CRIMINAL OMISSIONS

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ALL regulation must be concerned with the things we ought not to do, the things we may do and the things we ought to do. The law is composed of hypothetical patterns of conduct—conduct from which we must abstain on pain of sanction, conduct which we must pursue to attain certain ends and, more rarely, conduct which we must follow to avoid penalty. In criminal law, the classic picture has been of a body of prohibitions, but the criminal law has never been exclusively prohibitive. And this is not surprising, for even the Decalogue contains incitement to positive action and the western religious concept of sin has always contemplated inactivity as sometimes immoral. But, for the most part, our criminal law in its progress has only occasionally and almost reluctantly admitted the offense of omission within its scope. In recent decades the picture has been changing, and one of the most significant features of the modern development of penal laws has been the widening range of liability for crimes of inactivity. But this contemporary development has received little explicit treatment from modern Anglo-American writers on criminal law.[1]

THE HISTORY OF CRIMINAL OMISSIONS

Roman law knew little of criminal liability for omissions. There were only a few delicts *in omittendo*, chief of which were the failure of a slave to defend his master from assault, the failure of a soldier to assist his superior officer when the superior was taken by the enemy, the failure of a husband to prevent his wife from becoming a prostitute and the failure of a son to inform his father of a trap which his brother was laying for the father.[2] There is too in the *Digest* the text of Paul, *"nullum crimen patitur is qui non prohibet cum prohibere non potest,"* which seems to hint at some kind of liability for omissions but which is unclear in its import.[3] Certainly, these fragmentary instances of

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1. For helpful discussions, see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 9 (1947); Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937); Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Snyder, *Liability for Negative Conduct*, 35 VA. L. REV. 446 (1949). Continental European writers have devoted more attention to the question of criminal omissions. See, in France, GAND, DU DÉLIT DE COMMISSION PAR OMISSION (1900); Appleton, *L'Abstention Fautive*, 1912 REV. TRIM. 593; COHIN, L'ABSTENTION FAUTIVE (1929); ALBARET-MONTPEYROUX, L'INACTION EN DROIT PÉNAL (1944).

2. GAND, *op. cit. supra* note 1, at 40-41; ALBARET-MONTPEYROUX, *op. cit. supra* note 1, at 9.

3. DIGEST 50.17.109. MOMMSEN, RÖMISCHES STRAFRECHT 91 (1899), takes the view that the passage indicates the absence of liability in criminal law for omission. The sug-

liability for inaction made no substantial impact on the application of Roman law, and we know of no conceptual difficulties or adjustments to which they gave rise.

The early English institutional writers again show little awareness of criminal omissions as a field of liability of any special significance. Coke, in his *Third Institute*, seems to regard positive action as an almost inevitable element of guilt. He always insists on the overt deed: even the liability for treason in compassing the death of the monarch has to be excused and explained away as a special case.[4] The only offenses of omission clearly recognized are misprision of treason,[5] misprision of felony[6] and failure to yield up treasure trove.[7]

That Coke was not comprehensive in his treatment of criminal omissions appears from an examination of the editions of Hawkins's *Pleas of the Crown*, the first of which appeared in 1716. Here we find a slightly expanded catalogue of offenses of failure to act. In addition to those mentioned by Coke, Hawkins discusses the pervasive offense of common nuisance: "It seems, that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires."[8] But the numerous examples of nuisance which he gives are all cases of commission. Again, he lists the communal duty imposed by the common law on parishioners or the inhabitants of a county to keep highways and bridges in good repair.[9] Of

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gestion has also been made that the passage refers only to the responsibility of the father or master to control a child or slave, GAND, *op. cit. supra* note 1, introduction at 1, and, again, that it may bear quite a different significance and refer to the element of consent in assault cases, Honig, *Zur Frage der Strafbarkeit der Unterlassung im römischen Recht*, in FESTSCHRIFT FÜR HEILFRON 63 (1930). See also Kirchheimer, *supra* note 1, at 615.

4. COKE, THIRD INSTITUTE 5 (1817 ed.). Coke writes: "So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing. . . . But . . . in the case of the king, if a man had compassed or imagined the death of the king (who is the head of the commonwealth) and had declared his compassing or imagination by words or writing, this had been high treason and sufficient overture by the ancient law."

5. As Coke points out, this was treason itself at common law but was made a separate offense by 1 & 2 PH. & MARY c. 10 (1554). COKE, THIRD INSTITUTE 36 (1817 ed.). See also FOSTER, *Discourse of High Treason*, in CROWN CASES 181, 195 (1791 ed.). In the United States an offense of misprision of treason was created by the Act of April 30, 1790, 1 STAT. 112 (see now 18 U.S.C. § 2382 (1952)). The French CODE PÉNAL art. 103 (53d ed., Dalloz 1956) punishes with imprisonment up to ten years anyone who, having knowledge of projects or acts of treason or espionage, does not report them to military, administrative or judicial authorities as soon as he knows of them. These offenses are known in France as *délits de non-dénonciation*. See DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL 253, 437 (1947).

6. COKE, THIRD INSTITUTE 139 (1817 ed.).

7. *Id.* at 132.

8. 1 HAWKINS, PLEAS OF THE CROWN 692 (Curwood ed. 1824) (hereinafter cited as HAWKINS).

9. *Id.* at 696. Stating that any inhabitant may be proceeded against, Hawkins offers

greater interest in the field of common-law liability for omissions is the suggestion for the first time that homicide may be based on a failure to act, a notion significantly absent in Coke. The suggestion is admittedly a faint one, occurring in the following passage:

> "Also he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or a horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted as having himself feloniously killed him; and this is agreeable to the Mosaical law. However, as it is agreed by all, such a person is certainly guilty of a very gross misdemeanour."[10]

Hawkins has no further discussions of liability for omissions at common law.[11] However, a frail but interesting group of statutory offenses of inaction

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an interesting anticipation of the objection sometimes raised to an extension of the duty to rescue—that liability might extend to a throng of bystanders. An American case in which an indictment succeeded for common nuisance against highway supervisors for neglect to repair was Edge v. Commonwealth, 7 Pa. 275 (1847). New Hampshire, in the early nineteenth century, enjoyed a statute which provided that "if any town shall neglect to erect or keep in repair a guide-post or guide-board at each intersection of the highways therein, they shall forfeit for each month's neglect the sum of one dollar." The provision had germs of profit, since the penalty was recoverable by anyone who might sue. However, the New Hampshire supreme court held, in Clark v. Lisbon, 19 N.H. 286 (1848), that a separate penalty did not accrue for each unposted intersection and that one dollar payed for a whole month's neglect.

10. 1 HAWKINS 92. His reference to the Mosaical law is presumably to Exodus, 21:29: "But if the ox were to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or woman, the ox shall be stoned, and his owner also shall be put to death." This is an interesting juxtaposition of a primitive imposition of liability on animals with a highly civilized recognition of the owner's duty of care, though breach of the latter is rather severely punished. Liability for negligent control of animals is a popular instance of liability for omissions. 1 PHILLIPS, COMPARATIVE CRIMINAL JURISPRUDENCE 125 (1889), refers to the nineteenth-century Chinese Penal Code: "When horses, horned cattle, or dogs are viciously inclined, either to kick or bite . . . if the owner does not set a mark on them, and tie them up in the customary manner, or if he does not kill his dogs when they become mad, he shall be punished with forty blows. If, in consequence of such neglect, any person is killed . . . the owner of the animal shall be obliged to redeem himself from the punishment of manslaughter . . . by the payment of the legal fine." In 1927, the Cour de Cassation decided that a verdict of guilty of manslaughter was rightly brought against a man who had neglected to control his dog which had bitten the deceased on the leg and caused tetanus and death. Cour de cassation (Ch. crim.), Nov. 18, 1927, [1928] Sirey Recueil Général I. 192.

11. STROUD, MENS REA 155 (1914), suggests that at common law there were only seven offenses of omission: "(1) Contempts by failure to comply with mandatory orders of the Court. (2) Public nuisances by nonfeasance. (3) Default in the maintenance of a public ferry . . . . (4) Refusal to serve in a public office . . . . (5) Misprision of felony. (6) Failure by a magistrate to suppress a riot. (7) Failure by any person to assist public officers in such suppression, in the arrest of offenders or in the keeping of the peace."

can be found. The religious offense of not coming to church, for example, was created by 1 Eliz. 1, c. 2 (1558). Under this statute, reasonable excuse was recognized as a defense but the burden of showing it, Hawkins says, was on the defendant,[12] an interesting early demonstration of the necessity for dislocating traditional concepts of the criminal law when dealing with omissions. Hawkins has another comment on the offense—one of the earliest analyses of the nature of conduct involved in an omission. He says: "The offence in not coming to church, consisting wholly in a nonfeasance, and not supposing any act done, but barely the omission of what ought to be done, need not be alleged in any certain place; for, properly speaking, it is not committed anywhere."[13]

Another early criminal omission was nonconformity in office, committed by a holder of public office who had not taken the oath of supremacy and allegiance, and punishable by a fine of five hundred pounds.[14] Closely allied are the offenses of refusal—refusal to make a declaration against popery,[15] refusal to give personal assistance to the king and refusal to return home from a foreign country on a request by privy seal or proclamation when the foreign country was in rupture with England.[16] Are the offenses of refusal ones of omission or commission? This would seem to turn on whether silence and inactivity in the face of a request for positive action would have been sufficient for liability. The language of the statutes shows clearly that in some cases the duty to act did not depend upon a request; in others, liability only arose on refusal to accept a declaration when tendered.[17] Even in the latter cases silence would presumably have been sufficient to incur liability; thus, they all may be properly described as offenses of omission. Still, the distinction does underline the different circumstances under which a duty to act may be imposed—the varying conditions precedent to triggering the duty under different enactments.

Another instance of the positive duty to act found in Hawkins's commentary is the burden imposed on masters of merchant ships not to abandon

12. 1 HAWKINS 373. By 3 JAC. 1, c. 4 (1605), the offense was extended to those who maintained in their houses anyone who did not go to church.

13. 1 HAWKINS 373.

14. *Id.* at 369. The offense was created by the Test Act, 1672, 25 CAR. 2, c. 2.

15. 1 HAWKINS 397. The relevant statutes are 30 CAR. 2, stat. 2, c. 1 (1678); 1 GEO. 1, c. 13 (1714); 1 WILL. & MARY chapters 9, 15, 26 (1688).

16. Refusing assistance to the king apparently did not amount to treason but was regarded as a high misdemeanor, punishable by fine and imprisonment. Refusal to return home upon privy seal or proclamation might amount to evidence of adhering to the king's enemies and so to treason. See 1 EAST, PLEAS OF THE CROWN 80 (1806).

17. Under 30 CAR. 2, stat. 2, c. 1 (1678), and 1 GEO. 1, c. 13 (1714), an unconditional duty was imposed to take oaths against the practices of the Church of Rome. These statutes were directed at those sitting in Parliament or in the service of the king. But, under 1 WILL. & MARY chapters 9, 15, 26 (1688), liability only arose on refusal to subscribe to a declaration tendered by justices. These acts were concerned with residence within ten miles of London, bearing arms and presenting to a church.

any member of the crew.[18] Traditionally, and for obvious reasons, the relationship of master to crew has been regarded as a peculiarly paternalistic one, imposing a broader sweep of duty than the common law was generally ready to recognize.[19] Indeed, the common law seems to have granted a higher place to the interests of seamen than to those of children. Hawkins never suggests liability for homicide through neglect of children. He seems to demand a positive act of dangerous exposure by the parent before imposition of liability, as in the case he cites of "the harlot, who, being delivered of a child, left it in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof."[20]

But most significant is an absence, even in the later editions of Hawkins, of that cloud of offenses which was later to plague the consciences of the commentators on criminal law, the public welfare offenses of strict liability. In Curwood's edition of Hawkins in 1824, a brief section is devoted to the old statutes on regulating the price of victuals, dating mostly from the late seventeenth and early eighteenth centuries. They include prohibitions against the adulteration of beer, butter, cheese and honey and directions for the preservation of fish and fruit. Most are prohibitive, but one example of liability for an omission occurs, a provision that: "[E]very potter shall set upon every pot which he shall make for the packing of butter the just weight of such pot when burnt, and his christian and surname . . . , on pain of one shilling for every pot he shall omit so to mark; and every farmer or packer of butter, two shillings for every pot he uses so omitted to be marked . . . ."[21]

In this edition of Hawkins, the section on "Offences Against the Public Health" is confined to selling unwholesome provisions, spreading the plague and neglect of the quarantine laws.[22] East, in his *Pleas of the Crown*,[23] also knows nothing of the new aspect of criminal liability, which was in fact just

18. 11 Will. 3, c. 7 (1698-99), provided: "In case any master of a merchant ship or vessel shall . . . force any man on shore, or wilfully leave him behind . . . or shall refuse to bring home with him again all such of the men which he carried out with him . . . every such master shall . . . suffer three months imprisonment . . . ." See 1 HAWKINS 120.

19. See the comment of the Court of Appeals of New York in Ives v. South Buffalo Ry., 201 N.Y. 271, 311, 94 N.E. 431, 446 (1911): "The maritime law has wisely and benevolently built up peculiar rights and privileges for the protection of the seaman which are not cognizable in the common law. When he is sick or injured he is entitled to be cared for at the expense of the ship, and for failure of the master to perform his duty in this regard, the ship or the owner is liable. That is a right given to the seaman, and a duty enjoined upon the master, by the plainest dictates of justice, which arises out of the necessities of the case . . . ." For a discussion of criminal liability arising through neglect of a master to rescue a seaman who fell overboard, see United States v. Knowles, 26 Fed. Cas. 800, No. 15540 (N.D. Cal. 1864).

20. 1 HAWKINS 92. The case is usually referred to as The Harlot's Case.

21. 14 CAR. 2, c. 20 (1662), in 1 HAWKINS 652.

22. *Id.* at 681-85.

23. The treatise was first published in 1803. The edition used here is the Philadelphia edition of 1806.

over the horizon. For it was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts,[24] the Licensing Acts,[25] the Merchandise Marks Acts,[26] the Weights and Measures Acts,[27] the Public Health Acts[28] and the Road Traffic Acts.[29] With these statutes came a judicial readiness to abandon traditional concepts of *mens rea* and to base criminal liability on the doing of an act, or even upon the vicarious responsibility for another's act, in the absence of intent, recklessness or even negligence.[30] The case usually cited as the first powerful expression of this tendency is *Regina v. Woodrow*,[31] where a tobacco dealer was convicted of possessing adulterated tobacco, although he had bought it in the regular course of business and had no reason to suspect impurity. Apparently, he could only have discovered the impurity by procuring a complicated analysis; in the view of the court, this was not an unreasonable demand to impose for avoidance of the penalty.[32] America witnessed a very similar development, beginning with a group of cases in Connecticut and Massachusetts between 1850 and 1870.[33]

Many of the public welfare offenses are ones of omission. Even where the definition of the offense does not expressly impose a duty to take positive action, such a duty is often imposed by decisions like *Regina v. Woodrow*. Strict liability has appeared harsh and futile in crimes of commission; it must appear even more unattractive in offenses of omission, where the defendant may be quite innocently unaware of circumstances requiring his action. In some instances, courts have nevertheless employed notions of strict liability. In *Provincial Motor Cab Co. v. Dunning*,[34] for example, the appellants were charged under the Motor Car Order of 1903, a set of regulations issued by the Board of Trade, with failing to provide a vehicle with a rear light adequate to illuminate the registration plate. The appellants had appointed an

24. A great many old statutes regulated sale procedures, but there seems to have been no suggestion of strict liability until the nineteenth-century statutes. *E.g.*, Sale of Food and Drugs Act, 1875, 38 & 39 VICT. c. 63.

