Guilty of doing …… nothing: Should there be criminal liability for failure to rescue strangers in England and Wales?

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Abstract

It is late at night and James has collapsed on the side of the road. James requires urgent attention. Harry comes across James and sees his plight, in agony, pleading for help. However, Harry is in a hurry to get home and walks on by. James dies a few minutes later.

In England and Wales, Harry has not committed any crime.

There has been much academic discussion about whether omissions like these should be criminalised in England and Wales and if - as in many continental jurisdictions - we should introduce a Good Samaritan law which would criminalise Harry for his apathy.

This thesis explores this problematic and intriguing question.

Firstly, we will carry out a philosophical inquiry into the metaphysics of omissions and the nature of our moral and legal duties. The first three chapters establish an in-principle case for criminalisation.

Secondly, a doctrinal analysis of omissions will follow which will scrutinise what the current legal position is in England and Wales regarding omissions.

It will become apparent that recent case law is moving incrementally towards the Good Samaritan law being established in England and Wales: should we ever be confronted with a situation in which a stranger is in a dire need of help, a duty to help may exist in the English criminal law.

This thesis argues that there are convincing reasons for introducing a Good Samaritan law. Utilising comparative analysis with selected jurisdictions, and drawing on their experiences, a model Good Samaritan law will be drafted, explained and justified.

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"In the end, though, maybe we must all give up trying to pay back the people in this world who sustain our lives. In the end, maybe it's wiser to surrender before the miraculous scope of human generosity and to just keep saying thank you, forever and sincerely, for as long as we have voices." – Elizabeth Gilbert

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though as you never fail to cynically remind me, I won't be the type that helps people!

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Introduction

Consider the following hypothetical scenario. Hannah is walking through a deserted park. She comes across 12 year old Billy who is drowning in a pond. Hannah is in a position to save Billy, or at least summon help. Nevertheless, she is running late for an important job interview, and she keeps on walking. Billy drowns and dies.

After hearing that story, most readers would presumably feel some element of disgust and would be inclined to blame Hannah for her callous indifference. Maybe some would be thinking that this scenario is contrived and highly unrealistic. Surely, nobody would react the same way Hannah did in the vignette. Unfortunately, this is not one of those thought experiments which has no basis in reality. In 1934, Kitty Genovese was stabbed to death. Notoriously, thirty-eight people heard her screams but did nothing. In England and Wales, those thirty eight people would not be guilty of any crime as there is no Good Samaritan law. This is in stark contrast to many civil law jurisdictions in continental Europe and elsewhere that do criminalise a failure to rescue.

What is a "Good Samaritan law"? A Good Samaritan law criminalises people for a failure to render assistance. The Biblical parable of The Good Samaritan is often invoked to extol and imbue the selfless virtue of helping someone in need, voluntarily and altruistically. The Good Samaritan did not intervene because of a civic or a religious obligation but because of a sense of humanity and decency. Broadly speaking, a Good Samaritan law requires a person to come to the assistance of another who is exposed to grave physical harm, if there is no danger of risk of injury or other adverse consequences to the rescuer. In essence, such law criminalises deliberate failures of easy rescue and is intended to reduce bystanders' hesitation to assist.

This thesis investigates whether the current approach adopted by England and Wales to failures of easy rescue is justifiable. It poses the question whether English law should introduce criminal liability for failure to rescue strangers.

The thesis is divided into seven chapters. Hannah's failure to rescue Billy can be conceptualised in law as an omission. The criminal law of England and Wales treats omissions differently to acts which result in similar outcomes. Omissions are a problematic area of law in theory and practice. There is widespread disagreement amongst courts and commentators about what constitutes an omission, how an omission differs from a mere non-doing, as well as differentiating omissions in general, and omissions which are of interest to the criminal law.

The thesis begins by exploring the metaphysical issues surrounding omissions. Chapter 1 will answer two main questions. Firstly, we shall investigate the significance of metaphysical considerations. Why do metaphysical considerations matter? Once we have established why the metaphysics of action are important, the next task is to elucidate the best metaphysical account of omissions for our purpose. The chapter evaluates the merits of adopting Moore's influential metaphysical conception of action which differentiates acts and omissions on the basis of bodily movement. Moore defines omissions as "simply absent actions".[1] The chapter concludes by identifying the best metaphysical account for the purposes of this thesis.

With this metaphysical framework in place, the thesis then investigates the normative issues surrounding omissions liability in English criminal law. Chapter 2 considers the nature of our moral duties and asks three questions. Firstly, should a moral distinction be made between an act and an omission? There are a range of views addressing whether a moral difference exists.[2] The first part of Chapter 2

[1] Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law (Oxford University Press 1993) p53.
[2] See pages 34-37.

explores this question. Secondly, we examine whether moral agents owe a duty of beneficence to each other. How far do Hannah's moral duties extend? Do they extend only to Hannah's family and friends, or do they also extend to strangers? The chapter will explore the moral duties owed by an individual and clarify the basis for other-regarding duties.

Thirdly, once established whether we have other regarding duties, we ask the question to what extent should a duty of beneficence be limited? We analyse the merits of Singer's claim that we have an unlimited duty of beneficence[3] and contrast a legal duty to rescue in the form of a Good Samaritan law with a more general duty of beneficence.

If people in Hannah's position have a moral duty of rescue, should that duty be transformed into a legal obligation? Chapter 3 will examine to what extent the criminal law should enforce morality and looks at two main questions. Firstly, we will consider under what circumstances immoralities in general should be criminalised. We briefly survey the literature on this topic summarising the Hart and Devlin debate which famously debated the circumstances under which immoralities should be criminalised.[4] The chapter explores the Harm Principle devised by John Stuart Mill[5] and differentiates it from legal moralism. This chapter analyses to what extent the criminal law should reflect morality and which immoralities should be the concern of English criminal law.

Once the relationship between criminal law and morality has been clarified, the thesis examines some of the principled objections to criminalising Hannah. The discussion will focus in particular on issues of causation and autonomy. Chapter 4 examines the claim that omissions should not be criminalised due to absence of causation. Also, an often cited principled objection is that a Good Samaritan law

[3] See pages 51-53.
[4] See pages 80-86.
[5] John Stuart Mill, On Liberty (London: Parker 1859) p33.

restricts autonomy. The chapter evaluates whether such restrictions of autonomy can be justified.

Even if an in-principle case exists for criminalising Hannah, we need to examine the treatment of omissions within English criminal law in questions of doctrinal fit and principle. Only by investigating what the law is can we determine whether it should be reformed. Chapter 5 presents doctrinal analysis of omissions in England and Wales, looking at whether there are obstacles within English criminal doctrine preventing Hannah being criminalised. The chapter asks three questions. Firstly, we investigate the standard English criminal law approach towards omissions to identify the different types of duties relied upon to criminalise omissions. After setting out the standard account, we will explore whether the English criminal law's approach towards omissions is metaphysically sound and morally defensible. Chapter 5 concludes by considering afresh whether English criminal law would currently criminalise Hannah's omission.

Chapter 6 turns to consider comparative case examples. In terms of defining the conceptual parameters of a Good Samaritan law, comparative insight is derived from countries which already criminalise a duty of easy rescue. The limits and possibilities of comparative scholarship, and some of the methodological problems that potentially arise, are noted. The final part of the chapter critically evaluates the law in our selected jurisdictions. In making cross jurisdictional comparisons, this thesis considers two civil law jurisdictions – France and Germany, and selected states within the US. We list the different policy choices adopted in each jurisdiction.

Having concluded that there is a good argument for a Good Samaritan law, in principle, the thesis next considers the challenges of drafting such a piece of legislation for England and Wales. In particular, it investigates whether we can overcome pragmatic institutional constraints that could be said to block the

introduction of a Good Samaritan law. The chapter begins by discussing some practical concerns related to implementing a Good Samaritan law in England and Wales. Chapter 7 presents a draft model Good Samaritan law for England and Wales. The drafting experiences of other jurisdictions – considered in Chapter 6 - will aid us in this process. The chapter begins by stating what our Good Samaritan law is and justifying the different policy options chosen. Once our model Good Samaritan law has been presented, the chapter explains how it effectively counters objections rooted in pragmatic institutional constraints on its successful implementation.

This thesis employs three principal research methods. My approach is interdisciplinary, and draws on philosophical perspectives in particular. A philosophical inquiry will be carried out in Chapter 1 which explores the philosophy of action, and clarifies concepts such as what is an omission and what differentiates an omission from a non-doing. This metaphysical analysis provides a necessary foundation for exploring normative concepts relating to omissions. Chapter 2 examines ethical concerns arising from a Good Samaritan law and the nature of our duties to others, and to what extent those duties should be limited.

A doctrinal approach will be undertaken to gauge how we treat omissions in English criminal law. The doctrinal method "lies at the basis of the common law and is the core legal research method".[6] Hutchinson and Duncan describe how the crux of the doctrinal method "is the location and analysis of the primary documents of the law in order to establish the nature and parameters of the law".[7] It "seeks to achieve more than simply a description of the law".[8] Under the doctrinal method, legal rules are constructed by using cases, statutes, legal texts and other sources of law.[9] We shall explore omissions liability through analysing case law, statutes,

[6] Terry Hutchinson and Nigel Duncan, 'Defining and Describing what we do: Doctrinal legal research', 17 Deakin Law Review 87.
[7] Ibid 93.
[8] Ibid 91.
[9] Reza Banakar and Max Travers, Theory and Method in Socio-Legal Research (Oxford: Hart, 2005) p7.

Law Commission reports and Acts of Parliament. Through our analysis we shall investigate what the law is, and see whether it satisfies the moral and metaphysical requirements identified in previous chapters.

We shall also be employing a comparative method in relation to comparative literature for selected jurisdictions, namely the US, France and Germany. The purpose of such analysis is to gain comparative insight from countries that already have in place a Good Samaritan law. Through such analysis we can gauge how other jurisdictions draft statutes and deal with pragmatic concerns which will be helpful when we draft our own Good Samaritan law. Concerns such as linguistic difficulties (the author cannot read French or German), the utility of translated materials, and the merits of legal transplants are addressed at greater length in Chapter 6.[10]

This research is primarily aimed at legal theorists and policy makers. The intention is to communicate findings and the practical significance of the research, in a clear, straightforward fashion and in a language appropriate for the intended audience. The ambition is for the research to provide greater clarity and stimulate further research in this area. The debate surrounding implementation of a Good Samaritan law in England and Wales has been somewhat dormant in recent years. The hope is that this research can re-open the debate and catalyse further law reform activity. The Law Commission might usefully take up the cause.[11]

[10] See page 205.
[11] The Law Commission took up the cause in 1985 - See Law Commission, 'Codification of the Criminal Law' (1985) Law Com No 143 - and this was further expanded on by Glanville Williams, 'What should the Code do about omissions?' (1987) 7 Legal Studies 92. Since then there has been a dearth of research into this area.

Chapter 1 - Omissions: A metaphysical analysis

Introduction

This section of the thesis will address the metaphysical issues surrounding omissions and will answer two main questions. Firstly, an investigation as to the significance of metaphysics for criminal law is undertaken. Why do metaphysical considerations matter for questions of criminal legislation and criminal liability? Secondly, once we have established the significance of metaphysical considerations, we will present and defend the best metaphysical account of omissions for this thesis.

1) Why metaphysical considerations matter?

Why is it important to determine the metaphysical position? Kit Fine explains that, "metaphysics is concerned, first and foremost, with the nature of reality", and "it should be capable of providing a foundation for all other enquiry into the nature of reality".[1]

What is the relationship between criminal law and metaphysics? Moore astutely notes that "metaphysics generally has a bad reputation among lawyers", and how "metaphysical is often a pejorative label for a point or argument that is so ethereal, abstract and without content that it is thought to be an arbitrary posit rather than a discovered truth about the world".[2] When it comes to defining legal terms Moore observes that "criminal theorists like other legal academicians are descendants of the legal realist tradition according to which the use of a concept should be guided by the social consequences attached to that use, not by some underlying metaphysics".[3]

[1] Kit Fine, 'What is Metaphysics?' in Tuomas E. Tahko (eds.), *Contemporary Aristotelian Metaphysics* (Cambridge University Press 2012) p8.
[2] Michael S. Moore, 'The Moral and Metaphysical Sources of the Criminal Law' (1985) 27 American Society for Political and Legal Philosophy 25.
[3] Ibid.

Why is there scepticism towards metaphysics? Moore explains legal realist scepticism in which "concepts have no descriptive concept" and legal realist sceptics argue that instead of metaphysical truths we should be guided "by pragmatic policies having to do with what we want to achieve by use of these concepts in particular contexts".[4] Moore describes this approach as functionalism, and under this approach when we apply a legal term "one must look to the legal consequences being prescribed by its authoritative use by a judge, and further, that it was an illusion to think that such legal terms had a meaning that determined their correct use apart from such consequences".[5]

Moore counters the legal realist sceptic by arguing "that the meaning of legal, ordinary, and moral concepts cannot be found solely in the consequences of authoritative utterance" and "any concepts actually doing any work in legal reasoning must have descriptive content".[6] Metaphysics matters and as elucidated by Moore:

> The concepts employed in discussing all such questions are not empty labels for a moral or legal conclusion reached on other grounds, or no grounds at all; they are concepts having a descriptive and explanatory function, no matter what other expressive, prescriptive, or ascriptive functions they may serve in contexts such as those of responsibility assessment.[7]

The purpose of our metaphysical analysis is to clarify the conceptual ambiguity surrounding omissions. There is great confusion in the literature, as well as considerable disagreement and ambiguity amongst scholars, as to what constitutes an "omission". The courts have also struggled with these concepts.

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[4] Ibid.
[5] Ibid 28.
[6] Ibid 30.
[7] Ibid 29.

Some commentators argue that this lack of definitional and moral clarity has led to judicial manipulation and erroneous decisions. Tracey Elliot and David Ormerod contend that this "ambiguity allows them [Judges] to cloak their policy decisions".[8] Ashworth observes that, "there are many ambiguous cases in which the act-omission distinction should not be used as a cloak for avoiding the moral issues".[9]

Why does this distinction matter? The practical and legal ramifications are enormous as it is, "one thing for Parliament to legislate that no-one should do x on pain of serious criminal sanction and it is another to say that everyone must do x on pain of criminal sanction".[10] It is important to ascertain whether the defendant's conduct is properly classified as an act or an omission.

Under English criminal law,[11] liability for omissions is dependent upon the existence of a duty. There are different categories of duties recognised by the criminal law. A criminal omission rests on legal duties to act. When there is no such legal duty, there is no omission in the eyes of the law.[12]

The fact that an omission is only deemed criminal if there is a legal duty to act applies to all crimes. Many acts are near-universally considered immoral, such as adultery, vulgarity and lying. Nevertheless, these acts are in most circumstances not criminalised per se, as there is no legal duty to refrain, despite the existence of a moral duty to refrain from such behaviour. Therefore, the existence of a legal duty as a precondition to criminalisation does not tell us much about what an omission is, or what makes omissions distinct from acts.[13] The criminal law should not be built on case law, which is often self-contradictory. The courts should not adopt a legal nominalist position, in which an omission is said to exist after liability

[8] Tracey Elliott and David Ormerod, 'Acts and Omissions – A Distinction Without a Defence?' (2008) 39 Cambrian Law Review 42.
[9] Andrew Ashworth and Jeremy Horder, Principles of Criminal Law (7th edn, Oxford University Press 2010) p100.
[10] Elliott and Ormerod (n 8) 49.
[11] See page 143 for a doctrinal analysis on omissions.
[12] Jerome Hall, General Principles of Criminal Law (2nd edn, The Lawbook Exchange Ltd 2010) p247.
[13] Ibid.

is determined. This is conceptually speaking the wrong way round: we should be able to identify whether an omission occurred before liability is imposed. We are not going to adopt a nominalist account, in which the law defines terms and uses them for its own purpose. The rules of law are answerable to metaphysics and the law should not reconstruct its own metaphysics. Therefore, the criminal law has metaphysical obligations, and an account of omissions should be metaphysically defensible. There is no simple congruence between moral and legal duties. To gain clarity on these issues, we first need to address the metaphysical position on omissions.

The purpose of a metaphysical account of omissions is to establish conceptually a normative standard for legal rules and concepts. In order to investigate the jurisprudence[14] and normative issues, a metaphysical analysis of what omissions are is needed. This metaphysical analysis will set a framework to investigate the case law, the court's reasoning, decisions made regarding omissions, and also the normative issues underpinning those decisions. Normative and jurisprudential issues will be addressed in depth later in the thesis.

2) What is the best metaphysical account?

Having identified why metaphysical considerations matter for this investigation, the rest of this chapter will investigate the best metaphysical account of omissions. This refers to the best metaphysical conception for the purpose of assigning criminal responsibility, which is the principal focus of this thesis.

A metaphysically sound analysis of omissions will require us to enter more generally into the debate about the philosophy of action, and to look at acts as well as omissions. The vehicle for exploring this will be one particular and indeed controversial account produced by Michael Moore. The reason for exploring Moore's account is not necessarily to endorse his account, but to see what might

[14] By jurisprudence, I refer to the theoretical part of law.

be at issue in adopting different metaphysical positions. The next section will elucidate Moore's conception of both an act and an omission.

a) Michael Moore's conception of the act/omission distinction

Moore defines an act as, "a simple bodily movement that is caused by a volition before criminal liability attaches".[15] According to Moore, a bodily movement is a change in the relative position of the parts of the body, not merely holding still. A volition is a type of intention, which Corrido refers to as the "functional state of the brain, or perhaps a change in a functional state of the brain".[16] Therefore, an act is a change in the body constituting movement caused by volition. Diana Mertz Hsiesh offers the following stock example "the swinging of my leg would be an action if caused by my desire to kick the dog and my belief that swinging my leg would accomplish this task".[17] However, "if an identical movement was instead the result of a doctor testing my patella reflex, then the movement would not be an action in this technical sense".[18] For an act to occur, the movement has to be directly caused by the volition. Volition is a term used interchangeably with willed and voluntary. All three words have the same meaning in this context.[19]

Moore describes an act as a willed event, and in particular a willed movement. This is to be contrasted with an omission, which is a willed non-event, hence a non-movement of a particular sort. Moore describes omissions as an absence of any willed bodily movements. If acts are "willed bodily movements", then omissions are the opposite and are "literally nothing at all".[20] Moore thus defines omissions as follows:

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[15] Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law (Oxford University Press 1993) p45.
[16] Michael Corrido, 'Is There an Act Requirement in the Criminal Law?' (1994) 142 University of Pennsylvania Law Review 1530.
[17] http://www.philosophyinaction.com/docs/aac.pdf accessed 13th January 2016.
[18] Ibid.
[19] Corrido (n 16).
[20] Michael S. Moore, 'Reply: More on 'Act and Crime' (1994) 142 University of Pennsylvania Law Review 1773.

> "Omissions are simply absent actions. An omission to save life is not some kind of ghostly act of saving life, and certainly not some ghostly kind of killing. It is literally nothing at all."[21]

Aside from the difficulty in defining omissions, differentiating an omission from an act is a challenge, as "an omission can be characterized as part of a larger encompassing act".[22] To illustrate this difficulty, Fischer provides an example in which an individual operates a steam locomotive without a spark arrester, and a spark escapes, causing a fire. In that situation, both an act and omission occurred simultaneously. An act occurred as the individual carelessly operates the locomotive, and also an omission, as he failed to equip the locomotive with a spark arrester. The omission (failing to equip the locomotive with an arrester) is no crime. However, the omission becomes a crime when the locomotive is operated without the spark arrester. Therefore, the omission by itself did not constitute the crime, if any. Scenarios like this illustrate the difficulty in distinguishing between an act and an omission. In a situation where an act and an omission occur simultaneously, it is important to determine which of these constitutes the crime. In the example given, the crime was the act, specifically, the individual operating the locomotive without a spark arrester.[23]

In summary, Moore defines an act as consisting of a bodily movement caused by a volition. An act is something we bring about directly, and not by means of something else that we do.[24] Moore differentiates acts and omissions by bodily movements, defining omissions by lack of bodily movements, describing them as "non movements".[25]

Moore defines an omission as a willed non event (a non movement), which does not cause any other event. For Moore, "omissions are the absences of any willed

[21] Moore (n 15) p53.
[22] David A. Fischer, 'Causation in Fact in Omission Cases' (1992) Utah L. Rev. 1339.
[23] Ibid.
[24] Corrido (n 16) 1529.
[25] Moore (n 15) p52.

bodily movements".[26] In an instance where A watches X drown, an omission is, "just the absence of any willed bodily movements by A at t, which bodily movements would have had the property of causing X to survive the peril he faced from drowning".[27]

Moore's conception of acts and omissions though possessing great technical proficiency has attracted much critical discussion. There is no agreed, universal concept of an act. Many definitions of acts imply some element of voluntary bodily movement(s). Michael Moore's conception of an act is described as the "traditional view" by Michael Corrido. Corrido suggests that, "the most significant feature of the traditional view is that it takes willing or volition to be the key to voluntariness".[28] Charles Torcia states how, "an act is 'voluntary' when the bodily movement is the product of conscious effort or determination".[29] The meaning of voluntary is given by Arnold Loewy: "the term voluntary simply means that the muscular contraction is willed".[30] The rest of this chapter will elucidate some of the criticisms levelled at Moore's conception, and will analyse the validity of those criticisms. Through this dialectic, we will arrive at the best metaphysical conception of omissions for this thesis.

Moore differentiates acts and omissions on the basis of action and passivity. According to him, "there is no conceptual objection to be made to the movement/non-movement conceptualization of the act/omission distinction".[31] Is differentiating acts and omissions on this basis valid? Douglas Husak endorses Moore's position, acknowledging that despite the fact Moore's position, "has been vigorously attacked, no satisfactory alternative has emerged to take its place".[32] Fischer and Ravizza also define omissions in terms of bodily movements, stating

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[26] Ibid p53.
[27] Ibid p28.
[28] Corrido (n 16).
[29] Charles E Tocia and Franics Wharton, Wharton's criminal law (14th edn Clark Boardman Callaghan 1978) p138.
[30] Arnold H. Loewy, Criminal law in a Nutshell (West Publishing Company 1975) p138.
[31] Corrido (n 16) 1535.
[32] Douglas Husak, The Philosophy of Criminal Law (Rowman & Littlefield 2010) p174.

that omissions are fully constituted by "the way one actually moves one's body" at the relevant time, and this can also include "simply keeping the body still".[33]

b) Motionless actor

Michael Corrido disagrees with Moore's conception of acts and omissions. Corrido describes a scenario in which Smith dies after being run over by Jones' car. Jones would be responsible for the death only if he intended to kill Smith. If he ran over him by accident this would not result in murder. In addition, even if he had the intention to kill Smith but was not causally responsible for his death, he would not be guilty of murder. If Jones intended to kill Smith then his behaviour would satisfy the act requirement stipulated by Moore, as there was a bodily movement caused by a volition.[34]

Corrido poses a scenario which challenges the validity of Moore's conception. Jones is driving down a long, straight road in cruise control and suddenly he sees his enemy Smith standing in the road in front of him. Jones does not need to move the wheel as the road is straight. He deliberately does not divert the car and Smith dies.[35]

In that situation, Jones running over Smith was voluntary and intentional. Whilst it satisfies the second limb of Moore's act requirement, it does not satisfy the first part as there was no volitional movement. According to Corrido, if we hold Jones not moving his hand as an act, he would be found liable. However, under Moore's conception, holding still is not an act, as a willed movement of bodily parts is needed to satisfy the act requirement. Holding still is not a movement, and therefore does not satisfy the act requirement devised by Moore. [36]

[33] John Martin Fischer and Mark Ravizza, Responsibility and Control: A Theory of Moral Responsibility (Cambridge University Press 1998) p132.
[34] Corrido (n 16).
[35] Ibid.
[36] Ibid.

However, in this scenario starting the car and driving it satisfies the requirement of a voluntary act. Whilst it is true that no willed bodily movement took place at the moment that Jones ran over Smith, an act was needed to start the car in the first place.[37] Corrido counters that, in this hypothetical scenario, "the intention is not simultaneous with the volition, as it must be for liability to exist".[38] Despite activating the car, Jones did not intend to kill anyone at that time and had no forewarning of B's presence on the road. The fact that the intention did not accompany the act seems to imply that there is no act under Moore's mechanistic conception.[39]

Corrido poses another scenario in which Jones is on top of a hill and his car is stationary. The car rolls down the hill, but this event is not related to Jones being in the car. Jones has his hands on the wheel but does not turn as the road is straight. Corrido poses the question, "if I run down my enemy as before, am I not liable for killing her"?[40] Intuitively we would say yes and Corrido agrees with this assessment, therefore proving that "movement is not necessary even to violate a general prohibitory law".[41] Some act is required, but the acts involve driving, hitting B and killing her. Instead of an act being caused by willed movement, it is caused by willed stillness. This is another example of act which does not fulfil the requirements of Moore's conception.

In the motionless actor scenario devised by Corrido, Moore disagrees with Corrido's conclusion. He argues that Jones is not liable, as in the hypothesised scenario Smith being run over is not willed or caused by Jones. For Moore, Jones "no more kills in his hypothetical than he would if he were thrown off a cliff by the wind, his body landing on his old enemy and thereby causing the latter's death".[42]

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[37] Ibid.
[38] Ibid 1538.
[39] Ibid.
[40] Ibid 1540.
[41] Ibid.
[42] Moore (n 15) 1778-1779.

However, Moore then argues that "the earlier acts of driving are sufficiently proximate that they caused death, and therefore the driver did kill his old enemy".[43]

Even in the second scenario in which Jones is on top of a hill and does not start the car, Moore is still able to find Jones criminally liable. Moore argues that this would be an omission as Jones did not intentionally kill his old enemy by an act, but rather he innocently caused danger for Smith, and had a duty to rescue Smith. Despite not being responsible for Smith being on the road, and despite Smith being unreasonable and contributing to the danger by not looking out for on-coming cars, Jones had a duty to either stop or redirect the car. He failed to fulfil this duty and is therefore responsible on the basis of an omission.[44] It is unreasonable to hold Jones responsible for murder in the second scenario due to the absence of an act. However, that does not mean he is exempt from punishment for his action. He had a duty to avert the car once he saw B and by failing to fulfil that duty Jones is guilty of a crime by omission, according to Moore.

c) Stillness

Moore defines omissions by the absence of bodily movements. Are all instances in which an individual is still therefore (examples of) omissions?

Not always, according to Simester, who gives an example in which stillness counts as an act. Simester imagines a situation in which, "John is searching for Dick in order to shoot him. The slightest movement on Bill's part will alert Dick to John's threat, in which case Dick will escape".[45] Simester then asks the question, "if Bill remains immobile, and Dick is shot, was Bill's immobility a positive or negative instrumentality in Dick's death"?[46]

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[43] Ibid 1779.
[44] Ibid.
[45] Andrew P. Simester, 'Why Omissions are Special' (1995) 1 Legal Theory 311.
[46] Ibid 318.

The action seems to be a negative action (non-doing) in the sense that there was no movement, and therefore we would assume it was a non-doing. However, it was a positive action in that there was no range of (alternative) movements which would have brought about the same outcome. Bill's immobility is instrumental to the outcome, and therefore – if instrumentality is taken to be the criterion - constitutes an act rather than an omission.[47]

For Simester, bodily non-movement can result in an act being performed. Simester observes how "many non-movements constitute things done; consider, for example, sitting for a portrait or hunger-striking".[48] Holding still is not necessarily a passive action. Not moving may require a great deal of effort, as a ballet dancer remaining still requires a great deal of muscle strength to keep that pose. As described by Clarke, it consists of an individual maintaining a relatively unchanging posture and position, and might count as an act due to the causal mechanisms involved, namely "by a pattern of motor signals sent to certain muscles, perhaps the inhibition of other motor signals, the maintenance of balance, with fine adjustments made in response to feedback",[49] which results in the individual remaining still.

In addition, George Fletcher notes that it cannot be that "only willed bodily movements could be the object of praise and blame".[50] Fletcher illustrates this second objection with two examples. Fletcher mentions how tourists regularly pause and stare in wonderment at the motionless guards standing in front of Buckingham Palace, and he also refers to standing motionless on one's head. Both of these feats involve standing motionless under difficult circumstances and therefore, in context, warrant praise. Fletcher concludes that if non-movements

[47] Ibid.
[48] Ibid 313.
[49] Randolph Clarke, 'What is an Omission?' in *Omissions: Agency, Metaphysics and Responsibility* (Oxford University Press 2014) p22.
[50] George P. Fletcher, 'On the Moral Irrelevance of Bodily Movements' (1994) 142 University of Pennsylvania Law Review 1445.

under particular circumstances are worthy of praise, then under different circumstances, non-movements might also be the object of blame and condemnation.[51]

Therefore, basing a distinction between an act and an omission on whether or not the defendant's body has moved may not always be helpful for the purposes of appraising conduct.[52] Defining omissions as absences of bodily motions has already been criticised on the basis that bodily motions can still constitute an act. This was also argued by Fletcher who gives an example of how someone standing on their head is an act as opposed to an omission, despite the lack of movement. Fletcher observes that the "motionless state of a person, when willed by them, are actions on their part".[53] Moore's conception of acts and omissions seemingly failed to include this, and consequently seems too narrow in its conception of acts.

Moore's response to this criticism is to say that Fletcher and other critics misunderstand "the specific notion of omissions as the absence of willed bodily movements".[54] Moore agrees with Clarke that a resistance occurs when "an agent's body is about to be made to move by outside forces, but he keeps his body from moving by activating the appropriate muscles".[55] Agreeing with his critics to this extent, Moore also acknowledges these scenarios as involving acts, due to the fact that "the actor constantly adjusts his muscles in order to keep gravity from moving his body".[56] Moore mentions that as long as we "reconstrue 'bodily movements' to include muscle-flexings, as we should in these cases where we use our muscles to resist an outside force, there is nothing inconsistent with my theory of action in concluding that such resistings are actions, not omissions".[57]

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[51] Ibid.
[52] Jonathan Herring, Criminal Law: Great Debates in Law (3rd edn, Palgrave Macmillan 2015) p26.
[53] Fletcher (n 50) 1451. By actions Fletcher refers to acts.
[54] Moore (n 15).
[55] Ibid.
[56] Ibid 47.
[57] Ibid 49.

Moore's distinction is subtle. Despite the seeming lack of movement resulting in one standing on their head, there is the constant adjusting of muscles to counteract the force of gravity. These muscle flexings involve movement and therefore are not omissions but acts. This is to be contrasted with someone standing still in which one "does nothing at all".[58] However, even then, Moore acknowledges that, "standing still may become so difficult physically that it is like standing on one's head, in which case it will become a resisting".[59] Moore's metaphysical account of omissions therefore acknowledges how lack of bodily movements can constitute acts as well as omissions.

d) Multiple Omissions

Another challenge to Moorean metaphysics is that a single motion (or stillness) can constitute multiple omissions. For example, when one keeps their head still they might omit to nod it in agreement and omit to shake it in disagreement.[60]

Simester observes that we often do something else when we omit to do something. I may omit to answer the door bell and be reading a novel instead. Therefore, the same behaviour can include both things being done and not done. Also, non-doings may on occasion be constituted by behaviour which involves bodily movement irrelevant to the thing not done. In a situation where Hannah fails to throw a rope to save Billy from drowning, Hannah might do a number of things such as simultaneously dancing, singing and shouting. The variety of ways of saving Billy is limited, in contrast to the many ways of not saving Billy, which are numerous. Hannah might shout, dance, read a book instead, stand on her head, and do a host of acts instead of saving Billy. In these instances, we could say that Billy drowned as Hannah did not throw the rope, or alternatively Billy drowned because Hannah was shouting and singing.[61] Fletcher's position is congruent with

[58] Ibid 51.
[59] Ibid.
[60] Clarke (n 49) p18.
[61] Simester (n 45).

Simester's. Fletcher invokes a scenario in which one fails to vote. In that situation, one could be involved in a host of activities unrelated to voting.[62]

Moore's response to Fletcher's scenario is that, irrespective of the other activities, "one is still omitting to vote by my criteria for an omission", and the "mere presence of bodily motions at the time in question is irrelevant".[63] In a scenario in which Hannah watches Billy drown, Hannah might do a host of other activities but they are not directly relevant to the classification of his conduct. Only Hannah not throwing a rope to Billy is relevant, therefore that is regarded as the omission, and the only one which is directly relevant. As explained by Moore, "A omitted to will any bodily motions that were relevant to preventing B's death".[64]

Moore is persuasive in this regard. Despite Hannah's other movements being relevant in that they take place whilst Billy is drowning, only Hannah's not throwing the rope is necessary for Billy's death to occur. After all, if Hannah had refrained from singing, dancing or shouting, Billy would still not have been saved. Therefore, despite other activities occurring simultaneously, it is necessary to focus on the one which is directly relevant to the material issue, which is Hannah not throwing the rope to Billy. This involves a lack of bodily movement, and therefore satisfies the requirements of an omission under Moore's conception. In Simester's scenario, one may indeed be reading a book instead of answering the doorbell. However, the only directly relevant activity is not answering the bell, which is due to an absence of bodily movement *of the right kind*.

e) Displacement

Clarke observes that on some occasions an individual's body might be moved or kept still by someone or something else.[65] Clarke proposes an example of an

[62] Fletcher (n 50).
[63] Moore (n 15) 52.
[64] Ibid.
[65] Clarke (n 49) p18.

individual performing one action to prevent himself from performing another. He describes how Odysseus commanded his crew to tie him to the mast so he would be able to listen to the Siren's song, and not be lured to follow them to death. Despite his best efforts to jump in, his previous action prevented him.[66] Bruce Vermazen poses a similar scenario in which A may have a craving for hors d'oeuvres, but has prohibited himself from eating them. In order to resist temptation he twists the buttons on his vests to occupy his hands and to distract himself from eating the hors d'oeuvres.[67] Odysseus persuading his companions to tie the mast, and A twisting his buttons, is necessary for the omission. Owing to the displacement, does that mean that the activity does not qualify as an omission under Moore's conception?

In the same way that Moore responds to the problem of multiple omissions, Moore acknowledges that despite actions occurring simultaneously there is still an omission which is directly relevant. Odysseus not jumping in and A not eating involve no bodily movement of the relevant description, and are absences of acts. Therefore, they are omissions and it is immaterial whether or not that omission was caused by an act.[68]

3) Omissions and non-doings

Jennifer Hornsby argued that Moore's conception of an omission is too broad. On Moore's conception of omissions as the "absence of any willed bodily movements",[69] there are seemingly trillions of omissions performed by every person at any moment. For Hornsby, a metaphysically sound account of omissions would need to be more specific, whilst Moore's account is too general.[70] How serious is this objection to Moorean metaphysics?

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[66] Ibid.
[67] Bruce Vermazen & Merrill Hintikka, *Essays on Davidson: Actions and Events* (Oxford University Press 1987) p88-89.
[68] Moore (n 15).
[69] Ibid p28.
[70] Jennifer Hornsby, 'Action and Aberration' (1994) 142 University of Pennsylvania Law Review 1719.

Moore concedes to Hornsby that his conception of omissions implies that there are trillions of omissions performed by any person at every moment. Moore does not see that as a problem, once "one recognises that almost all of these omissions lack the surprise that would make them explanatorily interesting and lack the features of negligence, knowledge, or intention that would make them morally interesting".[71] In the drowning scenario mentioned earlier,[72] Hannah might carry out a host of other omissions whilst Billy is drowning and Moore would still distinguish Hannah throwing the rope at Billy, due to it being explanatorily interesting and/or morally interesting.[73]

This wide conception of omissions has been endorsed by Sara Bernstein:

> Let us stipulate at the outset that 'omission' refers to any action or event that doesn't occur. In contrast, one might use 'omission' to denote exclusively intentional failures (my refraining to pick up the dry cleaning), exclusively agent-involving failures (the gardener's failure to water the plant), or failures with an explicitly normative dimension (as in Billy not following through on a promise to walk Suzy's dog). Rather, let us assume that 'omission' is maximally broad and includes unintentional failures (my forgetting to pick up the dry cleaning), failures that do not involve agents (the failure of rain to fall), and failures that do not involve promises or norms (Suzy's forgetting to update her software).[74]

Other philosophers disagree. They would distinguish an omission from a non-doing. Myles Brand, for example, maintains that "refraining is itself a kind of action" in contrast to "just doing nothing at all".[75] Are all non-doings omissions? The answer is clearly no. Not all non-doings are omissions. The list of a person's

[71] Ibid.
[72] See page 1.
[73] Moore (n 15) 49.
[74] Sara Bernstein, 'The Metaphysics of Omissions' (2015) Philosophy Compass 10:3 212.
[75] Myles Brand, 'The Language of Not Doing' (1971) American Philosophical Quarterly 46.

non-doings at any given moment is infinite, and very few of them are omissions. A might omit to save B from drowning whilst not climbing Mount Everest, not eating an apple or not mowing the lawn. However, of all these non-doings, only A omitting to save B is significant, under most readily imaginable or interesting scenarios.[76]

What differentiates a non-doing from an omission? Not every non-doing or absence of action counts as an instance of omission. The trillions of activities not performed by any person every moment are not for the most part omissions, but rather non-doings. As stated by Kent Bach, "[o]mitting to do something is not simply not doing it. If it were, then we would each be omitting to do innumerable things at every moment".[77] There are many instances of non-doings occurring in the course of the day, and whilst omissions are generally non-doings, non-doings are not generally omissions. What differentiates an omission from a non-doing lies "not in what kind of entity exists in the two cases but in whether an action of the sort that is absent was called for by some norm or standard".[78] In other words, there has to be some reason or expectation for that thing to be done, for instance, because of custom, duty, a promise, or (more generally) standards of reasonable behaviour. For one to have omitted to do X, then one ought to have done X.[79] A non-doing only becomes an omission if there was some "norm, standard, or ideal that called for the agent to do that thing".[80]

What is the relevant norm? It is a requirement and is often a moral obligation. Clarke mentions how, "when you forget to do what you promised to do, you omit to do it".[81] However, the requirement need not be a moral one. For an omission to occur there has to be an "expectation that it was reasonable to expect the agent

[76] Simester (n 45) 312.
[77] Kent Bach, 'Refraining, Omitting, and Negative Acts' in Timothy O'Connor and Constantine Sandis (eds.), A Companion to the Philosophy of Action (Wiley-Blackwell 2010) p54.
[78] Clarke (n 49) p33.
[79] Simester (n 45).
[80] Randolph Clarke, 'Omissions, Abilities, and Freedom' in *Omissions: Agency, Metaphysics and Responsibility* (Oxford University Press 2014) p91.
[81] Clarke (n 49) p30.

to do what she didn't, due to some applicable norm or because of some habit of action".[82]

Does failing to observe a habit result in an omission? There is disagreement about whether having an established habit of doing a certain thing can render one's failure to do that thing an omission. Patricia Smith argues that a "routine or habit may found reasonable expectations" of behaviour, and thus failing to act results in an omission.[83] Bernard Williams, argued that where there is no normative expectation created by the habitual behaviour, the failure to act isn't an omission.[84] Joel Feinberg agrees with Williams' postulation, and proposes a scenario in which someone did not water flowers having decided to "refrain from [watering them], having briefly considered the matter and then decided against it".[85]

What about if an individual simply forgets? Michael Moore conceptualises these situations as involving "negligent omissions".[86] Fletcher describes two illustrative scenarios, the first featuring an individual who "failing to water the plant, when one reasonably expects the contrary, causes it to die".[87] The second involves "the failure to register for the draft, or the failure to pay one's income tax".[88] Moore observes that in Fletcher's first scenario, one may have simply forgotten to water the plants. As for the second scenario, one may have simply forgotten to register for the draft and failed to pay one's income tax. Despite this, Moore perceptively states that we still often blame such people and that simply forgetting "is no excuse here, because such forgetting would be negligent".[89] These non-doings are appropriately conceptualised as negligent omissions.

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[82] Ibid 32.
[83] Patricia G. Smith, 'Contemplating Failure: The Importance of Unconscious Omission' (1990) 59 Philosophical Studies 163.
[84] Bernard Williams, Making Sense of Humanity: And Other Philosophical Papers 1982-1993 (Cambridge University Press 1995) p337.
[85] Joel Feinberg, Harm to Others (Oxford University Press 1984) p161.
[86] Moore (n 15) 51.
[87] Fletcher (n 50).
[88] Ibid.
[89] Moore (n 15) 53.

Hornsby is persuasive, in observing that Moore's account of omissions is inadequately broad and general. Defining omissions as simply the "absence of action", does not differentiate between non-doings and omissions. There are relatively few non-doings which are classified as omissions. As described by Ashworth, "things that one does not do are best characterised as non-doings and the list may be tediously long and uninformative".[90] Bach gets to the rub of what makes an omission different from a non-doing when he remarks:

> There are different reasons why not doing something can count as an omission, but they all seem to be cases of failing to do something that one is, in a conveniently broad and vague sense, supposed to do. One obvious case is neglecting to execute a step in a procedure, for instance not cleaning a surface before painting it or not adding baking soda to a batch of batter. Equally obvious is the case of not fulfilling a duty or responsibility.[91]

In the last sentence, Bach isolates the vital connection between fulfilling a duty and the concept of an omission. This point was expanded further by Ashworth. Under Ashworth's definition of an omission, Ashworth proposes that it is only proper to speak of a non-doing as an omission if it constitutes a failure to carry out a duty.[92] For Ashworth, failing to perform a duty constitutes an omission.

Yet, whilst Moore's account was too broad, Ashworth's account seems too narrow. Identifying omissions as a breach of a pre-existing duty is metaphysically too strict an approach. Ashworth is identifying omissions in the context of criminal law. As well as differentiating omissions from non-doings, criminal omissions should be distinguished from mere omissions. For an omission, the existence of a duty is not essential, as an expectation might be based on a habit or a routine.

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[90] Andrew Ashworth, Positive Obligations in Criminal Law (Hart Publishing 2013) p31.
[91] Bach (n 77)
[92] Ashworth (n 90) p31.

Nevertheless, for the purpose of criminal law, the existence of a duty is an essential prerequisite for an omission. For the most part, failing to fulfil a norm will not result in criminalisation and those omissions are not of interest to criminal law. Instead, only those omissions which constitute a breach of a duty are. Under English criminal law, liability for omissions is dependent upon the existence of a duty, and there are different categories of duties recognised by the criminal law.[93]

Criminal law is not typically concerned with whether the omission was intentional or unintentional. As Bach points out "one can omit doing something intentionally or out of ignorance, forgetting, distraction, or carelessness".[94] Bach illustrates with this example:

> Take the case of not discharging a duty. A lifeguard is responsible for rescuing swimmers in jeopardy. Failing to rescue a swimmer could be intentional, say if the lifeguard sees the struggling swimmer but would rather not miss the rest of the music he is listening to. Or he could fail to rescue the swimmer because, having become engaged in a conversation, he gets distracted. Or, due to the heat, he could carelessly allow himself to nod off, not waking up until it's too late.[95]

A criminal omission rests on legal duties to act. In instances where there is no such legal duty, there is no omission under the eyes of the criminal law.[96] The situations in which a duty is said to exist will be addressed in a later chapter.[97]

To reiterate, for our metaphysical account an omission should be differentiated from a mere non-doing. A non-doing only becomes an omission if there is a violation of some norm or standard. Also, for our account omissions in general should be differentiated from omissions which are of interest to the criminal law,

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[93] See page 143.
[94] Bach (n 77).
[95] Ibid 54 and 55.
[96] Hall (n 12) p247.
[97] See page 143.

in which a breach of a prescribed duty may lead to liability under criminal law in England and Wales. Now we have clarified what constitutes an omission under criminal law, we introduce Fletcher's communicative theory which helps to shed further light on what constitutes an omission and presents a useful contrast to Moore's conception.

4) Fletcher's criminal law conception of an Omission

According to Fletcher, the main problem with Moore's conception is that there is too much emphasis on action as willed bodily movement, and an omission as the absence of action. Fletcher objects that in Moore's account, "action is analysed in isolation".[98] Fletcher names his alternative theory the "communicative concept of action".[99] According to Fletcher, it is necessary to examine the context in which a movement or non-movement takes place, in order to determine whether or not we consider such movement or non-movement to be a socially relevant action that may trigger the imposition of criminal liability.[100]

Fletcher's criticism has force. Acts and omissions consist of a lot more than just mechanical bodily movements. For those movements to make sense they should not be interpreted in abstracted isolation, but instead should be viewed in the specific social context in which they take place. The problem with Moore's conception, as articulated by Fletcher, is that Moore "examines action in abstraction from the way we act in relationships with other people".[101] Luis Ernesto Chiesa and Francisco Muñoz-Conde echo Fletcher's theory in arguing that the act or omission must not be "analysed like a metaphysical abstraction separated from its context and the social reality in which the subject acts".[102] In addition, human

[98] Fletcher (n 50) 1453.
[99] Ibid1456.
[100] George P. Fletcher, The Grammar of Criminal Law: American, Comparative and International: Volume One: Foundations (Oxford University Press 2007) p408.
[101] Fletcher (n 50) 1459.
[102] Luis E. Chiesa and Francisco Muñoz-Conde, 'The Act Requirement as a Basic Concept of Criminal Law' (2007) Pace Law Faculty Publications Paper 408.

action is an "intersubjective communication and not a simple causal or teleological process".[103]

What does this mean? Fletcher offers some helpful examples by way of elucidation. In a scenario in which a professor is teaching, and his students do not get up from their seats to slap him, we would not say that in that situation his students omitted to slap him. However, if they failed to get up from their seats after the lecture had finished, it is fair to assume that the failure to stand has some "socially relevant meaning", which cannot be gauged merely from the action of not getting up from the seat. The context in which this occurs gives meaning to the particular action.[104]

Recall Fletcher's example of a guard at Buckingham Palace remaining completely motionless, whilst tourists pose for photos with him.[105] How are we to interpret this scenario? Based on bodily movements alone, the guard's conduct seems entirely passive, and would constitute an omission from Moore's perspective. However, in context we know the guard is performing an act. Should someone attempt to break in, the guard would almost certainly do something in order to stop them. We cannot gauge if he is acting by the fact that he is standing motionless, but by viewing his behaviour in the specific social context, it becomes clear that such behaviour constitutes an act.[106] In short, whether the behaviour constitutes an act or an omission should "not be understood as a pure ontological causal or teleological process".[107] It should instead be viewed in context, as a "form of communication, as meaningful conduct that makes sense both to the person who acts and to the rest of us".[108]

Another advantage of Fletcher's metaphysical conception of action over Moore's is that acts do not get broken down into an artificial sequence of isolated and discrete

[103] Ibid.
[104] Ibid 412.
[105] Fletcher (n 50) 1461.
[106] Chiesa and Muñoz-Conde (n 102) 413.
[107] Ibid.
[108] Ibid 415.

events. Chiesa and Muñoz-Conde illustrate this with some further examples. When one is walking there is a series of steps involving the contraction of leg muscles. Breaking it down one action at a time is tedious and uninformative. However, with Fletcher's conception, one does not need to break down the activity into a sequence of isolated events, and it is clear that in the specific context the individual is walking.[109] The same occurs when one drives a car. Viewed in isolation and divorced from the context, there is a series of events such as turning the key, putting one's foot on the break, lifting up the handbrake, changing the gear stick, twisting one's head left and right etc… Once again, when viewed in the social context, such events can be unified into the single act: driving. The significance of walking and driving is not the isolated movements which accompany these activities.[110] Viewed individually, isolated movement becomes irrelevant. Under Fletcher's communicative theory of action, all the different actions are viewed as a whole in their particular social context. When this occurs, the isolated activities have communicative relevance and meaning.[111]

Fletcher's conception puts us in a better position to evaluate the legal and moral status of the particular act/omission in its social context. As Chiesa and Muñoz-Conde also observe, pulling the trigger of an unloaded gun may in some situations be viewed as a prank or joke, but if one pulled the trigger of an unloaded gun thinking it was loaded, suddenly the act has a whole new social and *legal* significance. Under Moore's conception, both instances of behaviour would be correctly identified as acts. However, without viewing the act in its proper context, it lacks any clear legal or moral significance. The act "only acquires meaning in relation with a concrete society", and every act/omission should consequently be judged in its specific social context.[112]

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[109] Ibid.
[110] With the exception if one is trying to teach a learner to drive.
[111] Chiesa and Muñoz-Conde (n 102) 417.
[112] Ibid 419.

The distinction between the two approaches can be illustrated in a euthanasia scenario. If a doctor switches off the life support machine, the movement of the fingers accurately describes such behaviour as an act. However, it does not shed light on the normative or legal questions surrounding the conduct. It doesn't answer whether the patient or the patient's family consented to such an arrangement. This would shed light on the moral status of the action. Also, it would be important for the purposes of assigning (criminal) responsibility to determine whether euthanasia is legal in the country in which the act took place. If it wasn't, consent would be irrelevant in classifying the act as a violation of criminal law. The same occurs when Hannah watches Billy drown. We should view the omission in its entire social context, and questions that need answering include whether Hannah is Billy's parent, or a stranger. This has significant legal ramifications. In countries which embrace a Good Samaritan Law, we should determine whether Hannah was in a position to help Billy. The mechanical act of Hannah watching Billy drown and doing nothing tells us that the behaviour constitutes an omission under Moore's theory. However, it does not answer the legal or moral questions surrounding such behaviour. Viewing the behaviour in its social context helps us infer the legal and moral status of the omission.

Fletcher's views have been supported by William Wilson. Like Fletcher, Wilson argues that, in addition to bodily movements, we should also consider the defendant's conduct. Wilson gives a powerful example to illustrate this point. It is part of popular legend that the Roman Emperor Nero was fiddling whilst watching Rome burn. As Wilson astutely noted, "the physical movements of Nero did not help us make any moral sense of his conduct".[113] Only when viewed in the entire context does such behaviour assume its proper significance, namely, that he was emperor and should have been more proactive in saving his people then casually playing on his fiddle.[114] It was not just the collection of bodily movements, but

[113] William Wilson, Central Issues in Criminal Theory (Hart Publishing 2002) p81.
[114] Elliott and Ormerod (n 8).

rather the context in which such movements took place that had significance. Fletcher's conception would be of greater practical value than Moore's in determining that, in the criminal law context.

From a purely ontological viewpoint, Moore's conception of acts/omissions as the product of bodily movements has many advantages. Despite metaphysics preceding normativity, Moore's metaphysical conception is unhelpful in discovering the legal and moral status of acts and omissions. As stated by Chiesa and Francisco Muñoz-Conde, Fletcher's communicative theory is better for that purpose as it "situates the conduct of the actor within the particular context in which it took place, in order to understand its social and legal significance".[115]

For this thesis, the best metaphysical conception of acts and omissions must serve the purpose of assigning criminal responsibility. The problem with Moore's theory is that, rather than illuminating, it obscures the legal and moral status of acts and omissions. The distinction between an act and omission does not lie solely in the movement, but rather in the social context under which it takes place. Fletcher's communicative theory succeeds in this endeavour, and aptly situates each act and omission in its proper social context. Clarifying whether certain behaviour qualifies metaphysically as an omission may help resolve conceptual uncertainty. Nevertheless, Fletcher's account is better in answering whether the behaviour has any moral or legal significance.[116]

It is important to note that Fletcher's contextual approach is not a form of nominalism or definition by stipulation. It is not an abandonment or displacement of metaphysics, but rather a refinement. The purpose of the metaphysical approach for this thesis is to identify which omissions the law should criminalise. Moore's metaphysical account is relatively fine grained, in comparison to Fletcher's which is coarse grained. For the purpose of assigning criminal responsibility, and

[115] Chiesa and Muñoz-Conde (n 102) 412.
[116] Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 University of Pennsylvania Law Review 1455.

for a jurisprudential analysis of omissions, Fletcher's coarse grained conception is more useful in terms of application to the legal context. The problem with Moore's account is that it views actions in abstractions, and is unhelpful in placing the behaviour in its proper context. Fletcher's conception takes into account more contextual factors, and therefore Fletcher's conception will be adopted for this thesis. Fletcher's conception will be used to help clarify the normative issues surrounding omissions.

