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ANGLO-AMERICAN PERSPECTIVES ON OMISSIONS LIABILITY: THEORETICAL AND SUBSTANTIVE CONTOURS OF CRIMINALISATION AND OPTIMAL REFORM PATHWAYS

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Abstract: This article examines the omission – commission binary divide that is of extant significance within Anglo-American criminal law theory and doctrine. In English law it has been encaptured in a seminal academic debate between Williams and Ashworth, who have propagated opposite stances with respect to criminal liability for omission. American law has also witnessed significant scholarly discourse in this

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arena, especially on the propriety of the legal duty requirement. Leavens has proposed we abolish this requirement and the act/omission distinction altogether, examining instead the causal link between the offender's course of conduct and the prescribed harm(s). Normative and philosophical debates within American and English law, and particularised concerns applicable to substantive precepts in each jurisdiction, are evaluated. An array of issues are deconstructed, notably the legal duty requirement and its scope, the offences that may be committed by omission, and specific concerns that Anglo-American law fails to meet fair warning and legality standardisations. There is a novel and distinctive comparative analysis of alternative perspectives on criminalisation, and creation of dangerous situation and legal duty to rescue principles are analysed via *dépecage* (issue splitting) analysis across a spectrum of five bespoke compartmentalisations. Good Samaritan laws as part of optimal reform proposals on failure to rescue and failure to report harm(s) are proposed.

Key Words: *omission liability; Anglo-American criminal law lerspectives; fair warning and legality; Good Samaritan laws; creation of dangerous situations; duty to rescue and to report; optimal reforms*

I. INTRODUCTION

The Good Samaritan biblical parable,[1] and the divine command to the lawyer to love one's neighbour, has been at the forefront of academic debate for generations.[2] Who is our "legal" neighbour and what is the extent of obligations to them to prevent or report potential harm? In the realm of Anglo-American criminal law, the conceptualisation that "charity begins where justice ends", and the question of which legal duties we ought to criminalise, has engendered significant controversy.[3] In truth, despite decades of development we are no clearer to any holistic answers on the justifiable applicability of Good Samaritan laws, their reach, and legitimation. This article seeks to provide new insights to this important concern via a comparative examination of Anglo-American substantive and theoretical criminal law principles, adducing optimal reform pathways for future standardisation.

In Section II of the article we focus on criminal omission liability in American law: the legal duty requirement; the legal duties giving rise to criminal omission liability; and which offences may be committed by omission. It is submitted that there are a number of main functions of the legal duty requirement, beyond causal salience functionality and potential ascription of liability. It should not be abolished as some commentators have suggested. Personal liberty, and the ability of the individual to mind her own business are, typically, significantly more compromised by the proscription of omissions, rather than prohibitions of actions. The legal duty requirement confines the criminal justice system's interference with the individual's

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[1] Luke 10:27-37 (King James).

[2] For discussion see M J Stewart, "How Making the Failure to Assist Illegal Fails to Assist" (1998) 25 *American Journal of Criminal Law* 385; Jeremy Waldron, "On the Road: Good Samaritans and Compelling Duties" (2000) 40 *Santa Clara Law Review* 1053; and Damien Schiff, "Samaritans: Good, Bad and Ugly: A Comparative Law Analysis" (2005) 11 *Roger Williams Law Review* 77.

[3] For discussion see Larry Alexander, "Criminal Liability for Omissions: An Inventory of Issues" in Simester and S Shute (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002), 121; and D B Yeager, "A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help" (1993) 71 *Washington University Law Review* 1.

personal liberty to situations where the law demands action, thus declaring that other societal interests trump the personal liberty interest. Moreover, the legal duty requirement ensures that criminal liability for failures to act accords with the legality principle and the fair warning requirement. By demarcating the boundaries between unlawful and lawful omissions, the legal duty requirement aims to attain certainty and provide the layperson with a fair notice as to the criminality of her conduct. It is our contention that across five categorizations of duty that we consider - status relationships, statutes, contracts, creation of peril and voluntary assumption of duty - American criminal law fails to provide fair warning on omission criminalisation and the culpability threshold boundary for liability.

In Section III we shift our focus to provide a detailed extirpation of criminal omission liability in English criminal law: the legal duty requirement; judicial legislation and culpability standardisations for omissive conduct; and creation of family and household obligations. Beyond early incantations of legal duty and omissive behaviour liability – constrained within the spheres of statute and contract-significant developments have pragmatically occurred at common law. English criminal law has witnessed an extraordinary instrumental propagation of legal duties, judicially created "responsibility obligations" to prevent harm(s). These novel responsibility obligations may be compartmentalised, as in American jurisprudence, within delineated spheres of status and other situational relationships. This solipsistic development of common law duties, ad hoc and often opaque in nature, has engendered a bewildering typology of potential exceptions to the conventional standpoint, that of no liability for "pure" omissions in failing to act. An individual citizen, as in American criminal law, is egregiously placed in a situation where no legal clarity or certainty is provided on effective legal duty requirements, or potential criminalisation of omissive behaviour.

The analysis is extended in Section IV to specifically evaluate Good Samaritan laws, and the way ahead, specifically in the context of creation of dangerous situations and legal duties to rescue. It is our standpoint that a novel schematic framework needs to be considered, distinctively applying *dépecage*[4] (issue-

[4] Dépecage methodology is adapted herein from conflict of laws principles whereby particularised precepts are applied to different issues in the same dispute via issue-

splitting) precepts to alternative, and differently modulated creation of dangerous situation and legal duty to assist "sources" of harm. The postulated illustrations we present are bound together by the contours of legitimate individual autonomy, and the normative assessments that flow from dissonant situational sources of harm creation, as interpreted through a broadened legal prism.

In our critique in Section IV we present five separate sets of circumstances that are inculcated in respect of creation of a dangerous situation/duty to rescue. It is adventitious to consider each in a bespoke manner as the implications for fair warning and legality in terms of criminalisation (or otherwise) are completely different; separate issues apply to proximate causation, and the effect of individual autonomy intersection we contend is fundamentally different. This critique across situational sources (A) – (E), set out below, and utilizing *dépecage* methodology, indicates that only in situational sources (D) and (E) is specific legislative enactment required on failure to rescue/failure to report.

The five situational sources of harm, and the contours of appropriate liability, can be deconstructed as follows: (A) Accidental attributable harm and supervening fault; (B) Non-accidental attributable harm and causality; (C) Systemic failures to prevent harm and fair imputation; (D) Hegemony and control – subjugation and usurpation of the means to self-protection of other persons; and (E) The inter-section of initial accident and subsequent omission by the defendant to prevent harm. This critique of Good Samaritan law, and duties to rescue, and broader Anglo-American legal duty requirements, are drawn together in Section V. In our concluding remarks we set out potential reform pathways to legitimately address concerns over lack of legal certainty and fair warning related to omission liability.

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splitting. The word dépecage is of French derivation from dépecer meaning to carve up, analyse minutely.

II. CRIMINAL OMISSION LIABILITY IN AMERICAN LAW

A. The Legal Duty Requirement

The doctrine of commission by omission is not new to American criminal law. In 1864, the District Attorney of the Northern District of California sought the conviction of Josiah Knowles, a ship captain, for manslaughter. This was predicated upon Knowles' failure to stop the ship or lower a boat in order to rescue a sailor who accidentally fell into and sea and drowned. The district judge instructed the jurors that "where death is the direct and immediate result of the omission of a party to perform a plain duty imposed upon him by law or contract, he is guilty of a felonious homicide".[5] That is only one of many examples in early American case law acknowledging criminal responsibility for failing to act.

Omission liability became a subject of further debate and controversy with the emergence of the regulatory state, and the resulting public welfare offences. A wide array of professional activities were placed under complex regulations to monitor their function and protect people from industrial hazards.[6] To put it bluntly, an explosion of regulations and regulatory offences has taken place in the last century. The number of federal regulations codified in the Code of Federal Regulations (CFR) alone exceeds 300,000.[7] This has stretched the scope of criminal omission liability in two ways. Firstly, by enacting many regulatory offences that are purely omissive,[8] and secondly by imposing numerous and elaborate duties on professional sectors, and sometimes the general public,[9] the omission of which may trigger liability for criminal offences if the other elements of the offence have been proven.

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[5] *United States v Knowles* 26 F Cas 800 (ND Cal 1864).

[6] Paul J Larkin, Jr, "Regulatory Crimes and the Mistake of Law Defense", (The Heritage Foundation, 9 July 2015), <https://www.heritage.org/crime-and-justice/report/regulatory-crimes-and-the-mistake-law-defense> (visited 13 April 2021).

[7] ibid 4.

[8] Graham Hughes, "Criminal Omissions" (1958) 67 *Yale L J* 590, 598.

[9] For example, The Food and Drugs Act provides detailed duties with regard to good manufacturing practices of infant formulas. 21 U S C § 350a.

The long-standing common law precept, under which an omission of a duty owed by one individual to another may, under certain circumstances, rise to a criminal level, has paved its way into modern criminal codes in the United States. The Model Penal Code, an initiative of the American Law Institute to standardise the criminal law in the country, was published in 1962.[10] The Model Penal Code has heavily influenced a large number of states when drafting and revising their codes, and courts often refer to its provisions and commentary in their opinions, even in jurisdictions where it has not been adopted.[11] Subsection 2.01(3) of the Model Penal Code provides: "Liability for commission of an offence may not be based on an omission unaccompanied by actions unless: (a) the omission is expressly made sufficient by the law defining the offence; or (b) a duty to perform the omitted act is otherwise imposed by the law."[12] Most states have taken the same stance regarding omission liability, whether through a general provision in their penal code - verbatim or similar[13] to the Model Penal Code's provision - or through a judicial common law rule.[14] The key element of criminal omission liability for those offences in which omission is not expressly made sufficient is the legal duty imposed by the law.

The legal duty approach, however widely accepted by legislatures, has been subject to criticism. Arthur Leavens was arguably the most prominent critic of this approach,[15] frequently cited by opponents of the legal duty requirement and the whole notion of any distinction between act and omission in criminal law. Leavens proposed abolishing this distinction in determining criminal liability, and instead of focusing on

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[10] Francis Barry McCarthy, "Crimes of Omission in Pennsylvania" (1995) 68 *Temp L Rev* 633, 641-642.

[11] Michael Duttwiler, "Liability for Omission in International Criminal Law" (2006) 6 *International Criminal Law Review* 1, 32.

[12] Model Penal Code § 2.01(3).

[13] *E.g.*, Ky Rev Stat Ann § 501.030 (Kentucky); 18 Pa Stat and Cons Stat Ann § 301 (Pennsylvania); 720 Ill Comp Stat Ann 5/4-1 (Illinois); NJ Stat Ann § 2C:2-1 (New Jersey).

[14] See, *e.g.*, *People v Sealy* 136 Mich App 168, 172 (1984) (Michigan CA); *State v Clark* 5 Conn Cir Ct 699, 708-709 (1969) (*Clark*).

[15] Arthur Leavens, "A Causation Approach to Criminal Omissions" (1988) 76(3) *California Law Review* 547

the offender's conduct that immediately precedes the ensuing harm, the court ought to examine the offender's full course of conduct vis-à-vis the resulting harm in order to properly assess the causal relationship between the two.[16] This causal relationship depends on how society defines the status quo for the situation at hand, and whether the relevant conduct is part of the normal "at rest" state of affairs, or rather abnormal and intrusive.[17] The causal attribution, and whether a certain conduct represents abnormality, and can be fairly said to have proximately caused the proscribed result, he suggested, should turn on both probabilistic and normative factors. The probabilistic aspect of normality asks for an empirically valid expectation that persons in similar circumstances would act to avert that harm, so that the omission demonstrates a departure from a pattern of regular performance. The normative aspect is satisfied if there is a deeply entrenched recognised understanding that society relies on the omitter to prevent the harm, so society would deem it reprehensible if she does not act to do so.[18]

Leavens' proposition, and the rationales underlying it, are flawed, both as a matter of fact and as a matter of law. Leavens himself admitted that the proposed approach of "examining an actor's course of conduct rather than a single discrete act - is hardly novel",[19] since the courts had previously followed such analysis. He even provided examples of the case law demonstrating that prior factorisation.[20] Today, almost four decades after his well-known article was published, this is still valid and courts continue to look at the defendant's full course of conduct, and the totality of circumstances prior to the imposition of criminal liability. In 2016, *Jason Voss* engaged in providing heroin to Douglas Greiger, and did not seek medical attention after the latter consumed an overdose of the drug, because of which he died.[21] *Voss* was convicted of involuntary manslaughter.[22] The Supreme Court of Missouri upheld

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[16] *Ibid*., 583-590.

[17] *Ibid*., 568-569.

[18] *Ibid*., 569 & 575.

[19] *Ibid*., 587.

[20] *Ibid*., 587-588.

[21] *State of Missouri v Voss* 488 S W 3d 97, 110-113 (2016) (Missouri SC) (*Voss*).

[22] *Ibid*.,107.

his conviction and concluded that he recklessly caused the death of the victim.[23] In doing so, the Court did not focus solely on the moment preceding the death, *i.e.* the fact that Voss failed to go back to the victim's hotel room and obtain medical help despite his concern about the victim's reaction to injecting the heroin after he left. The Court took into consideration his entire course of conduct, including his affirmative acts: providing the drug for a price; providing advice and technical support in its preparation; helping in manufacturing the necessary equipment for preparing the drug; and providing the expertise to load the drug-delivery device.[24]

Leavens argued that identifying a legal duty is used to "forge an intelligible causal link between the so-called omission and the criminal result".[25] Fletcher similarly described the legal duty to act as "a surrogate for the causal link".[26] What those contentions essentially imply is that courts choose to appeal to the legal duty requirement in order to "easily" avoid establishing legal causation. Courts have never denied the causal function of the legal duty requirement, and its nature as policy limitation preventing most omission from being deemed the proximate cause of a prohibited outcome.[27] Leavens did not deny either the role that a legal duty may play in establishing proximate causation. He acknowledged that the existence of a legal duty, and the fact that a body of law made a particular standard of conduct obligatory, suggests a regularity of performance, or in other words satisfies the probabilistic prong, but it is not sufficient since regularity alone does not constitute normality.[28]

Yet, Leavens and Fletcher ignore that the proximate causation inquiry does not end there, and lack of causation, as Moore argued, may not be remedied by the mere existence of a duty to act.[29] For example, the Court of Appeals in Michigan stated that

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[23] *Ibid*., 113.