25. 35 & 36 VICT. c. 94 (1872); 2 EDW. 7, c. 28 (1902); 10 EDW. 7 & 1 GEO. 5, c. 24 (1910); 11 & 12 GEO. 5, c. 42 (1921).

26. 50 & 51 VICT. c. 28 (1887); 16 & 17 GEO. 5, c. 53 (1926).

27. 52 & 53 VICT. c. 21 (1889); 16 & 17 GEO. 5, c. 63 (1926).

28. 38 & 39 VICT. c. 55 (1875); 26 GEO. 5 & 1 EDW. 8, c. 49 (1936).

29. 59 & 60 VICT. c. 36 (1896); 3 EDW. 7, c. 36 (1903); 20 & 21 GEO. 5, c. 43 (1930).

30. For general discussions of this development, see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 10 (1947); WILLIAMS, CRIMINAL LAW c. 7 (1953); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

31. 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846), discussed in the works mentioned in note 30 *supra*.

32. *Id.* at 412-13, 153 Eng. Rep. at 911.

33. See, *e.g.*, Barnes v. State, 19 Conn. 398 (1849); Commonwealth v. Boynton, 84 Mass. (2 Allen) 160 (1861); Commonwealth v. Farren, 91 Mass. (9 Allen) 489 (1864). See also Sayre, *supra* note 30.

34. [1909] 2 K.B. 599.

employee to see that the regulations were complied with, but a cab driver had apparently altered the position of his lamp so that it did not provide the necessary light. The divisional court held that the appellants had been rightly convicted of aiding and abetting the offense.[35]

In *Quality Dairies (York) Ltd. v. Pedley*,[36] the appellants had been charged under the Milk and Dairies Regulations, 1949, made under the Food and Drugs Acts. The relevant regulation provided that: "Every distributor shall ensure that every vessel . . . used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness . . . ." The defendants had contracted to supply milk to hospitals but had subcontracted with another dairy firm for one hospital. The milk was purchased by the second firm, bottled on its premises and delivered by a haulage firm. At no time did any of the defendant's employees handle the milk or the bottles. But the divisional court held that the defendants could nevertheless be convicted for the unclean state of one of the bottles.

American courts have at times been no kinder to the blameless defendant in cases of criminal omissions. In *City of Hays v. Schueler*, the Kansas court ruled that the duty to carry a red rear light on a motor vehicle was absolute and could not be escaped by a showing that, despite all possible precautions, the light had gone out.[37] Similarly, *State v. Ferry Line Auto Bus Co.* held that where the defendant company was liable for operating an auto stage without a license, one of its employees might also be held criminally liable although he had no knowledge that his employers had neglected to obtain the license.[38]

In addition to the burgeoning of offenses of strict liability, the last century witnessed a broadening of liability for homicide through failure to act. As we saw, Coke did not discuss this possibility at all, and in Hawkins only a hint is given in connection with the control of dangerous beasts. East's *Pleas of the Crown* contains an emerging recognition of liability for homicide through negligence. He writes:

> "Accidents frequently occur amongst persons following their lawful occupations, especially such from whence danger may probably arise. If they saw the danger, and yet persisted without sufficient warning, it will be murder. If the act were such as was likely to breed danger, and they neglected the ordinary cautions, it will be manslaughter at least, on account of such negligence; making due allowance for the nature of the occupation, and the probability of the danger; which if very remote, and

35. WILLIAMS, CRIMINAL LAW 282 (1953), points out that the decision is no longer good law in England, since it is now recognized that knowledge of the commission of an offense by the principal is necessary to convict an aider or abettor. See Ferguson v. Weaving, [1951] 1 K.B. 814; Thomas v. Lindop, [1950] 1 All E.R. 966 (K.B.).

36. [1952] 1 K.B. 275.

37. 107 Kan. 635, 193 Pac. 311 (1920). The court said: "The regulation falls . . . within the numerous class in which diligence, actual knowledge and bad motives are immaterial . . . ." *Ibid.*

38. 99 Wash. 64, 168 Pac. 893 (1917).

> in the particular instance not reasonably to be expected, may reduce the act to misadventure. The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct."[39]

At the same time, the scope of a parent's duty to care for his child was greatly extended, and liability for homicide was found in many cases of child neglect. Moreover, the duty was extended to cover others than infant children.[40] The criminal courts were evidently becoming more conscious of the positive burdens imposed by what East called "common social duty."

From these two streams, the public welfare offenses and the broader attitude on liability in homicide, a wide area of duty to take positive action has gathered in modern criminal law. Analysis of the concept of omission and of the policy involved in an extension of liability for failure to act thus becomes necessary.

THE CONCEPT OF AN OMISSION

"An omission," wrote Stroud, "is not like an act, a real event, but is merely an artificial conception consisting of the negation of a particular act."[41] By this is presumably meant that an act is sensible to feeling and to sight, while an omission is not observable by the senses but is only a significance legally attributed to passivity. Bishop, too, perhaps had this in mind when he wrote: "A neglect is not properly an act, yet in a sense it is. It is a departure from the order of things established by law. It is a checking of action; or it is like the case of a man who stands still while the company to which he is attached moves along, when we say, he leaves the company."[42]

These statements are valuable in pointing to the essential nature of an omission, but they suffer from a failure to specify the exact sense in which they use the idea of an act. "Act" must be defined before an omission can be distinguished; and no agreed juristic concept of an act exists. Austin defined an act as a motion of the body consequent upon a determination of the will,[43] but this approach implies a concept of volitions which has now been sufficiently exploded by Professor Ryle.[44] Holmes regarded an act as a "voluntary muscular contraction,"[45] which might be more acceptable, if "voluntary" is suitably defined. For the purposes of the criminal law, neither definition is very helpful. The criminal law never prohibits mere muscular contractions. It is not yet an offense to twitch. What the criminal law prohibits is muscular contractions in certain circumstances and, perhaps, productive of certain consequences.[46] The act of homicide in any particular in-

39. 1 EAST, PLEAS OF THE CROWN 262 (1806).
40. See text at note 109 *infra*.
41. STROUD, MENS REA 4 (1914).
42. 1 BISHOP, CRIMINAL LAW § 433 (5th ed. 1872).
43. 1 AUSTIN, JURISPRUDENCE 376 (1869).
44. RYLE, THE CONCEPT OF MIND *passim* (1950).
45. HOLMES, THE COMMON LAW 91 (1881).
46. See DIAS & HUGHES, JURISPRUDENCE 202 (1957).

stance must include the accompanying circumstance of the victim's existence and the consequence of the victim's death. The only fruitful concept of an act for the criminal law must synthesize the defendant's physical movements with external accompanying circumstances and, sometimes, with certain consequences.

And so with omissions. The definition of the specific offense must again single out physical movement in accompanying circumstances and, possibly, with certain consequences. It is not quite accurate to say, as Stroud did, that an omission is not, like an act, a "real event." The legal notion of omission, like that of an act, involves tangible happenings. Of course, in offenses which are purely those of commission, such as rape, the criminal act occurs when the general scheme of conduct projected by the statutory language is realized in the particular by the physical movements of the defendant in appropriate circumstances. In offenses purely of omission, such as misprision of treason, the criminal occurrence is the failure of the defendant in appropriate circumstances to make concrete the general pattern of conduct prescribed by the legal norm. The defendant may be acting constantly, but the legal significance is attributed to the absence of particular action realizing the legal pattern.

There is a third possibility: the offense which in its legislative expression seems prohibitive only, but which, by a process of judicial interpretation, has come to be regarded as capable of perpetration by omission. An example is homicide in a jurisdiction which refers only to the act of killing, as in New York, but where the courts have shown willingness to apply liability to one who causes death through neglect. No term of art in Anglo-American criminal law describes the liability for such an offense incurred through a failure to act. The French neatly call it "délit de commission par omission."[47]

The nature of certain offenses may make classification difficult. Examples might be drawn from the offenses of practicing certain callings without a license. Does the offense lie in practicing—commission—or in failing to obtain a license? The question is clearly absurd for neither practicing nor failing to get a license is in isolation criminal. The offense is practicing without a license and is committed by embarking on one course of conduct without first doing something else. It therefore contains elements of commission and omission. What the prosecution must show to obtain a conviction will constitute an effective test: here, both facts—practicing and no license—are necessary. The burden of showing a license may be on the defendant, but the essential character of the absence of a license as an ingredient of guilt is not thereby destroyed. The act receives a criminal color from a prior omission.

47. See ALBARET-MONTPEYROUX, L'INACTION EN DROIT PÉNAL 85 (1944). The Germans call these offenses "unechte Unterlassungsdelikte." The usual example is homicide by neglect, but it is not the only one. In Commonwealth v. Cali, 247 Mass. 20, 141 N.E. 510 (1923), the accused was indicted for burning a building with intent to injure the insurer. The evidence failed to show whether the accused had started the fire himself or whether he had merely refrained from any attempt to extinguish it after it had started accidentally. The court held that even on the second possibility conviction would be proper.

The defendant could have escaped the penal provision either by obtaining a license or by not practicing the calling. It is clearly the most tedious kind of verbal dispute to argue about the proper description of his offense in terms of action or omission. It is sufficient to notice that it contains elements of both natures.

Possibly, of course, the lawmaker may have a choice of pursuing his chosen policy by creating either an offense of commission or one of omission. But only rarely can identical results be achieved. Thus, householders might be required to set out garbage in specified receptacles between the hours of 9:00 P.M. and 7:00 A.M., or the setting out of garbage between 7:00 A.M. and 9:00 P.M. might be prohibited. But clearly, the alternative formulations lead to different results. The first would seem to be a sanitary measure designed to insure the collection and disposal of garbage, the second rather to show concern for the defacement of streets in the daytime. To prohibit from killing is very different from commanding the preservation of life.

Classification of Omissions

The criminal law may impose a duty to act under a variety of circumstances. The duty to embark upon physical activity only arises when the particular surroundings envisaged by the notional pattern of conduct occur. Here may be found a useful way of classifying offenses of omission. The following categories are suggested.

In rare instances, a duty is geared by an event entirely unconnected with the activity of the defendant. In this category are the duty to aid anyone in peril, to be found in some European systems,[48] the duty to report treasonable activities and the duty to register for military service. Such duties are imposed on the citizen solely by operation of law and because of his general participation in community life. Second, the duty may be imposed by virtue of a status relationship between individuals, as the duty of the husband to protect his wife or the parent to care for his child. Here, an element of voluntary assumption of the burden by the individual is apparent in his entrance into the relationship or his, possibly intentional, fathering of children. The status need not be domestic: the duty of the master, recognized by common law, to care for his servant or the captain of a ship to care for the crew might be included. As a third category, the duty may be imposed as a result of the defendant's exercise of a privilege to practice a calling or engage in a business or trade. Fourth, the duty may stem from the individual's decision to participate in some permitted sphere of public activity, such as the duty of those who have incomes to file tax returns or of those who drive automobiles to carry certain equipment. In this field, certain special duties may be imposed by the impingement of external events on the citizen in his chosen sphere of activity. The accident in which the motorist is involved, though none of his making, may place him under a duty to report to the

48. See text at note 145 *infra*.

authorities or to render aid to the injured.[49] These third and fourth categories include the great bulk of offenses of omission, and they reflect the contemporary policy of approving the imposition of duties on those who elect certain activities. Last is the duty to discharge properly burdens which one has undertaken by contract or even gratuitously, where their neglect might and does lead to death.[50] This category includes liability for homicide through negligent or reckless inactivity. Possibly, the proposition is true in other crimes as well. If *X* is requested by *Y* to copy *Y*'s will and deliberately omits a provision, thus altering the effect of the will, he may well be guilty of forgery.

This classification is probably neither exhaustive nor exclusive, but it does indicate the sphere in which most present offenses of omission are found and the policy which underlies their creation. To state that policy briefly, in the immense complexity and interdependency of modern life, those who elect to pursue certain activities or callings must, for the welfare of their fellow citizens, submit to a host of regulations, some of which will naturally and properly impose positive duties to act. That regulation through imposition of positive duties should be increasing is not surprising. Whether the traditional processes of the criminal law are always the most suitable means of insuring the observance of such regulation is more debatable.

Omissions and Mens Rea

Mens rea, which creaked through the criminal courts for centuries, has recently been dug up, scrubbed, repainted and paraded for the admiration of criminal lawyers. The old mumblings about "guilty mind" have been replaced by the ice-cutting concepts of intention and recklessness. And with offenses of commission these new tools on the whole work very nicely. In an offense of commission, the mind of the actor is almost always to some extent addressed to the prohibited conduct, even though he may be unaware of the legal prohibition. In these offenses, *mens rea* can quite usefully be generalized as an intention to bring about the prohibited consequences or, at the least, recklessness with regard to such consequences.[51] With omissions,

49. See text at note 64 *infra*. The duty may arise from the defendant's participating in illegal activity, as with the duty imposed on felons in some communities to register with the authorities. This is a complex example, as here the duty rests upon three prior occurrences: embarking on criminal conduct by defendant; conviction by a court for felony; and defendant's finding himself in the locality which imposes the duty to register. See the discussion in text at note 100 *infra* of Lambert v. California, 78 Sup. Ct. 240 (1957).

50. "Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life." CAN. CRIM. CODE c. 51, § 188 (1953-54).

51. "What, then, does legal *mens rea* mean? It refers to the mental element necessary for the particular crime, and this mental element may be either *intention* to do the act or bring about the consequence or (in some crimes) *recklessness* as to that consequence." WILLIAMS, CRIMINAL LAW 29 (1953).

the great difficulty is that the mind of the offender may not be addressed at all to the enjoined conduct, if he is unaware of the duty to act. One may not know that it is prohibited to place garbage cans on the sidewalk between 9:00 A.M. and 7:00 P.M., but one can hardly place such a can on the sidewalk without knowing that he is doing it. Rare cases of somnambulism or insanity occur, but here the traditional approach is to deny liability on the ground that the accused cannot be said to have performed any voluntary act.[52] This approach is clearly of no use with omissions, where the accused does not have to perform any act to incur liability. What of the offender who violates a regulation requiring garbage to be put out in suitable receptacles at certain times? If he was quite unaware of the existence of the rule, in what sense can he be said to have been addressing his mind at all to the conduct required of him by law? This is the difficulty which plagues the analysis of omissions in terms of the conventional concepts of *mens rea.*

Let us consider the case of the pharmacist who is under a duty to register the sale of all poisonous substances listed in a statutory catalogue. If he does not register such a sale, there are many possible explanations. A few may be suggested:

(1) He knows of the statutory rule and knows that the substance he is selling is a poison within the meaning of the law but decides not to register the sale.

(2) He has no knowledge of the existence of the rule and has never kept a poison book.

(3) He knows of the rule and does keep a poison book, but he does not know that the substance he is selling has been recently added to the list of poisons within the meaning of the act.

(4) He is mistaken about the chemical nature of the substance and thinks it is not a poison within the meaning of the act when in fact it is.

