16th Report, *Prostitution in the Street* (Cmd. 9329) (1984), para. 12. For psychological evidence that a person alone is more likely to offer assistance than is any one of a group of people, see L. Katz, *Bad Acts and Guilty Minds* (1987), pp. 145-153.

⁸⁵ Feinberg, *op. cit. supra*, n. 1, p. 170 (referring specifically to the fire services).

⁸⁶ A. T. H. Smith, *Offences against Public Order* (1987), para. 4-11; cf. also the common law duty of every citizen to take reasonable steps to prevent a breach of peace which occurs in his presence, referred to by Lord Diplock in *Albert v. Lavin* [1982] A.C. 546 as a "duty of imperfect obligation."

⁸⁷ Compare the decision on duress in *Howe* [1987] A.C. 417 with the indulgence shown towards instinctive reactions in a "moment of unexpected anguish" in the self-defence case of *Palmer v. R.* [1971] A.C. 814.

demands would not be too onerous, yet it would be potentially unfair in its vagueness and lack of detailed warning about what the law expects. It seems virtually impossible to draft offences of this kind without some reliance on the term "reasonable." One way of preserving the essence of the offences whilst keeping to a minimum any derogation from the "fair warning" principle would be to restrict the scope of the offences to those who fail to take steps towards rescue or law enforcement where there is no unreasonable risk, cost or inconvenience.⁸⁸ It should be clearer whether there was "no unreasonable risk" than whether the risk was reasonable or not. This recognises the vagueness problem and attempts to reduce it in a way which preserves the essence of the offence. Absolute insistence on certainty would defeat the offence itself, and this might be regarded as a false priority.

(B) *The Effect of the Duties*

Acceptance of the arguments for the recognition of new general duties is only the first step. Next to be considered is the *form* which the criminal liability should take. The approach pre-supposed above was that there should be two distinct offences of "failing to . . .," but the point should be considered in the light of the English tradition. The case of *Dytham* (1979)⁸⁹ provides a worthwhile focus: a police officer saw one man being beaten and kicked by three others, but he took no steps to intervene or to call assistance. The victim died. D was convicted of the common law offence of misconduct of an officer of justice, in that he deliberately failed to take any action to enforce the law, in circumstances "calculated to injure the public interest so as to call for condemnation and punishment." He was fined £150. It is evident both from the actual sentence and from the maximum sentence (two years' imprisonment) that the seriousness of the offence is measured in terms of the derogation from duty rather than in terms of the actual or probable consequences of that derogation. The officer failed to do one of the things he ought to have done as part of his office and his employment. This legal classification should be contrasted with that in the property-owner cases, where the publican and the car-owner were held liable as accomplices to the offences which they failed to take steps to prevent.⁹⁰ They were therefore convicted and liable to sentence as

⁸⁸ Feinberg, *op. cit. supra*, n. 1, pp.155-157. However, few problems appear to have been caused in France after the new law of 1945. Vitu reports that "the general public rapidly integrated the offence of '*refus de porter secours*' into its vocabulary, and this reception signifies that the offence corresponds with the parameters of popular morality": *op. cit. supra*, n. 66, p.1459.

⁸⁹ [1979] Q.B. 722; cf. B. Hogan, "Omissions and the Duty Myth" in P. F. Smith (ed.) *Criminal Law: Essays in Honour of J. C. Smith* (1987), at pp.86-87.

⁹⁰ Above, nn. 58 and 59 and accompanying text.

principal offenders, although their actual sentences might be somewhat lower than those of the actual principals. If English law contained a general offence of failing to take reasonable steps towards law enforcement, the publican and the car-owner might expect to be convicted and sentenced for that offence. Which approach is preferable, on the principle of fair labelling?⁹¹ Should the police officer in *Dytham* have been convicted as an accomplice to the homicide committed?

To regard the bystander's non-intervention as complicity in the crime being committed surely over-stretches a concept which is already considerably extended. True, the law of complicity brings within the net of criminal liability some persons whose contributions have been minimal; but part of the reason for thus stretching the law of complicity is the belief that such persons are culpable to some degree, and that there is no other way of criminalising their conduct. A discrete offence of failing to take reasonable steps towards law enforcement would offer one way of dealing with such persons. The label would be fairer in the sense that it would describe the citizen's precise role in a way that conviction of the offence witnessed (as a principal, though under the doctrine of complicity) would not, but it would perhaps be a less fair representation in that it would not state the nature of the offence in which the citizen failed to intervene. Since the citizen is present and will invariably know what offence is being committed, the decision to intervene or not will be contextually related to that offence. If, for example, the offence was a serious one and the intervention required of the citizen could not be described as onerous, the failure to take any steps towards law enforcement would be of a serious nature. What is required, then, is a form of criminal liability which makes it clear that the essence of the wrongdoing lay in the failure to take any steps towards law enforcement, but that the gravity of that failure is related not merely to what it was reasonable to expect of this citizen in the circumstances but also to the seriousness of the offence being witnessed. A model for this may be found in the crime of assisting an offender with intent to impede his apprehension.⁹² In English law this is a single offence, irrespective of the gravity of the crime committed by the person who is assisted, but the maximum sentence for the person assisting varies according to the maximum penalty to which the offender assisted is liable. If this legal approach were applied to the proposed offence of failing to take reasonable steps towards law enforcement, it would surely be a fair and appropriate compromise between the present expedient of occasional

⁹¹ See Ashworth, "The Elasticity of Mens Rea" in C. Tapper (ed.), *Crime, Proof and Punishment* (1981), and G. Williams, "Convictions and Fair Labelling" [1983] C.L.J. 85.

⁹² Criminal Law Act 1967, s.4.

convictions based on complicity in the offence witnessed and the other extreme of an undifferentiated offence of "failing" which conveys nothing about the context in which it occurred. It would not be necessary for the court to speculate upon whether the witnessed offence would have been committed or completed even if the bystander had fulfilled the duty by, for example, notifying the police. And the creation of such an offence would give fair warning to citizens of what is expected in these circumstances, in a way that fitful invocation of the law of complicity is most unlikely to do.