[24] *Ibid*., 112-113.

[25] Leavens, "A Causation Approach" (n. 15), 583.

[26] George Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978), 606.

[27] See, *e.g. State v Williquette* 129 Wis 2d 239, 253 (1986) (Wisconsin SC) (*Williquette*).

[28] Leavens, "A Causation Approach" (n. 15), 567.

[29] Michael S Moore, "More on Act and Crime" (1994) 142 *U Pa L Rev* 1749, 1784-85.

when a charge of manslaughter is predicated on a failure to act, the omission must have been the proximate cause of the death, and the death must have resulted from the neglect of a plain legal duty imposed by law or contract.[30] This indicates that the relationship between the legal duty and the proximate causation is not symbiotic, in the eyes of the court. Another even clearer example is the case of *Frank Johnson*, who was found guilty of manslaughter because he failed to take steps to protect his infant child from the mother's life-threatening behaviour.[31] *Johnson* was obviously under a legal duty of care toward his child, but that was not enough in terms of causation to affirm his guilt. The court went on to determine whether the occurrence of the harmful event was reasonably foreseeable to the defendant.[32] Such determination, we believe, should satisfy the reprehensibility or blameworthiness prong of Leavens' proposition. When a reasonable person is under a legal duty to act, she is expected to perform an act under some circumstances, and she can reasonably foresee the harmful event which society expects her to try to prevent, then she is sufficiently blameworthy to be held responsible for causing the prohibited result. Most of the criminal case law addressing omissions involve duties that are legally and morally indisputable - like duties of parents toward children or duties toward a spouse – that courts feel no need to elaborately discuss their normative nature, which may lead some to mistakenly think that the mere existence of a legal duty is sufficient to prove proximate causation.

The legal duty requirement serves other functions in the realm of criminal omissions, rather than simply constrained to establishing proximate causation. If the legal duty is merely used as a device to "forge" a causal link between a conduct and a harm, or as a surrogate for such link, then why is a legal duty required to hold someone liable for complicity of another for failing to make proper efforts to prevent the commission of an offence by the latter?[33] An accomplice, unlike a principal, is not the legal cause of the harm.[34] Thus, one may infer that the legal duty does not constitute, in and of itself, proximate causation, and serves other objectives in addition to contributing to the proximate causation analysis.

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[30] *People v Ogg* 26 Mich App 372, 382 (1970) (Michigan CA).

[31] *Johnson v State* 175 P 3d 674, 675 (Alaska Ct App 2008) (Alaska CA).

[32] *Ibid*., 678-680.

[33] Model Penal Code § 2.06(3)(a)(iii).

[34] Helen Beynon, “Causation, Omissions and Complicity” (1987) *Crim L R* 539, 542.

Among these objectives, two main ones are notable. The prohibition of harmful omissions entails a greater loss of personal liberty, and more interference with people's normal routine, compared to the prohibition of actions.[35] Based on this value of liberty, Michael Moore has argued there should be an act requirement in criminal law; the imposition of liability for omissions ought to be an exception, only for those failures to act carrying a sufficient violation of a duty that the injustice of leaving them unpunished overrides the curtailment of liberty fraught with such liability.[36] The liberty consideration also underpins the criterion of "willed bodily movement", suggested by Moore, to distinguish between acts and omissions, which still prevails today in extant law. It has been adapted in some state laws in spite of robust and vituperative criticism by some commentators: "no satisfactory alternative has emerged to take its place", as Douglas Husak has cogently stated.[37] Therefore, the legal duty requirement aims to reduce the number of situations in which the criminal system may interfere with people's freedom and ability to mind their own business, and restrict such interference to circumstances where the law demands actions, and thereby recognizes that other interests outweigh the personal liberty interest.[38]

The legal duty requirement is meant to ensure that criminal omission liability is in accordance with the legality principle, and the fair warning requirement derives therefrom. The Supreme Court has underscored the paramount importance of fair notice and people's freedom to "steer between lawful and unlawful conduct".[39] It emphasised that a layperson is entitled to have a reasonable opportunity to know what the criminal law demands or proscribes, and the meaning of penal laws should not be subject to speculations.[40] The legal duty requirement cabins the scope of omission

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[35] Roni Rosenberg, *"*Between Killing and Letting Die in Criminal Jurisprudence" (2014) 34 *N Ill U L Rev* 391, 395-396.

[36] Michael S Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (OUP 1993), 59.

[37] Douglas Husak, *Philosophy of Criminal Law* (Rowman and Littlefield 1987), 173.

[38] Itzhak Kugler, "Could Any Statute Imposing a Duty to Act Give Rise to a Conviction of Affirmative Offenses Based on an Omissive Conduct?" (2004) 20 *Mechkarey Mishpat* 379, 404 (Isr).

[39] *Grayned v City of Rockford* 408 US 104, 108 (1972) (US SC).

[40] *Ibid*., 108-109; and *Lanzetta v New Jersey* 306 US 451, 453 (1939) (US SC).

liability and prevents an unwarranted expansion of the criminal law's reach. It aspires to provide people with as fair as possible warning, and achieve consistency and certainty, by drawing the line between unlawful criminal failures to act, and other inactions that do not merit the intervention of the criminal justice system.[41]

Perhaps a testament to the significance of the legal duty requirement for the sake of fair warning is that a legal duty to act is essential not only in those offences defined in active terms. Even if the ability to commit an offence by omission is apparent from the plain language of the offence, the prosecution may still need to prove the existence of an extraneous legal duty applicable to the defendant.[42] To dispense with the legal duty requirement, besides providing explicitly that the offence is capable of commission by omission, it must specify the duty to be performed to evade liability, and the persons bound by this duty.

The case of *Heitzman*[43] exemplifies the aforesaid. The Supreme Court of California addressed the constitutionality of the elder abuse offence in the state.[44] The offence's language clearly prohibits also an omissive conduct by permitting the suffering of an elder or dependent adult. Yet, the court held that due to the broad language of the offence, it fails to provide fair notice with regard to the persons that may be covered by the offence and face criminal charges.[45] To avoid declaring the offence void for vagueness, the court construed the criminal responsibility for this sort

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[41] See T Macaulay, *A Penal Code Prepared by the Indian Law Commissioners* (Pelham Richardson, Cornhill 1837), 159-160.

[42] *E.g. Billingslea v The State of Texas*, 734 SW 2d 422 (1987) (Texas CA) (*Billingslea*).

[43] *People v Heitzman* 886 P 2d 1229 (Cal 1994) (California SC).

[44] The offence imposed criminal liability for a felony upon "any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health is endangered…"

[45] *Heitzman* (n. 43), 207.

of conduct to apply only to those who have a duty to control the conduct of the individual directly abusing the elderly person under existing tort principles.[46] Or, in other words, only those who are under a legal duty to act could be held liable for an elder abuse by omission, and only then the offence would not be considered vague.

The approach Leavens proposed is also deficient in the legal sense, since it fundamentally subverts the legality principle. It breaches the legislature's prerogative to proclaim the prohibited and required conducts, and confer upon courts the power to determine what is unlawful, and when a disappointment of societal expectation rises to the level of criminal conduct.[47] This approach fails to give ordinary people a fair notice with respect to when they are expected to act, and when their action, or lack thereof, crosses the line into the unlawful zone. Leavens' attempt to defend his suggested value judgment as being relatively specific and narrow, and hence fairly puts people on notice and does not offend fair warning,[48] is not persuasive. How would a person know if a societal expectation of preventive conduct by her is so widely recognised, ingrained, and common that her omission to do so may be considered to have caused an ensuing harm? Who determines that? Do we really expect laypeople to know whether a certain expectation is valid based on empirical grounds? How could a person normatively appreciate if society views her omission as reprehensible? What is that "society" whose expectation this approach assesses? Is this society the same throughout a jurisdiction? Would a bystander watching a man drowning in Upstate New York be judged similarly to a bystander watching a man drowning in the Hudson River in New York City? These questions seem to remain unanswered, leaving people to speculate whether by not acting and minding their own business they may have been engaging in a criminal conduct. This lack of fair warning must not be condoned. It effectively leads to a situation wherein omissions might be declared criminal *ex post facto*, when the expectation to perform the omitted act has not been established in any body of the law

In defending his proposition, Leavens referred to the formulations of culpability judgments in manslaughter and negligent homicide cases, which often are

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[46] *Ibid*., 212-214.

[47] Paul H Robinson, “Fair Notice and Fair Adjudication: Two Kinds of Legality” (2005) 154(2) *U Pa L Rev* 335, 344 & 365.

[48] Leavens, “A Causation Approach” (n. 15), 578-583.

raw, imprecise, open-ended value judgments, leaving the jury to evaluate and determine if the defendant's conduct is condemnable. These value judgments, he maintained, were always an acceptable criterion for criminal liability satisfying the requirement of fair warning.[49]

Leavens is right that fair warning does not require perfect precision. However, Leavens seems to conflate here between rules of conduct and rules of adjudication.[50] Culpability requirements are adjudication doctrines to determine whether certain violations should be criminally condemned. They are rules directed to the judicial decision-makers, applied after the facts underlying an allegedly criminal conduct, and they aim to ensure the minimum level of blameworthiness necessary for imposing criminal liability. This sort of rules, due to their function, tolerate a greater deal of complexity and imprecision in their formulation that one cannot reasonably expect the average citizen to grasp.[51] Duties to act, on the other hand, are *ex ante* rules of conduct, just like offences. These rules are directed to the general public, and their function is to define prohibited and required conducts, and to fairly tell people what they must or must not do. Because of their nature, providing fair notice is tremendously important as far as rules of conduct are concerned, and vague definition of duties, judicially created duties or broad interpretations of existing duties must not be tolerated.[52] Absolute certainty is not realistically achievable. Nonetheless, the criminal law is obliged to strive to the maximum fair notice possible. The judgments Leavens suggested, based on ambiguous probabilistic and normative assessments, are very far from that goal, and are not able to constitute an acceptable standard for criminal liability purposes.

The legal duty approach is imperfect. Its main shortcoming, as a few scholars pointed out, [53] is the failure to do justice when some omissions that the public, or parts of it, perceive as reprehensible and immoral, are not deemed criminal because the

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[49] *Ibid*., 579-580.

[50] See Robinson, "Fair Notice" (n. 47), 369-375.

[51] *Ibid*., 378-381.

[52] *Ibid*., 377-379.

[53] See George Fletcher, "On the Moral Irrelevance of Bodily Movements" (1994) 142 *U Pa L Rev* 1443, 1449; Leavens, "A Causation Approach" (n. 15), 562.

omitter was not bound by any legal duty. The famous case of *Carroll Beardsley*[54] is illustrative of this shortcoming. *Beardsley* was convicted of manslaughter for failing to care for his mistress who overdosed on morphine, a conduct that could be hardly justified or excused by any reasonable person. The Supreme Court of Michigan, nevertheless, quashed his conviction, as he was under no legal duty to act. In spite of that, and however harsh and morally repugnant the outcomes of the legal duty requirement may at times be, it is crucial for maintaining certainty and fair warning. This is not the only area in the criminal law which has set a criteria for liability that might seem artificial but necessary to avoid unpredictability and lack of fair notice. A typical example would be the minimum age for criminal responsibility. In Pennsylvania, for example, 10 years old is the youngest age to be adjudicated delinquent.[55] How is a child who committed murder a day after turning 10 years old more culpable and blameworthy than her peer who committed the same crime a day before her tenth birthday? The same grounds upon which the legal duty requirement is explained are appropriate here as well.

Recent case law has planted seeds, though so far only theoretically without practical ramifications, to erode the legal duty requirement. In two cases, the Missouri Court of Appeals mentioned that “where evidence to support a defendant's conviction for first-degree involuntary manslaughter consists of the defendant's affirmative acts, as well as his omissions, the defendant may still be found guilty of the offence even if a duty to perform the omitted act is not otherwise imposed by the law.”[56] One could find support for this view in the language of the Model Penal Code provision requiring a duty to act, since it applies to an "omission *unaccompanied* by action". Yet, adopting this interpretation grants courts an easy way to bypass the legal duty requirement, by manipulating the definition of conduct at hand, as it is almost impossible to think of a course of conduct that is purely omissive without a single affirmative action. Thereby, and since the legal duty requirement serves other objectives besides establishing causation, whenever the offender's failure to act is necessary to satisfy the elements of an offence, without which her conduct cannot be

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[54] *People v Beardsley* 150 Mich 206 (1907) (Michigan SC) (*Beardsley*).

[55] 42 Pa C S § 6302.

[56] *State of Missouri v Shell* 501 S W 3d 22, 30 (2016) (Missouri CA); *Voss* (n. 21), 110.

considered to have caused the prohibited result, a duty to act imposed by the law must be found.

Merely endorsing the legal duty requirement does not suffice, as the following section shows, to ensure fair warning.

B. The Legal Duties Giving Rise to Criminal Omission Liability

In order to hold a person liable, based on her failure to act, for an offence under which the omission is not "expressly made sufficient by the law defining the offence", the prosecution must prove she was under a duty to perform the omitted act, imposed by the law. What are the duties "imposed by the law" which may give rise to criminal responsibility in case they are breached? The leading scholars seem to agree roughly upon the categorisation of duties' sources pertinent to criminal omission liability.[57] Five categories of duties could be identified, the scope of which might at times overlap: status relationships, statutes, contracts, creation of peril, and voluntary assumption of responsibility.[58]

Reading the overviews that criminal law treatises provide with respect to the duties giving rise to omissions liability might give the misleading impression that these categories are well delineated and adequately defined. The reality, however, is more complicated. In fact, a thorough exploration of the case law reveals the unrestricted nature of the duties giving rise to criminal omission liability under the present governing rules. Even though courts across the jurisdictions still cite the basic rule articulated over a century ago that "the duty neglected duty must be a legal duty, and not a mere moral obligation",[59] their judgments demonstrate a departure from this rule.

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[57] Douglas Husak, "Courses of Conduct" in Dana Kay Nelkin and Samuel Rickless (eds), *Ethics and Law of Omissions* (2017) 164, 172.