Conclusion

1) We first established that metaphysics matters, and a metaphysical analysis was needed to clarify the conceptual ambiguity surrounding omissions, and to define what constitutes an omission.

2) In exploring the best metaphysical account of omissions for this thesis, we examined Moore's metaphysical conception. Moore's conception of acts and omissions is according to Brahman "impressively thorough and rich in scholarly detail", and Moore therefore "deserves great credit for bringing to the fore, with force and clarity, basic issues at the intersection of the philosophy of action and the criminal law".[117] Moore's conception of acts/omissions as the product of bodily movements is an extremely useful starting point, and has many analytical virtues. This chapter has canvassed criticisms of Moore's conception, as well as Moore's replies. Whilst for the most part Moore successfully silences his critics, his metaphysical theory will not be adopted as it is too broad.

3) For our chosen metaphysical account we differentiated an omission from a non-doing. Agents are not, generally speaking, criminally responsible for a non-doing. It was also argued that, for the purpose of criminal law, criminal omissions should be distinguished from mere omissions. Criminal omissions will be the primary focus of this thesis. Fletcher's communicative theory is adopted, as it places the

[117] Michael E. Brahman, 'Moore on Intention and Volition' (1994) 142 University of Pennsylvania Law Review 1705.

omission in its wider social context and in so doing helps us gain insight regarding the normative issues surrounding omissions.

Despite the importance of having a clear metaphysical account, in terms of determining whether a Good Samaritan law should be implemented in England and Wales metaphysical analysis is only the starting point. Freeman advocates that it is "not only expedient, but also desirable to avoid using the metaphysics of action as much as possible in the public realm", and goes on to argue that it "should be as a last resort, and then only to the degree necessary to resolve judicial and moral issues".[118] Freeman is persuasive in surmising how metaphysics in isolation cannot determine which omissions should be criminalised.

> Metaphysics should be seen not as the guide, but as the handmaiden to democratic adjudication and legislation. It should be used to resolve conceptual difficulties in principles and norms which themselves have their bases not in metaphysical considerations, but in the practical necessities and interests of democratic citizens." [119]

Now that we have clarified metaphysical issues, we will turn our attention to the normative questions surrounding omissions. The next chapter will explore the nature of our moral duties and the ethical significance of failing to discharge them.

[118] Freeman (n 116) 1457.
[119] Ibid 1460.

Chapter 2 - Omissions: A moral analysis

Introduction

Through a metaphysical analysis, we were able to gain insight as to what constitutes an omission, how an omission differs from a mere non-doing, as well as differentiating omissions in general, and omissions which are of interest to the criminal law. Nevertheless, metaphysics is only the starting point. In order to determine whether there is a prima facie case for introducing a Good Samaritan law, a moral analysis is necessary, and will be the focus of this chapter.

1) Should a moral distinction be made between an act and an omission?

Moore and many other critics argue that moral criteria should be used to differentiate an act from an omission. Opinions differ as to whether there is a moral difference. As summarised by Elliott and Ormerod:

> The views lie on a spectrum from those who suggest, for example, that there is no moral difference between killing and letting die, to those who argue that the difference is not only morally intuitive but fundamental.[1]

According to Moore, "wrongful as it is to let the child drown, it is much more wrongful to drown the child. Drowning it makes the world a worse place whereas not preventing its drowning fails to improve the world".[2] Moore describes how negative duties are more stringent than positive duties as, "we do much more wrong when we kill than when we fail to save, even when such failure violates a positive duty to prevent death".[3]

[1] Tracey Elliott and David Ormerod, 'Acts and Omissions – A Distinction Without a Defence?' (2008) 39 Cambrian Law Review 40.
[2] Michael S. Moore, Act and crime: The Philosophy of Action and Its Implications for Criminal Law (Oxford University Press 1993) p30.
[3] Ibid p59.

Intuitively, we do make an everyday distinction between acts and omissions. Our psychological and social reactions to criminal acts are different, and we are almost invariably less condemnatory towards omissions causing the same result as acts.[4] Moore makes a moral distinction between an act and omission. Moore argues that the difference between an act and an omission "lies in the differential force of our negative obligations not to make the world worse, on the one hand, and either our positive obligations, or our supererogatory ideals, to make it better, on the other".[5] According to Moore, not making the world worse is a more stringent duty than making it better. Philippa Foot also argued that, "letting die is contrary to charity but not to justice - that is, letting die is not a matter of violating rights". This is to be contrasted to killing which does violate rights and is contrary to (the virtue of) justice. Hence, the person who acts and kills is more blameworthy than the person who omits and lets die, because the omitter who lets someone die fails to make the world better, whereas the actor who kills makes the world a worse place. Omissions are held to be morally less culpable than acts on this basis, as they fail to improve the world rather than making it worse.[6]

Nevertheless, as argued by Williams, "there may be instances where our blood boils at the same temperature on account of both". Williams illustrates this in the following scenario:

> Parents who are charged with killing their baby (i) by smothering it or (ii) by starving it to death. In this instance we are likely to feel more angry and sad about the slow starvation (an omission) than about the comparatively merciful infliction of death with a pillow.[7]

[4] Andrew Ashworth, Positive obligations in criminal law (Hart Publishing 2013) p81.
[5] Moore (n 2) p54.
[6] Andrew P. Simester, 'Why Omissions are Special' (1995) 1 Legal Theory 311.
[7] Glanville Williams, 'Criminal Omissions – The Conventional View' (1991) 107 Law Quarterly Review 92.

This thought is seconded by Chiesa and Muñoz-Conde who mention how the mother who contributes to her new-born child's death by intentionally refusing to feed her is as deserving of blame as the mother who contributes to her baby's death by feeding her food that makes her ill.[8]

To generalise the point, all violations of positive duties are morally worse than those of negative duties. As Freeman illustrates, the proposition "wrongful as it is to let the child drown, it is much more wrongful to steal the child's purse (or pacifier, or any other trinket)" is false. Freeman argues that, "some infringements of others' rights and privileges are trivial in comparison to the great moral wrong we do in completely ignoring others and treating them as if they (or we) did not exist". Freeman also disagrees with Moore's claim that negative duties should not be condemned as they fail to make the world worse, persuasively counter-arguing that "many failures to improve the world enormously outweigh in moral heinousness many acts that make it worse".[9] Freeman states:

> Surely my failure to save my drowning nephew is morally worse than my breach of a legally binding contract with his mother to sing to his sister and tuck her into bed, or (to take a nonlegal example) my lying to my spouse about my whereabouts last night. Perhaps I make the world a worse place by breaching these obligations (suppose the child suffers from insomnia as a result of my failure, or my marital deceit undermines my marriage's integrity), but this is nowhere near the magnitude of the wrong that I commit when I fail to save an innocent person at virtually no inconvenience to myself. It is simply a false moral principle that all acts that make the world a worse place outweigh in wrongness all refusals to improve the world.[10]

[8] Luis E. Chiesa and Francisco Muñoz-Conde, 'The Act Requirement as a Basic Concept of Criminal Law' (2007) Pace Law Faculty Publications. Paper 408.
[9] Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 U. Pa. L. Rev. 1462.
[10] Ibid 1464.

Therefore, there are manifold examples in which omissions can be as, or more, wrongful than acts. Nevertheless, such counterexamples are the exception. On the whole, we have much stronger inhibitions against wrongful actions than wrongful omissions. For the majority of situations, Williams observes:

> We almost always perceive a moral distinction between (for example) killing a person and failing to save his life (the former being the worse); and similarly between other acts and corresponding omissions.[11]

Foot also distinguishes an act and an omission in terms of "what we owe people in the form of aid and what we owe them in the way of non-interference".[12] Since latter duties are more stringent, it is therefore morally more reprehensible if Hannah drowned the child, than merely watching him drown. In such scenarios, one has a greater duty to abstain from the positive duty (act) than the negative duty (omission) counterpart.[13] McLachlan further differentiates between the two types of scenario:

> Sometimes, one could save one child from drowning only by neglecting some other drowning child. Contrariwise, it is not the case that one can avoid murdering one particular child only by murdering another one.[14]

Granted that Hannah watching Billy drown is morally less blameworthy than if she actively drowned Billy. Despite that, does she still have a moral duty to rescue Billy? In order to gauge whether Hannah has a moral duty, we will first consider whether individuals owe a more general moral duty of beneficence to other people.

2) Do we owe a duty of beneficence?

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[11] Williams (n 7) 95.
[12] Philippa Foot, Moral dilemmas and other topics in moral philosophy (Clarendon Press 2002) p273.
[13] Freeman (n 9) 1469.
[14] Hugh V. McLachlan, 'The Ethics of Killing and Letting Die: Active and Passive Euthanasia' (2008) 34 Journal of Medical Ethics 636-638. Of course, there are limited examples in which this is untrue e.g. in Sophie's Choice.

A legal duty to rescue, in the form of a Good Samaritan law, must be contrasted with a general duty of beneficence. As described by Edwards, a "duty of beneficence generates moral obligations to act in ways which promote the well-being of others".[15] A duty of beneficence will require us to enter into the debate about the moral duties owed by an individual. Does morality impose other-regarding duties? Not according to an ethical egoist.

a) What is ethical egoism?

An ethical egoist argues that "our moral obligation is to seek one's own self-interest, and the rightness or wrongness of our conduct depends on us fulfilling our self-interest".[16] Ethical egoism should be contrasted with psychological egoism, which states how humans are predisposed to act in a way which fulfils their self-interest. Instead of explaining how we behave, ethical egoism describes how we ought to behave.

Universal ethical egoism stipulates that "everyone ought always to do those acts that will best serve his or her own best self-interest, even when it conflicts with the interests of others".[17] Under universal ethical egoism, Hannah should act in a way which maximises her self-interest, even when it conflicts with others. If saving Billy is not in her best interest, Hannah has no moral duty to undertake such a venture.

Ethical egoism should also be contrasted with altruism, which was defined by Daniel Batson as a "motivational state with the ultimate goal of increasing another's welfare".[18] An altruist would argue that Hannah has a duty to rescue Billy, as when we see a drowning child, "something emotional in ourselves, something admirable and which precedes reason, immediately, and without any

[15] Steven D. Edwards, Nursing Ethics: A Principle-based Approach (Palgrave Macmillan 1996) p42.
[16] Louis P. Pojman, Ethics Discovering Right and Wrong (7th edn, Wadsworth Publishing 2011) p82.
[17] Ibid p65.
[18] Daniel Batson, Altriusm in Humans (Oxford University Press 2011) p20.

calculation of which we are aware, concludes it is the right thing to do. It feels good. It is what we would want someone else to do for us".[19] The next section will examine some of the advantages in adopting an ethical egoist position.

b) Arguments in favour of ethical egoism

The foremost proponent of ethical egoism, Ayn Rand, describes how "the achievement of his own happiness is man's highest moral purpose".[20] For Rand, "man's proper values and interests, that concern with his own interests, is the essence of a moral existence, and that man must be the beneficiary of his own moral actions".[21]

Rand defines altruism as the "the placing of others above self, of their interests above one's own."[22] She describes how instead of being a virtue, altruism should be discouraged as it leads to the undermining of individual worth, as we end up living our lives for the sake of others. According to Rand, when an individual becomes an altruist, "his first concern in the realm of values is not how to live his life, but how to sacrifice it."[23] Rand describes how this demeans the individual and undermines their value. We should instead focus on our own well-being which should be our foremost goal. Rand's argument is superficially cogent. Self-love is a virtue and Rand is persuasive when she argues that we should not abandon our projects and dreams, and live our lives for the sake of others. If an individual were to forfeit all their desires and whims for their partner, they would be disparagingly labelled as a doormat, and such acts would rightly be considered as demeaning. Such an individual would likely be taken advantage of, and lose respect from others. Therefore, Rand argues that it is our moral duty to reject altruism, and become an ethical egoist.

[19] Dale A. Johnson, The Authentic Life (New Sinai Press 2014) p36.
[20] Ayn Rand, The Virtue of Selfishness (Signet 1964) p30.
[21] Ibid px.
[22] Ayn Rand, For the New Intellectual: The Philosophy of Ayn Rand (New York: Signet 1961) p36.
[23] Rand (n 20) p49.

Many attempted criticisms of ethical egoism are not persuasive. Ethical egoism has been criticised as failing as a moral principle due to it not being universal. It is argued that no true ethical egoist can truly advocate that each person act in their own self-interest as if they did, it would inevitably conflict with their own interests.[24] This can be illustrated in the following scenario. Jack and Jill are both applying for the same job. Jack is a staunch ethical egoist, and therefore desires to succeed in getting the job. However, if Jack claims to be a universal ethical egoist, he must therefore consistently advocate that Jill maximises *her* best interests, despite her competing with Jack. The fact that ethical egoism has no way of adjudicating conflicts is a powerful criticism.

However, this criticism fails once we separate our beliefs from our desires. This is the position taken by Jesse Kalin who likens the situation to a sports event. In a boxing match, you believe and recognise that your opponent will do his very best to win the match, however, you desire and hope for your own victory. Kalin describes how in chess:

> I may see how my chess opponent can put my king in check. That is how he ought to move. But believing that he ought to move his bishop and check my king does not commit me to wanting him to do that, nor to persuading him to do so. What I ought to do is sit there quietly, hoping he does not move as he ought.[25]

Extrapolating from that example, Jack recognises Jill's right to do her very best to succeed in the interview, whilst still desiring his own success.

Another criticism levelled at ethical egoism is that it justifies a whole host of immoralities, and encourages unimpeded hedonism. If one had the inclination to

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[24] Pojman (n 16) p92.
[25] Jesse Kalin, "In Defense of Ethical Egoism" in David Gauthier, *Morality and Rational Self Interest* (Englewood Cliffs 1970) p74.

spend days taking drugs, gamble, squander his talents, ethical egoism would encourage such behaviour, as the individual is pursuing his conception of pleasure.

This criticism also fails, as pursuing such activities is not in an individual's best interest. As stated by Rachels, "ethical egoism does not imply that in pursuing one's interests one ought always to do what one wants to do, or what gives one the most pleasures in the short run".[26] Whilst it endorses being self-interested, it does not endorse foolishness or indeed simplistic conceptions of welfare as hedonism.

Even helping others might be promoted by ethical egoism, as "it may happen in many instances that your interests coincide with the interests of others".[27] If helping others benefits oneself, than an ethical egoist will encourage such acts. However, the only benefit in such an action is that it benefits oneself, as "benefit to others is not what makes the act right, what makes the act right is, rather, the fact that it is to one's own advantage".[28]

Rachels summarises how many conventional moral virtues can be justified by an ethical egoist. It will not be in our best interest to harm others, as it would lead to us being disliked, and individuals will not act in our self-interest if we harm them. Also, we should refrain from lying as we would lose people's trust and it would severely damage relationships which could have been of great benefit to us. It is similarly advantageous to keep promises as by acting in such a way, we can rely on others to keep their promises, and therefore enter into beneficial relationships with them.[29]

David Brink refers to this type of calculation as strategic egoism, arguing that:

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[26] James Rachels, The Elements of Moral Philosophy (4th edn, McGraw-Hill Publishing Co 2002) p78.
[27] Ibid.
[28] Ibid.
[29] Ibid p83.

> It is in the long term interest of agents to develop, maintain and act on other- regarding attitudes because compliance with familiar other regarding moral norms of restraint, cooperation and aid is mutually advantageous.[30]

Under strategic egoism, "the way to enjoy the benefits of others' compliance is to be compliant oneself".[31] Paradoxically, it may be in our self-interest, not to act too self-interested. Relating ethical egoism to the drowning scenario,[32] an ethical egoist may welcome the implementation of a duty to rescue, albeit not on the moral basis of rescuing another. By Hannah rejecting a duty of easy rescue, she will have to face up to the possibility that she may need the help that she denies others, and she "is as likely to derive greater benefit from reciprocal recognition of this duty than the burden it imposes on her".[33] Therefore, it may be in her best interests to rescue Billy.

Ethical egoists advocate that it is more beneficial for society for us to look after our best interests, and become our best selves. As famously proposed by Howard Thurman:

> Don't ask what the world needs. Ask what makes you come alive, and go do it. Because what the world needs is people who have come alive.[34]

This view was also supported by Robert G. Olson, who argued that "the individual is most likely to contribute to social betterment by rationally pursuing his own best long-range interests."[35] Therefore, ethical egoism has been championed as prioritising the supreme value of the individual, in contrast to altruism which

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[30] David O Brink, 'Self Love and Altriusm' (1997) 14 Social Philosophy and Policy 130.
[31] Ibid 125.
[32] See page 1.
[33] Freeman (n 9) 1460.
[34] http://www.goodreads.com/quotes/6273-don-t-ask-what-the-world-needs-ask-what-makes-you accessed 1st February 2016.
[35] Robert G. Olson, The Morality of Self-Interest (Harcourt, Brace and World 1965) p552.

devalues the individual and places an unrealistic expectation upon the individual to sacrifice his desires for the sake of others.

Despite these cogent arguments, there are stronger counter arguments as to why universal ethical egoism should be rejected as a moral position.

c) Why ethical egoism should be rejected

Constantly sacrificing ourselves for the sakes of others degrades the individual and should be rejected. Tending to one's own needs is the better alternative, and out of the two positions, Rand is correct in endorsing ethical egoism over altruism.

However, Rand presents a false choice. As Rachels argues, by presenting altruism as a doctrine in which "one must be ready to sacrifice oneself totally any time anybody asks it", then "any view, including Ethical Egoism will look good by comparison".[36] These are not the only two choices one might adopt. Moreover, the extreme version of altruism that Rand presents is a gross distortion.

What, then, is altruism? Ralph Waldo Emerson declared that, "it is one of the beautiful compensations of life that no man can sincerely try to help another without helping himself."[37] Many artists, athletes, philanthropists, and scientists become wealthy and benefit many through their actions. However, their motivation is rarely purely altruistic, as they do what they do because it rewards and fulfils them.[38] If such behaviour benefits us, can it be considered altruism? Is it merely enlightened self-interest? Does one's intention need to be purely selfless for her action to be considered altruistic?

[36] Rachels (n 26) p90.
[37] http://www.goodreads.com/quotes/29365-it-is-one-of-the-beautiful-compensations-of-life-that accessed 1st February 2016.
[38] Tibor R. Machan, 'The Ethics of Benign Selfishness' (2013) 5 Contemporary Readings in Law and Social Justice 20.

The primary motivation underlying one's behaviour is important in determining whether such behaviour is altruistic or egoistic. Often the benefits to one's self are not the ultimate goal of altruistic behaviour, but are rather the unintended side effects. If Hannah rescues Billy, she will probably derive great personal satisfaction. It may make her feel good to receive adulations from her friends, and co-workers, as someone who selflessly saved a child. Nevertheless, when confronted with such a situation, an individual's primary motivation is almost invariably to rescue the drowning child, and if they are successful, the good feelings that occur afterwards are a by-product. Therefore, despite the joy concomitant in helping someone, such behaviour is still considered altruistic. Batson concurs that when performing an altruistic act, "benefit to the other is an ultimate goal and any self-benefits are unintended consequences".[39] Of course, if Hannah's primary motivation in helping Billy were to gain plaudits from her friends, benefit to the other was "an instrumental means to reach the ultimate goal of benefiting oneself".[40] In this instance, such behaviour is egoistic. Therefore, in determining whether an action is altruistic, it is important to determine whether the primary motivation is to benefit others.[41]

In the social world, the ethical egoist is at a disadvantage. Can he ever experience true friendship? The basis of true friendship often involves a degree of self-sacrifice, in which we sacrifice our desires for those we love. If a close friend calls us at an inconvenient time to share with us something which is troubling them, such a call may conflict with our interests and an ethical egoist would advocate avoiding the call. Of course, an ethical egoist may argue, to the contrary, that it is in our self-interest to take the call for the sake of preserving the friendship. After all, an ethical egoist may argue that it is in "our self-interest to have friends and loving relations, without which life lacks the highest joy and meaning".[42]

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[39] Batson (n 18) p89.
[40] Ibid.
[41] Peter Singer, The Expanding Circle: Ethics and Sociobiology (Clarendon Press 1981) p43.
[42] Pojman (n 16) p93.

However, it is unlikely that an ethical egoist can ever experience true friendship, as to be a true friend, it is often necessary to have an altruistic disposition. As argued by Pojman:

> A true friend is one who is not always preoccupied about his or her own interest in the relationship but who forgets about herself altogether, at least sometimes, to serve or enhance the other person's interest.[43]

Paradoxically, to "reach the goal of egoism one must give up egoism and become (to some extent) an altruist, the very antithesis of egoism".[44] Of course, an ethical egoist could advocate pretending to behave like an altruist in order to reap the benefits. However, such behaviour is inauthentic, difficult to maintain, and fundamentally lacking in integrity.

As mentioned, adhering to many conventional moral virtues is advocated by an ethical egoist as compliance with conventional morality in often in our best interests. However, what if it behaving in such a way is not in our best interest? It is agreed by many that we have a duty to care for the environment for future generations, to preserve scare resources, and not to pollute. An ethical egoist would argue that we have no duty to posterity, however, as posterity has done nothing to serve me. However, "most of us do find it intuitively obvious that we have obligations to future people, even if they cannot reciprocate".[45]

What if an individual could gain great benefits from harming another? Consider the following scenario. Bob is driving home late at night from a party, and is over the alcohol limit. He accidently hits a vagrant who is rendered unconscious, and therefore would not be able to identify him. Nobody saw the incident take place, and there is no CCTV anywhere. If Bob were to report the accident to the police, he would lose his licence, and potentially face imprisonment. Bob is a taxi driver

[43] Ibid.
[44] Ibid.
[45] Ibid p94.

and his livelihood is invested in keeping his licence. Bob also has a pregnant fiancée, and he needs to work to pay for the forthcoming wedding and baby. It is in Bob's self-interest to carry on driving, and an ethical egoist would agree with him.

Yet, from a deontologist point of view, Bob has other-regarding duties towards the vagrant that go beyond his self-interest. He should ensure that he tends to the vagrant's needs, and face the consequences of his recklessness. This scenario illustrates that the obligations to refrain from harming another cannot be derived solely from ethical egoism, as "not all our moral obligations can be explained as derivable from self-interest".[46] In some situations, if we can profit by harming others, ethical egoism would not prohibit us, and may actively encourage us to maximise our self-interest by harming others. As reasoned by Rachels, "we have 'natural' duties to others simply because they are people who could be helped or harmed by what we do".[47] Individuals are ends in themselves and should not be used purely as means to serve us. If an action seriously harms another that in itself is a reason why we should refrain from such behaviour, regardless of whether it benefits ourselves.

Another reason why ethical egoism should be rejected is that it is akin to racism. Rachels observes how racism divides individuals into specific groups, and places greater importance on the rights of some groups over the rights of others. This thinking is used to justify nationalism and discrimination. Such positions can only be vindicated on the basis that there is "is some factual difference between them that is relevant to justifying the difference in treatment".[48] Such thinking was used to justify racism in the past, as blacks were perceived as inferior to whites due to them being "stupid, lacking in ambition and the like".[49] Clearly, such a way

[46] Rachels (n 26) p84.
[47] Ibid p77.
[48] Ibid p89.
[49] Ibid.

of thinking is grotesque and untrue. Rachels compares racism to ethical egoism as the latter divides the population into two categories, "ourselves and all the rest".[50] Rachels then questions what justifies us in prioritising our interests over the interests of others. Rachels asks:

> Am I more intelligent? Do I enjoy my life more? Are my accomplishments greater? Do I have needs or abilities that are so different from the needs or abilities of others? In short, what makes me so special? Failing an answer, it turns out that Ethical Egoism is an arbitrary doctrine, in the same way that racism is arbitrary. And this, in addition to explaining why Ethical Egoism is unacceptable, also sheds some light why we should care about others.[51]

Rachels claims that "it is this realisation that we are on a par with one another, that is the deepest reason why our morality must include some recognition of the needs of others, and why, then, Ethical Egoism fails as a moral theory".[52]

Our needs are important but so are the needs of others, so we should "try and reconcile the demands of self-interest and other-regarding morality".[53] The importance of the needs of others is why Rand's description of altruism should be rejected: "even if we should reject the extreme ethics of altruism, it does not follow that we must accept the other extreme of Ethical Egoism, because there is a middle way available".[54] In many instances, self-love is a commendable virtue, however, it should not be prioritised "at the expense of other people's legitimate interests".[55] Our interests, as well as the interests of others are important, and that middle way involves us balancing each set of interests against the others.

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[50] Ibid.
[51] Ibid.
[52] Ibid p90.
[53] Brink (n 30).
[54] Rachels (n 26) p90.
[55] Pojman (n 16) p90.

How do we balance these interests? How far do these other-regarding duties of beneficence extend? Do these other-regarding duties apply only to intimate friends and family, or do they also extend to strangers? A much discussed example in the literature concerns overseas aid. This is pertinent to the present discussion as it is a particularly powerful example of why we should care about strangers, and why we should care about other people as a consideration of justice rather than charity. It is argued that individuals have these duties not because of charity or supererogation, but because justice demands it. But then further questions arise. Should such a duty be bound by geographical restrictions? What are the practical limitations? Should it be an individual and informal duty, or a collective, legally enforceable duty of beneficence? Should this duty be enforced by the state as opposed to being left to the individual? Using overseas aid as an example, the next section examines what limitations should be placed upon a general duty of beneficence.

3) How are duties of beneficence circumscribed?

Millions of individuals are living today in conditions of extreme poverty, whilst, "at the same time, we witness an unprecedented accumulation of wealth and technological capabilities in the hands of affluent people in industrialized countries".[56] Gilabert states that, "it is possible, and indeed not very expensive, for the world's rich to assist the world's poor to end their ruinous destitution".[57] Many moral theorists propose a duty to aid the destitute. The seventeenth century philosopher John Locke described how the "first and fundamental natural Law is the preservation of the Society, and of every person in it."[58] According to Locke, "God requires [a man] to afford to the wants of his Brother."[59]

For Freeman:

[56] Pablo Gilabert, 'Contractualism and Poverty Relief' (2007) 2 Social Theory and Practice 303.
[57] Ibid 289.
[58] John Locke, Two Treatises of Government (Peter Laslett: Student edn 1988) p355-56.
[59] Ibid.

> Any moral theory that omits the duty of mutual aid, or either of its components, is fundamentally flawed. Moreover, any legal system that does not in some way enforce these moral duties is also flawed. Moral duties of mutual aid are matters of minimal decency, required as a matter of mutual respect for the humanity of others.[60]

The next section considers a famous and controversial account of a duty of beneficence inscribed to Peter Singer.

a) Singer's principle of benevolence

In 1971, Peter Singer wrote an article in response to the many people dying in East Bengal due to inadequate food, shelter and medical care. Such individuals were living in absolute poverty which McNamara, the President of the World Bank, described as:

> A condition of life so characterized by malnutrition, illiteracy, disease, squalid surroundings, high infant mortality, and low life expectancy as to be beneath any reasonable definition of human decency.[61]

Singer began by proposing that "suffering and death from lack of food, shelter, and medical care are bad", and argued that "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it".[62] Singer went on to explain how by significant moral importance, he meant, "without causing anything else comparably bad to happen, or doing something that is wrong in itself, or failing to promote some moral good, comparable in significance to the bad thing that we can prevent".[63]

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[60] Freeman (n 9).
[61] The World Development Report 1978. https://openknowledge.worldbank.org/bitstream/handle/10986/5961/WDR%201978%20-%20English.pdf?sequence=1&isAllowed=y accessed 2nd February 2016.
[62] Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 Philosophy and Public Affairs 231.
[63] Ibid.

Singer described a scenario in which, if one is walking past a shallow pond and witnesses a child drowning, one "ought to wade in and pull the child out".[64] Despite the inconvenience this may result in, such as getting one's clothes dirty, or missing an important appointment, Singer emphasised that this is insignificant in comparison to the death of the child. Applying this principle to the situation in East Bengal, Singer argued that the same principles applied as it "makes no moral difference whether the person I can help is a neighbor's child ten yards from me or a Bengali whose name I shall never know, ten thousand miles away".[65] Also, "the principle makes no distinction between cases in which I am the only person who could possibly do anything and cases in which I am just one among millions in the same position".[66] According to Singer, a duty of beneficence is in principle not restricted by proximity or distance.

This is not to deny the pragmatics of proximity. If the situation is close at hand, "we are in a better position to judge what needs to be done to help a person near to us than one far away, and perhaps also to provide the assistance we judge to be necessary".[67] However, even when individuals are far away, we still have a moral duty as "instant communication and swift transportation have changed the situation" and "expert observers and supervisors, sent out by famine relief organizations or permanently stationed in famine-prone areas, can direct our aid to a refugee in Bengal almost as effectively as we could get it to someone in our own block".[68] Modern communication has negated the possibility of limiting moral responsibility, especially with the (later) advent of the internet. Due to this, Singer sees no justification for "discriminating on geographical grounds".[69]

[64] Ibid.
[65] Ibid 232.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.

Singer does recognise how, under his principle, the "traditional moral categories are upset", as the "distinction between duty and charity cannot be drawn, or at least, not in the place we normally draw it".[70] Singer noted that giving money to a Bengal relief fund would generally be viewed as an act of charity with the donor praised for his generosity. By viewing such an act as charity, the "charitable man may be praised, but the man who is not charitable is not condemned".[71] Typically, we do not feel ashamed or guilty if we spend money on gifts, rather than giving to aid agencies. Instead, Singer advocates that individuals living in affluent countries "ought to give money away, rather than spend it on clothes which we do not need to keep us warm", and to do so is "not charitable, or generous", as it is wrong not to do so.[72] This has led to what Miller refers to as the "radical conclusion" in which, "everyone has a duty not to spend money on luxuries or frills, and to use the savings due to abstinence to help those in dire need".[73]

b) Is Singer's principle too demanding?

As astutely noted by Arneson, under Singer's principle:

> Even after one has donated most of one's income each month to world poverty relief, one could still donate more, and should do so according to the principle. For after all, the further reduction in one's available spending money does not incur anything that is comparable in badness to the loss that occurs to those in need of charitable relief if one's extra monthly donation is not forthcoming.[74]

Consequently, Singer's principle has been criticised as being far too onerous on individuals, by placing an undue burden and requiring an unrealistic degree of self-

[70] Ibid 235.
[71] Ibid.
[72] Ibid.
[73] Richard W. Miller, 'Beneficence, Duty and Distance' (2004) 4 Philosophy and Public Affairs 360.
[74] Richard J. Arneson, "Moral Limits on the Demands of Beneficence" in Deen K. Chatterjee, *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press 2004) p33.

sacrifice. As questioned by Ashworth, "must I sell my car and my house, live at subsistence level and devote all my surplus earnings and time to preventing so many people from 'sleeping rough' in London, or to provide towards the relief of starvation in Africa?"[75] This is considered too unrealistic. As argued by Williams:

> We cannot do everything, and it would be absurd to expect us to try. When we decide what to do, we are entitled to acknowledge that the content of our own lives is valuable to us intrinsically and not merely instrumentally for the sake of the rest of the world.[76]

Is adopting Singer's principle absurd? Doubtless it intuitively strikes one as far too demanding, austere, and contrary to human nature. Kagan is correct in noting how, "our ordinary moral intuitions rebel at this picture", as "we want to claim that there is a limit to what morality can require of us".[77] It is true that "people are not trained to accept anything close to the demands of the Singer Principle", and that their "intuitive responses instilled by processes of socialization pull against acceptance of it and compliance with it".[78]

Nevertheless, the fact that such a proposal seems intuitively wrong does not necessarily mean it is false or unfit for purpose. As observed by Kagan, "the mere fact that our intuitions support some moral feature hardly constitutes in itself adequate philosophical justification".[79] The fact that Singer's principle conflicts with our personal concerns, and requires a huge amount of self-sacrifice, is not in itself adequate justification for rejecting it. It may even be due to the fact that we are "socialized in a bad society that grossly underestimates the true moral

[75] Andrew Ashworth, 'The scope of criminal liability for omissions' (1989) 105 Law Quarterly Review 430.
[76] Williams (n 7) 93.
[77] Shelly Kagan, 'Does Consequentialism Demand too Much? Recent Work on the Limits of Obligation' (1984) 13 Philosophy and Public Affairs 243.
[78] Arneson (n 74) p36.
[79] Kagan (n 77) 245.

demands of beneficence".[80] Singer acknowledges that his argument might be viewed as too demanding, and consequently "the whole way we look at moral issues - our moral conceptual scheme - needs to be altered, and with it, the way of life that has come to be taken for granted in our society".[81] Therefore, "if we are to go beyond mere intuition mongering",[82] we need to explore the philosophical and pragmatic reasons against adopting Singer's principle, and so limiting the duty of beneficence. If that proves to be unsuccessful, Kagan articulates the implication:

> If the intuition that consequentialism demands too much remains impossible to defend, we may have to face the sobering possibility that it is not consequentialism, but our intuition, that is in error.[83]

Singer proposes that, unless his principle "is rejected, or the arguments are shown to be unsound, I think the conclusion must stand however strange it appears".[84] The rest of this chapter will evaluate the merits of this principle, and whether it should be applied to our problem. Singer's approach is not just one which recommends itself to consequentialists. It also arises in versions of deontological theory. One modern philosopher who has given extended consideration to these types of questions is Thomas Scanlon. We will contrast Scanlon's contractualism theory with that of Singer's and investigate whether contractualism also endorses a duty of beneficence.

c) Scanlon's duty of contractualism

A detailed description of Scanlon's contractualism is beyond the scope of this chapter. The following analysis will only be for the purpose of determining whether

[80] Richard J. Arneson, "What Do We Owe to Distant Needy Strangers?" in Jeffrey A. Schaler, *Peter Singer Under Fire: The Moral Iconoclast Faces His Critics* (Chicago and LaSalle: Open Court, 2009) p270.
[81] Singer (n 62).
[82] Kagan (n 77).
[83] Ibid.
[84] Singer (n 62).

contractualism endorses a duty of beneficence, and whether and how the duty should be limited. The motivating aim of contractualism is not necessarily promotion of the good. Instead, it develops an account of justice rooted in being able to justify our conduct to one another. As stated by Scanlon, "what is basic to contractualism ... is the idea of justifiability to each person (on grounds that he or she could not reasonably reject)".[85] The foundation of Scanlon's contractualism is that:

> An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement.[86]

What constitutes reasonable rejection? One might object due to harm suffered. However, the mere fact that a principle impacts negatively on you, is not in itself sufficient cause for reasonably rejecting it. One must ascertain how such a principle impacts on others and consider "various individuals' reasons for objecting to that principle and alternatives to it".[87]

If a principle imposes a burden on you, but every alternative poses a greater burden on someone else, it cannot reasonably be rejected. Under contractualism, individuals are to an extent motivated by self-regard, but to a greater extent should be motivated by what we owe to others, as judgements of reasonable rejection are always comparative.[88] Therefore, a principle is deemed reasonable if no one can reasonably reject it. The fact that it imposes a burden upon you is not in itself sufficient grounds for rejecting it.[89]

d) How does contractualism differ from utilitarianism?

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[85] Thomas M. Scanlon, What We Owe to Each Other (Harvard University Press 1998) p390.
[86] Ibid 153.
[87] Ibid 229.
[88] Ibid 195.
[89] Elizabeth Ashford, 'The Demandingness of Scanlon's Contractualism' (2003) 113 Ethics 285.

Contractualism is similar to Kantian ethics in that it treats individuals as ends in themselves. Owing to the fact that "the justifiability of a moral principle depends only on various individual reasons for objecting to that principle and alternatives to it",[90] they must be objecting on their own behalf, and not on a group's behalf.[91] This differs from utilitarianism, as under utilitarianism, "imposing high costs on a few could always be justified by the fact that this brought benefits to others, no matter how small these benefits may be as long as the recipients are sufficiently numerous".[92] The (fundamental) difference between the two approaches can best be seen in a thought experiment devised by Scanlon:

> Suppose that Jones has suffered an accident in the transmitter room of a television station. Electrical equipment has fallen on his arm, and we cannot rescue him without turning off the transmitter for 15 minutes. A World Cup match is in progress, watched by many people, and it will not be over for an hour. Jones's injury will not get any worse if we wait, but his hand has been mashed and he is receiving extremely painful electrical shocks. Should we rescue him now or wait until the match is over?[93]

Should the quantity of people watching determine our decision? Due to the fact that contractualism does not aggregate pleasure and pain, "there is no collective point of view that combines the frustration of all those viewers"[94] against the pain suffered by Jones. Therefore, we would make a comparison on an individual basis between Jones and each individual watching the World Cup. In comparison to the agony suffered by Jones, it becomes clear that his pain far exceeds the frustration suffered by a viewer, and for that reason none of the millions of watchers could reasonably object to the match being interrupted. Under utilitarianism, in which

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[90] Scanlon (n 85) p229.
[91] Ashford (n 89) 300.
[92] Scanlon (n 85) p230.
[93] Ibid 235.
[94] Thomas Nagal, 'One-to-One' (1999) 21 London Review of Books 448.

the "interests of a minority may be outweighed by the greater aggregate interests of a majority",[95] the collective frustration of a billion viewers would offset the agony suffered by Jones, and therefore there is a strong and possibly compelling case not to rescue him until the match is over. This unacceptable outcome is avoided under contractualism. As argued by Scanlon, "if one can save a person from serious pain and injury at the cost of inconveniencing others or interfering with their amusement, then one must do so no matter how numerous these others may be".[96]

By rejecting a principle from the point of view of distinct individuals, we can avoid some of the more controversial conclusions reached by adopting a utilitarian standpoint. It is a seemingly a more flexible principle than utilitarianism as it takes into account other reasons to reject a principle, aside from whether it contributes to utility. As argued by Nagal:

> Scanlon, by contrast, believes one could reasonably reject certain principles that would maximise total well-being, in favour of other principles that would produce a lower expected total but that have other virtues – they are less unfair, they do not impose such severe burdens on anyone, they do not require the abandonment of important values not reducible to well-being.[97]

In summary, under contractualism the burdens have to be acceptable to each person, considered from that person's own point of view, without the sum total of burdens being aggregated.[98] However, such a principle does not necessarily make contractualism less demanding than utilitarianism. This has been illustrated with an imaginative scenario devised by Elizabeth Ashford.

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[95] Ibid 446.
[96] Scanlon (n 85) p235.
[97] Nagal (n 94) 446.
[98] Ashford (n 89) 299.

Ashford refers to Scanlon's view that the unlikelihood of harm arising does not diminish the complaints of those individuals who do experience harm. Scanlon argues that:

> The grounds for rejecting a principle are based simply on the burdens it involves, for those who experience them, without discounting them by the probability that there will be anyone who actually does so.[99]

Therefore, the remoteness of the harm does not contribute to whether the principle should be rejected. Ashford relates this to air travel. There have been instances in which individuals have been killed in air travel. Nevertheless, these unfortunate individuals are a tiny minority compared to the millions of individuals who fly every day. Due to this, nobody would argue that we should ban air travel as it would be far too burdensome (the same balancing approach applies in relation to travelling by car).[100] However, as noted by Ashford, under Scanlon's contractualism:

> In deciding whether a principle permitting air travel can reasonably be rejected, we need to compare the burden of not being allowed to travel by air with the burden of actually being killed. And the burden of being killed outweighs the burden of forgoing air travel.[101]

The principle of utility prioritises the maximisation of social happiness. On this view, "all our duties are subordinate to the absolute claims of overall utility, which we are always under a general duty to maximize".[102] Under utilitarianism the utility of air travel far outweighs the rare cases of fatalities. However, under contractualism, an individual comparison of all those travelling entails that the remote risk of death decisively outweighs the inconvenience of not flying. Ashford

[99] Scanlon (n 85) p208.
[100] Ashford (n 89) 300.
[101] Ibid.
[102] Freeman (n 9) 1463.

plausibly surmises that a "principle imposing such a ban therefore cannot be reasonably rejected".[103] It would appear that, the inflexibility of contractualism in considering each individual and not aggregating, can in some situations, similar to utilitarianism, lead to extremely demanding situations.

e) Does a duty of beneficence exist under contractualism?

Devoting oneself to the alleviation of poverty is considered by many as an admirable trait, but many would disagree that it is one's duty. Singer's principle has often been accused of being far too demanding, and placing unreasonable expectations upon individuals. Is such a demanding duty compatible with contractualism?

Scanlon does not answer this question directly, but through unpicking his arguments we can gauge what his position would be. Scanlon proposes that:

> If we can prevent something very bad from happening to someone by making a slight or even moderate sacrifice, it would be wrong not to do so.[104]

Scanlon's views can be explored in the following scenario. John is a middle aged professional who has a young son named Adam who is about to start secondary school. John earns an average salary and is comfortably well off. Does John have a duty to aid those in need?

Scanlon defines the needy as those "in dire straits: their lives are immediately threatened, for example, or they are starving, or in great pain, or living in conditions of bare subsistence".[105] Under contractualism, John may appeal to other considerations aside from the maximisation of pleasure to justify his reasons for

[103] Ashford (n 89) 298.
[104] Scanlon (n 85) p224.
[105] Ibid.

not helping the needy. John might protest that providing for the needy is too demanding. Unlike the duty to rescue an individual from a pond, the duty of beneficence is continuous. John argues that it would severely constrain his time and money, as well as the pursuit of his own life goals. As Nagal observes, devoting our time and attention to saving the destitute would mean that we have to forego a "range of individualistic values – aesthetic, hedonistic, intellectual, cultural, romantic, athletic and so forth".[106] John argues that providing for the needy prevents him from fulfilling his obligations towards Adam, by providing him with a good education. Does the disruption into John's personal projects, and the fact it does not give him the opportunity to provide the best possible start in life for Adam, constitute valid reasons for overriding John's obligation to provide for the needy?

Under contractualism, John would have to justify his choice to the millions living in poverty on an individual basis as to why he has decided not to aid them.[107] Scanlon mentions how one should, "take others' interests into account when you can very easily do so".[108] Contractualism does not allow John to give disproportionate weight to his own interests, and should be impartial, in the sense that "in every decision that you make, you ought to give no more weight to your own interests than to similar interests of others".[109]

If we balance the inconvenience suffered by John compared to one of the needy individuals, it is clear that the moral significance of helping the needy clearly overrides the moral significance of any costs that John incurs. John may have reason to complain that he is not in a position to provide Adam the best opportunity in life. Nevertheless, the very needy are not in a position to provide any education for their children. Their main priority is to ensure that their children

[106] Nagal (n 94) 446.
[107] Ibid.
[108] Scanlon (n 85) p225.
[109] Ibid p224.

do not suffer from malnutrition, and are often unable to prevent starvation or even death. Their claims are morally more weighty. As argued by Ashford:

> Although the agent's worry about not being able to give her children as good a start in life as she would like is a very strong one, she cannot legitimately give it more weight than the complaint of other parents that they are unable to secure their children's survival.[110]

A donation of money seems a moderate sacrifice to prevent a very bad thing from happening, namely, death induced by poverty. Similar to utilitarianism in this respect, a moral duty of beneficence also exists under contractualism. The fact that consequentialists and deontologists – despite adhering to different traditions in moral philosophy – endorse a duty of beneficence reinforces its strength. The reason it is so demanding is because, "the most morally salient feature of an emergency is that persons' basic interests are at stake, which means that whatever an agent who is in a position to help does or fails to do has a drastic and irrevocable impact on others".[111] Ashford is persuasive that contractualism in this instance is as demanding as utilitarianism. Ashford does not see this as a criticism of either view, because she insists:

> If we take seriously the central tenet of enlightenment moral theory that each person has equal moral status, we may have to accept that our current moral obligations to those in need are drastically more demanding than our commonsense moral thinking tells us.[112]

John might alternatively complain that it is unfair that such a huge burden is placed solely on him, and the reason for this is that others do not aid at all. John claims that it is unfair for him to shoulder the burden of others. Developing this objection,

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[110] Ashford (n 89) 287.
[111] Ibid.
[112] Ibid 289.

Liam Murphy advocates that beneficence should be viewed as a collective enterprise subject to a 'compliance condition'.

f) Murphy's compliance condition

How does Murphy's Compliance Condition differ from Singer's principle? Similarly to Singer, Murphy acknowledges that a principle of beneficence should exist, as the imposition resulting from the reduction in each agent's time and well-being is outweighed by the good produced by helping the poor. As we have seen, many object to the Singer principle due to "the demands it imposes on agents", and these critics believe that there should be "limits to the demands of morality's requirement that we promote the good".[113] Such critics advocate a principle of beneficence which imposes limited demands on its agents.

Murphy notes that the demandingness of Singer's principle is a problem inherent in all moral theories in which there is "a principle requiring us to promote the good".[114] Murphy also correctly points out how those who complain that Singer's principle is too demanding do not present any alternative account of "how to understand and justify a limit to the demands of a principle of beneficence".[115] By limiting a principle of beneficence in favour of our own interests, we are in danger of illegitimately giving our interests disproportionately greater weight than the interests of others and consequently, "we would hardly ever be required to make any sacrifices at all".[116] Murphy astutely observes that we currently lack a "clear conception of what the appropriate limit to the demands of beneficence would be".[117] Murphy consequently gives up on the project of elucidating a workable limited principle of beneficence, and instead develops an alternative tack.

[113] Liam B. Murphy, 'The Demands of Beneficence' (1993) 22 Philosophy and Public Affairs 274.
[114] Ibid 273.
[115] Ibid.
[116] Ibid 275.
[117] Ibid 277.

Murphy argues that the reason Singer's principle is viewed as too demanding is to be found in the fact that "most others are not doing what they ought to do".[118] After all, if everyone gave to charity, there would be a lesser burden placed on a few individuals to give everything. Under such circumstances it is perfectly reasonable for John to wonder why he should do more just because others are doing less. He will feel aggrieved that he has to sacrifice more, because others are not doing what they ought to do. Murphy believes that "principles of beneficence should not demand more of agents as expected compliance by other agents decreases".[119] He argues that it is unfair for "agents to take up the slack caused by the noncompliance of others".[120]

From this reassessment Murphy devises his Compliance Condition, according to which "a principle of beneficence should not increase its demands on agents as expected compliance with the principle by other agents decreases".[121] The main idea behind the Compliance Condition is that "one should not be required to do more than one's fair share of the demands of beneficence".[122]

Murphy suggests that instead of looking at the demands faced by individual agents, we should instead focus on how these demands are affected by the level of non-compliance by others. Murphy suggests focusing on beneficence as a cooperative project, where each of us aims to "promote the good together with others".[123] By viewing beneficence as a collective enterprise, it would be "natural to resist taking on the shares of people who could contribute to the project but do not".[124] Under Murphy's principle, "each agent is required to act optimally to perform the action that makes the outcome best except in situations of partial compliance with this principle".[125] Under the Compliance Condition, "each agent is

[118] Ibid.
[119] Ibid 267.
[120] Ibid 278.
[121] Ibid.
[122] Ibid 281.
[123] Ibid 286.
[124] Ibid 288.
[125] Ibid 280.

required to sacrifice only as much as would optimally be required of her under full compliance".[126] Unlike Singer's principle, John would not have to contribute his own share as well as the share of other non-complying agents. John is "required to do no more nor less" than he would be required to do under full compliance.[127]

Murphy claims that his formulation of the Compliance Condition does not result from the argument that Singer's principle was overly demanding. However, Murphy acknowledges how one advantageous side-effect of his principle is that the demands are indeed less. Murphy proposes that "if we could come up with a criterion for setting the limit, we could go on to develop a Limited Cooperative Principle of Beneficence".[128]

However, this theory has its own flaws, which can be illustrated in the following scenario. Hannah is with two companions, and comes across a pool in which she sees three children drowning. Under Murphy's principle, all three agents would be required to save a single child. However, two of them walk off leaving Hannah alone. Hannah is a great swimmer, and could easily have saved all three children at minimal inconvenience to herself. She decides to save only one of them, and the other two children drown.

Under Singer's Principle, Hannah would be under a moral obligation to save all three, and it is irrelevant that her two companions have deserted her. However, under Murphy's principle, "the extent of the agent's obligation depends solely on what would be the fair division of the burden of giving help among those beneficiaries".[129] Under Murphy's principle, Hannah would be perfectly entitled to act in the same way as if there had been full compliance. It is irrelevant that the other two slackers failed to fulfil their duty, Hannah has satisfied her requirement under Murphy's principle. In this instance, Arneson is justified when he states that,

[126] Ibid.
[127] Ibid 287.
[128] Ibid 289.
[129] Ashford (n 89) 287.

the "mere fact of noncompliance by some does not automatically set an upper limit on the amount of sacrifice it is reasonable to demand of others who can provide cost-effective aid".[130] This highlights a major problem with Murphy's principle, as expounded by Ashford:

> The agent's refusal to give more than her fair share of help would have no impact on the slackers and would have a drastic impact on certain individuals in desperate straits who would not be helped and otherwise would have been. Those in need are clearly not the ones who are acting unfairly, but it is they who would suffer if she let her complaint against the slackers determine the amount of aid she gave.[131]

Bauhn would likewise argue that Hannah has a moral obligation to save all three children. Bauhn states that "it is not the number of potential rescuers that matters, but what they actually do".[132] The fact that the other individuals left the scene means that Hannah now has an obligation to save all the children. However, if such an operation endangered Hannah, then she is discharged of her duty to rescue. She is under no moral obligation to take greater risks which compromise her wellbeing, due to the passivity of her accomplices. As argued by Bauhn, "our duty to rescue should not be turned into a supererogatory imperative that we sacrifice our health, physical integrity, or other aspects of our basic well-being, just because other agents refuse to do their fair share".[133]

g) A duty to aid the destitute vs a duty to rescue

We have seen that Singer derived his duty towards a child dying of starvation many miles away by analogy to rescuing a drowning child from a pond. However,

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[130] Arneson (n 74) p36.
[131] Ashford (n 89) 289.
[132] Per Bauhn, 'The Duty to Rescue and the Duty to Aid the Starving' (2013) 3 A Multidisciplinary Journal of World Affairs 33.
[133] Ibid.

a duty to rescue in the form of a Good Samaritan law should be contrasted with a general duty to aid the destitute. Bauhn distinguishes the two putative duties based on necessity, with the following illustration:

> You are on your way to the Post Office to mail a sum of money that you know will save the lives of five starving persons in a faraway country, when you observe that a child is about to drown in a nearby pond. You can easily, and without any risks to yourself, pull the child out of the water, but in the meantime the post office will close, and you will not be able to save the lives of the five starving persons. But if you do not pull the child out of the water now, she will die. You know this. So, what should you do? If you are a utilitarian who, like Singer, wants to maximize the prevention of suffering, then you should not stop to pull the child out of the water, but instead leave her to drown and hurry on to get to the post office in time. This outcome, however, would appear morally outrageous to many of us.[134]

Bauhn argues that we have a duty to save the drowning child above the five starving individuals based on necessity. Our duty to save the drowning child is more morally pressing than to save the other individuals thousands of miles away due to the fact that we are the only individual in a position to save the child.[135] As Bauhn states:

> Your intervention may be sufficient to save either the child or the five starving persons, your intervention is necessary to save the child. Somebody else may contribute the money needed to save the five starving persons, but only you can save this child from drowning.[136]

[134] Ibid 36.
[135] Ibid.
[136] Ibid 25.