At least three general duties have now been proposed on the basis of a "social responsibility" approach to the criminal law—the duty to assist those in peril, the duty to take reasonable steps towards law enforcement, and the duty to ensure the health and welfare of one's children. If a person deliberately breaches such a duty, knowing that the consequence is virtually certain to be the death of another person, should liability for murder be a possibility? This is a stern test for adherents of the "social responsibility" view. For example, should the police officer in *Dytham* have been liable for murder if it were proved that he realised at the time that the victim was virtually certain to die or suffer serious injury if he made no effort to enforce the law? Should this be dismissed as a grotesque example of constructive liability, or accepted as a fair parallel to the liability of the parent in *Gibbins and Proctor*⁹³ for the murder of the child by failing to provide food? The answer should be to accept the fair parallel, and to denounce the attempt to regard this as a form of constructive liability. It is not constructive because conviction for murder still requires the full mental element for that crime: the omission to fulfil one of the stated duties is an essential element of liability too, and there is no precise equivalent of this in offences of commission. So long as the duties are clearly set out, so as to achieve fair warning to citizens, there is no objection to using the duties as one step in the construction of a murder conviction in cases where intention is also proved. However, causal uncertainties re-emerge in this context—who knows whether *Dytham* could have prevented the men from killing the victim?—and convictions for murder and other substantive offences might be best reserved for causally clear cases such as *Gibbins and Proctor*. If the citizenship duties towards those in peril and towards law enforcement are accepted, then there will be less scope for the particular duties developed at common law. Nonetheless, the arguments above⁹⁴ in favour of retaining duties based on contract or office retain some force, although it will be rare that they can be invoked in a crime requiring intention. Many of the

⁹³ Above, n. 46 and accompanying text.

⁹⁴ Section 6(ii) and (iii), above.

English decisions on omissions relate to manslaughter, a crime which, in its present form, places too much emphasis on resulting harm and too little upon the fault element. Reform of the law of manslaughter is needed⁹⁵ and so no detailed analysis of that offence has been offered here.

9. SUMMARY

It has been argued that the law should move towards the "social responsibility" view, recognising certain duties of citizenship and equally recognising the limits on what it is fair to ask of citizens. Among the general offences of omission should be child neglect and two new offences, failing to take steps to assist someone in sudden peril and failing to take steps towards law enforcement. The offences should be drafted with maximum certainty and widely publicised, and should be subject to qualifications based on the situation and the locality. These should be discrete offences, replacing some aspects of the law of complicity, and they would establish duties which could found liability for more serious offences (when accompanied by the required fault element). The general principle in criminal law should be that omissions liability should be possible if a duty is established, because in those circumstances there is no fundamental moral distinction between failing to perform an act with foreseen bad consequences and performing the act with identical foreseen bad consequences. The principle should be used to impose omissions liability for any offence irrespective of the wording used in creating the offence, provided that the required mental element is present and that there is no inconsistency with the purpose of the offence or with the principle of fair warning. Such an approach would run directly counter to the received principles of statutory interpretation, but the argument here has been that the vagaries of ordinary language and drafting should not be permitted to overwhelm the questions of deep principle involved in omissions liability. These questions of deep principle should now become the concern of the courts: the Law Commission recognises that to determine which existing offences should and which should not be capable of commission by omission "would require a multitude of decisions of a law reform character,"⁹⁶ and it implies that no such exercise is likely in the near future. Even if the Criminal Code Bill were to be enacted, then, the scope of omissions liability would remain "fully open to the courts" to determine.⁹⁷ The need, therefore, is to develop a broader and more

⁹⁵ Criminal Law Revision Committee, 14th Report, *Offences against the Person* (Cmnd. 8744) (1980), part IIIg, incorporated into the draft Criminal Code Bill (Law Com. No. 177, above, note 26), clause 55(c).

⁹⁶ Law Com. No. 177 (above, note 26), vol. 2, para. 7.11.

⁹⁷ *Ibid.*, para. 7.13.

coherent approach, which takes proper account of the wider moral and social issues. Apart from the occasional adoption of a "social responsibility" view,⁹⁸ the courts have generally followed the conventional view in restricting omissions liability: "The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal."⁹⁹ Is it not now time for both courts and legislature to reconsider?

ANDREW ASHWORTH.*

⁹⁸ The high water-mark being *Stone and Dobinson*, above, note 53 and text thereat.

⁹⁹ Per Lord Diplock in *Miller* [1983] 2 A.C. at p.175.

* Edmund-Davies Professor of Criminal Law and Criminal Justice, King's College, University of London. The article began as a paper to an Oxford seminar held jointly with Hugh Collins, Nicola Lacey and Anne de Moor, to whom I am grateful. Thanks are also due to Helen Beynon, Tony Honoré, Jeremy Horder, Paul Robinson and Andrew von Hirsch for their critical comments on drafts.

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CRIMINAL OMISSIONS—THE CONVENTIONAL VIEW

THIS is a reply, by one who now discovers himself to be a conventionalist, to Professor Ashworth's piece "The Scope of Criminal Liability for Omissions."¹ Ashworth stages the debate as a conflict between two contrasting approaches to the subject of criminal omissions: one, the "conventional view" (which he seems to regard as selfish and callous), and an opposing (virtuous) approach dubbed the "social responsibility view." For several pages it is not clear whether Ashworth wears the halo of "social responsibility" unblemished, but it later transpires that he does. The opposing "conventional view," to which I would subscribe if it were presented with due moderation, is stated by Ashworth in terms of narrow nineteenth-century individualism, so that few people nowadays would wish to support it; but to present the argument in this way is merely shadow-boxing.

The author's basic position is that, granted the existence of a moral duty to act, no important moral difference can be seen between an act and an omission.

"The general principle in criminal law should be that omissions liability should be possible if a duty is established, because in those circumstances there is no fundamental moral distinction between failing to perform an act with foreseen bad consequences and performing the act with identical foreseen bad consequences" (at p. 458).

Two remarks on this. Ashworth says that there is no moral difference between (i) a positive act and (ii) an omission when a duty is established. But even if this is so, he has already conceded a difference between the two when he says that an omission is culpable only when there is duty to act. The duty requirement sometimes involves considerations that are irrelevant to crimes of commission. Of course, every crime is a breach of legal duty not to commit the crime, but this is part of the meaning of the word "crime." The point is that no requirement of a particular duty not to act (over and above the specification of the crime) applies to wrongs of commission.

If there is no fundamental moral distinction between killing and letting die (in breach of duty), it is a fact that has been missed by members of the medical profession, who see a great difference between the two. Whereas killing your patient is absolutely taboo, according to the present law and official medical ethics, letting your

¹ (1989) 105 L.Q.R. 424.

patient die is qualifiedly permissible, namely when the patient is dying and there is no point in continuing his agony. Ashworth suggests that the proper way to deal with the doctor's dilemma is to let him help his patient *in extremis* whether by acting or by omitting. I am warmly with him on this, and as a Vice-President of the Voluntary Euthanasia Society would be very pleased for him to join our ranks. But legislation on this subject is extremely hard to achieve; and I would certainly not bargain away the discretion now allowed to doctors under the omissions doctrine in return for a pipe dream about legislation.