[58] See, in general, Paul H Robinson, "Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States" (1984) 29 *NY L Sch L Rev* 101, 111-116; Leavens, "A Causation Approach" (n. 15), 557-561; *Jones v United States* 308 F 2d 307 (1962) (US CA).

[59] *Beardsley* (n. 54), 209.

The prevailing stance throughout most jurisdictions in the United States recognises common law duties – duties developed in the case law – as capable of constituting a basis for criminal omission liability.[60] These are not restricted to criminal common law duties only. The court of appeals in Missouri, for example, stated that "civil precedent is instructive in determining when the duty to act arises".[61] In this regard, a string of cases recognised deriving legal duties giving rise to criminal responsibility from the Restatement of Torts.[62] Based on the Restatement, the court of appeals in Arizona upheld a jury instruction alluding to the duty of a landowner to exercise the ability to control a third person's activity, when she knows or should know that such exercise is called-for to avoid any harmful results.[63] In jurisdictions that have undergone a serious codification process, courts remarked that recognising a common law duty, not reflected in a statute, is not inconsistent with other criminal liability principles provided by the State's penal code.[64] In *Williquette*, the court held that enumerating the professionals obligated to report suspected child abuse in a statute, does not exempt those bound by a common law duty from doing so and protecting the children,[65] which effectively means enacting statutory duties does not alter the applicability of existing common law duties.

The area of status relationships, in particular, has witnessed a noticeable amount of judicial creativity, and unchecked discretion, with regard to legal duties. The once dominant approach limiting duties to core relationships like parental or marital ones, has been eroded. Courts opined that not only biological or adoptive parents owe a child the duty to care for her, supply her with necessities, and protect her from an abuse or injury inflicted upon her. Cohabitants and live-in boyfriends may

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[60] See, *e.g.*, *Clark* (n. 14), 706; and *West v Commonwealth* 935 S W 2d 315, 317 (1996) (Kentucky CA) (*West*).

[61] State of *Missouri v Gargus* 462 S W 3d 417, 423 (Mo Ct App 2013) (Missouri CA) (*Gargus*).

[62] A treatise published by the American Law Institute that summarises the principles of common law in the United States concerning tort law.

[63] *State v Brown* 129 Ariz 347 (1981) (Arizona CA).

[64] *State v Miranda* 245 Conn 209, 220 (1998) (Connecticut CA).

[65] *Williquette* (n. 27), 259-260.

be also bound by such duties.[66] By the same token, a man and a woman who cohabited for several years, but not entering wedlock, are under legal duties toward each other.[67]

In this context, courts have frequently employed the doctrine of "*in loco parentis*", in order to impose legal duties, and hold omitters liable whenever not able to find a formal status relationship. The doctrine emerged originally from the civil common law, and it literally means "in place of a parent". It catches those relationships wherein a person assumes, informally and even temporarily, some parental responsibilities, obligations, and functions, toward a child.[68] A pimp who moved with a prostitute from one hotel to another, serving as her son's sole caregiver while she was engaging in prostitution acts, and assuming several parental functions, was convicted of involuntary manslaughter for not seeking medical attention to the ill child. The legal duty underlying his liability was derived from the *in loco parentis* doctrine.[69] This is only one example, and the case law contains an array of cases holding persons who stood *in loco parentis* to a child liable for the results ensuing from their failure to perform their duties.[70]

Basic cornerstones of the legality principle are hardly served as long as defining legal duties is still significantly governed by the common law and courts wield a vast discretion to determining their scope. Fletcher contends that "law" in the context of a duty imposed by the law according to the Model Penal Code means case law, law as a principle, rather than statutory law.[71] This contention - allowing the recognition of common law duties for criminal purposes - can barely hold water in

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[66] *Leet v State* 595 So 2d 959, 962-963 (1991) (Florida CA).

[67] *State ex rel. Kuntz v Montana Thirteen Judicial District Court*, 298 Mont 146, 153 (2000) (Montana SC) (*Kuntz*).

[68] *State of Tennessee v Sherman* 266 S W 3d 395, 406 (2008) (Tennessee SC) (*Sherman*); *People v Thomas*, No 329448, 2017 WL 1533861 (Mich Ct App 2017) (Michigan CA).

[69] *People v Mathis* No 279352 2008 WL 4649001 (Mich Ct App 2008) (Michigan CA).

[70] See, *e.g.*, *People v Thomas* 85 Mich App 618, 624 (1978) (Michigan CA); *Sherman* (n. 68); *People v Munck* 92 A D 3d 63, 64-67 (2011).

[71] Fletcher, “On the Moral Irrelevance” (n. 53), 1448-1449.

light of the abolition of common law offences in the vast majority of American jurisdictions, and is indefensible as a matter of law. The imposition of criminal liability based on a failure to discharge a common law duty circumvents this abolition,[72] and is tantamount to judicially creating an offence defined in omissive terms. In this regard, relying upon common law duties prompts judicial law-making, and undermines the authority of the legislature as the sole responsible for outlawing conduct and defining criminal offences.

The current situation fails to put laypeople on fair notice as to when and how they are expected to act. One cannot ignore that the public lacks knowledge regarding common law rules, let alone civil common law rules and scholarly writings like the Restatement of Torts.[73] Even legal professionals struggle with stating the law clearly. Moreover, the elastic and unwritten character of common law duties, invites courts to constantly develop them and alter their boundaries as they see fit according to the cases brought before them. This unduly leaves people to speculate over the criminality of their conduct, and without a proper ability to ascertain whether they might be crossing the line into criminal behaviour. Since courts tend to expand the reach of duties, vesting a great degree of discretion in them to shape and define legal duties entails a risk for retroactive application of judicial interpretation broadening criminal rules.

Fair notice is further compromised by the absence of requirement for any kind of culpability with respect to the legal duty to act. An offender who is not aware that she is under a legal duty to act in a certain situation, may be nonetheless held criminally liable for failing to carry out her duty, no matter how reasonable and honest her ignorance was.[74] Attempts made by courts to relax this rigid rule remained modest and limited to narrow circumstances, like pure omission offences requiring willfulness or intent,[75] or circumstances similar to those addressed by the Supreme

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[72] See McCarthy, "Crimes of Omission" (n. 10), 665-666; Robinson, "Fair Notice" (n. 47), 379. See also the dissenting opinions in *Commonwealth of Pennsylvania v Pestinikas* 421 Pa Super 371, 404 & 414 (1992) (Pennsylvania SC) (*Pestinikas*).

[73] Robinson, "Fair Notice" (n. 47), 340.

[74] Wayne R. LaFave, *Criminal Law* (3rd edn, St. Paul Minn.: West Group 2000) 220.

[75] See, *e.g.*, *People v Garcia* 25 Cal 4th 744 (2001) (California CA); and *Hargrove v United States* 67 F 2d 820 (5th Cir 1933) (US CA). Courts elected to not extend this

Court in the famous case of *Lambert*.[76] This rule becomes more unjustified as time goes by, in light of the proliferation of statutes and regulations, and the massive and complex body of law from which duties may be derived. The law does not signify only basic mores of society as it used to do in earlier times,[77] and it is not widely known and easily accessible anymore,[78] thus rendering the presumption of people to know the law applying to them unrealistic and unreasonable.

Another detrimental consequence of leaving the determination of the duties triggering criminal omission liability to the common law, and judicial discretion, is the considerable likelihood of decline in uniformity when applying common law rules by different judges.[79] The duty arising from a voluntary assumption of responsibility, for instance, is a purely common law duty. While some courts consider seclusion of the victim necessary to hold someone bound by this duty,[80] other courts do not.[81] In the context of the duty based on the creation of a peril, the boundaries of the duty are still not satisfactorily clear in situations wherein the danger has been created lawfully, like in self-defence.[82] These examples prove that common law duties, which are fairly ambiguous and lack clear parameters, invite courts to freely bend their boundaries in order to impose duties whenever they deem it just.

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interpretation to offenses requiring less than willfulness, even when the offense requires "knowingly". See, *e.g.*, *United States v Int'l Minerals & Chem Corp* 402 US 558 (1971) (US SC); and *United States v Hopkins* 53 F 3d 533, 537-538 (2d Cir 1995) (US CA).

[76] *Lambert v California* 355 US 225 (1957) (US SC). See also Peter Low and Benjamin Wood, "Lambert Revisited" (2014) 100(8) *Va L Rev* 1603, 1617.

[77] See Edwin Meese III and Paul Larkin, "Reconsidering the Mistake of Law Defense" (2012) 102(3) *J Crim L & Criminology* 725, 738; Andrew Ashworth, "Ignorance of the Criminal Law, and Duties to Avoid It" (2011) 74(1) *Modern Law Review* 1, 3; Douglas Husak, "Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer" (1999) 2 *Buff Crim L Rev* 859, 886.

[78] See, *e.g.*, Meese & Larkin (n. 78), 739.

[79] Robinson, "Fair Notice" (n. 47), 341.

[80] *West* (n. 60), 317.

[81] *Gargus* (n. 61), 423.

[82] See *Kuntz* (n. 67), 157.

One may argue that dismissing common law duties as a basis for criminal liability is not workable. Fletcher asserted[83] that no common law legal system determines by statute those relationships sufficiently close to engender a duty to act the breach of which may support a conviction for criminal homicide. This assertion is not entirely accurate. One jurisdiction stands out. Texas has a long-standing approach, excluding common law as a source wherefrom legal duties may be imported for the sake of criminal omission liability. The Texas Penal Code provides that a failure to perform an act amounts to an offence only if a law imposes the duty to act,[84] whilst the definition of "law" does not include case law or common law.[85] Texas courts followed this approach consistently and strictly. They quashed convictions and struck indictments whenever a statutory duty has not been found or specified, irrespective of the reprehensible and upsetting conduct of the defendant, and the discomfort fraught with exonerating her from responsibility.[86]

The case of *Billingslea* illustrates the foregoing perfectly.[87] *Ray Billingslea*, along with his wife and son, had taken care of his 94-year-old mother after she became confined to her bed. Yet, he severely neglected her, to the point she was found by the police in an extremely bad situation, lying in her urine and excrement, and suffering from bedsores, muscle loss, burns and blisters. She died two weeks later. The jury found him guilty for injury to an elderly due to his failure to secure medical attention to his deceased mother. *Billinglsea* was clearly under a moral duty to provide adequate care for his mother. However, the duty of children to support their parents does not exist in Texas statutory law, and voluntary assumption of responsibility does not constitute a basis for omission liability. Thus, his conduct did not rise to a criminal offence, and the court of appeals - not wholeheartedly – reversed his conviction.

Taking into account the serious problems inherent in basing criminal liability upon common law duties, recognising that only statutory duties may prompt criminal

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[83] Fletcher, "On the Moral Irrelevance" (n. 53). 1448.

[84] Tex Penal Code Ann § 6.01.

[85] Tex Penal Code Ann § 1.07.

[86] *E.g. Ronk v State* 544 S W 2d 123 (1976) (Texas CA); *Smith v State* 603 S W 2d 846 (1980) (Texas CA) (*Smith*).

[87] *Billingslea* (n. 42).

sanctions is inevitable. A duty does not qualify automatically to underpin an omission liability only because it arises from a statutory law. It needs to be a plain and clear duty, whose obligatory force is not questionable.[88] Whilst it is the legislature's responsibility to formulate statutory duties and define them with sufficient clarity and precisions, it is the courts' obligation to construe these duties narrowly and strictly, and refrain from broadening their scope beyond the legislature's intent, or employing a loose construction of statutes to reach the right verdict.[89] This may lead to unwanted, or at least uncomfortable results. But when people's liberty is at stake, and the consequences of criminal proceeding may be disastrous, it is crucial to put people on fair notice. Undesirable outcomes, because of lack of legislation, arise also in commission cases. Once, marital rape was not criminalised, sexual harassment short of assault did not constitute an offence, and operating in conflict of interest was not unlawful. The answer to these issues was amending the legislation, and the case of duties to act should not be any different.

In order to be on fair notice, people need not only to know what their legal duties are, but to what criminal offences omission liability is relevant.

C. What Offences May Be Committed by Omission?

Criminal omission liability is obviously not confined to those offences under which the omission is "expressly made sufficient by the law defining them". However, imposing criminal liability based on failures to act for offences formulated in active terms, immediately begs the very challenging question of what offences are capable of being committed by omission? Neither the text of the Model Penal Code's provision, nor the commentary, is of any help in answering this question or clarifying to which offences section 2.01(3)(b) applies.

In the absence of any clear statutory or judicial guiding principles, American courts have adopted an interpretative approach on a case-by-case basis. In each case pending before it, wherein the possibility of perpetrating the offence through omission has been contested, the court interprets and analyses the relevant statutory provision.

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[88] *Kuntz* (n. 67), 163-164; *Pestinikas* (n. 72), 381; Robinson, “Fair Notice” (n. 47), 356-357.

[89] Robinson, “Fair Notice” (n. 47), 347-348 & 353-356.

In doing so, judges rely upon a host of factors: the plain language of the statute and the meaning of the words comprising it; the legislative history and the legislature's purpose; as well as broader policy considerations. The Law Commission for England and Wales has explicitly embraced this approach, probably for lack of a better alternative. Upon acknowledging that no comprehensive review has been conducted to discern offences capable to be perpetrated by omission from those which are not, the Law Commission decided "to make no attempt to define which offences… should be capable of commission by omission. This must remain a matter of construction and, so far as the duties to act are concerned, of common law".[90]

Omission liability has probably never been a matter of dispute when homicide crimes were at stake. Courts have traditionally accepted that failures to perform a legal duty resulting in death may rise to a homicide, whether it is murder or manslaughter, even when the statutory definition of the offence used affirmative terms - like "killing" or "causing the death" - and did not indicate an omission liability.[91] It is evident, however, that for other offences determining whether they could be realised by inaction proved to be more complicated. In *Michael v State*,[92] the defendant failed to prevent the injuries inflicted by his wife on their daughter and obtain medical attention to her. The Court of Appeals in Alaska addressed the question whether his conduct rose to second degree assault, that criminalises whoever "recklessly causes serious physical injury to another person".[93] A definition of the term "causes" did not exist in the relevant statute, therefore the court resorted to the dictionary meaning, and to the case law in other jurisdictions for help. "Cause" is defined as "something that brings about an effect or a result", and, thus, one could construe the plain statutory language to cover the defendant's conduct. The court revealed that a host of cases in other states recognised a parental duty to protect the

[90] Simone France, "The Law of Omissions – Proposals for Reform" (1992) 7 *Otago L Rev* 625, 631.