This is a persuasive argument. Whilst you could send the money tomorrow, or someone else may intervene, your intervention alone determines whether the child lives or dies.

Geographical distance is significant. When an individual is near to us, we are in a better position to gauge what needs to be done. Back to our central drowning scenario,[137] Hannah is clearly able to judge what needs to be done to save Billy. All Hannah has to do is to pull Billy out the water, and he will be rescued and safe. However, when it comes to a starving child in another country, the solution is less clear, since "unlike holding out your hand to save the drowning child, helping someone in need generally requires a major investment of time and resources".[138] In relation to combatting famine, Opeskin argues that "the capability to be well-nourished depends not only on the provision of food, but on the provision of other goods such as health services, medicine, and nutrition education".[139] Freeman further observes that, "there is in fact little that we as individuals can do to help the destitute", as the "problem of destitution is largely one of background justice, of the inability of prevailing economic and property schemes to provide adequately for the basic needs of all individuals".[140]

Poverty relief should not be viewed in a vacuum. Even if our objective is the alleviation of hunger, we must investigate if this is "best promoted by addressing hunger directly, or by promoting political liberties, female literacy, and other constituents of a human being's quality of life".[141] Bauhn highlights the difference:

> When it comes to successfully fighting a famine, what is required is a change of those human-made political, social, cultural, and economic

[137] See page 1.
[138] Judith Lichtenberg, "Absence and the unfond heart: why people are giving less than they might be" in Deen K. Chatterjee, *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press 2004) p93.
[139] Brian R. Opeskin, 'Foreign Aid in a Bounded World: An Appraisal of the Universalistic Moral Tradition' (1996) 20 Bulletin of the Australian Society of Legal Philosophy 46.
[140] Freeman (n 9) 1452.
[141] Martha Nussbaum, Philosophical Interventions: Reviews 1986-2011 (Oxford University Press 2012) p193.

> structures that made the famine possible in the first place. Unlike the rescuing of a drowning baby, relieving famine victims involves engaging oneself with a whole societal structure.[142]

h) What role should the state play in regulation and enforcement?

With regard to overseas aid we have been focusing only on individual duties. What role should the state play towards providing overseas aid? Opeskin aptly describes the symbiotic relationship between the state and its citizens:

> First, in keeping with the idea of the state as a moral steward, the state must be expected regularly to spend part of the revenue it receives through the taxation system on foreign aid. Secondly, the amount raised by the state for this purpose must reflect the aggregate of the obligations of individuals. And finally, the mechanisms for the redistribution of wealth and income within the state must be sensitive to the moral requirements of the theory impelling the international redistribution of resources.[143]

A detailed account relating to the duties of the state is beyond the scope of this thesis. In summary, one duty of the state is to provide for the needy and the destitute. A duty to aid the destitute "requires governmental action to put the requisite institutions in place that enable us to satisfy this duty fairly and effectively".[144] Gilabert helpfully suggests how we should focus on developing an institutional framework to alleviate poverty. He proposes that:

> Individual agents have, in isolation from each other, a general imperfect duty to assist all those in need that they must choose, at their discretion, how to discharge. We seek, instead, an institutionally articulated picture

[142] Bauhn (n 132) 36.
[143] Opeskin (n 139) 45.
[144] Freeman (n 9) 1455.

> in which resourceful individuals acquire different clearly specified obligations that, together, constitute a scheme of collective action geared to the eradication of destitution.[145]

We have already mentioned how one of the problems with a collective duty of beneficence is the fact that many individuals do not contribute towards poverty relief, and it is incumbent upon a few to pay more to make up for these 'slackers'. In order to ensure that such a collective duty is enforced, it should not merely be left up to individual conscience. There should be legal penalties for breaching such a duty. In the United Kingdom, if an individual fails to pay taxes, HM Revenue and Customs will take enforcement action to get the money. This is done by a variety of methods such as liaising with debt collection agencies to collect the money, taking the individual to court or making her bankrupt.[146] Failing to pay a tax to aid the destitute should be treated in a similar fashion.

Should the state aid citizens within its own jurisdiction, or should the state seek to provide charitable services for other citizens regardless of where they live? Does a moral obligation extend beyond particular countries' borders? Should the duty of beneficence be a global one?

Many argue that a state should respect another state's sovereignty, and it is up to each individual state to deal with the destitute within its own jurisdiction.[147] There are many limitations on what a state can provide for individuals not within its own territorial jurisdiction. As mentioned by Goodin:

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[145] Gilabert (n 56) 301.
[146] https://www.gov.uk/if-you-dont-pay-your-tax-bill/overview accessed 14th February 2016.
[147] Antony Duff, Answering for Crime (Hart Publishing 2007) p48.

> We can conscript fellow citizens for service in our armed forces, even if they are resident abroad. We cannot so conscript foreign nationals, even if they are resident within our own country.[148]

Singer himself acknowledges that we are in a better position to provide assistance to and judge the needs of those who are closest to us, rather than those who are far way and the state is correspondingly better placed to look after its own citizens. However, even if the state owes more to its citizens than to foreigners when it comes to giving aid,[149] this does not mean that the state does not have an additional duty towards individuals outside its borders. A state may have special obligations towards its citizens, but it also has "obligations of humanity", which "provide a welfare floor for all individuals irrespective of their affiliations, whereas special duties may require more extensive redistribution amongst those who share communal membership".[150]

Beyond our local cultural differences, human beings in many ways want the same things. The need for food and shelter is universal. Regardless of one's nationality or kinship, we all need food and water. As mentioned by Opeskin, "a person's nationality or kinship, like race, has nothing to do with his or her need for food".[151] There is no global state. Nevertheless, in our increasingly interconnected world, there are many collective global duties placed upon nations. As stated by Gilabert, "the rulings of the World Trade Organization and the International Monetary Fund have pervasive effects on the well-being of people across the world".[152] There is embedded within many countries' constitutions a "universalistic commitment to equality".[153] It is famously declared within Article 1 of the German Constitution that: "Human dignity shall be inviolable. To respect and protect it shall be the duty

[148] Robert E. Goodin, 'What Is So Special about Our Fellow Countrymen?' (1988) 98 University of Chicago Press 670.
[149] Ibid.
[150] Opeskin (n 139) 48.
[151] Opeskin (n 139) 49.
[152] Gilabert (n 56) 298.
[153] Opeskin (n 139) 46.

of all state authority".[154] Currently, developed states do not do enough to provide for individuals living in developing states. A duty of beneficence exists by virtue of an individual's humanity, and this extends to a moral obligation to relieve human suffering, irrespective of national boundaries. Such obligations "rest on concern for the welfare of individuals, or on respect for them as moral agents, irrespective of their proximity, ethnicity, nationality or citizenship".[155] As argued by Opeskin:

> The language of morality should be used to validate the needs of individuals beyond state borders as a matter of legitimate political concern, to define and interpret those needs in an expansive way, and to satisfy them through the global redistribution of resources.[156]

Duties of humanity transcend national boundaries, and the richer developed nations consequently have a moral duty to aid the destitute. Now that we have clarified duties of the state we shall turn our attention to how far do other regarding duties extend for individuals.

i) How far do other regarding duties of beneficence extend?

We have established that morality does sometimes place seemingly onerous demands upon us. As mentioned by Ashford:

> Any plausible moral theory must hold that there are some situations in which agents face extreme moral demands—for example, a situation in which the only way of stopping billions of people suffering an agonizing death was by hacking off your left leg with a fairly blunt machete.[157]

The fact that a moral theory is extremely demanding is not per se sufficient grounds for objecting to it. Giving up a vast proportion of your time and money to

[154] The German Constitution, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html accessed 14th February 2016.
[155] Opeskin (n 139) 299.
[156] Ibid 300.
[157] Ashford (n 89) 286.

combat poverty may strike many as unreasonable. However, "initial reactions based on strong feelings are not always reliable guides".[158] As persuasively argued by Ashford, it might be that "our current moral obligations to those in need are drastically more demanding than our commonsense moral thinking tells us".[159] It has been established that Scanlon's contractualism, similarly to Singer's principle, also places agents under a duty to aid the destitute.

Nevertheless, one of the practical disadvantages of an unlimited principle of beneficence is that in setting too onerous a standard for individuals, it would be far too difficult to reach, and in the process, it will deter many from even attempting to do so. Arneson states that:

> As the level of requirements becomes ever more demanding, more people will tend to become alienated from the enterprise of morality and to become less disposed to carry out even its minimal requirements.[160]

On a practical level, "reliance on moral intuitions (judgments concerning what is morally so) cannot be avoided".[161] Therefore, with human nature being what it is, it would be far more sensible to limit the duty as a practical matter. This would likely result in more aid actually being given, and legitimise a duty which "will compromise with human nature rather than wage war against it".[162]

Singer himself acknowledged the merits of this argument, and has reformulated his position, so that it does not become overly demanding and risk deterring individuals from complying. It is important to note that, Singer has not abandoned his more stringent moral principle, but only qualified it for the sake of practical compliance. Singer explains:

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[158] Peter Singer, Practical Ethics (3rd edn Cambridge University Press 2011) p197.
[159] Ashford (n 89) 288.
[160] Arneson (n 74) p34.
[161] Arneson (n 80).
[162] Arneson (n 74) p33.

> For a consequentialist, this apparent conflict between public and private morality is always a possibility and not in itself an indication that the underlying principle is wrong. The consequences of a principle are one thing, the consequences of publicly advocating it another. If we think of principles that are suitable for the intuitive level of morality as those that should be generally advocated, these are the principles that, when advocated, will give rise to the best consequences.[163]

The Singerian principle is so demanding because "so few of those with the ability to help the poor are doing anything significant to help them".[164] Similar to Murphy, Singer acknowledges that if everyone living in developed countries contributed towards aiding the destitute, then we would not have to sacrifice so much. As Singer elucidates:

> If few are helping, those few have to cut very deep before they get to the point at which giving more would involve sacrificing something of comparable moral significance to the life saved by their gift.[165]

It was discussed earlier how our intuitions balk at adopting a Singerian duty of beneficence, as it would be far too onerous on individuals. Individuals are likely to (and should) prioritise their own interests, and the interests of those close to them, beyond the interest of others. Morality is partial (or 'agent relative') in this respect.[166] As argued by Simester:

> A mother who gives her own child pocket money warrants no reproof when she does not do the same for the child next door. Of course, such a view may be no more than a moral mistake. But if it is, then its almost

[163] Singer (n 158) p214.
[164] Ibid 215.
[165] Ibid.
[166] Diane Jeske, 'Friendship and Reasons of Intimacy' (2001) 2 Philosophy and Phenomenological Research 331.

> universal acceptance is, I suspect, unavoidable, an inescapable feature (flaw?) of our very human lives.[167]

Consider the following scenario. Two children are drowning in a pond, and one of the children is Hannah's son. She is only able to rescue one child. Which one should she choose?

Bauhn persuasively argues that if we "choose to rescue a stranger at the cost of failing to rescue our child, friend, lover or any other person with whom we have involved ourselves in a sufficiently close manner, then we can be justly accused of being morally tone-deaf".[168] In a situation akin to Hannah's, it would be natural for her to prioritise the well-being of her own child beyond those of a stranger, as our foremost duty is "to protect the basic well-being of those to whom we stand in a special relationship".[169] As a parent, Hannah has a moral duty not to be "indifferent to whether it is my own child or somebody else's child that drowns", and should arrange her priorities so that "I save my own child before I try to save any other child".[170] To do otherwise would indicate "a severe lack of understanding of what is involved morally in the relationship between parent and child".[171] By becoming a parent, Hannah has acquired a moral responsibility for her child that exceeds her duty towards other children. Singer observes how "our preference for our own interests, and those of our close kin, over the interests of strangers is no doubt a natural outcome of the evolutionary process".[172] Singer concedes:

> We feel obligations of kinship more strongly than those of citizenship. What kind of parents could give away their last bowl of rice, if their own children were starving? To do so would seem unnatural. Indeed, it would be contrary to our nature as biologically evolved mammals with

[167] Simester (n 6).
[168] Bauhn (n 132) 38.
[169] Ibid 36.
[170] Ibid.
[171] Ibid.
[172] Singer (n 158) p214.

> offspring who are dependent on us for many years – but that alone would not show that it was wrong to do so. In any case we are not faced with that situation but with one in which our own children are well fed, well clothed, well-educated and would now like new bikes or more sophisticated computer games. In these circumstances, any special obligations we might make to our children have been fulfilled, and the needs of strangers make a stronger claim on us.[173]

Most of us accept that we have special obligations to those in our inner circle – family and friends. These duties can be described as special obligations as opposed to natural duties. Natural duties can be understood to be "moral requirements which apply to all men irrespective of status or of acts performed"[174] whilst special obligations are those "that are owed not to all persons, but to some limited class of persons".[175] These special obligations are "grounded by the special relationship between promiser and promisee".[176]

Singer's account accommodates an agent-relative stance with special obligations towards others rather than endorsing it. However, we will be adopting an agent relative account in which an ethically well orientated relationship to your family means you favour your children and also you prioritise your friend's interests over others. As Sandal observes we have special obligations to such individuals that go beyond natural duties as such relationships with these individuals "partly define the person I am".[177] As summarised by Belliotti "we have moral requirements of a special sort to those who contribute to and help nurture our identities, and those whose attachment is essential for our self-understanding".[178] By virtue of our

[173] Ibid 193.
[174] Diane Jeske, 'Families, Friends, and Special Obligations' (1998) 28 Canadian Journal of Philosophy 528.
[175] Ibid 529.
[176] Ibid 530.
[177] Michael Sandal, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) p179.
[178] Raymond Belliotti, 'Honor Thy Father and Thy Mother and to Thine Own Self Be True' (1986) 24 The Southern Journal of Philosophy 152.

closeness we are in an ideal position "both causally and epistemically, to promote the good of those we know well and who are our constant companions".[179]

A moral duty of beneficence exists towards other individuals, and our exemplar Hannah has other-regarding duties which extend beyond her intimate friends and family. Despite Hannah's duty to prioritise the welfare of her own child, the other child, too, has a right to be saved. Hannah has a moral obligation to ensure that once her child is saved, she makes every attempt to save the other child as well if she can. Even if we insist that we owe more to those closest to us, the morality of agent-relative duties still does not negate the fact that we also have duties to those outside our close circle of friends and family. Deontologists, contractualists (like Scanlon) and utilitarians (including Singer) all agree that Hannah has a moral duty to rescue Billy.

Conclusion

In conclusion, this chapter has established:

1) Aside from a few exceptions, omissions are morally less culpable than acts. However, this does not mean omissions are never blameworthy or culpable.

2) The ethical egoist position should be rejected, since we have other regarding duties of beneficence. This conclusion is endorsed by an 'overlapping consensus' between utilitarian, contractualist, and deontological accounts.

3) The example of foreign aid demonstrates that we have other regarding duties of beneficence that extend to strangers. These moral duties exist by virtue of one's own and everybody else's humanity regardless of geographical proximity.

4) An individual duty to rescue should be contrasted with a duty to aid the destitute, as despite our collective duty to contribute towards foreign aid, we have

[179] Jeske (n 166) 530.

stronger individual duties to rescue those in our proximity on account of moral necessity.

5) Hannah has other regarding duties that extend beyond the close circle of her family and friends. In particular, Hannah has a moral duty to rescue Billy.

Should this moral duty be translated into a legal obligation? Is Hannah's duty to rescue merely one of virtue, and one that should not be externally compelled by the criminal law? To answer this we need to look at the relationship between criminal law and morality, and decide to what extent the criminal law should enforce moral duties. Is it possible to reconcile a Good Samaritan law with an individualistic philosophy? As Nussbaum rightly observes, "philosophy of this sort cannot afford to be naive armchair rumination", and "even when ideal theory is in question, philosophy must confront economic and political realities".[180] We will need to grapple with the practical institutional constraints on criminal legislation, as a legal duty to rescue must take into account the institutional and political contexts of its specification and implementation.

[180] Nussbaum (n 141) p197.

Chapter 3 - General Principles of Criminalisation: Towards a Modest Moralism

Introduction

To what extent should the criminal law enforce morality? What kinds of conduct ought to be criminalised? These are vast topics, and an in-depth analysis is beyond the scope of this thesis. The following analysis will only briefly examine the relationship between the criminal law and morality at a general level. We shall explore under what circumstances immoralities should be criminalised. When investigating whether conduct warrants criminalisation, "the first stage is the 'in principle' stage: what kinds of conduct are in principle 'criminalisable'?"[1]

In our investigation, we shall look at two theories of criminalisation – the harm principle and legal moralism. For our purpose, we shall be adopting Duff's modest legal moralism and the following chapter will explore whether under this theory an in principle case exists to criminalise bad Samaritans.

a) What is distinct about criminal law?

What makes the criminal law distinct from other forms of regulation such as civil law? It can be distinguished in three ways.

Firstly, Sir Carleton Allen proposed that:

> Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.[2]

More recently, Simester and Von Hirsch propose that "convictions are the most distinctive aspect of criminal law", and they go on to say that by labelling the

[1] Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, The Boundaries of the Criminal law (Oxford University Press 2010) p12.
[2] Carleton Kemp Allen, 'The Nature of a Crime' (1931) 13 Journal of Comparative Legislation and International Law 14.

accused as a criminal, a "conviction makes a public, condemnatory statement about the defendant; that she is blameworthy for doing the prohibited action".[3] This is a major distinction between criminal and civil proceedings, as the latter involves no public censure. As cogently summarised by Simester and Von Hirsch:

> The criminal law has a communicative function which the civil law does not, and its judgements against the accused have a symbolic significance that civil judgments lack. They are a form of condemnation: a declaration that the accused did wrong.[4]

That is one of the key components of criminal law. Criminal law condemns the individual, and it expresses "condemnation or censure".[5] This condemnatory feature makes criminal law distinct from civil law, as the "breach of a civil regulation does not warrant condemnation".[6] There is a public component inherent with criminal offences, and it is therefore in the public interest to prevent and prosecute such offences.

Secondly, what makes the criminal law distinct is that it "warrants punishment of the offender".[7] Tadros states that whilst those who "breach civil regulations are liable to bear some cost for what they have done… they are not liable to be punished".[8] The level of sentence issued by the court is one way the court signals the wrongfulness of the defendant's actions. Despite there also being fault-based actions in civil proceedings, damages for tort losses are normally compensatory, not punitive.[9]

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[3] Andrew Simester and Andrew von Hirsch, Crimes, Harms, and Wrongs: On the Principles of Criminalisation (Hart Publishing 2011) p5.
[4] Ibid.
[5] Antony Duff and Stuart. P. Green, Defining crimes: Essays on the Special part of the Criminal Law (Oxford University Press 2005) p9.
[6] Victor Tadros, "Criminalization and Regulation" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal Law* (Oxford University Press 2010) p165.
[7] Ibid 108.
[8] Ibid.
[9] Simester and Von Hirsch (n 3) p4.

However, it is important to note that whilst punishment is one function of criminal law, it does not in itself make it unique. Simester and Von Hirsch perceptively observes how a conviction is not always accompanied by punitive sanctions:

> Sometimes offenders are discharged without receiving any sentence for their wrongdoing. Offenders may also be subject to confiscation orders, or indeed to the life sentences or extended sentences of imprisonment for purposes of public safety rather than punishment. This suggests that while punishment is an important facet of the criminal law, it is not its most distinctive feature.[10]

Thirdly, the procedural process makes the criminal law distinct. A conviction can only be reached if there is a high standard of proof, and there is "a range of other procedural protections, which have a role both in protecting people against wrongful convictions and in ensuring that their rights of participation are fully protected, … in criminal trials".[11]

Therefore, "to criminalize a certain kind of conduct is to declare that it is a public wrong that should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it".[12] The coercive nature of the criminal law means it should not be deployed without good reason, as the "constriction of people's conduct calls for justifications, especially when it is accompanied by censorious and punitive treatment of those who do not comply".[13]

To summarise:

> The criminal law, then, is a powerful and condemnatory response by the State. It is also a bluntly coercive system, directed at controlling the

[10] Ibid.
[11] Tadros (n 6) 165.
[12] Simester and Von Hirsch (n 3) p6.
[13] Ibid.

> behaviour of citizens. Criminalisation involves rules backed up by threats. In a sense, criminal law is the means by which the State forces citizens into complying with its injunctions.[14]

Should conduct be criminalised if it is immoral, or only if it is harmful? What kinds of criterion, principle or value should guide decisions about criminalisation?[15] Debates about the relationship between morality and the criminal law often begin with references to the famous debate between Hart and Devlin. Despite Devlin's conclusions being rejected by the vast majority of modern Western moral philosophers, this celebrated confrontation remains an important introduction to the relationship between morality and criminal law and introduces the two main theories of criminalisation discussed in this chapter.

b) The Hart and Devlin debate

In 1957 a report was produced which advocated the decriminalisation of homosexual behaviour, and also that prostitution (a restricted version) ought to become legal. This report was the "Wolfenden Report", which famously announced that there "must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".[16]

Hart agreed with the policy of the Wolfendon Report, linking back to the argument made by John Stuart Mill who argued that, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection".[17] Further, "the only purpose for which power can be rightfully exercised over any member of a civilised community is to prevent harm to others".[18] The imposition of criminal sanctions such as imprisonment has adverse consequences on the individual, often leading to a

[14] Ibid.
[15] Duff and Green (n 5) p4.
[16] Report of the Committee on Homosexual Offenses and Prostitution 1957, Cmnd No 247.
[17] John Stuart Mill, On Liberty (London: Parker 1859) p33.
[18] Ibid.

deprivation of liberty. For that reason, Mill advocated that the imposition of these penalties should only be used to prevent harm to others. Mill and the Wolfenden Committee both argued that the criminalisation of behaviour for being merely immoral, but without causing discernible harm, was not legitimate. This principle became known as the 'Harm Principle'.

Lord Devlin refuted that argument. He disagreed with the findings made by the Wolfenden Report, and with Mill's Harm Principle. Devlin argued that:

> Society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[19]

Devlin believed that morality stemmed from the shared beliefs of the community, the same as that held by "the man on the Clapham omnibus", who "might also be called the right minded man".[20] For Devlin, the job of the criminal law is to enforce this public morality.[21]

Public morality is not universal but rather specific to each nation, society or legal jurisdiction; and for that reason, if the public moralities of societies differ so do the laws. For example, some societies abhor polygamy, whereas in others, it is a common occurrence and lawful.

Which conduct should be prohibited according to this conception of "public morality"? Devlin stated that the limits of toleration are reached not merely when a majority dislikes a practice. There must be strong feelings of revulsion and disgust:

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[19] Patrick Devlin, The Enforcement of Morals (Oxford University Press 1965) p10.
[20] Ibid 15.
[21] Ronald M. Dworkin, 'Lord Devlin and the enforcement of morals' (1966) 75 Yale Law Journal 1001.

> No society can do without intolerance, indignation and disgust, they are the forces behind the moral law, and indeed it can be argued that if they, or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.[22]

This view, or something like it, was also explicated by Durkheim who described how societies are bound together by a "collective conscience". This was defined by Durkheim as, "the totality of beliefs and sentiments common to the average members of a society which forms a determinate system with a life of its own".[23] Durkheim further proposed that "we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness".[24] Similar to Devlin, Durkheim observed how a violation of a community's commonly held beliefs and principles will arouse collective public moral indignation, and therefore that is a good reason to criminalise such behaviour.

In the late 1950s there was enough intolerance, indignation and disgust in Devlin's view to justify the criminal law prohibition against homosexual behaviour between consenting adults. For Devlin, an act becomes immoral when the beliefs of a population are backed up by the emotion of disgust, and also a degree of cool reflection.[25]

There is a major problem with such a formulation. It could hypothetically justify egregious acts due to the fact that society did not find such acts disgusting, and thus they were even promoted and celebrated. Apartheid, suppression of women and slavery are all examples of acts which are currently viewed in England as morally repugnant but were once considered to be legitimate practices by society.

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[22] Devlin (n 19) p17.
[23] Émile Durkheim, The Division of Labour in Society (Macmillan Publishing 1984) p38-39.
[24] Ibid 40.
[25] David Samuelson, 'Hart, Devlin and Arthur Miller on the legal enforcement of morality' (1998) 78 Denver University Law Review 193.

This is a central problem with Devlin's formulation. Societal practices may be immoral from a critical perspective despite the fact that some societies deem them to be morally acceptable.

By adopting Devlin's conventionalist view, which is that the law should enforce the morality which happens to be accepted and shared by society, there is a danger that the law will be entrenching society's prejudices under the banner of morality. Under this form of legal moralism the destruction of Jews in Nazi Germany could be legitimised if there was not enough disgust or indignation in opposition to this policy. In many countries, especially those with dictatorial regimes, people are afraid to speak out and oppose acts even if they feel disgust at the policy adopted by the government. Morality based on shared beliefs could potentially legitimise all manner of terrible laws and conduct.[26]

One example of Devlin's theory of society being bound together, not by moral truth, but simply by shared moral beliefs can be seen with the cultural practice of Female Genital Mutilation (FGM).[27] There are many potential health complications arising from FGM such as infections resulting in severe pain during sexual intercourse, a decrease in sexual pleasure, agony during childbirth, an increased risk of infertility and problems during menstruation.[28] Despite the many adverse health effects, FGM is still carried out in places where there is gender inequality.[29] One of the main reasons why it is carried out is that it is a tradition in many African countries and is seen as a rite of passage, which promotes belonging and social acceptance into the community. In order to avoid ostracisation and social isolation, parents ensure that their daughters have the operation.[30]

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[26] Simon Lee, Law and Morals: Warnock, Gillick and beyond (Oxford University Press 1986) p28.
[27] Stephen Guest, Ronald Dworkin (3th edn, Stanford University Press 1991) p154.
[28] Haseena Lockhat, Female Genital Mutilation: Treating the Tears (Middlesex University Press 2004) p107.
[29] Ibid 109.
[30] Comfort Momoh, Female Genital Mutilation (Radcliffe Publishing 2005) p10.

In cultures which carry out FGM the shared consensus is that FGM is not only moral, but that it would in fact be immoral if a girl failed to have the procedure carried out. According to Devlin, such a policy would be deemed acceptable due the shared moral beliefs of that society. However, it is objectively immoral due to the fact that it violates an individual's human rights and bodily integrity, and reinforces female subjugation. The example of FGM illustrates that morality should be based on more than just shared beliefs or other merely conventional standards.

A fairly standard position in moral epistemology is that morality consists of more than merely societal consensus. It should be based on reason, in contrast to being based solely on emotion. For Devlin, "what is important is not the quality of the creed but the strength of belief in it".[31] As discussed, the problem with this position is that an immoral society can pass any law no matter how immoral it may seem to outsiders, if there is societal consensus. George observes that:

> A Devlinite legislator may consider an act to be perfectly upright. Still, if he perceives that the morality dominant in his community vigorously condemns it – albeit on the basis of sheer prejudice – he must ban that act for the sake of social cohesion.[32]

Dworkin was averse to the idea of morality being based solely on the expression of public feeling. Dworkin's idea of morality is that it should be reason-based, not merely a projection of societal indignation and disgust.[33] Dworkin argued that we must produce reasoned and rational explanations for why we hold a certain view. Some reasons do not count in philosophical reflection, for example, those views that are prejudiced, based solely on emotion or based on mistaken facts.[34] However, we should not necessarily dismiss emotions such as disgust and indignation as determinants of whether an act is moral. Many acts that are

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[31] Devlin (n 19) p114.
[32] Robert George, Making Men Moral: Civil Liberties and Public Morality (Oxford: Clarendon Press 1993) p78.
[33] Guest (n 27) p152.
[34] Ibid 154.

universally considered immoral such as rape, cannibalism and torturing animals rightly invoke disgust and indignation in us. Having these emotions can be part of the reason why one considers an act immoral, but it should not be the sole evidence.[35] We should investigate the reasons behind those feelings and consider whether they are valid. For example, one may consider FGM to be immoral due to the fact it disgusts us, but that in itself is not a valid reason. However, if that disgust results from the fact that it causes adverse health implications, and violates women's autonomy, these could be sufficient reasons for such an act to be immoral.[36]

Under reason-based morality Dworkin describes how community consensus on morality goes beyond what people happen to think and feel. Dworkin, like Devlin, believed that the community's morality should count, but what he disagreed with Devlin on was "not his idea that the community's morality counts, but his idea of what counts as the community's morality".[37] Dworkin persuasively argued that public morality is more complex than a description of what the public feels at a particular time. Dworkin's version of morality could accommodate contrary views, as it was not based on societal consensus but on reason.

Hart also disagreed with Devlin's formulation. He acknowledged the danger of criminal law reflecting popular morality, and how such a principle could accommodate racial and religious hatred dependent on prevailing societal consensus.[38] Hart, like Devlin, did believe that "some shared morality is essential to the existence of any society."[39] However, Hart's main disagreement with Devlin stemmed from when the criminal law should intervene. Devlin advocated that the criminal law could intervene if the behaviour was deemed morally offensive,

[35] Ibid 156.
[36] Ibid 156.
[37] Ibid 158.
[38] Samuelson (n 25) 195.
[39] HLA Hart, Law Liberty and Morality (Stanford: Stanford University Press 1963) p51.

invoking disgust and indignation by prevailing social consensus.[40] This view has been rejected in favour of a reason-based morality.

Hart, unlike Devlin, did not believe that society's moral code should be the result of the man in the jury box, but should derive from universal values formed from elemental truths of the human condition. Hart was a firm believer in prioritising individual liberty, acknowledging that the criminal law should uphold universal values, such as individual freedom, and sanctity of life. Hart also argued that the law should only be used to protect individuals from intentionally inflicted harm.[41] We shall now explore the merits of adopting the Harm Principle as the principal theory of criminalisation.

1) What is the Harm Principle?

The Harm Principle was famously formulated by John Stuart Mill, in the following terms:

> The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because, it will make him happier because in the opinion of others to do so would be wise or even right.[42]

Mill's version of the Harm Principle prima facie justifies criminalising conduct in order to prevent or sanction harm to others. To justify interfering with an individual's liberty through criminalising his behaviour it must be shown why his conduct is harmful to others.[43] Mill did not consider negative feelings, such as outrage or disgust as harm. For that reason, under a Millsian Harm Principle, homosexual acts would not be considered harmful despite some individuals being

[40] Samuelson (n 25) 196.
[41] Ibid 195.
[42] John Stuart Mill, On Liberty (London: Parker 1859) p33.
[43] Simester and Von Hirsch (n 3) p108.

offended by the practice. On this view, disgust is not sufficient to count as harm and lead to criminalisation of the behaviour.

In modern times, the Harm Principle has been reformulated by Feinberg to state:

> It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and that there is probably no other means that is equally effective at no greater cost to other values.[44]

This approach to criminalisation is elucidated by Herring:

> The Harm principle is seen as playing an important role in protecting individual autonomy. This is the idea that each person should be able to decide for themselves how they will live their lives and what they will spend their time doing. Each person should be able to do that free from outside interference unless what they are doing harms someone else.[45]

Feinberg's version differed from that of Mill, as Mill was unequivocal that harm to others is the only purpose which could warrant state interference. Under Feinberg's reformulation, harm provides the State with a good reason to coerce. In addition to harm to others, Feinberg also considered offence to others as a potentially good reason for state coercion.[46]

This position is also consistent with liberal political theory, which when applied to criminalisation is defined by Roberts as "the view that only the 'harm principle' or the 'offence principle' can ever provide a good reason to support criminal legislation".[47] For the liberal, state interference should be kept at a

[44] Joel Feinberg, Harm to Others (Oxford University Press 1984) p26.
[45] Jonathan Herring, Great Debates in Criminal law (3rd edn, Palgrave Macmillan 2015) p2.
[46] Joel Feinberg, The Moral Limits of the Criminal Law: Offence to Others (Oxford University Press 1985) p82.
[47] Roberts in Law Commission, Consent in the Criminal Law (Law Com No 139, 1995) para C.25.

minimum and only employed for the purpose of preventing harm/offence to others.

It is important to note that harm in itself does not entail that conduct should be criminalised. There are other factors to consider in determining whether such behaviour warrants criminalisation. According to Simester:

> A responsible legislator should, therefore, consider the gravity and likelihood of the wrongful harm and weigh that against the social value of the conduct to be prohibited and the degree of intrusion upon citizens' lives that criminalisation would involve.[48]

Relating that to speeding, we do not set the speed limit at 20 miles per hour, even though such a measure would doubtless save more lives, as the countervailing social costs, namely the reduced mobility and inefficient transportation systems, would be too great.[49]

a) What counts as harm?

When Mill formulated his version of the Harm Principle he offered no clear guidelines as to which actions are harmful. Helpfully, Feinberg provided an explanation. He defined harm as "thwarting, setting back or defeating of an interest."[50] Conduct becomes eligible for prohibition when it adversely affects the interests that serve another person's well-being.[51] Feinberg explains how we are harmed when one or more of our interests are left in a worse state than it was before.[52] When we are harmed, our interests are set back.[53] What counts as harm

[48] Simester and Von Hirsch (n 3) p649.
[49] Ibid p48.
[50] Feinberg (n 44) p33.
[51] Simester and Von Hirsch (n 3) p142.
[52] Simester and Von Hirsch (n 3) p36.
[53] Ibid.

is the impairment of some resource (physical, proprietary or otherwise) over which the harmed person has a legitimate claim.[54]

Should we only criminalise conduct when it causes an identifiable harm? This is conduct which is most often criminalised by the Harm Principle, and is referred to as primary forms of harm. These primary harms often involve damage to personal interests, such as our physical integrity, or our property.[55]

Feinberg noticed that the Harm Principle does not provide explanation for many criminal prohibitions we take for granted as being justified. In addition to harm, Feinberg acknowledged that there were other good reasons to criminalise behaviour, especially if the behaviour caused serious offence.[56]

The existence of the Offence Principle came into being, as Feinberg could not defend the criminalisation of certain acts via the Harm Principle. Therefore Feinberg expanded his theory to justify criminalising behaviour preventing wrongful offence, as well as wrongful harm to others.[57]

Feinberg's Offense Principle states:

> It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end.[58]

What counts as potentially criminal offensive behaviour? Feinberg argued that there is a prima facie justification for criminalising conduct under the Offence Principle:

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[54] Ibid p37.
[55] Ibid p44.
[56] Danny Scoccia, 'In Defense of 'Pure' Legal Moralism' (2013) 7 Criminal Law and Philosophy 520.
[57] Duff (n 57) p125.
[58] Feinberg (n 44) p33.

> Provided that very real and intense offense is taken predictably by virtually everyone, and the offending conduct has hardly any countervailing personal or social value of its own, prohibition seems reasonable even when the protected sensibilities are not.[59]

There is a public element to Feinberg's Offence Principle, and there needs to be some sort of contact with the offensive behaviour for it to be considered for criminalisation. For example, behaviour such as a couple engaging in sexual intercourse might be criminalised under the Offence Principle if this behaviour occurred in a public area frequented by other people, such as a park. There is nothing wrong with the conduct itself in private. It only becomes an issue when it occurs in public, due to the fact that it is likely to offend and disgust others. Therefore, there is a prima facie case for criminalising such behaviour under the Offence Principle.[60]

For behaviour to be criminalised under the Offence Principle, the behaviour has to be more than mere emotional distress, inconvenience, embarrassment, or annoyance. This ensures that trivial acts are not outlawed, as we cannot prohibit everything that causes some sort of offence to others, due to the high social costs inherent with criminalisation. If the Offence Principle were broadened so that behaviour which caused mere annoyance to individuals was criminalised, it would lead to all types of behaviour being considered for criminalisation and implications for personal freedom. For example, eating too loudly with one's mouth open is irritating, and even offensive to many. A liberal might find the views espoused by a conservative offensive. However, this does not mean that such behaviour should be considered for criminalisation (also owing to the value of free expression of political views).[61]

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[59] Feinberg (n 46) p36.
[60] Scoccia (n 56) 522.
[61] Raphael Cohen-Almagor, Speech, Media and Ethics: The Limits of Free Expression (Palgrave Macmillan 2001) p10.

Liberals who support the Harm Principle often advocate criminalising behaviour where there is an identifiable harm. As well as primary harms, should secondary harms be criminalised?[62] There are many instances when we allow the criminalisation of conduct that creates the risk of harm. One example would be when we criminalise drink driving, as such behaviour is deemed to be dangerous even when no harm occurs.[63] Criminalising secondary harms also occurs when we set speed limits. In the United Kingdom it is a crime to drive in excess of 70 miles per hour. Driving at 80 miles an hour is not necessarily immoral, but the faster one drives the more likely an accident (and therefore harm) will occur. Therefore, under the Harm Principle, there is a prima facie case for criminalising driving in excess of 70 miles an hour.[64]

So what conduct causing indirect harm can form a basis for legal restriction? Kent Greenawalt identifies three instances. Firstly, when conduct will greatly increase the risk of harm to others. Secondly, when a likely future consequence of conduct is harm to others. Thirdly, when conduct is likely to make someone a burden on society.[65] The greater the gravity of the harm, and the more likelihood of it occurring, the stronger the case for criminalisation. Since it also embraces indirect harms, the scope of the Harm Principle, and what counts as harm, are much broader than generally recognised.[66]

Having defined the Harm Principle and explained what type of outcome constitute 'harm', we will now investigate some of the criticisms made against this approach to criminalisation.

b) The Harm Principle is underinclusive

[62] Simester and Von Hirsch (n 3) p44.
[63] Duff (n 57) p126.
[64] Simester and Von Hirsch (n 3) p46.
[65] Kent Greenawalt, 'Legal Enforcement of Morality' (1995) 85 Journal of Criminal Law and Criminology 710.
[66] Simester and Von Hirsch (n 3) p52.

A criticism of the Harm Principle is that it is underinclusive. Is conduct still eligible for criminalisation under the Harm Principle if there is no identifiable harm? This conundrum was raised by Gardner and Shute in a thought experiment which they referred to as the "pure case of rape". Rape is universally acknowledged as an egregious moral wrong which typically inflicts grave psychological and sometimes physical harm on victims and is therefore plainly eligible for criminalisation under the Harm Principle. In a "pure case of rape" scenario, the victim is raped whilst unconsciously unaware of the wrong she suffers. Nor will she ever find out.[67] Lack of awareness means that the victim will not suffer any of the adverse physical or psychological effects. Although this is an unlikely scenario, it is not physiologically impossible, as not all rapes involve damaging or painful force. This would alert the victims to the fact they have been raped. Under these circumstances the victim will be subjectively indifferent to being raped, with no memory of being attacked.[68]

It is clear that the pure case is still rape, morally and legally, and therefore should be criminalised. However, it is harmless due to the lack of identifiable harm to the victim. Therefore, it seems to be a counter example to proponents of the Harm Principle who state that harm is a prerequisite for conduct to be criminalised. Does it follow (due to the lack of identifiable harm) that pure rape would not be eligible for criminalisation under the Harm Principle?[69]

Despite the lack of identifiable harm to the victim, the conduct is still eligible for criminalisation under the Harm Principle. Gardner and Shute explain that since the vast majority of rapes result in harm, such conduct should be criminalised. They side-line the fact that in the 'pure case' situation, the action results in no harm, by observing that the Harm Principle's standard is met if the act is one which in the majority of cases, tends to cause harm. This is true of rape, in spite of the

[67] John Gardner and Stephen Shute, "The Wrongness of Rape" in Jeremy Horder, Oxford Essays in Jurisprudence (Oxford: Clarendon Press 2000) p199.
[68] Dennis J Baker, The Right Not to be Criminalised: Demarcating Criminal Law's Authority (Ashgate Publishing 2011) p152.
[69] Horder (n 67) p197.

remote possibility of a rape occurring in which the victim is unaware at the time or subsequently.[70] They claim that if the act was not criminalised, then it would undermine and weaken the criminal law, thus leading to a greater likelihood of the individual's rights to sexual autonomy being violated. Some who support the criminalisation of pure rape under the Harm Principle argue that the Harm Principle sets a framework, and that there are occasions in which it would be correct to deviate from it, such as in the case of pure rape. Others contend that a case of pure rape does harm the victim. Whilst it does not cause harm physically or psychologically, it results in dignitary harm, or harm due to the violation of the victim's sexual integrity.[71] Dignitary harms can be defined as "the indignities that an actor A inflicts upon S by manifesting that he has so little regard for S that he is ready to abridge S's legitimate interests in order to aggrandize himself".[72]

Clearly, a "pure case of rape" is still a crime. Even strict adherents to the Harm Principle would agree that it should be criminalised, if only as an exception to the Harm Principle. They preserve the Harm Principle, but broaden it. And in the process weaken it by stretching the Harm Principle to the extent that the lack of an identifiable harm still results in "harm". When this occurs, it is unclear where we can set the limits of the criminal law, and the Harm Principle forfeits some of its heuristic power and policy utility.[73]

Danny Scoccia makes a compelling argument against the Harm Principle. He argues that in some circumstances, acts which are deemed "harmless immoralities" should still be criminalised. By not providing a justification, the Harm Principle is under-inclusive. An example can be seen in the relationship between the Harm Principle and corpse desecration.[74]

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[70] Ibid.
[71] John Stanton-Ife, "Horrific Crime" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, The Boundaries of the Criminal law (Oxford University Press 2010) p161.
[72] Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct (Law, Justice and Power) (Routledge 2004) p149.
[73] Duff (n 57) p136.
[74] Joel Feinberg, Harmless Wrongdoing (New York: Oxford University Press 1988) p19.

Liberals advocate that the right to personal autonomy trumps the right of the state to punish harmless immorality. Feinberg refers to three types of harmless immorality. Firstly, there are harmless grievances, which are acts that wrong another individual, despite doing no harm to him. Secondly, there are impersonal wrongs, and these are connected to individuals' welfare. Thirdly, there are free floating evils which are impersonal wrongs that are not connected to individuals' welfare.[75]

What are free floating evils? They would be acts that some legal moralists would seek to prohibit, and include acts such as viewing extreme pornography and public indecency. Feinberg states that these acts should not be criminalised under the Harm Principe as they are merely harmless immoralities. Scoccia argues that, under that principle, corpse desecration would be considered a free floating evil. Scoccia describes a scenario in which, when the individual was alive, he was completely apathetic to how his corpse would be treated after his death. This individual dies alone and unmourned (nobody was concerned about his welfare). Such a scenario is not that uncommon today, as there are instances of individuals whose loved ones die before them, and as a consequence, live their remaining years in solitude.[76]

Despite there being no identifiable harm, does such behaviour contravene the Offence Principle? It would do if the desecration of corpses occurred in public, but not in a scenario in which the corpse was desecrated in private. Some liberals are in favour of criminalising corpse desecration on the basis that such behaviour risks corrupting one's character, and this could lead to harming the living.[77] This argument seems weak. Trying to justify the criminalisation of such behaviour under the Harm Principle, on the basis of speculative, remote harm, considerably weakens the Harm Principle. In addition, it blurs the distinction between the Harm

[75] Scoccia (n 56) 521.
[76] Ibid.
[77] Ibid.

Principle and legal moralism. Many legal moralists would argue for the prohibition of pornography using the same argument that it corrupts one's character. Liberals would disagree with such an analysis, stating that this harm would be too remote. Therefore the argument that corpse desecration would corrupt one's character, and could lead to such conduct harming the living, is not persuasive.[78]

Corpse desecration should be criminalised for the reason that it is immoral. It demeans and degrades human life. Even Feinberg conceded that he could not reject the argument raised by legal moralists that some free floating evils (inherently immoral and harmless conduct) should be criminalised.[79]

c) Why the Harm Principle should be rejected as the master principle

Duff summarises criticisms of the Harm Principle:

> Like any would-be master principle it faced two kinds of objection: that it is underinclusive, since it cannot – or cannot without serious distortion – capture kinds of conduct that clearly should be criminalised; and/or that it is overinclusive, in that it renders 'criminalisable', at least in principle, kinds of conduct that should not be criminalised.[80]

These are significant disadvantages in adopting the Harm Principle as an exclusive principle for criminalisation. In terms of under-inclusiveness, there are instances of conduct which should be criminalised such as pure rape and corpse desecration. Such conduct does not cause what many liberals would identify as harm. In order for the criminalisation to be justified, some liberals argue that there would have to be exceptions to the Harm Principle, or the Harm Principle would have to be distorted and stretched to justify criminalising the conduct. When the latter occurs, it weakens the relationship between the conduct and the type or level of harm that is needed to justify criminalisation.[81] This leads to the Harm Principle losing its

[78] Ibid 522.
[79] Feinberg (n 74) p318.
[80] Duff, Farmer, Marshall, Renzo, and Tadros (n 1) p20.
[81] Ibid.

potency and becoming over-inclusive posing the complementary danger of over-criminalisation. As described by Harcourt, "claims of harm have become so pervasive that the Harm Principle has become meaningless".[82] This goes against why the Harm Principle was established. It was meant to constrain the power of the state. By extending the notion of what conduct is harmful, the usefulness of the Harm Principle in constraining the state's punitive power is eroded.[83]

The other way to deal with difficult cases is to acknowledge that they are departures from the Harm Principle, and also to acknowledge that some conduct which should be criminalised is not necessarily harmful. However, this weakens the Harm Principle too. It loses its status as the exclusive rationale of criminalisation, and becomes merely a theory which provides one good reason – amongst potentially many - for criminalisation.[84]

Choosing between the Harm Principle and legal moralism as the principal theory of criminalisation often creates a fault-line between harm arguments and moral arguments. However, the Harm Principle and legal moralism should not necessarily be treated as two separate categories. The problem with the position held by many advocates of the Harm Principle is that they are monists and consider harm to others to be the *only* valid reason why an act should be criminalised. In doing so, they deny the importance of the role non-harmful immorality plays in determining whether certain conduct should be criminalised. There is nothing wrong with utilising the Harm Principle to determine whether conduct should be criminalised; the problem arises from a reductionist approach which considers harm to be the sole metric for criminalisation.[85] Harm can be a valid reason to criminalise particular conduct. But so also can non-harmful immorality. We can

[82] Bernard E. Harcourt, 'The Collapse of the Harm Principle' (1999) 90 Journal of Criminal law and Criminology 113.
[83] Simester and Von Hirsch (n 3) p53.
[84] Duff (n 57) p130.
[85] Scoccia (n 56) 522.

explore the relationship between immorality and the criminal law by further investigating "legal moralism".

2) What is Legal Moralism?

We have seen that Devlin believed that it was essential for a healthy functioning society to prioritise morality, and to use the criminal law to enforce such judgements. Devlin believed that "society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."[86] He maintained that morality is the law's business since it is fundamental to a society's existence that it promotes moral conformity. In Devlin's view, a society is in part constituted by its morality and it therefore has a right to defend itself against any attack on that morality. In order to protect morality, society must "use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence".[87] Devlin rejected the Wolfendon Committee's notion that there is an area of morality and immorality that is not the law's business. Instead, he was of the opinion that the law must do what it can to protect social morality.[88] Devlin's arguments formed the foundations of modern legal moralism. For Devlin, "there are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislate against immorality."[89]

What is legal moralism? There are various definitions, and some should be rejected as unilluminating or otherwise unfit for purpose. For example, Cranor describes legal moralism as the view that "the immorality of a particular form of conduct provides a reason, but not a sufficient [or necessary] reason for making it illegal." [90] This definition is unsatisfactory due to its lack of distinctiveness from other theories. Downplaying the importance of immorality to the extent it is not a

[86] Devlin (n 19) p10.
[87] Ibid p11.
[88] Dworkin (n 21) 999.
[89] Devlin (n 19) p14.
[90] Carl Cranor, 'Legal Moralism Reconsidered' (1979) 89 Ethics 149.

sufficient reason for criminalisation may make it difficult to distinguish legal moralism from the Harm Principle. If immorality becomes neither a sufficient nor a necessary reason for criminalising conduct, it means that other factors can determine whether conduct should be criminalised other than immorality. Under Cranor's formulation harm to others could be the main reason as to why conduct is criminalised. In that situation, the difference between legal moralism and the Harm Principle evaporates.[91]

Cranor's formulation also underrates the importance of morality. There are examples of conduct which is eligible for criminalisation purely on moral grounds, despite causing no identifiable harm. Corpse desecration was previously mentioned, and other examples include acts such as attempted murder, incest and bestiality.[92] Thomas Søbirk Petersen provides a better definition, as follows:

> Conduct of type A is regarded as (or is) immoral, this can provide a sufficient reason for the state to criminalise A, even though the conduct does not cause (or risk causing) someone to be harmed.[93]

Petersen's formulation enables theorists to balance the advantages and disadvantages of criminalising certain immoral conduct. It allows theorists to consider several reasons for criminalising conduct in addition to immorality, and also authorises him to criminalise certain immoralities whether or not they cause harm.

It is important to note that what differentiates legal moralism from the Harm Principle is not that the Harm Principle justifies criminalising immoral conduct, for "injunctions against causing harm or serious offence to others are surely moral

[91] Ibid.
[92] Thomas S. Petersen, 'What is Legal Moralism?' (2011) 12 Northern European Journal of Philosophy 83.
[93] Ibid 84.

rules".[94] Instead, as Roberts states, the distinction between the two lies in the fact:

> The liberal will only use the criminal law to enforce that part of morality constituted by the harm and offence principles. By contrast, the moralist will in principle use the criminal law to proscribe any immorality, even if it causes no harm or offence to anybody.[95]

a) Should all immoralities be criminalised?

Criminalising all immoral behaviour should be rejected for a number of reasons. The enforcement of the criminal law is extremely costly. If all immoral conduct were criminalised it would constrain liberty as well as being a huge financial burden upon the state. This would likely result in the state not being in a position to adequately fund other priorities, such as healthcare, schooling and defence.[96] There are numerous types of immoral behaviour which are far too insignificant to justify criminalisation. Examples of such behaviour include unsportsmanlike conduct, unceremoniously abandoning a lover, breaking promises, betraying a friend's confidence, displays of rudeness, or vulgarity. Those individuals who exhibit such behaviour merit condemnation, but they should not be criminalised.[97]

Moreover, extending criminal liability to all conduct that is immoral is likely to be bad for the criminal law. Blurring the moral voice also leaves the criminal law less distinct from civil law. It diminishes the criminal law as a distinct, valuable tool for social control and doing justice. In cases involving private wrongs, it would be better dealt with by the civil as opposed to the criminal law.[98] Criminalising all immoral behaviour would be radically over inclusive, and – recalling the Wolfenden

[94] Roberts (n 47) para C.72.
[95] Ibid.
[96] Peterson (n 92).
[97] Simester and Von Hirsch (n 3) p107.
[98] Ibid p22.

report's classic statement - some behaviour is "in brief and crude terms not the law's business".[99]

Criminalising all immoralities would be impractical, over-inclusive, and too expensive.[100] What immoralities should the criminal law then concern itself with? We will investigate this question by examining Duff's legal moralism.

b) What is Duff's Legal Moralism?