Ashworth further makes the point that it is sometimes hard to distinguish between killing and letting die (disconnecting the drip-feed). But this sort of problem vexes all moral propositions. It does not disprove the validity of the distinction in the usual case.

Let me state in my own words what I regard as the conventional, or at any rate proper, attitude towards criminal liability for pure omissions. Although this perspective may broadly be regarded as conventional, the judges have been chipping away at it, and if the Draft Code is implemented it will be further undermined (or ameliorated, according to your point of view).

First, then, omissions liability should be exceptional, and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be construed to include omissions except when the statute contains a genuine implication to this effect—not the perfunctory and fictitious implication that judges use when they are on the lawpath instead of the purely judge-path. Thirdly, maximum penalties applied to active wrongdoing should not automatically be transferred to corresponding omissions; penalties for omissions should be rethought in each case.

The case for the conventional view

The arguments for this philosophy may be briefly stated. (I would have thought them too obvious to need statement.) First, society's most urgent task is the repression of active wrongdoing. Bringing the ignorant or lethargic up to scratch is very much a secondary endeavour, for which the criminal process is not necessarily the best suited.

Secondly, our attitudes to wrongful action and wrongful inaction differ. There may be instances where our blood boils at the same temperature on account of both, but these are very exceptional. The only likely instance that comes to my mind is that of parents who are charged with killing their baby (i) by smothering it or (ii) by starving it to death. In this instance we are likely to feel more angry and sad about the slow starvation (an omission) than about the comparatively

merciful infliction of death with a pillow. But on other occasions we almost always perceive a moral distinction between (for example) killing a person and failing to save his life (the former being the worse); and similarly between other acts and corresponding omissions.

This moral distinction, which we express in our language, reflects differences in our psychological approach to our own acts and omissions. We have much stronger inhibitions against active wrongdoing than against wrongfully omitting. This again is coupled with the fact that it is in every way easier not to do something (personal needs apart) than to do it. Also, a requirement to do something presupposes the ability to do it (the physical ability, and often the financial and educational ability as well), whereas almost everyone has the ability to refrain from ordinary physical acts.

Thirdly, serious crimes of commission can usually be formulated merely by stating the forbidden conduct, but laws creating crimes of omission are rarely directed against the whole world. They are intended to operate only against particular classes of person (and sometimes only for the protection of particular classes), in which case these persons must be singled out in the statement of the crime. To take an example: the courts can, in theory, punish everyone (with exceptions) who knowingly kills, but they cannot punish everyone who fails to save life, without some minimum specification of whose lives are to be saved. I cannot be made criminally responsible when I knowingly fail to save (and do not even try to save) the lives of unfortunate inhabitants of the Ganges delta who are drowned in floods; yet I could do something to help them by selling my house and giving the money to a suitable charity. Ashworth meets the point by saying that the requirement of duty "establishes moral responsibility and delineates in time and space the number of people who may be said to have omitted" (at p. 435). Very well, but this looks like translating law into morals rather than morals into law. Anyway, Ashworth does not propose that everything that may be regarded as a moral duty should automatically become a legal duty. So when we propose to punish omissions we are left with the problem of defining the scope of legal duty.

Fourthly, when crimes are expressed with the use of verbs implying action, it is a breach of the principle of legality to convict people of them when they have not acted; and it is unfair "labelling" (Ashworth's expression) to convict non-doers of acts under the name of doers.

Fifthly, and perhaps most important of all, the law enforcement agencies (including the courts) have their work cut out to deal with people who offend by active conduct. The prisons, it is scarcely

necessary to recall, are packed with them. To extend the campaign by attempting to punish all (or large groups of) those who contribute to the evil result by failing to co-operate in the great endeavour of producing a happier world would exceed the bounds of possibility.

Ashworth says of the conventional view that the supporting arguments "depend on a narrow, individualistic conception of human life which should be rejected as a basis for morality and (although this raises further issues) as a basis for criminal liability" (at p. 430). I leave it to the reader to judge whether the arguments as I have formulated them deserve this stricture.

In justifying the conventional view I have made no reference to the philosophy of individualism or to the autonomy principle, both of which Ashworth (erroneously I think) regards as the foundation of the conventional view. How far the State should provide financial succour and social services for those in need has nothing to do with the question whether individuals should be criminally punishable for not providing others with these advantages. To bring these considerations based on general social policy into the discussion simply muddies the waters. The same remark applies to Ashworth's support for legislation requiring the wearing of seat-belts, support which is now platitudinous, as well as being irrelevant to his attack on "the conventional view." The argument against treating omissions in the same way as positive acts does not go to the extent of saying that omissions running contrary to the public interest should never be punishable. Those who oppose seat belt legislation (among whom I am not to be counted) do so on the ground that it unjustifiably restricts bodily liberty, not on the ground that it wrongly punishes omissions. The legislation forbids one to drive in a car without belting up, and the forbidden conduct is a hybrid act/omission, which is legally classified as an act, not an omission.

ASHWORTH'S THREE PROPOSALS

In an endeavour to lock horns with my friend on the issues that divide us, I pass to the end of his article where he summarises his proposals for "three general duties on the basis of a 'social responsibility' approach to the criminal law—the duty to assist those in peril, the duty to take reasonable steps towards law enforcement, and the duty to ensure the health and welfare of one's children." As to the first, I would support a proposal to create a duty of "easy rescue," but would not give a blank cheque on the subject. Imprisonment as a means of enforcing the duty should be ruled out, because imprisonment creates great distress and is a poor way of trying to add to the sum of human happiness, unless the advantages of it are much clearer than they are in this instance. A purely moralistic approach, attempt-

ing to calibrate the degree of moral turpitude in omitting with the tragedy of the fatal result, as though the defendant had recklessly acted to cause the result instead of merely failing to prevent it, leads to the kind of judicial cruelty practised upon Mr Stone.² So my support would be given only on condition that the maximum penalty is a fine and/or community service, the preferred outcome being either a discharge with a warning or an order for some kind of education or training. And I doubt whether the proposal would rank high in the list of priorities for new criminal legislation. At the moment we should be thinking about what new legislation is needed if we are to have a satisfactory criminal code, and the creation of an offence of failing to make easy rescue would have little bearing on this.³