[91] See *The State of Tennessee v Bordis* 905 S W 2d 214 (1995) (Tennessee CA); *Palmer v State* 164 A 2d 467 (1960) (Maryland CA); *People v Sealy* 136 Mich App 168, 172 (1984) (Michigan CA).

[92] *Michael v State of Alaska* 767 P 2d 193 (1988) (*Michael*) (Alaska CA).

[93] AS 11.41.210(a)(2).

children and imposed liability based on parents' failure to fulfil their duty in various offences including assault, child abuse and child neglect.[94]

The case of *Sharon Degren*[95] provides an even better example of the complicated statutory construction in which the court engages in order to reach a conclusion in this regard. Twelve-year-old Jennifer stayed with Sharon and her husband, Nick, her mother's friends, for a total of three weeks. Sadly, Jennifer was raped multiple times by Nick and another man, in the presence and the knowledge of Sharon.[96] Consequently, she was charged (among other counts) with child abuse under Maryland Code.[97] Sharon asserted that failure to prevent molestation or exploitation is not punishable under the language of the statute.[98] The court remarked that the word "act" in the definition of sexual abuse is open to more than a single interpretation, thus Sharon's assertion could not be resolved based on the plain language of the offence, and the court sought the legislative intent in other ways.[99] Eventually, the court concluded that Sharon's omission falls within the boundaries of the offence, and predicated its conclusion on three grounds: the purpose of the child abuse statute to protect children who were subject to abuse; the expansion of the statute's scope through legislative amendments, extending the conducts qualifying as an abuse; and the court's holdings in two other cases finding child abuse capable of commission by omission.[100]

Needless to say, this approach entails serious drawbacks, and it primarily demonstrates a significant infringement upon the legality principle and the fair warning requirement. As the above-described cases clearly show, in seeking to find the appropriate meaning and ambit of statutory offences, courts engage in a complex interpretation. This interpretation extends beyond the language of the statute, and involves analysis of dictionary linguistic meaning of the offence's wording, the legislative history of the statute, the amendment the statute has undergone, judicial

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[94] *Michael* (n. 92), 197-198.

[95] *Degren v the State of Maryland* 352 Md 400 (1999) (Maryland CA).

[96] *Ibid*., 406-408.

[97] *Ibid*., 403.

[98] *Ibid*., 409

[99] *Ibid*., 419.

[100] *Ibid*., 419-428.

decisions in the same jurisdiction as well as other jurisdictions, general principles and policy consideration. Expecting reasonable persons to reflect upon this entire process in order to avoid unlawful conduct, and understand what is prohibited or required under a certain statute, is unfair and unrealistically ambitious. It is far from providing clarity and fair warning to the average citizen.

If judges on the same bench opine differently, and disagree over the scope of the same statute, vis-à-vis the same concrete facts, how are we to expect laypeople to be sure about the criminal implication of their behaviour beforehand? *Terri Williquette* was prosecuted for two counts of child abuse, for her failure to take any steps to prevent her husband from repeatedly abusing both of her children, sexually and physically, and even leaving them in his sole custody for a significant amount of time, although she knew of his abusive behaviour. The primary question to be addressed in this case was whether Williquette's failure to act constitutes a criminal child abuse and meets the offence's definition, which may be brought about by subjecting the child to cruel maltreatment including physical injuries. [101]

Three courts before which the case was brought rendered three different opinions.[102] The three Wisconsin Supreme Court judges sitting in the case were not able to reach a consensus either. The majority judge explored the dictionary meaning of the word "subjects" and the purpose of the child abuse statute, concluding that the offence is not restricted only to people who take an active role in abusing children, but also to the exposure of a child to a foreseeable risk of abuse by a person who owes a duty to the child.[103] The concurring opinion agreed with the opinion of the court of appeals, that the mother can be held liable as an aider and abettor for the commission of the offence by her husband, but not as a principal actor.[104] The dissenting judge, on the other hand, rejected the prosecution's argument, and echoed the position of the trial court, excluding the defendant's conduct from the scope of the statute. He based his position on linguistic reasons, of the same text and language that the majority

[101] *Williquette* (n. 27), 242-243.

[102] *Ibid*., 246-249.

[103] *Ibid*., 248-262.

[104] *Ibid*., 262-263.

examined, as well as the legislative history, and distinguished other cited cases from this case.[105]

One interesting insight that a closer look at the case law may provide, is the impact of the classification of the offence, as a "result" or a "conduct offence", on recognising it as capable of commission by omission, albeit often times in an implicit and subtle way. The *actus reus* of statutory criminal offences may consist of conduct elements, attendant circumstances elements, and result elements.[106] The existence or absence of the latter determines the category within which the offence falls. Result offences are those specifying the result or harm realised by the defendant's conduct, and they aim to punish unwanted consequences, like death or injury. Conduct offences, on the other hand, do not rely on any further outcomes of the conduct, and do not embody a result element in their definition. They are committed once the conduct prescribed in the offence takes place, as they are pre-emptive in nature and target behaviours, which create a risk for undesirable consequences. The drafters of the Model Penal Code seem also to have adopted this distinction, and thus stated that the Code's first general principle is the prevention of a "conduct that unjustifiably and inexcusably *inflicts or threatens* substantial harm to individual or public interests".[107]

Courts appear to recognise omission liability for result offences rather than conduct offences. Consider, for example, the case of *Terry Williquette* again. The statutory offence of child abuse, back then, contained two grounds for holding a person liable: either based on *torturing* a child - a conduct offence on its face - or on *subjecting a child to cruel treatment* including severe bruising or any great bodily harm, under which the defendant's conduct should result in a cruel treatment or a physical harm to the child.[108] This is evident also from the dictionary meaning of the word "subjects", that includes "to cause to undergo some experience".[109] The

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[105] *Ibid*., 263-275.

[106] Dan Ciolino, "The Mental Element of Louisiana Crimes: It Doesn't Matter What You Think" (1996) 70 *Tul L Rev* 855, 901.

[107] Model Penal Code § 1.02(1).

[108] *Williquette* (n. 27), 265.

[109] *Ibid*., 249.

Supreme Court of Wisconsin, thus, concluded that the ordinary and accepted meaning of "subjects" is not restrained to active abuse.[110]

Williquette was charged and convicted of subjecting her children to cruel treatment, and not for torturing them, and the entire judicial discussion revolved around the question whether the statute reaches her conduct. In other words, the prosecution and the court thought that it is more appropriate to observe the defendant's failure to act as establishing the result offence in the child abuse statute, rather than the conduct offence of torturing, which does not appear to imply a possibility of committing it by omission. The Court of Appeals of Michigan did not find any problem in interpreting the first-degree child abuse, a result offence punishing a person who "knowingly or intentionally causes serious physical or serious mental harm to a child", as covering inactive conducts. The court held so despite the fact that the second-degree child abuse expressly criminalises omissions causing physical and mental harms.[111]

In *State v Ainsworth*, a mother was charged and convicted of aiding and abetting a first-degree rape of her son.[112] The facts underlying the indictment described how the defendant failed to prevent sexual intercourse between the victim (her twelve-year-old son), and a thirty-year-old woman, who, at some point, lived with the family, shared the bedroom and bed with Mr and Mrs Ainsworth, and served as a babysitter for the son.[113] Rape, as known, is a conduct offence, that is not capable of commission by omission, based on its language, as well as common sense. Therefore, it was not plausible to charge Mrs Ainsworth of rape as a direct principal, but alternatively she could be liable for aiding and abetting the woman who engaged in sexual relationship with her child.

The opinion of the Supreme Court of Kentucky in *Bartley v Commonwealth*[114] manifests the unofficial significance that courts ascribe to the distinction between

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[110] *Ibid*.

[111] *People v Borom* No 313750 2013 WL 6690728 (Mich Ct App, Dec 19, 2013) (Michigan SC).

[112] *State of North Carolina v Ainsworth* 109 NC App 136 (1993) (North Carolina CA).

[113] *Ibid*., 138-142.

[114] *Bartley v Commonwealth of Kentucky* 400 S W 3d 714 (2013) (Kentucky SC).

conduct and result offences in recognising liability for commission by omission. Bartley was convicted of assault in the first degree, which applies when a person "under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person".[115] Obviously, this is a result offence, as the court mentioned that the injury must have been the result of the defendant's conduct.[116] The court explained how the legislature transformed the assault offence from a conduct offence under the common law and the previous statutes to a result offence: "As discussed in the Commentary to our Penal Code, the Code's assault provisions were meant to incorporate and to modify significantly the then existing crimes of assault and battery. Under both the common law and the statutes then in effect, "assault [was] defined as an attempt to commit a battery, which in turn [was] defined as the unlawful application of force to the person of another…". The new provisions departed from this common law focus on an "offensive touching," (the popular notion of assault upon which *Bartley* relies), and focused instead on the outlawed result. As the Commentary to the Model Penal Code puts it, "[t]he principal thrust of Section 211.1 [Assault] is to reach the infliction of physical injury"".[117]

The statutory language of the Kentucky Penal Code, and its commentary, according to the court, show that the notion of assault by neglect is recognised under the State's Code, as well as the Model Penal Code which inspired the former. Yet, since this idea have not been discussed in appellate decisions in Kentucky, the court drew an analogy to the homicide crime, that outlaws death as a result, wherein homicide by neglect has been accepted, both before and after the Penal Code was adopted.[118] The court stated unequivocally the essential role that the reformulation of assault as a result offence has played in reaching the conclusions that it may be committed by a failure to act:

> Inasmuch as under *KRS 501.030(1)* one can engage in criminal conduct by failing to perform a legal duty, and inasmuch as under KRS Chapter

[115] *Ibid*., 721.

[116] *Ibid*., 721-722.

[117] *Ibid*., 722.

[118] *Ibid*., 723-724.

> 508 assault has been redefined as a "result" crime analogous in most respects to the other principal result crime—homicide—we agree with the Commonwealth and with the trial court that assault, like homicide, can, under our law, be committed by neglect. Where the neglect in such cases results not in death, but in physical injury or serious physical injury, the offence committed is punishable as an assault provided all of the other statutory elements are met.[119]

The English literature has witnessed a significant debate between Glanville Williams and Andrew Ashworth on the contours of omissive liability (or otherwise) and diametrically opposed perspectives have been advanced, explored further subsequently. The former advocated for a conventional "overly narrow" view of criminal omissions; interpretationally opposed to construing statutes utilising affirmative terms as also embracing failures to act.[120] Ashworth, on the other hand, has argued for an expansion of criminal omission liability, on the theory of social responsibility. The contention is that statutory offences should be broadly construed to be applicable to omissions as well as acts, regardless of their language, so long as the context and the purpose of the offences, alongside fair warning principles, do not expressly indicate otherwise.[121] Conversely, the question of what offences are capable of perpetration by a failure to act has not been adequately addressed in the American legal literature. Arthur Leavens argued that "criminal omissions can occur only in "cause-and-result" crimes, that is, crimes that proscribe the causation of a particular harm".[122] This argument seems in accordance with the case law presented previously, but Leavens did not elaborate on this argument, and did not lay down the rationales underpinning it. He did not explain whether, from his perspective, liability for all result offences may be based upon omission, and did not explain why conduct offences are not capable of commission by omission. One could think of a plethora of

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[119] *Ibid*., 724.

[120] Glanville Williams, "Criminal Omissions – The Conventional View" (1991) 107 *LQR* 86, 87; Glanville Williams, "What Should the Could Do About Omissions" (1987) 7 *Legal Studies* 92, 97

[121] Andrew Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 *LQR* 424, 438 & 458.

[122] Leavens, "A Causation Approach" (n. 15), 562.

examples for conduct offences that may be committed by omission: such as harbouring a fugitive by not calling the police after finding a fleeing suspect in the house; or escaping from custody by an inmate who does not return from a temporary leave she lawfully received.

Approaching the issue based on the classification of the offence as a result or conduct offence does, however, have merits. The crux of result offences is the proscribed harm brought about by the offender's conduct, whereas the means or the manner through which the harm is caused, whether actively or passively, is immaterial. In addition, fair warning concerns are less acute with regard to result offences. Typically, the result element specified in those offences signifies an obvious harm like death, injury, or obtaining property deceptively. Every ordinary person with common sense comprehends that she should abstain from engaging in a conduct, any conduct, that might cause such harm. Furthermore, liability for conduct offences, unlike result offences, does not depend on proving causation in the factual and the legal sense. The requirement for proximate causation is a remarkable safeguard against imposing criminal liability based on remote and insignificant duties, and where the harmful result was not a sufficiently foreseeable consequence of the failure to comply with a duty to act.

In conclusion, until American criminal statutory law undergoes a major reform, in which the legislature clarifies whether each bespoke offence may be committed by omission, liability for a failure to act can apply to “any” result offence. Inculpation is potentially applicable, unless the offence definitional elements clearly and unequivocally command otherwise. In complementarity, liability may apply to those conduct offences whose definition expressly make an omission sufficient as a culpability gradation. The existing case law accedes to this proposition. Liability for a failure to act, however, should remain contingent upon the existence of a legal duty: ideally one clearly recognised and stated by the legislature, as the legality principle is otherwise unduly compromised. Arguments raised against the legal duty requirement, as articulated by Leavens, might seem compelling at first glance. A deeper examination reveals that such arguments are legally and factually flawed: the legal duty requirement is indispensable, not only for its contribution to establishing causation, but also the fair warning it seeks to provide, and the constraint it legitimately places on undue interference with personal liberty. Unfortunately, extant laws in American jurisdictions, although prompting in part the legal duty approach,

still constitute a fertile ground for judicial law- making, and consequently fail to comply with the legality principle to ensure fair notice as to the criminality of certain behaviours. English law in this regard, as the following pages illustrate, is no more satisfactory, and unfortunately subject to similar vagaries of inconsistency and indetermination.