Under Duff's legal moralism, the criminal law defines conduct as criminal, and in doing so:

> It defines and condemns such conduct as wrong: not merely, and trivially, as legally wrong, as a breach of the rules of this particular game, but as morally wrong in a way that should concern those to whom it speaks, and that warrants the further consequences (trial, conviction and punishment) that it attaches to such conduct.[101]

For Duff, immorality is a prerequisite of criminalisation. Crimes are only prima facie worthy of criminalisation if they are morally wrongful. However:

> Criminal law does not (cannot) turn conduct that was not already wrongful into a moral wrong: it does not determine, but presupposes, the moral wrongfulness of the conduct that it defines as criminal; it determines which pre-criminal wrongs should count as 'public' wrongs whose perpetrators are to be called to public account.[102]

Duff differentiates mala in se crimes from mala prohibita. Mala in se crimes consist of conduct which is morally wrongful independent of the law. Rape and murder are considered morally wrongful, regardless of what the law states. Duff contends:

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[99] Report of the Committee on Homosexual Offenses and Prostitution 1957, CMND No 247.
[100] Duff (n 57) p20.
[101] Antony Duff, "Responsibility, Citizenship, and Criminal Law" in Antony Duff and Stuart. P. Green, *Philosophical Foundations of Criminal law* (Oxford University Press 2011) p127.
[102] Ibid.

> The salient purpose of criminal law, on this view, is not directly to guide conduct (although the prospect of criminal liability might have that effect, and securing that effect might be a proper purpose for criminal law); it is to provide for an appropriate formal, public response to the pre-legally wrongful conduct that it defines as criminal.[103]

Mala prohibita consist of conduct which is not "wrongful prior to its legal proscription".[104] Duff defines mala prohibita as "those wrongs whose wrongfulness consists in the breach of some public regulation that serves or purports to serve the common good".[105] If morality is a prerequisite of criminalisation, does this mean that mala prohibita offences should not be criminalised? According to Duff, such conduct should still be criminalised and illustrates this claim with the following example.

Duff argues that we have good reason to regulate driving because such regulations are "grounded in pre-legal moral demands (as speed limits are grounded in the demand to drive safely)".[106] It is an offence to drive through red traffic lights. Of course "it was impossible to do that prior to the legislation that created this system of traffic lights and the rules that go with them". However, once we have implemented that system, it has now become "wrongful to drive through a red light".[107] Duff breaks down the process of criminalising such behaviour. Duff states that "the first stage of this process of criminalization lies in legislative deliberation about how best to regulate and coordinate this dangerous activity of driving".[108] The consensus was that traffic lights were an effective means of regulating this activity, and these signs will be "mandatory rather than merely advisory or exhortatory, and that will tell drivers when they may (or must) or must not drive

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[103] Ibid.
[104] Ibid p128.
[105] *Antony Duff, 'Political Retributivism and Legal Moralism' (2012) Virginia Journal of Criminal Law 179.*
[106] Duff and Green (n 101) p129.
[107] Duff (n 105) 177.
[108] Ibid.

across the junction".[109] It is important to note that thus far the criminal law does not play a part. Such rules are within the domain of traffic regulations.[110]

The second stage involves dealing with methods of enforcing such regulations, and penalties for breaching them. Now that the regulations are in place, we can see why breaching them is morally wrongful. As Duff describes:

> If the lights are sensibly located and ordered, obedience to them serves the ends of road safety, and one who drives through a red light will normally be creating an unwarranted risk of harm, given especially that he must know that others will be coordinating their driving by reference to the lights and that he will not normally be able to see clearly whether another car is coming.[111]

Driving through traffic lights is a public wrong as it "bears on the safety of citizens generally".[112] We have reasons to criminalise those who transgress such a law, and "to declare formally that these are wrongs for which perpetrators will be held to public account, convicted, and punished".[113]

We should differentiate Duff's more circumscribed legal moralism from other legal moralists such as Michael Moore. Under Moore's legal moralism, the function of the criminal law is to "punish all and only those who are morally culpable in the doing of some morally wrongful action".[114] Moore acknowledges that, "despite there being good reasons to punish all wrongdoers", these reasons might be defeated by "various epistemic, pragmatic and moral considerations".[115] Such a law might be very expensive to enforce and may restrict autonomy too much. According to Moore, all acts of immorality concern all moral agents. Duff disagrees,

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[109] Ibid.
[110] Ibid 175.
[111] Ibid.
[112] Ibid 176.
[113] Ibid.
[114] Michael S. Moore, Placing Blame: A Theory of the Criminal Law (Oxford University Press 1997) p35.
[115] Ibid pIII.

arguing that whilst there are moral transgressions that concern all of us, there are:

> [m]any wrongs in relation to which both wrongdoer and victim can reasonably rebuff an intervener with some version of 'It's not your business': the wrongdoer can argue that he is not answerable to this stranger; nor can we plausibly explain this by saying that whilst any other moral agent has reason to intervene, countervailing reasons often make intervention on balance inadvisable. If I regularly fail to buy my round for the friends with whom I drink, that is their business; but it is not even in principle the business of the passing stranger who happens to hear about it.[116]

Duff characterises Moore's version of legal moralism as "an ambitious version, since he holds that every kind of moral wrongdoing is in principle worthy of criminalization". However, despite this, "other considerations, both principled and pragmatic, militate against criminalizing many kinds of wrongdoing".[117] One particular reason not to criminalise is that criminalisation potentially undermines "the presumption of liberty". Under Moore's legal moralism, the proper purpose of the criminal law is to carry out retributive justice on culpable transgressors. Under such a principle, if a person has "culpably committed a moral wrong, he deserves to suffer in proportion to the seriousness of that wrong; his suffering is thus a moral good, which is something that we all have reason to promote".[118] For this reason, all wrongdoing is in principle worthy of criminalisation in order to promote retributive justice.[119]

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[116] Duff and Green p133.
[117] Antony Duff, 'Towards a Modest Legal Moralism' (2013) 8 Criminal Law and Philosophy 17.
[118] Antony Duff, "Legal Moralism and Public Wrongs" in Kimberly Kessler Ferzan and Stephen J. Morse, *The Philosophy of Michael S. Moore* (Oxford University Press 2016) p99.
[119] Antony Duff, 'Theorizing Criminal Law: a 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 360.

Duff highlights a problem in using retribution as the main aim behind the criminal law. Firstly, he observes that it is not always clear what retributivists mean when they state the wrongdoer deserves to be punished. What if the punishment occurred through chance? What about if a burglar is injured trying to burgle someone's house? Has he received just punishment for his crime? The difficulty in quantifying just punishment is a pitfall inherent in adopting a retributivist criminal justice policy.[120] If the criminal justice system is a tool for bringing about retributive justice, then how can we object if private citizens seek to address that measure themselves? As Thorburn observes:

> It seems that there is no reason in principle why we should object: so long as the vigilante 'gets it right' and punishes only those who have committed moral wrongs (and does so for that reason and in proportion to the offender's desert), it seems that Moore would have no principled reason to object to this practice.[121]

For Moore, the state is in a better position than private individuals to determine what level of suffering meted out to the transgressor is proportionate to the crime. Duff points out that "retributive justice is something that can, in principle, be achieved by private individuals who set about imposing deserved suffering on wrongdoers".[122] If retributive justice is the main aim of the criminal law, it is unclear why such "deserved suffering" cannot be "imposed by other mechanisms" such as private justice meted out by vigilantes. For these reasons, retribution should not be the principal aim of criminal punishment. [123]

Also, to consider every kind of moral wrongdoing as in principle worthy of criminalisation seems absurd. We owe many moral obligations to friends, family

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[120] Ibid 361.
[121] Malcolm Thorburn, "Constitutionalism and the Limits of the Criminal Law" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Structures of the Criminal Law* (Oxford University Press 2011) p92.
[122] Duff (n 118) p98.
[123] Duff (n 119) 359.

and strangers. If Charlie tells her friend Ben a secret, and he shares it with other people, such a violation of trust would strike many as immoral. However, nobody would seriously consider such behaviour worthy of criminalisation. This type of moral transgression:

> [d]oes not seem like the kind of wrong that merits public denunciation by the criminal law, or for which I should be called to account by the whole polity through its criminal process; it is, surely, a private matter between me and my friend (and perhaps the circle of friends to which we both belong), not a public matter that concerns the state, or my fellow citizens as such.[124]

Moore would likely argue that Ben should not be criminalised as his wrongdoing is not serious enough to justify the deprivation of liberty and costs concomitant with criminalisation. However, as Duff rightly argues, "things have gone wrong as soon as it is said that there is any reason at all to bring such wrongs within the reach of the criminal law".[125]

Duff describes how under Moorean legal moralism:

> One way to arrive at such an expansive legal moralism would be via a totalitarian, rather than a liberal, conception of the polity, according to which the public sphere includes all aspects of its members' lives: there would be no private sphere that was in principle not the polity's business.[126]

Duff rightly argues that our objections stem from an intuitive sense that not every private transgression should become the business of the criminal law and that "wrongs committed abroad are likewise not the business of our domestic criminal

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[124] Robert Justin Lipkin, 'Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue' (1983) 31 UCLA Law Review 260.
[125] Duff (n 119) 358.
[126] Ibid.

law".[127] As discussed previously, unreflective and contested intuitions are not in themselves reliable data for disproving a theory.[128] Does Duff's (modest) legal moralism provide a convincing alternative to Moore's comprehensive legal moralism?

In comparison to Moore, Duff's legal Moralism is described as a *modest one*, which "holds that only certain kinds of moral wrongdoing are even in principle worthy of criminalization".[129] Duff, contra Moore, does not believe that all moral wrongdoing makes criminalisation in principle appropriate. Furthermore, there may be some moral transgressions which are in principle worthy of criminalisation, but are subject to "persuasive countervailing reasons against criminalization".[130] This poses the further question: which immoralities should be the concern of the criminal law?

c) Which immoralities should be the concern of the criminal law?

Duff proposes that in deciding whether a particular behaviour is worthy of criminalisation, it should pass through a serious of analytical stages. Firstly, the conduct to be criminalised must be wrongful. Secondly, it must require a collective response; and thirdly, we must have good reason to make its wrongfulness salient in that collective response.[131]

For Duff, the criminal law should concern itself only with public wrongs:

> We should be held criminally responsible for wrongdoings which are public in the sense that they properly concern all members of the polity, and merit a formal public response of censure and condemnation.[132]

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[127] Ibid.
[128] See page 53.
[129] Duff (n 117).
[130] Duff and Green (n 101) p133.
[131] Duff (n 117).
[132] Duff (n 57) p123.

In terms of deciding which wrongs are public wrongs the challenge put forward by Duff is to identify:

> A distinction (or set of distinctions) between the public and the private realms—between those aspects of citizens' lives which belong to the civic enterprise of living together as a polity, which are therefore of legitimate interest to their fellow citizens in virtue simply of their citizenship; and those aspects that fall instead within the various non-political, non-civic, spheres of the citizens' lives. That distinction will then generate a distinction between 'public' and 'private' wrongs—between the wrongs that could in principle fall within the reach of the criminal law, and wrongs that are in principle not the law's business.[133]

Duff emphasises the importance of the criminal law in holding defendants answerable to the political community for their crimes. By public wrongs, Duff does not mean that such crimes are necessarily committed in public. Take the example of domestic violence which is considered a public wrong. Despite most cases of domestic violence occurring in private, and behind closed doors, it is as much a public concern as a brawl at a football match. Domestic violence undermines values which:

> [a]re (which should be) so central to a community's identity and self-understanding, to its conception of its members' good, that actions which attack or flout those values are not merely individual matters which the individual should pursue for herself, but attacks on the community.[134]

Some transgressions concern not only the transgressor and his victim, but the entire community. Many moral transgressions such as lying and adultery are not

[133] Duff (n 117).
[134] Paul H. Robinson, Stephen Garvey, Kimberly Kessler Ferzan, Criminal Law Conversations (Oxford University Press 2011) p237.

public wrongs, and therefore should not be punishable by criminal law. Even though adultery is a serious wrong, and it is fair for the transgressor's partner and children to hold them responsible, the state[135] has no interest in criminalising such conduct as "we have no right to condemn people publicly for committing adultery."[136]

Many wrongs occur within personal or family relationships, and involve betrayals of trust or ingratitude.[137] These wrongs require an answer to those directly involved. However, there is no need to invoke the criminal law, which is a public condemnatory response.[138] This is not to say that wrongs that occur in personal relationships should never be criminalised, as murder and rape are two prime examples of personal crimes which demand criminal sanctions. Nevertheless, many indiscretions which occur within personal relationships are not serious enough for the perpetrators to warrant criminal sanctions.[139]

Wrongs which warrant criminalisation demand a public response, such that it should not be left to the individuals directly affected to deal with them. This differentiates criminal from civil law, as "a criminal law response is a collective response by the whole political community" whilst a "civil law response remains in the hands, under the control, of the victim — the person who claims to have been wrongfully harmed or endangered".[140] A criminal law response is not a private but public response in which the transgressor is "collectively marked and censured".[141] According to Duff:

> It is a crucial task for any democratic polity to work out, through public deliberation, what belongs to the civic enterprise and thus to the public

[135] By state, I refer to western liberal polities. Despite adultery not being criminalised in the majority of countries, it is considered a crime in many Islamic countries.
[136] Tadros (n 6) p166.
[137] David O. Brink, 'Retributivism and Legal Moralism' (2012) 25 Ratio Juris 503.
[138] Duff (n 57) p123.
[139] Brink (n 137) 501.
[140] Duff (n 117).
[141] Ibid.

> realm. In doing so, citizens will also be working out which wrongs should count as public wrongs.[142]

Some public wrongs "violate our public values, and because we share them with the victim: our concern for the victim as our fellow citizen makes them our business".[143] Also, "to say that such wrongs are 'public' wrongs is, rather, to say that they are wrongs that concern all citizens, in virtue of their civic fellowship with the victim (and the offender)".[144] Yet it is hard to define exactly which "kinds of wrongs we, as citizens, share in a common interest". Duff's answer is that "public wrongs should be understood as those wrongs which could be seen as violating the values that define us as a community".[145] The criminal law is therefore:

> [p]art of the apparatus through which we define and structure the civic enterprise of our shared polity. It must express values that are our values as members of the polity, to identify and condemn what we can recognise as wrongs in terms of those shared values; it must be a voice in which we speak to each other, to ourselves, as citizens.[146]

This public morality was also advocated by George. George describes how the criminal law has a role to play in enforcing morality, albeit a "subsidiary role".[147] George argues that such laws can play a role by "helping to preserve the moral ecology in which people make their morally self-constituting choices; and educating people about moral right and wrong".[148]

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[142] Duff (n 105).
[143] Duff and Green (n 101) p139.
[144] Ibid p140.
[145] Lindsey Farmer, "Criminal Wrongs in Historical Perspective" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal law* (Oxford University Press 2010) p222.
[146] Antony Duff, "Perversions and Subversions of Criminal Law" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal law* (Oxford University Press 2010) p91.
[147] George (n 32) p1.
[148] Ibid.

What is meant by moral ecology? It can best be defined as the social environment in which all exist. In the same way that "physical environment marred by pollution jeopardises people's physical health; a social environment abounding in vice threatens their moral well-being and integrity".[149] For this reason, a case can be made for prohibiting vices such as drug abuse and prostitution, if such behaviour is deemed to threaten moral ecology. For "a social environment in which vice abounds (and vice might, of course, abound in subtle ways) tends to damage people's moral understandings and weaken their characters as it bombards them with temptations to immorality".[150] Even those morally upstanding individuals "who sincerely desire to avoid acts and dispositions which they know to be wrong may nevertheless find themselves giving in to prevalent vices and more or less gradually being corrupted by them".[151]

It is important to differentiate Duff and George's definition of public wrongs from Devlin's definition. As we have seen, Devlin's public morality, "was no more than the most fervent beliefs of a people, marked by the intensity of their disgust and not by any criterion about the content of their moral beliefs".[152] When identifying public wrongs, such identification should occur via reflection as exemplified by Dworkin,[153] in which we rigorously examine the reasons why conduct is deemed immoral by a particular community. If, after examination, we find there to be adequate reasons that go beyond mere disgust, we have to then decide if such a transgression is serious enough to warrant criminalisation in principle.

Duff limits crimes to a specific jurisdiction. However, as noted by Duff, Moore's legal moralism is not restricted by geographical proximity:

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[149] Ibid p43.
[150] Ibid p45.
[151] Ibid.
[152] Michael Moore, "Liberty's Constraint on What Should be Made Criminal" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) p199.
[153] See page 85.

> Moral wrongdoing deserves punitive suffering wherever, by whomever, against whomever it is committed. We all therefore have reason to promote the imposition of such suffering on wrongdoers anywhere in the world, and reason as legislators to bring all wrongdoers within the reach of our criminal law.[154]

Should England and Wales be concerned with moral transgressions committed in Melbourne? Extra territorial 'jurisdiction' strikes us intuitively as questionable. Duff acknowledges that Moore can counter this by arguing that:

> There are obvious and conclusive countervailing reasons against giving domestic criminal law such global scope: reasons to do with the practicability and costs of trying to enforce such a globally ambitious criminal law; reasons to do with the importance of respecting other states' sovereignty.[155]

Does that mean a murder occurring in another jurisdiction is not a serious transgression worthy of criminalisation? What if a rape occurred in Poland? Is such conduct less morally wrong than a rape occurring in England? Duff persuasively answers as follows:

> In saying that a rape committed in England is a crime in English law for which the rapist must answer in an English court, whilst a rape committed in Poland is not a wrong in English law or a matter for the English courts, we do not imply that the rape in Poland is not wrong, or less wrong, or wrong on different grounds. Nor do we imply that it is not a wrong that matters to us as human beings, or as moral agents: it is, we can say, our moral or human business (though that raises the

[154] Antony Duff, "Legal Moralism and Public Wrongs" in Kimberly Kessler Ferzan and Stephen J. Morse, *The Philosophy of Michael S. Moore* (Oxford University Press 2016) p99.
[155] Ibid p100.

> question of what we can do about it simply as human beings or moral agents), as a serious wrong committed against a fellow human being. What is at issue here, however, is what concerns us as citizens, and what concerns the criminal law of this particular polity; we cannot see a rape committed in Poland as a wrong committed within our civic enterprise as a polity or, therefore, as a wrong that concerns our criminal law.[156]

Consequently, in those situations, each state should respect another state's sovereignty, and it is generally up to each individual state to deal with such crime within its own jurisdiction.[157]

Conclusion

In conclusion, this chapter has established:

1) The Harm Principle was rejected as the exclusive criterion for criminalisation as it was both under-inclusive, and over-inclusive. We explored instances in which there is a valid reason for criminalisation, independent of whether that behaviour causes any harm.

2) The theory we will adopt is pluralistic and flexible, in that it acknowledges that harm *and* immorality can determine whether an act should be criminalised.[158] We endorsed Duff's modest legal moralism, in which immoralities should only be criminalised if they constitute a public wrong.

In our everyday life, criminal law and morality both regulate our behaviour. Morality regulates our behaviour through a mixture of internal and external "sanctions". Internal sanctions include the guilt we internally feel when we commit immoral acts, while external sanctions may be condemnation by society or

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[156] Duff and Green (n 101) p140.
[157] Duff (n 57) p48. Of course there are some exceptions such as in cases of genocide, war crimes, crimes against humanity etc…
[158] Scoccia (n 56) 521.

significant others.[159] There are some instances in which it is better for social morality or other types of informal regulation to regulate behaviour as opposed to criminal law. In these instances, it is beneficial solely to rely on morality to regulate behaviour, and not incur the extra costs concomitant with using the law.[160]

To what extent should the criminal law reflect morality? As George observes, "laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason".[161] Whilst it is true that "laws can command outward conformity to moral rules", the same laws cannot "compel the internal acts of reason and will which make an act of external conformity to the requirements of morality a moral act".[162] Whilst laws by themselves cannot force people to be moral, or "establish and maintain a healthy moral ecology", they do serve an important (albeit supporting) role. When the private gains and expected harm from engaging in a certain conduct is large, morality alone may not be sufficient in discouraging such conduct. In such instances it will be beneficial to use the criminal law in tandem with morality, according to Shavell.[163]

One objection to criminalisation is that it would "rob altruism of its moral beauty".[164] Prentice counters this, arguing that:

> The larger advantage for both the victim and society comes when a life is saved or serious physical injury is averted. This advantage is not diminished in the slightest by the fact that the rescue was motivated by a legal requirement. Furthermore, even obligatory acts of valor, such as those performed by soldiers in battle, are praiseworthy…After all,

[159] Steve Shavell, 'Law versus Morality as Regulators of Conduct' (2002) 4 American Law and Economics Review 230.
[160] Yves Caron, 'The Legal Enforcement of Morals and the So-called Hart-Devlin Controversy' (1969) 15 McGill Law Journal Vol. 33.
[161] George (n 32).
[162] Ibid.
[163] Shavell (n 159).
[164] Robert A. Prentice, 'Expanding the Duty to Rescue' (1985) 19 Suffolk U. L Rev. 19.

> legal sanctions merely reinforce social morality; they are not a substitute for it. Those who would have been Good Samaritans in the absence of a legal duty will continue to act through praiseworthy motivations. [165]

Prentice is persuasive. Far from undermining morality, legal sanctions reinforce morality, and if they "move in the same direction, they strengthen one another, for they share a symbiotic relationship".[166] Prentice goes on to argue that if "something that is morally wrong is made legally wrong, then social and individual controls both become stronger".[167] Conversely, the reverse is also true: "the failure of the law to punish improper conduct may lead to the breakdown of the moral sanctions against that conduct […as] a system of law that lags too far behind widely-held notions of true justice will ultimately lose the sympathy, the confidence, and then the respect of the community".[168] After all, "people lose respect for the law when it lends itself to shocking decisions". The law should "play a leading role in laying down guidelines for human conduct".[169] Ashworth likewise states that "both respect for the law and the level of social co-operation will be improved if the law encourages morally desirable conduct".[170]

Criminalisation can reinforce and strengthen the potency of moral sanctions. When the criminal law and morality work in tandem, it reinforces the idea that certain behaviour is immoral, and would enhance the internal and external moral sanctions of guilt and condemnation. By working in tandem, the criminal law can uphold public morality, and powerfully reinforce "the teachings of parents and families, teachers and schools, religious leaders and communities, and other persons and institutions who have the leading roles in the moral formation of each

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[165] Ibid 21.
[166] Ibid 23.
[167] Ibid.
[168] Ibid 25.
[169] Kemp J Kemp, 'The duty to rescue-compulsion or laissez faire?' (1985) 18 The Comparative and International Law Journal of Southern Africa 169.
[170] Andrew Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 Law Quarterly Review. 430.

new generation".[171] Together, morality and criminal law can help to preserve and even "shape the framework of understandings and expectations that helps to constitute the moral environment of any community".[172]

Criminal law has a role to play in reinforcing morality. The next chapter will look at whether there is a prima face case for criminalising Bad Samaritans.

[171] George (n 32) p46.
[172] Ibid.

Chapter 4 – The Prima Facie Case for Criminalising Bad Samaritans

Introduction

The previous chapter looked at general principles of criminalisation and examined when immoralities should be criminalised. We adopted Duff's legal moralism which posits that immoralities should be criminalised when they constitute a public wrong. Chapter 2 showed that Hannah has other-regarding moral duties to rescue Billy.[1] Does Hannah's failure to rescue Billy constitute a public wrong? Even if the answer is in the affirmative, can it overcome the in principle objections to criminalisation? This chapter will argue that a prima facie case exists in England and Wales to criminalise Hannah for failing to rescue Billy. We begin by briefly recapitulating the current position in English criminal law regarding omissions.

a) Does the English criminal law criminalise Hannah's immorality?

In most European legal systems, there is a criminal law requirement "that a bystander renders easy aid to the gravely imperilled, provided he has recognized the opportunity to give assistance and has the ability to do so".[2] By contrast, there is generally no parallel common law duty to rescue (in common law systems generally) a stranger in distress, even if the rescuer would incur little inconvenience and would be in no danger.[3]

English criminal law does not generally impose liability for an omission, unless there was a duty to act.[4] Therefore, it has become important to determine whether the defendant's conduct amounts to an act or an omission. This act/omission distinction has become deeply embedded in the law. Elliott and Ormerod argue that "the current law relating to the criminal liability for omissions is defective in

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[1] See page 76.
[2] John Kleinig, 'Criminal Liability for Failures to Act' (1986) 49 Law and Contemporary Problems 161-162.
[3] Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 U. Pa. L. Rev. 1455.
[4] Antony Duff, "Action and Criminal Responsibility" in Timothy O'Connor and Constantine Sandis (eds.), *A Companion to the Philosophy of Action* (Wiley-Blackwell 2010) p333.

principle and practice".[5] They go on to state how despite that deficiency, "no proposal for solving these problems has met with widespread acceptance or approval".[6] This lack of clarity was prefigured by Fletcher:

> In the mess of confusions called Anglo-American criminal law, writers commonly refer to the "problem of punishing omissions." There is something untoward, they say, about imposing criminal liability on the bystander who could intervene to save a drowning child and fails to do so. Punishing acts in violation of the law is all right, but there is some special difficulty, never completely understood and clarified, about imposing liability for omissions.[7]

To answer whether there is a prima facie case for criminalising Hannah, we need to first investigate whether Hannah's conduct constitutes a public wrong?

1) Does Hannah's conduct constitute a public wrong?

Proposing a normative/ideal theory of criminalisation must engage with several aspects of the criminal law. Duff argues that we should resist the reductive desire to:

> Find some single concept or value that will capture the essence of crime or the essential characteristic in virtue of which crimes are properly punished…in favour of a pluralism that recognises a diversity of reasons for criminalisation matching the diversity of kinds of wrong which can legitimately be the criminal law's business.[8]

[5] Tracey Elliott and David Ormerod, 'Acts and omissions – a distinction without a defence?' (2008) 39 Cambrian L. Rev. 40.
[6] Ibid 41.
[7] George P. Fletcher, 'On the Moral Irrelevance of Bodily Movements' (1994) 142 U. Pa. L. Rev. 1443.
[8] Antony Duff, Answering for Crime: Responsibility and Liability in the Criminal Law (Hart Publishing 2007) p139.

The previous chapter endorsed a legal moralist approach akin to Duff. Would Hannah's conduct be criminalised under Duff's modest legal moralism? Let us recap what Duff's theory states.

Duff stated that in order for conduct to be criminalised, firstly the conduct must be wrongful. We concluded in chapter 2 that Hannah has other regarding moral duties towards Billy which she fails to fulfil, and therefore, her conduct amounts to a moral wrong.[9]

Secondly, the wrong must amount to a public wrong which we defined as wrong that concerns "all members of the polity, and merit a formal public response of censure and condemnation."[10] Hannah's not rescuing Billy constitutes a public wrong, as it is a wrongdoing that violates the "polity's defining values",[11] and marks a total disregard for the "basic framework values which a society acknowledges".[12] Hannah's blatant disregard for the drowning Billy's life violates the community's values based on mutual cooperation and respect for the sanctity of life. These are central values in our public political culture.

Therefore, the fact that Hannah's conduct is immoral, and constitutes a public wrong, means that there are in principle reasons to criminalise her behaviour. However, we cannot criminalise all public wrongs, since:

> [our] polity has other values, other goals, which may sometimes conflict with, and may sometimes outweigh, the reasons we have for responding to public wrongs as wrongs whose perpetrators must be called to public account, censured, and punished.[13]

[9] See page 76.
[10] Duff (n 8) p123.
[11] Ibid p138.
[12] William Wilson, Central Issues in Criminal Theory (Hart Publishing 2002) p40.
[13] Antony Duff, 'Towards a Modest Legal Moralism' (2013) 8 Criminal Law and Philosophy 14.

Recognising this conflict, Duff advocates a modest legal moralism. Even though we have principled reasons to criminalise all public wrongs, "we might have weightier countervailing reasons either for doing nothing formally, or for preferring legal mechanisms other than that of criminalization".[14]

The next question that arises is whether there are "any countervailing principles that may militate, even in principle against criminalisation"?[15]

2) The principled case for criminalising Hannah

There may also be conflicting rights to consider when it comes to determining whether the act should be criminalised. For example, an individual may write something which is (deemed) grossly immoral. In determining whether to criminalise such behaviour, we should consider other rights that could be infringed if the act was criminalised, such as the right to free speech. The existence of these other rights may militate against criminalising some types of immoral behaviour.[16]

Will criminalising Hannah interfere with any other right? Criminalisation in particular can carry heavy costs in terms of restrictions on liberty and invasions of privacy. The more intrusive and restrictive criminalisation is upon the liberty of the individual, the stronger the case against criminalising it. Legally compelling Hannah to rescue Billy is an incursion into her autonomy. Should this prevent the state from criminalising such conduct?

a) Does absence of causation militate against criminalising Hannah?

As an initial objection, one of the main arguments against criminalising omissions is (apparent) lack of causation. Hannah did not push Billy in the pond, so why

[14] Ibid.
[15] Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal law* (Oxford University Press 2010) p12.
[16] Andrew Simester and Andrew von Hirsch, Crimes, Harms, and Wrongs: On the Principles of Criminalisation (Hart Publishing 2011) p146.

should she be held criminally responsible for his fate? This takes us back to some of the metaphysical considerations canvassed in chapter 1.

Katz argues that in order to classify whether the activity was an act or an omission, we should ask the question, "would X have occurred in the same manner if the defendant had not existed"?[17] If we apply that principle, it would have been irrelevant if Hannah had not existed as Billy still would have drowned. Whether or not Hannah came along is immaterial to the outcome, which would have occurred anyway. Hannah's failure to intervene did not change the course of events.[18] As Moore argues, "when I omit to prevent some harm I do not make the world worse, I only fail to make it better. Only when I cause that harm to occur through my actions do I worsen the world".[19] Hannah has not done anything to put Billy in a worse position. Therefore Hannah's conduct will not seemingly be a sine qua non (or 'but for') cause of any harm.

However, Husak counters that individuals in Hannah's position may still be held liable, due to the fact that she had some control over the outcome, but she failed to try and prevent it.[20] For Wilson the "key function of causal inquiries in the law, namely identifying and condemning those whom society has good cause to hold to account for the occurrence of social harms", is satisfied in this example.[21] Under such a principle we can hold Hannah causally responsible or simply deny the science of causation.

As discussed in Chapter 1, the criminal law needs to be metaphysically plausible. However, when discussing whether we should criminalise Hannah, causation is not relevant, and is a red herring. Even if it is established that omissions cannot be causes, it does not negate the fact that certain omissions should be criminalised.

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[17] Leo Katz, Bad Acts and Guilty Minds: Conundrums of the Criminal Law (1st edn, University of Chicago Press 1987) p144.
[18] Jonathan Herring, Great Debates in Criminal law (3rd edn, Palgrave Macmillan 2015) p30.
[19] Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law (Oxford University Press 1993) p28.
[20] Douglas N. Husak, 'Omissions, Causation and Liability' (1980) 30 The Philosophical Quarterly 318-326.
[21] Wilson (n 12) p193.

After all, there are many crimes which do not require causation, such as the criminal offence of dangerous driving. Many statutes punish conduct without the existence of causation, such as laws proscribing the failure to file an income tax return.[22] Also, it is a crime to go through red lights regardless of whether harm results from the conduct.[23] Therefore, physical causation alone does not determine or even affect whether Hannah should be criminally liable.

b) Criminalising Hannah restricts her autonomy

Another objection is that criminalisation would restrict autonomy. What is autonomy? George defines it as the "capacity to be author of one's own life", and "one is said to be 'autonomous' when one can choose one's own ends, act on one's own choices, design one's own life, 'define' oneself".[24] Raz defines autonomy in a similar fashion, stating that "a person's life is autonomous if it is to a considerable extent his own creation."[25] George describes Raz's position as that of "perfectionist' liberalism", in which "the value of autonomy requires not neutrality, but pluralism: namely, a wide range of morally acceptable options among which people may freely choose".[26]

Forcing Hannah to rescue Billy might be criticised as interfering with her autonomy, and forcing her to act. Schonsheck describes how the:

> Enforcing of criminal statutes is the most intrusive and coercive exercise of domestic power by a state. Forcibly preventing people from doing that which they wish to do, forcibly compelling people to do that which they do not wish to do – and wielding force in merely attempting to compel

[22] Graham Hughes, 'Criminal Omissions' (1957) 67 Yale Law Journal 590.
[23] Kleinig (n 2).
[24] George (n 24) p147.
[25] Joseph Raz, The Morality of Freedom (Clarendon Press 1986) p408.
[26] George (n 24) p4.

> or prevent – these state activities have extraordinarily serious ramifications.[27]

Ashworth identifies such a view as the conventional view and describes it as embodying "a minimalist stance on criminal liability for omissions".[28] The conventional view takes a libertarian position arguing that the state should "not use its coercive apparatus for the purpose of getting some citizens to aid others".[29] Due to the coercive effects of criminal law, the state should interfere in the everyday lives of citizens as little as possible. After all, "the criminal law's major function on this view is the prevention of wrongdoing not the promotion of good habits".[30] Imposing positive duties encroaches upon individual autonomy, and should only be resorted to in limited circumstances. As argued by Simester and Sullivan:

> The prohibition of omissions is far more intrusive upon individuals' autonomy and freedom than is the prohibition of acts, which is why the systematic imposition of (criminal or civil) liabilities for failure to act is to be restricted.[31]

Moore is a supporter of the conventional view. His metaphysical conception of omissions influences his political morality. Moore disagrees with criminalising most omissions on the basis that imposing a duty to perform an act restricts a person's liberty to engage in many other activities. Moore argues that this is a far greater incursion on our liberty than imposing a duty not to commit a particular act, in which an individual still has many alternative lawful options. According to Moore, criminalising Hannah would "stigmatise the very people which liberal society cherishes – those who go around minding their own business and whose destiny

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[27] J.Schonsheck, On Criminalization: An Essay in the Philosophy of Criminal Law (Kluwer Academic Publishers 1994) p1.
[28] Andrew Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 Law Quarterly Review 427.
[29] Robert Nozick, Anarchy, State and Utopia (Wiley-Blackwell 2001) pix.
[30] Wilson (n 12) p95.
[31] AP Simester, JR Spencer, F Stark, GR Sullivan and GJ Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine (6th edn, Hart Publishing 2016) p73.

is to leave no kind of mark on society let alone a bloody one".[32] Another advocate of the conventional view, Glanville Williams, argued that "society's most urgent task is the repression of active wrongdoing", and "bringing the ignorant or lethargic up to scratch is very much a secondary endeavour, for which the criminal process is not necessarily the best suited".[33]

It is true that, many features of modern life are not especially good for us, such as "getting drunk, playing dangerous sports, smoking, eating fatty foods, failing to take regular exercise".[34] Such activities should nevertheless be permitted in a liberal polity:

> Freedom includes the freedom to go wrong. Respect for persons as autonomous agents involves respect for individuals as deliberating agents who have the capacity independently to pursue goals and values which they have themselves adopted. If we are not allowed to choose badly then, in effect, our choices are no longer determined by our own goals and values. A paternalistic legal system which made people's choices for them may well end up alienating people from their own conduct.[35]

To live a meaningful life, we must shape it ourselves, and have the freedom to choose, even if that choice often involves choices many consider bad. After all, "when a person's choices are pre-empted by the law, she does not shape her own life. And to live a meaningful life, one must shape it oneself".[36] Personal autonomy is described by Gardner as "an ideal of human flourishing",[37] and to be personally autonomous means to "shape one's life over time by making successive choices

[32] Moore (n 19) p58-60.
[33] Glanville Williams, 'Criminal Omissions – The Conventional View' (1991) 107 Law Quarterly Review 87.
[34] Simester and Von Hirsch (n 16) p658.
[35] Ibid.
[36] Ibid.
[37] John Gardner, 'Prohibiting Immoralities' (2007) 28 Cardozo Law Review 2613.

for oneself from among a range of valuable, appealing, and realistic options".[38] By criminalising Hannah, we have removed her choices, as she has to forego her personal interests in order to alleviate the sufferings of Billy, and "to impose a duty to do X at a certain time prevents the citizen from doing anything else at that time".[39] In contrast, "conventional prohibitions of the criminal law leave the citizen free to do whatever else is wanted apart from the prohibited conduct".[40] In essence:

> Untrammelled responsibility for harms the occurrence of which one is prima facie unconnected with is, in effect, a denial of respect for the idea that one's practical choices should be determined by one's own goals and values.[41]

Simester's argument is persuasive. The criminal law should respect autonomy and "preserve an extensive 'private' sphere in which people can pursue their own conceptions of the good, their own activities, free from the intrusive interest of the polity".[42] In characterisation this private sphere:

> Is that sphere that is not our collective civic business: it includes all those activities and enterprises in which we might engage, and in which what we do (and think or feel) might be the business of other participants, but is not the business of our fellow citizens simply in virtue of their fellow citizenship.[43]

Simester and von Hirsch claim that individuals should be allowed to "pursue their own goals without having legal duties to act or intervene constantly thrust upon

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[38] Ibid.
[39] Ashworth (n 28) 427.
[40] Ibid.
[41] Andrew P. Simester, 'Why Omissions are Special' (1995) 1 Legal Theory 333.
[42] Antony Duff, "Legal Moralism and Public Wrongs" in Kimberly Kessler Ferzan and Stephen J. Morse, *The Philosophy of Michael S. Moore* (Oxford University Press 2016) p106.
[43] Ibid.

them, unanticipated, unpredictable, and unwanted, because of the actions of others".[44] After all, the Anglo-American legal system:

> [i]s predicated on individualism as an underlying social value. Individualism, which includes championing a person's self-interest, imposes severe limits on what the law can require of an individual. In such a scheme, law may set necessary guidelines for social conduct, but should not structure all of social life. While morality may require much more from the individual, including altruism and additional duties to others, it is not the purpose of the law to maintain the entire fabric of morality.[45]

On the conventional view, a legal duty imposed on Hannah to rescue Billy is deemed to run counter to an individualistic ideology which "holds autonomy, privacy, and self-interest as paramount values",[46] and advocates that an individual should be allowed to make his own decisions, without being compelled by the state to act in a certain way. By criminalising Hannah, she is forced to assume responsibility for an event she did not bring about.[47] Forcing Hannah to rescue Billy runs "counter to the liberal principles that inform our legal order", as the law should not "require one person to act solely for the benefit of another".[48] Whilst advocates of the conventional view would readily praise Hannah for saving Billy, they would argue that an act of benevolence should not be a legal obligation, for "stopping to help is part of the morality of aspiration, not the morality of duty".[49] Whilst there may be a moral obligation to rescue one in distress, such an obligation goes beyond the limits of the criminal law.

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[44] Simester and Von Hirsch (n 16) p16.
[45] Robert Justin Lipkin, 'Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue' (1983) 31 UCLA Law Review 255-256.
[46] Ibid 276.
[47] Simester and Von Hirsch (n 16) p15.
[48] Steven J. Heyman, 'Foundations of the Duty to Rescue' (1994) 47 Vanderbilt Law Review 673.
[49] Ashworth (n 28) 428.

c) Is the restriction on Hannah's autonomy justified??

When may a person's autonomy be restricted by a liberal state? Should it be restricted if one makes bad choices? Joseph Raz answers this as follows:

> A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy. But it will not tolerate coercion for other reasons. The availability of repugnant options, and even their free pursuit by individuals, does not detract from their autonomy. Undesirable as those conditions are they may not be curbed by coercion.[50]

Raz also argues that, "autonomy is valuable only if exercised in pursuit of the good", and the "autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships."[51] In addition, "it does not extend to the morally bad and repugnant. Since autonomy is valuable only if it is directed at the good it supplies no reason to provide, nor any reason to protect, worthless let alone bad options".[52] Despite Raz stating that "within bounds, respect for personal autonomy requires tolerating bad or evil actions",[53] such choices are not valuable as they are not exercised in pursuit of the good. An immoral choice, for Raz, may be autonomous, but it is nevertheless devoid of value.

Regan finds these statements inconsistent pointing out that:

> There is no inconsistency in saying that autonomy is autonomy even when it chooses the bad, and saying that autonomy is valuable only when it chooses the good. But there is an inconsistency in asserting both

[50] Raz (n 25) p418.
[51] Ibid p381.
[52] Ibid p411.
[53] Ibid p403-404.

> of these propositions and in supposing also as Raz does) that autonomy, tout court, is valuable. These propositions taken together entail that autonomy which chooses the bad both is and is not valuable.[54]

George notes that Raz uses two terms, personal and moral autonomy. If an individual chooses a bad option, he is exercising his personal autonomy (which for Raz is intrinsically valuable), however, there is no value in pursuing an immoral option. George also identifies Raz's inconsistency in stating that autonomy is intrinsically valuable, yet if one chooses an immoral option, it has no value.[55] George astutely observes that autonomy is not an intrinsic good in itself but morally neutral. Only when autonomy is exercised for good, does it have any intrinsic value.[56]

We have discussed how criminalising Hannah restricts her autonomy. To sum up the liberalist position:

> Members of a political community ought to be allowed to decide how to live their lives in any way they choose and consider fulfilling. The purpose of the state is largely to provide the framework within which individuals may pursue happiness as autonomous individuals. The state is therefore generally not justified to demand of citizens to act in a certain way; it is only authorised to mark the outer boundaries of citizens' freedoms. And any transgression of these boundaries on the part of citizens counts as wrongful and as prima facie eligible for criminalisation.[57]

Has Hannah transgressed those boundaries? Countering the liberalist is the legal paternalist, who advocates "that the state may be justified in using its most

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[54] Donald H. Regan, 'Authority and Value: Reflections on Raz's Morality of Freedom' (1989) 62 California Law Review 1084.
[55] George (n 24) p176.
[56] Ibid p176.
[57] Markus D. Dubber and Tatjana Hörnle, The Oxford Handbook of Criminal Law (Oxford University Press 2014) Chapter 16 p366.

coercive powers to force a person to act or forbear to act against his will in order to promote his own self-interest and well-being".[58] Roberts identifies that the "challenge for the legal paternalist in marking out the moral limits of the criminal law is to explain why the promotion of an individual's welfare should take precedence over the liberal preference for respecting his or her autonomy".[59] When we determine whether conduct should be criminalised, we should balance the gravity of the immorality, and the detriment that results from it, against the social value of criminalising the act, and how intrusive the criminalisation would be upon the life of the citizen. The greater the scale of immorality, the greater the case for criminalising it.[60]

Under the "social responsibility" view, there is a strong case for criminalising Hannah. What is the "social responsibility" view? Ashworth describes how, as "social beings", we have reciprocal obligations in aiding the rest of the members of the community. Ashworth argues for a citizenship duty in which someone is under a duty to act, due to their status as a member of society. Advocates of the social responsibility view believe there should be a "certain level of co-operation and mutual assistance between citizens".[61] The social responsibility view argues that omissions liability should be extended in order to reflect the "growing interdependence in modern society".[62] Lacey describes it as "an implicit political theory – liberalism with a strong social-democratic even mildly communitarian tinge".[63] This view supports communitarian ideals of solidarity, arguing that there are some instances when it is morally and legally obligatory to render assistance to individuals.

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[58] Roberts in Law Commission, Consent in the Criminal Law (Law Com No 139, 1995) para C.59.
[59] Ibid para C.61.
[60] Thomas S. Petersen, 'What is Legal Moralism?' (2011) 12 Northern European Journal of Philosophy 80-88.
[61] Andrew Ashworth and Jeremy Horder, Principles of Criminal law (7th edn, Oxford University Press 2010) p55.
[62] Hughes (n 22).
[63] Nicola Lacey, "Principles, Policies, and Politics of Criminal Law" in Lucia Zedner and Julian V. Roberts, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) p28.

We have mentioned how criminalising omissions is seen as a far greater infringement of liberty than criminalising acts, in terms of restricting options. The criminal law prevents Hannah from pushing Billy into a pool, and this is not viewed as a significant infringement of liberty on the basis that it still leaves her with plenty of alternative (good) options. Conversely, compelling Hannah to rescue Billy drastically reduces her options, as there is only one thing she can do. Whilst it is undoubtedly true that, invariably, a negative duty is less restrictive than a positive duty, this is not always case. Freeman astutely notes how in some situations legally enforced negative duties place greater restrictions than some positive duties. The negative duty to refrain from theft for a starving, impoverished individual is undeniably more restrictive than many conceivable positive duties.[64] Freeman argues:

> Property laws prohibiting trespass restrict freedom of movement and can cause great inconvenience to a hiker lost in a snowstorm if the hiker is prohibited from the one path that she knows leads to civilization. The hiker's freedom is limited far more by the property rights of the estate owner than the estate owner's freedom would be limited by a positive duty to assist by allowing the hiker to pass over his land. Positive duties do not then always limit freedom more than negative duties.[65]

Positive duties do not always limit aggregate freedom more than negative duties, but in the drowning scenario[66] a duty of (easy) rescue (potentially) does. Hannah may be on the way to her birthday party or a job interview when she sees Billy drowning. She may feel aggrieved at the situation, that she must rescue Billy or summon assistance instead of attending to her other plans.

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[64] Freeman (n 3) 1455.
[65] Ibid 1478.
[66] See page 1.

Respect for autonomy means that "the law is to respect the right of citizens to control their own lives, it should not deprive them of that control without good reason".[67] After all, when "a person's choices are not voluntary, but instead decided by laws, the life she lives is not entirely her own".[68] Nevertheless, imposing a legal duty on Hannah to rescue Billy does not violate her autonomy in any "substantial, pervasive, or long-term sense".[69] Even though a restriction does occur, it is important to note that such restriction occurs only temporarily as, "the obligation to rescue will last only for a short time and is unlikely to hamper the pursuit of [people's] life goals".[70]

Rather than inconveniencing Hannah, a Good Samaritan law is just as likely to benefit her as, "over a lifetime, we are no more likely to be interrupted in our normal plans by having to assist another in distress, than we are likely to meet with distress ourselves and to require the emergency aid of another".[71] In reality, "the number of times in a lifetime that one would be called upon to act on this duty are few",[72] and "many people will live their lives without ever coming across a person whose life is in danger".[73]

Our political system is highly individualistic and prioritises safeguarding the autonomy of the individual. As expounded by Ashworth:

> There would have to be some limitations on freedom of action although the general thrust of liberalism is that they should be kept to a minimum. When it comes to prohibitions embodying the censure and sanctions of the criminal law, minimalism is even more in order.[74]

[67] Simester and Von Hirsch (n 16) p7.
[68] Ibid.
[69] Ibid.
[70] Herring (n 18) p33.
[71] Freeman (n 3) 1480.
[72] Freeman (n 3) 1484.
[73] Herring (n 18) p33.
[74] Andrew Ashworth, Positive Obligations in Criminal Law (Hart Publishing 2013) p35.

Ashworth observes that individual autonomy is often limited for paternalistic reasons. Laws mandating car seatbelts do restrict liberty and self-determination. Nevertheless, it is held to be justified due to the benefit (social costs of health care) reaped from such a comparatively minor infringement of freedom of liberty, and the pleasure of riding unconstrained.[75] Similarly, when we criminalise Hannah, the "infringement on individual liberty is so slight", that the "cost of lost freedom is outweighed by the value of saving a life or preventing a serious injury".[76]

As discussed in the previous section, the principle of autonomy means the state should often respect and not interfere with bad decisions made by individuals. Moore alludes to this when he observes that part of the objection to criminalising a failure to rescue "lies in the value we accord to persons' liberty to make the wrong choice."[77] It is true that an individual should be allowed to make choices that deviate from social conformity and what is considered right by prevailing social mores. Granted that individuals who smoke cigarettes, refrain from exercising, and eat certain unhealthy foods are making bad choices in terms of good health, it would be far too draconian to criminalise such activities (even though disincentives do exist through taxation).

George too acknowledges the importance of freedom to sometimes make the wrong choice, and how "the human goods of personal integrity and self-constitution depend upon the availability of significant opportunities for practical deliberation, judgment, and choice".[78] However, he adds "it is not at all clear that these goods depend on the availability of particular immoral choices that are insulated from interference."[79]

George expands upon this thought with a helpful example. What if an individual wants to join the Nazi party? Should the state grant him freedom for such a choice?

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[75] Ashworth (n 28) 424-459.
[76] Robert A. Prentice, 'Expanding the Duty to Rescue' (1985) 19 Suffolk U. L Rev. 37.
[77] Moore (n 19) p57.
[78] George (n 24) p124.
[79] Ibid.

For George, such a freedom should be restricted as "a person's essential integrity is not denied, nor is his status as a self-constituting person sacrificed, when he is forbidden by law (or, for that matter, by his parents or employer) to join the Nazis".[80] Even if such an individual considers joining the Nazi party as essential to his self-constitution George rightly states that "the sort of personal integrity and self-constitution that are humanly valuable and therefore worth worrying about are not at stake".[81] In short, there are instances in which one's freedom to make the wrong choice can be justifiably interfered with.

It has been established that Hannah's not rescuing Billy is immoral, and therefore is the wrong choice.[82] Should she be granted permission by the state to make such a decision? It is submitted that Hannah should not have the liberty to make the wrong choice regarding saving Billy. Hannah's right to liberty is comparatively much less important than Billy's right to life. As Freeman observes, "a liberal legal community does not assign intrinsic value to absolute, or natural, liberty as such, the unrestrained liberty to do just as one pleases".[83] Whilst it is acknowledged that a Good Samaritan law does impose a restriction on our freedom, and prevents Hannah from going about her business, this restriction (if properly formulated) is minimal and temporary, and should therefore be imposed in principle in order to prevent Billy's death.

Moore holds that, "the good of punishing culpable wrongdoers must outweigh the bad of coercively interfering with choice".[84] There are many situations where an individual is in distress, such as they suffer a flat tyre, or they have no money for the bus home. Of course, we would praise those individuals who stopped and helped, however, those who did not should not be criminalised. Nevertheless, in situations where one is in grave danger, the interference of liberty is justified by

[80] Ibid.
[81] Ibid.
[82] See page 76.
[83] Freeman (n 3) 1485.
[84] Michael S. Moore, Placing Blame: A Theory of the Criminal Law (Oxford University Press 1997) p282.

the good resulting from saving lives. As mentioned by Ashworth, "the value of one citizen's life is generally greater than the value of another citizen's temporary freedom".[85]

Imposing a Good Samaritan law has been assumed to be incompatible with English law's "individualistic" values. Prentice contends that the criminal law in its current form should not "enforce unselfishness or make individuals serve their fellows".[86] This individualistic conception of human life is opposed by the social responsibility view which emphasises a (more) communitarian social philosophy, grounded in the interrelationship between individuals and their mutual interdependence. Advocates of the social responsibility view do not view this as opposed to autonomy. To the contrary, our pursuit of goals is enhanced by the "network of relationships which support one another by direct and indirect means", and "a level of social co-operation and social responsibility is both good and necessary for the realisation of individual autonomy".[87] Society is becoming more interdependent, as Kircheimer observed many decades ago:

> The concept of an isolated individual whose legal obligations are few compared to his range of possible activity deviates from the facts of present day society. A greater amount of group dependency on the part of each individual as well as a steady increase in the number of affirmative duties established by statute is discernible everywhere. The problem of finding sufficient legal basis for affirmative duty thus becomes less acute than it was under a more individualistic form of society.[88]

Wilson observes how such cooperation has wider implications, as "society as well as individuals are threatened when neighbours are not responsive to the basic

[85] Ashworth (n 28) 432.
[86] Prentice (n 76) 36.
[87] Ashworth (n 28) 432.
[88] Otto Kirchheimer, 'Criminal Omissions' (1942) 55 Harvard L. Rev. 642.

minimum requirements of community". Consequently, new legal duties "arise to satisfy social expectations rather than moral aspirations".[89] Wilson insists that, "the state should keep interference to the minimum necessary to guarantee the maximisation of individual autonomy",[90] for "undesirable social side effects, loss of privacy, diminution of freedom and autonomy emphasise that state coercion is a necessary evil which should only be embarked upon for the most compelling of reasons".[91] On rare occasions when these preconditions are satisfied, autonomy must be subjugated to the collective interests. After all:

> It is a proper function of the criminal law to promote good character and to restrain or discourage people from engaging in activities that cause moral harm to themselves or to others. Having and sustaining a good character is part of living well. And the law, including the criminal law, may have a role to play in enabling or assisting those who are subject to it in achieving this good.[92]

Collective goals may at times interfere with individual autonomy and the freedom to pursue one's individual goals. However, if we balance the life of Billy against the infringement of liberty incurred by Hannah, clearly the evil of inaction far outweighs the infringement of liberty. In some instances individual autonomy might legitimately be overridden by the collective community interests. Raz acknowledges that to be autonomous does not mean that one should be free of all constraints. Whilst one must be free to a considerable extent, Raz states that "autonomy is possible only within a framework of constraints".[93] Moreover "the completely autonomous person is an impossibility. The ideal of the perfect

[89] Wilson (n 12) p99.
[90] Ibid p20.
[91] Ibid p35.
[92] Steve Wall, 'Enforcing Morality' (2013), 7 Criminal Law and Philosophy 455.
[93] Raz (n 25) p155.

existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream".[94]

The argument for criminalising Hannah rests on; is underpinned by the fact that in certain, select circumstances our individual and collective moral welfare justifies a temporary incursion on our individual autonomy. We are all diminished by Hannah's indifference towards Billy.