(5) He is undecided whether the substance comes within the meaning of the act but neglects to resolve this doubt by consulting the act.

(6) He is undecided about the chemical nature of the substance but neglects to resolve this doubt by further research and risks a sale without making an entry in the poison book.

In an offense of commission, a solution might be reached by applying concepts of intention, recklessness and perhaps negligence to the conduct

52. See, *e.g.*, Rex v. Harrison-Owen, [1951] 2 All. E.R. 726 (Crim. App.), where the accused was charged with burglary after being found in a house at night. He protested that he had no recollection of having entered and that he must have been in a condition of "automatism." After evidence of previous convictions for burglary was admitted, he was convicted. In the Court of Criminal Appeal, evidence of previous convictions was held admissible to rebut a defense of lack of *mens rea* when the *actus reus* has been proved, but the prisoner's defense here was a denial of the act itself and the evidence was therefore wrongly admitted against him. The conviction was quashed.

prohibited. But with omissions, with the pharmacist, for example, the approach is senseless until an inquiry has been made into the state of his mind about the duty to act, for until this knowledge is established, in no sense can he be said to address his mind to the conduct enjoined.

Of the possible explanations of the pharmacist's omission, examples two, three and five raise the question of the offender's ignorance of the existence of the legal duty to act. In example two, he is quite ignorant of the existence of the duty. In example three, he knows of the general existence of such a duty but is ignorant that it has recently been extended to cover the substance with which he is dealing; and in example five he is doubtful about the extent of the duty and neglects research.

In these circumstances, his liability should depend upon the culpability of his ignorance which, in turn, should depend on the answer to several questions. What steps are taken by governmental agencies to bring the existence of such duties and changes in their scope to the notice of pharmacists? What likelihood is there that by the nature of their activities pharmacists should have knowledge of the existence of the duty? What special circumstances can the defendant show which might take him out of the normal expectation of knowledge in a pharmacist? Clearly, the pharmacist's state of mind in example five should be no defense. There, he had a suspicion of the applicability of the duty and elected to make no further investigation. This might be called a reckless ignorance, a reckless refusal to consult easily available information when a suspicion of duty to act had arisen. In example two, it is difficult to imagine how a defendant engaged in the trade of pharmacist could allege that complete lack of knowledge is not culpable. The opportunities for acquiring this information must be so manifold that the prosecution's burden of proof in showing culpable ignorance would be easily discharged. Example three is the really interesting one, in that the defendant's lack of knowledge is conceivably not culpable. Perhaps, the official authority concerned neglected to inform the trade immediately of its new regulation. No way may have been available to the pharmacist to acquire the information, short of legal research.

The imposition of strict liability in such a situation is futile and distressing. It can serve no purpose of deterrence, it protects the public in no way at all and it contributes nothing to the strict enforcement of regulations. The maxim, "ignorance of the law is no excuse," ought to have no application in the field of criminal omissions, for the mind of the offender has no relationship to the prescribed conduct if he has no knowledge of the relevant regulation. The strictest liability that makes any sense is a liability for culpable ignorance. We may say with some plausibility that the defendant ought to be punished even though he did not know that he was supposed to do something, if he ought to have known that he should have done something. But to find him liable whether he knew of the duty or not, and whether he ought to have known of it or not, is to impose more than a strict liability. It is a liability for a complete absence of relevant conduct. Such liability is indefen-

sible even by the weak and compromised arguments which are conventionally used to justify strict liability in cases of commission.

The application of *mens rea* ideas to criminal omissions cannot, of course, end with an investigation of the accused's knowledge or ignorance of the duty to act. If knowledge or culpable ignorance of the law is found, a conventional discussion, as with crimes of commission, of the accused's mental state becomes necessary with respect to the physical circumstances under which the duty arose.[53] The pharmacist in examples four and six does not have certain knowledge that the substance is chemically, not legally, within the scope of the law. He knows the law but does not know that his present situation brings him within its compass. Clearly, liability ought to be recognized for recklessness, as in example six; and in the field of public welfare offenses, a liability for negligence ought perhaps to be admitted.[54] For nonculpable ignorance, it is submitted that there should be no liability.

The conventional analyses of *mens rea* in omissions suffer either from a complete neglect of the aspect of ignorance of the law or a tendency to confuse the two separate issues of ignorance of the duty and ignorance of the circumstances which triggered the duty. So, Dr. Glanville Williams, in his

53. See Westrup v. Commonwealth, 123 Ky. 95, 101, 93 S.W. 646, 648 (1906): "One cannot be said in any manner to neglect or refuse to perform a duty unless he has knowledge of the condition of things which require performance at his hands." This statement should be qualified by the remarks of the Louisiana court in State v. Irvine, 126 La. 434, 446, 52 So. 567, 572 (1910), that one is not "exculpated by his ignorance" if "he was charged with the special duty of being informed."

54. "Recklessness" and "negligence" are used here in the senses indicated by WILLIAMS, CRIMINAL LAW (1953): "In recklessness there is foresight of the possible consequence of conduct . . . . It is like intention in that the consequence is foreseen, but the difference is that whereas in intention the consequence is desired, or is foreseen as a certainty, in recklessness it is foreseen as possible or probable but not desired." *Id.* at 49. "A person may be held guilty of negligence although he did not foresee the risk of harm, because his expectation did not accord with common experience; and he may also be held guilty where he was unjustifiably ignorant of some circumstance that increased the risk." *Id.* at 82.

The following definitions are offered in an unpublished Preliminary Draft of a Code of Correction for the Commonwealth of Puerto Rico, prepared by Professor Donnelly of the Yale Law School, July 1957:

"A state of mind is reckless towards an objective element of an offense when, if the objective element is the actor's behavior or a result thereof, he is aware of a substantial and unjustifiable risk that the element exists or will result from his behavior and disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's behavior and his awareness of the circumstances, its disregard involves a gross deviation from the standard of care that would be exercised by a reasonable person in his situation.

"A state of mind is negligent towards an objective element of an offense when the actor should be aware of a substantial and unjustifiable risk that the objective element exists or will result from his behavior. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his behavior and the circumstances known to him, involves a substantial deviation from the standard of care that would be exercised by a reasonable person in his situation."

admirable work on criminal law, treats this topic in a brief and unsatisfactory way:

> "There is some practical difficulty in classifying omissions as intentional or negligent. In considering whether conduct is intentional it is unnecessary to ascertain whether the party knew of the rule of law, and whether (if he knew of it) he was adverting to it at the time in question. Suppose, then, that a chemist, not knowing, or forgetting, that a particular substance is a statutory poison, sells it without complying with the Poisons Act. Is his omission to comply with the Act intentional or negligent? The ordinary man would call it negligent, but in view of the rule just stated (as to knowledge of the law) it would seem to be intentional. He intentionally sells the drug without formality which is the *actus reus* of the offence."[55]

Dr. Williams continues:

> "It would seem that the practical test of intention in omission is as follows. If the defendant had been asked at any time while the omission was continuing: 'Are you doing so-and-so?' (which the statute makes it his duty to do), would the true answer based on the facts as he knows them be: 'I am not'? If so, the omission is intentional. In effect this makes intentional omission equivalent to conscious omission. Intention is, however displaced by mistake, where the accused thinks that he is doing the required act."[56]

This is a very strange view of intention. If I am eating an orange in a chair at home and someone asks me "Are you climbing Mount Everest?" I will reply "No," but it would not seem very sensible to interpret this as meaning that at the moment I was eating the orange I was intending not to be climbing Mount Everest. When a legal concept strays so ludicrously far from common understanding, the suspicion that something is wrong is justified. Dr. Williams goes on:

> "The foregoing test assumes that intention is required to exist at the moment of the legal omission, but there must be some qualification upon this. If the accused, knowing that it will be his duty to act in five minutes' time, allows himself to go to sleep, without intending to wake up to perform his duty, the omission is clearly intentional, although there is no mental state at the time when the omission takes place. Yet it cannot be said that every omission during sleep is an intentional omission. The only way of drawing the line is to say that the omission is intentional if the accused, when he fell asleep, realised what his duty was and that he was disabling himself from performing it. To this extent a knowledge of the law is a requisite of *mens rea*."[57]

So, starting with a declaration that knowledge of the law is irrelevant to intention, the learned author is later driven to admit that cases may exist in which it is not sensible to speak of intention without taking into account

55. WILLIAMS, CRIMINAL LAW 40 (1953).
56. *Ibid.*
57. *Ibid.*

knowledge of the duty to act. But one may ask why he confines his reservation to the hypothetical case of the sleeper who does not awaken. In Dr. Williams's analysis, the chemist who sells a poison not knowing that it is covered by the statute is guilty of an intentional omission, while the man who falls asleep, not knowing that he will be under a duty to act in five minutes' time, is not. This analysis is misleading. The chemist's omission, in Dr. Williams's analysis, is intentional not because he has knowledge of the duty—he hasn't—but because he has knowledge of the activity—selling the substance—which causes the duty to be imposed. The sleeper, too, has no knowledge of the law. Accordingly, Dr. Williams's implication must be that knowledge of the activity which gears the duty is sufficient to make the omission intentional. If so, it is by no means certain that a man who falls asleep not knowing that it will be his duty to act in five minutes is not guilty of an intentional omission. For, although he does not know of the duty to act, he may know that an event will occur in five minutes, and that event may be the circumstance which causes the duty to be imposed. Why then should his ignorance of the duty be relevant on Dr. Williams's analysis? His position is no different from the chemist's before investigation of his knowledge of the imminence of the event. To make his analysis consistent, Dr. Williams should have maintained that the sleeper's intention will depend not on his knowledge of an approaching duty to act when he fell asleep but on his knowledge, when he fell asleep, of an approaching circumstance which, unknown to him, imposes a duty to act. Dr. Williams is thus led into an inconsistency by failing to take up a central position on ignorance of the law in crimes of omission.[58]

But these difficulties are more apparent than real. They are a revelation of the unfortunate tendency which besets men generally and jurists in particular to construct generalizations from individual instances and then to suppress or avoid the fresh instance which defies the generalization. The concept of *mens rea* and its subconcepts, intention and recklessness, were con-

58. Though the language is rather obscure, STROUD, MENS REA 5 (1914), while avoiding the question of ignorance of law, seems more consistent in analysis: "An omission may be due to passivity, or to acts inconsistent with the act omitted. Cases of the former kind, which are few and almost negligible, may be called passive omissions. Cases where an omission is due to inconsistent action are frequent in occurrence, and are divisible into two classes, according as the inconsistent acts committed are prior to or coincident with the omission. In the former case the omission is nothing more or less than a consequence of the acts preceding it. This distinction is of importance in the consideration of any question as to whether an omission is intended or not. If the omission be entirely attributable to present inconsistent action, or to mere passivity, intention consists of advertence alone, the omission being intentional if the person adverts to the act omitted and does some other act in lieu thereof, or remains passive. If, however, as would usually be the case, the omission be due to prior inconsistent action, the omission being merely a consequence of what has already been done, intention consists of advertence coupled with expectation, as in the case of any other consequence of an act done." But in most cases, the person would probably not advert to the act omitted, unless he had a knowledge of the duty to act.

structed as generalizations of the instances of liability for offenses of commission. They cannot be fluently applied to offenses of omission, and it is a mistake to attempt to do so. The real concern should not be with the circumstances in which an omission may properly be described as intentional but with those circumstances in which an omission is excusable or ought to be excusable.

Professor H. L. A. Hart has argued that many legal concepts are only understandable through a recognition of their "defeasible" character.[59] By this, he means that many legal concepts are attempts to state in an affirmative generalization a collection of negative conditions which must be present to invoke the appropriate rule. So a contract will be binding unless there is undue influence, unless there is fraud or unless there is fundamental mistake. But we attempt to summarize these conditions which may defeat a contract by an affirmative statement that consent must be free and full. So in the criminal law, an act will be criminal unless the accused was insane, acted under mistake of fact or, perhaps, was coerced. We tend to forget the reality of this set of exemptive circumstances and impose upon them what Professor Hart calls a "spurious unity" by stating generally that the accused's act must be "voluntary," or that it must be "intentional" or "reckless." "In order," Professor Hart writes, "to determine what 'foresight' and 'voluntariness' are and how their presence and absence are established it is necessary to refer back to the various defences and then these general words assume merely the status of convenient but sometimes misleading, summaries, expressing the absence of all the various conditions referring to the agent's knowledge or will which eliminate or reduce responsibility."[60]

This thesis of Hart's is supported by the reflection, too rarely made explicit in works on criminal law, that the burden of proving *mens rea* is very infrequently a real burden on the prosecution. In practice, the evidential burden is usually on the defense to come forward with some evidence which takes the accused out of the normal field of liability. And the main inquiry should thus always be into the circumstances the law will permit the accused to raise successfully as a defense and, of course, into the circumstances he should be allowed to raise.

Again, a modern writer in the areas of philosophy and psychology, Professor Ryle, has convincingly demonstrated that voluntariness is not a state of mind or a mental operation but a concept of action in certain circumstances:[61]

> "In their most ordinary employment 'voluntary' and 'involuntary' are used, with a few minor elasticities, as adjectives applying to actions which ought not to be done. We discuss whether someone's action was voluntary or not only when the action seems to have been his fault. He

59. Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (n.s.) 171 (1948-49).

60. *Id.* at 181.

61. RYLE, THE CONCEPT OF MIND 62-74 (1949).

> is accused of making a noise and the guilt is his, if the action was voluntary, like laughing; he has successfully excused himself if he satisfies us that it was involuntary, like a sneeze."[62]

Ryle goes on to submit that the decision whether an act was voluntary in fact rests on whether the actor had the competence to do the right thing and whether any external coercion prevented him from doing it.[63] This is a thesis of particular interest for the approach to omissions in the criminal law. If we can reject the mesmerizing impact of the affirmative concepts of *mens rea* and begin to approach the defendant's position by considering exactly what he alleges by way of excuse, most of the difficulties will disappear.

Some Case Law

An instructive area of inquiry lies in the duties imposed on motorists, by legislation in most jurisdictions, to report an accident or to render assistance to the victims. In England, the Road Traffic Act of 1930 requires that where an accident occurs owing to the presence of a motor vehicle on the road whereby damage or injury is caused, the driver must stop and give his name, etc. to any person who has reasonable grounds for inquiring or report the accident to the police within twenty-four hours.[64] In *Harding v. Price*, the divisional court was faced with an appeal from a conviction in the magistrates' court under this provision.[65] The accused's defense was that he had no knowledge that an accident had occurred, since the impact was a slight one and the noise in the cab of his truck was so great that he never heard

62. *Id.* at 69.