III. CRIMINAL OMISSION LIABILITY IN ENGLISH LAW

A. The Legal Duty Requirement

> Omissions are special in some senses, our psychological and social reactions to those who allow things to happen are different (and usually less condemnatory) from our reactions to those who make things happen. The equivalence or neutrality thesis – that omissions should always be treated the same way as acts is untenable: omissions are generally less culpable…. [W]hat has become clear, however, is that it is necessary to grapple with some fundamental issues of what the state may properly require of individual's if progress is to be made on the criminalisation of omissions, within a rule of law framework.[123]

The fundamental issue that Ashworth has cogently posited, notably how to properly criminalise omissions (or otherwise), within a rule of law framework, has troubled English courts and academicians for generations.[124] There has been a long-standing recognition, an antediluvian heritage dating back to the nineteenth century, that culpability may exist for an omission to act, engendering consequential harm(s).[125] Far less certain has been the apposite schematic template to justifiably inculcate any legal duty requirement or effective criminalisation standardisations. Omissive "conduct" was traduced, and recalibrated as punishable liability, within the

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[123] Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013), 76-78.

[124] *Ibid*.

[125] For discussion see J F Stephen, *A History of the Criminal Law of England* (vol 3, London, MacMillan, 1883).

contextualisation of legal (statutory) or contractual obligations[126] to prevent blameworthy outcomes. James Stephen repositioned the spectrum and parameters of legal duty in promulgating a series of life-protecting affirmative duties: "killing by omission is in no case criminal unless there is a legal duty to prevent harm."[127]

Beyond early incantations of legal duty and omissive behaviour liability – constrained within the spheres of statute and contract – significant developments have pragmatically occurred at common law. English criminal law has witnessed an extraordinary instrumental propagation of legal duties, judicially created "responsibility obligations" to prevent harm(s).[128] These novel responsibility obligations may be compartmentalised, as in American jurisprudence, within delineated spheres: family and household obligations; voluntary assumption (seclusion of others); public office; and creation of dangerous situations.[129] This solipsistic development of common law duties, ad hoc and often opaque in nature, has engendered a bewildering typology of potential exceptions to the conventional standpoint, iterated by Williams.[130] The general proposition is no liability for "pure" omissions in English law, and that we punish misfeasance not nonfeasance, with culpability attaching to wilful wrongdoing, not to punish the idle, negligent or simply indolent.[131]

The orthodox perspective, advocated by Williams may be split into three components. In terms of moral relativity, it is contended that actions are simply morally more blameworthy than omissions – a view it is argued is shared by the public at large. It is also contended that there are too many variations of omissive

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[126] *Rex v John (1825)*, 20-2 (a contractual duty to provide sufficient food and bedding to young apprentices in the same house).

[127] Stephen, *A History* (n. 125) 10.

[128] For discussion see A P Simester, J R Spencer, F Stark, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law Theory and Doctrine* (7th edn, Hart Publishing, 2019), 74-96; and David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th edn, Oxford University Press, 2018), 45-62.

[129] For discussion see Alan Reed and Ben Fitzpatrick, *Criminal Law* (4th edn, Sweet and Maxwell, 2009), 25-36.

[130] Williams, "Criminal Omissions" (n. 120).

[131] ibid 87-88.

behaviour to properly craft coherent criminalisation principles. Moreover, Williams argued from a rule of law perspective on commissions, centred on Diceyan conceptions of clarity and legality of law.[132] The arbitrary imposition of liability without effective guidelines to govern individual behaviour is arguably capricious-effective guidance found only in a very limited set of statutory exemptions.

In contradistinction, and imbuing more recent Anglo-American developments, Ashworth[133] has rejected the conventional perspective, viewed through a rigid lens of over-extended individual autonomy. As considered further herein, Ashworth has adopted a social responsibility framework: "co-operative elements of social life on the basis of which it may be fair to place citizens under obligations to render assistance to other individuals in certain situations."[134] The nature of these situations where affirmative duties to act ought legitimately to apply, and novel adaptive frameworks to provide certainty and clarity, is explored subsequently in terms of our bespoke reform proposals. The analysis of other academicians has, in truth, cut across the analytical divide. Simester has contended that it would be, "a denial of respect for the idea that one's practical choices should be determined by one's own goals and values", if one were saddled with "untrammelled responsibility for harms the occurrence of which one is unconnected with."[135] This represents a very constrained construction of individual autonomy: in counterpoise Raz views autonomy in a wider lens – that a state may in broadened circumstances compel individuals to take action to improve societal options and opportunities.[136] In similar vein, Lord Devlin has argued that the criminal law should be utilised against immoral behaviour that

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[132] ibid 92-95.

[133] Ashworth, "The Scope of Criminal Liability" (n. 121); and see also Ashworth, "Ignorance of the Criminal Law" (n. 77); Ashworth, "Positive Duties, Regulation and the Criminal Sanction" (2017) 133 *Law Quarterly Review* 606; and Ashworth, "Manslaughter by Omission and the Rule of Law" (2015) *Criminal Law Review* 563.

[134] Ashworth, *Positive Obligations* (n. 123).

[135] Andrew P Simester, "Why Omissions are Special" (1995) 1 *Legal Theory* 311, 333.

[136] Joseph Raz, *The Morality of Freedom* (1986), 416.

deviated from a common morality and could affect society injuriously:[137] Fletcher iterates that the general rejection of failure to rescue offences has more to do with, "causal attitudes towards the principle of legality", than with a less developed communitarian attitude.[138]

The debate in English criminal law on omissive conduct liability mirrors to a significant extent that presented earlier on American jurisprudential precepts. Judicial legislation, on omissions, has produced a landscape that is imperfect, confused and often contradictory. Successful prediction of outcome in terms of ascriptive culpability is as likely as tattooing soap bubbles. Individuals are not presented with fair notice in English criminal law as to when and how they are expected to act across a smorgasbord of potential responsibility obligations.[139] This criticism is equally applicable across all compartmentalisations: familial and household obligations, voluntary assumption (seclusion of others), public office and creation of dangerous situations. It applies in equiparation to longer standing contractual legal duty obfuscations. Incremental and uncertain development, by judicial sleight of hand, has improperly extended potential legal duties, without recourse to effective legislative clarity, and boundary setting. The deleterious outcome is that, as iterated, it leaves individual "actors" to speculate over the criminality (or otherwise) of their possible responsibility obligations, without a proper ability to evaluate whether they might be straddling the criminality boundary threshold.

There are significant legal principles that are arguably, in part, contumeliously disregarded in Anglo-American omissive conduct liability - those of legality and fair warning. The legality precept is off-stated in the following maxim: *Nullum crimen sine lege, nulla poene sine lege* – there is no punishment without law. As Robinson cogently adumbrates, this important principle serves to propagate to judiciaries a canon of construction regarding statutory and common law offences which ought to

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[137] P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965), 11.

[138] Fletcher, "On the Moral Irrelevance" (n. 53), 1449-50.

[139] For discussion see J Edwards and A Simester, "What is Public about Crime?" (2017) 35 *Oxford Journal of Legal Studies* 105; and C Elliott, "Liability for Manslaughter by Omission: Don't let the Baby Drown" (2010) *Journal of Criminal Law* 163.

generally favour the individual defendant.[140] The concomitant is strict interpretation of offence definitional elements, and restrictive adaptation of uncertain constructive offence ingredients. Moreover, there coheres a standardisation of exacting construction, in terms of drafting and interpretation of all criminal law offences, that ought to be applied and enforced by our courts with clarity and uniformity.[141]

The challenge, and unfortunate consequence for dyspeptic stakeholders, is that Anglo-American "responsibility obligation" liabilities fail to meet this exacting legality maxim across bespoke compartmentalisations of potential liability. Illustratively, the determination in *Dytham*[142] reveals an egregious disregard for the exacting enforcement standards of clarity and uniformity. A police constable was convicted of the "ethereal" offence of misconduct as an office of justice for failing to intervene to protect the Queen's Peace, more specifically failing to intervene to protect a citizen who was being kicked to death outside a nightclub. As Ambos states,[143] such "unwritten" judge made obligations are difficult for individuals to foresee, and in contravention of the legality principle: similar criticism, "can also be levelled against the many vague and uncertain duties recognised in both civil and common law jurisdictions."[144]

B. The Legal Duties Giving Rise to Criminal Omission Liability: Judicial Legislation and Culpability Standardisations

There is a significant risk that Anglo-American courts continue to act instrumentally, and seek to expand the reach of omission liability in an untrammelled and unstructured manner.[145] A particularised concern relates to the risk of retrospective

[140] Robinson, "Criminal Liability for Omissions" (n. 58), 107.

[141] *Ibid*.

[142] [1979] QB 722.

[143] Kai Ambos, "Omissions" in Kai Ambos, Anthony Duff, Julian Roberts and Thomas Weigend (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press, 2020), 32.

[144] *Ibid*.

[145] For discussion see Gavin Dingwall and Alisdair Gillespie, "Reconsidering the Good Samaritan: A Duty to Rescue" (2008) 39 *Cambrian L R* 26.

application of judicial interpretation, unduly and deontologically creating over-broad criminal liability, notably for involuntary manslaughter liability as exemplified in *Stone and Dobinson*,[146] which represents a radical point of departure between conventional and social responsibility perspectives on omission. *Stone*, and his mistress, *Dobinson*, both of limited intellect, were held by the appellate court as assuming the responsibility of caring for an infirm relative, *Stone's* sister, and by the very assumption of that responsibility a corresponding legal duty was imposed upon them to ensure that the duty was satisfied. The sister died from a combination of anorexia nervosa, and their neglect: both were convicted of involuntary manslaughter, despite their limited capacity. It was notable that the family relationship itself did not impose specific duties upon them: no obligation prevailed to let the sister stay with them, nor to offer any other type of help.

A different principle, as Ashworth iterates,[147] was engaged in this determination, and other cases of involuntary manslaughter where affirmative duties are created via voluntarily associated drug-taking – the uncertain conceptualisation of "seclusion". The legal duty arises in these situations as in assuming the care of a helpless person, the individual actor(s) has thereby removed the possibility of others rendering assistance.[148] Seclusion is consequentially viewed through a broadened legal prism of affirmative judicially created responsibility "by taking a sick person into his house the defendant had effectively secluded that person from state help, (i.e. from the probability that others would call for help, and so the duty to call the emergency services must fall on the person who (albeit out of kindness) took the person in."[149]

The nature of seclusion, particularly within the realm where an individual actor subjugates, and in effect, abjugates the autonomy of another, creating a

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[146] [1977] QB 354.

[147] Ashworth, *Positive Obligations* (n. 123), 51-52.

[148] It is noteworthy that a similar perspective was referenced in *Evans* [2009] 1 WLR 1999 (CA) (A case of drug supply and failing to render assistance). Lord Judge CJ determined that a duty might arise, illustratively, where a voluntary assumption of responsibility by the defendant had led the victim, or others, to become dependent on them to act: ibid., at [36].

[149] Ashworth, *Positive Obligations* (n. 123), 52.

dangerous situation (and risk of harm), is explored in a subsequent section of the article.[150] It suffices at this juncture to affirm that the determination in *Stone and Dobinson*, and other cases of involuntary manslaughter via voluntary association in drug-taking,[151] raise a number of concerns about fair warning and legality principles. The judicial touchstones for creation of a legal duty are opaque and unclear, uncertainty prevails over the determination of "creation of a risk of significant harm",[152] and the legal duty requirement to establish gross negligence manslaughter liability remains open to the vagaries of dissonant court interpretation and enforcement.[153]

A further challenge is that legal duty requirements at common law abjure the requirements of legality, and of notions of certainty contained in Article 7 of the European Convention on Human Rights. A template that Anglo-American courts should apply in assessing the issue of certainty is the test of notional legal advice – could the defendant find out, utilising a lawyer if needs be, whether his or her responsibility obligation would render them liable in defined circumstances? As was stated by the European Court of Human Rights, in the context of statutory provision

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[150] For further discussion see Richard Taylor, "The Contours of Involuntary Manslaughter: A Place for Unlawful Act by Omission" (2019) *Criminal Law Review* 205.

[151] See generally, *R v Taktak* (1988) 34 A Crim R 334 (Australia); *Ruffell* [2003] 2 Cr App R (5) 330 (CA); and *Sinclair* (1998) (Unreported).

[152] For further discussion see Glenys Williams, "Gross Negligence Manslaughter and Duty of Care in Drugs Cases" (2009) *Criminal Law Review* 631.

[153] The offence of gross negligence manslaughter, in general, has been the subject of conjecture and controversy in English criminal law. In *Rose* [2017] EWCA Crim 1168 (CA) at [77], more recently, Brian Leveson P set out the definitional comportation of the offence as follows: "The offence of gross negligence manslaughter requires breach of an existing duty of care which it is reasonably foreseeable gives rise to a serious and obvious risk of death and does, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to go beyond the requirement of compensation but to amount to a criminal act or omission.

interpretation in *Kokkinakis v Greece*,[154] the criminal law must not be construed excessively to the disadvantage of an accused, but the requirement of certainty is met, "where the individual can know from the wording of a relevant provision, and if needs be, with the courts' interpretation of it, what acts and omissions will make her liable."[155]

There has been a reluctance across variegated factual presentations in English law to properly engage with this fundamental issue of certainty, within legal duty and omissive conduct requirements for gross negligence manslaughter (by omission) at common law.[156] A core problem remains of there being no external criteria by which to measure the concept of "gross"-ness within this extant offence, or any exactitude *vis-à-vis* responsibility obligations that pertain to voluntary assumption/creation of a significant risk of harm. A deleterious by-product, beyond lack of fair warning to any individual defendant, is that members of the jury, as our "moral" arbiters are left to define extant principles for themselves and, thus, not merely to determine whether the offence has been committed, but also the interpretative definition of the constituent elements of the offence.[157] The jury is required to take a view on the degree of negligence relational to omissive behaviour which would render the conduct of the defendant sufficiently blameworthy. A dilemma may still prevail in that a question of law – or at least a mixed question of fact and law – is inappropriately left to the jury.