Turning to Ashworth's second proposal, the creation of a "duty to take reasonable steps towards law enforcement," I would not give it even this tepid measure of approval. His proposal must mean, primarily, a duty to report on offences and offenders; also to do anything reasonably possible to thwart offenders and to assist the police in arresting them. If Ashworth were a recent visitor to Britain, with no knowledge of our legal history, it might be possible to understand this proposal, though not to agree with it. He is in effect advocating the revival of misprision of felony in a possibly expanded form, which was an offence abolished in 1967 because it was found to be productive of such severe problems as to be unusable. It would have required people to report on their companions and acquaintances, including their best friends and near members of their family, whatever might be the degree of seriousness of the particular felony in question. This would be an appalling way of extending the circle of criminality beyond the immediate doers and omitters and their accomplices. It is inconceivable that a proposal to revive misprision in some modernised form, and to turn us all by force of law into subsidiary policemen and tell-tales, would have any chance of legislative acceptance. What the citizen chooses to do to help the police must be left to his sense of citizenship. The Prevention of Terrorism Act is exceptional because it is directed against serious threats that could materialise for any of us.

Ashworth's third proposal, a "duty to ensure the health and welfare of one's children," is present law, since neglect of the duty can found a charge of manslaughter or wilful neglect. But, as for manslaughter, decisions of the lords have given this crime such an intoler-

² [1977] Q. B. 354.

³ If we are considering possible new offences it would be far more important to have an offence of supplying property or information with intent to facilitate crime, to fill the gap that judges now endeavour to fill by distorting the law of complicity and conspiracy and by extending the offences of conspiracy to defraud and obstructing the police. See J. R. Spencer's powerful article in *Criminal Law: Essays in Honour of J. C. Smith*, ed. P. Smith (1987).

ably wide scope that a self-respecting prosecutor can hardly use it, except in the most glaring cases. (Ashworth agrees in dismissing it from consideration on the present issue.)

The offence of wilful neglect of children is occasionally mal-administered. At one time the courts held, scandalously, that parents who thought they were doing the best for their sick child by prayer were guilty of wilful neglect in not calling a doctor. The aberration was cured by the decision in *Sheppard*,⁴ where the lords held, *per* Lord Diplock, that a parent could be convicted of wilful neglect of his child if and only if he was aware that failure to provide his child with medical aid would put the child's health at risk, or alternatively if his unawareness of the child's peril was due to his not caring whether the child's health were at risk or not. This formula had the advantage of exempting devout parents who believed that God would intervene upon request; it was also thought to establish that liability for wilful neglect rested on subjective recklessness. But in a recent case the courts (including the Court of Appeal) showed themselves to be either unaware of Lord Diplock's words or neglectful of them; at any rate they punished a parent for wilful neglect on the basis of simple misjudgment or incompetence, and moreover, failed to recognise (as Lord Diplock's formula failed to mention) that there are some risks that a parent may consciously run without deserving the appellation of being wilfully neglectful or reckless.

The case to which I have referred⁵ was one in which the defendant (an unemployed man, apparently a single parent), who was doing his best to bring up two children, left them alone in his flat for about 30 minutes one evening, with instructions to take a bath. His son, aged 9, was a boy who delighted to surprise his father with his help. He got a hair drier from another room and, using an extension lead which his father used for listening to music in the garden, operated the hair drier in the bath. The drier, of course, fell into the bath and both children were electrocuted. The defendant had previously been found guilty of neglecting the children, but we are not told the nature of his neglect on this previous occasion. He was sentenced to 18 months' jail, reduced to 12 months on appeal. The evidence showed that he had been a loving father, and the judge, in sentencing, generously added: "Whatever sentence I pass will be as nothing to the distress you have suffered and are still suffering."

An appeal was taken, but only against sentence: no appeal was taken against conviction, presumably because it was thought to be hopeless; and the Court of Appeal did not invite counsel for the

⁴ [1981] A.C. 394.

⁵ *Burcher*, *The Times*, July 21, 1987; March 1, 1988 (C.A.); further details kindly supplied by the Crown Prosecution Service.

appellant to add an appeal against the conviction (as it could have done). Yet in no intelligible sense of the word was the father's conduct "wilful." He obviously did not foresee what would happen, and there was absolutely no ground for inferring that he did not care whether the children were at risk or not. The conviction was, therefore, contrary to *Sheppard*.

The Court of Appeal reduced the sentence, but only because at that time child neglect was punishable with a maximum of 2 years' imprisonment, and this was not the worst possible case. The court intimated that if the legal maximum had been higher (as it now is), the sentence of 18 months would have been upheld. Goodness knows what the sentence would have been if the defendant had been convicted of a double manslaughter, which would have been perfectly possible. Yet his fault was only to leave his two children alone in the house for half an hour, which countless numbers of parents must do each year. It is not perfect parenthood, but is it criminal? And notwithstanding the judge's words in sentencing, totally insufficient account was taken of the fact that the defendant had lost both his children, whom he obviously loved. He had received to the full the natural punishment that may befall people who neglect their children, and to add a term of imprisonment to his bitter loss was purposeless cruelty. (The purpose could not have been to improve the defendant's behaviour as a parent, because he was no longer a parent.)

The case is a parable conveying many messages. It is an instance of how a "social responsibility" or moralistic approach to problems of the criminal law can turn sour. It is a dismaying instance of the failure of practical compassion sometimes shown by judges, and of their lack of common sense in dealing with accidents produced by foolishness. Particularly disconcerting is the judges' failure to follow an unusually liberal and enlightened opinion of the lords, and their continued incomprehension of the meaning of the word "wilful" in the English language. The criticism extends not only to the judges but to the Crown Prosecution Service, which chose a most unsuitable case for prosecution, probably because they were unduly influenced by the fact that deaths had occurred.

In a 1972 survey by the Road Research Laboratory it was found that 13 per cent. of mothers of children aged only two years thought it was safe for them to cross a main road alone. Some of these children are killed and injured, but rarely, if ever, are the dim-witted mothers taken to court. Is it possible that the courts discriminate in favour of mothers and against fathers? What is certain is that if everyone who caused a casualty by stupidity and failure of foresight received a custodial sentence, our jails would have to be expanded even faster than now.