Prentice poses the question:

> Do we wish to continue to sanction and protect cruel, callous indifference that can cost lives? Or do we wish to use the law to encourage citizens to help one another in times of emergency?[95]

The criminal law has a role in enforcing basic, communal values which promote prosocial behaviour which fosters "collective well-being such as providing reasonable acts of assistance to those in desperate need".[96] No man is an island[97] and there is an inter-relationship between individual behaviour and the collective good. Whilst it is possible for "society to exist without recognition of a duty to assist the distressed", such a society is undesirable as it undermines the moral ecology and would be tainted with a "kind of mutual disregard, perhaps even mutual disdain".[98] Reinforcing the moral duty to rescue others with a legal duty would ensure that, "the most self-interested of persons can be motivated to rescue a drowning infant in a wading pool at little cost to his freedom of action, so long as there are sufficient sanctions - positive or negative – in place to induce that conduct".[99]

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[94] Ibid.
[95] Prentice (n 76) 54.
[96] Wilson (n 12) p41.
[97] John Donne, Meditation XVII http://www.online-literature.com/donne/409/ accessed 3rd June 2016.
[98] Freeman (n 3) 1482.
[99] Ibid 1487.

It is important to note that we are not adopting a paternalistic approach. If we were, it would be self-evident that Hannah should stop and rescue Billy. What we are arguing is that for the compelling reasons we have expounded in this chapter the temporary restriction on Hannah's liberty is necessary to prevent a far greater evil, namely the loss of Billy's life. Proportionality is not the rationale for introducing a Good Samaritan law, but rather a constraint on it. For the reasons we have discussed in the chapter balancing the good Hannah would do by carrying out the easy rescue of Billy, against the inconvenience of e.g. a missed/late appointment, the overwhelming good should offset the effort and inconvenience. Whilst a duty to assist does indeed restrict options, the degree of intrusiveness has a temporary duration as it is only whilst Hannah is carrying out the rescue. It is very uncommon for these situations to occur. As Ashworth states, "to refer to us as citizens being forced constantly to interrupt our own actions and plans in order to prevent outcomes that are brought about by others is surely an exaggeration".[100] Compared to the avoidable death of Billy, placing a duty on Hannah to rescue is an insignificant, and a necessary, infringement of Hannah's liberty.[101] Therefore, there is a strong prima facie case for criminalising Hannah's conduct in principle.

Conclusion

In conclusion, this chapter has established:

1) Hannah's behaviour constituted a public wrong. We then investigated the validity of two principled objections for criminalising her conduct.

2) Causation was not deemed to be relevant as there are many crimes in which there is no causation, but still the conduct was criminalised.

[100] Ashworth (n 74) p36.
[101] Michael A. Menlowe and Alexander McCall Smith, The Duty to Rescue: Jurisprudence of Aid (Dartmouth Publishing Co. Ltd 1993) p45.

3) The temporary restriction on Hannah's autonomy was justified, on the basis that such inconvenience was deemed comparably insignificant to the greater good arising from the easy rescue of Billy.

Therefore, Hannah's conduct is in principle worthy of criminalisation.

3) Pragmatic institutional constraints on criminalising Hannah

Roberts posits that when determining whether conduct should be criminalised, two questions should be answered in the affirmative:

> (1) Is there a good (moral) reason to justify extending the criminal law to this particular conduct? (2) Should this conduct be criminalised all things considered (with particular reference to other moral principles and the pragmatics of law enforcement)?[102]

This chapter has answered the first question in the affirmative. There is a prima facie case in England for extending criminal liability to criminalise Hannah. Now we must move onto the second question.

Before criminalising Hannah's conduct, we also need to explore the "practicability and the costs (material and moral) of actually criminalising what (in principle) we have reason to criminalise".[103] Duff notes that the criminal law as is "represented in codes, treatises or orthodox textbooks" must reflect "what actually happens as the police and other officials apply the law, as alleged crimes are investigated, prosecuted and punished".[104] Therefore, ideal theory must reflect the practicalities, including the "political, economic and social context in which the law operates", and a "normative theorist of the criminal law will therefore have to look

[102] Roberts (n 58) para C.18.
[103] Duff, Farmer, Marshall, Renzo, and Tadros (n 15) p12.
[104] Antony Duff, 'Theorizing Criminal Law: a 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 354.

beyond the law itself, to discern the conditions and preconditions of its legitimacy".[105] For it is not just:

> [t]he law as it figures in official edicts or declarations, but the law as it impinges on the lives of those who are subject to it; in asking what is or should be criminal we must attend not just to criminal codes or statutes, but the ways in which such codes or statutes are or are not enforced by police and prosecutors.[106]

When considering whether to criminalise particular conduct it is important to analyse whether such a policy would be practical in the real world. A distinction should be made between law in books (which is the law represented in statutes, codes, textbooks and treaties), and law in action (the law as applied and is used by the police and other officials as they enforce the law, and investigate and prosecute crimes), and both should be considered before a legal rule is implemented.[107] After all, the criminal law is not just abstract theory that is codified in books and statutes, divorced from society. It is essential to consider the practical implications of enforcing such laws.[108] Duff alludes to the conflict between theory and practice:

> Normative theory must not simply aim to align itself with actual practice, of course: practice, the theorist can properly insist, is answerable to and assessed in the light of normative theory. But theorists cannot simply ignore actual practice and the ways in which it changes: we must ask whether it is still possible, in the light of changing practices and the circumstances under which they change, to maintain the demands of

[105] Ibid 360.
[106] Duff, Farmer, Marshall, Renzo, and Tadros (n 15) p3.
[107] Duff (n 8) p11.
[108] Duff, Farmer, Marshall, Renzo, and Tadros (n 15) p14.

> our preferred normative theory as demands that hold good not just in an imagined and better world, but in the world in which we live.[109]

There are many hurdles to surmount when deciding whether conduct is worthy of criminalisation all things considered. Will criminalisation have undesirable side effects? An example of undesirable side effects would be when alcohol was prohibited in the USA in the 1920s and this led to a huge increase in the conflict between gangs who were involved in the black market in order to provide alternative sources of alcohol. This is an example of the side effects which can result from criminalisation, and under those circumstances the undesirable consequences provide better reasons not to criminalise certain activities.[110]

Other questions that need to be asked are whether it would deflect resources away from a point at which they are needed more? Consider the following scenario. Smoking inside your house is deemed to be immoral, and harmful to health. Even if there existed a prima facie case for criminalising smoking, such a policy would not be practical. The only way to enforce such a policy is by using invasive methods of surveillance such as installing cameras in every home. Not only would this be a massive invasion of privacy, but would also be extremely costly to enforce, due to the investment in cameras and the huge increase in policing needed to monitor such activity. If every instance of harmful or potentially harmful activity were criminalised, administration of the criminal law would not merely be cumbersome, but unaffordable.[111] The economic expense of maintaining a criminal justice system with police, courts, and prisons is large, and the criminal justice process does not have unlimited resources. Therefore, it is important to ensure that criminalising certain activity warrants the ensuing cost. Enforcement of a desired policy may be prohibitively expensive and divert resources away from other goals

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[109] Antony Duff, "Perversions and Subversions of Criminal Law" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal law* (Oxford University Press 2010) p105.
[110] John Stanton-Ife, "Horrific Crime" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal law* (Oxford University Press 2010) p161.
[111] Simester and Von Hirsch (n 16) p150.

the state may wish to pursue, as there are "demands on the Revenue, from defence, education, the health service, social security and so on".[112]

The criminal law is a powerful, expensive and invasive tool, and should not be deployed lightly.[113] As Tadros argues:

> We might conclude that although some conduct is harmful, publicly wrongful and in principle deserving of punishment, we ought not to criminalize it because it is a disproportionate response to the conduct we are concerned with. It is disproportionate because some less draconian alternative is available to us.[114]

In addition to the economic costs concomitant with criminal enforcement, there are also the human costs. These include:

> The subjection of groups of individuals or communities to additional surveillance; the arrest, pre-trial detention, and conviction of some innocent people (because mistakes will in practice always be made, no matter what procedural mechanisms are used to protect the innocent from wrongful conviction); indirect setbacks to the interests of convicted persons and their families, including loss of income through fines or incarceration (which impacts on offenders' families as well as on offenders themselves); and the discrimination faced by ex-prisoners in the job market after they have served their sentences.[115]

Therefore, when deciding whether to criminalise Hannah's conduct, it is important to determine whether the criminal law is "the least coercive means that will be effective in combatting the conduct".[116] Ethics and morality, in isolation, do not

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[112] Roberts (n 58) para C.103.
[113] Simester and Von Hirsch (n 16) p150.
[114] Victor Tadros, "Criminalization and Regulation" in Antony Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal law* (Oxford University Press 2010) p164.
[115] Roberts (n 58) para C.96.
[116] Ibid para C.93.

determine whether an omission should be criminalised. Criminalisation is ultimately responsive to the law in social context, and is based on practical, not just metaphysical or moral concerns. Whilst there is a principled case for criminalising Hannah, this may be overridden due to various pragmatic, practical, and financial constraints. These material costs of enforcing the criminalisation of a particular immoral act might be so great, that it would be detrimental, on balance, to criminalise it.[117]

In terms of addressing the pragmatic issues, how we define our Good Samaritan law is important. Questions we need to answer, include: are "can we provide a definition that is clear enough to be followed and applied by citizens (including lay participants in the criminal process such as jurors and lay magistrates)? Can we provide definitions that are neither grossly over nor grossly underinclusive?"[118]

When defining the offence, we must determine to what extent an individual should physically intervene. The attempt to save an individual might put the rescuer at risk of serious harm. Is merely reporting the crime, a fulfilment of the Good Samaritan law, even if Hannah could easily have waded into the pool to rescue Billy? Should it be a duty to report, as opposed to a duty to rescue? What should be the penalty for breaching the Good Samaritan law? These practical questions are addressed in chapter 7 of the thesis.

A law criminalising Hannah cannot be "evaluated purely in its own terms", as "lawmakers do not in reality legislate de novo onto a blank statute-book. Even root-and-branch reform proposals presuppose an existing framework of substantive and procedural rules that will remain unaltered".[119] The next chapter analyses doctrine through investigating the treatment of omissions in English criminal law, and we will investigate whether there is a good reason in the English case law, as to whether our in principle case should follow through in legislation.

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[117] Peterson (n 60) 80-88.
[118] Duff, Farmer, Marshall, Renzo, and Tadros (n 15) p12.
[119] Roberts (n 58) para C.105.

Are there are obstacles within English criminal law preventing criminalisation of Hannah?

We will conclude by looking at foreign case examples and investigate whether we can overcome the pragmatic institutional constraints. In terms of defining the conceptual parameters of a Good Samaritan law, an investigation of whether we can gain comparative insight from countries which already criminalise a duty of easy rescue will take place.

Chapter 5 - Omissions: A Doctrinal Analysis

Introduction

This chapter will explore English criminal law's position regarding omissions. Only by first investigating what the law of a particular legal jurisdiction is, can we evaluate whether it needs to be reformed. Our investigation will focus on the categories used to criminalise omissions and assess which category the duty of easy rescue falls into. This raises several questions. Firstly, if the duty falls into a category we already criminalise, then why are we not already criminalising failures of easy rescue? Conversely, if the duty does not fall into a pre-existing category then should the criminal law go beyond its current conceptual boundaries? Are there embedded within the criminal law normative principles which would support its extension? Is the criminal law internally conflicted? The answers to these questions can only be established following an analysis of the current English criminal law position on omissions.

What is occurring in these cases? What arguments are the judges making in order to justify the criminalisation of omissions? In order to answer these questions, we shall engage with the case law, and determine to what extent it conforms to our model. We shall begin by looking at the standard account of the English criminal law's position towards omissions.

1) What is the standard English criminal law approach towards omissions?

The legal distinction between acts and omissions was addressed by Lord Mustill in the House of Lords case *Airedale NHS Trust v Bland*:[1]

> The English criminal law, and also it would appear from the cases cited, the law of transatlantic state jurisdictions, draws a sharp distinction

[1] Airedale NHS Trust v Bland [1993] A.C. 789 - Please refer to page 168 for an analysis of the case.

> between acts and omissions. If an act resulting in death is done without lawful excuse and with intent to kill it is murder. But an omission to act with the same result and with the same intent is in general no offence at all. So also with lesser crimes. To this general principle there are limited statutory exceptions, irrelevant here. There is also one important general exception at common law, namely that a person may be criminally liable for the consequences of an omission if he stands in such a relation to the victim that he is under a duty to act. Where the result is death the offence will usually be manslaughter, but if the necessary intent is proved it will be murder.[2]

The main focus of this chapter will not be criminal omissions per se, but more specifically omissions in relation to manslaughter as these cases are most directly related to duty to rescue scenarios which is the focus of this thesis. The conditions for criminalising omissions in English criminal law in relation to manslaughter were succinctly laid out in *R v Khan*[3], in which Swinton Thomas L.J. referred to *R v Adomako*[4] as authority which raised a series of questions that should be posed to the jury when determining whether a conviction of manslaughter by omission could be sustained. The key questions are:

> (1) Was there in the circumstances a duty of care owed by the Defendant to the deceased (assuming that the Judge has ruled that on the facts such a duty was capable of arising).
>
> (2) Was there a breach of that duty?
>
> (3) Did that breach cause the death of the deceased?

[2] Ibid 893.
[3] R v Khan (Rungzabe), R. v Khan (Tahir) [1998] Crim LR 830 - Please refer to page 179 for an analysis of the case.
[4] R v Adomako [1995] 1 A.C. 171.

(4) Should the breach of duty be characterised as gross negligence and therefore characterised as a criminal act.[5]

Omissions to act which cause the same result as a parallel intended act are not generally criminalised because there is held to be no causation. However, despite an absence of causation an individual may be criminally liable for the consequences of an omission if there existed a duty to act which was subsequently breached. Under what circumstances are individuals under a duty to act? According to Lord Mustill "precisely in what circumstances such a duty should be held to exist is at present quite unclear".[6] Nevertheless, attempts have been made to come up with a list of liability-imposing duties and a standard account is given by Ormerod and Laird.[7] The list includes a duty arising from statute, duty arising out of a contract, duty arising out of the creation of a dangerous situation, duty arising out of a personal relationship and duty arising from voluntary incurred obligations. We will now briefly review each category.

a) Duty arising from statute

A duty can arise if it is created by statute, and there are some instances in which the statute explicitly imposes liability for an omission. This is especially true for motoring offences. For example, Section 7(6) of the Road Traffic Act 1988 states that the driver is under a duty to provide a breath specimen for analysis. Failing to provide a breath sample when required to do so will result in a criminal offence being committed. In addition, Section 170 of the Road Traffic Act 1988 states that omitting to stop and give details after causing a road accident is a criminal offence.

Parliament has shown its willingness to criminalise omissions which result in death. Section 4 of the Domestic Violence, Crime and Victims Act 2004 imposes criminal

[5] Khan (n 3).
[6] Airedale (n 1) 893.
[7] David Ormerod and Karl Laird, Smith and Hogan's Criminal Law (14th edn, Oxford University Press 2015).

liability if the members of a household caused the death of a child or vulnerable adult and "were aware or ought to have been aware that the victim was at significant risk of serious physical harm from a member of the household" and "they failed to take reasonable steps to prevent that person coming to harm". The duty to protect children is also found in Section 1(2)(a) of the Children and Young Persons Act 1933. This requires individuals to supply legally dependent children (under 16) with adequate food, clothing, medical aid and lodging. If the individual fails to discharge this duty, they may be criminally liable for neglect.[8]

Further clarification is provided by judicial interpretation of relevant statutory provisions. In *R v Lancaster*,[9] the appellant omitted to provide information about a change in his circumstances. It was held that Lancaster's non-disclosure was material in misleading the authorities in paying him benefits he was not entitled to, and his appeal was dismissed. It was stated "whether an omission is significant will depend on the nature of the document and the context".[10] According to Toulson LJ, once an omission is identified, the jury should determine "whether they regard the omission as significant".[11] In relation to the S.17 offence, an omission is only of interest if that omission has had the effect that "the document is liable to mislead in a way which is significant".[12]

In the Northern Irish case of *O'Reily v Public Prosecution Service*,[13] the question of whether an omission could be criminalised without the relevant duty being explicitly stated in the statute was investigated. The appellant, when stopped by the police, failed to fully disclose details of his travels. O'Reily was subsequently charged under Section 21 of the Justice and Security (Northern Ireland) Act 2007. However, the district judge also added that O'Reily could have been charged with

[8] AP Simester, JR Spencer, F Stark, GR Sullivan and GJ Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine (6th edn, Hart Publishing 2016) p75.
[9] R v Lancaster [2010] 1 W.L.R. 2558.
[10] Ibid 2565.
[11] Ibid.
[12] Ibid.
[13] O'Reily v Public Prosecution Service [2016] NICA 16.

obstructing a police officer under Section 66(1) of the Police (Northern Ireland) Act 1998 (Assaults on, and obstruction of, constables), which carried a higher penalty. The issue before the Northern Ireland Court of Appeal[14] was whether the district judge was correct in ruling that an:

> [o]ffence under Section 21(3)(b) of the Justice and Security Act 2007 could alternatively be prosecuted as obstructing a police officer in the due execution of his duty [contrary to] Section 66(1) of the Police (Northern Ireland) Act 1998?[15]

Allowing the appeal, it was held that it was not an option to prosecute under Section 66(1) of the 1998 Act. For, as stated by Treacy J, "liability for omissions was exceptional in the criminal law, existing only when the law imposed a duty to act".[16] Under Section 66(1) the accused was not "obliged by common law or statute to give the constable the information requested".[17]

This was a strict reading of Section 66(1). This case exemplifies that common law courts are still reluctant to impose liability for an omission unless a duty to act is explicitly imposed by statute. Based on the facts, a duty might have been logically inferred by the lack of full disclosure, and it was even acknowledged that a lack of full disclosure by the appellant made it difficult for the police officer to perform his duty. However, there was no duty due to a lack of a direct reference to an existing duty, reinforced by the established constitutional principle that there is no common law duty to assist the police.[18]

b) Duty arising out of a contract

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[14] Despite the criminal law in Northern Ireland falling under a different jurisdiction than England and Wales, it's approach to criminalising omissions greatly mirrors that of England and Wales and it is therefore relevant for our investigation.
[15] O'Reily (n 13).
[16] Ibid.
[17] Ibid.
[18] Rice v Connolly [1966] 2 QB 414.

A duty can arise out of a pre-existing contract. This was established in *R v Pittwood*.[19] In *Pittwood*, a gatekeeper at a level crossing omitted to close the gate which resulted in the death of a cart driver who had driven through the open gate and been hit by a train. The case established that a duty can arise out of a contract. It was held that the gatekeeper was criminally negligent for manslaughter, as he had been paid to keep the gate shut and protect the public. He had failed to discharge his duty.[20]

To similar effect, in *R v Dytham*[21] a police officer was charged with misconduct for failing to perform his contractual duty to protect the public as he stood idly by when a man was kicked and beaten to death, making no move to summon help. The court held that the officer's conduct amounted to a crime as the "misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment".[22]

c) Duty arising out of the creation of a dangerous situation

As summarised by Ormerod and Laird:

> Where D's conduct puts in peril V's person, his property, his liberty or any other interest protected by the criminal law, and D is aware that he has created the peril, he has a duty to take reasonable steps to prevent the harm in question resulting.[23]

This duty was established by the House of Lords in *R v Miller.*[24] In *Miller*, the appellant accidently dropped a cigarette prior to falling asleep, causing a mattress to become alight. He awoke to find the mattress smouldering but did not attempt to extinguish the fire, and instead moved it to another room. As a result the house caught fire causing £800 damage. Miller was found guilty of arson and his appeal

[19] R v Pittwood [1902] 19 T.L.R. 37.
[20] Ibid 37.
[21] R v Dytham [1979] Q.B. 722.
[22] Ibid 728.
[23] Ormerod and Laird (n 7) p80.
[24] R v Miller [1983] 2 AC 161.

was dismissed by the Court of Appeal. On appeal to the House of Lords, Miller's chief argument was that the actus reus and mens rea did not occur simultaneously.[25] When Miller dropped the cigarette there was an accidental act accompanied by no mens rea. When Miller acquired the necessary mens rea, there was no accompanying act. Therefore, it seemed legally he committed no crime.[26]

Dismissing the appeal, the House of Lords held that when a person had caused danger he had a responsibility to take measures to counteract the danger and prevent or reduce the risk. It was accepted that Miller did not set the fire intentionally or recklessly; it was a mere accident. A distinction was made between one who comes across a dangerous situation, where one is generally under no pre-existing duty to do anything, and when one has caused a dangerous situation. Lord Diplock explained that a duty arose due to the defendant's failure to counteract the danger he himself had created:

> I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of "actus reus", suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failure to act cannot give rise to criminal liability in English law.[27]

The court held that commission by omission had occurred. *Miller* reflects a contextual approach, in which the conduct was not considered in isolation but as a course of conduct. There was a sequence of events starting with an act that set

[25] See "correspondence principle" defined in Andrew Ashworth, Principles of Criminal Law (5th edn, Oxford University Press 2006) p87.
[26] Miller (n 24).
[27] Ibid 176.

the fire and an omission to take steps to deal with it. Instead of looking solely at the act/omission distinction, Lord Diplock reviewed all the accompanying conduct to see if an offence had been committed. Clearly it had, as once Miller was aware of the risks posed by his conduct, he should have taken steps to counteract the fire and forestall potentially catastrophic consequences "by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk".[28] As stated by Baker:

> It would be grossly negligent to sit idly as a building burns down when you have started the fire and when you have no way of knowing whether there are people inside it.[29]

The ruling in *Miller* was extended in *R v Evans (Gemma)*,[30] in which the defendant gave her half-sister Carly some heroin which Carly self-injected. The victim complained of some symptoms indicative of an overdose but Gemma and her mother omitted to seek medical assistance as they were worried about getting into trouble themselves. They put the victim to bed hoping she would recover without the need for medical assistance. Unfortunately, the victim died of heroin poisoning.

Evans and her mother were charged with gross negligence manslaughter. On appeal, it was acknowledged that the relationship between Evans and her half-sister did not fall into the list of legally recognised pre-existing duties, nor was she under a contractual obligation to provide assistance. However, it was held that a duty existed in these circumstances as Evans had contributed to the dangerous situation by providing heroin. Once she realised that consuming it was causing

[28] Ibid.
[29] Dennis J. Baker, 'Omissions Liability for Homicide Offences: Reconciling R v Kennedy with R v Evans' (2010). 74 Journal of Criminal Law 310.
[30] R v Evans (Gemma) [2009] 1 W.L.R. 1999.

adverse effects, Evans had a duty to take reasonable steps to save the victim's life.[31]

Evans extended the principle established in *Miller*, but with uncertain limits. In *Miller*, the defendant had created the risk and failed to take steps to counteract the danger. In *Evans* however, the defendant did not create the dangerous situation, as Evans's sister created the dangerous situation by making the independent choice to self–inject. According to the Court of Appeal, however, a duty can now arise "when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening".[32] In such situations, "a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise".[33]

It is difficult to reconcile *Evans* with the House of Lords' ruling in *R v Kennedy*.[34] In *Kennedy*, the appellant prepared a syringe of heroin and handed it to the victim who, upon taking the syringe, injected himself and died. The issue discussed by the House of Lords was:

> When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?[35]

Lord Bingham stated that the "appeal is concerned only with unlawful act manslaughter and nothing in this opinion should be understood as applying to manslaughter caused by gross negligence".[36] In order to establish unlawful act manslaughter it must be shown "that the defendant committed an unlawful act",

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[31] Ibid.
[32] Ibid 2007.
[33] Ibid.
[34] R v Kennedy (No 2) [2008] AC 269.
[35] Ibid 273.
[36] Ibid 274.

and "that such unlawful act was a crime".[37] Despite the fact that the appellant committed a criminal act by supplying the heroin to the deceased, merely supplying the drug could not harm the victim unless it was actually administered.

The court held that merely supplying drugs does not make the supplier causally responsible as the individual's autonomous choice in taking the drugs breaks the chain of causation. His Lordship stated:

> The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.[38]

Whilst it is true that the "appellant supplied the drug to the deceased", the victim had a choice "whether to inject himself or not".[39] The drug was self-administered, not jointly administered and therefore the new intervening act (novus actus interveniens) broke the chain of causation. This is a specific application of the general principle elucidated by Glanville Williams:

> The new intervening act (novus actus interveniens) of a responsible actor, who had full knowledge of what he is doing, and is not subject to mistake or pressure, will normally operate to relieve the defendant of

[37] Ibid.
[38] Ibid 275.
[39] Ibid 279.

> liability for a further consequence, because it makes the consequence too remote … What a person does (if he has reached adult years, is of sound mind and is not acting under mistake, intimidation or other similar pressure) is his own responsibility, and is not regarded as having been caused by other people.[40]

Applying that principle to *Evans* it is difficult to see why she was criminally responsible for the outcome.[41] Carly was fully autonomous when taking the drugs, and she was not coerced. The problem with holding an indirect contribution sufficient for creating a duty is addressed by Simester and Sullivan:

> What about another person, E, who may introduce D (or V) to the heroin dealer? Or F, who lends money to buy the drugs? What about a vendor of alcohol, when he sees the buyer in a drunken altercation? Or a driver who leaves his intoxicated friend sleeping on a hot day, never to awake? All kinds of background acts of facilitation could now underpin potential criminal-law duties.[42]

Baker persuasively argues that "the act of supplying drugs *per se* does not create a dangerous situation any more than selling a gun does".[43] Baker is correct in observing that "a duty of care to counteract a dangerous situation should only be imposed where D has directly caused the dangerous situation".[44] After all, "if someone had supplied Miller with matches, would he too have been liable for creating a dangerous situation?"[45] Following *Kennedy* a duty should not exist based merely on the fact that *Evans* supplied the drugs to her half-sister. The fact of supplying heroin does not seem a sufficient basis to hold that a duty exists.

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[40] Glanville Williams, Textbook of Criminal Law (2nd edn, Stevens & Sons Ltd 1983) p291.
[41] Kennedy (n 34).
[42] AP Simester, JR Spencer, F Stark, GR Sullivan and GJ Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine (6th edn, Hart Publishing 2016) p80.
[43] Dennis J. Baker, 'Omissions Liability for Homicide Offences: Reconciling R v Kennedy with R v Evans' (2010). 74 Journal of Criminal Law 310.
[44] Ibid.
[45] Ibid.

Despite the different types of manslaughter in each scenario -Gross negligence manslaughter in *Evans* and Unlawful Act Manslaughter in *Kennedy* -Simester and Sullivan describe *Evans* as "an illegitimate extension of the otherwise sound principle in *Miller*".[46]

d) Duty arising out of a personal relationship

A duty can arise from a personal relationship. For example, a duty exists between a parent and child, as can be seen in *R v Lowe*.[47]

In *Lowe*, the defendant failed to summon a doctor when his child was sick. The child subsequently died of dehydration. The defendant was charged with child cruelty, contrary to Section 1 (1) of the Children and Young Persons Act 1933. The trial judge instructed the jury that a conviction for wilful neglect which caused death will also result in a conviction for manslaughter. Upon appeal, the court sympathised with the defendant and acknowledged that he had instructed his wife to go the doctor, and she falsely claimed to have gone. Therefore she had deceived him of her true intentions. Nevertheless, it was held that he was still "gravely to blame"[48] and there was enough evidence to convict the appellant of wilful neglect. A duty exists between parent and child, but does a step-mother also have a duty? It seems she does, on the authority of *R v Gibbins and Proctor*.[49] In this case, the appellants were convicted of murdering their daughter by starvation. Gibbins had provided money to Proctor to maintain the house and feed his children but she denied food to one of his daughters (Nelly). There was evidence that she hated this child. It was argued that whilst a duty existed for the father, the step-mother was exempt due to the lack of a biological bond. The court held that an omission with a malicious intent, that is, with the intention to cause the child death, means the defendant is liable for murder. The court followed the ruling in *R v Instan*[50]

[46] Simester, Spencer, Stark, Sullivan and Virgo (n 42) p80.
[47] R v Lowe (Robert) [1973] Q.B. 702.
[48] Ibid 709.
[49] R v Gibbins and Proctor [1918] 13 Cr App Rep 134.
[50] R v Instan [1893] 1 Q.B. 450 – Please refer to page 36 for an analysis of the case.

which stated that "there is no case directly in point, but it would be a slur upon, and a discredit to the administration of, justice in this country if there were any doubt as to the legal principle, or as to the present case being within it".[51]

A case which affirms the duty of a husband to care for his wife is *R v Hood,*[52] in which the husband's conduct was identified by Waller LJ as a "pure omission"[53] and he was convicted of manslaughter. This is a rare instance in which criminal liability was imposed for a pure omission. The appellant's wife fell and broke several bones, and the husband failed to summon medical assistance for three weeks. She eventually died in hospital from pneumonia brought on by her low standard of care. The husband's omission to summon medical care resulted from his wife's reluctance to go to hospital, and she was in a position to summon help herself as there was a pull cord in her room. The appeal court was sympathetic to this fact and reduced the sentence from 4 years to 30 months. Nevertheless, the conviction still stood.[54]

The husband in Hood did not create the dangerous situation as the defendant did in *Miller*, he merely failed to summon help. Whilst the Court of Appeal's compassionate sentence reduction is laudable it is puzzling why the conviction was not quashed altogether. The court did not satisfactorily explain why the conviction still stood. Ashworth objects that convicting the husband denies the right to "self-determination".[55] The wife clearly did not wish to go to hospital despite her having the means to summon help if she desired. As Ashworth argues:

> However strongly the conflicting emotions may play on the capable spouse, it is a step too far to hold that the capable spouse has a duty to override the indisposed spouse's wishes—a duty whose non-

[51] Ibid 454.
[52] R v Kenneth Hood [2004] 1 Cr. App. R. (S.) 432, 436.
[53] Ibid 432.
[54] Ibid.
[55] Andrew Ashworth, 'Manslaughter by omission and the rule of law' [2015] Criminal Law Review 563.

> performance amounts to a ground for manslaughter liability, and for a substantial sentence of imprisonment.[56]

As observed by Ormerod and Laird, the criminal law is "increasingly willing to protect wide categories of individuals on the basis of their existence within an extended family".[57] As seen in *R v Stone and Dobinson*[58] (discussed below) and *Evans* a duty existed for the defendants to care for their sister, and in *Instan*, a duty existed for the defendants to provide for an aunt.

Aside from family relations, it seems a duty can also arise on the basis of friendship. This occurred in *R v Sinclair*.[59] In *Sinclair*, Darren Coleman fell unconscious from a self-inflicted methadone overdose at 2:30pm. Sinclair stayed with him throughout, but failed to call for medical help. Sinclair eventually called for medical assistance at 6:30am the following morning, and the victim was pronounced dead upon arrival. Medical evidence indicated that the victim would have had a much greater chance of survival had he been treated earlier.[60]

The primary rationale for imposing a duty on Sinclair is unclear. It was mentioned by Lord Justice Rose that Sinclair was "a close friend of the deceased for many years and the two had lived together almost as brothers".[61] The co-defendant Johnson was said to be in a different position because, as Lord Justice Rose stated, no duty existed for Johnson because he did not "know the deceased", and "his only connection with him was that he had come to his house and there taken methadone and remained until he died".[62]

Ormerod and Laird conclude that, "outside these core examples, a lack of case law has (again) led to considerable uncertainty", and "it is difficult to predict what

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[56] Ibid 571.
[57] Ormerod and Laird (n 7) p78.
[58] R v Stone, R v Dobinson [1977] QB 354.
[59] R v James Sinclair, Brian Johnson, Ian Smith [1998] 148 N.L.J. 1353.
[60] Ibid.
[61] Ibid 15.
[62] Ibid.

other relationships will also give rise to similar duties".[63] It is often unclear whether a duty exists, and how far the courts are willing to extend liability. In the process, "the courts have managed to avoid identifying with precision those relationships which can be sufficient to ground liability" and "have failed to identify what is significant about those relationships on which a duty has been imposed".[64] For example, does a duty exist for children to care for parents? This was raised by Glanville Williams, who argued many years ago that "the muscular 15-year-old boy who finds his fainting mother drowning in a shallow pool should not be permitted by the criminal law to pass by and allow her to die".[65]

e) Duty arising from voluntarily incurred obligations

As identified by Ormerod and Laird:

> The need to define precisely the categories of relationship which trigger a duty has often been avoided by the courts because the particular case calling for adjudication has involved a number of overlapping bases of liability including significantly, the fact that D has voluntarily undertaken a position of responsibility towards V.[66]

Ashworth remarks that "the strongest criterion is D's assumption of responsibility for V's welfare, combined with the requirement that D be aware, or ought reasonably to be aware, that V is in a life-threatening condition".[67]

A duty to act arising from voluntarily incurred obligations is best illustrated by *R v Stone and Dobinson.*[68] The defendants were convicted of manslaughter, on the basis of a duty to care for their lodger. The defendants were themselves disabled. Stone was partially deaf and almost totally blind. His partner Dobinson was

[63] Ormerod and Laird (n 7) p53.
[64] Ibid p78.
[65] Glanville Williams, 'What should the Code do about omissions?' (1987) 7 Legal Studies 92.
[66] Ormerod and Laird (n 7) p79.
[67] Ashworth (n 55).
[68] Stone and Dobinson (n 58).

"ineffectual and inadequate".[69] They resided with their son. Stone's younger sister, Fanny, came to live with them. She suffered from anorexia nervosa and spent considerable time confined to her room. She was not cared for, beyond being washed by the defendants with the help of a neighbour two weeks prior to her death. Both defendants were advised to summon a doctor but they failed to take heed and Fanny died of toxaemia caused by chronic neglect. Had she received medical care soon after being washed she would probably have survived. The appeal court held that the appellants had assumed a duty of care to Fanny and therefore should have summoned help or taken it upon themselves to care for their lodger more effectively.[70]

As we have seen criminal liability for an omission under English law requires the existence of a duty which is then breached. As recounted by Geoffery Lane L.J., in *Stone and Dobinson* the court was confronted with "the suggestion… that, heartless though it may seem, this is one of those situations where the appellants were entitled to do nothing; where no duty was cast upon them to help, any more than it is cast upon a man to rescue a stranger from drowning, however easy such a rescue might be".[71] However, the court held that a duty did exist, as Fanny was a blood relation of Stone, and Dobinson had willingly undertaken certain duties by washing her and providing her with food. There was no effort made to summon medical help. It was explicitly stated by Geoffery Lane L.J. that this was "not a situation analogous to the drowning stranger".[72] Efforts had been made to provide care. Stone and Dobinson had tried to locate the doctor, and help with the washing and provision of food. Therefore a duty had been assumed, placing upon Stone and Dobinson a further duty "either to summon help or else to care for Fanny themselves".[73] A legal duty arose as the defendants voluntarily assumed a duty

[69] Ibid.
[70] Ibid.
[71] Ibid 361.
[72] Ibid.
[73] Ibid.

to act, and this duty was breached. The appellants were accordingly found guilty, and imprisonment was deemed necessary to "mark the public disapproval of such behaviour".[74] Based on Stone's disability the court extended some mercy, reducing the original three year sentence to one of twelve months.

Stone is significant as it extends the situations under which there is a duty to act in English criminal law. It seems that a duty can extend to care for siblings, but it remains unclear if this applies in all situations. As observed by Menlowe and McCall Smith, the duty seemed to arise on the basis that Fanny was living under the same roof as Stone, and it is unlikely Stone would be under the same duty had he been made aware of Fanny's condition whilst residing in another house, or even next door. Under such circumstances Stone would have been less likely to have been in a position to seek medical attention. Apparently, a duty arises to care for those residing under one's roof, irrespective of whether there is a genetic bond.[75] This duty seems to have arisen from a "voluntary assumption of responsibility" derived from the appellants' "family relationship, and their cohabitation with the victim".[76] This is understandable. If an individual takes it upon themselves to care for a vulnerable individual, they have isolated him from any external help. These sentiments were echoed by Hogan:

> I see nothing wrong with the principle in *R v Stone* which I take to be that if one chooses to assume the care and control of another then the self-imposed responsibility must be carried out with reasonable care and skill and that liability for manslaughter (or even murder) may be incurred if that responsibility is discharged in a grossly negligent…manner.[77]

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[74] Ibid 364.
[75] Michael A. Menlowe and Alexander McCall Smith, *The Duty to Rescue: Jurisprudence of Aid* (Dartmouth Publishing Co. Ltd 1993) p64.
[76] Ormerod and Laird (n 7) p80.
[77] Brian Hogan, "Omissions and the duty myth" in Peter Smith, *Criminal Law: Essays in Honour of J.C. Smith* (Butterworth & Co 1987) p91.

However, Hogan adds that "what is disturbing about *R v Stone* is that the evidence hardly supported the inference that these two elderly incompetents had taken it upon themselves to discharge the onerous task of looking after the sister".[78] This case has been heavily criticised, and not without merit. Williams rightly points out that "the sentence upon Stone was harsh, and shows how the moral outrage aroused by a conviction of manslaughter can inflate punishment beyond reason".[79] He argues that "people of poor intelligence who unsuccessfully face a baffling problem do not deserve substantial sentences".[80] After all, the poor intelligence exhibited by Stone and Dobinson makes one wonder whether they were in a position to look after themselves, never mind Fanny. A duty had arisen, but the unique facts meant that the court was overly strict to hold the appellants in breach of this duty.

Ormerod and Laird suggest that the test used to determine their liability was whether what they did was "reasonable based on the standards of reasonable competent people?"[81] In such situations, "if the current law is represented by this latter test (the judgement was not clear), then there is potential for considerable injustice".[82] Ormerod and Laird are persuasive in noting that it is unfair to "demand things from Stone and Dobinson that are beyond their abilities".[83]

A duty to act, based in part on voluntarily incurred obligations, was also found to exist in *R v Ruffell*.[84] In *Ruffell*, three friends purchased drugs, and consumed them at Ruffell's mother's home. Sawyer (the deceased) had an adverse reaction and various attempts were made to revive him. Come the next morning, Ruffell phoned the victim's mother to inform her that he had left Sawyer outside the front door as he needed to go work. Sawyer's mother instructed Ruffell to move him inside

[78] Ibid.
[79] Williams (n 65).
[80] Williams (n 65) 95.
[81] Ormerod and Laird (n 7) p57.
[82] Ibid.
[83] Ibid.
[84] R v Stephen David Ruffell [2003] EWCA Crim 122.

and cover him with a blanket. Ruffell refused to do this, and left Sawyer outside the house, where he was found a few hours later. Upon discovery, Sawyer was taken to hospital where he died of hypothermia.[85]

It is unclear why a duty arose in this situation. There is no definitive reason articulated in the judgement, but it may have arisen due to the friendship between the appellant and the deceased, and the attempts made to revive him. Similar to Dobinson, it seems that Ruffell's attempts to revive had created a duty. Ashworth speculates that a duty may have arisen as Ruffell had assumed responsibility for his friend, and by secluding him had prevented him from otherwise receiving adequate care. Ashworth acknowledges the ambiguity as to how a duty arose as "once again, there is no indication that two or even one of these factors would have been sufficient to ground a duty".[86]

In cases such as *Sinclair, Ruffell,* and *Stone,* a duty seemed to be grounded on the basis that the victim was secluded and had no recourse to external help. Also, in *Evans*, it was held that once her half-sister had taken heroin, Evans was responsible for Carly's welfare as she had supplied the heroin, and had a legal obligation to summon medical assistance.

Whichever factors may have been decisive in particular cases, many basic conceptual and doctrinal questions remain unanswered. How direct does the contribution have to be for the court to find that the defendant assumed responsibility? How significant is the assumption of responsibility in deciding that a duty existed? This is unclear, as even when a duty is said to arise out of an assumption of responsibility, this is not usually the only factor present and "does not appear to be determinative".[87] Thus, the scope of criminal liability for an

[85] Ibid.
[86] Ashworth (n 55) 563.
[87] Ibid.

omission in English law remains significantly under-specified and open to interpretation.

2) A critical appraisal of English criminal law on omissions

Now that we have set out the standard criminal law model relating to criminalising omissions, we shall investigate whether this standard account accurately reflects the English criminal law's treatment of omissions and whether it should be refined on the basis of our normative theoretical models. We will gauge to what extent the criminal law relating to omissions is metaphysically sound and normatively defensible.

a) Is the English criminal law treatment of omissions metaphysically sound?

We have established that a metaphysical analysis is needed to set a framework to investigate the case law. Through our investigation we differentiated an omission from a non-doing. The latter only becomes an omission if there is a "norm, standard, or ideal that called for the agent to do that thing".[88] We differentiated criminal omissions from mere omissions, as under English criminal law, liability for omissions is dependent on there being a legally-recognised duty. As surveyed in the previous section, there are several categories of duties recognised under criminal law. In instances where there is no such legal duty, there is no (relevant) omission in the eyes of the criminal law. Legal criteria for identifying duties do not tell us much about what an omission is or what makes omissions distinct from acts.[89]

Chapter 1 argued that the rules of law are answerable to metaphysics. The criminal law should not reconstruct its own metaphysics. The criminal law has metaphysical obligations, and an account of omissions should be metaphysically defensible. One purpose of a metaphysical account is to establish a normative standard for legal

[88] Randolph Clarke, 'Omissions, Abilities, and Freedom' in *Omissions: Agency, Metaphysics and Responsibility* (Oxford University Press 2014) p89.
[89] Jerome Hall, General Principles of Criminal Law (2nd edn, The Lawbook Exchange Ltd 2010) p247.

rules and concepts. We explored the best metaphysical account of omissions, and for our purpose the best metaphysical account must serve the purpose of assigning criminal responsibility.[90]

For this reason, we rejected Moore's metaphysical account of omissions which focused on bodily movement. The problem with Moore's account is that it views actions in abstraction, and is unhelpful in placing the behaviour in its proper context. Moore's theory obscured the legal and moral status of acts and omissions. We adopted Fletcher's communicative theory, as it puts us in a better position to reconstruct the legal and moral status of the particular act/omission in its social context. Fletcher's communicative theory is more helpful in assessing whether the behaviour has any moral or legal significance.[91] How seriously do the courts take metaphysics?

A good illustration can be seen in the 1977 Court of Appeal case, *R v Speck*.[92] In *Speck* the appellant was sitting on a chair when an eight year old girl placed her hand on his genitals. She continued to leave her hand there which resulted in the appellant getting an erection. It is important to note that the appellant did not encourage the child or place her hand there, he merely omitted to remove her hand.[93] The appellant was charged under Section 1 of the Indecency with Children Act 1960 (indecent conduct towards young child) which stated, "any person who commits an act of gross indecency with or towards a child under the age of fourteen … shall be liable on conviction on indictment to imprisonment…". The court held that "such inactivity can nevertheless amount to an invitation to the child to undertake the act",[94] and "the mere fact that the appellant himself remained inactive is no defence to it".[95] The court decided that the defendant's conduct amounted to an act, which supported his conviction. The court held the

[90] See page 32.
[91] Ibid.
[92] R v Speck [1977] 65 Cr. App. R. 161, 164.
[93] Ibid.
[94] Ibid.
[95] Ibid.

appellant liable as the defendant's conduct amounted to a sexual assault. The court was correct in its decision, however, its reasoning was flawed.

Applying our metaphysical model, such conduct amounts to an omission. Speck did not invite or encourage the girl but remained motionless, not doing anything to discourage the girl, or make any attempt to remove her hand. On these facts, a duty arose for the appellant to remove her hand, transforming his non-doing into an omission. In this instance it seemed the court discarded adherence to metaphysics in favour of arriving at a guilty verdict. The court's reluctance in criminalising pure omissions meant that in order to reach the correct verdict, the defendant's conduct had to be characterised as an act. This case aptly demonstrates that sexual assault can arise from a pure omission. It once again highlights the flaws in Moore's metaphysical approach in which an omission is not criminalised due to the lack of bodily movement. The contextual approach we have adopted suggests the correct reasoning: Speck's conduct amounted to an omission, which in these circumstances constituted a sexual assault. It would be preferable to acknowledge openly when conduct amounts to an omission, as "when we have a case which plainly consists in liability for an omission, it is at least unhelpful and possibly dangerous to try to disguise the fact and to describe the occurrence as an act".[96] McCutcheon insightfully points out that stretching the "concept of an act, sometimes beyond the point of credulity, to classify an omission as an act is a linguistic slight of hand".[97] The purpose behind this is to "remain faithful to tradition" that omissions should not be criminalised and in the process ensuring that "criminal liability is extended".[98] In this way, the question whether we should penalise omissions is neglected.[99]

[96] John C. Smith, 'Liability for Omissions in the Criminal Law' (1984) 4 Legal Studies 88.
[97] J Paul McCutcheon, 'Omissions and Criminal Liability' (1995) Irish Jurist 60.
[98] Ibid.
[99] Ibid.

Metaphysical confusion can also be seen in the 1968 Divisional Court case of *Fagan v Commissioner of Metropolitan Police*.[100] In *Fagan*, the defendant was convicted of assaulting a police officer. The appellant was asked by the police officer to pull into a nearby road so he could produce some documents. Having directed the car where to park, the appellant accidently drove onto the police officer's foot. Upon being made aware of what had transpired, the appellant switched his engine off and refused to move his car. Eventually, he reversed the vehicle off the officer's foot.

The question that arose on appeal was "whether the prosecution proved facts which in law amounted to an assault".[101] It was held that an assault had occurred. However, because "a mere omission to act cannot amount to an assault"[102] the majority of the Divisional Court held that an omission had not in fact occurred but rather an act constituting assault. James J. stated :

> Knowing that the wheel was on the officer's foot the appellant (1) remained seated in the car so that his body through the medium of the car was in contact with the officer, (2) switched off the ignition of the car, (3) maintained the wheel of the car on the foot and (4) used words indicating the intention of keeping the wheel in that position. For our part we cannot regard such conduct as mere omission or inactivity.[103]

This ruling was not unanimous; Bridge J. (as then he was) dissented. He acknowledged that the defendant had behaved disgracefully, but he did not view the defendant's action as a continuing act. After all, "the car rested on the foot by its own weight and, remained stationary by its own inertia. The appellant's fault was that he omitted to manipulate the controls to set it in motion again".[104] Bridge J. distinguished the appellant's conduct from one who "accidentally treads on

[100] Fagan v Commissioner of Police of the Metropolis [1969] 1 Q.B. 439.
[101] Ibid 443.
[102] Ibid 444.
[103] Fagan (n 100) 445.
[104] Ibid 446.

another's toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests".[105] Whilst this is an assault, it should be differentiated as the appellant did not hold or maintain the car wheel on the police officer's foot and merely "allowed the wheel to remain".[106] On this basis, Bridge J. characterised the defendant's conduct as an omission, and since no mere omission can result in an assault, Bridge J. believed the conviction should have been quashed.

Bridge J. was correct in identifying the conduct as an omission, however, it is also an omission which constitutes an assualt. This case is an apt example of how the courts misconceive metaphysics in reaching their decisions. They imaginatively interpret the facts so that the defendant's conduct amounted to an act, purely for the purpose of finding him criminally liable for assault. An assault had taken place as the defendant deliberately left his car on the police officer's foot. As stated by Bridge J., such conduct amounted to an omission. The court should correctly adhere to metaphysics, acknowledging that an omission had occurred, and also that an omission can constitute an assault.

The erroneous rationale for finding Fagan guilty can be better explained following the subsequent ruling in *Miller.*[107] By following *Miller*, Fagan would likely have been criminalised on the basis that he had created a dangerous situation and omitted to take reasonable steps to alleviate the danger.

It was discussed in *Miller* whether the conduct amounted to an omission to put out the fire, or was instead a continuing act. Lord Diplock stated that the defendant's conduct might amount to either a continuous act or a commission by omission as "both theories lead to an identical result".[108] The first theory held that "events preceding the fire were all part of a single course of conduct on Miller's part", and

[105] Ibid.
[106] Ibid.
[107] Miller (n 24).
[108] Ibid 179.

therefore Miller's "failure to do anything about the fire is to be treated as merely part of an overall act of setting fire to the building".[109] The second theory, which was adopted, is one in which it was established that the defendant had created a dangerous situation and therefore he was under a duty to avert that dangerous situation, and omitted to do so. Either approach was deemed correct, but the duty theory was preferred for its simplicity in being "easier to explain to a jury".[110] JC Smith is persuasive when he argues that "there is more at stake here than ease of explanation to a jury".[111] As established in chapter 1, the criminal law is answerable to metaphysics. It is not enough to propose a principle merely because it is easier to explain to the jury.