It is contended that in English criminal law fair warning principles are further compromised by the manifest disregard of specific and particularised culpability requirements as a progenitor of the duty to act. A fundamental illustration of diluted clarity as to specific criminal law duties, as Simester et al highlight[158] is civil law obligations and coalescence, particularly those that may (or potentially not) arise from contractual responsibility, as iterated in *Pittwood*.[159] A railway crossing gate keeper

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[154] (1993) 17 EHRR 397 (ECHR), at [52].

[155] *Ibid*.

[156] Taylor, "The Contours of Involuntary Manslaughter" (n. 150) 207-209; and see also Andrew Ashworth, "Public Duties and Criminal Omissions: Some Unresolved Questions" (2011) Journal of Commonwealth Criminal Law 1.

[157] Reed and Fitzpatrick, *Criminal Law* (n. 129), 370-375.

[158] Simester and others, *Simester and Sullivan's Criminal Law* (n. 123), 80.

[159] (1902) 19 TLR 37 (CC).

opened the gate to let a cart pass, and decamped for his lunch forgetting to shut it again. A hay cart subsequently entered the crossing and was struck by a train, killing the victim. The defendant was convicted of manslaughter. In terms of fair warning it was wholly unclear whether the legal duty of Pittwood derived from having been hired to discharge a duty to the public (in general) that was owed by his employers (the railway company), or alternatively on the predicate that he was specifically hired to protect other people, and there was a representational likelihood they would be injured by his inattention. The latter perspective seems the perspective adopted by Wright J in his judgment,[160] but dissonant arguments prevail.

Consider by way of postulation from *Pittwood* an illustration adapted from evaluation by Simester et al[161] on the inter-relationship and synergistic connection between civil law obligations and enforceable contractual duties in criminal law. D, a paramedic has signed a new Covid-19 related extended contract with the health authority that contains a term requiring her to intervene, and save people at large – that is even when off-duty, and away from the hospital. In such a posited scenario D's failure to rescue someone when out walking with their family, either in Boston USA, or Birmingham England, may be a breach of contract, but should not unilaterally and holistically be a criminal offence, in the absence of legislative provisions that satisfy fair warning and legality principles, as discussed subsequently in terms of bespoke duty to rescue offences.

C. Legal Duties: Family and Household Obligation

The contours of liability in the realm of family and household obligations, creating legal duties (or otherwise), remains uncertain in English law. This mirrors inconsistencies in American law in terms of our previous consideration of an array of cases that have held individuals, in a broadened sense, in *loco parentis* to a child to be liable for the consequential results ensuing from their failure to perform their duties. In English law it is problematical to describe with any certainty the categories of family relationship, or some household obligations, that should activate criminal

[160] *Ibid*., 38: "The man was paid to keep the gate shut and protect the public… A man might incur criminal liability from a duty arising out of contract".

[161] Simester and others, *Simester and Sullivan's Criminal Law* (n. 123), 80.

liability predicated on an omission.[162] In an important extirpation of precedential authorities, Ashworth has contended,[163] more broadly, that liability for an omission may arise if there exists, "a settled relationship of dependence", and that since the cases primordially deal with situational sources where the allegation is that a failure to act led to the death of the victim, contextually we are appraising a duty to preserve life, and a failure to report.[164]

It is clear that parents are under a duty to preserve the life of their children. In James Stephen's off-sited illustration of a child drowning in a shallow pool of water,[165] and alternate bystanders, if one of these observers is a parent then a legal duty prevails (from status) to save the child from drowning. Exactly how far the parent would be expected to go in order to save the child's life, in dissonant circumstances, is not clear. If the child is drowning in a deep fast-flowing river, English law would not expect the parents to risk their own life.[166] The parent would be expected to take such steps as are reasonable in the circumstances to preserve the child's life. Is there a corresponding duty on the child to preserve its parents' lives? There is no precedential authority on this point, but it would seem logical for there to be such a duty once the child is over the age of ten and in a position to act. In *William*

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[162] For further discussion see J C Smith, "Liability for Omissions in Criminal Law" (1984) 4 *Legal Studies* 88; and Peter Glazebrook, "Criminal Omissions: The Duty Requirements in Offences Against the Person" (1960) 76 *Law Quarterly Review* 386.

[163] See Ashworth, *Positive Obligations* (n. 123); and for further discussion see Jonathan Herring, *Older People in Law and Society* (2009); M Hayes, "Criminal Trials where a Child is the Victim: Extra Protection for Children or a Missed Opportunity" (2005) 17 *Child and Family Law Quarterly* 307*;* and Jonathan Herring, "Familial Homicide: Failure to Protect and Domestic Violence: Who's the Victim" (2007) *Criminal Law Review* 923.

[164] Ashworth, *Positive Obligation* (n. 123), 44-46.

[165] *Ibid*.

[166] Stephen, *A History* (n. 125), 10: "A number of people who stand around a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt shameful cowards, but they can hardly be said to have killed the child."

Smith,[167] it was determined that a brother owed no duty of caring for his sisters. The same lack of general authority surrounds legal duties arising out of "close relationship", including household obligations,[168] however, it may be that a husband and wife are under a duty to preserve the life of the other.

If a duty is based on a close relationship, there is a question of when such a duty will come to an end. On the assumption that a duty to take care does in fact exist between husband and wife, it is possible that one spouse can release the other in certain circumstances form obligations of further care. In *Smith*,[169] the wife, who had an aversion to doctors and medical treatment refused initially to allow her husband to seek medical assistance on her behalf after she had given birth to a still-born child at home. A subsequent permission was granted, but the time delay unfortunately proved fatal. The husband was charged with involuntary manslaughter as medical evidence suggested her life could have been saved with prompt treatment. Griffiths J told the jury that it was for them "to balance the weight that it is right to give to his wife's wishes to avoid calling a doctor against her capacity to make rational decisions. If she does not appear too ill it may be reasonable to abide by her decision. On the other hand, if she appeared desperately ill then whatever she may say it might be right to override."[170] The implications from the direction in *Smith* is that if the wife was not too ill then it was permissible for her to direct her husband not to call the doctor. The husband would then be released from his duty of care.

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[167] (1826) 172 ER 203 (CA); and for further discussion see G Mead, "Contracting in to Crime: A Theory of Criminal Omissions" (1991) 11 O*xford Journal of Legal Studies* 141.

[168] *Ibid*.

[169] [1979] Crim LR 251 (CA). Note in the draft Criminal Code the proposal of the Law Commission is to impose liability upon D if he might have prevented the actus reus. By cl 17(1) it is provided that: "a person causes a result…when (b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence."

[170] *Ibid*., 255-256

In the case of a parent's duty towards a child, it may be that in normal circumstances the duty terminates when the child reaches eighteen.[171] If this is the case then it would seem any duty the child had towards the parent should also terminate at that time. All this suggests that there are few clear cut answers. Beyond the parental legal duty obligation, in English common law determinations have concentrated instead an "interdependence" and undertakings by an individual to look after another, rather than any special relationship or status. This connotation, that of assumption of legal duties, was applicable in *Instan*,[172] where the defendant lived with her aunt, who paid for the food they consumed. When the aunt became bedridden, *Instan* failed to supply her with any food or to seek assistance, a voluntary assumption of a duty was created, and failure to discharge this duty was the predicate for a manslaughter conviction.

There is a further unresolved dilemma as to what any status duty obliges an individual to do if it does arise in terms of fair imputation, coalescing around responsibility obligations invoking a duty to preserve life, and duty to report. This is considered further in our subsequent *dépecage*, (issue-splitting) analysis of responsibilities, as to whether an individual has obligations in terms of self-protection of others in hazardous dangerous circumstances, and consideration of the effectuation of appropriate legislate responses. An important consideration will be whether criminalisation applies where the defendant performs an act which they believe to be sufficient to fulfil any duty, or where reasonable obligations to report harm(s) are breached.[173]

IV. CREATION OF A DANGEROUS SITUATION AND LEGAL DUTY TO RESCUE: GOOD SAMARITAN LAWS AND THE WAY AHEAD

> Wholesale liability for omissions could force us constantly to interrupt our own actions and plans in order to prevent outcomes that are

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[171] If the child is dependent for any reason on its parents then the duty would presumably continue.

[172] [1893] QB 450.

[173] Ashworth, *Positive Obligations* (n. 123); and see Ormerod and Laird, *Smith, Hogan and Ormerod's Criminal Law* (n. 128), 52.

> brought about by others; to become, in effect, our brothers keepers. It would be incompatible with a country's ambition to be a liberal state.[174]

An equipoise needs to be established, as Simester et al state,[175] between individual autonomy rights – we are not our brothers keepers – whilst also criminalising omissive behaviour where legitimate and normatively proportionate. In accordance with our previous discussion, any such criminalisation needs to be in accordance with fair warning and legality precepts, that are currently absent in Anglo-American criminal law. Within the typology of common law legal duties that have been considered, extreme dilemmatic choices relationally apply to whether to criminalise failure to rescue by individuals where dangerous situations of variegated circumstances, have been created.[176] A strict view of criminalisation, as Smith[177] states, merely requires an act violatory of a non-criminal norm of conduct, for example, the general duty of care, and broadly any dangerous act would suffice for liability: "any act entailing a dangerous sequence of events suffices so long as there is an offence capable of being committed by omission, and the omitter possessed the requisite fault element of the respective crime."[178]

The arguments presented against any general duty to rescue in dangerous situations have been clearly set out by Waldron[179] and Robinson[180] amongst other commentators: (1) rescuers should be motivated by altruism not fear of criminalisation and state imposed penalties; (2) any legislative enactments, prompted by moralism not normative and proportionate legal clarification, will fail standardisations of fair warning and legality; (3) lack of societal consensus as to the

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[174] Simester and others, *Simester and Sullivan's Criminal Law* (n. 123), 76.

[175] ibid.

[176] For further discussion see Jacobo Dopico Gomez-Aller, "Criminal Omissions: A European perspective" (2008) 11 New Criminal Law Review 419; and F.J.M. Feldbrugge, "Good and Bad Samaritans" (1965) 14 The American Journal of Comparative Law 630.

[177] Smith, "Liability for Omissions" (n. 162), 94-95.

[178] *Ibid*.

[179] Waldron, "On the Road" (n. 2), 1063.

[180] Robinson, "Criminal Liability for Omission" (n. 58), 104.

mores of appropriate religious/moral values on which a duty to rescue is based; (4) it is inapt to require intervention via "physical" action not an omission; and (5) any legislative response would unjustly impinge on rights to liberty and the value of individual autonomy.[181] As Robinson states,[182] however, despite alternative perspectives that adduce reluctance to criminalise inactivity, these concerns might be overridden by other societal policy concerns: "outweighed by the government's interest in the health and safety of its citizens, and the government's prerogative of establishing duties incumbent upon the exercise of the privilege of citizenship."[183]

A debate in Anglo-American criminal law jurisprudence, amongst courts and academicians has smouldered for decades as to how to identify the instances in which an individual actor's intersection in (or creation of) a hazardous condition imbues responsibilities to counteract otherwise harmful results, and steps needed (or otherwise) to inure a party from criminalisation. The academic critique has been enervated by arguments presented by continental theorists, notably Gomez-Aller[184] and Ambos.[185] The latter has recently contended that an answer can be provided to posited issues in prevailing situations: where an individual can be said to have an affirmative duty to act reinforced by the criminal law; and the appropriate intensity of criminalisation.[186] The solution Ambos presents is to be found in the situational relationship between the assister and the person in need. This contention, more specifically, is that to "justify" the assister's obligation to intervene, it is important to focus on her relationship with the receiver of the assistance, and to consider whether a

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[181] Waldron, "On the Road" (n. 2), 1063.

[182] Robinson, "Criminal Liability for Omission" (n. 58), 105.

[183] *Ibid*.

[184] Gomez-Aller, "Criminal Omissions" (n. 176).

[185] Ambos, "Omissions" (n. 143). And for further discussion see T Hornle, "Rights of Others in Criminisation Theory", in A P Simester, A P Du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andrew Von Hirsch* (Hart Publishing, 2014), 169; and D Husak, "The Alleged Act Requirement in Criminal Law", in J Deigh and D Dolinko (eds), *The Oxford Handbook of Philosophy and Criminal Law* (Oxford University Press, 2011), 107.

[186] *Ibid*., 44-45.

duty to assist can be derived from the relationship, notwithstanding the societal context or framework in which the relationship exists.[187]

It is our standpoint, however, that a novel schematic framework needs to be considered, distinctively applying *dépecage* (issue splitting) precepts to alternative, and differently modulated creation of dangerous situation and legal duty to assist "sources" of harm. The postulated illustrations we present are bound together by the contours of legitimate individual autonomy and the normative assessments that flow from dissonant situational sources of harm creation, as interpreted through a broadened legal prism. In our analysis there are five separate sets of circumstances that are inculcated in respect of creation of a dangerous situation/duty to rescue. It is adventitious to consider each in a bespoke manner as the implications for fair warning and legality in terms of criminalisation (or otherwise) are completely different: separate issues apply to proximate causation,[188] and the effect of individual autonomy intersection is fundamentally different. This critique across alternative situational sources (A) – (E), set out below, and utilising *dépecage* indicates that only in situations (D) and (E) is specific legislative enactment required on failure to rescue. The five situational sources of harm, and the contours of appropriate liability, can be deconstructed as follows: (A) when an individual actor "accidentally" causes danger and then has a duty to prevent further harm; (B) when an individual actor non-accidentally effects danger and then has a duty to prevent further harm; (C) a systemic failure by a defendant over a period of time to protect others from harm for whom they bear responsibility, notably as an employer or supplier; (D) where the defendant has a responsibility in terms of self-protection of others, either via control or hegemony on their part, or removal of autonomy for others to act, including within family and household obligations; and (E) where harm transposes through the situational source of an initial accident followed by a subsequent omission by the defendant.

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[187] *Ibid*., 45.

[188] For further discussion on proximate causation more broadly see Andrew P Simester, "Causation in Criminal Law" (2017) 113 *Law Quarterly Review* 416; and E Witjens, "Considering Causation in Criminal Law" (2014) 78(2) *Journal of Criminal Law* 164.