63. *Id.* at 69-74. See also Hart, *supra* note 59, at 180: "[A]s can be seen from Aristotle's discussion in Book III of the Nicomachean Ethics, the word 'voluntary' in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, mistakes etc., and not to designate a mental element or state; nor does 'involuntary' signify the absence of this mental element or state . . . ." Courts have often perceived the sense of this approach. See State v. Noakes, 70 Vt. 247, 262, 40 Atl. 249, 254 (1897), where the court said, "If there is not capacity, means and ability to perform the legal duty, the omission to perform is not criminal." See also the treatment of intention in Anscombe, Intention (1957); Pasmore & Heath, *Intentions*, Proceedings of the Aristotelian Society (supp. vol. 29) 131 (1955), and the judgment of Barry, J., in Rex v. Charlson, [1955] 1 All E.R. 859 (Q.B.). An overly rigid approach to these concepts is perhaps revealed by Perkins, *A Rationale of Mens Rea*, 52 Harv. L. Rev. 905, 912 (1939): "If a watchman charged with the duty of lowering the gates at a crossing whenever a train is approaching fails to do so on a particular occasion, with fatal consequences to a motorist, the death is due to his (negative) act. But it would be absurd to speak of the act as 'voluntary' if he was inattentive and did not see the train approaching. As his legal duty required him to be attentive in this regard his want of knowledge of the need for immediate action will not excuse him, but it leaves his failure wholly unintentional." An unnecessary equation of "voluntary" with "intentional" appears here. The real point is that in Perkins's example the criminal law seems to attach liability to simple negligence; whether the description "voluntary" is applied to negligent conduct is not very important.

64. 20 & 21 Geo. 5, c. 43, § 22 (1930).

65. [1948] 1 K.B. 695.

or felt it. The prosecution relied heavily on the argument that the word "knowingly," which had appeared in the corresponding section of the earlier Motor Car Act of 1903, was omitted in the Road Traffic Act and that this deletion indicated a legislative purpose to create an offense of strict liability.

The divisional court refused to accept the prosecution's view. The conviction was quashed on the ground that while offenses of commission may be construed as ones of strict liability, this inference should not be drawn so readily in offenses of omission, even in the absence of statutory language indicating need for proof of knowledge. The Lord Chief Justice said:

> "If, apart from authority, one seeks to find a principle applicable to this matter it may be thus stated: if a statute contains an absolute prohibition against the doing of some act, as a general rule mens rea is not a constituent of the offence; but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed? If the duty be to report, he cannot report something of which he has no knowledge."[66]

The court relied upon the earlier case of *Nichols v. Hall.*[67] There, the accused was acquitted of failing to report a contagious disease in one of his animals when he did not know that the animal was infected. The prosecution's point about the change in statutory language was met by the argument that at most the omission of "knowingly" only affected the burden of proof; although formerly the prosecution might have had to show knowledge, the burden was now on the accused to show an absence of knowledge.

This decision must be wholly welcome, for a conviction on such facts would be a profitless legal operation. Unfortunately, the divisional court was not so courageous when faced a few years later with a more subtle variation on the theme, in *Quelch v. Phipps.*[68] Here the same Lord Chief Justice who had created the principle in *Harding v. Price* refused to apply it to slightly different circumstances. One of the passengers of the defendant-bus driver had attempted to get off the bus when the driver was slowing down for a red light. The attempt was rash, and the passenger was injured. The conductor informed the driver of the accident, the driver stopped, and the conductor escorted the injured passenger home. The passenger was not supplied with the information required by the Road Traffic Act, and the driver did not report the accident to the police, though the conductor did report it two days later. The magistrates' court acquitted the driver on the ground that the statute's use of the word "accident" contemplated some sort of collision; however, the divisional court took the view that the accident was of a kind embraced by the statutory language, "owing to the presence of a motor vehicle on the road," and the appeal of the prosecution succeeded.

66. *Id.* at 701.
67. L.R. 8 C.P. 322 (1873).
68. [1955] 2 Q.B. 107.

Harding v. Price was distinguished since, here, the driver did know that an accident had occurred.

Clearly, the driver knew someone was hurt, and he knew exactly how he was hurt. His defense may be expressed as a lack of knowledge that these physical happenings triggered the duty to report. Although generally aware of the duty to report accidents and under no misapprehension about the physical facts, he did not regard this as an accident. He is in the position of the pharmacist who knew of the duty to record the sale of poisons but did not know that the law regarded the substance with which he was dealing as a poison. The pharmacist's ignorance in the example might have been nonculpable, at least morally, if the substance had recently been added to the poison list and no steps had been taken to bring this to the notice of pharmacists. On the other hand, he might have been clearly negligent in not keeping up with official circulars. In *Quelch v. Phipps*, the position of the defendant was a little different, since he had no official list to consult to determine readily what was and what was not an accident. Is his mistake of law to be regarded as culpable? The duty to report accidents, one might argue, is so socially pressing that anyone who is involved in a situation where the slightest suspicion of the applicability of the legal duty might occur to a reasonable man fails to act at his peril. The decision is perhaps justifiable on this ground, but disappointingly it holds that mistake of this sort can never be a defense. One may be able to afford the luxury of the defendant who is surprised to learn that he has not committed a crime when he was fairly confident that he had. It is much more disturbing to find the innocent defendant, who mistakenly believed that the law did not impel him to act, convicted on the ground that he could not accurately forecast the divisional court's view of what is an accident. At the least, one hopes that steps have now been taken to instruct bus drivers in the implications of this decision.

The divisional court, which took a sensible step in restricting strict liability in *Harding v. Price* on a question of ignorance of fact, failed to act in the same way on a question of mistake of law in *Quelch v. Phipps*.[69] The approach ought to be the same in both cases; liability should rest on the culpability of the defendant's lack of knowledge or mistake. The divisional court may, of course, advance for the future an interpretation of the Road Traffic Act which would support a defendant's conviction in a *Quelch v. Phipps* situation. But such a conclusion need not logically entail a finding of guilt in the particular defendant, in his condition of reasonable mistake at a time before the interpretation was advanced.

The American jurisdictions have also generally demanded that the defendant have knowledge of an accident before conviction will lie for evasion of

69. An invaluable survey of theories and practice of denying ignorance of the law as a defense is Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421 (1957). See also Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1 (1957); and the symposium on this topic, 26 REVUE INTERNATIONALE DE DROIT PÉNAL 293-352 (1955).

responsibility. Some states expressly include the word "knowingly" in the definitions of these offenses;[70] others have come to require knowledge through case law alone. So, in an early case, the Texas court suggested that lack of knowledge would be a good defense, though the local statute did not specifically require knowledge:

> "Appellant complains that the indictment is defective in not alleging that accused 'knowingly' struck the party injured . . . . We cannot agree to this contention. The word 'knowingly' or 'knowing' does not appear in the description of the act denounced as an offence, and it is not necessary for the State so to allege. If it becomes an issue on the trial, lack of knowledge on the part of a defendant that he had injured someone would excuse him and be a defense to a prosecution . . . ."[71]

The Virginia[72] and California courts have also accepted lack of knowledge as a defense in the absence of specific statement in the statutes. Some of the California cases are worthy of special notice. In *People v. Graves*, for instance, the trial judge had charged the jury that: "The duty imposed upon a driver of an automobile which strikes a person . . . is a duty which he must perform in all cases . . . ."[73] The defendant asserted that this would seem to impose a duty even in the absence of knowledge of collision and was therefore prejudicial error. The court agreed that the legislature could not have intended the statute to apply to one without knowledge but felt that a jury could not conceivably convict a man who had no knowledge; it therefore affirmed the conviction on the ground that the defendant's interpretation of the instruction was unreasonable. This approach is even more marked in *People v. Rallo*.[74] In that case, a conviction was reversed and a new trial ordered on the ground of misdirection, in spite of the showing that the defendant had good reason to suspect that his car had run over someone. The faulty instruction was identical with that in the *Graves* case, but the court felt that the necessity for knowledge must be made explicit in the directions. In the court's view, the gist of the offense was willful omission to render reasonable assistance; thus, failure to express the necessity for knowledge in the directions amounted to an omission of an essential ingredient of the offense.[75]

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70. See, *e.g.*, CONN. GEN. STAT. §§ 2410, 2493 (1949).

71. Scott v. State, 90 Tex. Crim. 100, 105, 233 S.W. 1097, 1100 (1921).

72. Herchenbach v. Commonwealth, 185 Va. 217, 38 S.E.2d 328 (1946).

73. 74 Cal. App. 415, 417, 240 Pac. 1019, 1020 (1925).

74. 119 Cal. App. 393, 6 P.2d 516 (1931).

75. See also People v. Dallas, 42 Cal. App. 2d 596, 109 P.2d 409 (1941); People v. Odom, 19 Cal. App. 2d 641, 66 P.2d 206 (1937); People v. McKee, 80 Cal. App. 200, 251 Pac. 675 (1926). In People v. Bowlin, 19 Cal. App. 2d 397, 65 P.2d 840 (1937), the defendant attacked the constitutionality of the California enactment on the ground that it tended to a deprivation of liberty without due process of law, since it did not affirmatively insist on knowledge as an element of liability. It was held that the defect, if any, was cured by judicial insistence on knowledge in applying the statute. On this point, see Lambert v. California, 78 Sup. Ct. 240 (1957). The constitutionality of this provision

One of the more interesting California cases is *People v. Henry*.[76] The defendant-driver struck and killed a truck driver who was standing by the side of his disabled vehicle. The defendant did not stop and, when accosted by a patrol car, gave a false explanation of the damage to his car. At the trial, the defendant alleged that he had been in a state of amnesia or fugue during the period when the accident occurred. He appealed his conviction on the ground that, since his amnesia was not disproved by the prosecution, the state had failed to discharge its burden of showing knowledge. The court took the view that a defense like the accused's could not be sustained where there were no witnesses to the accident and the evidence "overwhelmingly indicated" that the defendant's automobile was involved in an accident. The trial court had properly called the jury's attention to the requirement that the defendant have knowledge and that it be proved beyond a reasonable doubt. And the jury was not bound to accept the defendant's story.

This decision seems to stand for the proposition that the burden of coming forward with evidence on the knowledge question is on the defense. But the court properly indicated that the ultimate burden is on the prosecution to show knowledge beyond a reasonable doubt. The jury may balance the defendant's story against the circumstantial or direct evidence of knowledge, but it should not find against him unless satisfied of knowledge beyond a reasonable doubt. Perhaps some danger arises from the court's view that a defense of lack of knowledge cannot be sustained where there are no witnesses of the accident. What if, in this case, the defendant had been able to call convincing medical testimony of his susceptibility to states of fugue or amnesia? In such circumstances, he might well inject a reasonable doubt and be entitled to a verdict.

In all these cases, with the exception of *Quelch v. Phipps*, the question has been the defendant's knowledge of the physical circumstances which gear the duty, not knowledge of the duty itself. A motorist could scarcely allege that he did not know of the duty to report an accident or render assistance. Yet a great many motorists may in fact be unaware of these duties. Why, then, should ignorance be so unthinkable as a defense? Presumably, the answer is that the motorist should make it his business to be informed about this kind of duty; thus, the nonculpability of ignorance is hardly a conceivable possibility. A motorcar is a lethal instrument; those who drive should ascertain the extent of the legal obligations which this activity may impose on them, as far as reasonably practical. But the question also arises whether enough is done by official agencies to bring to motorists notice of the full range of duties which the law places upon them.[77]

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has also been attacked, unsuccessfully, on the ground that the requirement that information of accidents be lodged with the authorities amounts to a compulsion to be a witness against oneself. See People v. Diller, 24 Cal. App. 799, 142 Pac. 797 (1914).

76. 23 Cal. App. 2d 155, 72 P.2d 915 (1937).

77. The British Highway Code, issued to all applicants for a driving test leading to a license, contains at 26 a section headed "The Law's Demands" which summarizes the statutes and regulations which may impinge on the motorist.

Agreement seems fairly general, on the other hand, that liability should not be imposed on the motorist who is ignorant of the occurrence of an accident, a holding reached even by jurisdictions such as California and England which have enactments on the point containing no express reference to knowledge. A question may arise here of a shift in the burden of introducing evidence: in those states where the statute does not refer to knowledge, the burden of introducing evidence is on the defense; in those jurisdictions where knowledge is expressly demanded by the regulation, the burden on the prosecution may be somewhat more difficult to discharge.

Tax Cases

The basis of liability for an omission has been much discussed under the income tax statutes. Section 145(a) of the Internal Revenue Code of 1939 made it a misdemeanor willfully to fail to pay estimated tax, make returns, keep records or supply information. And section 145(b) created a felony: a willful "attempt in any manner to evade or defeat any tax imposed by this title." In *United States v. Murdock*, the defendant had refused to give information about claims for deductions in his tax returns on the ground that to give such information would be self-incriminatory.[78] Defendant's conviction by the district court was reversed in the court of appeals, and the matter came before the Supreme Court on certiorari. There, the decision of the court of appeals was affirmed; the defendant could incur no liability until his lack of constitutional privilege had been determined and followed by a refusal to supply information. Congress did not intend, the Court felt, that a person should incur liability for failure to meet a prescribed standard of conduct when the failure was due to a bona fide misunderstanding of his legal position. The prosecution's burden was to show more than a voluntary omission.

The implication of this decision, that mistake of law is a defense to a failure to act, at any rate where that failure is qualified as "willful" in the governing enactment, is welcome. The decision can be instructively compared with *Quelch v. Phipps*. In both cases, the defendant was aware of the existence of a duty to act but believed that the law did not attach the duty to him in his position. In *Murdock*, the defendant's attention was of course expressly drawn to the existence of the duty, but he relied on his own judgment that he was exempted. In *Quelch v. Phipps*, the defendant may not have expressly adverted to the duty, though he presumably had knowledge of it and though a reasonable man in his position might have contemplated the possibility of its relevance. Again, in both cases, the applicability of the relevant duty to the defendant was in fact undetermined when he neglected to act and was only settled by the decision of the court in the defendant's own trial process. Unhappily, the English divisional court refused to weigh

78. 290 U.S. 389 (1933). This was a prosecution under the Revenue Act of 1926, § 1114(a), 44 STAT. 116, and the Revenue Act of 1928, § 146(a), 45 STAT. 835 (later Int. Rev. Code of 1939, § 145(a), 53 STAT. 62; now see INT. REV. CODE OF 1954, § 7201).

the culpability of defendant's failure to anticipate a given view of the law and closed its eyes altogether to the possible appropriateness of such a defense. The Supreme Court, much more sensibly, held defendant's bona fide belief a good defense. But the usefulness of bona fides as a criterion may be questioned in this context. A man is either mistaken or he is not. He is either ignorant or he is not. How can one be ignorant or mistaken dishonestly? The sensible criterion is surely the reasonableness of mistake or ignorance.[79] A person may clearly be recklessly mistaken or ignorant because he has neglected to contact readily available sources of information or consultation. The criterion of liability might well be reckless mistake, or at most negligent mistake. So viewed, both *Murdock* and *Quelch v. Phipps* should have resulted in acquittal, future compliance with the law being insured by a proper dissemination of information by government agencies on the scope of the duty in such cases.

The tax cases also contain an interesting illustration of the significance which courts are sometimes willing to attribute to the distinction between offenses of omission and those of commission. The misdemeanor under section 145(a) of the Internal Revenue Code consists of willful omission, while the felony under section 145(b) lies in a willful attempt to evade or defeat the payment of tax. A question frequently raised is whether willful omission or a series of willful omissions can constitute willful attempt to evade. In *Spies v. United States*, the defendant, who admitted that he had neglected to file a tax return, pleaded at his trial that his physical illness during the relevant period should be taken into consideration.[80] He was nevertheless convicted of the felony of willful attempt, under the charge to the jury: "[I]f you find that the defendant willfully failed to file an income tax return for that year, if you find that the defendant willfully failed to pay the tax due . . . you may, if you find the facts and circumstances warrant . . . find that the defendant willfully attempted to defeat or evade the tax." The court refused a requested instruction that an affirmative act was necessary to constitute a willful attempt. The Supreme Court took the view that liability under the felony clause demanded proof of more than omissions sufficient for liability under the misdemeanor clause. The attempt was an independent crime, requiring proof of affirmative action.