Miller was a landmark case in determining that an omission can result in an assault. It was applied in *Director of Public Prosecutions v Santa-Bermudez*[112] in which the respondent was instructed by a police officer to turn out his pockets. When Santa-Bermudez was asked if that was everything, he omitted to disclose that there was another needle in his pockets. The officer pricked her finger on a needle in his pocket, and Santa-Bermudez was convicted of an assault occasioning bodily harm. He was acquitted by judicial directive on a submission of no case to answer. Santa-Bermudez's conduct amounted to an omission, and therefore did not result in an assault.[113]

The Divisional Court disagreed, stating that an omission to act can amount to an assault, if that omission exposes another to a reasonably foreseeable risk of injury. The respondent's dishonest assurance that there was nothing in his pockets exposed the officer to a reasonably foreseeable risk of injury. *Miller* was invoked as the authority which set a precedent that a duty arises when an individual creates a dangerous situation. The accused had created a dangerous situation by

[109] Menlowe (n 75) p61.
[110] Miller (n 24) 179.
[111] Smith (n 96) 90.
[112] Director of Public Prosecutions v Santa-Bermudez [2003] EWHC 2908.
[113] Ibid.

having needles in his pockets, and therefore had a duty to disclose their existence to the attending police officer. This was held to satisfy the actus reus requirements of the offence. As stated by Mr Justice Maurice Kay:

> Where someone (by act or word or a combination of the two) creates a danger and thereby exposes another to a reasonably foreseeable risk of injury which materialises, there is an evidential basis for the actus reus of an assault occasioning actual bodily harm.[114]

Judges are not metaphysicians. Nevertheless, the court should not misconceive metaphysics in order to arrive at the correct decision. The court's flawed approach to metaphysics was also displayed in the 1993 House of Lords case *Airedale NHS Trust v Bland*.[115] In *Airedale,* Mr Bland was in a permanent vegetative state and not in a position to give or withhold consent to medical treatment due to an injury sustained in the Hillsborough football stadium disaster. It was agreed that there was no hope for recovery. In such situations, the doctor decides whether treatment is in the patient's best interest. In this instance it was appropriate for the treatment to stop as there was no prospect of improvement. The feeding tube was disconnected from the patient, and this was distinguished from administering drugs to kill the patient. Whilst it was not lawful to accelerate death, it was permissible to withhold life sustaining treatment in certain situations. Such conduct was held to amount to an omission. Due to the conduct being an omission, what was the duty of the doctors? It was held that there was no breach of duty as it was not in Bland's best interest for treatment to continue. A doctor had a duty towards a patient, but discontinuing the life support machine did not breach the duty.[116]

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[114] Ibid.
[115] Airedale (n 1).
[116] Ibid.

Lord Goff remarked that the doctor's conduct in "discontinuing life support can properly be categorised as an omission".[117] Lord Goff acknowledged that "it is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end".[118] This analysis was based on the fact that the "the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition".[119] Lord Goff differentiated the situation from that of an "interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor".[120] In that situation, the conduct of the interloper cannot be categorised as an omission. This act/omission distinction was judged to be useful as it explained how "discontinuance of life support can be differentiated from ending a patient's life by a lethal injection".[121] Whether the behaviour was an omission is not determined by bodily movement (clearly there was bodily movement involved in switching off the machine), but rather whether there was an interruption in nature taking its course or the expected sequence of events. Switching off the life support machine returns the individual to the position he was in when he arrived at the hospital. Therefore the individual dying is an example of nature taking its course, and is considered an omission.[122]

The correct decision was reached and the doctors appropriately stopped treatment. Nevertheless, the courts were mistaken in their approach to

[117] Ibid 866.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Jonathan Herring, Criminal Law: Great Debates in Law (3rd edn, Palgrave Macmillan 2015) p27.

metaphysics. Why was this approach taken in *Airedale*? Glenys Williams helpfully explains that:

> The central tenet of the acts/omissions distinction (AOD) in this context is that an act is deemed to be intended and to 'cause' the death of (i.e. kills) the patient, whereas an omission assumes the absence of intention and attributes the cause of the patient's death to his pre-existing illness or injury.[123]

However, the criminal law should not reconstruct its own metaphysics. Whether it be a doctor or an interloper, the behaviour still amounts to an act regardless of who carries out the conduct. A distinction between an act and omission should not be made on basis of the identity of the individual performing the conduct. The courts were wrong in classifying the doctor's conduct as an omission. The conduct (switching off the life support machine) does not become an omission if it is performed by a medical practitioner, as it is still an act. It may not be an act that warrants criminalisation, or moral condemnation, but metaphysically speaking it is still an act.

The correct approach would have been to argue that the doctors carried out an act which should not be criminalised rather than obscuring the nature of the conduct by characterising it as an omission. The approach in distinguishing acts and omissions in *Airedale* amounts to "linguistic sophistry and semanticism".[124] Classifying the conduct as an omission is used as a tool to absolve doctors of criminal liability. Exculpating doctors by labelling their conduct as an omission is problematic. The courts have used the act/omission doctrine to absolve doctors of responsibility for passive euthanasia, as switching off the respirator is considered an omission, when it is in fact an act. Passive euthanasia is not an omission. As

[123] Glenys Williams, 'Acts and omissions in treatment withdrawal: conceptual problems and policy decisions' (2008) 39 Cambrian Law Review 81.
[124] Ibid 75.

argued by Begley, the act/omission distinction does not provide "an accurate barometer of the defendant's moral culpability".[125] The moral status of the conduct can only be fully appreciated "after an inquiry into matters such as the patient's interests, motivation and context".[126] Of course, there are many situations where an act is morally more heinous than an omission, but this is not always the case.

Ashworth observes that the courts should be "explicit about the grounds for exonerating doctors or nurses, rather than concealing the reasons behind the act/omission distinction".[127] Ashworth goes on to state:

> Whether we term certain events 'acts' or 'omissions' may be both flexible in practice and virtually insoluble in theory: for example, does a hospital nurse who decides not to replace an empty bag for a drip feed make an omission, whilst a nurse who switches off a ventilator commits an act? It would seem wrong that criminal liability or non-liability should turn on such fine points, which seem incapable of reflecting any substantial moral distinctions in a context where the preservation of life is generally paramount. [128]

As Elliot and Ormerod point out, "a better solution needs to be found…to exculpate doctors performing such conduct,"[129] as "to regard the same conduct as amounting to an omission (and lawful) if committed by a medical practitioner treating the patient, and an act (and murder) if committed by any other individual, is surely untenable".[130] Lord Mustill acknowledged the ambiguity surrounding acts and omissions, but maintained "we cannot however try to put it in order here. For the

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[125] Ann-Marie Begley, 'Acts, Omissions, Intentions and Motives: A Philosophical Examination of the Moral Distinction Between Killing and Letting Die' (1998) 28 Journal of Advanced Nursing 867.
[126] Ibid 872.
[127] Andrew Ashworth, 'The scope of criminal liability for omissions' (1989) 105 Law Quarterly Review 433.
[128] Ibid 426.
[129] Tracey Elliott and David Ormerod, 'Acts and Omissions – A Distinction Without a Defence?' (2008) 39 Cambrian Law Review 40.
[130] Ibid.

time being all are agreed that the distinction between acts and omissions exists, and that we must give effect to it".[131]

This weak excuse is unpersuasive. The courts should not manipulate the definition of acts/omissions to absolve medical practioners of criminal liability. To do so creates a further lack of clarity in a field beset with confusion. In such instances the courts should respect metaphysics: when doctors switch off life support machines, it should be acknowledged that an act was performed, albeit an act which should not be criminalised (because it was justified).

Another instance of the court's failure to properly adhere to correct metaphysics can be seen in the distinction between duty to act and a duty of care. For "a duty of care is a tort law concept essential to the tort of negligence, and identifies all those we must take care to avoid harming by our acts and omissions when conducting our lives".[132] This should be contrasted with a duty to act which identifies a "narrower set of duties where D's liability can be based on an omission".[133] As stated by Ormerod and Laird, "where a duty to act is found there will always be a duty of care; however, a duty of care will not always indicate a duty to act".[134] In the *Evans* judgment, the two concepts were frequently run together, and not properly distinguished. The problem with this has been identified by Elliott:

> The trial judge must direct the jury on the legal meaning of both a duty of care and a duty to act so that the jury can then apply the facts of the case to those legal definitions to determine whether both those forms of duty exist in a relevant case of manslaughter by omission. The task of

[131] Airedale (n 1) 893.
[132] Ormerod and Laird (n 7) p52.
[133] Ibid.
[134] Ibid.

> the jury will not be facilitated if trial judges are themselves blurring these two concepts.[135]

These concepts are being used to impose liability for gross negligence manslaughter by omission.[136] Due to the gravity of such an offense, the courts should take the metaphysics seriously, clearly define what each term means, and consistently differentiate between them.

According to Moore, "our [US] law is simply wrong about the metaphysics".[137] In the English cases we have explored, the same criticism applies. There is a lack of conceptual clarity or consistency in the court's reasoning, and this "ambiguity allows them to cloak their policy decisions".[138] Ashworth and Horder are persuasive when insisting that, "there are many ambiguous cases in which the act-omission distinction should not be used as a cloak for avoiding the moral issues".[139]

In *Santa-Bermudez* the court acknowledged that a "great deal of undesirable complexity has bedevilled our criminal law as a result of quasi theological distinctions between acts and omissions".[140] As we established in chapter 1, metaphysical considerations are only the starting point and cannot in isolation determine which omissions should be criminalised.[141] Santa-Bermudez's conduct was immoral, and he deliberately and knowingly took the risk that the police office could hurt herself whilst searching him. What role do moral considerations play in the criminalisation of omissions? The next section will explore this question.

b) Is the English criminal law treatment of omissions morally defensible?

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[135] Catherine Elliott, 'Liability for Manslaughter by Omission: Don't Let the Baby Drown!' (2010) 74 Journal of Criminal Law 170.
[136] Ibid 163.
[137] Michael S. Moore, 'Reply: More on 'Act and Crime' (1994) 142 University of Pennsylvania Law Review 1749 – Moore was referring to American law but English criminal law use similar principles to justify criminalising omissions.
[138] Elliott and Ormerod (n 129) 43.
[139] Andrew Ashworth and Jeremy Horder, Principles of Criminal law (7th edn, Oxford University Press 2010) p100.
[140] Santa-Bermudez (n 112) 2908.
[141] See page 33.

Chapter 2 explored the moral status of omissions, using our exemplar Hannah. We acknowledged that on the whole omissions are morally less culpable than acts.[142] Legally a distinction is made too. Thus in *Lowe*, Phillimore L.J. differentiated an act from an omission, stating that there is a clear distinction between an "omission and an act of commission likely to cause harm".[143] His Lordship illustrated the difference with an example:

> If I strike a child in a manner likely to cause harm it is right that, if the child dies, I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate.[144]

Phillimore L.J. argues that manslaughter should not be an inevitable consequence of an omission, even if deliberate. Whilst Phillimore L.J. identifies that a distinction should be made between an act and omission, he does not explain on what basis. Whilst it is true that omissions are usually less morally culpable than acts causing the same result, this is not always the case. In this instance, it is not clear why a distinction should be made.

Despite the fact that we owe more to those closest to us, the morality of agent-relative duties still does not negate the fact that we also have duties to those outside our close circle of friends and family. A moral duty of beneficence exists towards other individuals. For instance, Hannah – as already argued - has other-regarding duties towards Billy, and there exists a moral duty to rescue him.[145] This section will explore the extent to which moral considerations have influenced the courts in finding criminal liability for omissions.

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[142] See page 35.
[143] Lowe (n 47) 709.
[144] Ibid 709.
[145] See page 76.

The cases we have analysed in the previous section (with the exception of *Airedale*) are cases relating to non-fatal offences against the person. These cases are metaphysically the most problematic as the courts often (incorrectly) assert that an assault cannot be carried out by an omission, only by an act. Homicide cases doctrinally do not pose the same problems as non-fatal offences for "the courts have long accepted without debate that murder and manslaughter are capable of commission by omission".[146] The majority of cases being investigated in this section concern manslaughter by omission. However, murder can also result by omission, as can be seen in *R v Gibbons and Proctor.*[147] Nevertheless, *Gibbons* is the exception and the majority of homicide by omission cases have resulted in charges and (convictions) of manslaughter.

We can now narrow down the central question. For manslaughter by omission, how significant are moral considerations in determining whether there exists a legal duty to act? The 1907 US case *People v Beardsley*[148] nicely illustrates how in early Anglo-American jurisprudence morality and the criminal law do not correlate.

In Beardsley, the defendant had invited a woman to spend a weekend with him in his apartment. Together they consumed alcohol, and the woman consumed drugs. She fell into a coma and, despite her evidently being ill, the defendant merely put her to bed without summoning help. Eventually, help was summoned by a friend of the defendant but when the doctor arrived, the woman already had died. The court held that the defendant was under no legal duty to provide help, even though he was aware her life was in danger.[149] The Supreme Court of Michigan emphatically stated:

[146] Ormerod and Laird (n 7) p75.
[147] R v Gibbons and Proctor (1918) 13 Cr App R 134.
[148] People v Beardsley [1907] 150 Mich. 206.
[149] Ibid.

> The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter.…This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death.[150]

The court held that the defendant was under no legal duty to provide help, as no special relationship existed between the two parties. The court concluded:

> In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; ... and if such efforts should be omitted by any one when they could be made without imperilling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.[151]

This case has been criticised, and as summarised by Hughes:

> 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 civilised 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.[152]

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[150] Ibid 209.
[151] Ibid 215.
[152] Graham Hughes, 'Criminal Omissions' (1957) 67 Yale Law Journal 590.

A significant English case in which the immorality of the defendant's conduct was a decisive factor in the existence of a legal duty to act was *R v Instan.*[153] In *Instan* the deceased suffered from gangrene in her leg. This rendered her incapacitated, incapable of providing for herself, or summoning assistance. The deceased lived with her niece who made no effort to procure any medical or nursing assistance, or even offer any food to her incapacitated aunt, who subsequently died. The defendant claimed that there was "no evidence of any legal duty such as would bind the prisoner to give or to procure any food, or nursing, or attendance to or for the deceased, or to give any notice to anyone that such was required".[154] The question for the courts was whether a legal duty to act had arisen. It was acknowledged that a legal duty requiring the niece to act "has no clear source in external law"[155] as it did not fit into a prexisting duty established by statute or recognised by common law. Despite this, a relationship of dependence was held to exist outside direct family; and in this case the niece owed a duty to her aunt. It was held that the niece's omission to provide any assistance made her causally responsible for her aunt's death which was initially caused by gangrene but "substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previous to the death".[156] Lord Coleridge C.J. noted that there was a clear duty for the accused to share the food, especially since it was purchased with the deceased's own money. This duty was not performed and therefore the niece was found guilty.

As Lord Coleridge C.J explained, "the prisoner was under a moral obligation to the deceased from which arose a legal duty towards her".[157] Lord Coleridge went on to say that:

[153] Instan (n 50) 450.
[154] John Kleinig, 'Criminal Liability for Failures to Act' (1986) 49 Law and Contemporary Problems 170.
[155] Ibid 178.
[156] Instan (n 50) 451-452.
[157] Ibid 454.

> It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.[158]

In *Instan*, the actions of the niece in failing to provide any assistance for her incapacitated aunt were morally defective and deserved punishment. *Instan* was a landmark case in acknowledging that in manslaughter by omission cases a legal duty to act has moral foundations. Nevertheless, as noted by Hughes half a century ago, "regrettably, the courts have not faced up to their own advancing attitudes to social duty".[159] Instead, 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".[160] As a result, this "refusal to acknowledge the reality of the progress has impeded the advance".[161]

Hughes' observation was made in 1957. Has the English criminal law progressed since then? Not according to Elliott, who argues that "the courts have refused to accept Lord Coleridge's lead, and law and morality as a result have parted ways".[162] Elliott astutely identifies that "while law and morals do not always need to correlate, they should not veer too widely apart without good reason, particularly where those moral values have a logical foundation based on social responsibility and the reduction of harm".[163] The decision in *Instan* is to be welcomed for "avoiding the rigidity that results from reliance on external law as a source for duty".[164] By "external law", Leavens refers to previous rulings and statutes. Based on previous rulings there was no legal duty for the niece to provide for her aunt, however, in *Instan* a legal duty to act was "founded on the moral

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[158] Ibid 453.
[159] Hughes (n 41) 593.
[160] Ibid 591.
[161] Ibid.
[162] Elliott and Ormerod (n 129) 41.
[163] Ibid 174.
[164] Arthur Leavens, 'A Causation Approach to Omissions' (1988) 76 California Law Review 550.

imperative of the victim's glaring need and the relative ease with which aid could be rendered".[165] Leavens argues that in "more difficult cases such as *Instan,* in which deep-rooted moral sensibilities can be offended by the strict legal duty result, conventional analysis provides no conceptual aid to inform the decision on liability".[166] As a result, we "are left with the bald choice between the rigid but predictable legal duty formulation on the one hand, and the unpredictable but flexible moral duty approach on the other".[167] In manslaughter by omission cases, is there really a divergence between morality and English legality? It would seem so, on the basis of the decision in *R v Khan*[168].

In *Khan,* two drug dealers supplied heroin to a 15 year old prostitute. She was an inexperienced heroin user, and upon consummation, she choked and went into a coma. The two dealers left the flat, and failed to summon medical help. If medical help had been summoned, she likely would have survived. Upon returning the next day, they found the victim dead. The defendants then disposed of her body, and burnt some of her clothes and the mattress on which she was lying.[169]

The main issue in *Khan* was whether a legal duty to act existed for drug dealers. Applying *Airedale*, Swinton Thomas L.J. decided that before an individual is "convicted of manslaughter by omission there must be a pre-existing duty to act".[170] He distinguished other cases such as *Lowe*, in which there was a relationship arising from the fact that the deceased was the defendant's child. Also in *Stone* the defendants were the brother and sister in law of the deceased, and had assumed a duty of care and therefore were obliged to summon help. Swinton Thomas L.J. stated:

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[165] Ibid 553.
[166] Ibid 557.
[167] Ibid 588.
[168] Khan (n 3) 830.
[169] Ibid.
[170] Ibid.

> To extend the duty to summon medical assistance to a drug dealer who supplies heroin to a person who subsequently dies on the facts of this case would undoubtedly enlarge the class of person to whom, on previous authority, such a duty may be owed. It may be correct to hold that such a duty does arise. However before that situation can occur, the Judge must first make a ruling as to whether the facts as proved are capable of giving rise to such a duty and, if he answers that question in the affirmative, then to give the jury an appropriate direction which would enable them to answer the question whether on the facts as found by them there was such a duty in the case being tried by them.[171]

The court allowed the appeal and quashed the conviction for manslaughter. For an individual to be convicted of manslaughter by omission, there has to be a "breach of duty coupled with gross negligence".[172] It is significant that, whilst the Court acknowledged that extending a duty to drug dealers would enlarge the class of people subject to such a duty, the possibility was not excluded. The conviction was quashed on the basis that "the question as to the existence or otherwise of a duty to take care towards the deceased was not, in this case, at any time considered by the Judge, and the jury was given no direction in relation to it. In these circumstances the summing up of the Judge in this case on manslaughter by omission was flawed and inappropriate".[173]

In allowing the appeal Swinton Thomas L.J did not find the defendants guilty of manslaughter by omission which meant that legally the defendants were not responsible for the victim's death. Nevertheless, Swinton Thomas L.J. acknowledged that the defendant's conduct was morally wrong, stating:

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[171] Ibid.
[172] Ibid.
[173] Ibid.

> The behaviour of these two Defendants towards Lucy Burchell was about as callous and repugnant as it is possible to imagine but, for the reasons which we have given, we are obliged to quash the conviction for manslaughter in respect of Rungzabe Khan.[174]

The two Khans created a dangerous situation by administering the drugs to Lucy, and would have been aware that taking heroin orally was risky. Upon seeing her adverse reaction, no steps were taken to avert the danger, and they declined to summon help. This lack of assistance proved to be a significant factor in Lucy's untimely death. Not punishing those in the position of the Khans, whilst punishing Sinclair[175] is problematic, as it leaves immoral and callous behaviour unpunished due to the lack of an existing duty, whilst punishing those who attempt to rescue, albeit too late. As Kleinig observes:

> A duty to act was only found in respect of Sinclair because there was evidence that he was a close friend of the victim and demonstrated a voluntary undertaking of responsibility towards the victim by staying with him for some hours before calling for an ambulance. The result of this judgment is that someone with a loving relationship to the victim who negligently fails to act may be faced with imprisonment while a drug-dealer who callously allows his customer to die will commit no offence as a consequence of his omission.[176]

We have seen that, in *Ruffell*,[177] a duty to act seemed to arise on the basis of the friendship between Ruffell and the deceased. Another reason why the conviction was not quashed stemmed from Ruffell's conduct, in as much as "deliberately leaving someone in a bad condition and in cold weather, when he could easily have

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[174] Ibid.
[175] See page 156.
[176] Kleinig (n 154) 171.
[177] Ruffell (n 84) 122.

brought him inside, put a more serious reflection on the case".[178] For Ashworth, this was not the main ground of liability as the court merely regarded it as "a breach of a duty that already existed, and not as giving rise to a further duty".[179] However, the moral reprehensibility of Ruffell leaving the deceased uncovered in the freezing cold, despite instructions from his mother to cover him up, may have been a significant aspect of this case and partly explains why the courts found Ruffell in breach of a legal duty to act.

The cases of *Sinclair, Ruffell,* and *Evans* seem to indicate a trend towards the establishment in English criminal law of a new type of duty, one which Elliot refers to as a "category of duty for people who jointly engage in a hazardous activity like drug abuse".[180] In all three cases, there seems to be a break in causation as the victims all chose to inject themselves independently. Nevertheless, the courts held the defendants responsible and in breach of a duty for omitting to summon help. What is the underlying basis for this duty? The same moral principle underlying *Miller* applies in these cases, namely one is responsible for creating this dangerous situation and now has a duty to rectify it. Aside from the illegality of the conduct (consuming drugs), secluding the victim from external help, and the prior relationship existing between the parties involved, another factor appears to be the immorality of the defendants' conduct in failing to summon aid for those in dire need. For this reason (amongst others) courts hold the defendants responsible for their conduct, and place a duty on them to discharge their responsibility by rendering aid of some kind.

In *R v Wacker*[181] a Dutch driver appealed against his conviction for the manslaughter of 58 Chinese illegal immigrants. Wacker had concealed them in the back of his lorry, and shut the ventilation source. Due to Wacker's omission to

[178] Ashworth (n 55) 566.
[179] Ibid 564.
[180] Elliott and Ormerod (n 128) 42.
[181] R v Wacker [2003] QB 1207.

open the air vent, the immigrants suffocated and died.[182] Did Wacker owe the immigrants a duty of care? His defence was that he did not owe the immigrants a duty of care as they all shared the same joint illegal purpose, and under the principle ex turpi causa non oritur actio "the law of negligence did not recognise the relationship between those involved in a criminal enterprise as giving rise to a duty of care owed by one participant to another".[183] In addition, Wacker was alleged to have omitted to open the air vent, and it was not clear at which point the duty arose.

It was held that nobody's actions but Wacker's own could have saved the immigrants from suffocating to death. When the vent was closed one immigrant asked whether there would be enough air to survive. Wacker was "shouldering the duty to take care for their safety" and he "was aware that no one's actions other than his own could realistically prevent the Chinese from suffocating to death and if he failed to act reasonably in fulfilling this duty to an extent that could be characterised as criminal, he was guilty of manslaughter if death resulted".[184] As for the existence of a duty, "the duty arose from the moment the vent was shut"[185] and continued for the duration of the journey. Kay LJ stated that:

> There are occasions when it is helpful when considering questions of law for the court to take a step back and to look at an issue of law that arises without first turning to, and becoming embroiled in, the technicalities of the law. This is such a case. We venture to suggest that all right-minded people would be astonished if the propositions being advanced on behalf of the defendant correctly represented the law of the land. The concept that one person could be responsible for the death of another in circumstances such as these without the criminal law being

[182] Ibid 1207.
[183] Ibid 1212.
[184] Ibid 1208.
[185] Ibid 1218.

> able to hold him to account for that death even if he had shown not the slightest regard for the welfare and life of the other is one that would be unacceptable in civilised society.[186]

The moral heinousness of the conduct was such that Kay LJ explicitly states that criminal law should directly reflect it, mindful that the "criminal law will not hesitate to act to prevent serious injury or death even when the persons subjected to such injury or death may have consented to or willingly accepted the risk of actual injury or death". [187] The *ex turpi* counter argument was rejected:

> We can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time or, indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise.[188]

Recalling Leavens' assertion that we "are left with the bald choice between the rigid but predictable legal duty formulation on the one hand, and the unpredictable but flexible moral duty approach on the other",[189] the moral heinousness implicit in allowing 58 people to die at the back of a lorry was sufficient to ground a duty to act in English criminal law. Similar to *Instan*, the legal duty to act was founded on a moral duty.

Notwithstanding categories and cases surveyed in this section, there is a certain flexibility in the court's approach in deciding that a legal duty to act existed, and the courts are expanding the list of duties. This flexible moral duty approach espoused by Leavens is to be welcomed in dealing with the unique facts inherent

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[186] Ibid 1216.
[187] Ibid 1217.
[188] Ibid.
[189] Leavens (n 164) 553.

in each case. Nevertheless, this flexibility leads to a lack of legal certainty and could potentially breach Article 7 of the European Convention of Human Rights. As Glanville Williams memorably said:

> If the top lawyers in a Government committee find the law hard to state clearly, what hope have the Stones and Dobinsons of this world of ascertaining their legal position, in advance of prosecution, when they find themselves landed with a hunger-striking relative?[190]

Through our investigation of the case law, it has become clear that there is a lack of consistency in the courts' decisions, and "without a rule of interpretation to guide courts in this area, it seems that the decision whether to classify D's conduct as an act or omission is one that is made on a case-by-case basis".[191] Even when a duty exists, the boundaries of this duty remain unclear. According to Mathis, this results in the case law being "theoretically inconsistent or even internally contradictory".[192] Even when the correct outcome is reached, the courts do not properly adhere to sound metaphysics in their justificatory reasoning and so arrive at decisions that lack consistency in comparison to previous rulings. The list of categories of duties is not closed, and the courts seem to be willing to extend it depending on the unique facts of the case. As Fletcher has put it, it seems that the courts are more "concerned about condemning the injustice of not punishing immoral omissions",[193] as opposed to being logically or legally consistent. This approach is to be welcomed for its flexibility in reaching the right decision, nevertheless it lacks legal certainty.

The main problem in the list of duties potentially expanding on a case by case basis is highlighted by Ashworth. He notes that "there may be nothing to put the

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[190] Williams (n 40) p266.
[191] Ormerod and Laird (n 7) p59.
[192] Stephen Mathis, 'A Plea for Omissions' (2003) 22 Crim. Just. Ethics 15.
[193] George P. Fletcher, 'On the Moral Irrelevance of Bodily Movements' (1994) 142 University of Pennsylvania Law Review 1443.

individual on notice of the duty-situation"[194] and this is a problem as "it is regarded as a fundamental principle that criminal legislation should not be retroactive, and that fair warning is given".[195] For Ashworth, "the judicial recognition of new duty-situations in these serious cases would seem to violate this".[196] This concern was also shared by Rose LJ in *Sinclair*:

> Even if it is appropriate, in criminal as well as in civil law, for the circumstances in which a duty of care exists to expand incrementally, it is undesirable that there should be such elasticity in that expansion that potential defendants are unaware until after the event whether their conduct is capable of being regarded as criminal.[197]

Despite there being "inevitably a penumbra of uncertainty in many legal terms", Ashworth argues that when "it comes to criminal liability, it is wrong that citizens should be taken by surprise".[198] The result is that "duty-situations developed by the courts in the current law of manslaughter by omission are unprincipled, unpredictable and capable of producing injustice".[199]

One way to combat this uncertainty is to have a statute listing the categories of duties which exist when criminalising omissions. Uncertainty would not be eliminated, as even then the courts would still have to interpret the statutory provisions and specify how the general standards (e.g. close personal relationship) apply to different situations. Through a detailed inquiry into reforming criminal law omissions in this respect is beyond the scope of this thesis, it is something which would benefit from being addressed. Ashworth's argument that "issues of this kind

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[194] Andrew Ashworth, 'Ignorance of the Criminal Law and Duties to Avoid it' (2011) 74 Modern Law Review 1.
[195] Ibid 3.
[196] Ibid 4.
[197] Sinclair (n 59) 17-18.
[198] Ashworth (n 55) 565.
[199] Ibid 563.

cry out for the kind of principled, across-the-board consideration that a Law Commission should be able to undertake"[200] is compelling.

3) Would English criminal law criminalise Hannah's omission?

We argued that moral reasoning was a factor in imposing a duty. Would the courts impose a duty on Hannah to rescue Billy? This is what we shall now explore.

Is there a sound basis in doctrinal criminal law for the recognition of a duty requiring Hannah to rescue Billy? The standard position in English criminal law is that Hannah does not have a legal duty to rescue Billy. This position is adopted by textbook writers who regularly recycle this stock hypothetical:

> A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.[201]

This is echoed in *Miller* where Lord Diplock described the traditional English approach:

> The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal; and if it ever were to do so there would be difficulties in defining what should be the limits of the offence.[202]

The consensus amongst academic commentators is that no legal duty exists for Hannah to act, in contrast to continental jurisdictions in which there is embedded within civilian jurisprudence a general duty of easy rescue.

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[200] Ibid 564.
[201] James Fitzjames Stephen, A Digest of the Criminal Law (Crimes and Punishments), (3rd edn, London: Macmillan 1883).
[202] Miller (n 24) 175.

Referring to the standard taxonomy of legally-recognised duties discussed earlier, it seems there exists no legal duty for Hannah to rescue Billy. There is no statutory duty to help strangers in peril, which would exist if there were a Good Samaritan law. A duty does exist at sea. Under Section 93(1) of the Merchant Shipping Act 1995 the captain of a ship is not only under a duty to protect the lives of the passengers and crew but also to "proceed with all speed to the assistance of the persons in distress" in other ships. This duty however is exceptional and clearly does not apply to Hannah. There is likewise no legal duty for Hannah to act arising out of any contractual obligation. If Hannah were the park-warden, a contractual duty to rescue Billy might have arisen as "a particular position may give rise to an obligation to rescue", such as a "policeman, lifeguard, or the like".[203] Also, Hannah does not have any prior relationship with Billy, as she has never met him before. Following *Sinclair*[204] as authority, she has no legal duty to act arising from previous acquaintance or a personal relationship.

Would a legal duty act arise from a voluntarily incurred obligation? Once again, no legal duty to act exists for Hannah as she did not attempt to rescue Billy, and therefore did not assume responsibility for him. The park was deserted. Does a legal duty exist on the basis of seclusion, as it did in *Stone and Dobinson*,[205] *Evans*[206] and *Ruffell*?[207] It would appear not, as what differentiates Hannah's conduct from the cases we have examined is that the defendants actively attempted to help the victim, isolating them in the process. Ironically, if Hannah voluntarily attempted to help Billy but later abandoned the rescue or once beginning to help failed to summon medical assistance, then a duty might arise, despite the fact that, on the whole, attempting to help is morally superior to complete apathy.

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[203] Menlowe (n 75) p64
[204] Sinclair (n 59) 1353.
[205] Stone and Dobinson (n 58).
[206] Evans (n 30) 1999.
[207] Ruffell (n 84) 122.

Despite the apparent lack of a legal duty existing within the orthodox taxonomy, there are good reasons to conclude that if we were confronted with a situation equivalent to the drowning scenario, Hannah would be held to be under a legal duty to act. After all, the standard taxonomy of duties is not a definitive list followed by the courts. As we have seen, there is an "incremental development of relationships which can give rise to a duty to act".[208] The courts are flexible, taking a contextual approach, and investigating whether a legal duty to act exists scenario by scenario. Recent cases seem to indicate that the courts may not be implacably hostile to introducing an appropriately circumscribed duty to rescue. The grounds for imposing a legal duty to act on Hannah may already be embedded within the criminal law as opposed to requiring any radical extension.

The standard common law position rehearsed in *Beardsley* seemed to recognise little correlation between morality and legality. Lord Diplock was obviously correct in his assertion in *Miller* that English criminal law does not formally embrace a Good Samaritan law. Nevertheless, Lord Diplock made that statement in 1983 and recent cases seem to point in a different direction.

The evolution of modern case law exhibits progression since *Beardsley*. This can be seen in a recent unreported case, *R v Bowditch*,[209] in which 21 year old Michael Bowditch was convicted of gross negligence manslaughter. The facts are as follows. Bowditch and Becky Morgan met at a birthday party and consumed a cocktail of drugs and alcohol. They spent the evening together and went out to sea. They were "mucking about" and Morgan accidently fell into the water and could not swim. Bowditch did not attempt to rescue her or summon help. Bowditch returned to the coast and called the police two hours later stating that he saw someone die that night.[210]

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[208] Elliott (n 135) 169.
[209] R v Bowditch [2017] (unreported) Maidstone Crown Court.
[210] http://www.bbc.co.uk/news/uk-england-kent-38757650 accessed 13th March 2017.

Bowditch was initially charged with murder, which he denied. The charge was later reduced to gross negligence manslaughter, to which Bowditch pleaded guilty. Bowditch received a five and a half year custodial sentence. The prosecution stated that "it is the failure to take any steps to prevent Miss Morgan's death after she fell into the sea which forms the basis of his culpability for manslaughter".[211] In sentencing, Judge Jeremy Carey stated "you did not try in any way to help a drowning girl - not by throwing her a life buoy, not by going to her aid as some would have done, not by calling for help, not by contacting the rescue or emergency services".[212] Judge Carey added that Bowditch "left her to drown", and explicitly told the defendant "you then behaved in a way which many will rightly find repugnant".[213]

Why was Bowditch under a legal duty to act? Let's return to our taxonomy of duties. Clearly there was no duty arising out of statute as there is no Good Samaritan statute. As for a duty arising from a personal relationship, Bowditch was not related to Morgan nor would it be right to classify her as a friend, as they had met namely a few hours before the tragic incident occurred. Bowditch did not create the dangerous situation as in *Miller,* as by all accounts Bowditch and Morgan mutually consented to go out to sea and Bowditch did not accidently knock her into the water. Based on previous precedent it seems that there was no legal duty for Bowditch to act, only a moral duty.

It is important to stress that this case never went to trial, and if it did it would have been interesting to see whether the court would have found that the circumstances were such that there was a legal duty for Bowditch to act. Judge Carey's use of the word repugnant seems to indicate that he thought a legal duty to act existed on account of the moral heinousness of Bowditch's omission. To not

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[211] http://www.bbc.co.uk/news/uk-england-kent-38757650 accessed 13th March 2017.
[212] http://www.kentonline.co.uk/thanet/news/man-admits-killing-teen-girl-119541/ accessed 17th March 2017.
[213] http://www.kentonline.co.uk/thanet/news/man-admits-killing-teen-girl-119541/ accessed 17th March 2017.

make any attempt to rescue Morgan or to summon help until it was too late was indeed morally repugnant.

In *Airedale*, Hoffmann LJ drew attention to the relationship between morality and legality:

> The decision of the court should be able to carry conviction with the ordinary person as being based not merely on legal precedent but also upon acceptable ethical values.[214]

In cases relating to manslaughter by omission such as *Instan,*[215] *Ruffell*,[216] *Wacker*[217] and *Bowditch*[218] the moral heinousness of the conduct seems to be a significant factor in deciding a legal duty to act existed. However, whilst a moral duty is often indeterminate, a legal duty requires much more precision, and it is the job of the criminal law to define how far this duty extends and under what circumstances it exists.

Having reviewed the present state of the law concerning criminal omissions, recent judicial decisions seem to extend culpability to morally reprehensible omissions. Increasing social interdependence seems to be influencing English law into adopting a more "communitarian" approach to criminal responsibility. This was evidenced in *Wacker*,[219] in which it was explicitly stated that the law will follow the moral expectations of the community. In *Wacker*, the legal duty arose in line with community expectations, since to hold the defendant not criminally liable "would be unacceptable in civilised society".[220] In such situations, even "where there is no extraneous legal duty, equally strong public expectations calling for action might warrant the imposition of culpability for failure to act".[221]

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[214] Airedale (n 1) 865.
[215] Instan (n 50) 450.
[216] Ruffell (n 84) 122.
[217] Wacker (n 181) 1207.
[218] R v Bowditch [2017] (unreported) Maidstone Crown Court.
[219] Wacker (n 181) 1207.
[220] Ibid 1216.
[221] Lionel H. Frankel, 'Criminal Omissions: A Legal Microcosm' (1965) 11 Wayne Law Review 367.

There is no recorded prosecution of someone passing a drowning child in English criminal law, but what would happen if that situation ever arose? Would such a gross disregard for human life and welfare, and acting so contrary to community morality, lead to a duty being recognised in Hannah's case? Would the court expand the list of duties and include a new duty criminalising Hannah's conduct; a duty based in citizenship? Ashworth argues for the creation of a citizenship duty, in which someone is under a duty to act "by virtue of their status as a member of society."[222] Ashworth, harking back to Duff's modest legal moralism, poses the question:

> Should a person who comes across a man raping a woman have a duty to take steps towards law enforcement, or should that person be free to walk away or even to stay and watch the commission of the offence?[223]

Based on the doctrinal analysis presented in this chapter under English criminal law, Hannah may have a legal duty to rescue Billy. It would certainly be a terrible moral transgression if she did not attempt to undertake the relatively easy rescue of Billy. Thus far, we do not have an authoritative ruling on whether a duty would exist for Hannah to rescue Billy. Nevertheless, by looking at recent case law, the social and cultural context is such that there may be criminal liability for failing to rescue in these circumstances. As we have seen, there is ambiguity as to whether a duty exists. The courts have been extending the concept of duty and finding more circumstances in which a duty exists. If the courts were ever confronted with a situation akin to our drowning child scenario it is quite likely that a duty would be found. We discussed that the current English criminal law regarding omissions lacks certainty which could potentially lead to breaches of Article 7 ECHR. One way to alleviate this uncertainty is to have the law embedded in a statute clearly defining under what circumstances a legal duty to act exists. If we were to draft a

[222] Ashworth (n 126) 433.
[223] Ibid 431.

Good Samaritan law, practical difficulties inherent in drafting such a law would need to be tackled. Hogan highlighted the "immense practical difficulties in identifying who is required to play the Good Samaritan and what he would be required to do to discharge his duty".[224]

How difficult would it be to define the offence, and specifically the scope of duty? Does a Good Samaritan law also relate to saving people from non-fatal incidents or is it explicitly a duty to prevent death? Many countries do have a Good Samaritan law. In the next chapter we will attempt to gain comparative insight from these countries regarding drafting a Good Samaritan law for England and Wales and gauge how successfully these selected countries deal with institutional pragmatic constraints on the criminalisation of failures to rescue.

Conclusion

The discussion in this chapter elucidates some points relating to omissions. We have not addressed every issue on omissions and we have looked specifically at duties in the context of providing assistance or aid in omissions relating to manslaughter. Any potential duty to rescue statute should certainly apply to homicide cases. Hence, our main focus was in relation to specific duties which have tended to arise in homicide cases.

A liberal, democratic, pluralistic, rights-respecting criminal law like in England and Wales prioritises human life and autonomy. We flagged up some issues which were not relevant for our inquiry but warrant further investigation, specifically how the flexibility of the courts could lead to uncertainty and potentially breach Article 7 ECHR due to citizens not being put on notice when a duty exists. An investigation by the Law Commission is much needed to devise ways to combat this uncertainty whilst still respecting the flexibility inherent within common law.

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[224] Hogan (n 77) p90.

What we did is review the existing English criminal law on omissions in homicide cases and looked at the range of existing duty situations. We identified five principal of duty: 1) duties arising from statute 2) duties arising out of a contract 3) duties arising out of the creation of a dangerous situation 4) duties arising out of a personal relationship 5) duties arising from voluntarily incurred obligations. After summarising a standard account of omissions, we investigated how this account stacked up against our normative models devised in earlier chapters. This is what we found:

1) Relevant case law shows that the courts often do not adhere to sound metaphysical analysis and manipulate the definition of an omission in favour of upholding a guilty verdict. This is especially prevalent in omission cases involving non-fatal offences against the person e.g. *Speck*,[225] *Fagan*,[226] and *Santa-Bermudez*.[227]

2) In homicide by omission cases, a legal duty to act is grounded in moral duties, as can be seen, for example, in *Instan,*[228] *Ruffell*,[229] *Wacker*[230] and *Bowditch*[231]*.* The courts are flexible in deciding a duty existed in such situations, and are willing to expand the list of duties.

3) Whilst there has never been an equivalent litigated case of a drowning child in English criminal law, the evolution of case law suggests that a duty to act would likely exist on the basis of it being a terrible moral transgression and the relative ease incurred in rescuing the child.

We have identified the current English criminal law's position with regards omissions. Now we have identified what the law is, we shall turn our attention to

[225] Speck (n 91).
[226] Fagan (n 100).
[227] Santa-Bermudez (n 112).
[228] Instan (n 50).
[229] Ruffell (n 84).
[230] Wacker (n 181).
[231] R v Bowditch [2017] (unreported) Maidstone Crown Court.

drafting a Good Samaritan law. In terms of drafting a Good Samaritan law, and dealing with the institutional pragmatic constraints inherent its implementation, a comparative analysis with selected countries which already have a Good Samaritan law will take place and this will form the basis of the next chapter.

Chapter 6 - A Comparative Survey of Good Samaritan Laws

Introduction

We have established a prima facie legal and moral case for introducing a Good Samaritan law in England and Wales in earlier chapters. Nevertheless, there are still some unanswered questions relating to drafting a Good Samaritan law. According to Anthony D'Amato much of the debate around implementing Good Samaritan laws starts "from the viewpoint of the victim in a series of egregious cases where strangers failed to utter a word of warning or lift a finger to help".[1] Not implementing a Good Samaritan law is troubling due to the "disparity between the rule of law and the dictates of morality".[2] In such circumstances, commentators invariably condemn such moral heinousness, as well as the English criminal law's treatment of such cases for being cold, callous and uncaring in allowing the victim to die without the Samaritan incurring any criminal liability. The problem with this approach is that "rarely is consideration given to the Samaritan's situation".[3]

A number of questions arise. What kind and degree of danger warrants interfering in the lives of citizens through criminal sanctions?[4] How far should the Samaritan intervene to save the victim? What is required of him? If a law exists, what should be the penalty for breaching it? Good Samaritan laws are condemned by critics as being unnecessary and unworkable.[5] How valid is that criticism?

To explore the conceptual parameters of a viable Good Samaritan law, an investigation to gain comparative insight from countries which already impose a duty to rescue backed by criminal sanctions will form the basis of this chapter.

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[1] Anthony D'Amato, 'The Bad Samaritan Paradigm' (1976) 70 Northwestern University Law Review 798.
[2] Ibid 800.
[3] Ibid 801.
[4] Ferdinand J. M. Feldbrugge, 'Good and Bad Samaritans: A Comparative Study of Criminal Law Provisions Concerning Failure to Rescue' (1965-1966) 14 Am. J. Comp. L. 630.
[5] Andrew Ashworth, 'Criminal Omissions and Public Duties: The French Experience' (1990) 10 Legal Stud. 153.

1) The limits and possibilities of comparative scholarship

After reading our stock example discussed in earlier chapters, and learning that Hannah does not have a legal duty to rescue Billy, English criminal law students might assume that this is the standard legal answer. It is one of those familiar instances in which criminal law does not reflect morality. However, in reference to US criminal law, Chiesa suggests that "such passive acceptance of the American reticence to punish omissions to aid can be challenged by venturing into the realm of comparative criminal law".[6] When investigating comparative criminal law, students will be surprised to learn that a Good Samaritan law exists in most European and Latin American countries. The Anglo-American experience is the exception rather than the norm, and there is clearly no universal way to approach this issue. Students may be surprised further to learn that there are a handful of states within the US in which there exists a criminal law duty to rescue. Schiff carried out a detailed comparative analysis of Good Samaritan statutes in both common law and civil law jurisdictions, and identified the following benefits of such analysis:

> It provides fodder for legal reform; it invites analytical assistance from other disciplines; and it emphasizes cultural differences otherwise unnoticed. The comparative analysis is particularly useful in the area of bad Samaritan statutes, as nearly every European jurisdiction has a legally enforceable duty to rescue, whereas only five American jurisdictions have any legal duty to rescue, and even for these states, the punishment for being a bad Samaritan is slight.[7]

[6] Luis E. Chiesa, "Comparative Criminal Law" in Markus Dubber and Tatjana Hörnle, *Oxford Handbook of Criminal Law* (Oxford University Press 2014) p1092.
[7] Damien Schiff, 'Samaritans: Good, Bad and Ugly: A Comparative Law Analysis' (2005) 11 Roger Williams U. L. Rev. 77.

Comparative legal research examines legal issues in two or more countries with the intention of comparing those issues in different socio-cultural settings.[8] It is the dual process of discovering both similarities and differences among phenomena.[9] A comparative law approach is useful as, by viewing differences and similarities in the way that different legal systems cope with similar legal issues, we can gain a greater insight into how our own legal system might best deal with such problems. As stated by Örücü and Nelken, "with comparative law, the study of similarities and differences is the heart of the endeavour"[10]. Comparative research is "useful as a tool for enriching scholarly enterprises".[11]

Chiesa describes how criminal law reformers often suffer from "tunnel vision" which he states "is the failure to consider alternatives that deviate from one's previously established decision-making framework".[12] This prevents reformers "from fully considering alternatives to the prevailing mode of thinking about the criminal law".[13] Chiesa argues that the way criminal law reformers can combat tunnel vision is to "look beyond the prevailing paradigm".[14] In the medical context, Chiesa describes how getting a fresh perspective from a different physician increases the likelihood of spotting tunnel vision. If both are in agreement it increases confidence, whilst conversely if disagreement arises, there are grounds to reconsider. Applying that analogy to comparative analysis of law, analysing different systems of criminal law provides us with a fresh perspective. If that criminal law system differs from our own approach, then "we have good reason to

[8] Linda Hantrais, and Stephen Mangen, Cross-national research methods in the social sciences (London: Pinter 1998) p1.
[9] Donald P. Warwick and Samuel Osherson, Comparative research methods (Prentice-Hall publishing 1973) p7.
[10] Esin Örücü and David Nelken, 'Comparative Law and Comparative Legal Studies' in *Comparative Law – A Handbook* (Hart Publishing 2007) p25.
[11] Dubber and Hörnle (n 6).
[12] Luis Chiesa, 'Comparative Analysis as Antidote to Tunnel Vision in Criminal Law Reform' (2017) Draft paper - Rutgers University Theorizing Criminal Law Reform Conference https://law.rutgers.edu/sites/law/files/attachments/Chiesa%20-%20Comparative%20Analysis%20as%20Antidote%20to%20Tunnel%20Vision.pdf accessed 30 June 2017.
[13] Ibid.
[14] Ibid.

take a step back and assess whether we are on the right track".[15] In the process, Chiesa states that "we should consider whether we have failed to contemplate alternative arrangements because we are so embedded within a certain paradigm or pattern of criminality that our creativity in problem-solving has been stifled".[16] In such instances "we can force ourselves to think outside of the dominant pattern and come up with more novel solutions to the problem at hand".[17] By taking "a different pattern of criminality as [our] point of departure, we increase the likelihood of identifying blind spots in our ways of thinking".[18]

Although there are immense advantages to carrying out comparative research, there are also limitations. Language barriers make access to some foreign sources of criminal law difficult. In addition, the content and the scope of the criminal laws cannot be fully comprehended without taking into account "the historical and cultural contingencies that helped shape such laws"[19] and understanding the local legal culture in which laws are embedded.

a) What is legal culture?

The meaning of legal culture is far from settled. Mousourakis describes how legal culture "pertains to the general outlook, practices, knowledge, values and traditions of the legal elite of a legal system",[20] whilst Cotterrell defines legal culture as "a convenient concept with which to refer provisionally to a general environment of social practices, traditions, understandings, and values in which the law exists."[21] Nelken observes how investigating "another legal culture is inevitably a matter of tacking backwards and forwards between the culture(s) of

[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Dubber and Hörnle (n 6) p1113.
[20] George Mousourakis, 'How Comparative Law Can Contribute to the Development of a General Theory on Legal Evolution' (2008) 14 Tilburg L. Rev. 272.
[21] Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken, *Comparing Legal Cultures* (Darmouth Publishing 1997) p14.

origin and that being studied."[22] Moreover, "given the difficulty of finding a neutral starting point, it is all too evident that the culture from which you start is obviously crucial in affecting the way the culture of 'the other' is conceptualized, understood and evaluated".[23] Nelken continues:

> Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do.[24]

To fully understand legal culture, one needs to understand the "broader historical and societal context that shapes the interpretation and development of law".[25] According to Chiesa, engaging in comparative criminal law analysis is complicated by "historical and cultural contingencies that significantly contribute to shaping the way in which criminal laws have evolved in the world's different legal systems".[26] In addition, "a failure to take into account how historical contingencies such as these shape the legal culture of different countries quite often leads to misapprehending the legal system of a particular jurisdiction".[27] Yet "it is easy to lose sight of these nuances if the issue is approached without giving proper weight to the historical and cultural factors that shape the content and scope of legal rules in the systems that are being compared".[28] Legrand states that comparatists often

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[22] David Nelken, 'Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 Social and Legal Studies 435.
[23] Ibid 437.
[24] David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Austl. J. Leg. Phil. 1.
[25] Jeremy Webber, 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken, Jeremy Webber Two Concepts of Culture' (2004) 29 Austl. J. Leg. Phil. 27.
[26] Dubber and Hörnle (n 6) p1104.
[27] Ibid p1009.
[28] Ibid.

stop at the surface and look merely to the rule and proposition, whilst forgetting the "historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is".[29] In the process, they forget that the law is an "indissoluble amalgam of historical, social, economic, political, cultural, and psychological data".[30] Therefore, understanding a legal culture involves more than the mere reading of statutory rules and judicial decisions.

There is an understandable tendency for comparatists who see certain legal provisions 'working' in some jurisdictions to proscribe them for their own. The term legal transplants have been used to describe this phenomenon and the merits of attempting a legal transplant are pertinent for our discussion when carrying out comparative research on countries that have a Good Samaritan law, not least in deciding which countries will be selected as comparators.

b) What is a legal transplant?

The term legal transplant was devised by Alan Watson and succinctly described by Mousourakis as "a legal system incorporating a legal rule, institution or doctrine adopted from another legal system".[31] In order to determine the possibility of a legal transplant, several factors have to be considered, such as to what extent "the importing and exporting countries are compatible with respect to culture, socio-economic structure and level of development".[32]

When carrying out a comparative study and reviewing the possibility for a legal transplant, according to Mousourakis "it is not good sense to use the perspective and framework of one's own legal culture when examining a law or legal concept in a legal system operating within the context of another culture".[33] Such a simplistic approach "carries the risk of implying the existence of many more

[29] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Stud. 232.
[30] Ibid 234.
[31] Mousourakis (n 20) 275.
[32] Ibid 273.
[33] Ibid.

similarities than there actually are".[34] When a rule is transplanted, it is unlikely to operate in exactly the same way as it did in its country of origin. Also, in terms of reforming our criminal law we should be very cautious regarding what Ferguson refers to as "adopting a 'pick and mix' approach to law reform which transplants some features of one system into the other".[35] Ferguson goes on to say that "plucking just a few elements from one system of criminal procedure and transplanting them into another, quite different, system seems a recipe for disaster".[36]

Many writers debate the effectiveness of legal transplants. Legrand is particularly sceptical, stating that "anyone who takes the view that 'the law' or 'the rules of the law' travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage".[37] Legrand argues that the meaning of a legal rule is culture-specific and, according to Eva Hoffman, you "can't transport human meanings whole from one culture to another any more than you can transliterate a text".[38] In order "to transport a single word without distortion, one would have to transport the entire language around it".[39] Therefore, to "translate a language, or a text, without changing its meaning, one would have to transport its audience as well".[40] As a result, what is "displaced from one jurisdiction to another is, literally, a meaningless form of words"[41] making legal transplants conceptually and literally impossible, according to Legrand. Once a rule crosses a legal boundary "the

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[34] Ibid 274.
[35] Pamela R Ferguson, 'Reforming Criminal Procedure: Should Adversarial Systems of Justice Become More Like Inquisitorial Ones?' (2017) Draft paper - Rutgers University Theorizing Criminal Law Reform Conference. https://law.rutgers.edu/sites/law/files/attachments/Ferguson%20-%20Reforming%20Criminal%20Procedure%20-%20Should%20Adversarial%20Systems%20of%20Justice%20Become%20More%20Like%20Inquisitorial%20Ones.pdf accessed 3rd July 2017.
[36] Ibid.
[37] Pierre Legrand, 'The Impossibility of 'Legal Transplants' (1997) 4 Maastricht J. Eur. & Comp. L. 111.
[38] Eva Hoffman, Lost in Translation (Minerva 1991) p175.
[39] Ibid p272.
[40] Ibid p275.
[41] Legrand (n 37) 113.

original rule necessarily undergoes a change that affects it qua rule".[42] For Legrand, "unless the comparatist can learn to think of law as a culturally-situated phenomenon" and "accept that the law lives in a profound way within a culture-specific **-** and therefore contingent **-** discourse, comparison rapidly becomes a pointless venture".[43] For Legrand, it is essential to view the law in its specific cultural context. Mousourakis agrees:

> Whenever a proposal is put forward to adopt a foreign legal rule, a legislator must first consider whether the rule has proved efficient in its country of origin when dealing with the specific problem at hand and then, second, whether it will produce the desired effects in the country contemplating its adoption. In many cases it may prove impossible to adopt, without important modifications, a rule that was successful in a foreign country because of differences pertaining, for example, to the court system and the legal process, as well as the more general differences regarding the socio-economic, political and cultural environment in which the rule would have to fit.[44]

A legal transplant might not be successful if there is a big difference between the two systems. As Alan Watson observes, "except where the systems are closely related, the differences in legal values may be so extreme as to render virtually meaningless the discovery that systems have the same or a different rule".[45]

c) To what extent is a legal transplant affected by language?