A. *Accidental Attributable Harm and Supervening Fault*

The first postulation is straightforward, and we suggest non-contestable. In the circumstance where an individual actor "causes" danger albeit accidentally in terms of its situational source, then an incumbent legal duty prevails at common law to prevent further harm. Causal salience is attributable to the actor/author as a progenitor of harm(s) – no legitimate issues accrue in terms of legality and fair warning. The position in English law has been cogently adumbrated by Ashworth:[189] the presence and opportunity of the causer of the accident not only points to that individual as the person who should take action, but posits that their failure to do so (with the required blameworthiness) should amount to the commission of the substantive offence.[190] Liability is attributable to that individual as a "principal", and proximate causation standardisations are implicated: affirmative liability and ascriptive causation applies more "directly" than in other typologies of creation of significant risk of harm that is not ameliorated.[191]

An individual, albeit accidentally at T1 point of temporal individuation, who has created a dangerous situation is under a "legal" duty to take effective remedial practical steps (normatively and proportionally assessed) to mitigate any consequent harm(s). Thus, whereas a stranger who comes across a burning house could stand idly by, and admire the spectacle, the individual who caused the blaze (albeit accidentally), would be under a duty to take effective remedial steps, and a failure to do so would lead to criminal liability for the resultant damage.[192] Any other outcome would, it is suggested, be counter-normative, and counter-intuitive.

The nature of duties imposed on individuals with a special relationship to the harm arose before the English House of Lords in *Miller*.[193] The defendant, squatting

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[189] Ashworth, *Positive Obligations* (n. 123), 77.

[190] *Ibid*.

[191] Gomez-Aller, "Criminal Omissions" (n. 176), 425: "The notion that a person who fails to prevent harm when he had a duty to avoid such harm should be punished as if he had actively caused the harm is reflected in many legal systems. I will call this the "special duty" conception of crimes of commission by omission."

[192] Reed and Fitzpatrick, *Criminal Law* (n. 129), 32.

[193] [1983] 2 AC 161 (HL) (*Miller*).

in a house belonging to another fell asleep whilst smoking a cigarette. The mattress caught fire – *Miller* awoke to find that the mattress was smouldering – instead of seeking assistance to put out the fire he simply moved to the next room and fell asleep. The house caught fire, and *Miller* was subsequently convicted of arson. Their Lordships, affirming the conviction, whilst acknowledging that the arson had been committed by *Miller's* "knowing omission" to deal with the fire, determined that this omission could satisfy the *actus reus* requirement of arson because his unintentional starting of the fire created a legal duty.[194] *Miller* was under a legal duty, or rather a "responsibility", as the House of Lords stated that duty is more referentially appropriate to civil law situations, to take remedial action. The responsibility obligation is to take reasonable practical measures that lie within one's power to counteract a danger of harm to life, limb or property that one has oneself created.[195]

The distinguishing factorisation in *Miller* and some similar cases of situational sources of harm[196] is the individual actor's autonomous causal responsibility for creating the circumstances of danger. Affirmative causal responsibility is directly applicable and *supervening fault* precepts apply to direct fair warning of potential criminalisation:[197] "Even if the causation is the purest of accidents it suffices to create a degree of responsibility that explains why D, more than anyone else, should bear the primary duty of taking steps to remove or remedy the danger."[198] There is a far stronger responsibility herein than in other situational sources of creation of danger, discussed below, in terms of failure to rescue, where individual autonomy and obligation normatively sits in an entirely different juxtaposition, and *supervening fault* is characterised in an alternative supererogatory manner.

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[194] Simester and others, *Simester and Sullivan's Criminal Law* (n. 123), 81.

[195] *Miller* (n. 193), 176 (Lord Diplock).

[196] In terms of other situational sources of harm see further discussion in *Fagan* (1969) 1 QB 439; and *Santana-Bermudez Z* [2003] EWHC 2908 (Admin).

[197] Ashworth, *Positive Obligations* (n. 123), 77: "The law could not fairly demand that the defendant should act to remove the danger created; it can only properly require the person to take reasonable steps to remove the danger; as by alerting the emergency services and taking any positive action that can be taken without personal danger."

[198] *Ibid*., 52.

B. Non-Accidental Attributable Harm and Causality

The prior discussion, focused on accidental attributable harm, and intersection with *supervening fault* and independent autonomous culpability. A different perspective will apply where an individual effected the dangerous act with an awareness of the danger, or is blameworthy as there was an intention to create potentially harmful consequences.[199] Non-derogable legal duties/responsibilities may normatively be imposed to prevent the materialisation of harm, or to effectively counteract the danger. A more problematical scenario is that presented before the English Court of Appeal in *Evans (Gemma),*[200] and more recently before the Missouri Supreme Court in *Jason Voss* (as previously iterated), engaging illegal supply of drugs, voluntarily taken by the victim, but where the supplier "knowingly" omits to seek medical or emergency help, aware that the drug-taker is suffering an overdose. Arguably, what is primordial herein is not so much the qualitative nature of the *prevening act* (non-accidental supply of drugs), but rather the victim's independent autonomous act to inject themselves with the drugs:[201] "this should turn the supplier's responsibility into a secondary one, at most, similar to that of a mere accomplice".[202] Causal salience (or otherwise) of the intervening independent act by the "principal" (the victim) sits uneasily with the inculpation of the drug supplier for involuntary manslaughter, not simply a drug supply statutory crime.[203]

In *Evans (Gemma),* the defendant, a half-sister to the victim (Carly Townsend), lived together with their mother. Gemma Evans bought the heroin for her half-sister who injected herself with it, and became ill. Gemma Evans and her mother took some limited remedial steps to help the victim – cold towels on her face to reduce the overdose fever and they carried her to bed for rest but decided not to seek appropriate medical help for fear that they all might "get into trouble". Gemma Evans conviction for involuntary manslaughter (gross negligence) – controversially the first in English law for a drug supplier at common law in such circumstances – was upheld

[199] Gomez-Aller, "Criminal Omissions" (n. 176), 442-442.

[200] [2009] 1 WLR 1999 (CA); and see Williams (n. 132).

[201] Ambos, "Omissions" (n. 143), 38.

[202] *Ibid*.

[203] Williams (n. 132).

by the appellate court on the predicate that the defendant was grossly negligent in failing to aid the victim once to Gemma Evans' knowledge, became ill. For the purposes of the offence of manslaughter by gross negligence, when an individual had "created or contributed to a state of affairs", which they knew, or ought reasonably have known, had become life-threatening (a serious risk of harm) a consequential legal duty (responsibility) arose, to take "reasonable steps" to save the other's life.[204] In terms of fair notice, however, it was unclear when the contribution to the creation of a serious risk of harm accrued, or indeed when it might be terminated.

The determination in *Evans (Gemma)* and similarly in *Jason Voss* before the Missouri Supreme Court, present an abrogation of affirmative proximate causation precepts, drawing a coach and horses through fair notice and legality considerations.[205] The outcomes are counter-factual. In both cases responsibility is attributed to the defendant via the conduit of creating a dangerous situation through provision of the drug (the heroin), and a concomitant legal duty to counteract all harm that flows from their *prevening fault*.[206] The causality analysis is flawed in *Jason Voss* and *Evans*. There is a failure to attribute significance to the victim's voluntary intervening autonomous act – ingestion of the drug by Douglas Greiger and Carly Townsend themselves – a *novus actus interveniens* in the pithy sense that it was a

[204] [2009] 1 WLR 1999 (CA) per Judge LCJ at [31]; and for an interesting comparison with some European systems see J Keiler, *Actus Reus and Participation in European Criminal Law* (2012), 145.

[205] Simester and others, *Simester and Sullivan's Criminal Law* (n. 123), 82: "What kind of non-causal contribution to the danger is required? What about another person E, who may introduce D (or V) to the heroin dealer? Or F, who lends money to buy the drug What about a vendor of alcohol when he sees the buyer in a drunken altercation? Or a driver who leaves his intoxicated friend sleeping in the car, never to awake? All kinds of background acts of facilitation could now underpin potential criminal law duties. Part of the point of causation doctrines is to restrict the ambit of criminal responsibility when things go wrong. *Evans* is a plain attempt to evade the scope of those doctrines. In our view it represents an illegitimate extension."

[206] *Ibid.*

free, deliberate and informed act by V with attendant capacity.[207] This represents a radical point of department from other situational sources of harm where a hazardous situation is created, and an individual actor fails to rescue.[208]

There is an anomaly here in irrefragably reducing the qualitative nature of the prior act (drug supply) to equate to a naturalistic causation of "any" danger. There is a failure to accord with rules of fair notice. To adapt, in part, as evidence of this discordance, an illustration provided by Ambos[209] in a different contextualisation. By way of postulation, suppose that I lend my mobile phone to person A, who then uses that phone to engage in fraudulent insider share trading. It is not my responsibility (or legal duty) to intervene over the wholly autonomous independent acts of the primary criminal actor: "in the terminology of the theory of objective (fair) imputation the autonomous acts of third persons are supervening events which fully set aside any initial causal responsibility. I am not responsible for a risk created by the subsequent acts of fully autonomous agents."[210] It is causality and fair imputation that ought to guide criminalisation rather than omitting to render aid in light of prevening qualitative acts: involuntary manslaughter at common law is inapposite, but statutory crimes relating to drug supply *per se* are engendered.[211]

C. Systemic Failures to Prevent Harm and Fair Imputation

A separate categorisation of creation of danger and failure to counteract harm inures to systemic failures to act (an inculcated course of conduct). This bespoke categorisation in our *dépecage*, issue-splitting analysis, notably applies to employer or business supplier advertent failures.[212] The outcome, herein, is, we suggest, more

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[207] Simester and others, *Simester and Sullivan's Criminal Law* (n. 123); and Witjens "Considering Causation" (n. 188).

[208] Gomez-Aller, "Criminal Omissions" (n. 176), 442.

[209] Ambos, "Omissions" (n. 143), 38.

[210] *Ibid*.

[211] For further discussion see J Herring and E Palser, "Gross Negligence Manslaughter and the Duty of Care" (2007) *Criminal Law Review* 24.

[212] Gomez-Aller, "Criminal Omissions" (n. 176), 442-443.

straightforward in terms of broader criminalisation. As Leavens has stated,[213] albeit in a different context, the value judgment called for in the omission inquiry may (in certain defined circumstances) operate with specificity, and the inquiry is whether individuals are "so commonly expected to take protective action", that their failure to do so normatively ascribes causative responsibility for ensuing harm(s)."[214] Where systemic failure over a period has ensured by an employer/business supplier the fair imputation is to charge the independent autonomous (non) – actor with consequential wrongdoing – there is a post hoc awareness and legitimate expectation of enforcement. In constrained circumstances, derived from enduring systemic business failures, over a temporally individuated period of time, there is fair notice that perceptible violations will be subject to criminalisation in accordance with societal norms on legitimate behaviour (or otherwise).[215] The effectuation of such principles, in accordance with fair notice and independent autonomous criminality, are comparatively extirpated in the Anglo-American authorities of *Commonwealth v Welansky*, and recently before the English Court of Appeal in *Zaman*.[216]

In the off-cited American determination in *Commonwealth v Welansky*[217] the defendant failed to take proper precautions (no adequate fire escapes) to prevent, and to make proper provisions to extinguish, potential fire in his property (Boston's Coconut Grove night club). A fire broke out, and the business owner was convicted of several counts of manslaughter after nearly 500 individuals perished in a fire in his club. The court imposed liability on the defendant and explained its reasoning as follows: "Usually wanton or reckless conduct consists of an affirmative act in disregard of probably consequences to another. But where there is a duty of care wanton or reckless conduct may consist of intentional failure to take such care in "disregard of probably harmful consequences."[218] The Massachusetts Supreme Judicial Court analysed the business owner's systemic and continuous course of conduct as a predicate for effective criminalisation: these in(actions) were

[213] Leavens, "A Causation Approach" (n. 15), 581.

[214] *Ibid*.

[215] *Ibid*.

[216] [2017] EWCA Crim 1783 (CA).

[217] 316 Mass 383, 55 NE 2d 902 (1944).

[218] *Ibid*., at 397.

characterised as a failure to engage in expected preventative conduct, or alternatively as a series of required affirmative acts (unlawful derogated from) in maintaining the property, with causal salience for impacted harm(s).[219] There was specific and particularised course of conduct requirements imposed on business premises owners, systemically breached, and with independent autonomous awareness of risks created by omissive behaviour.

The recent determination in *Zaman*[220] before the English appellate court similarly resonates in terms of compartmentalisation of individuated criminalisation for systemic business supplier failures to prevent harm, and culpability in accordance with fair imputation threshold gradations. It was determined, more broadly, that whether an individual actor owed a duty of care to others is a question of law for the judge who should direct the jury that a duty of care is owed if certain facts are established, the determination of those facts being for the jury.[221] Zaman, as a restauranteur, stands as the first defendant in English law to be convicted of involuntary manslaughter (gross negligence by omission) for systemic failures in business practice over supply of products to customers. The owner of an Indian restaurant was found to have owed a duty of care (a legal duty) to the victim who had expressly acknowledged their peanut allergy, and who had been explicitly assured that their food contained no peanuts but had died from contaminated mixtures. The defendant, as owner, who had improperly failed to put in place any effective control mechanisms received a six year custodial sentence. A breach of duty was established in systemic course of conduct neglect, an abject failure over a number of weeks to advertently institute health and safety food production standard to avoid imputable risk of harm. A normative assessment of systemic failures to prevent harm, within the contextualisation of business supply or employer engagement, and commonly in the sphere of medical care, seems non-contestable, and in accordance with the rule of law.[222] The criminalisation of advertent harms by independent autonomous actors,

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[219] *Ibid*.

[220] [2017] EWCA Crim 1783 (CA).

[221] *Ibid*.

[222] *Ibid*., and for further discussion in general of gross negligence manslaughter liability see S Gardner, "Manslaughter by Gross Negligence" (1995) 111 *Law Quarterly Review* 29.

dependent on systemic course of conduct failures to effect preventative measures, seems proportionable and legitimate.