The significance of the *Spies* case can be confined to the necessary implication of the Internal Revenue Code, which, by separating the offense of felony from that of misdemeanor, presumably required proof of something more to constitute the graver offense. However, the decision may be taken to reflect the underlying assumption of western morality and jurisprudence that omission is a less heinous mode of conduct than commission.[81] Dr.

79. Of course, an argument may be advanced for allowing any mistake of law as a defense, but this seems an undue relaxation.

80. 317 U.S. 492 (1943).

81. Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 616 (1942), points out that medieval theologians, notably Aquinas, took the view that positive action must be

Glanville Williams takes the view that criminal attempts in general always require the commission of an affirmative act and that an omission is never a sufficient ground of liability.[82] The policy of this approach is questionable. Nothing in the potentially harmful effects of failures to act entitles omissions to more lenient treatment than commissions. That liability should not be imposed where the defendant is innocently ignorant of the circumstances which require him to act or of the presence of the duty requiring action is a most desirable rule, but in the absence of these exculpatory circumstances, no pressing need for lenient treatment appears. If a completed crime is capable of commission by omission, an attempt should also be. If a parent's failure to feed his child so that the child dies is homicide, why should it not be attempted homicide for the parent to fail to feed the child so that the child is in danger of death and would have died but for intervention? The present penal policy of omissions vacillates between an unjustifiable general feeling that omissions are less heinous than commissions on the one hand and a refusal to admit legitimate defenses to statutory crimes of omission on the other. Indeed, the *Spies* principle has not worked out too happily in later cases.[83] The courts have been driven to uphold the position that the man who successfully contrives to make no tax returns at all for a number of years is guilty of a smaller offense than the man who willfully misstates his income once when he makes a return. The practical damage is probably slight, since the man making no returns will in the nature of things almost certainly be guilty of affirmative acts which bring him under the felony clause, but the theoretical structure of the provisions is clearly unreasonable. Omissions may often be more damaging and just as reprehensible as commissions.

Observable Trends and Some Suggestions

At this point, two conclusions should have emerged. First, no sufficient awareness has yet developed of the potential harmful effects of failure to act; consequently, a legislative and judicial tenderness to offenses of omission,

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further removed from virtue than simple absence of good conduct. *But see* LACTANTIUS, INSTITUT. DIVINAE bk. VI, c. 2: *"Qui succurrere perituro potest si non succurrerit, occidit."*

82. WILLIAMS, CRIMINAL LAW 476-77 (1953). *But see* the same author's SANCTITY OF LIFE AND THE CRIMINAL LAW 274 n.2 (1957), where the suggestion is made that some situations occur in which failure or refusal to act might constitute attempted suicide, still a criminal offense in England.

83. See Cave v. United States, 159 F.2d 464 (8th Cir. 1947); United States v. Croessant, 178 F.2d 96 (3d Cir. 1949). Professor Bittker of the Yale Law School has pointed out to the author that for some purposes the Internal Revenue Code does attach peculiar significance to omissions. For example, no limitation period is granted for civil liability for a complete failure to file tax returns, while for a nonfraudulent return the period of three years' limitation applies. Again, there is a special limitation period of six years for an omission to disclose more than 25% of a gross income. See INT. REV. CODE OF 1954, §§ 6501(a), (c)(3), (e)(1)(a).

not always justified by the circumstances, is still to be found. Second, a partial refusal exists to recognize the necessity of abandoning conventional attitudes to ignorance of the law as a defense in the cases of omission; this refusal extends even to ignorance of fact about the circumstances giving rise to the duty to act. The law thus vacillates between excessive lenity and excessive rigor. To be sure, many jurisdictions have begun to be aware of the peculiarity of omissions when confronted by defenses of mistake or ignorance. But examples may still be found of a blind adherence to the worst extremes of strict liability. So, in *State v. Masters*, a prosecution was brought under a West Virginia statute imposing liability on the driver of an automobile who failed to stop after striking a person.[84] The defendant argued that the indictment was defective, for it failed to allege his knowledge of the accident. Denying defendant's appeal, the court said:

> "The statute in the instant case does not make knowledge of the accident a part of the offence, and, under the general rule, it is not necessary for the State to so allege. To hold otherwise would be to defeat the very object of the statute, namely, the protection of the person and property of the traveling public from motorists who seek to dodge all responsibility in cases of accidents on the highway to which they are parties. In most cases it would be impossible for the State to prove *scienter* beyond a reasonable doubt, while the accident itself might properly be proven."[85]

The policy advocated in this passage seems perversely applied. Surely, the release from liability of those who do not know that they have been in an accident cannot possibly defeat the object of protecting those who are injured. Will convictions in such cases insure that in future those who do not know they have been involved in an accident will stop? And the difficulty of proving knowledge is much exaggerated. It has not troubled those jurisdictions which insist on knowledge and seems perfectly susceptible of solution by allowing the prosecution to raise an inference of knowledge from the circumstances of the accident, thus placing the burden of introducing evidence in dispute on the defendant. Possibly, the *Masters* case would no longer be followed in West Virginia, though it has never been expressly repudiated.

What is needed is a highly organized dissemination of information about the duties which the law imposes on those who are engaged in special fields of activity. This feature of penal law enforcement was long ago recognized by Max Ernst Mayer.[86] He distinguished between the major crimes in a penal system, the wrongfulness of which has become common knowledge through cultural heritage, and, on the other hand, the mass of regulatory offenses which are "culturally indifferent." This sounds at first like the old

84. 106 W. Va. 46, 144 S.E. 718 (1928). The statute is to be found in W. VA. CODE c. 46, § 97 (Barnes 1923). The case is discussed in Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34, 54-55 (1955).

85. 106 W. Va. at 48, 144 S.E. at 718.

86. MAYER, RECHTSNORMEN UND KULTURNORMEN (1903), discussed in MUELLER, MENS REA AND THE PENAL LAW WITHOUT IT (unpublished thesis in Columbia Law School Library 1955). This account of Mayer is taken from Mr. Mueller's thesis.

and discredited distinction between *mala in se* and *mala prohibita,* but Mayer's approach does not require the belief that some offenses deal with conduct as legally prohibited. The difficulty of distinguishing between conduct which is inherently wrong and conduct which is only wrong relative to a given time, place and culture may be accepted, yet Mayer's point that certain crimes by their immemorial prohibition in a community have seeped into the communal awareness with the stamp of wrongfulness still holds. Lundstedt and other Scandinavian jurists contend that morality is more the product of law enforcement than the law is the product of morality.[87] This position is also compatible with Mayer's contention that the antiquity of the prohibition and its immemorial connection with severe punishment of the offender can produce a communal reaction to the act which becomes a part of general sentiment and awareness. With such crimes, Mayer contends, the conventional canons of guilt, intention or recklessness are adequate. But with the culturally indifferent offenses—the public welfare offenses—the chief criterion should be knowledge of the legal norm or, at least, negligence in the lack of knowledge. To further this policy he suggested a program of information through local announcements, a listing of laws on license certificates and the like.

Mayer intelligently anticipated a problem which was later to become more acute. In England and America, concern has been growing about the techniques of publicizing legislation, particularly delegated legislation. The problem is now dealt with in England by the Statutory Instruments Act of 1946 which provides that, where any person is charged with an offense under a statutory instrument, it shall be a defense to prove that the instrument had not been issued by the Stationery Office at the date of the alleged contravention, unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.[88] In America, the debate engendered by the Hot Oil case [89] provoked the passage of the Federal Register Act;[90] and, in the Administrative Procedure Act, the provision is now found that: "No person shall in any manner be required to resort to organization or procedure not . . . published [in the Federal Register]."[91] But provision for publication is not enough in itself. Since the Federal Register Act, two cases have arisen in which the relevant regulation did not come to the notice of the appropriate governmental or judicial body;[92] and, in one of these cases, the failure led to a most unhappy

87. See LUNDSTEDT, SUPERSTITION OR RATIONALITY IN ACTION FOR PEACE *passim* (1925); LUNDSTEDT, LAW AND JUSTICE (ACTA INSTITUTI UPSALIENSIS IURISPRUDENTIAE COMPARATIVAE I 1952); OLIVECRONA, LAW AS FACT *passim* (1939).

88. 9 & 10 GEO. 6, c. 36, § 3(2) (1946). See H. PHILLIPS, CONSTITUTIONAL LAW OF GREAT BRITAIN AND THE COMMONWEALTH 326 (1952).

89. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

90. 49 STAT. 500 (1935), as amended, 44 U.S.C. §§ 301-14 (1952).

91. 60 STAT. 238 (1946), 5 U.S.C. § 1002 (1952).

92. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Gibson v. United States, 329 U.S. 338 (1946).

finding against a petitioner in a court of appeals, followed by a confession of error by the government before the Supreme Court.[93] What is needed is not mere publication but also organized dissemination to the interested bodies and parties. For different bodies, different forms of dissemination will be appropriate. As one commentator observes in a stimulating discussion:

> "In publishing rules the Government must consider the needs of laymen, as well as the needs of lawyers and other specialists who advise laymen. Rules governing rent control, for example, though frequently the concern of lawyers and real-estate agents, have more often concerned landlords and tenants who had no counsel. In addition, the requirements of officials who administer the rules must be met."[94]

A good deal of this kind of activity goes on already. Some of it is conducted by government agencies in official circulars, some of it by private enterprise, as in trade journals. But doubt persists whether the effort is sufficiently organized or intense. The citizen, of course, has a duty to take active steps to familiarize himself with the regulations governing his chosen field of activity, but the government should surely go at least halfway. At a minimum, equal official zeal is necessary to acquaint him with the duties he must observe.

The extreme forms of strict liability with respect to ignorance or mistake of fact are now on the wane. In England, this recoil has come in two ways: first, by the increasingly common legislative practice of inserting in statutes possible defenses of all due diligence,[95] bona fide mistake or accident,[96] or procedures for interpleading third parties;[97] and, second, by an increasing

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93. *Id.* at 341 n.4.

94. Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 931 (1950). See also Bailey, *The Promulgation of Law*, 35 AM. POL. SCI. REV. 1059 (1941); Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934); Jaffe, *Publication of Administrative Rules and Orders*, 24 A.B.A.J. 393 (1938); Ronald, *Publication of Federal Administrative Legislation*, 7 GEO. WASH. L. REV. 52 (1938).

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950), the Supreme Court said: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed."

95. An early example is the Merchandise Marks Act, 1887, 50 & 51 VICT. c. 28.

96. See the Sale of Food (Weights and Measures) Act, 1926, 16 & 17 GEO. 5, c. 63, § 12(2).

97. See the Food and Drugs Act, 1938, 1 & 2 GEO. 6, c. 56, § 83. These acts are discussed in WILLIAMS, CRIMINAL LAW 241-45 (1953). An interesting example of such a legislative mollification is the West German practice in the field of economic crimes, where the defendant is allowed to show in excuse a nonculpable error about the applicability of the violated norm—a perfect solution for such cases as *Quelch v. Phipps*. See Economic Penal Law of 1949, WI GBL 27/193 (now WIRTSCHAFTSSTRAFGESETZ 1954, BGBl 1, 175), discussed in MUELLER, *op. cit. supra* note 86, at 104.

judicial reluctance to dispense with *mens rea*.[98] Also needed is a compromise procedure between the rigid dualism of penal conviction or acquittal. The possibility of official warning or serving of official notice suggests itself. Rarely, something of the sort is already found. West Virginia, which perpetrated the lamentable statement of principle in the *Masters* case, redeemed itself to some extent by providing that state personnel shall be empowered to stop vehicles suspected of being improperly equipped. An inspection follows and, if the vehicle is found defective, an order is made that the defect must be remedied within five days and that the vehicle must then be submitted to a further inspection. If the vehicle is not so submitted or if the defect is unrepaired, criminal liability follows.[99] The procedure is perhaps not consciously directed at those who are in ignorance of the relevant duties, but it contains a mechanism which could be very appropriately applied to such persons.

Although this discussion relates generally to strict liability in public welfare offenses, it has a particularly sharp reference to offenses of omission. Here, where there is no question of action and where the mind of the defendant may be innocently unaware of the duty to act, the need is pressing for a recognition that the ancient legal dualism of conviction and acquittal must be supplemented by an administrative procedure which is, initially at least, outside the area of the conventional criminal process. This need has now received at least partial recognition from the United States Supreme Court in *Lambert v. California*.[100] The appellant had been convicted under a provision of the Los Angeles Municipal Code which required anyone who had been convicted in any place of an offense punishable as a felony in California to register with the police within five days of entering the city.[101] The appellant at her trial had contended that the section denied her due process of law. By a majority of five to four, the Supreme Court held that the ordinance, as applied to the appellant, violated the due process requirement of the Fourteenth Amendment.

The majority opinion, delivered by Justice Douglas, proceeds squarely on the distinction between offenses of commission and those of omission. The Court assumed appellant's ignorance of the duty to register, since her offer of proof in this regard had been rejected. "[W]e deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts or the failure to act under circumstances that should alert the doer to the consequences of his deed."[102] While strict liability for a failure to register

98. See, *e.g.*, Wilson v. Inyang, [1951] 2 K.B. 799; Younghusband v. Luftig, [1949] 2 K.B. 354; Harding v. Price, [1948] 1 K.B. 695. The United States Supreme Court gave powerful expression to this tendency in Morrissette v. United States, 342 U.S. 246 (1952).

99. See discussion of this provision in Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34, 62-63 (1955).

100. 78 Sup. Ct. 240 (1957).

101. LOS ANGELES MUNICIPAL CODE §§ 52.38(a), 52.39, 52.43(b).

102. 78 Sup. Ct. at 243.

might be properly imposed where the duty was stimulated by the defendant's embarking on a course of activity of a special nature, strict liability could not exist where the duty arose on mere presence in a locality. The fact that the appellant was given no opportunity to comply with the law when she became aware of the duty to register impressed the Court: "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand."[103]

A dissent was recorded, written by Justice Frankfurter with Justices Harlan and Whittaker joining.[104] Unimpressed by the majority's distinction between offenses of omission and those of commission, Justice Frankfurter said: "But what the Court here does is to draw a constitutional line between a State's requirement of doing and not-doing. What is this but a return to *Year Book* distinctions between feasance and nonfeasance—a distinction that may have significance in the evolution of common-law notions of liability, but is inadmissible as a line between constitutionality and unconstitutionality."[105] However, that this was the distinction drawn by the majority is not at all clear. Nothing in the majority judgment leads to the conclusion that ignorance of the law must always be admitted as a defense to any crime of omission. Rather, the opinion carefully confines its remarks to the omission where the duty to act arises only because of a person's presence in a certain locality.