Many disciplines such as Physics, Maths and Chemistry have a universal common language. However, the same does not apply in Law. Legal terminology is filled

[42] Ibid 118.
[43] Ibid 111.
[44] Mousourakis (n 20) 275.
[45] Alan Watson, Legal Transplants: An Approach to Comparative Literature *(*University of Georgia Press 1993) p5.

with many linguistic differences.[46] As stated by Gutto, "language is more than just a means of communication as it is a repository of social, cultural and ideological values".[47] Bernhard Grossfield astutely observes that the close connection between law and language can be seen in the etymological roots of both expressions. In Latin, the word "lex" means "law", but in the combination "lexicon" it has the meaning "word". Grossfield goes on to compare the genitive of "lex", which is "legis", with the Greek word "logos", which stands for word or idea, demonstrating how interrelated law, language and thought are.[48]

Watson argues that "too frequently linguistic deficiencies interpose a formidable barrier between the scholar and his subject." [49] Yet "the vast majority of legal notions in a modern society exist within the realm of language. Law is read as a bill in parliament, it gets published as a text in the official records or as a court decision".[50] As a result, "language becomes the comparative lawyer's most important instrument in choosing, describing and analysing the objects of his comparison".[51]

Language is instrumental in creating and shaping reality and therefore, in terms of law, a different legal reality.[52] In order to fully comprehend this new legal reality, many contemporary commentators and scholars argue that one has to learn the legal language of the foreign legal system. Brand highlights some of the linguistic problems that arise within a comparative study. One problem is that of "monolingualism". Meaningful comparison implies that "the comparatist needs to describe foreign law in its particular coordinate system, according to the original

[46] Peter de Cruz, A Modern approach to Comparative Law (Kluver Law and Taxation Publishers 1993) p35.
[47] Shadrack B.O. Gutto, 'Plain Language and the Law in The Context of Cultural and Legal Pluralism' (1995) 11 South Africa Journal on Human Rights 312.
[48] Bernhard Grossfield, 'Language and the Law' (1984-1985) 50 Journal of Air Law and Commerce 793.
[49] Watson (n 45) p10.
[50] Oliver Brand, "Language As a Barrier to Comparative Law" in Frances Olsen, Alexander Lorz and Dieter Stein*, Translation Issues in Language and Law* (Palgrave Macmillan 2009) p19.
[51] Ibid.
[52] Grossfield (n 48) 795.

source, with its own instruments, spirit and perspective".[53] Such a skillset involves a "command of the respective legal system's language".[54]

Nevertheless, as pointed out by Chiesa, there is a "scarcity of translations of seminal criminal law works" and this "makes it very difficult to engage in meaningful comparative analysis unless one is fortunate enough to be able to read the works without translation".[55] Chiesa astutely observes that it is "necessary to remedy the awful lack of translated criminal law source materials", since "until this happens, robust comparative inquiry is destined to remain the province of the few who are able to overcome the challenges posed by the language barrier".[56] Chiesa further states:

> Similarly, the lack of translations of textbooks, articles, statutory materials and case law originally published in English hinders the propagation of Anglo-American criminal theory to jurisdictions steeped in the European Continental legal tradition.[57]

Even when legal sources from different countries have been translated into English, Markesinis remarks that such a translation requires more than linguistic skill:

> It requires the acquisition of a 'feeling' for the other system, the mastery of a form of intellectual juggling which allows the matching of different concepts and notions.[58]

Proficiency in legal language is distinct from just being acquainted with the local language. Whilst in ordinary translations it is often not difficult to find an equivalent word within another language, "the jurist is in a less comfortable

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[53] Oliver Brand, "Language As a Barrier to Comparative Law" in Frances Olsen, Alexander Lorz and Dieter Stein*, Translation Issues in Language and Law* (Palgrave Macmillan 2009) p20.
[54] Ibid p21.
[55] Dubber and Hörnle (n 6) p1097.
[56] Ibid.
[57] Ibid p1094.
[58] Basil S. Markesinis, Foreign Law and Comparative Methodology: a Subject and a Thesis (Hart Publishing 2007) p199.

position" as "each national legal system uses terminology that does not necessarily correspond with the legal languages of other countries".[59] As a result, "a literal translation of a given legal term into another language may not exactly express the same concept".[60] By way of example Legrand asks, "is it proper for a French lawyer doing research on English law to translate the English 'contract' by the French *'contrat'?* Are the two terms conveying the same idea or the same message?"[61] Legrand answers that whilst contract refers to an exchange of promises, *contrat* usually refers to a meeting of minds and therefore translating contract to *contrat* is not a faithful rendering.[62]

Legrand poses the question, "who has developed a theory of translation that will allow the comparatist to surmount, if imperfectly, the intricate entanglements of law and language?"[63] For Legrand, "French law is much more than a compendium of rules and propositions"[64], and therefore "to say that the study of French law consists in the study of French legislative texts and judicial decisions is plainly inadequate".[65] Each comparatist is "bound by his preconceptions and his own cultural disposition; he will always remain one of his (own) people".[66] Consequently, when interpreting foreign terms the comparatist "will regularly miss hidden implications and the valuable hints they give on the 'social function' of legal institutions".[67] Moreover, "the greater the geographic, ethnic and cultural distance in its original context between the comparanda and the comparatist's own legal culture, and the fewer historical contacts and the common models that exist, the more readily hidden implications will be missed".[68] In light of this, Legrand

[59] Brand (n 53) p22.
[60] Ibid.
[61] Legrand (n 29) 234.
[62] Ibid 232.
[63] Ibid 234.
[64] Ibid 236.
[65] Ibid.
[66] Hans-Georg Gadamer, Truth and method (New York: Seabury Press, 1975) p252.
[67] Brand (n 53) p26.
[68] Ibid.

forcefully argues that comparative legal study cannot be taken seriously unless it develops a strategy to come to terms with the "foreignness of languages".[69]

It is important to note that even if two countries share a natural common language, this may still pose a barrier to comparative scholarship. With regards to America, George Bernard Shaw famously stated that England and America are "two countries separated by a common language".[70] Brand highlights that "many problematic cases of communication within the same language, like a different meaning of words and phrases in different dialects, do have a massive impact on the practice of law".[71] However, for Brand this particular aspect does not pose a problem as the issue of different dialects is "of secondary concern for the comparatist, because they do not directly affect legal language which is highly technical and largely unaffected by dialects".[72] Therefore, whilst barriers do exist even with countries that share a common legal language, the barriers between such countries are not as great as countries which have a different legal language.

As an outsider to a foreign legal system can we truly recover an insider's perspective, even supposing that language barriers can be overcome? Whilst it is true that some laws are culturally specific, gaps between cultures are not unbridgeable in every respect:

> The basic unity of human spirit makes possible the effective communication between peoples. Law is not only a national phenomenon; it is, first and foremost, a human phenomenon. A people can accept and adopt as its own a law created by another people because, in the nature of both peoples, there exist common demands and needs which [often] find expression in law.[73]

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[69] Legrand (n 29) 232.
[70] George Bernard Shaw, http://www.quotationspage.com/quote/897.html accessed 23rd Jan 2017.
[71] Brand (n 53) p30.
[72] Ibid.
[73] Giorgio Del Vecchio, 'Les bases du droit comparé et les principes généraux du droit' (1960) 12 Revue internationale de droit comparé, 493 cited in George Mousourakis, '*Transplanting Legal Models across*

According to Zweigert and Kotz, similarities which exist "in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (praesumptio similitudinis)".[74] Despite the limitations inherent in carrying out a comparative analysis, it is still possible to achieve "an empathy for alterity"[75] and useful insight. All comparative experiences are informative, and comparative scholarship is still possible and valuable notwithstanding the challenges raised by Legrand. The more similar the legal culture, the more effective our comparison is likely to be, all else equal.

d) Legal translation instead of legal transplant?

Taking issue with Watson's term 'legal transplant', Langer argues that we should instead adopt the term legal translation "as a new heuristic device for approaching these issues".[76] Langer notes some reasons why the legal transplant metaphor has been successful:

> As a medical and botanical metaphor, it includes the transferred legal rule's necessity for adjustment to the new organism or environment—the practices of an existing legal system—and, at the same time, the possibility of rejection by the receiving organism or environment—the receiving legal system.[77]

Nevertheless, Langer is critical of the term legal transplant. He notes that when reformers (intend to) "transplant" a legal idea, "this new legal idea may still be transformed by the structure(s) of meaning, individual dispositions, institutional and power arrangements, systems of incentives, etc., present within the receiving

Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 Osaka Unversity Law Review 86.

[74] Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (3rd edn, Clarendon Press, Oxford, 1998) p40.

[75] Legrand (n 29) 240.

[76] Máximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 Harvard International Law Journal 1.

[77] Ibid 5.

legal system".[78] The problem with the term transplant is that even "if a human body has to adjust itself to a new organ, it will still remain essentially unchanged".[79] In contrast, "the changes produced in a legal system by the transference of legal rules, ideas, and institutions…may go much deeper than that".[80] Therefore, the deep transformation from the original legal rules "transplanted" (from the original) to the receiving legal systems renders the term "legal transplant" a poor metaphor.[81]

Langer is persuasive in arguing that the term legal translation is more informative as it "retains the comparative dimension that has made the metaphor of the transplant so powerful". As well as highlighting "the differences between the original and translated text, the metaphor of the translation also distinguishes the transformations the legal idea may undergo when initially transferred from the source to the target legal system".[82]

Langer argues that "metaphors matter because we think through them and because they highlight different aspects of reality". The term legal 'translation' depicts more accurately how "legal practices and institutions may be transformed when translated between legal systems either because of decisions by the reformers (translators) or structural differences between the original and receiving legal systems (languages)".[83] Moreover, the translation metaphor also captures the transformations that the legal idea or practice may undergo in its exchanges with the target legal system after its initial translation. Such transformations include "the total neutralization of the translated 'text'—the legal rule or practice—by either ostracism (disuse or desuetude) or censorship (i.e., stating that the practice is unconstitutional[84])".[85] Finally, legal translation more accurately depicts

[78] Ibid 7.
[79] Ibid 9.
[80] Ibid 6.
[81] Ibid.
[82] Ibid 3.
[83] Ibid.
[84] The phrase unconstitutional was used in the US context.
[85] Langer (n 76) 6.

"the transformation that the receiving linguistic and social practices may undergo under the influence of the translated text".[86] Therefore, for these cogent arguments listed by Langer, we shall be endorsing the term translation rather than transplant.

After highlighting, some of the key methodological challenges that arise within comparative research, we shall now discuss the countries we have chosen for our comparative analysis.

e) Countries selected for comparative analysis

Having identified some of the benefits and pitfalls of comparative scholarship, which countries should be selected for our comparative analysis? Our starting point is, obviously, other jurisdictions which already have in place a Good Samaritan law. The US is an interesting jurisdiction, as some states have a duty to rescue. The US is also useful as a comparator, as aside from being a common law jurisdiction, English is the main language and "much of the United States' legal system is deeply rooted in the English common law tradition".[87]

Despite the fact there have been many more recent modifications, there is still broad similarity between English and American law as regards the treatment of omissions. The influence of English criminal law on American criminal law is highlighted by Dubber, who states that American criminal law "for the first hundred years or so of its existence, relied almost exclusively on English precedent" and the "the only foreign criminal law system that received some attention was English law".[88] Whilst English language and culture influenced American law, "the common law of England is not to be taken in all respects to be that of America".[89] Each

[86] Ibid 3.
[87] Louis F. Del Duca and Alain Levasseur, 'Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System' (2010) 58 The American Journal of Comparative Law 1.
[88] Markus Dubber, "Comparative Criminal Law" in Markus D. Dubber and Tatjana Hornle, *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) p1299.
[89] Del Duca and Levasseur (n 87) 7.

American state took certain elements of English common law and adapted it to particular situations.[90]

For our comparative analysis our main focus will be on selected states within the US which have adopted Good Samaritan laws. In addition, we shall also be examining two civil law jurisdictions. France and Germany, are both extensively studied and oft-cited examples in the literature as countries which already have in place a Good Samaritan law, and are the obvious choices for comparators beyond the common law world.

We have highlighted two obstacles that may be presented to comparative analysis with other jurisdictions: the linguistic barrier; and the possibility that extreme differences of legal culture might make a legal translation ineffective. For France and Germany, will these two barriers limit the effectiveness of our comparative analysis?

It is difficult to surmount the linguistic barrier. As the author has limited knowledge in both French and German we will consequently be relying on translated material. Unfortunately, there is a dearth of translated cases and therefore we will be relying on secondary materials, of which there is also a scarcity.

As for the differences in legal culture, a comparative analysis between France, Germany and England has its merits as these countries are all Western legal systems in contrast to non-Western legal systems such as Asian, Islamic or African. There are many classifications of legal systems. A widely used taxonomy has been proposed by Zweigert and Kötz, comprising seven "legal families":

> 1. Romanistic Legal Family 2. Germanic Legal Family 3. Anglo-American 4. Nordic (Scandinavian) 5. Far Eastern Legal Family 6. Islamic Law 7. Hindu Law.[91]

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[90] Ibid 6.
[91] Zweigert and Kötz (n 74) p69.

The lack of uniformity amongst "Western" legal systems has made that an outmoded phrase in classifying legal families, and is rejected by Zweigert and Kötz. Within the Western legal tradition are an enormous "variety of legal norms and styles that are common within it, not only within the Civil law and the Common law domains, but also across the borders of these legal families".[92]

Whilst it is true that England and Wales share a common culture with France and Germany in the sense that they are both "Western style democracies with free enterprise economies, strong industrial bases, high per capita incomes and relatively well-educated populations"[93], England and Wales adopts a common law system as opposed to the French and German system which embrace continental civil law. There are vast differences between both systems as "common law often deviates substantially from the continental legal style in matters such as organization of courts, judicial procedures, the theory of legal sources and the manner of judicial argumentation".[94]

In reference to a comparison between the common law and countries adopting civil law, Alan Watson observes that it is:

> [p]erfectly feasible for a professor from one common law jurisdiction to go to another for a semester and teach a perfectly respectable course in the current local law. Some extra work will be necessary of course. However, a professor from a civil law country would have a (virtually) impossible job teaching the local law of a common law country, even in his or her own field of specialization; the vocabulary, the constructs, the underlying assumptions, the procedure, and even the relationship between procedure and substantive law would all be new.[95]

[92] Mousourakis (n 20) 272.
[93] Oscar G Chase, 'Legal Processes and National Culture' (1997) 5 Cardozo J. Int'l & Comp. L. 1.
[94] Franz Wieacker, 'Foundations of European Legal Culture' (1990) 38 Am. J. Comp. L. 1 1990.
[95] Alan Watson, 'The Future of the Common Law Tradition' (1984-1985) 9 Dalhousie L.J. 67.

We have laid out the pitfalls of comparative analysis - namely differences in legal culture and lack of linguistic equivalence - as well as rejecting the term legal transplant in favour of legal translation as it more accurately captures the changes that a legal idea undergoes when we carry out a comprehensive comparative analysis. An effective legal translation requires an insider knowledge of the respective legal systems as well as a high degree of linguistic proficiency of the selected jurisdictions.

Do these limitations negate the effectiveness of using the US, France and Germany as comparators? The answer would be yes, if we intended to directly transplant the Good Samaritan law of these countries into our own jurisdiction. In comparing the US to France, Tomlinson argues that the US legal system "differs from the French in too many ways to allow a successful transplant",[96] and the same applies regarding a successful transplant from the US, France or Germany to England and Wales. However, we are not intending to directly transplant US, French and German law. Instead, of directly transplanting, we will be focusing on drafting a Good Samaritan law and using the approach in different countries merely as data to inform this drafting process rather than carrying out a detailed comparative analysis. As there is no Good Samaritan law in England and Wales, it would be useful to look at Good Samaritan laws in other countries to gauge how they have been drafted and what those countries' experiences have been in the operation of such laws. This is more in keeping with the "translated approach" advocated by Langer. Therefore, our approach ensures we avoid the comparative pitfalls. Despite the linguistic and cultural barriers and the dearth of material, the US, French and German approach and experience can still be insightful in shedding light on how we might draft a Good Samaritan law for England and Wales.

[96] Edward A. Tomlinson, 'The French Experience With Duty to Rescue: A Dubious Case for Criminal Enforcement' (2000) 20 N.Y.L. Sch. J. Int'l & Comp. L. 451.

2) Exploring Comparative Models

This section presents an overview of the policy choices adopted in each comparator jurisdiction, starting with the US and then turning to civilian perspectives.

a) United States

It is often stated that Good Samaritan laws are unnecessary as situations in which one is in danger and no one attempts to rescue do not occur. This complacent assumption is false, as evidenced in three famous US cases.

In 1964, Catherine (Kitty) Genovese was stabbed outside her New York apartment. Thirty eight neighbours witnessed the attack and did not do anything to attempt to rescue her. Thirty five minutes after the attack the police were summoned and upon arrival she was found to be dead.[97] In 1983, in a bar in Massachusetts, six patrons raped and sodomised Cheryl Araujo whilst onlookers watched and cheered.[98] In 1997, Jeremy Strohmeyer raped and murdered a seven year old girl in the ladies restroom in Las Vegas. His friend David Cash was aware of what was occurring but did not interfere or even report the crime after Strohmeyer informed Cash that he had killed the girl.[99] Upon being asked why he did not interfere, Cash callously stated "the simple fact remains I do not know this little girl. I do not know starving children in Panama. I do not know people that die of disease in Egypt**.** I'm not going to lose sleep over somebody else's problem."[100] In each situation none of these onlookers was convicted of any offence.

It is important to note that these cases are a demonstration of human behaviour rather than specifically American behaviour. Similar high profile cases have

[97] Diego Pol Longo, 'Are we Bad Samaritans? A Comparative Analysis of Duty to Rescue Legislation and Cadaveric Organ Donation Systems in Spain and the United States' (2011) 39 Syracuse J. Int'l L. & Com. 55.
[98] Ibid 57.
[99] Ibid 59.
[100] Ibid 57.

occurred in other jurisdictions such as in China when 2 year old Wang Yue was crushed by a van. As she laid there bleeding and dying on the road 18 bystanders ignored her. These bystanders were caught on CCTV leading to a public outcry at the moral apathy showed by these individuals.[101] Cases such as these demonstrate the utility of enforcing moral duties with criminal sanctions.

In the US, the majority of the states have some form of Good Samaritan law but these are not generally penal statutes. These Good Samaritan provisions define the liability of any person who aids. Most Good Samaritan statutes protect rescuers from liability, and covering even negligent actions. It is important to note that not all Good Samaritan statutes are the same, as whilst some provide protection to a narrow class of individuals, others protect a broader class of people. Five U.S jurisdictions have some form of criminally enforceable duty to rescue: Hawaii, Minnesota, Rhode Island, Vermont and Wisconsin.[102] Our focus will be on these states that have created a statutory duty to render assistance to others who are in peril. We shall now review the main provisions of those Good Samaritan statutes.

i) Vermont

Vermont was the first state in the US to enact a Good Samaritan law in 1967. It was enacted shortly after the brutal murder of Kitty Genovese and was called The Duty to Aid the Endangered Act. The statute reads:

> (a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to

[101] http://latimesblogs.latimes.com/world_now/2011/10/toddlers-death-evokes-outpouring-of-grief-and-guilt.html accessed 5th July 2017.
[102] Schiff (n 7) 81.

> others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
>
> (b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.
>
> (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.[103]

Vermont's duty is broad and extends to anybody exposed to grave physical harm. Also, even if an individual does not see someone in danger, "knowledge is sufficient for the duty to arise"[104] and a duty seemingly exists for anyone who knows the danger.

What type of assistance is required of the rescuer? The statute states that "reasonable assistance to the exposed person" should be provided "unless that assistance or care is being provided by others". The question then arises, what constitutes reasonable assistance under the Vermont statute? Case law provides further guidance. In *Hardingham v. United Counselling Service of Bennington,*[105] the claimant sued the counselling service that he worked for and its employees for failing to provide reasonable assistance while he was intoxicated. The Vermont Supreme Court dismissed this appeal on the basis that reasonable assistance was given on the facts:

> Defendants made repeated visits to plaintiff's apartment; they made multiple calls to plaintiff's wife and to emergency rooms and physicians;

[103] Vermont Statute 12 V.S.A. § 519.
[104] Schiff (n 7) 79.
[105] Hardingham v. United Counselling Service of Bennington et al. 672 A.2d (Vt 1995).

> they sought the help of the police and the emergency rescue squad; they physically removed plaintiff from his home, despite his resistance, so that police would assist them; and they accompanied plaintiff to the hospital emergency room and encouraged him to consent to treatment.[106]

The Supreme Court interpreted the term reasonable assistance "to refer only to the extent of the rescuer's effort to comply with the statutory duty to render aid, not to the adequacy of the aid actually rendered".[107] Therefore, only a "person who wilfully fails to make a reasonable effort to provide assistance is subject to a $100 fine",[108] and that individual "is not subject to civil liability unless the person's actions are grossly negligent or unless the person receives or expects to receive remuneration".[109] The Vermont Supreme Court explained that "any other interpretation would render the statute internally inconsistent and would thwart the statute's primary purpose to encourage rescuers to provide assistance by protecting them from civil liability for ordinary negligence".[110]

The Vermont statute clarified the duty owed by a lay rescuer (i.e. somebody without medical training) in *State v. Joyce*.[111] It was held that the statute does not create a duty to intervene in a fight. In *Joyce* an intoxicated father knocked his son to the ground and repeatedly kicked him in the head. There were five eyewitnesses who did not intervene. It was held that despite the fact that the statute "create[d] a duty to aid endangered persons under some circumstances. It does not create a duty to intervene in a fight" for such a situation "must present the 'danger or peril' to the rescuer which under the statute prevents a duty from arising".[112]

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[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] State v Joyce 433 A.2d at 271 (Vt 1981).
[112] Ibid.

Should an individual physically intervene, or is calling for help enough? It was not clear as to whether there was a duty for the bystanders to report the crime to the authorities and "uncertainty exists regarding whether the law effectively promotes this duty".[113] It is probable that calling for aid discharges the duty. Schiff speculates that "perhaps notification to the authorities would discharge the Vermont duty, for once emergency personnel responded to the Good Samaritan's call, they would presumably qualify as persons providing 'assistance or care' within the meaning of the statute".[114]

What is the penalty? The Vermont statute explicitly stipulates that, "any person who violates this section shall be guilty of a petty misdemeanour" and subject to a fine of not more than $100.[115]

ii) Minnesota

Minnesota's Good Samaritan law came into effect in 1983 soon after the Cheryl Araujo incident. It reads:

> A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.[116]

[113] John T. Pardun, 'Good Samaritan Laws: A Global Perspective' (1998) 20 Loy. L.A. Int'l & Comp. L. Rev. 591.
[114] Schiff (n 7) 80.
[115] Vermont Statute 12 V.S.A. § 519.
[116] Minnesota Statute 604A.01.

Under Minnesota's statute, the individuals who have a duty are those who are at the scene of an emergency. Like Vermont, Minnesota's duty extends to anybody exposed to grave physical harm. Despite this, the Minnesota case *Swenson v Waseca Mutual Insurance Company*[117] is significant in concluding that an accident victim does not need to be suffering from a life-threatening injury for an emergency to exist, thus seemingly contradicting the idea that the individual must be exposed to or has suffered grave physical harm.

The facts of *Swenson* were as follows. Kelly Swenson was injured in a snowmobile accident. A passing motorist, Lililian Tiegs, saw Swenson and tried to summon help using a cell phone. This proved to be unsuccessful and Tiegs drove Swenson to a nearby hospital stopping by her house along the way to allow Swenson's friends to deposit their snowmobiles on Tieg's property and then go to the hospital. En route Tiegs had a collision with a speeding tractor trailer and Swenson died as a result of the accident.

In *Swenson*, the court acknowledged that "emergency" had not been defined by statute or case law in the context of the Good Samaritan law. The court described an emergency as "any event or occasional combination of circumstances which calls for immediate action or remedy."[118] Using that definition, it was decided that "coming upon a roadside personal-injury-accident scene is the epitome of an emergency."[119]

A criticism of Good Samaritan laws is that individuals would be discouraged from rescue due to legal repercussions if the rescue goes awry. *Swenson* addressed this concern. Judge Barry Anderson stated that the purpose of Minnesota's Good Samaritan statute "is to encourage laypersons to help those in need, even when they are under no legal obligation to do so, by providing immunity from liability

[117] Swenson v. Waseca Mutual Insurance Co., 653 N.W.2d (Minn. 2002).
[118] Ibid 800.
[119] Ibid.

claims arising out of an attempt to assist a person in peril".[120] It is important to note that *Swenson* is a dealing with immunity in a civil law context, nevertheless, it made some useful observations on the criminal statute. *Swenson* investigated whether "a layperson who provides transportation for an injured person to a health-care facility, where the transportation utilizes an indirect route, or a brief stop on the way to the facility is acting at the scene of an emergency and protected from liability as provided by Minnesota's Good Samaritan law"?[121] The court held that Tiegs was not in a position to determine the extent of Swenson's injuries nor could she contact help. She was in a situation which demanded immediate action. Tiegs took an indirect route to the hospital but that did not lessen the emergency encountered. Tiegs' actions at the scene of the emergency and her attempt to transport Swenson to the hospital fell within Minnesota's Good Samaritan statute and therefore rendered her immune from liability.[122] The effects of this broad interpretation will likely "encourage individuals to act at the scene of an emergency even if only by contacting professionals or driving the victim to a health care facility".[123] As stated by Nowlin, "by continuing to broadly construe the immunity granted by Minnesota's Good Samaritan statute, individuals will, in time, be more apt to respond at the scenes of emergencies without fear of suffering legal repercussions for any injuries the victim may suffer due to the actor's negligence".[124] A broad reading of immunity narrows down the scope of criminal liability.

To what extent must rescuers intervene? The Minnesota statute specifies that obtaining aid from law enforcement and medical personnel is sufficient and does not require individuals physically intervening. It requires intervention only if the victim is exposed to or has suffered grave physical harm and the rescuer can

[120] Ibid 797.
[121] Ibid 786.
[122] Ibid 800.
[123] Carl V. Nowlin, 'Don't Just Stand There, Help Me!: Broadening the Effect of Minnesota's Good Samaritan Immunity through Swenson v. Waseca Mutual Insurance Co' (2004) 30 William Mitchell Law Review 1001.
[124] Ibid 1003.

attempt to rescue without endangering himself or others. So it therefore does "not force an incompetent or frightened person to act". [125] As for the penalty, "any person who violates this section shall be guilty of a petty misdemeanour".[126] Similar to Vermont, the penalty is minor and at the lower end of the gravity scale.

iii) Wisconsin

Similar to Minnesota, Wisconsin's Good Samaritan law also was enacted in 1983 soon after the Cheryl Araujo incident. It reads:

> Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.[127]
>
> A person need not comply with this subsection if any of the following apply: 1. Compliance would place him or her in danger; 2. Compliance would interfere with duties the person owes to others; 3.... assistance is being summoned or provided by others.[128]

Wisconsin's statute differs from Minnesota and Vermont as it only imposes a duty to aid those who are victims of crime. Similar to Vermont, "knowledge is sufficient for the duty to arise"[129] and a duty seemingly exists for anyone who knows the danger. As with Minnesota and Vermont, the violation of the statute is minor, being a Class C misdemeanor.

Wisconsin's Good Samaritan statute can be better defined as a duty to report rather than a duty to rescue as it clearly stipulates that summoning law enforcement discharges the duty. Therefore, to use our drowning scenario, there would be no legal duty for Hannah to actually rescue Billy herself. The statute in

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[125] Kent W. Feuerhelm, 'Taking Notice of Good Samaritan and Duty to Rescue Laws' (1984-1985) 11 J. Contemp. L. 219.
[126] n 115.
[127] Wisconsin Statute 940.34 (2a).
[128] Ibid (2d).
[129] Schiff (n 7) 82.

Wisconsin has been seldom applied but was invoked in the case of *State v LaPlante*.[130]

LaPlante hosted a party at her house. One of the attendees, Hendy, was brutally attacked by seven other guests. LaPlante witnessed what occurred but failed to aid Hendy or summon help. LaPlante was subsequently convicted of failing to aid the victim or notify law enforcement. On appeal, LaPlante argued that the statute was unconstitutionally vague as "it was not clear what level of knowledge was required in order to impose a duty to aid, and whether or not a person witnessing a crime actually had to believe a crime was being committed".[131] LaPlante raised six questions for the court:

> (1) What is the level of knowledge required to impose a duty to aid; (2) Does the underlying crime have to have been reported to appropriate law enforcement authorities in order for the duty to report to attach; (3) Does the person witnessing the crime actually have to believe that a crime was being committed; (4) What is the nature of the four exceptions listed… Does the duty to report attach only while the crime is being committed and not afterwards; and (6) When does a person become a victim?[132]

Regarding questions one and three, it was held that "the state must convince the fact-finder that an accused believed a crime was being committed and that the victim was exposed to bodily harm".[133] As for the second question it was held that "it is not a necessary element of the statute…that the 'crime ... being committed' be a crime already reported. Indeed that rarely would be so and such an interpretation would be absurd".[134] As for whether the duty to report should arise

[130] State v. LaPlante, 521 N.W.2d at 427 (Wis. 1994).
[131] Ibid.
[132] Ibid 433.
[133] Ibid 434.
[134] Ibid.

whilst the crime is being committed, as opposed to after its completion, the court responded that "the record clearly reveals that several individuals who were at the party witnessed LaPlante standing idly by while Hendy was being brutally beaten. Thus, LaPlante's conduct falls squarely into the prohibited zone of the statute and we need not consider her hypothetical scenario."[135] As for when an individual becomes a victim, it "need not be objectively determined" as "if a person believes a crime is being committed, then, by definition, the person must necessarily also believe there is a victim of that crime".[136] The case of *LaPlante* is significant as it is the first case of a successful prosecution under the Good Samaritan law in the US.[137]

iv) Rhode Island

The Rhode Island Good Samaritan statute enacted in 1984 provides that:

> Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars ($500), or both.[138]

Similar to Wisconsin, the Rhode Island Good Samaritan law is only triggered if the serious physical harm results from the commission of a crime.[139] Rhode Island requires the defendant to be present at the crime scene for a duty to arise. The

[135] Ibid 435.
[136] Ibid 436.
[137] Pardun (n 113) 593.
[138] Rhode Island Statute 11-56-1.
[139] Schiff (n 7) 83.

Rhode Island statute requires the individual to give reasonable assistance. It is not clear whether calling the authorities discharges the duty.

Rhode Island is significant for the comparative harshness of the maximum penalties for failing to render reasonable assistance; consisting of "imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars ($500), or both".[140] The imprisonment term is more punitive than the other American states we have considered.

v) Hawaii

Hawaii's statute enacted in 2009 reads:

> Any person at the scene of a crime who knows that a victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanour.[141]

Similar to Wisconsin and Rhode Island, a Good Samaritan law only operates if the serious physical harm results from the commission of a crime[142] and requires the defendant to be present at the crime scene. Hawaii's statute also states that *obtaining or attempting to obtain aid* discharges the duty. It would therefore be more accurate to classify it as a duty to report, rather than a duty to rescue. Similar to the other statutes – excluding Rhode Island – the penalty is minor.

b) Civil Law Jurisdictions

Now that we have explored relevant US jurisdictions we next consider Good Samaritan laws in France and Germany.

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[140] n 139.
[141] Hawaii 663-1.6.
[142] Schiff (n 7) 82.

i) France

France has a duty to rescue statute which imposes criminal liability on a bystander who fails to summon aid. The duty to rescue was first enacted in France in 1941 when France was being occupied by the Nazis. The Vichy government enacted the statute to ensure that French citizens were not passive "when Gaullist or other resistance fighters attacked occupying Nazi troops or sabotaged military or industrial facilities useful to the Nazis".[143] Surprisingly, even after the Nazi occupation was over and the Vichy government was declared illegal (with most of its measures annulled), the essence of the duty to rescue statute still remained and became part of the modern French penal code mostly intact. As Tomlinson states, many French jurists agreed that "the duty to rescue was acceptable as a good French idea and need not be rejected as a Nazi aberration".[144]

The text of the French duty to rescue is codified under Article 223-6 of the 1994 French Penal Code:

> Any person who wilfully abstains from rendering assistance to a person in a state of peril that necessitates immediate intervention when he or she could have rendered that assistance without risk to himself, herself, or others, either by acting personally or by calling for aid, may be punished by up to five years imprisonment and a fine of up to 75,000 euro.

Tomlinson breaks down the French approach into four basic elements:

> First, there must be a person in peril. Second, the defendant must fail to render assistance, either by intervening personally or by calling for aid. Third, the defendant must have been able to render that assistance

[143] Tomlinson (n 96) 453.
[144] Ibid 455.

> without risk to himself, herself, or others. Fourth, the defendant's failure to render assistance must be intentional.[145]

The French statute applies to anyone in peril (not just victims of crime). The "only types of peril covered by the offense are those likely to cause death, serious bodily injury, or serious impairment to physical health" and this peril must be "imminent, patent, and requiring an immediate intervention."[146] Tomlinson describes how the "courts have vacillated on whether to require that the defendant actually know the gravity of the peril",[147] and "in many situations it is sufficient that the defendant should have known".[148] This seems to indicate that under the French statute the test is objective.

If a doctor is summoned to the crime scene he has a duty to personally check on the individual to gauge his condition, even if he believes that "the reported peril does not warrant his or her personal intervention".[149] In one case, known as *Dr. T,* the court held that a doctor "informed of a peril of which he alone is able to judge the seriousness cannot refuse his assistance without doing what he can to assure himself that the peril does not require his personal attention".[150]

Tomlinson from a common law perspective is scathing in his assessment of French case law, stating that the French courts "have never resolved or even honestly confronted the central questions of what assistance the law expects from the rescuer".[151] Despite the statute explicitly stating that the defendant should incur no risk it is still unclear what risks the defendant must assume.

Tomlinson highlights that "enforcing any such duty creates serious line-drawing problems and that those problems are likely to outweigh any benefit obtained by

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[145] Ibid 457.
[146] Ibid 452.
[147] Ibid 453.
[148] Ibid 455.
[149] Ibid 459.
[150] Ibid 452.
[151] Ibid 453.

recognizing the duty". [152] Tomlinson points out how "prosecutions have occurred in surprising situations never envisioned by most advocates of the duty to rescue".[153] An example can be seen in the *Dominici* case, in which three English tourists were murdered in the late 1940s. A bystander called Gustave arrived at the crime scene whilst one of the victims was still alive. Gustave did decide to summon help and asked a passing cyclist to tell the police in the next town that a corpse had been found. Afterwards, Gustave continued with his day, and the police arrived several hours later to find the victim dead. Gustave was sentenced to six months in prison for his delay in summoning help.

This case highlights that the French statute requires more than just summoning help. Tomlinson poses some pertinent questions, such as "should Gustave have waited for a car or have found a neighbor with a telephone, a modern device not found on the Dominici farm?"[154] Of course, in modern society such problems are alleviated, where it is easy to access a phone in the vast majority of cases.

On the face of the statute, it seems that it only applies to easy rescue cases and calling for aid seems to be sufficient for the individual to fulfil the duty. However, "merely reporting a peril may be, according to the courts, ineffective assistance".[155] Moreover, that text does not "define 'peril', nor does it specify how the defendant learned that a person was in peril".[156] In addition:

> There also does not appear to be any requirement that the person in peril actually suffer harm following the defendant's failure to rescue. Thus … a defendant who abstains from rescuing a person in peril cannot raise as a defense that someone else rescued that person or that the person miraculously escaped any harm.[157]

[152] Ibid 451.
[153] Ibid 452.
[154] Ibid 454.
[155] Ibid 455.
[156] Ibid 453.
[157] Ibid 454.

Under the French statute, even if no harm is suffered or someone else rescues the victim, if one fails to discharge the duty they are still criminally liable. Calling the authorities does not necessarily discharge the duty in France as the "method which necessity demands" determines whether a duty has been met.[158] Tomlinson describes in one French case how a father-in-law refused to offer a pole to his drowning son-in-law and instead summoned help. The father-in-law was convicted as he could have provided aid himself without summoning help.

The maximum punishment for breaching the law in France amounts to 75000 Euros and a five year imprisonment. This maximum sentence is severe by comparison to the US states we have examined.

ii) Germany

The German duty-to-aid statute was introduced in 1935. Section 330c of the German Criminal Code provided that:

> Who does not render assistance in the case of a misadventure or common danger, or necessity, even though this is his duty according to sound popular sentiment and, in particular, does not comply with the request for assistance of a police agent, even though he could comply with the request without serious danger and without the infringement of other important duties, is punishable with prison for up to two years or with a fine.

This text has been amended under Section 323c of the German Criminal Code (failure to render assistance):

> Whoever does not render aid during accidents or common danger or need, although it is required and can be expected of him under the

[158] Ibid 455.

> circumstances and, especially, is possible without substantial danger to himself and without violation of other important duties, shall be punished with imprisonment for not more than one year or a fine.

The German approach refers to peril as "accidents or common danger or need."[159] Such wording could theoretically be widely applied as "an entire village aflame, passengers trapped in a derailed train, or one injured in a barroom brawl might fall within its scope"[160] and it "could even be applied to cases where only property is at risk".[161]

In Germany, there is also no clear standard as to what conduct discharges the rescuer's duty. The statute speaks of "rendering aid" and this could potentially encompass notifying authorities rather than personally carrying out rescue. The statute explicitly states that the duty is triggered if the aid is required, can be expected under the circumstances and carried out without substantial danger to the individual and without violation of other important duties.

Under German law, a citizen can incur imprisonment of up to one year if he does not attempt to rescue when it would have been possible without danger of serious injury to the rescuer. The literature and case law is unclear as to what these other important duties entail.

The various statutes reveal a number of policy options that need to be determined in drafting a Good Samaritan law. This can best be illustrated in the following table which summarises the different policy options adopted by our selected jurisdictions.

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[159] Schiff (n 7) 82.
[160] Schiff (n 7) 79.
[161] Schiff (n 7) 81.

	United States	Western Europe
System of Law	Common Law	Civil Law
Who Does the Duty Apply Too?	Vermont – General duty applicable to those exposed to grave physical harm Minnesota– General duty applicable to those exposed to grave physical harm Wisconsin– Duty applicable to victims of crime Hawaii – Duty applicable to victims of crime Rhode Island – Duty applicable to victims of crime	France – General duty applicable to those in a state of peril Germany – General duty applicable to those experiencing accidents or common danger or need
Victims Must be In Grave Physical Danger for Rescuer to Assist	Vermont - Yes Minnesota - Yes Wisconsin - No Hawaii - Yes Rhode Island - Yes	France – Yes Germany - No
Danger to the Rescuer Discharges Duty	Vermont - Yes Minnesota- Yes Wisconsin- Yes Hawaii- Yes Rhode Island- Yes	France – Yes Germany - Yes
Physical Proximity Between Rescuer and Victim	Vermont – Not Required Minnesota–Required Wisconsin– Not Required Hawaii – Required Rhode Island – Required	France – Required Germany – Not Required
Personal Intervention on Behalf of Rescuer	Vermont – Not Required Minnesota– Not Required Wisconsin– Not Required Hawaii– Not Required Rhode Island– Not Required	France – Required Germany - Unclear
Notification of Authorities	Vermont – Possibly required Minnesota - required Wisconsin - required Hawaii - required Rhode Island - Possibly required	France – required Germany - unclear
Punishment for Failing to Assist	Vermont – Fine up to $100 Minnesota – Petty Misdemeanour Wisconsin – Class C Misdemeanour Hawaii – Petty Misdemeanour Rhode Island - 6 months Sentence or $500 Fine	France 5 years imprisonment and a fine of up to €75,000 Germany – Imprisonment up to 1 year or a fine

Conclusion

What have we learnt from comparative experiences? Having looked at the methodological considerations, it was concluded that two key issues arose – the lack of linguistic equivalence between different jurisdictions and the disparity between different legal cultures. The term legal translation was adopted rather than legal transplant as it better encapsulates the process involved in legal ideas being incorporated in other jurisdictions.

After reviewing the methodological considerations, selected states in the US were the main focus of the comparative analysis as the linguistic equivalence and similar legal culture makes such a comparison valuable. Other jurisdictions included France and Germany and despite the lack of linguistic equivalence, and reliance on secondary material, the data derived from our comparison is helpful in drafting a Good Samaritan law. Now we have identified the key policy issues in our selected jurisdictions, the next chapter will draw on those experiences and we shall focus on devising a Good Samaritan statute for England and Wales. Four main questions will be addressed:

What is the duty to rescue for our model statute?
When does the duty apply?
What are the issues related to culpability-mens rea?
What penalty should be imposed?

The next chapter draws upon the drafting experiences of other jurisdictions and in recognition of the dangers of translating determines whether a model Good Samaritan law can fit within English traditions, and legal culture. Although we will endeavour to make our statute as specific as possible to reduce the possibility of line drawing problems, the statute will be unable to predetermine all situations that encompass a duty to rescue.

Chapter 7 - Drafting a Model Good Samaritan Law

Introduction

How should one draft a model Good Samaritan law for England and Wales? In his analysis of the French duty to rescue, Tomlinson concludes that "the seemingly simple and straightforward statutory text has raised a host of difficulties which the courts have proved unable to resolve satisfactorily through interpretation".[1] Tomlinson acknowledges that this does not mean that other states should not introduce a Good Samaritan law as they "may enact better drafted statutes and courts may interpret them more skilfully".[2]

In terms of drafting a model Good Samaritan statute, Feuerhelm clarifies:

> The victim's standpoint is very important in drafting Good Samaritan statutes. It is that person the acts are designed to help. However, the rescuer's interest must be considered also. Thus, a just duty to rescue statute must balance the victim's concerns with the rescuer's concerns.[3]

We have examined various Good Samaritan statutes enacted by France, Germany and selected states within the US and discussed the policy options chosen for the statutes. When drafting a Good Samaritan law, these experiences from other jurisdictions will be used as data to help with the drafting process. First we shall look at some general guidelines which will aid legislators in drafting a model Good Samaritan law.

1) Drafting our model Good Samaritan law

a) Guidelines for drafting

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[1] Edward A. Tomlinson, 'The French Experience With Duty to Rescue: A Dubious Case for Criminal Enforcement' (2000) 20 N.Y.L. Sch. J. Int'l & Comp. L. 451.
[2] Ibid 452.
[3] Kent W. Feuerhelm, 'Taking Notice of Good Samaritan and Duty to Rescue Laws' (1984-1985) 11 J. Contemp. L. 219.

When drafting a Good Samaritan law for England and Wales the following general guidelines are a good starting point. One shall ensure that the model Good Samaritan law is simple. Karpen helpfully elucidates what constitutes simplicity, namely that the drafting "must be clear, precise, coherent and as simple as possible. The language used by the legislator is simply the vehicle which carries the will of Parliament".[4] Despite the drafting being clear and simple, it should also "ensure maximum understanding, precision and concision to exclude any ambiguity".[5]

There are many pieces of criminal legislation that do not follow this principle and they are overly complicated. J. R. Spencer argues that much of the criminal legislation enacted is unnecessary and enacted with excessive haste making it far too detailed and prescriptive. In the process it fails to pay heed to basic rules of substantive criminal law. By way of example he refers to the Sexual Offences Act 2003 and critiques this Act on the basis that it creates an excessive number of criminal offences. In contrast to French and German Criminal Codes which manage to cover all forms of sexual misbehaviour around six offences, the Sexual Offences Act has around 50 offences resulting in a huge amount of overlap and repetition. The same result could have been achieved with legislation that was much simpler. Despite the excessive length some of the sections still fail to capture what they (were) set out to do.[6]

To whom are the laws directed and who is Parliament addressing when it passes a law? The laws in general (especially criminal law) are directed to the citizens. The problem with the drafting of much legislation is the complicated language used by drafters (when simpler language would have had the same affect). Spencer observes what "chance has the ordinary citizen of understanding them" if the

[4] Ulrich Karpen, 'Instructions for Law Drafting' (2008) 10 Eur. J.L. Reform 163.
[5] Ibid 165.
[6] J. R. Spencer, 'The Drafting of Criminal Legislation: Need It Be so Impenetrable?' (2008) 3 Cambridge Law Journal 67.

obscurity of the language means that even professional judges find the terms used difficult to understand?[7] Unintelligible statutes result in two unfortunate consequences. Firstly, the complexity of law means that ordinary people may be deprived of its benefits due to a failure to comprehend and follow criminal prescriptions. Secondly, there are financial costs imposed due to an increased need to summon expert legal advice for members of the public as well as those who administer the law.[8]

Countering this, there are those who argue that "complex legislation is the inevitable result of complex subject matter, not of drafting defects".[9] Moreover, "clarity and precision are sometimes incompatible goals; attempts to reduce complex legislation to plain English will result in a sacrifice of accuracy and precision".[10] Whilst it is desirable to have understandable statutes, intelligibility for ordinary people cannot always be achieved. Nevertheless, "what can be achieved is the removal of obstacles which unnecessarily impede communication".[11] Whilst complete comprehension of every statute by a layman is not practicable, "the ordinary man should be able by reading a statute to obtain a good idea of what the legislator is telling him".[12] When drafting legislation, it should be possible to convey the intended meaning to ensure that it is comprehensible and easy to understand without a loss of accuracy and precision.

Legislation should be drafted with precision. Devlin states "a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand".[13] In terms of drafting, sentences should be as simple as possible with long sentences avoided. A long and complex clause should be cut up into subsections.[14] In drafting criminal

[7] Ibid 69.
[8] David St. L. Kelly, 'Legislative Drafting and Plain English' (1986) 10 Adelaide Law Review 409.
[9] Ibid 411.
[10] Ibid 412.
[11] Ibid 409.
[12] Ibid.
[13] Patrick Devlin, 'Statutory Offences' (1958) 4 J. Society of Public Teachers of Law 206.
[14] Ibid 207.

legislation one has to keep in mind that the text is a vehicle of communication. It should be readable, avoid unnecessary words and minimise technicality.

Prosser eloquently states:

> [T]he infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. With a rescue duty, the consistent application of a sound formula governing the necessity of intervention would minimize the risk of intermeddling.[15]

The next section will set out our model Good Samaritan law which draws on the guidelines discussed as well as lessons learnt from other jurisdictions.

b) Model Good Samaritan law

Here is our model Good Samaritan law.

(1) Any person who witnesses another at the scene of an emergency and in immediate peril of life threatening physical injury shall make a reasonable effort to notify the emergency services immediately.[16]

(2) An individual need not comply with subsection 1 if reporting would place him or others in danger.

(3) A violation of subsection 1 is punishable by a fine of no more than £5000, imprisonment for a term not exceeding 6 months, or both.[17]

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[15] Dan B. Dobbs, Robert E. Keaton and David G. Owen, *Prosser and Keeton On Torts* (5th ed. West Group 1984) p73.
[16] Jay Silver, 'The Duty to Rescue: A Reexamination and Proposal' (1985) 26 Wm. & Mary L. Rev. 423, Mark K. Osbeck, 'Bad Samaratinism and the Duty to Render Aid: A Proposal' (1985) 19 U. Mich. J.L. Reform 315**,** Damien Schiff, 'Samaritans: Good, Bad and Ugly: A Comparative Law Analysis' (2005-2006) 11 Roger Williams U. L. Rev. 77.
[17] Ibid.

Our Good Samaritan law achieves the requisite simplicity as it is easily understandable. Despite the minimal incursion on autonomy that arises, such constraints are balanced by the resulting good, therefore it achieves proportionality. We have been mindful when drafting to ensure that the statute is precise. We drafted our statute so that it could cover many potential situations. Nevertheless, there may arise scenarios that have never been envisaged by the statute and in these situations the courts will have to "work out its exact parameters on a case-by case basis"[18] in the usual common law fashion.

The next sections will explain and justify the different policy options chosen for our model Good Samaritan law.

c) What is the duty to rescue for our model statue?

In drafting our statute, we have to look at what type of assistance is required of the rescuers and to what extent individuals should intervene. How much risk should an individual be obliged by law to expose himself to? There is an established prima facie case for criminalising Hannah in failing to rescue Billy.[19] However, in drafting a Good Samaritan law we have to be mindful of the legal culture in which the law is implemented and therefore it is important to align our model Good Samaritan law with English traditions, expectations and concepts. Whilst a Good Samaritan law might fit well with French values, which are more communitarian, in England and Wales, the culture tends to be more individualistic. Harry Triandis defines individualism as:

> [A] social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, rights, and the contracts they have established with others; give priority to personal goals over the goals of others; and

[18] Osbeck (n 16) 317.
[19] See page 136.

> emphasize rational analyses of the advantages and disadvantages to associating with others.[20]

Various commentators have linked Anglo-American law with individualism. Lipkin claims "individualism as an underlying social value" which "reflects a minimalist conception of the state, whose salient function is proscribing harmful conduct, not a person's failure to act morally".[21] Under individualism, "personal autonomy reigns as the supreme virtue".[22] Individualism, as a general theoretic construct, holds autonomy, privacy, and self-interest as paramount values.