The working of the offence shows the Government's lack of wisdom in raising the maximum sentence to 10 years for an offence of neglect where there is no purpose to injure.⁶ Ministers continually bewail the rise in the prison population, yet raise maximum punishments for no better reason than to convince the general populace that they are trying to control crime. For serious cases of child cruelty the rise was unnecessary, because these cases could be more than adequately dealt with as ordinary offences against the person. For cases of child neglect by omission without intention to harm the new sentence is pitched much too high. Moreover, it should be obvious that sending an incompetent parent to prison is far from being the best way of improving his standards, or of improving children's conditions of life. The public money spent on prosecuting (and defending) the lone parent in the hair drier case, and keeping him in jail, would have made a contribution to the funds available for helping single parents to grapple. But no one tries to make a cost-benefit analysis of the criminal process as compared with social help. Failing better knowledge of what we are doing, inadvertent negligence by an omission to take care, without foresight of the harmful result as a high probability, should never carry a custodial sentence, and, failing more enlightened legislation, the Court of Appeal should establish sentencing principles to make sure that it does not.

It may be said that the errors in this case did not rest simply on the court's failure to draw the act/omission distinction (which was not a legally relevant consideration on a charge of child neglect). Although the defendant's offence was one of omission, the tragedy might have happened if he had been present and had handed the children the hair drier to use in the bath—which would have been an act on his part. But his failure of foresight would have been grosser in that case; on the facts before the court, he did not realise that the boy would use the hair drier. All offences of negligence or recklessness need greater care and restraint in sentencing than they sometimes receive, and the fact that the offence was due to the defendant's inadequacy rather than his malevolence should be a prime consideration.

THE "SOCIAL RESPONSIBILITY" VIEW

Having opposed one of Ashworth's three favoured offences, and doubted the other two in the unrestricted form in which he states them, I turn now to the earlier remarks in which he formulates his general attitude, based, as he sees it, on "social responsibility." His

⁶ Criminal Justice Act 1988, s.45.

most challenging proposition is that a statute that *prima facie* penalises only acts should be extended by judicial construction to omissions in breach of duty.

“The principle [of the moral equivalence between acts and omissions] should be used to impose omissions liability for any offence irrespective of the wording used in creating the offence, provided that the required mental element is present and that there is no inconsistency with the purpose of the offence or with the principle of fair warning. Such an approach would run directly counter to the received principles of statutory interpretation, but the argument here has been that the vagaries of ordinary language and drafting should not be permitted to overwhelm questions of deep principle involved in omissions liability” (at p. 457; *cp.* p. 438).

This is a challenge indeed. In the passage following this quotation Ashworth makes it clear that he favours allowing the courts to do the work of deciding which active verbs are to be construed to cover omissions and which not, the discrimination being made entirely on social and policy grounds and without regard to the ordinary usages of speech. This, he says, is to be subject to the principle of fair warning; but how is that principle to be satisfied if the courts can at discretion construe any active verb as including omissions? Of course, the case when decided will establish the law for the information of all concerned (if they are students of these matters); but the interpretation of an active verb in one statute does not guarantee that the same verb in another statute will be understood similarly. (The courts at present hold that you can “obstruct” a constable by inactivity, but that “obstructing” a highway requires an act. This distinction has nothing to do with linguistic meanings and everything to do with the desire of the courts to support the police.) If there are serious policy decisions to be weighed in deciding the scope to be given to the penal legislation, why should not the required consideration be given by the legislature, and the outcome be expressed in the legislation? Does not the legislature express its decision on the question by using only an active verb in formulating the crime, and making no mention of an omission? Failing aptly-worded legislation, there seems to me to be an unanswerable case for maintaining the general rule that statutory words are to be given their ordinary meanings unless the context indicates a different intention.

Ashworth appears to say that the question of omissions liability can arise only if a duty is first established. “Clearly there must be a duty in existence before it is proper even to speak of an omission” (at p. 434). This is not so. The opinion overlooks the fact that a statute imposing a penalty for an omission creates the duty to act at the same

time as it penalises the omission. They are two sides of the same coin. Generally there is no difficulty in deciding who is under the duty to act, because he is specified in the penal statute in question. But there may sometimes (not always) be difficulty in deciding who is meant to be protected by the duty to act, and here the courts are on their own if the statute is silent. Ashworth discusses various possible heads of duty and classes of beneficiaries, but it would not be practical to enact that duties of positive action are owed only to people within the categories he discusses. Everything depends upon the particular duty. It might, for example, be possible to define "members of the same household" as beneficiaries of a duty to supply food and obtain medical assistance during illness, but this category of beneficiaries would be inapplicable to the duty to pay taxes or file accounts.

A more important criticism of the author's thesis is his confusion (as I see it) between three questions: questions of legislative policy, of legislative interpretation, and of judicial powers in interpretation. To illustrate. (i) Should this omission (say, an omission to help a constable in his duties) be expressly penalised by legislation? (ii) If we simply penalise an act like "obstructing a constable," will the courts hold that the forbidden act covers an omission to remove an obstruction? (iii) Ought the courts to be left on a free rein in deciding whether act-words in penal legislation are to be taken to cover omissions? Sometimes it seems from the article that the author believes the answers to the three questions not to matter, so long as the courts punish all the omissions that socially ought to be punished. Take the following passage.

"In supporting the 'social responsibility' view it has not been argued that omissions liability should be assimilated to liability for acts. There remain some theoretical and practical reasons why criminal liability for omissions should be given a slightly different structure than liability for acts, and why omissions liability should not be available for every offence. It is important to be clear what these reasons are. The linguistic argument is not one of them" (at p. 451).

This passage appears to be dealing with a question of legislative policy, and in this context it is irrelevant and unhelpful to take a swipe at the linguistic argument. *Of course* the linguistic argument is inapplicable on a question of legislative policy. The linguistic argument comes into play after the legislation has been passed, and presupposes that the verb used by Parliament is an "active" one, primarily applying to positive acts. The linguistic argument is simply a statement of the principle that the normal function of the courts is to apply penal legislation as it stands, reading words in their ordinary meanings, not to play fast and loose with language in order to extend

criminal prohibitions. Ashworth's object seems to be to encourage the courts to do just this.

"The argument here is that there should be recognition of a principle that criminal statutes should be interpreted so as to apply to omissions as well as to acts, where a relevant duty can be established, unless the context indicates otherwise. It would be unusual to have a strong principle which could override the wording of an Act in some circumstances, but it would be easier to defend than allowing the law to continue its erratic course based on 'ordinary language' " (at p. 438).

"Recognition of a principle" here means "establishment of a principle," since no such principle has hitherto been proclaimed. And Ashworth later makes it clear that the "recognition" is to be done by the courts, if need be, without reference to Parliament.

"Apart from the occasional adoption of a 'social responsibility' view, the courts have generally followed the conventional view in restricting omissions liability. . . . Is it not now time for both courts and legislature to reconsider?" (at p. 459).