Two questions must be kept separate. The first is the advisability of legislative policy creating criminal registration statutes and the advisability of judicial policy applying them along lines of strict liability. The second question is that of constitutionality. The majority opinion in the *Lambert* case admirably perceives the dangers of strict liability notions in such an area. But as a text for establishing a principle of unconstitutionality, it is more controversial. What is the principle? Is it generally applicable to all offenses of omission, as Justice Frankfurter seemed to think? Or, is it confined to duties to act imposed on those who find themselves in a locality? Justice Frankfurter said: "If the generalization that underlies, and alone can justify, this decision were to be given its relevant scope, a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired."[106] But what generalization underlies the majority decision and what legislation Justice Frankfurter

103. *Ibid.* It may be doubted whether the demand here for proof of "actual knowledge of the duty" or "the probability of such knowledge" is the happiest formulation. Is this to be taken as requiring a less severe standard of proof than the usual proof beyond a reasonable doubt? A demand for proof of knowledge or culpable ignorance would seem a better rule.

104. *Id.* at 244. Justice Burton dissented separately on the ground that, as applied to the appellant, the ordinance did not violate her constitutional rights.

105. *Ibid.*

106. *Id.* at 245.

had in mind are not clear.[107] At the least, the decision reveals a heightened awareness of the peculiar problems attending ignorance of the law with respect to criminal omissions, and of the special character of offenses of omission.

Duty To Care for Others

The difficulties which beset a discussion of omissions are by no means confined to a treatment of those offenses which already exist. An equally troubling problem is the controversial question of extending liability for omissions into fields where the criminal law has not so far intruded. Such an extension is possible in two ways, either by the express legislative creation of fresh offenses of omission or by a judicial process which may interpret offenses superficially seeming to be those of commission as ones capable of perpetration by omission. In both fields, discussion has centered around the possible imposition of liability for failure to aid those in distress.

The conventional way of approaching the duty to care for others is to say that a duty to act in the criminal law can never rest on a moral duty alone but must be supported by some legal expression. Professor Jerome Hall has sufficiently demonstrated the emptiness of this approach.[108] If it refers to a duty imposed by the criminal law, it is a tautology. If it implies that neglect of a duty imposed by any rule of law is always criminal, it is clearly wrong; for a person may often fail to act under a duty imposed by contract or tort and not be criminally liable. If it means that every criminal liability for an omission must rest either upon an express mandate of the criminal law or at least upon some legal duty outside the sphere of the criminal law, it is empty of information; for it affords no criterion of the duties in the civil law that will lead to a criminal liability if breached. The approach is a relic of the principle worked out in the nineteenth-century manslaughter cases that the common-law duty to care for children could be used as a base on which to found a homicide conviction if death ensued through neglect, but that this duty could not be extended into a more general duty to aid those in distress where the status relationship of paternal support was absent. The growth of liability for neglect may perhaps best be traced in this line of cases.

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107. In *Lambert*, the appellant had been convicted of a felony in Los Angeles and had lived there for seven years. As the dissent points out, the appellant was therefore not confronted, as may happen under these ordinances, with the difficulty of deciding whether an offense committed in another jurisdiction can amount to a felony in California. The ordinances dealing with registration of criminals are helpfully discussed in Note, 103 U. Pa. L. Rev. 60 (1954), where the common practice of prison officials, parole and probation officers, and even judges to inform convicted criminals of their possible duty to register is pointed out. The note says, at 82-84, that in one locality (Lakewood, N.J.) the police department distributes notices of the duty to hotels, bus terminals, restaurants and post offices. And in St. Paul, Minnesota, the public have been informed of the ordinance by newspaper articles and talks on radio and television.

108. Hall, General Principles of Criminal Law c. 9 (1947).

Homicide by Neglect

In England in the nineteenth century, the courts became very ready to fix liability for death on a parent who neglected to supply necessaries for his child [109] or on a master or mistress who neglected to care for a helpless apprentice.[110] Early in the century, in *Rex v. Smith,* the courts had refused to find the defendants liable for homicide when they had neglected to care for their mentally defective, middle-aged brother who was living in their house and to whom they were bound by their father's will to pay an annual income.[111] But in 1893, in *Regina v. Instan,* the court inferred an undertaking in the defendant to care for her aunt on the ground that they were living in the same house and the aunt, who was aged, was supporting the niece.[112] Consequently, a criminal liability for homicide by neglect was also imposed. Between these two cases, a marked advance had clearly taken place in the notion of the scope of the duty to care for another. Regrettably, the courts have not faced up to their own advancing attitudes to social duty. They have taken refuge in the narrow enclave of the undertaking to care as a facade behind which to hide the progress of the law. And, as often happens with such protective devices, the refusal to acknowledge the reality of the progress has impeded the advance.

The inadequacies of the contract approach are revealed in two interesting

109. Regina v. Bubb, 4 Cox Cr. Cas. 455 (Oxford Cir. 1851). Liability for homicide through neglect of children was recognized by late Roman law in the east. See the HEXABIBLOS, a fourteenth-century manual of Byzantine law, providing: "A person murders his child not only by suffocating it, but by deserting it or starving it, or by exposing it in a public place for alms . . . ." *On Torts and Crimes,* 6 HARMENOPOULOS, A MANUAL OF BYZANTINE LAW c. 8, § 15 (Freshfield ed. & transl. 1930).

110. Rex v. Squire, Stafford Lent Assizes 1799, manuscript cited in 1 RUSSELL, CRIME 457-58 (Turner ed. 1950); Regina v. Smith, 8 C. & P. 153, 173 Eng. Rep. 438 (Cent. Crim. Ct. 1837).

111. 2 C. & P. 449, 172 Eng. Rep. 203 (Gloucester Assizes 1826).

112. 17 Cox Cr. Cas. 602 (Cr. Cas. Res. 1893). The contrast between the two cases is pointed out by HALL, *op. cit. supra* note 108, at 274-75. The judgment of Lord Coleridge, C.J., in *Instan* is powerful and attractive: "It is not correct to say that every moral obligation is a legal duty, but every legal duty is founded upon a moral obligation. In this case, as in most cases, the legal duty can be nothing else than taking upon oneself the performance of the moral obligation. There is no question whatever that it was this woman's clear duty to impart to the deceased so much of that food which was taken in the house for both and was paid for by the deceased as was necessary to sustain her life. The deceased could not get it for herself, she could only get it through the prisoner. It was the prisoner's clear duty at common law to supply it to the deceased and that duty she did not perform . . . . There is no case directly in point but it would be a slur and a stigma upon our law if there could be any doubt as to the law to be derived from the principle of decided cases, if cases were necessary. There was a clear moral obligation and a legal duty founded upon it; a duty wilfully disregarded . . . ." 17 Cox Cr. Cas. at 603-04. The court was clearly influenced by the fact that the deceased supported the accused. For the history of the French law of homicide by neglect of dependents, see ALBARET-MONTPEYROUX, L'INACTION EN DROIT PÉNAL 102 (1944).

English nineteenth-century decisions—the cases of *Knights*[113] and *Shepherd*.[114] In the *Knights* case, the defendant had neglected to take any steps to ensure the safe delivery of a child about to be born to her. She had denied her pregnancy a few hours before the birth, although she had had a child before and must have known of the imminence of the birth. The child was found dead in a bag in the defendant's room. The prosecution submitted that, if the jury were to find that the defendant knew she was about to be confined, omitted to take the necessary steps to preserve the life of the child, and as a result the child died, she would be guilty of manslaughter. Overruling this argument, the court took the view that such facts could not establish liability for homicide, and the defendant was convicted of concealment of birth. Any view of the merits of this decision must depend on one's attitude to the advisability of protecting stringently the lives of newly born children,[115] but if the duty of the mother to care for her living child is admitted, little reason can be found to exempt her from the duty to prepare for a safe birth.[116]

In *Shepherd*, the defendant had neglected to provide a midwife for her eighteen-year-old daughter who was in labor, and through this neglect the daughter died. The daughter had lived with the defendant and her stepfather. The trial judge instructed the jury that if it believed the neglect to be the cause of death, it must convict of murder or manslaughter, the verdict to depend on whether the defendant intended to bring about the death. A conviction of manslaughter was returned, but a point of law was reserved for the Court for Crown Cases Reserved. Here, the five judges were unanimous in holding that the defendant could not be criminally liable. Their reasoning proceeds on tortured and convoluted grounds. The duty to take care, the court asserted, must proceed from contract or relationship. In the instant case, no contract existed, and the duty could not be based on the relationship, since the child was not a helpless infant. The duty to provide necessaries for children who are not helpless infants is on the father primarily

113. Regina v. Knights, 2 F. & F. 46, 175 Eng. Rep. 952 (Bury St. Edmund's Spring Assizes 1860).

114. Regina v. Shepherd, L. & C. 147, 169 Eng. Rep. 1340 (Cr. Cas. Res. 1862).

115. See, generally, WILLIAMS, SANCTITY OF LIFE AND THE CRIMINAL LAW 5-33 (1957).

116. *Knights* was followed by Rex v. Izod, 20 Cox Cr. Cas. 690 (Oxford Cir. 1904). But contrast these cases with Regina v. Handley, 13 Cox Cr. Cas. 79 (Oxford Cir. 1874), where the judge directed the jury that the defendant would be guilty of murder if she had intended the death of the child and left it to die after birth or if she intended to conceal the birth and used methods that would probably result in death. The difference seems to be that the neglect of precautions before birth to provide a safe birth will not result in liability, but any neglect of the child after birth may. This is a subtle ground of distinction and is hardly in accord with the general common-law view that where a child is born alive subsequent death may amount to homicide even though the *actus reus* of the accused preceded birth. See also Regina v. Edwards, 8 C. & P. 611, 173 Eng. Rep. 640 (K.B. 1838); Pallis v. State, 123 Ala. 12, 26 So. 339 (1899); Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948); 1 RUSSELL, CRIME 456-57 (Turner ed. 1950).

and not the mother; and, by statute, a stepfather's duty to care for his children ends before they reach the age of eighteen. The court was also impressed by the point that the mother might not have been able to pay for the services of a midwife. The midwife might have been willing to act gratuitously, but the court felt that the defendant could not be liable criminally for failing to request services which might have been gratuitously rendered.[117]

The decision is shocking, particularly in view of the evidence that the mother failed to call a midwife out of hostility to her daughter. The spirit of the later nineteenth-century cases, particularly that of *Instan*, suggests that *Shepherd* will not be followed.[118] Indeed, in *Rex v. Gibbins and Proctor*, the Court of Criminal Appeal confirmed the murder convictions of a man and his mistress for the death of the man's child through neglect.[119] The man kept the woman supplied with sufficient money to feed his children, but, apparently through malevolence, she denied food and attention to one of them, who died from starvation. Counsel for the appellants argued that the man's duty was fulfilled by supplying enough money for household needs, while the woman should be exempt since the legal obligation to maintain was on the husband. The Court of Criminal Appeal very properly dismissed these arguments. In answer to the father's contention, the court said: "He is in this dilemma; if he did not see her [the daughter] the jury might well infer that he did not care if she died; if he did he must have known what was going on."[120] And to the woman: "She had charge of the child. She was under no obligation to do so or to live with Gibbins, but she did so, and receiving money, as it is admitted she did, for the purpose of supplying food, her duty was to see that the child was properly fed and looked after . . . ."[121] These

117. Now, the English Children and Young Persons Act, 1933, 23 & 24 GEO. 5, c. 12, § 1(2)(a), provides that an inability to provide food, clothes or medical assistance shall be no defense to a criminal prosecution unless the defendant can show he made an application to the poor law authorities (now the National Assistance Board) for aid. At common law, there was a duty to bury the dead, but in Regina v. Vann, 2 Den. 325, 169 Eng. Rep. 523 (Q.B. 1851), the court held that a parent was not liable for failure to bury a dead child where he had no money to pay for the burial, even though he was offered a loan by the poor law authorities. The court felt that the parent had no obligation to get into debt or, to put it another way, that the necessity of getting into debt to comply with the duty was equivalent to making the task impossible of performance. This raises the interesting question of impossibility of performance as a general defense to crimes of omission. "It may be laid down as a general proposition that where the law imposes a duty to act, non-compliance with the duty will be excused where compliance is physically impossible." WILLIAMS, CRIMINAL LAW 588 (1953), citing Regina v. Bamber, 5 Q.B. 279, 114 Eng. Rep. 1254 (1843) (no liability for not repairing a road when it was washed away by the sea). Interesting cases in this area are those considering how far the citizen need go to discharge his duty of aiding the police. See, particularly, Dougherty v. State, 106 Ala. 63, 17 So. 393 (1895).

118. Professor Hall thinks that *Instan* overrules *Shepherd*, but it does not expressly do so. HALL, *op. cit. supra* note 108, at 275 n.68.

119. 13 Crim. App. R. 134 (1918).

120. *Id.* at 139.

121. *Ibid.*

cases point to a healthier approach, but they do not remove all traces of doubt about the basis of liability. In *Instan,* the accused was supported by the deceased; in *Gibbins and Proctor,* the victim was a seven-year-old child. Both can thus be distinguished from *Shepherd*'s case. While a new attitude is surely apparent, a solider footing of principle would be welcome.

A *cause célèbre* in this field is the Michigan decision in *People v. Beardsley* in 1907.[122] The defendant had spent the weekend in his apartment with a woman while his wife was away. They drank heavily, and finally the woman sent out for morphine and camphor. The defendant detected her taking some of the tablets and struck the box from her hand, but she had taken enough to send her into a coma. The defendant procured a friend to carry the woman to a basement apartment, since he was too intoxicated to do this himself. As a result of delay in receiving medical attention, the woman died. At the trial, the defendant was convicted of manslaughter and sentenced to a term of one to five years. But on appeal, the conviction was reversed; for, in the court's view, the defendant was under no legal duty to care for the woman, although the fact that he must have known her life was in danger was conceded. The duty, said the court, must be imposed by law or contract. "The fact that this woman was in his house created no such duty as exists in law and is due from a husband towards his wife. . . . Such an inference would be very repugnant to our moral sense."[123]

To be temperate about such a decision is difficult. In its savage proclamation that the wages of sin is death, it ignores any impulse of charity and compassion. It proclaims a morality which is smug, ignorant and vindictive. In a civilized society, a man who finds himself with a helplessly ill person who has no other source of aid should be under a duty to summon help, whether the person is his wife, his mistress, a prostitute or a Chief Justice. The *Beardsley* decision deserves emphatic repudiation by the jurisdiction which was responsible.

An interesting problem, on which the present law is vague, is the possible duty of X, who has caused danger to Y through no fault of his own, to aid Y. In the special case of accidents through the operation of motor vehicles, this duty is clearly established by statute, but outside this field the position is not clear. X may start a fire in a building accidentally. He escapes himself and then sees Y trapped at a window. X could save Y by propping up an available ladder, but he will not do so. If Y is burnt to death, is X guilty either of murder or manslaughter? That he should not be seems deplorable, but criminal liability is by no means clear. This kind of situation is raised by an interesting Kentucky decision, *King v. Commonwealth.*[124] There, the defendant had shot and wounded X while defending his father from X's attack. The defendant called a police officer but left X lying and did not at-

122. 150 Mich. 206, 113 N.W. 1128 (1907).
123. *Id.* at 214, 113 N.W. at 1131.
124. 285 Ky. 654, 148 S.W.2d 1044 (1941).

tempt to summon a doctor. In fact, no doctor was available within five miles, and the defendant had no car or telephone. The victim died, and the defendant was convicted of manslaughter. On appeal, the conviction was reversed. Where the initial shooting was unlawful, a subsequent failure to summon aid which accelerates death or converts a nonfatal wound into a fatal one amounts to murder. But since the instruction to the jury had proceeded on the basis that the defendant's liability must be predicated on the unlawfulness of the initial shooting, and since the nature of the jury's finding indicated that they believed the shooting to be in defense of the accused's father, the court felt it must quash the conviction.