A Good Samaritan law is incompatible with individualistic values. The individualistic objection to a general duty of easy rescue is that such a duty deprives the rescuer of his liberty to choose whether to rescue the victim or do something else (including nothing at all). Lipkin explains why a Good Samaritan law is incompatible with individualistic values:

> Compelling a person to attempt dangerous rescues entails risking loss of life and permanent injury in exchange for the knowledge that others are required to attempt a dangerous rescue on his behalf. In dangerous rescues there is always the chance that the rescuer will fail in his rescue attempt. The benefit in a dangerous rescue saving the victim is considerably less than certain; the burden-injury to the rescuer is more than just possible. It is precisely this trade-off which is not entailed by individualistic values. [23]

Despite English law being rooted in individualism, in case law we have seen a relaxation of the rule against recognising a duty of easy rescue by expanding the

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[20] Harry C. Triandis, *Individualism And Collectivism* (Westview Press 1995) p2.
[21] Robert Justin Lipkin, 'Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue' (1983) 31 UCLA L. Rev. 252.
[22] Kevin J. Worthen, 'The Role of Local Governments in Striking the Proper Balance between Individualism and Communitarianism: Lessons for and from Americans' (1993) 2 BYU L. Rev. 475.
[23] Lipkin (n 21) 250.

number of special relationships which required a legal duty to aid the victim. After carrying out a doctrinal analysis of omissions liability there was found to be an "incremental development of relationships which can give rise to a duty to act".[24] In cases relating to manslaughter by omission such as *R v Instan,*[25] *R v Ruffell,*[26] *R v Wacker,*[27]and *R v Bowditch*[28] the moral heinousness of the conduct seems to be a significant factor in finding a legal duty to act. Recent judicial decisions seem to extend culpability to morally reprehensible omissions and the underlying interdependence in society seems to be influencing English law into adopting a more "communitarian" approach. Chapter 5 entertained the possibility that if English courts were confronted with the situation equivalent to the drowning scenario they might well rule that a legal duty to act is already embedded within criminal law as opposed to requiring an extension.[29] As stated in *Wacker*,[30] the law will follow the moral expectations of the community. Despite an equivalent case to our drowning scenario[31] never having arisen within reported appeal cases, it is possible that a court might rule that leaving the child is so morally reprehensible, that a new duty to criminalise Hannah must be recognised. Despite this evolution in case law, there has been very little movement in explicitly recognising a Good Samaritan law in England and Wales. It seems that such a duty is still deemed incompatible with the individualistic principles underlying common law.

If we are going to reform English criminal law and implement a Good Samaritan law, it will have to be accommodated within the individualistic framework underpinning our law. In reference to reforming American criminal law, Lawrence Mitchell stated that "the values of individualism and autonomy are so deeply ingrained in American society that any attempt to destroy those values will not be

[24] Catherine Elliott, 'Liability for Manslaughter by Omission: Don't Let the Baby Drown!' (2010) 74 Journal of Criminal Law 169.
[25] R v Instan [1893] 1 Q.B. 450.
[26] R v Stephen David Ruffell [2003] EWCA Crim 122.
[27] R v Wacker [2003] QB 1207.
[28] R v Bowditch [2017] (unreported) Maidstone Crown Court.
[29] See page 194.
[30] Wacker (n 27).
[31] See page 1.

taken seriously by policy makers".[32] The same applies for the legal system of England and Wales. Any proposed reforms will be more persuasive if they are "incremental changes, consistent with the values of individualism or autonomy".[33] Therefore, a Good Samaritan law must be framed in a way that is congruent with legal values in England and Wales such as minimal interference with personal autonomy. "[O]nly when proposals for reform are cast in terms of these values will they overcome the cultural obstacles to change".[34]

The high importance placed on autonomy in the legal system of England and Wales means it is too onerous to expect the criminal law to compel individuals to perform acts of heroism and risk life and limb to save the victim. In most rescues there is often an element of risk. In our drowning scenario, "even the strongest of swimmers may drown, or more likely, suffer a sprain or some scratches, in rescuing that proverbial drowning child".[35] It is less onerous and more realistic for a bystander to discharge her duty by notifying the authorities. A statute which requires a duty to report, rather than to effect a rescue, would "achieve the proper balance between a community of aid and one which respects the autonomy and well-being of bystanders".[36] A 'duty to report' statute is endorsed by Ashworth, who persuasively argues that it is "unjustifiable to expect a citizen to place himself or herself in the line of physical danger".[37] Consequently, "a duty to report and call should be sufficient and any further involvement should be left up to conscience".[38] Ashworth argues that:

> Beyond a duty to report, some physical intervention might appropriately be required in clear and urgent situations such as a police officer-victim,

[32] Lawrence Mitchell, *Stacked Deck: A Story of Selfishness in America* (Temple University Press 1998) p93.
[33] Michael Dominic Meuti, 'Legalistic Individualism: An Alternative Analysis of Kagan's Adversarial Legalism' (2004) 27 Hastings Int'l & Comp. L. Rev. 319.
[34] Ibid 320.
[35] Tomlinson (n 1) 453.
[36] Daniel B. Yeager, 'A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers' (1993) 71 Washington University Law Review 1.
[37] Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013) p65.
[38] Ibid p67.

> parent-child, or perhaps household member-vulnerable person but generally this should not be expected of ordinary citizens.[39]

Ashworth's argument is persuasive. For a model Good Samaritan law, a duty to rescue should be defined as a duty to report. Whilst a persuasive argument can be put forward that a duty to rescue is an infringement on autonomy, that argument carries less weight regarding a duty to report as the impact on individual liberty is comparatively quite minimal especially when it applies only to someone at the scene of an emergency witnessing another suffering life threatening physical injury. Encountering such situations is rare; and even when encountered, a call to the emergency authorities discharges the duty. Given the great moral failing that results from doing nothing, this minor infringement on liberty is justified. A duty to report is consistent with English legal values and would not require a substantial theoretical revision.[40]

d) When does the duty apply?

Many rescue statutes are vague in specifying in which situations an individual should intervene. By way of an example, the French statute states that the duty applies to anyone in a "state of peril".[41] Individuals voluntarily engage in many perilous activities and there is nothing in the statute to prevent someone from personally intervening when an individual is, say, rock climbing if they perceive them to be in a state of peril. Individuals cannot be certain whether in a particular situation they are required to act. Someone may watch a violent domestic dispute in the street and refrain from getting involved for fear of being perceived as meddling.

To reduce this uncertainty the model Good Samaritan law is explicit that an individual has a duty to summon aid only to those at the scene of an emergency.

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[39] Ibid p80.
[40] Schiff (n 16) 81.
[41] Article 223-6 of the 1994 French Penal Code.

An emergency occurs when one is in immediate peril of life threatening physical injury. By limiting our proposed statute to those in immediate peril of life threatening physical injury it therefore applies only to serious cases as opposed to one who suffers trivial injury such as a sprained ankle. A high proportionality threshold is consistent with liberal values and "limiting the duty in this way keeps it from being excessively burdensome to the witness and ensures that it does not encourage people to meddle in the affairs of others when their help is not required".[42] With the relative precision of our model Good Samaritan law in applying only to emergency situations in which the individual is in immediate peril of life threatening physical injury, the uncertainty ambit of many Good Samaritan statutes is greatly reduced.

Our model Good Samaritan law requires that the onlooker makes a reasonable effort to notify the emergency services. For the vast majority of cases due to access to mobile phones and other bystanders, this should be fairly easy to achieve. Nevertheless, if a situation arises that one cannot alert the emergency services without exceptional effort – such as if one is camping in a remote area miles away from any phone or police station – it would be unreasonable to hold the individual criminally liable for failing to summon aid. Our statute is drafted not to force the defendant to perform acts of heroism and no duty applies if reporting the incident poses a danger to the rescuer or others. What is deemed reasonable will be determined on a case by case basis and such a duty should be easy to discharge and not overly burdensome for the eyewitness.

How direct does the knowledge have to be of the emergency? Back to our drowning scenario, what if Hannah told her friend Susan about Billy's plight and Susan informed her colleague Dale. Does Dale now have a legal duty to summon aid?

[42] Osbeck (n 16) 319.

There is a principled case for a Good Samaritan law in England and Wales and in addition any Good Samaritan law should also counter pragmatic objections. One pragmatic objection is the fear that the duty would be too broad. If we were to make the duty applicable to those who knew of the emergency only indirectly this would extend the scope of the duty to rescue beyond those who were proximate to help and would unduly burden people. Only those who are most proximate are those we should target. For those who are closer, their duty is more pressing as it is easier for them to know what to do and summon aid and it is less of an imposition on their autonomy. Making the duty applicable to those who only knew of the emergency indirectly would broaden the scope of the statute unjustifiably and this raises many questions.

Therefore, only those who witness the emergency and fail to do anything should be held criminally liable.[43] The defendant would have to actually see the victim's plight for a duty to arise. It does not apply to those who have indirect evidence that someone is in danger, in contrast to Vermont and Wisconsin in which "knowledge is sufficient for the duty to arise"[44] and a duty seemingly exists for anyone who knows the danger. Therefore under our model Good Samaritan law Dale has no duty towards Billy. This duty should not extend to those who have indirect knowledge of someone in peril. If one indirectly knows of someone in peril they may have a moral obligation – possibly even a strong obligation - to offer assistance but it will not be a legally enforceable one.[45]

As we saw in the previous chapter, Vermont's and Minnesota's duty is broad and extends to anybody exposed to grave physical harm. Wisconsin's statute differs from Vermont as it only imposes a duty to aid those who are victims of crime. Similar to Wisconsin, in Hawaii and Rhode Island, a Good Samaritan law only

[43] John Kekes, 'The Dangerous Ideal of Autonomy' (2011) 30 Crim. Just. Ethics 192.
[44] Schiff (n 16) 83.
[45] Ibid 85.

applies if the serious physical harm results from the commission of a crime.[46] Should our model Good Samaritan law apply only to victims of crime or is it to be more general?

To answer this, let's recap the main steps in the argument. We have established previously that we have other-regarding duties of beneficence towards strangers, and - returning to our hypothetical scenario - Hannah has a moral duty to aid Billy.[47] We then asked whether Hannah's duty to rescue was one of virtue, and should it be externally compelled by the criminal law? We followed a legal moralist approach akin to Duff's analysis of criminalisation in which only public wrongs prima facie warrant criminalisation.[48] Hannah's behaviour constituted a public wrong as her blatant disregard for the drowning child's life violates the community's values based on mutual cooperation and respect for the sanctity of life. Compared to the avoidable death of a child, we found that placing a duty on Hannah to rescue is an insignificant, and a necessary, infringement of Hannah's liberty.[49]

Therefore, based on what we have found, for our model Good Samaritan law, our duty is not restricted only to danger that arises out of criminality but rather is a general duty that applies irrespective of how the peril arose.

e) Culpability – Mens rea issues

When should the individual be held to be criminally culpable? Criminalisation is the legislator's ultima ratio and should be used as a last resort. The ultima ratio principle holds that criminalisation should be used only as "uttermost means in uttermost cases"[50] and argues that criminal sanctions should only be enforced

[46] Ibid.
[47] See page 76.
[48] See page 113.
[49] See page 136.
[50] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 Ohio State Journal of Criminal Law 521.

when all other means (e.g., private law litigation, administrative solutions, non-criminal sanctions, etc.) fail. According to Husak, if "noncriminal means prevent the conduct in question as well or better than criminal sanctions, the criminal law should not be employed".[51] It should be viewed as a last resort as it is the State's most intrusive means of enforcement and is one of the most wrongful things the State can lawfully do to its citizen. Criminal sanctions often involve imprisonment and the loss of liberty is grossly intrusive and results in severe societal censure, and is deeply stigmatising and humiliating for the individual. Even after release a criminal record greatly affects employment opportunities. Aside from a deterrence aspect the criminal law also has a communicative aspect to it. Punishment must communicate to the offender justified censure for past wrongdoing.

Therefore, for criminalisation to be justified the conduct should be morally blameworthy and should wrong the victim. We have discussed how acts are on the whole more morally reprehensible than omissions causing the same results. The motives behind the conduct also make a difference. Individuals "deserve the censure inherent in punishment only if their conduct merits this response".[52] Criminalisation should only be applicable for a Bad Samaritan if the wrongdoing is voluntary.[53]

What constitutes voluntary wrongdoings? Voluntariness requires intention. Let's consider a hypothetical scenario. Steve walks past James lying unconscious on the road. Despite walking right past James, Steve fails to notice him as he is engrossed checking his mobile phone. Under our model criminal statute is Steve criminally liable as a bad Samaritan?

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[51] Douglas Husak, 'Applying *Ultima Ratio:* A Skeptical Assessment' (2005) 2 Ohio State Journal of Criminal Law 535.
[52] Jareborg (n 50) 537.
[53] Antony Duff and Andrew von Hirsch, 'Responsibility, Retribution and the "Voluntary": A Response to Williams' (1997) 56 The Cambridge Law Journal 103.

Duff and Von Hirsch ask the question, "how, then, should we understand 'voluntariness', as a condition of moral responsibility and criminal liability"?[54] Duff helpfully elucidates by stating that certain things need to be true of the agent we punish. Firstly, we must be able to intelligibly communicate the purpose of punishment to the individual and ensure that we portray the action as one the individual could "properly acknowledge as his or her own in its character as wrongdoing".[55] In order to determine voluntariness Duff focuses on the rational agency of the actor suggesting that this is an action which is in principle "susceptible to being guided by reasons, done by an agent who would be capable of recognising whether such reasons are good ones".[56] For Duff this captures the idea of moral responsibility and what "we condemn the agent for is a failure to recognise, to accept, or to be adequately motivated by, reasons for action (those offered by the law) which were within his grasp".[57]

Returning to the hypothetical, whether we hold Steve liable depends largely on whether we apply a subjective or objective test to determine criminal liability. Under conventional English criminal law principles, a person is criminally culpable "if and when he commits a statutorily-proscribed act (or fails to perform a legally-imposed duty) with the requisite statutory mens rea (e.g., purpose, knowledge, recklessness) and without a valid excuse, such as duress".[58] If we adopt the subjectivist position it means that Steve will only be held liable if he knew or foresaw the result which would or might occur due to his act.[59]

Under the subjectivist position, the underlying desire is to punish a guilty mind. This standard ensures that those who are stupid or careless are not criminalised, reserving punishment only for the callous. To punish a bystander it is important

[54] Ibid 105.
[55] Ibid.
[56] Ibid 107.
[57] Ibid.
[58] Stephen P. Garvey, 'The Moral Emotions of the Criminal Law' (2003) 22 Quinnipiac Law Review 93.
[59] John C. Smith, 'Subjective or Objective - Ups and Downs of the Test of Criminal Liability in England' (1982) 27 Villanova Law Review 1179.

to find him morally blameworthy. Moral blameworthiness is a function of the state of mind and according to Gordon "cannot be determined by a reference to any external norm such as the reasonable man".[60] The essential criterion is "what the agent has in mind (or will), and not what the reasonable (or normal or average) man, or what the trier of fact, would have had in mind (or will)".[61] Mann astutely states that to "ignore a criminal's state of mind at the time of the act, except that he had knowledge of the circumstances, and to proceed objectively, is to refuse to face these subjective factors that made the individual a criminal".[62] Knowledge of the individual's peril is important to establish moral blameworthiness. As Sayre states: "to subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."[63] If it is determined that an individual had knowledge of the danger and yet chose to ignore it, this indifference warrants punishment by the criminal law. If Steve had knowledge of the danger he might likely have come to James' aid. Taking account of the individual's state of mind is a necessary element for the imposition of criminal liability and applies to our model Good Samaritan law.

Nevertheless, in some situations English criminal law imposes liability based upon negligence in which defendants lack moral blameworthiness as they did not foresee the consequences of their actions, however, under the objectivist position they *should have* foreseen what could have resulted. The objectivist position states that it is immaterial whether Steve did not know such things, rather it will be deemed sufficient "that a reasonable and prudent man would have known them".[64] Applying that to our scenario, it might be argued that a reasonable and prudent man would have been aware of James in danger and therefore Steve should be

[60] Gerald H. Gordon, 'Subjective and Objective Mens Rea' (1975) 17 Crim. L.Q. 355.
[61] Ibid 357.
[62] Arnett Mann, 'The Negligent Murder--Is it Objective or Subjective (Subjective View)' (1947) 35 Ky. L.J. 252.
[63] Francis B. Sayre, 'Public Welfare Offenses' (1933) 33 Colum. L. Rev. 55.
[64] Ibid 57.

held liable for not attempting to summon help. Whilst pure subjectivism argues that Steve is only liable if he consciously was advertant to James's plight and ignored it, inadvertence can also be morally culpable when it aligns itself to wanton disregard towards the welfare of others. The danger does not have to be foreseen but *should have* been foreseen.

Negligence is a problematic area of law for as stated by Moore and Hurd, "there is only the counterfactual judgement that a reasonable person *would* have foreseen the risk and the normative judgement that this defendant *should* have foreseen the risk".[65] Criminal negligence is a contested term and gross negligence is described by Moore and Hurd as where "risks are serious and obvious and the justifications for running them are minimal".[66] Such negligence can be inadvertent. It is debated whether such inadvertent negligence warrants punishment since "culpability is generally conceived of as wrongdoing in the mind of the actor".[67] Can the blissfully unaware be held to be culpable?

Those who argue that some instances of gross negligence demands censure under the criminal law state that the individual should have known. Moore poses the question "how clear and vivid must the experience be to constitute awareness"?[68] Does a dim awareness suffice that the individual should have known? Moore refers to this as wilful blindness, namely that "the actor has the inkling or suspicion…of the existence of some risk; and he does not want to know for sure that there really is such a risk, so he avoids steps that he knows to be available to verify its existence, including even thinking more about it".[69] Moore, in relation to some hypothetical scenarios, gives examples of some situations in which actors had no malicious intent to inadvert nevertheless "would have adverted to the risk if he

[65] Michael S. Moore and Heidi M. Hurd, "The Culpability of Negligence" in Rowan Cruft, Matthew H. Kramer, and Mark R. Reiff, *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* p311.
[66] Ibid p313.
[67] Ibid p314.
[68] Ibid p317.
[69] Ibid p320.

had not been so selfishly indifferent to the welfare of other people or if he had not been so desirous of getting home in time for his favourite television show (that he never looked for warning signs, for example)"[70] and in another situation the actor "would have adverted to the risk if he had not been so clumsy (as to drop his cigarette just as he was passing the warning sign about children being present, for example)".[71] Applying that to the scenario Steve should have known as he passed right by James yet chose to focus on his mobile rather than assist James.

Once we have established advertence the next question is whether Steve "has or lacks the capacity to advert".[72] Could Steve had adverted the risk posed to James, namely did he possess "the skill or competence to advert"?[73] All Steve had to do under the model statute was to call for emergency aid and such an undertaking was well within his capacity.

Therefore, for the model Good Samaritan law, we shall be adopting the objectivist position in English criminal law. Steve should have been aware of the immediate peril James was in and is therefore criminally liable.

f) Penalties

What should be the penalty for breaching our model Good Samaritan law? We have seen a range of punishments, from France's severe penalties to Germany and US states' comparatively minor penalties. In chapter 2, we noted a moral distinction between an act and an omission. Whilst it was argued that some omissions warrant criminalisation, in the vast majority of cases omissions are morally less culpable than acts causing the same outcome.[74]

We have described the English criminal law position on omissions which punishes omissions in certain situations, and if death arises as a result of the omission the

[70] Ibid p330.
[71] Ibid.
[72] Ibid p321.
[73] Ibid.
[74] See page 37.

offence may constitute manslaughter. This offence is too draconian, for as noted by Ashworth, "there should be a significant distinction made between the actual perpetrator of the offence and the onlooker".[75] Easy rescue offences "are typically middle range crimes with a moderate maximum penalty".[76]

Specifying a precise penalty requires extensive analysis of sentencing principles and is beyond the scope of this thesis. The penalty should not be merely symbolic, but should be severe enough to ensure that the duty is taken seriously. Section 170 of the Road Traffic Act 1988 can guide us in formulating a penalty for our model Good Samaritan law. The Act states that omitting to stop and give details after causing a road accident is a criminal offence and under Section 170(2) if a driver is involved in an accident he "must stop and, if required to do so by any person having reasonable grounds for so requiring, give his name and address and also the name and address of the owner and the identification marks of the vehicle". Failure to comply can result in a maximum penalty of £5000 and a 6 month prison sentence. A failure to report a road accident should be distinguished from our drowning scenario as the driver caused the accident whilst Hannah was not responsible for Billy falling into the lake. Nevertheless, Hannah's conduct is morally more reprehensible than the vast majority of failures to report car accidents. Despite the lack of direct causation, a similar maximum penalty of 6 months and a £5000 fine seems commensurate with the nature of the offence, and on the lesser end of the gravity scale.

2) How does our model Good Samaritan law counter practical objections?

Previous chapters have discussed some of the theoretical objections to creating a Good Samaritan law in England and Wales. These objections include the fact that such a law violates an individual's liberty and affects their autonomy. We countered those objections on the basis that the infringement on individual liberty

[75] Ashworth (n 37) 62.
[76] Ibid 67.

is so very slight, and lasts for only a temporary duration; whereas the harm to be averted may be grave. [77]

For many, the legal enforcement of moral duty seems unnecessary as the duty to rescue someone in extreme danger strikes one as intuitively obvious. However, as Murphy points out, "even if it is right to assume that it is a rare person who lacks the minimal level of benevolence needed to move her to perform an easy rescue, this line of thought ignores the fact that strong contrary inclinations will often be present in such situations".[78] There are many well documented cases in which "the milk of human kindness has not been present in sufficient quantities to inspire help out of a sense of altruism".[79] The desire to be law abiding and the fear of legal sanctions might compel many to rescue whereas, without legal compulsion, they may have been too timid or lacking the motivation to intervene. The criminal law has a role to play in reinforcing morality.[80] Prentice persuasively argues that "the imposition of a duty to rescue is justified by the desirability of bringing the law into line with prevailing moral standards, and the concomitant increase in respect for the law this would likely produce".[81] According to Franklin, the public is more likely to view the duty to rescue as being morally required if it is legally required. In other words, "we might well conclude that the legal requirement of rescue would, in moments of hesitation, tip the balance toward the desired action. Some rescuers might be moved initially by awareness of such a law".[82]

Despite this, there are a host of practical concerns related to drafting and implementing a Good Samaritan law. We proposed a hypothetical scenario at the start of this thesis relating to Hannah walking by and failing to rescue Billy.[83] The problem with basing law on hypothetical scenarios is that they are often "contrived

[77] See page 136.
[78] Liam Murphy, 'Beneficence, Law, and Liberty: The Case of Required Rescue' (2001) 89 Geo. L.J. 605.
[79] Robert A. Prentice, 'Expanding the Duty to Rescue' (1985) 19 Suffolk U. L Rev. 33.
[80] See page 116.
[81] Prentice (n 79).
[82] Marc A. Franklin, 'Vermont Requires Rescue: A Comment' (1972-1973) 25 Stan. L. Rev. 51.
[83] See page 37.

and skewer the issue because they are just that: hypothetical cases. In real life, cases rarely arise where the danger is so clear and the rescue is so easy".[84] In reality, scenarios tend to be messier and are rarely so clear cut.

A number of practical objections have arise in relation to implementing a Good Samaritan law. One concern is the possibility that assailants may pretend to be in need of aid in order to lure individuals and then attack them. Under such circumstances, the "Good Samaritan becomes the target, or victim of crime while acting in accordance with the law".[85] Another practical objection to implementing a Good Samaritan law has been raised by Woozley. Woozley points out that in a situation in which one is in peril, the number of bystanders who walk on by could be numerous, and "the police, especially in a case of the latter kind, are not going to be able to round up everybody who could have helped but did not".[86] If they manage to identify one of those individuals, would it be fair to hold him responsible for failing to rescue whilst hundreds of others in his situation got away? Also, there is the ubiquitous slippery slope argument. Once the government decides to impose a mandatory legal duty to rescue strangers in peril and "an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty".[87]

Individuals may not wish to rescue those victims involved in violent crimes for fear of retaliation. How much personal danger should a bystander be willing to risk in carrying out his legal duty?[88] What response do we expect from a defendant who witnesses someone in extreme danger? Feinberg suggests that a Good Samaritan law should be drafted so that the defendant has an opportunity to rescue in a way

[84] Tomlinson (n 1) 452.
[85] John T. Pardun, 'Good Samaritan Laws: A Global Perspective' (1998) 20 Loy. L.A. Int'l & Comp. L. Rev. 591.
[86] Anthony D. Woozley, 'A Duty to Rescue: Some Thoughts on Criminal Liability' (1983) 69 Va. L. Rev. 1273.
[87] Ibid 1277.
[88] Alison McIntyre, 'Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes' (1994) 23 Philosophy and Public Affairs 157.

which poses "no unreasonable risk, cost, or inconvenience".[89] What does that mean in practical terms? Scholars have addressed the fact that there are "immense practical difficulties in identifying who is required to play the Good Samaritan and what he would be required to do to discharge his duty".[90] The following sections focus on how our model Good Samaritan law counters some well-rehearsed practical objections.

a) Difficult to limit its scope

A forceful objection to a Good Samaritan law is the slippery slope argument. This argument arises from the fear that a duty to rescue is vague. It is therefore difficult to put limits on its scope and to draw "a line between this duty and more extensive infringements on individual liberty that are undesirable".[91] Such an argument is made on the basis that the philosophical underpinning of a duty to rescue statute is a duty of beneficence – an acknowledgment that we have duties to alleviate the sufferings of strangers which should be legally enforced. Therefore, so the argument goes, there is nothing in principle to prevent a Good Samaritan law extending to the impoverished living in a country thousands of miles away and beggars on the street at home.

The argument that a Good Samaritan law is difficult to limit is weak, as similar provisions have been introduced in many countries without "undermining the foundations of individual liberty".[92] The model Good Samaritan law implies a minimal incursion on liberty and only applies in very particular circumstances. Calling the authorities is not likely to impact on individual liberty in any overly intrusive way as the "average person is likely to encounter such a situation only rarely, and some people may go their entire lives without such a duty arising".[93]

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[89] Joel Feinberg, Harm to Others (Oxford University Press 1984) p156.
[90] Brian Hogan, "Omissions and the duty myth" in *Peter Smith, Criminal Law: Essays in Honour of J.C. Smith* (Butterworth & Co 1987) p90.
[91] Osbeck (n 16) 4.
[92] Woozley (n 86) 1275.
[93] Osbeck (n 16) 2.

Given the harm (both physical and societal) that can and does result from indifference to an individual at the scene of an emergency suffering life threatening physical injury, such minimal restriction on liberty is justified. Fear of a broad duty to rescue statute which could lead to further infringements of liberty is assuaged by creating a modest duty to notify which only arises once an individual is in immediate peril of life threatening physical injury.

As for the standard objection that a Good Samaritan law is too vague in specifying what needs to be done to discharge the duty, such a criticism is unfounded in this instance. Our model Good Samaritan law clearly states that the bystander's duty is discharged if an individual notifies the authorities when he observes someone suffering life threatening physical injury at the scene of an emergency. This limits the duty, which would plainly not extend to giving money to beggars. Duty-to-notify statutes are "even less likely than duty-to-rescue statutes to contain expansive language". [94]

b) Fear of retaliation

Individuals may not wish to rescue those victims involved in violent crimes for fear of retaliation. As argued by Yeager, some individuals (whom he calls villains) "represent a danger not only to the victim, but to anybody who is rash enough to interfere with him".[95] In addition, "sometimes the risks of intervening are subtle or long-range, since the bystander lucky enough to avoid physical contact with the villain still may face future dangers, such as retribution from the villain or her friends".[96] By notifying the authorities, Yeagar argues that "society still derives a substantial benefit from notification" and "the victim benefits if professional rescuers arrive before a second or third attack takes place".[97] The fear of

[94] Osbeck (n 16) 319.
[95] Yeagar (n 36) 3.
[96] Ibid.
[97] Ibid 7.

retaliation is removed by making a call to the emergency services a safe distance away from the attack.

c) Criminals feigning injury

One concern is that criminals may pretend to be in need of aid in order to lure individuals and then attack them. Under such circumstances, the "Good Samaritan becomes the target, or victim of crime while acting in accordance with the law".[98] Our model Good Samaritan law deals with this concern as a witness does not have to personally get involved but only has to summon help.[99] By not needing to approach the victim and physically intervene, the fear of being lured into a trap is alleviated.

d) Problems in prosecuting multiple bystanders

Woozley contemplates that there potentially might be many bystanders who do not rescue. The police might not be able to prosecute the majority of them but only one of the bystanders.[100] Is it fair to hold this unlucky individual solely responsible for the failure to report, bearing in mind that the majority got away?

Woozley counters his objection by observing that these selective enforcement issues occur all the time for many other criminal offences. It is only unfair to convict someone for an offence if that individual had not committed that offence. It is a reality that "every day somebody gets caught breaking into a bank, and every day plenty of others do not get caught".[101] In that situation, "if the bank robberies are independent of each other, nobody would suggest that the first robber, who was caught, ought not to be charged and convicted unless all the others were rounded up too".[102]

[98] Pardun (n 85) 592.
[99] Osbeck (n 16) 318.
[100] Woozley (n 86) 1271.
[101] Ibid 1273.
[102] Ibid.

Woozley gives another example, "stopping and booking a motorist for breaking the speed limit".[103] In that situation, if a single police officer was on duty he can only stop a single vehicle. Whilst dealing with that driver, many other vehicles pass on by also breaking the speed limit. The driver may "lament that he was the one who was caught, but he has no ground for feeling aggrieved or for complaining about it".[104] The same logic applies in a scenario where many people witness a crime, but only one or a few are convicted under a Good Samaritan law.

In addition, the problem of multiple bystanders who fail to rescue does not seem to be a problem in states which have already implemented a Good Samaritan law. As Murphy observes, "if the problem of multiple potential rescuers were serious enough to warrant rejection of the duty to rescue, one would expect some supporting evidence to have emerged by now".[105] Murphy comments, rather facetiously, that "it is somewhat astonishing to read practical objections such as these that take no account of the existence of a world in which the impossible has not come to pass".[106]

e) A Good Samaritan law will be too costly to enforce

As for the argument that a criminal law duty to report will be too costly to enforce, Jain suggests that if a state determines "that the costs of enforcing a duty-to-rescue rule outweigh the benefits of lives saved, it can simply adopt the statute without undertaking measures to enforce the statute actively, thus gaining at least some of the benefits of the rule without the cost".[107] According to Pardun, this "is the route states like Minnesota and Wisconsin have chosen to take, implementing

[103] Ibid 1275.
[104] Ibid. Of course if the driver was BAME and felt he was stopped as a result of racial profiling that would be a different situation and then he may have every right to feel aggrieved for being stopped.
[105] Murphy (n 78) 607.
[106] Ibid 610.
[107] Sungeeta Jain, 'How Many People Does it Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State' (1999) 74 Wash. L. Rev. 1181.

their largely unenforced Good Samaritan laws with the primary purpose of providing a 'moral compass' to point society in the proper direction".[108]

Even if our model Good Samaritan law were not actively enforced, its mere existence could be of benefit. Moral values may be enhanced through the symbolic effect of unenforced prohibitions. According to Basson, even "an 'empty' law without provision for enforcement may still convey a sense to the people and their government that X is right or wrong and thus may affect the moral climate of a community"[109]. Increased moral censure of Bad Samaritanism, in turn, "may inspire people toward greater altruistic behaviour, and it may also help to bring about a heightened sense of community among individual members of society".[110] As a result, "this climate… may prompt increased compliance with the defined legal obligation."[111] This is a plausible hypothesis, though it is dependent on empirical contingencies that cannot be very easily generalisable.

A high financial cost is inherent in many criminal statutes and is deemed a legitimate expense due to the benefit arising from these criminal prohibitions. Whilst an unenforceable law has value in reinforcing the potency of moral sanctions and guiding human behaviour, non-enforcement of the law may undermine its potency with it not being taken seriously and bringing it into disrepute.

f) The heroic bystander

Our model statute does not require the individual to physically intervene, as calling the emergency services discharges the duty. What if the individual chooses to intervene but does not succeed? Let us return to our hypothetical scenario. After Hannah walks on by, Joe sees Billy in peril and straight away dives into the water

[108] Pardun (n 85) 592.
[109] Marc D. Basson, *Ethics, humanism, and medicine: Proceedings of three conferences* (A.R. Liss 1980) p214.
[110] Osbeck (n 16) 316.
[111] Prentice (n 79) 35.

to rescue Billy. Despite his best efforts, Joe is unsuccessful, and Billy drowns and dies.

Clearly, Joe made a bona fida attempt at rescue, but purely based on the text of the law Joe has not discharged his duty. He did not make a reasonable attempt to notify the emergency services immediately as his immediate action was instead to dive into the water and rescue Billy. Would our model statute punish Joe's failed attempt turning our hero into a criminal?

In rescue situations, heroism should not be penalised. In England and Wales, Parliament in 2015 took the welcome step of introducing the Social Action, Responsibility and Heroism Act, as many volunteers were discouraged from rescuing due to fear of being deemed negligent if the rescue goes awry. Lord Faulks stated that the aim of the act was:

> To provide reassurance to people who act in socially beneficial ways, behave in a generally responsible manner, or act selflessly to protect someone in danger by ensuring that the courts recognise their actions and always take that context into account in the event that something goes wrong and they are sued.[112]

The Social Action, Responsibility and Heroism Act provides immunity from liability under section 2 if "the alleged negligence/breach of duty occurred when the defendant was acting for the benefit of society or any of its members". Under section 4 "the court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger". This Act is laudable in encouraging heroic behaviour without fear of concomitant liability and is intended to reassure individuals that if they are sued, their entire behaviour will be taken into context rather than the result. The Act does not have any bearing on criminal

[112] Faulks in Hansard HL (vol 756 col 1545, 2014).

liability, but the same principles still apply, and Joe should not face criminal sanctions.

Our model statute should not discourage individuals from intervening; it merely should not compel them. The criminal law is about enforcing minimal duties, and does not stop one going beyond that. Our model statute does not set out all what one must do in such a scenario, but rather the minimum of what one must do. Under our model statute, reasonable but failing efforts do not merit criminalisation. If one tried in good faith to do more and it did not work out, they should not be criminalised for their failed attempt. Therefore, Joe should not face punishment under our model statute for his failed attempt at rescuing Billy.

g) Other practical concerns alleviated by a duty to notify statute

A final, more esoteric concern raised by Silver is that there will be uncertainty as to whether summoning aid has occurred due to "altruistic impulses or by fear of legal sanctions".[113] If Hannah decided to call the emergency authorities, does it matter whether her motivation arose from fear of the legal repercussions rather than an altruistic desire to help? A Kantian would argue that it does and that the moral worth of her action does not arise from the consequences but rather the intention. For Kantians, the right thing should be done for the right reason.[114] For our model Good Samaritan law the motivation is irrelevant. Regardless of the motivation which caused Hannah to call the emergency services, Billy now has assistance. Therefore, even if compliance with our model Good Samaritan law arose due to fear of legal sanctions rather than altruistic impulses, society would still benefit (not to mention the victims!).

[113] Silver (n 16) 425.
[114] Richard R. McCarty, 'Kantian Moral Motivation and the Feeling of Respect' (1993) 31 Journal of the History of Philosophy 433.

Conclusion

The principal conclusions of the foregoing analysis may be summarised as follows.

1) The model Good Samaritan law should be drafted with precision and clarity and should not be overly complex or technical.

2) A model Good Samaritan law should impose a duty to report rather than a duty to rescue. We argued that any reforms should be in line with an individualistic legal culture and our legal culture prioritises autonomy. A duty to report is a minimal infringement on autonomy.

3) The duty only applies in an emergency when one is suffering life threatening physical injury.

4) A reasonable effort to notify the emergency services discharges the duty. What is reasonable would culturally be determined contextually, on a case by case basis.

5) Our model Good Samaritan applies to anyone suffering life threatening physical injury irrespective of how that injury occurred (including as a crime victim).

6) The model Good Samaritan law applies only to eye witnesses, and not those who have merely indirect knowledge.

7) Our model Good Samaritan law adopts the objectivist position in relation to knowledge. In finding criminal liability an individual should be aware someone is in danger yet choose to ignore it.

8) Specifying a precise penalty is beyond the purview of the thesis. Nevertheless, we indicated on the basis of general considerations that a moderate penalty should be applied with a maximum penalty of £5000 and a 6 month sentence.

9) Our model Good Samaritan law successfully counters practical objections discussed in the existing critical literature.

Hannah should have a legal duty to rescue Billy as "callous indifference to the life or well-being of others is not a protected right".[115] Schiff argued over ten years ago that the "common law's adherence to the 'no duty' theory has become attenuated in today's society of urbanization, telecommunication and professional emergency services" and consequently: "a legally enforceable duty that requires notification of authorities in limited circumstances is well-suited to the times".[116] This argument remains valid today for England and Wales.

[115] Prentice (n 79) 33.
[116] Schiff (n 16) 79.

Conclusion

This thesis investigated one major question: Should there be criminal liability for failure to rescue in English law? Previous scholarship answers this question but not in the systematic way we addressed it. By laying a foundation for answering this question we considered the best metaphysical account of omissions, and addressed why a moral duty exists. Most studies that look at the merits of implementing a Good Samaritan law skip these two preliminary stages. They do not take metaphysics seriously taking for granted that we have a moral duty to others. They jump straight to the third stage of the argument, by asking whether there is a prima facie case for criminalisation.

The thesis began by carrying out a metaphysical analysis of omissions. Due to the great confusion and ambiguity in the literature around defining what an omission is, it is important to attend carefully to questions of definition. In addressing the question why metaphysical considerations matter, we considered the dangers of adopting a 'legal nominalist' position, in which an omission is said to exist after liability has already been determined rather than before liability is imposed. This is back to front reasoning. We rejected a nominalist account, on the basis that the criminal law has metaphysical obligations. It is important to define clearly what an omission is and to distinguish it from an act before determining liability. The purpose of our metaphysical account was to provide a foundation for investigating the case law, and thus to establish a solid basis for law reform.

In exploring the best metaphysical account of omissions for the purpose of the thesis, we analysed Moore's metaphysical conception of omissions. We distinguished between an omission and a non-doing and defended the view that a person is not responsible for a non-doing. It was also identified how, for the purpose of criminal law, criminal omissions should be distinguished from mere omissions. Moore's theory does not account for this distinction, making Moore's theory far too general and broad for our purposes. For the purpose of the thesis,

the best metaphysical account was the best metaphysical conception for the purpose of assigning criminal responsibility. Having considered and rejected Moore's theory, we adopted Fletcher's communicative theory as a superior account in evaluating whether any particular omission has moral or legal significance. Whereas Moore's account conceptualised actions in abstraction, Fletcher's account accommodates more contextual factors. For the purpose of assigning criminal responsibility, and for a jurisprudential analysis of omissions more generally, Fletcher's account was adopted.

Having specified the best metaphysical conception of omissions, we turned our attention in chapter 2 towards moral considerations. First, we considered whether a moral distinction should be drawn between an act and an omission. We found that there are a few examples in which omissions might be deemed morally as wrongful as acts. Nevertheless, for the majority of situations omissions are morally less blameworthy than acts. Returning to our hypothetical scenario, Hannah watching Billy drown is morally less blameworthy than if she herself drowned Billy. In order to determine whether Hannah has a moral duty to rescue Billy, this requires analysis of moral duties owed by an individual and in particular whether morality contains other-regarding duties. We rejected ethical egoism and concluded that morality does support other-regarding duties, which can be described generally as 'duties of beneficence'. Hannah, thus, has a moral duty to rescue Billy.

The question we then addressed was how far the duty of beneficence extends. Much of the philosophical literature has focused on overseas aid. A powerful argument is that we should care about other people as a consideration of justice rather than charity. We found that we have other-regarding duties of beneficence that extend to strangers and exist regardless of geographical proximity. We contrasted a duty to rescue with a duty to aid the destitute. In the hypothetical scenario, Hannah has a stronger moral duty to rescue Billy than to save a starving

child in Bangladesh as her duty to save Billy is more morally pressing. Hannah is the only individual who can save Billy. In contrast to the starving child in Bangladesh, her (non-)intervention alone determines whether Billy lives. Also, due to her physical proximity, Hannah is in a better position to gauge what needs to be done in contrast to assessing the needs of the starving child in Bangladesh.

Once we established that Hannah is under a moral duty of rescue, the next question we addressed is whether Hannah's moral duty should be enforced under the criminal law. Chapter 3 considered whether there was a prima facie case for criminalisation. We considered the structural relationship between criminal law and morality and considered to what extent the criminal law should enforce moral duties. The relationship between morality and the criminal law is a vast topic and largely beyond the scope of the thesis. Our examination of the circumstances in which immoralities should be criminalised builds on extensive philosophical literature. We rejected the Harm Principle - which under Feinberg's formulation states that harm and offence to others provides the state a good reason to criminalise behaviour[1] - as the exclusive criterion for criminalisation on the basis that it is both under and over inclusive. Duff's modest legal moralism was adopted as an alternative theory which states that immoralities should be criminalised only if they are deemed to be public wrongs. Public wrongs are those that violate the community's values. Duff explains convincingly that defendants should be held criminally liable to the political community.

Chapter 4 applied these principles to a duty to rescue and concluded that Hannah's behaviour, in failing to rescue Billy, constituted a public wrong. Before finally determining whether there was a prima facie case for criminalising Hannah, however, we dealt with two anticipated objections of principle. One was the causation argument, which argues that since Hannah was not the cause - as she

[1] Joel Feinberg, Offense to Others: The Moral Limits of the Criminal Law (Oxford University Press 1985) p82.

did not push Billy into the water - she should not be held criminally responsible. However, we noted that there are many crimes in which there is no causation yet conduct is still criminalised. Secondly, we considered the autonomy objection which states that criminalising Hannah restricts her autonomy. We argued that restrictions on autonomy are justified when temporary and proportionate. Therefore, it was argued that there is a prima facie case to criminalise Hannah.

After establishing a prima facie case for criminalisation, Chapter 5 extended the discussion to a doctrinal analysis of omissions in England and Wales. Only by establishing what the law is can we see whether it needs to be reformed. We started by revisiting the standard account of omissions liability expounded in textbooks, most notably in *Smith and Hogan's Criminal Law*.[2] On this account, an omission is criminalised only if there is a breach of an existing duty to act, and there are four duty categories conventionally recognised by criminal law: (1) duties arising out of a contract, (2) duties arising out of the creation of a dangerous situation, (3) duties arising out of a personal relationship, and (4) duties arising from voluntarily incurred obligations.

Having sketched the standard account of omissions we re-examined the extent to which this account is metaphysically sound and normatively defensible. We investigated the case law and found that the courts do not consistently adhere to metaphysical logic. Too often judges resort to legal nominalism by manipulating the definition of an omission in favour of finding liability. Regarding homicide by omission cases, a legal duty to act often has a moral foundation as can be seen in *R v Instan,*[3] *R v Ruffell,*[4] *R v Wacker,*[5] and *R v Bowditch.*[6] We concluded through reanalysing the case law that despite the standard position in English criminal law stating that there is no Good Samaritan duty, in fact, Hannah might be under a

[2] David Ormerod and Karl Laird, Smith and Hogan's Criminal Law (14th edn, Oxford University Press 2015).
[3] R v Instan [1893] 1 Q.B. 450.
[4] R v Stephen David Ruffell [2003] EWCA Crim 122.
[5] R v Wacker [2003] QB 1207.
[6] R v Bowditch [2017] (unreported) Maidstone Crown Court.

legal duty to act were courts ever confronted by a situation akin to our hypothetical scenario. On a plausible reading of the authorities, a legal duty on Hannah to act might already be embedded in English criminal law. Hannah's legal duty to act may arise due to her conduct being a flagrant and very serious moral transgression and the relative ease of summoning help or personally rescuing Billy.

As discussed, the consensus amongst textbook writers and academics is that in English law there is no duty to act to rescue a stranger, unlike in some continental jurisdictions. *R v Miller*[7] is used as a key authority to reinforce this point. However, through our analysis of case law we found that if the courts were ever confronted with a situation akin to our hypothetical scenario there is a strong case for them to find a duty. This part of the discussion pushes the boundaries of the existing literature and tries to take the discussion further than has generally been taken in previous work on this topic.

Doctrinal analysis of omissions, at least in discussions addressing failure to rescue, is surprisingly limited in other common and civil law jurisdictions. Commentators present brief overviews of the law in this area without a comprehensive analysis, or citation from important cases. Plainly, only by first ascertaining what the law is can we determine whether the law is in need of reform and how effective a duty to rescue statute might or has been. An in depth doctrinal analysis of omissions carried out by insiders of particular jurisdictions would be worthwhile.

We turned our attention in the last two chapters of the thesis to the technical challenges of drafting a Good Samaritan law. Even if they concede a prima facie case for criminalisation, critics often draw attention to the many pragmatic institutional constraints on its acceptable implementation. Such concerns include that some nefarious individuals may pretend to be victims in peril in order entrap good-hearted individuals. Also, there could be numerous bystanders who walk by,

[7] R v Miller [1983] 2 AC 161.

and the question then arises, is it fair to hold one or just a few individuals criminally responsible, whilst many others got away? More broadly, there is the slippery slope argument that if we allow a Good Samaritan law, the state will interfere into many other areas of social life thus unacceptably eroding individual autonomy. Additionally, there is the difficulty of defining the scope of the duty and determining which individual is required to play the Good Samaritan and what would be required of that individual to discharge the duty.

Comparative law offers resources in responding to these critics. Chapter 5 looked at other countries that have implemented a Good Samaritan law apparently successfully. It is only natural to ask, how do these countries deal with the practical challenges of implementing such laws? Chapter 6 examined the drafting choices and practical experiences of these selected countries – France, Germany and selected states within the US.

International comparisons raise methodological issues. It is important to consider the cultural context in which the laws are to be implemented. The lack of linguistic equivalence between France, Germany, and England and Wales, encouraged our focus to be primarily on selected states within the US. Clearly, we should not directly transplant from France, Germany and even the US as their legal culture may be significantly different to England and Wales. Our comparative survey helped us identify the key policy issues for drafting our Good Samaritan law. Four key questions were identified: (1) Who does the duty apply to?, (2) what type of danger necessitates intervention?, (3) what conduct discharges the duty?, and (4) what penalty should be imposed?

With the benefit of this comparative context, chapter 7 undertook the difficult work of drafting a Good Samaritan law. We considered data in the form of legislative and practical experience from other jurisdictions to help us with drafting our own statute. The statutes examined have their advantages but were also not without flaws. The Vermont and French statutes are burdensome in the sense that they

require an individual to intervene. The Rhode Island and Hawaiian statutes are more reasonable in that they simply require a call to the emergency services, but they are still problematic in a different direction: they restrict the scope of the offence too much, by applying only to victims of crime. Chapter 7 proposed the following model Good Samaritan law:

(1) Any person who witnesses another at the scene of an emergency and in immediate peril of life threatening physical injury shall make a reasonable effort to notify the emergency services immediately.[8]

(2) An individual need not comply with subsection 1 if reporting would place him or others in danger.

(3) A violation of subsection 1 is punishable by a fine of no more than £5000, imprisonment for a term not exceeding 6 months, or both.[9]

Each principal element of the draft was explained and defended in chapter 7. This model Good Samaritan law is this thesis' main contribution to knowledge. It is hoped that academics and policy makers might use our model Good Samaritan law as a template for legislation. Unlike the Vermont statute, but similar to the Minnesota and Wisconsin provisions, our model Good Samaritan law does not require the individual to attempt physical rescue but rather only to summon assistance. In drafting our Good Samaritan law we were mindful that our law should be congruent with English values and traditions and not carelessly transplanted from another jurisdiction with a different legal culture to ours. Individualism and autonomy are the cornerstones of our legal culture. An advantage of the 'duty to notify' statute defended in this thesis is that a "minimal duty to inform the authorities in an emergency, enforceable only in the criminal

[8] Jay Silver, 'The Duty to Rescue: A Reexamination and Proposal' (1985) 26 Wm. & Mary L. Rev. 423, Mark K. Osbeck, 'Bad Samaratinism and the Duty to Render Aid: A Proposal' (1985) 19 U. Mich. J.L. Reform 315**,** Damien Schiff, 'Samaritans: Good, Bad and Ugly: A Comparative Law Analysis' (2005-2006) 11 Roger Williams U. L. Rev. 77.
[9] Ibid.

law, is consistent with the ethos of Anglo-American jurisprudence".[10] Those commentators who argue that we should adopt a more expansive duty to rescue statute should heed Tomlinson's advice "that a narrow duty to report may be more palatable as a first step in reforming the common law than a broader duty to rescue".[11]

Our proposed model Good Samaritan law is minimally intrusive and a minor infringement on autonomy.[12] The minimal infringement to liberty and autonomy is offset compared to the benefits that would result from its enactment. Our model Good Samaritan law "is drafted with an eye toward striking a fair compromise between, on the one hand, the legitimate bases for imposing a duty to rescue, and on the other, the equally legitimate reasons for preserving a substantial sphere of individual autonomy".[13] The fear of legal sanctions in our statute would hopefully act as encouragement to hesitant bystanders and motivate them to act in fulfilment of their moral duties.

In the infamous Kitty Genovese murder, the police arrived only two minutes after they were summoned. Had one of the onlookers called the police at the beginning, the tragedy most likely would have been averted. Even if due to the slight delay in summoning the authorities the harm cannot be prevented, the "the duty-to-notify statute would have a preventative impact insofar as it increases the likelihood that an attacker will be caught and prevented from committing future crimes".[14]

Further research would benefit from carrying out an empirical analysis on countries which have a duty to rescue. David A Hyman carried out an ambitious project to

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[10] Damien Schiff, 'Samaritans: Good, Bad and Ugly: A Comparative Law Analysis' (2005-2006) 11 Roger Williams U. L. Rev. 79.
[11] Edward A. Tomlinson, 'The French Experience With Duty to Rescue: A Dubious Case for Criminal Enforcement' (2000) 20 N.Y.L. Sch. J. Int'l & Comp. L. 453.
[12] Sungeeta Jain, 'How Many People Does it Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State' (1999) 74 Wash. L. Rev. 1181.
[13] Schiff (n 10) 80.
[14] Mark K. Osbeck, 'Bad Samaratinism and the Duty to Render Aid: A Proposal' (1985) 19 U. Mich. J.L. Reform 315.

investigate empirically how often Americans fail to rescue one another.[15] This law in action approach is to be commended, and further similar research would be useful in other jurisdictions. An empirical analysis in England and Wales might try to assess how many individuals die after bystanders fail to summon aid. However, as already mentioned, even if it were shown that cases of aid being failed to be summoned are rare (as was found in Hyman's US analysis) this should not in itself deter policy makers from drafting and implementing a Good Samaritan law.

The thesis focused solely on whether there should be criminal liability for a failure to rescue. We found that a criminally enforceable duty should exist and devised a model Good Samaritan law. What about civil liability for failing to summon aid? Alongside criminal duties to rescue, does a duty exist in tort law? We stayed away from exploring this question as deducing criminal liability was the priority as the public nature of the wrong made it fall within the ambit of the criminal law. An extensive investigation into tort law, summarising what the law is and whether there should be civil liability for failure to rescue would be valuable. It also raises an interesting question about the relationship between crime and tort. If it were found that, in addition to the criminal duty, there should be a civil law counterpart, an investigation into how the law should be drafted could take place with an exploration into the amount of damages that should be awarded.

Our proposed duty to rescue statute is a "minimally burdensome tool for combating the needless injury and loss of life that result from Bad Samaritanism".[16] It would be easy to discharge the duty, requiring very little from people who happen to find themselves in a position to save a stranger in peril. The proposed duty raises no insurmountable practical problems. It respects individual autonomy whilst simultaneously helping to saving lives.

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[15] David A. Hyman, 'Rescue without law: An Empirical perspective on the duty to rescue' (2005) 84 Texas Law Review 653.
[16] See (n 14) 313.

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