There is more in the same vein. Unwrapping it and putting it into plain language, the thesis is that the courts have occasionally construed active verbs as including omissions, for policy reasons, but sometimes (indeed, generally) they have not done this, so the results are "erratic," and the solution is that the courts should always construe active verbs to cover omissions, when reasons of policy so require, even when this does not accord with their ordinary meanings.

I find it a strange argument. The policy that the author seems to overlook is that of leaving policy decisions to the democratic legislature.⁷ It is true that at the end he brings in a reference to the legislature, but he seems to be ready to allow the courts to refashion the law irrespective of help from Parliament.

The discussion of this subject has a history. The Criminal Law Revision Committee considered it on its fourteenth reference, and made two proposals. First, liability for omissions in the sphere of offences against the person should be confined to murder, manslaughter, causing serious injury with intent (*i.e.* s.18 of the Offences

⁷ Although Ashworth may appear to be an out-and-outer on the subject of omissions, there is one limitation upon which I agree with him strongly. Ashworth concedes that if it is decided to impose criminal liability for omissions, this should not be done (as the present law does to some extent, and as the Draft Code proposes to do even more) by making the ommitter liable as an accomplice to the active doers. He writes: "To regard the bystander's non-intervention as complicity in the crime being committed surely over-stretches a concept which is already considerably extended" (at p. 456). There should be "discrete offences, replacing some aspects of the law of complicity" (at p. 458). My arguments in criticism of the present law on these matters will appear in the *Criminal Law Review*.

against the Person Act 1861), and offences of unlawful detention. But, secondly, as regards these offences the courts should be left with unfettered discretion to decide when there is a duty to act and for whose benefit the duty is imposed. I was a member of the committee, and was the sole dissident on the second proposal. (We were unanimous on the first.)⁸ In the light of the hair drier case I would now want to add a provision severely restricting sentencing powers in respect of manslaughter by omission where there was no intention to cause harm. Also, I am of opinion that if we have a code there should be analogous restrictive provisions for other offences of omission, *e.g.* omissions in sexual and property offences.

The academic team that produced the first version of the Draft Code proposed to enact the committee's recommendations, except that they made a valiant effort to put into statutory form a list of persons who are under a duty to act to save people from being killed, seriously injured or detained, and also a list of beneficiaries of the duty.⁹ These proposals, together with those of the Criminal Law Revision Committee, were jettisoned by the Law Commission in Mark 2 of the code, which now contains virtually no provisions on the subject of criminal omissions, except that particular offences are re-drafted in terms of "causing" a result, to facilitate their interpretation to include omissions. The judges are to be left to make their own decisions as to duty-holders and beneficiaries as cases arise. I regard this perverse decision as directly contrary to the purpose of a criminal code.

Ironically, the commission in its Report acknowledged to me the help it had received from a list I published of cases where the courts had construed active verbs as covering omissions. I made the list in order to show that the court had sometimes done this, while making clear my view that the practice was improper. The commission took my list to support their view that the courts could do it and should be allowed to go on doing it—while at the same time ignoring the arguments I advanced against the practice. On these matters I view the Draft Code with abhorrence, but it suits Ashworth's thesis very well, and he quotes it without disapproval (at p. 436).

Two incidental points. The commission assumes that its offences of "causing" death, injury, etc., will cover omissions. There are decisions (in other contexts), against this broad interpretation of the word in statutes; and I persist in thinking that here, as elsewhere, if Parliament wants to punish omissions it should direct its mind to this particular subject and provide for it.

⁸ Cmnd. 7844 (1980), at pp. 108–110.

⁹ Law Com. No. 143 (1985), cl. 20.

The other point relates to the burden of proof. This has been given topicality by the proposal in the Draft Code to replace the rule in *Morby*¹⁰ (that the prosecution must prove that a criminal omission caused the death or other result that is charged, and therefore must prove that the result would not have occurred but for the omission) by a rule requiring it merely to prove that the omission "might" prevent (might have prevented?) the occurrence of the harm.¹¹ This would be a change in the substantive law, which the commission normally eschews, and a retrogressive change at that. It is extraordinary to propose that the criminal liability of omitters should be made more stringent than the criminal liability of doers; and I have criticised the proposal on this ground.¹² Ashworth, however, supports it, on what to me is the mysterious argument that "so long as we are satisfied that under certain circumstances an act and an omission are morally equivalent, then under those circumstances no separate casual enquiry is necessary, for a sufficiently close link exists" (at p. 105). Take two hypotheticals. (i) Parents abuse child, who dies, but the child had a heart condition; the death might have been caused by the abuse, but it might well have been caused by the heart condition irrespective of the abuse. Parents not guilty of homicide, and no one has suggested otherwise. (ii) As above, but the parents were guilty not of positive abuse but of a reckless (or intentional) omission. According to the Law Commission (and the academic team) the parents should be guilty of homicide if the parents' omission might have caused the death even though it is not proved to have done so; and Ashworth's explanation is that there is now a "close link" between the omission and the death. On what evidence?

GLANVILLE WILLIAMS.*

¹⁰ (1882) 15 Cox. 35.

¹¹ Clause 17(1)(b); cp. Example 17(ii) in the appendix to the Report.

¹² 7 L.S. 107.

* Emeritus and Honorary Fellow, Jesus College, Cambridge.

A Without going in detail into the considerable volume of technical evidence which has been put before me, it seems to me to be the case that when death results from arsenical poisoning it is brought about by two conditions; on the one hand dehydration and on the other disturbance of the enzyme processes. If the principal condition is one of enzyme disturbance—as I am of the view it was here—then the only method of treatment which is likely to succeed is the use of the specific antidote which is commonly called B.A.L. Dr. Goulding said in the course of his evidence:

C “The only way to deal with this is to use the specific B.A.L. I see no reasonable prospect of the deceased being given B.A.L. before the time at which he died”—and at a later point in his evidence—“I feel that even if fluid loss had been discovered death would have been caused by the enzyme disturbance. Death might have occurred later.”

D I regard that evidence as very moderate, and it might be a true assessment of the situation to say that there was no chance of B.A.L. being administered before the death of the deceased.

For those reasons, I find that the plaintiff has failed to establish, on the balance of probabilities, that the defendants' negligence caused the death of the deceased.

Judgment for the defendants.