D. Hegemony and Control: Sub-jugation and Usurpation of the Means to Self-Protection of Other Persons

A further bespoke categorisation is applicable where an individual actor has a responsibility to prevent harm(s), a synchronicity in terms of self-protection of others. This is implicated either via control on their part, or removal of autonomy for others to act, including the realm of family and household obligations. The epicentre of this compartmentalisation is that the defendant in essence, usurps the means of self-protection of another person, or has autonomy and hegemony over status relationships.[223]

In the initial sub-division will be where, illustratively, a participatory actor has falsely imprisoned, detained, or kidnapped another individual. The rights and autonomy of others have been subjugated, and they are unable to make their own provision. This standardisation is of broader ambit in that it embraces other situational sources where a party has directly subjugated and dissolved the victim's own autonomy to act, and of self-determination to seek assistance or relief.[224] By way of illustration, for instance, in *Bowler*,[225] before the English Court of Appeal, the defendant in the course of extreme sado-masochistic practices, had left the victim in a "mummified" state, wrapped tightly in cellophane, with air gaps restricted for up to three hours. *Bowler's* liability for involuntary manslaughter was predicated upon the creation of a dangerous situation, and that he had left the other party helpless, and without self-autonomy; an abjuration of self-preservation individualisation.

There is, of course, a wider remit to this particular sub-categorisation, and it resonates with our previous extirpation of familial and household obligations – notably in cases such as *Frank Johnson*, *Billingslea v State*, and *Terri Williquette* it

[223] Gomez-Aller, "Criminal Omissions" (n. 176), 441-443.

[224] *Ibid*.

[225] [2015] EWCA Crim 849 (CA).

coheres to failure to report harm/failure to protect children or vulnerable adults in the same household, and fair imputation of liability.[226]

It is our perspective, to accord with fair warning/legality precepts, that it is essential to introduce broadened statutory failure to protect offences – providing clarity and reasonable enforceable provisions as part of legitimate criminalisation.[227] The hegemony that the individual defendant has over children or vulnerable adults in the same household is significant – the status relationship aligned with control subjugation to effect potential liability.[228] A legislative framework is important to protect children/vulnerable adults "behind closed doors" where their physical safety is at risk.[229] English law, in part, has provided some fundamental rights (and protection) through section 5 of the *Domestic Violence, Crimes and Victims Act 2004*, but the partial safeguarding provided needs to be enhanced across Anglo-American reforms to status liability.

The posited issue is whether B is liable for A's crime because they failed to intervene to prevent it, or put a stop to it in special situational circumstances.[230] A negative response is immediately elicited, as there is no general duty to prevent the commission of a crime by A, but exceptions may apply. In an Australian case, *Russell*,[231] it was held that a father was a secondary party to the homicide of his children when he stood by and watched the mother drown them. In England, a limited solution to the problem of proving which one of two or more defendants attacked a person in the same household is provided by the Domestic Violence, Crime and Victims Act 2004.[232] By section 5, an offence, punishable by a maximum of 14 years imprisonment has been created to cover the death of a child or vulnerable adult in the same household. In effect, the crime is one of negligence as the defendant, if not the

[226] Herring (n. 163).

[227] Ashworth, *Positive Obligations* (n. 123), 49.

[228] Reed and Fitzpatrick, *Criminal Law* (n. 129), 123.

[229] Ashworth, *Positive Obligations* (n. 123), 49; and for further discussion see C Hoyle, "Victims, the Criminal Process, and Restorative Justice", in M Maguire, R Morgan and R Reiner (eds), *Oxford Handbook of Criminology* (5th edn, 2012), 401.

[230] Reed and Fitzpatrick, *Criminal Law* (n. 129), 123.

[231] [1933] VLR 59 (Victoria SC).

[232] Herring (n. 163).

direct cause of death, is liable if they ought to have been aware of the risks: the risk of which the defendant ought to have been aware is a "significant" one of "serious injury", and the death must have occurred in the circumstances that they ought to have foreseen. Liability is established where an individual fails to take such steps as they could reasonably have been expected to take to protect the child/vulnerable adult from the risk. It remains unclear, however, how a jury will view the criterion of "reasonable steps" for that particular defendant where they also have been the subject of abuse in a violent household: harm(s) now extend to serious physical injury as well as death in the same household.[233]

The English regulatory response to criminalise harm(s) in the same household (death or serious physical injury), could be adapted to present a broadened legislative obligation on parents to non-adult children and vulnerable adults in general, beyond the same household. It would consequentially provide fair warning clarity on bespoke criminalisation to a defendant such as *Ray Billingslea* who severely neglected his own mother, living with his wife and himself, who was found in an extremely bad situation at the time of her death lying in her urine, and excrement, and suffering from bedsores, muscle loss, burns and blisters. In other cases engaging status relationships such as distant relatives, guests and close friends, as Ashworth, in part iterates, criminalisation should occur, if at all, via duties of easy rescue offences, in specific situational sources of harm, as set out subsequently.[234]

E. The inter-section of initial accident and subsequent omission by the defendant to prevent harm: Good Samaritan law and Duty to Rescue

Finally, in our *dépecage* (issue-splitting) analysis of creation of dangerous situations, there is the most problematical situational source of liability to evaluate; inter-section of initial accidental harm and subsequent omission. There are a cadre of cases[235] wherein an initial accident occurs, followed by a subsequent omission by an

[233] *Ibid.* And see *Khan and Others* [2009] EWCA Crim 1569 (CA).

[234] Ashworth, *Positive Obligations* (n. 123), 49.

[235] For further discussion see Cath Crosby, "Gross Negligence Manslaughter by Omission: The Emergence of a Good Samaritan Law" (2018) 82 *The Journal of Criminal Law* 127.

individual party to provide assistance: a failure to rescue. It is within this contextualisation that issues of fair notice/legality are most starkly presented, and policy inculcations are implicated. The source of the duty is often not perceived through a legal prism of causality, but as a question of policy.[236] Hughes has contended that this policy is at best amorphous with no guiding lodestar to define enforceable duties: "The classification of recognised legal duties is probably neither exhaustive nor exclusive, but it does indicate the sphere in which most present offences of omission are found, and the policy which underlies their creation."[237] In terms of fair imputation Hughes suggests that the reductive policy gradation for culpability would be to make criminal any failure to save a life where the victim's peril is clear to the actor, and the required preventive conduct involves little or no risk. Frankel[238] has, in contradistinction, advocated an "externally recognised" legal duty as a basis for criminal liability; such external recognition is imbued by Kirchheimer[239] through adducement of communal value structures that underpin any requirement for engagement in preventative conduct.

The difficulty, of course, with amorphous policy considerations and propagation of communal value structures is lack of certainty or fair warning as to when, and why, we criminalise failures of easy rescue. In general, cases of voluntary failure to provide assistance to the victim of an accident caused by negligence should not be treated as instances of involuntary manslaughter, but rather should be dealt with normatively and proportionately by specific and bespoke legislation to criminalise, where appropriate, in terms of culpability and sentencing, a failure to act to prevent serious harm. There is a fundamental dichotomy herein, in contrast to exemplars provided in earlier situational source illustrations: the supererogatory importance of individual autonomy. The contours of liability draw a vital binary divide: on one side the *scylla* of responsibility to control one's own sphere of

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[236] Mack, "Bad Samaritanism and the Causation of Harm" (1980) *Philosophy and Public Affairs* 230.

[237] Hughes, "Criminal Omissions" (n. 8) 600.

[238] Frankel, "Criminal Omissions: A Legal Microcosm" (1965) 11 *Wayne Law Review* 367, 390.

[239] Kirchheimer, "Criminal Omissions" (1942) 55 *Harvard Law Review* 615, 630.

autonomy; and, on the other side, the *charybdis* of responsibility to "autonomously" save another party harmed by an accident. In the former sphere the individual has dominion and control over their own sources of danger, but in the latter the act of saving an individual harmed in an accident is *sui generis*, potentially to be carried out by all. As such any Good Samaritan law, applicable to all, needs to be normatively constructed, and constrained in scope to provide legitimate fair warning of legal duties.

Hard cases often make bad law. The recent determination in English law in *Bowditch*[240] highlights in sharp focus that extreme caution needs to be exercised before an individual actor is inculpated for involuntary manslaughter, predicated simply on an omission to act, consequential to an initial accident by another autonomous party. Mere opprobrium, as part of nebulous communal value structures, directed at egregious human inaction, does not equate to fair notice for homicide criminalisation on any enforceable definitional principles.

In *Bowditch*, the defendant had met the victim (Miss Morgan) at a party before going to the harbour arm in Ramsgate later that night. In the early hours of the morning, Miss Morgan accidentally fell into the sea. Bowditch had consumed quantities of alcohol, cannabis and cocaine, and whilst Miss Morgan had shouted out for his help as she was unable to swim, he said that he was unable to assist and stood and watched her drown. Shortly afterwards, Bowditch was seen drinking and dancing in a bar, before he was made to leave due to his intoxication.[241] Nearly two hours passed before he telephoned the police to provide details that he had witnessed the death of another individual. The defendant was convicted of gross negligence manslaughter, and received a five and a half year custodial sentence. Bowditch's omissive conduct was undoubtedly egregious, and shocks our conscience. It remains unclear, however, on what rationale, in situational circumstances of individual autonomous accident followed by non-action (failure to rescue), a responsibility was applied to create a legal duty between the parties, with no proximate causation or creation of a risk of serious harm on the part of Bowditch.[242]

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[240] *R v Bowditch* (Unreported) Maidstone Crown Court, 2t January 2017; and see Crosby (n. 235).

[241] *Ibid*.

[242] *Ibid*.

In cases of accident – omission interaction in which circumstances should an affirmative duty to act be imposed, reinforced by the criminal law? It is submitted that an alternative legal response is required in terms of clarity and uniformity, that normatively and proportionally establishes individual liability for failure to effect an easy rescue, with attendant appropriate sentencing guidelines. Criminalisation should only occur in extreme circumstances where there is a serious risk of death that can be prevented by an individual with specific opportunity and capacity to take reasonable effective measures in the prevailing circumstances with no risk of any personal harm.[243] In such constrained circumstances, as elaborated upon further in our concluding remarks, even where accident-omission intersect in terms of legal duty (or otherwise), it may be legitimate to subjugate general individual autonomy rights.

V. CONCLUSIONS

This article has examined the contours of Anglo-American theoretical and substantive perspectives on omission liability, and criminalisation where legal duty requirements pertain. The legal duty requirement, however, directly contrary to the assertion of Leavens, has dissonant functionality in the realm of criminal omissions other than simply as a "moral barometer" to establish proximate causation; it has a broadened synchronicity to align with appropriate culpability. Imposition of liability for harmful omissions interposes to a far greater extent with individual autonomy and normal routines; consequentially this abrogation of autonomy needs to be legitimately constrained and delimited to particularised interference(s) where the rule of law demands actions, and freely recognises countervailing supererogatory societal interests.

The legal duty requirement aims to ensure that criminal omission liability is in accordance with the legality principle, and the fair warning requirement derives therefrom. This article has extirpated Anglo-American omission liability across five categorisations of identifiable legal duties, the scope of which at times overlaps: status relationships; statutes; contracts; voluntary assumption of responsibility (seclusion); and creation of peril. There is a deep-rooted concern that extant common law deleteriously leaves individuals to speculate whether by not acting and minding their

[243] Ashworth, *Positive Obligation* (n. 123).

own business they have been engaging in criminal conduct. This lack of fair warning - under which failures to act might be labelled criminal retroactively and the duty to perform the omitted act has not been properly established - must not be tolerated.

In terms of expectations (or otherwise) to commit an omitted act we have deconstructed extant Anglo-American criminal law by *dépecage*: novel issue-splitting principles within discrete standardisations of creation of peril. Our analysis is presented in terms of five discrete contextualisations: (A) when an individual actor "accidentally" causes danger, and then has a duty to prevent further harm; (B) when an individual actor non-accidentally effects danger, and then has a duty to prevent further harm; (C) a systemic failure by a defendant over a period of time to protect others from harm for whom they bear a responsibility, notably as an employer or supplier ;(D) where the defendant has a responsibility in terms of self-protection of others, either via control or hegemony on their part, or removal of authority for others to act, including within family and household obligations ;and (E) where harm transposes through the situational source of an initial accident followed by a subsequent omission by the defendant.

In situational sources (D) and (E), as presented, and given the legislature's policy decision to criminalise failures to act within these categories, urgent legislative responses are needed in Anglo-American criminal law to equate omissive behaviour in complementarity with fair warning and culpability gradation thresholds. A limited legislative response has been provided in English law to criminalise deaths of children or vulnerable adults living in the same household as the defendant, but is constrained in effect. In terms of our prior analysis any legislative response needs to ensure compotation with discrete factorisations: (i) it is applicable to initial and accidental harm where an individual is present at the scene; (ii) a nexus alternatively mandated where common danger is presented to children or vulnerable adults living in a household, and another adult is aware of the risk, and is closely related; (iii) the presented harm is death or serious injury; (iv) an individual actor has capacity to undertake reasonable steps in the circumstances to prevent immediate harm; (v) in terms of criminalisation the penalty equates to a summary (misdemeanour) scale offence.

The definitional elements of the offence may be stated as follows: An individual who is present at the scene of an accident, or closely related to a child or vulnerable adult with whom he lives in the same household, who is aware that another

individual is exposed to the risk of death or serious injury shall, subject to their own capacity, and to the extent that they can do so without danger or peril, provide reasonable assistance to the exposed individual. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel, or report the serious risk of potential harm to lawful authorities. An individual who violates this section shall be guilty of a summary (misdemeanour) offence, and shall be subject to imprisonment for a term not exceeding six months, or a fine. A legislative response is needed to provide fair imputation of liability for omissive conduct in bespoke creation of peril situational sources of danger.

Imposing a general duty to rescue that requires citizens to be Good Samaritans, is a question of policy. Before enacting an offence for failing to comply with said duty, the legislature must be persuaded that such offence is necessary, both in terms of the existence of a problem that it strives to alleviate, and its ability to achieve its goals. This duty, like any other duty, ought not be created merely as an intuitive and deontological response to egregious cases of failure to rescue: omissions that shock societal conscience and outrage public opinion thereafter. Outwith our morally repugnance at an individual's non- action, the criminalisation standardisations must be clearly delineated, and strictly constrained within normatively appropriate limits. The abovementioned definitional elements adventitiously guarantee, to the greatest extent possible, a narrowly tailored duty, providing fair warning, and minimal, but legitimate, infringement upon individual autonomy.