The judgment is tantalizing; the court refused to analyze those circumstances in which a duty to aid may be imposed on people who have justifiably or accidentally caused harm. Of course, the victim was the initial wrongdoer, but in another case the victim may be innocent. Does this affect the defendant's position? The court said the decision did not imply that those who prevent a victim from obtaining aid may not be guilty of homicide "when the duty to render it exists,"[125] but it did not indicate in what circumstances the duty might exist. What of the mountain climber who cuts a rope securing another so that one is sacrificed to save ten others whom he is imperiling? Perhaps the climber is under no liability for his initial act, for he can plead the necessity of saving the greater number. But will he be outside the reach of the law of homicide if he neglects to render aid, when he reasonably could, to the climber whom he has cut down? In the present law, no clear warrant imposes liability. The possible situations here are graduated: first, the defendant who injures a wrongdoer in repelling him; next, the defendant who accidentally injures an innocent victim; and, finally, the defendant who out of necessity deliberately sacrifices an innocent victim. Although the same glaring moral obligation does not arise in all three cases, they are all proper subjects for the recognition by the criminal law of a duty to aid. In the English case of *Green v. Cross*, the accused was charged with the statutory offense of cruelty to animals.[126] He had found a dog caught in a vermin trap which he had lawfully laid down; but he delayed for two hours before taking steps to have the dog released. The divisional court, Channell, J., dissenting, held the trial court wrong in dismissing the complaint and sent the case back with a direction that, on the evidence, a conviction might be proper. The court felt that an omission of this nature could establish liability though the language of the statute did not expressly refer to failures to act. Channell, J., dissented on the ground that an affirmative act was necessary for liability. This interesting decision regrettably does not discuss the wider implications of the holding as a basis for liability for homicide.

From this survey of a few crucial decisions, the lack of any firm, discernible principle in the present law must be apparent. The implied contract

125. *Id.* at 659, 148 S.W.2d at 1047.

126. 103 L.T.R. 279 (K.B. 1910). See discussion in WILLIAMS, CRIMINAL LAW 5-6 (1953).

theory is inadequate even to cover the existing decisions, which seem to rest on the assumption by the defendant of a moral responsibility, as Lord Coleridge, C.J., insisted so courageously in *Regina v. Instan.*[127] But a view of moral responsibility is surely outmoded which imposes liability on the father who does not warn his child of the precipice before him, but not on a stranger who neglects to warn the child, or which would convict of homicide a man who fails to call a doctor for his wife, but not a man who fails to do so for a weekend mistress. The same anomaly is to be found in the cases of death resulting from a defendant's neglect of the duties of his employment. The railroad crossing watchman who deliberately does not take steps to warn and protect a pedestrian from an approaching train may be guilty of murder, but the stranger who, knowing of the train's approach, fails to warn is guilty of no crime at all.[128] And this is due to the watchman's breach of his contract of employment, which seems utterly irrelevant to his intent to do nothing to prevent the pedestrian's probable death.[129] The law often lags a half century or so behind public mores, but the spectacle cannot be lightly entertained in a field of this importance. The duty to take active steps to save others, and a liability for homicide in the absence of such action, could well be based on the defendant's clear recognition of the victim's peril plus his failure to take steps which might reasonably be taken without risk to himself to warn or protect the victim. For those who have a special duty to look out for such dangers, such as the watchman, a case for liability might be based on a reckless failure to observe the danger, but the significance of the contract of employment should be no greater.[130]

127. See note 112 *supra.*

128. But in Regina v. Smith, 11 Cox Cr. Cas. 210 (Northern Cir. 1869), a railroad-crossing keeper who left his post, a pedestrian being killed in his absence, was not liable for homicide on the strange ground that the watchman owed no duty to the public, since his employer was not required by law to employ a watchman for the protection of the public. *Compare* State v. Harrison, 107 N.J.L. 213, 152 Atl. 867 (Sup. Ct. 1931); Rex v. Pittwood, 19 T.L.R. 37 (Taunton Assizes 1902).

129. It is not suggested that the stranger and the watchman should be in the same position as to liability. If neither of them knows of the approaching train, the stranger should be subject to no liability at all, but the watchman might well be liable for manslaughter. For his contract of employment is evidence of his duty to anticipate the approach of trains, and his failure to notice one might well amount to recklessness. Even here, it is dangerous to speak of his liability for negligence. In the area of homicide, the injection of liability for simple negligence is not to be welcomed.

130. A draft proposal for liability for homicide based on the failure to warn or rescue was put forward by LIVINGSTON, *Code of Crimes and Punishments,* in 2 COMPLETE WORKS 126-27 (1873): "Homicide by omission only is committed by voluntarily permitting another to do an act that must, in the natural course of things, cause his death, without apprizing him of his danger if the act be involuntary, or endeavouring to prevent it if it be voluntary. He shall be presumed to have permitted it voluntarily who omits the necessary means of preventing the death, when he knows the danger and can cause it to be avoided without danger of personal injury or pecuniary loss." An interesting approach is that of the new KOREAN CRIMINAL CODE OF 1953, which provides in art. 18: "A person who, having a duty to prevent danger from arising or, having brought about jeopardy

Causation

Even where a duty to act is clearly recognized by express provision of law, resulting liability for homicide through subsequent death is traditionally plagued by the question of causation. This was a topic which much troubled the German jurists of the nineteenth century. Lüden put forward the theory that man is always acting; thus, if he omits to rescue or warn, he does so because he is doing something else, such as looking on or walking away.[131] This substituted positive act, Lüden suggests, must be regarded as the cause of the harm. A more popular approach, in accord with the Anglo-American view, was that of Glaser.[132] He posited culpability for the man who omitted to halt a force which he originally put in motion or who, if he did not originally put the force in motion, had a specific duty to intervene. As already suggested, this approach is more of an abdication than a constructive proposal. A later theory regarded the omission itself as causal on a "but for" argument: but for the defendant's failure to intervene, the harm would never have happened.[133] This view commends itself to a modern French commentator who uses, to describe the defendant's responsibility for failure to intervene when peril approaches the victim from natural causes, the felicitous phrase "complicité du cas fortuit."[134] In Anglo-American writings, the problem of causation in the field of omissions has been best treated by Professor Jerome Hall.[135] He points out that no difficulty arises in establishing a causal link between the inactivity of a father who fails to rescue his child and the death of the child. The causal problem is in a physical sense no different when the one who fails to rescue is not the father but a stranger. The problem is easily dissipated, Professor Hall suggests, by a recognition that, in the criminal law as in the law of torts, causation is not altogether or even chiefly a question of mechanical connection or scientific law but a mixed question turning largely on the policy of imputing or denying liability.

In this context, causation has sometimes been used to deny liability for a failure to act and so restrict the duty to take steps for the care of others. An excellent example is the judgment of Lord Campbell, C.J., in *Regina v.*

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by his own act, does not prevent danger from arising shall be punished for the results of such danger." This provision is commented on by Ryu, *The New Korean Criminal Code of October 3, 1953*, 48 JOURNAL CRIM. L., C. & P.S. 275, 286-87 (1957). Mr. Ryu writes: "[The section] does not state upon what conditions the duty to prevent danger depends. This is left to judicial interpretation. The courts have formulated three grounds upon which the duty to prevent danger is based: statute or customary law, contract, and principles of good faith and public policy. It is believed that the third mentioned source should be invoked only in extreme cases . . . ."

131. LÜDEN, ABHANDLUNGEN AUS DEM GEMEINEN TEUTSCHEN STRAFRECHT 74 (1840).

132. 1 GLASER, ABHANDLUNGEN AUS DEM ÖSTERREICHISCHEN 289 (1888).

133. SIGWART, DER BEGRIFF DES WOLLENS 33 (1870); WINDELBAND, DIE BEGEHUNG DURCH UNTERLASSUNG (1887), discussed in ALBARET-MONTPEYROUX, L'INACTION EN DROIT PÉNAL 92 (1944).

134. *Id.* at 86.

135. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 256-66 (1947).

Pocock.[136] There, the trustees appointed under a local act to repair roads had neglected to contract for repairs, and, because of the resulting disrepair of one road, a man was killed. The court refused to recognize a liability for homicide in the trustees:

> "No doubt the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter. . . . But how can the principles I have stated apply to the present case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said that where the inhabitants generally are bound to repair, and a death is caused as in the present case, all the inhabitants are indictable for manslaughter."[137]

But the liability of all the inhabitants for manslaughter is not a ludicrous idea. Obviously, duties such as the repair of roads are better imposed on more precise bodies than the inhabitants of a community generally, but even if the duty is so placed, nothing seems impractical about imposing a communal fine for the punishment of a death caused by neglect of the duty.

The American decisions also reveal many instances of causation as a device for denying liability for homicide. In *State v. Reitze*, an innkeeper had served drink to an intoxicated person who slipped as he was getting into his wagon and died from the fall.[138] The New Jersey court held that the hotel keeper could not be convicted of manslaughter. Death was not the usual result of overindulgence, said the court, and therefore liability could not be based on the sale of the liquor to the deceased while intoxicated. Neither could it be founded on the defendant's failure to help the deceased on his way when he was leaving, for, again, the defendant had no reason to assume that the result of his failure to assist the deceased would be the latter's death. The death, then, was not a natural and probable consequence of the accused's acts and failures to act.

The decision may be reasonable. The defendant, by his initial wrongful act in serving liquor to the deceased while he was drunk, had collaborated with the deceased's own foolishness. If the deceased's condition had been one of complete helplessness, to allow him to attempt to make his way home through a snowstorm might be a sufficiently reckless omission to predicate liability for manslaughter. The judgment is at fault in not discussing more fully the

136. The Queen v. Pocock, 17 Q.B. 34, 117 Eng. Rep. 1194 (1851).

137. *Id.* at 38-39, 117 Eng. Rep. at 1196. Stephen was very conscious of the causation difficulty. See 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 9-10 (1883): "It would be extravagant to say that a man who, having food in London, omits to give it to a person starving to death in China, has killed the man in China . . . . 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." Why not?

138. 86 N.J.L. 407, 92 Atl. 576 (Sup. Ct. 1914).

exact extent of the deceased's incapacity, but in so far as the facts appear, the decision seems to be justifiable.

Rietze may be compared with two decisions in which the causation approach seems to have been used to exonerate a defendant who eminently deserved conviction. In *Bradley v. State*, the defendant was a Christian Scientist.[139] He had neglected for several weeks to call a doctor for his minor daughter who had fallen into the fire during an epileptic attack and had been horribly burnt. The ground for reversal of defendant's conviction was mainly the impossibility of saying that a physician might have prevented the child's death, had one been promptly summoned. Thus, a causal link between the father's neglect and the child's death could not be established. The majority view—there was a powerful dissent—was clearly much influenced by the sincerity of the father's religious beliefs. But sincerity is a virtue which loses its appeal when it involves the passive contemplation of a child during weeks of hideous suffering. The extent of the child's suffering should admittedly not obscure the fact that the charge was one of homicide, not cruelty to a child; but since medical testimony in the case suggested that prompt attention might have saved the life of the child, the reversal of the conviction is hard to understand.[140]

An earlier and even more incomprehensible decision is *State v. Lowe*.[141] The accused had agreed for consideration to take care of a pregnant woman during her delivery and to furnish her with medical assistance. When the woman was helpless and unable to leave the room to which the defendant had taken her, he neglected to provide her with any medical care. In addition to her pregnancy, or perhaps as a concomitant, she was suffering from blood poisoning and consequently died. A conviction for third degree murder was reversed on the ground that the state had failed to allege in the indictment that the omission of the defendant to call medical aid was the cause of death. But in fact the indictment did charge that the deceased died "of the said neglect and the sickness induced thereby," seemingly an ample allegation. The court, however, seemed impressed by the fact that the woman's blood poisoning was not induced by the accused's neglect but antedated it.

Both these cases show an unnecessary delicacy in approaching the problem of the link between failure to provide medical care and death. In neither case was the illness induced by the accused's act, but both defendants were under a clear duty to care for the deceased during sickness by even the narrowest legal test. In such situations, where the deceased has suffered an extreme illness of obvious gravity, and where no steps at all were taken by the accused to summon medical aid, the analogy of the commission cases suggests that lack of causal connection is an improper ground for decision. Thus,

139. 79 Fla. 651, 84 So. 677 (1920).

140. The court is partly redeemed by the dissenting judgment of West, J. *Id.* at 657, 84 So. at 679. *Compare* The Queen v. Senior, [1899] 1 Q.B. 283 (1898); Stehr v. State, 92 Neb. 755, 139 N.W. 676 (1913).

141. 66 Minn. 296, 68 N.W. 1074 (1896).

where an apparently healthy victim has been struck down by a bullet or knife, a causal link is established when the prosecution introduces evidence describing the nature of the wound. No one would suggest that the prosecution must introduce evidence to show that the victim would not have died at that moment if the wound had not been inflicted. Similarly, if *D* shoots *X* so that *X* is unable to board an airplane which crashes with the loss of everyone on board, *D* will still be guilty of murder even though *X* does not die until after the time of the airplane crash in which he would probably have lost his life in any case. The omission cases, though more complex, are not essentially different. The prosecution must still be under a burden to go forward with evidence showing the causal link between the accused's failure to act and the death, but is this burden not adequately discharged by showing a grievous sickness in the deceased so that death was a likely consequence, a duty in the defendant to summon medical aid and defendant's knowledge of the deceased's danger and his failure to procure aid? The nature of the charge of homicide in these cases is that the defendant denied the deceased the ordinary civilized opportunities for saving or prolonging life. The state of modern medicine is such that it is difficult to conceive of a case in which life could not, at the very least, be prolonged. There seems to be no valid objection to taking judicial notice of this and allowing the prosecution to rest when it has established the dangerous nature of the sickness and the failure to call aid. Of course, as in the commission cases, the defendant may then introduce evidence to show that the deceased would have died anyway, even with the alleviations of medicine, but to raise a good defense he must create a doubt on the question whether medical aid could have prolonged the life of the deceased even for an instant.

Knowledge in the accused of the dangerous nature of the deceased's sickness is also essential for liability. But how far must the prosecution go to show such knowledge? It will be no breach with settled doctrine to suggest that once it has been shown that the deceased was so sick that the reasonable man would have perceived danger, the prosecution has sufficiently raised an inference of knowledge and the burden shifts to the accused to rebut it if he can. A further difficulty then arises in the cases where the accused has deliberately refrained from calling a doctor because of his religious beliefs, as in *Bradley*. The only satisfactory solution for such a situation seems to be a resolute denial of the admissibility of such beliefs as a defense. Society cannot allow individuals to opt out of their duty to care for others, however passionate their convictions may be. The interest in religious freedom shrinks and vanishes before the interest in the health and lives of children.[142]

142. The comment of the English court in the celebrated prosecution of an eminent surgeon for performing a therapeutic abortion, an admittedly distinguishable fact situation, is interesting here: "On the other hand there are people who, from what are said to be religious reasons, object to the operation being performed under any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be an obstetrical surgeon, for if a case arose where the life of the woman could

A very different attitude on causation is revealed in *People v. Smith.*[143] Here, the defendant was vice-president and general manager of a railroad corporation. His duties involved the employment, training and supervision of the engineers. Defendant was charged with employing an incompetent engineer and failing to stipulate safe maximum speeds; as a result, a train being run at an excessive speed was derailed, and a passenger died. The defendant was indicted for manslaughter, his demurrer was overruled and he appealed. He urged that his omission to issue proper instructions and give proper training and supervision could not be treated as the direct cause of the accident, since the engineer might and ought to have known what speed was reasonable and to have observed it. The court dismissed this point and affirmed the order disallowing the demurrer.[144]

This comparison of cases reveals the strange readiness of courts to find against a defendant in a homicide prosecution based on neglect of a duty of employment, and, on the other hand, an equally strange reluctance to convict for homicide in a case of neglect of a helpless person. There is an understandable delicacy about branding with the stamp of homicide an ignorant and ill-informed parent; but, remarkably, the defendants in the employment cases are held to a standard close to that of simple negligence in tort law, while in the cases of neglect of helpless persons, the accused sometimes seems to have escaped when his conduct was at the least reckless. These anomalous results reveal a fundamental maladjustment of the law of manslaughter to modern feeling and opinion.