E Solicitors: *W. H. Thompson; Nigel Ryland.*

F **FAGAN v. COMMISSIONER OF METROPOLITAN POLICE**

Crime—Assault—Police—Car driven on to policeman's foot—Doubt whether intentional or accidental—Deliberate delay in removing car—Mens rea—Actus reus—Whether subsequent inception of mens rea capable of converting original unintentional act into an assault.

G *Crime—Mens rea—Assault—Unintentional battery—Car driven on to policeman's foot—Supervening mens rea constituted by deliberate delay in removing car—Whether an assault.*

A police constable wishing to question the defendant driver directed him to park his vehicle at a precise space against the kerb, whereupon the defendant drove his car on to the police

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JAMES
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constable's foot. After the latter had repeated several times, "Get off my foot!" the defendant reversed the car off the constable's foot. The defendant was convicted by justices of assaulting a police constable in the execution of his duty. He appealed to quarter sessions, who found that while they were left in doubt as to whether the initial mounting of the wheel was intentional or accidental, they were satisfied beyond all reasonable doubt that the defendant knowingly, provocatively and unnecessarily allowed the wheel to remain on the police constable's foot after he had been told to drive off, and that on those facts an assault was proved.

On appeal, on the ground that on the justices' finding the initial mounting of the wheel could not be an assault; that the act of mounting the foot came to an end without any mens rea and that, accordingly, there was no act done by the defendant which could constitute an actus reus:—

Held, dismissing the appeal (Bridge J. dissenting) (1) that where an assault involved a battery it could be inflicted through the medium of a weapon or instrument controlled by the action of the offender.

(2) That although the elements of actus reus and mens rea were necessarily present at the same time in an assault, it was not necessary for the mens rea to be present at the inception of the actus reus: it could be superimposed on an existing act provided it was a continuing act.

(3) That the defendant's act in mounting the policeman's foot with his car was an unintentional battery which his later conduct in purposely delaying the removal of the car from the foot rendered criminal from the moment the necessary intention to inflict unlawful force was formed.

Per curiam. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence (post, p. 444b).

Per Bridge J. There was no act done by the appellant after he had driven the car on to the police constable's foot which could constitute an assault (post, p. 446b-c).

CASE STATED by Middlesex Quarter Sessions.

On October 25, 1967, the appellant, Vincent Martel Fagan, appealed to Middlesex Quarter Sessions against his conviction at Willesden magistrates' court upon a charge preferred by David Morris, a constable of the Metropolitan Police Force, for and on behalf of the respondents. He had been convicted of assaulting David Morris when in the execution of his duty on August 31, 1967, contrary to section 51 of the Police Act, 1964. The appellant's appeal was dismissed.

On the hearing of the appeal the following facts were either proved or admitted.

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A (a) David Morris was at all material times in the execution of his duty.

B (b) On August 31, 1967, the appellant drove a motor vehicle in Fortune Gate Road, London, N.W.10, near the junction with Craven Park Road, London, N.W.10. While the appellant was in the course of reversing his motor vehicle from the said road on to a pedestrian crossing in Craven Park Road, David Morris asked the appellant to pull into the road against the north kerb so that he could ask the appellant to produce documents relating to the appellant's driving. First of all the vehicle stopped and it did not move. David Morris, who had walked into the middle of the road, pointed out to the appellant a suitable parking space against the kerb. The appellant drove the vehicle towards David Morris and stopped it with its rear side a substantial distance from the kerb. David Morris went up to the appellant and asked him to park the vehicle closer to the kerb. David Morris walked to a position about one yard in front of the vehicle and pointed to the exact position against the kerb. The appellant drove the vehicle in David Morris's direction and stopped the vehicle with its front off-side wheel on David Morris's left foot. David Morris said to the appellant, "Get off, you are on my foot!" The appellant's driving window was open. The appellant said "Fuck you, you can wait." The appellant then turned off the ignition or at least the engine stopped running. David Morris then said to the appellant several times, "Get off my foot!" The appellant then said very reluctantly, "Okay, man, okay." The appellant thereafter very slowly turned on the ignition and reversed the vehicle off David Morris's foot.

C (c) As a result of the appellant's act or omission David Morris's left big toe was injured. The toe was swollen and slightly bruised.

D It was contended for the appellant that David Morris was uncertain that the appellant deliberately mounted the wheel of his vehicle on to his foot. To establish the charge of assault the prosecution must prove that it was deliberate on the appellant's part. The incident might have been accidental. At any rate it was not proved to the satisfaction of the court that what the appellant was alleged to have done was done by him deliberately.

E It was further contended for the appellant that if one drove a vehicle over some part of a man's body that might be accidental but if one held it there it required a rather more positive act and if one did hold the vehicle in the said manner it was not an assault, because the actual assault, whether it was by accident or not, was that the vehicle got on to the foot; the fact that the

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driver might have taken a little longer to take it off—if the court accepted the time deposed by David Morris, that is to say twenty-five seconds—could not be an assault, because the assault had already taken place. It was also contended for the appellant that the continued pressure on David Morris's foot was not a fresh assault.

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It was contended for the respondents that if the vehicle was deliberately left in a position where pressure was still being exerted and if the appellant had reasonable time in which to get the vehicle off David Morris's foot and if the appellant in those circumstances left the vehicle on his foot, an assault in law would commence as soon as the reasonable time had elapsed for the appellant to get the vehicle off altogether, if the appellant deliberately delayed in getting the vehicle off, that would be an assault in law. No authorities were cited to the deputy chairman and the justices.

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On those facts the deputy chairman and the justices were left in doubt as to whether the initial mounting of the motor wheel on David Morris's foot was intentional on the part of the appellant or accidental. They were satisfied beyond all reasonable doubt that the appellant knowingly, provocatively and unnecessarily allowed the motor wheel to remain on David Morris's foot after the latter said, "Get off, you are on my foot." They came to the conclusion that the charge of assault on David Morris had been made out, and dismissed the appeal.

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The question of law for the opinion of the High Court is whether upon the facts stated above the deputy chairman and the justices were right in dismissing the appeal.

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A. Abbas and *A. Azhar* for the appellant. The actus reus consisted of the appellant driving his car on to the policeman's foot. The justices had been in doubt as to whether the mounting of the wheel on to the policeman's foot was intentional or accidental, accordingly there was no mens rea at the time of the actus reus and there could not be an assault. The continued pressure on the policeman's foot was not a fresh assault. The appellant's failure to remove the car from his foot could not be an assault in law: Stone's Justices' Manual (1968), Vol. 1, p. 651.

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James Rant for the respondent. The actus reus was a continuing act and the intervention of mens rea turned that act into an assault: *Hunter v. Johnson*.¹ The essence of assault was an attempt to injure or put into fear. There was no reason why a sustained

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¹ (1884) 13 Q.B.D. 225.

- A attempt should not be an assault. Alternatively, there might be a duty to act in which case an omission to act in breach of duty would amount to an assault.

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Cur. adv. vult.

- B July 31. LORD PARKER C.J. I will ask James J. to read the judgment which he has prepared, and with which I entirely agree.

- C JAMES J. The appellant, Vincent Martel Fagan, was convicted by the Willesden magistrates of assaulting David Morris, a police constable, in the execution of his duty on August 31, 1967. He appealed to quarter sessions. On October 25, 1967, his appeal was heard by Middlesex Quarter Sessions and was dismissed. This matter now comes before the court on appeal by way of case stated from that decision of quarter sessions.

The sole question is whether the prosecution proved facts which in law amounted to an assault.

- D On August 31, 1967, the appellant was reversing a motor car in Fortunegate Road, London, N.W.10, when Police Constable Morris directed him to drive the car forwards to the kerbside and standing in front of the car pointed out a suitable place in which to park. At first the appellant stopped the car too far from the kerb for the officer's liking. Morris asked him to park closer and indicated a precise spot. The appellant drove forward towards him and stopped it with the offside wheel on Morris's left foot.
- E "Get off, you are on my foot," said the officer. "Fuck you, you can wait," said the appellant. The engine of the car stopped running. Morris repeated several times "Get off my foot." The appellant said reluctantly "Okay man, okay," and then slowly turned on the ignition of the vehicle and reversed it off the officer's foot.
- F The appellant had either turned the ignition off to stop the engine or turned it off after the engine had stopped running.

- G The justices at quarter sessions on those facts were left in doubt as to whether the mounting of the wheel on to the officer's foot was deliberate or accidental. They were satisfied, however, beyond all reasonable doubt that the appellant "knowingly, provocatively and unnecessarily allowed the wheel to remain on the foot after the officer said 'Get off, you are on my foot'." They found that on those facts an assault was proved.

Mr. Abbas for the appellant relied upon the passage in Stone's *Justices' Manual* (1968), Vol. 1, p. 651, where assault is defined. He contends that on the finding of the justices the initial mounting of the wheel could not be an assault and that the act of the wheel

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mounting the foot came to an end without there being any mens rea. It is argued that thereafter there was no act on the part of the appellant which could constitute an actus reus but only the omission or failure to remove the wheel as soon as he was asked. That failure, it is said, could not in law be an assault, nor could it in law provide the necessary mens rea to convert the original act of mounting the foot into an assault.

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Mr. Rant for the respondent argues that the first mounting of the foot was an actus reus which act continued until the moment of time at which the wheel was removed. During that continuing act, it is said, the appellant formed the necessary intention to constitute the element of mens rea and once that element was added to the continuing act, an assault took place. In the alternative, Mr. Rant argues that there can be situations in which there is a duty to act and that in such situations an omission to act in breach of duty would in law amount to an assault. It is unnecessary to formulate any concluded views on this alternative.

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In our judgment the question arising, which has been argued on general principles, falls to be decided on the facts of the particular case. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. Although “assault” is an independent crime and is to be treated as such, for practical purposes today “assault” is generally synonymous with the term “battery” and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case the “assault” alleged involved a “battery.” Where an assault involves a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand upon another, and the action does not cease to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim. So for our part we see no difference in principle between the action of stepping on to a person’s toe and maintaining that position and the action of driving a car on to a person’s foot and sitting in the car whilst its position on the foot is maintained.

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To constitute the offence of assault some intentional act must have been performed: a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault: they can only shed

- A a light on the appellant's action. For our part we think the crucial question is whether in this case the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment a distinction is to be drawn between acts which
- B are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete it cannot thereafter be said to be a threat to inflict unlawful force upon the victim. If the act, as distinct from the results thereof, is a continuing act there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues there is a
- C continuing act of assault.

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- D For an assault to be committed both the elements of *actus reus* and *mens rea* must be present at the same time. The "*actus reus*" is the action causing the effect on the victim's mind (see the observations of Park B. in *Regina v. St. George*¹). The "*mens rea*" is the intention to cause that effect. It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed upon an existing act. On the other hand the subsequent inception of *mens rea* cannot convert an act which has been completed without *mens rea* into an assault.

- E In our judgment the Willesden magistrates and quarter sessions were right in law. On the facts found the action of the appellant may have been initially unintentional, but the time came when knowing that the wheel was on the officer's foot the appellant (1) remained seated in the car so that his body through the medium of the car was in contact with the officer, (2) switched off the ignition of the car, (3) maintained the wheel of the car on the
- F wheel in that position. For our part we cannot regard such conduct as mere omission or inactivity.

- G There was an act constituting a battery which at its inception was not criminal because there was no element of intention but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant's argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

¹ (1840) 9 C. & P. 483, 490, 493.

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BRIDGE J. I fully agree with my Lords as to the relevant principles to be applied. No mere omission to act can amount to an assault. Both the elements of actus reus and mens rea must be present at the same time, but the one may be superimposed on the other. It is in the application of these principles to the highly unusual facts of this case that I have, with regret, reached a different conclusion from the majority of the court. I have no sympathy at all for the appellant, who behaved disgracefully. But I have been unable to find any way of regarding the facts which satisfies me that they amounted to the crime of assault. This has not been for want of trying. But at every attempt I have encountered the inescapable question: after the wheel of the appellant's car had accidentally come to rest on the constable's foot, what was it that the appellant did which constituted the act of assault? However the question is approached, the answer I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant's fault was that he omitted to manipulate the controls to set it in motion again.

Neither the fact that the appellant remained in the driver's seat nor that he switched off the ignition seem to me to be of any relevance. The constable's plight would have been no better, but might well have been worse, if the appellant had alighted from the car leaving the ignition switched on. Similarly I can get no help from the suggested analogies. If one man accidentally treads on another's toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests, there is clearly an assault. But there is no true parallel between such cases and the present case. It is not, to my mind, a legitimate use of language to speak of the appellant "holding" or "maintaining" the car wheel on the constable's foot. The expression which corresponds to the reality is that used by the justices in the case stated. They say, quite rightly, that he "allowed" the wheel to remain.

With a reluctantly dissenting voice I would allow this appeal and quash the appellant's conviction.

Appeal dismissed.

Solicitors: *Clinton Davis, Hillman & Parkus; Solicitor, Metropolitan Police.*

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