Legislative Imposition of Duty To Aid

Judicial extension of liability for homicide by neglect is one way in which the duty to aid one's fellow man in distress may be stimulated. In the common-law countries, this method of expansion seems to have halted about the end of the last century and appears incapable of further progress within the existing conceptual framework. An alternative possibility is direct legislative imposition of liability for a failure to aid those in peril. In common-law countries, this proposal has received no concrete expression except in motorist cases. But in Europe, it is becoming increasingly fashionable.

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be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this Court on a charge of manslaughter by negligence." The King v. Bourne, [1939] 1 K.B. 687, 693 (1938).

143. 56 Misc. 1, 105 N.Y. Supp. 1082 (Sup. Ct. 1907).

144. A more lenient attitude toward causation may be displayed in the defendant's favor in criminal cases as compared with civil suits. Two instructive decisions to compare are United States v. Knowles, 26 Fed. Cas. 800, No. 15540 (N.D. Cal. 1864), and Harris v. Pennsylvania R.R., 50 F.2d 866 (4th Cir. 1931). The ITALIAN PENAL CODE OF 1930, art. 40, deals expressly with the question of causation in omissions by providing: "Not to prevent an event which it is legally obligatory to prevent is equivalent to causing it."

In France, by a Vichy law of 1941, liability was imposed for a failure to give assistance to a person in peril where that person lost his life or suffered serious bodily harm as a result of the neglect.[145] After the liberation, this law was remodeled and is now to be found as article sixty-three of the Code Pénal:

> "Whoever is able to prevent by his immediate action, without risk to himself or others, the commission of a serious crime or offense against the person, and voluntarily neglects to do so shall be liable to imprisonment from one month to three years and a fine of 24,000 to 1,000,000 francs, or one of these penalties only.
>
> "The same punishments are applicable to one who voluntarily neglects to give to a person in peril assistance which he could render without risk to himself or others whether by his personal action or by procuring aid."[146]

The Dalloz editor comments that the article does not specify the cause or nature of the peril; it is enough that it be "imminent et constant et nécessite une intervention immédiate."[147] It has been applied to a doctor who refused to go to a person who was dangerously ill[148] and a hospital director who refused to admit a patient whom a doctor declared to be dangerously ill.[149] On the other hand, an accident witness, himself injured and in need of treatment, was relieved of his duty to aid a victim.[150]

Again, article 147 of the Yugoslav Criminal Code provides that "whoever fails to offer help to a person exposed to immediate danger, although he was able to do so without any danger to himself or any other person, shall be punished by detention for not more than one year."[151]

And the Italian Penal Code of 1930, article 593, provides that:

> "Whoever finds, abandoned or lost, a child under the age of ten years, or another person incapable through disease of mind or body, or through old age or other cause, of looking after himself, and neglects to give immediate notification to the authorities shall be punished with penal servitude up to three months or a fine . . . .
>
> "Any person who, finding a human body which is or appears to be lifeless, or a person wounded or otherwise in danger, neglects to afford the necessary assistance or to give immediate notification to the authorities, shall be liable to the same penalty.

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145. DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL 73 (3d ed. 1947).

146. CODE PÉNAL art. 63 (53d ed., Dalloz 1956). Translation by the author. Ancient Egyptian law punished as a murderer one who could save a man under attack and did not do so. 1 TYTLER, HISTORY 37 (1844).

147. CODE PÉNAL art. 63 (53d ed., Dalloz 1956).

148. Cour de cassation (Ch. crim.), May 31, 1949, [1949] Dalloz Jurisprudence 347; Tribunal correctionnel de Charleville, Feb. 6, 1952, [1952] Dalloz Jurisprudence 481. *Compare* Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901).

149. Tribunal correctionnel de Douai, Dec. 20, 1951, [1952] Dalloz Sommaires 53.

150. Tribunal correctionnel de Rouen, March 31, 1949, [1950] Dalloz Sommaires 9.

151. See Donnelly, *The New Yugoslav Criminal Code*, 61 YALE L.J. 510, 526, 534 (1952).

> "If by reason of the guilty person's conduct a personal injury results, the punishment shall be increased; if death results, the penalty shall be doubled."[152]

A Soviet commentator has conjectured that a similar duty is imposed by article 130 of the Constitution of the U.S.S.R.: "It is the duty of every citizen of the U.S.S.R. to abide by the constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labor discipline, honestly to perform public duties and to respect the rules of socialist intercourse." The commentator writes:

> "Illegality of a failure to act may be based not only on specific requirements of the law . . . but also on the fundamental propositions contained in Art. 130 of the Constitution of the U.S.S.R. The court, depending on the concrete peculiarities of a given situation, must establish whether a given person is required to render assistance to another from the point of view of the relationship which ought to exist in a socialist society (in accordance with the rules of community life under socialism). For example it would violate Art. 130 of the Constitution of the U.S.S.R. if a healthy person who knew how to swim failed to render aid in the summer time to another person who was drowning in a river not far from the bank."[153]

In the German Federal Republic, a law of 1953 provides:

> "Whoever fails to render assistance in case of accidents or common danger or emergency, even though such assistance was required and he could be expected to render it under the circumstances, particularly without considerable danger to himself and without violating other important duties, shall be punished with imprisonment up to one year or by fine."[154]

In 1952 the Bundesgerichtshof held that a similar earlier provision did not apply to a wife who had quarreled with her husband and did not come to his aid when she found him hanging himself.[155] The court's decision was based on the view that suicide could not be regarded as an accident within the

152. Quoted in MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 1304 (1940).

153. 11 GRAZHDANSKOE PRAVO 392 (1938), quoted in HAZARD, MATERIALS ON SOVIET LAW 54 (1947). See also Note, *Failure To Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952). The extract is from a Soviet text on civil law, and it is therefore not clear that the commentator is implying a criminal sanction.

154. Law of Aug. 3, 1953, [1953] BUNDESGESETZBLATT pt. 1, at 735. This represents a denazified version of the Law of June 28, 1935, [1935] REICHSGESETZBLATT pt. 1, at 833, which had imposed a duty to assist when there was such a duty "according to the people's sound sentiment." See SCHÖNKE-SCHRÖDER, STRAFGESETZBUCH KOMMENTAR 917-20 (7th ed. 1954); Ryu, *supra* note 130, at 284.

155. Decision of Bundesgerichtshof, Feb. 12, 1952, 2 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN, herausgegeben von den Mitgliedern des Gerichtshofes und der Bundesanwaltschaft 150. The court, however, indicated that a conviction for manslaughter might be founded on such facts. An interesting extract from the court's judgment is given in Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 373 n.94 (1955).

meaning of the provision, but on this point the finding has now been reversed.[156]

Conventional criticisms of the imposition of a duty to rescue are usually based on objections to compelling one man to serve another, to creating a fear of prosecution which might cause citizens to interfere officiously in the affairs of others, and to the feasibility of imposing liability on a crowd of spectators all of whom had knowledge of the peril but were too selfish to intervene.[157] These objections, however, do not seem to have much merit. To the first, the reply may be made that the evil of interfering with individual liberty by compelling assistance is much outweighed by the good of preserving human life. The second is a speculation which would be difficult to support. The third point appears to pose a real difficulty, but it is no different from a situation which commonly occurs in offenses of commission. In a riot, for example, it is difficult if not impossible to bring all the participants to book, but this has never been considered an obstacle to trial and punishment of those who can be reached. If a crowd of spectators stands by and watches a child drown in shallow water, nothing seems objectionable in trying and punishing all who can be tracked down and cannot show a reasonable excuse. To think that such an example of selfish group inertia could exist in our society is distressing, but, if it did, there would be every reason for invoking the criminal law against it.

The time is ripe for Anglo-American systems to translate into legislative fact the modern consciousness of interdependence. Surely, it is not in socialist countries alone that the duty of a citizen to help his fellows in these situations of extreme peril can be recognized.[158]

CONCLUSION

Apart from the public welfare offenses, criminal liability for inaction is spreading, and some of the recent extensions have been into areas of urgent

156. *Ibid.*

157. See Note, 52 COLUM. L. REV. 631, 641-42 (1952); Honoré, *Le Défaut D'Assistance,* 26 REVUE INTERNATIONALE DE DROIT PÉNAL 393 (1955); Levasseur, *L'Omission de Porter Secours,* 26 REVUE INTERNATIONALE DE DROIT PÉNAL 407 (1955).

158. The impulse to rescue those in danger has been recognized in tort law as natural and laudable; it does not render injury to the rescuer too remote a consequence to cut off the liability of a negligent defendant who has imperiled a third party. In Eckert v. Long Island R.R., 43 N.Y. 502 (1871), Grover, J., said: "The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such an injury. But the evidence further showed that there was a small child upon the track who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself." *Id.* at 505. There is, of course, a difference between saluting heroism by allowing dam-

importance. In the field of civil liberties, a tendency is becoming apparent to find certain statutory crimes capable of commission through inaction.[159] Thus, in *Catlette v. United States*, it was held that a police officer who made no effort to protect some Jehovah's Witnesses from an aggressive mob was properly convicted.[160] In the court of appeals, Judge Dobie said: "It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection."[161] In *Lynch v. United States*, police officers were convicted for a failure to take action to prevent the Ku Klux Klan from seizing and beating Negroes.[162] The court of appeals said: "There was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection."[163] And recently, in *United States v. Konovsky*, where the conviction of a police officer for failing to take steps to suppress a race riot was quashed on the ground that the trial court wrongly admitted evidence, the court at the same time held that evidence of a willful failure to disperse the crowd could properly be admitted as evidence of conspiracy.[164]

In the field of war crimes, *In re Yamashita* revealed the possibility of liability for grave crimes involving the death penalty through a failure to supervise subordinates.[165] The Supreme Court held that the defendant was properly convicted because of "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[166] This case exposes the danger of such pro-

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ages in this way and requiring intervention. But the "duty to rescue" is clearly recognized in some sense for some purposes.

A famous advocate of the translation of this duty into the criminal sphere was Bentham: "Every man is bound to assist those who have need of assistance if he can do it without exposing himself to sensible inconvenience. This obligation is stronger, in proportion as the danger is the greater for the one and the trouble of preserving him the less for the other . . . . the crime would be greater if he refrained from acting not simply from idleness, but from malice or some pecuniary interest." BENTHAM, WORKS 164 (1859).

159. 62 STAT. 696 (1948), 18 U.S.C. §§ 241, 242 (1952). These sections are concerned with willful deprivation under color of law of rights and privileges by reason of color or race.

160. 132 F.2d 902 (4th Cir. 1943).

161. *Id.* at 907. The court relied on two Supreme Court decisions, McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914), and Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), but in fact these two decisions do not seem to lend much weight to the proposition in the *Catlette* case. See *State Action*, 1 RACE REL. LAW REP. 613, 631 (1956).

162. 189 F.2d 476 (5th Cir. 1951).

163. *Id.* at 479.

164. 202 F.2d 721 (7th Cir. 1953).

165. 327 U.S. 1 (1946).

166. *Id.* at 16.

ceedings in the absence of a clear resolution of the basis of liability for an omission. This danger was made clear in the powerful dissenting opinion of Justice Rutledge; he pointed out that the trial proceedings did not make explicit whether the accused was convicted on the basis of his knowledge of the atrocities committed by his subordinates or on the basis of his negligence in not having knowledge of such atrocities. The failure to be explicit on such a fundamental issue is inconceivable in the conventional jurisprudence of commissions and exposes the lack of firm conceptual foundations for offenses of omission.[167]

Finally, the complexities of governmental control over modern financial operations have led to a widening liability for omissions. The Securities Act of 1933 [168] and the Securities Exchange Act of 1934 [169] make violation of any of their provisions or of any of the rules issued by the Securities and Exchange Commission a criminal offense. Under section eleven of the 1933 act, liability is imposed for failures to make material statements; the same position is probably reached by section eighteen of the 1934 act.[170]

The conclusion which emerges from the present state of the law is that a penal policy of omissions and a criminal jurisprudence of offenses of omission are overdue. The penal policy should be governed by the recognition that nothing inherent in the failure to act ought to mark it off from positive action as a proper subject for penal law. The legislature should, admittedly, seek to avoid the strictures of Montesquieu's comment on Sulla [171] that by distinguishing an infinite number of actions as murder he found murderers in all parts.[172] But where inaction is evidently socially harmful, no good reason appears for shrinking from penal prohibition. Any penal policy, however, must be linked with a consciousness of the need to promulgate and publicize offenses of omission and a recognition by the judiciary that conventional attitudes to *mens rea*, particularly with respect to ignorance of the law, are not adequate tools to achieve justice for those accused of inaction.

The pursuit of these inquiries is only possible by a mingling of the tech-

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167. The case is discussed in Snyder, *Liability for Negative Conduct*, 35 VA. L. REV. 446 (1949).

168. 48 STAT. 87 (1933), 15 U.S.C. § 77x (1952).

169. 48 STAT. 94 (1934), 15 U.S.C. § 78ff (1952).

170. See LOSS, SECURITIES REGULATION 1169-74 (1951); Herlands, *Criminal Law Aspects of the Securities Act of 1933*, 67 U.S.L. REV. 562 (1933); Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 VA. L. REV. 139 (1934).

171. MONTESQUIEU, SPIRIT OF LAWS bk. 6, c. 15.

172. Indeed, a policy of imposing liability for omissions may prove unsatisfactory in some areas. A recent commentator on Soviet labor law writes that, from the late 1920's to the early 1940's, "Soviet labor legislation continually increased the degree of compulsion and pressure on the working class. . . . Since 1950-1951, the situation has been changing. . . . [F]inally, by the decree of April 25, 1955, they abolished court penalties entirely." Gliksman, *Recent Trends in Soviet Labor Policy*, 79 MONTHLY LAB. REV. 767-68 (1956). I am indebted for this reference to Professor Leon Lipson of the Yale Law School.

niques available to the jurist. Analysis of the nature of the prohibition involved in offenses of omission and of its relation to conventional concepts of the criminal law is necessary. This analysis is supplemented by and supplements the inquiry into the present operation of offenses of omission and the harm which may be done to society by the absence of certain penal stimuli to positive action. And both these approaches are connected and informed by the ethical consideration of the proper objects of official compulsion. It is a jurisprudential trinity which mysteriously combines in the wholeness of the integrated solution.

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