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A Causation Approach To Criminal Omissions

Arthur Leavens†

This Article examines the scope of criminal laws that impose liability for failures to prevent a proscribed harm. Traditionally, courts have only imposed criminal sanctions upon individuals for their failure to act where the individual has a "legal duty" to prevent a specific harm. Professor Leavens rejects this conventional approach as being an artificial and ultimately unfair way to set the limits of omission liability. He asserts that in order for the courts validly to utilize any concept—including "legal duty"—to define the scope of omission liability, that concept must fairly reflect the underlying criminal prohibition; namely, that one may not cause particular harms. He argues that, at least in conventional omission analysis, "legal duty" is no more than an imperfect proxy for the law's requirement that there be an appropriate causal relationship between the omission and the harm before liability is imposed. Professor Leavens concludes by suggesting an alternative approach to imposing liability for omissions. He recommends eliminating the distinction between acts and omissions, claiming that it unnecessarily limits the courts' ability fully to evaluate the chain of causality between an actor's conduct and the prohibited harm. Instead, he suggests that courts consider the full course of the actor's conduct in light of the commonsense purposes of the criminal prohibition against causing certain harms. This approach, the Author states, will ensure that individuals have fair warning of the conduct expected of them and will avoid inconsistent applications of criminal liability.

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INTRODUCTION

Among criminal law's most fundamental prohibitions are those proscribing the infliction of a particular harm.¹ Unlike laws that forbid particular conduct without regard to actual consequences, laws defining result-oriented crimes such as homicide prohibit the causation of certain harms without specifying the conduct by which those harms are accomplished.² Because liability for producing certain results does not depend on how the results were brought about, the law has always imposed criminal liability not only for acts that cause harm but also for failures to prevent harm.³ Despite this longstanding acceptance, however, the limits of criminal liability for omissions have never been well defined.

The conventional approach to criminal omissions defines the limits of such liability through the concept of duty. The theory is appealingly simple: if a person has a duty to prevent a harm and fails to do so, he shall be punished the same as one who affirmatively acts to cause that harm. It is not so simple, however, to determine which "omitters" have a duty to act and thus properly are subject to liability for a particular harm. The doctrinal answer is that criminal law punishes only those omitters who, at the time of their omission, were under a "legal duty" to act.⁴ This approach to defining omission liability is unsatisfactory, for it

1. These prohibitions, sometimes called "crimes of cause-and-result," W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 278 (2d ed. 1986), include a broad range of crimes, such as assault and battery and malicious destruction of property. The most extended and important example of "cause-and-result" liability is the prohibition against criminal homicide, the most basic normative command of our culture. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 341-42 (1978) (observing that "causing death is perceived as a unique desecration"); see also 4 W. BLACKSTONE, *COMMENTARIES* *177 ("Of crimes injurious to the *persons* of private subjects, the most principal and important is the offense of taking away that life which is the immediate gift of the great Creator . . .") (emphasis in original); *Exodus* 20:1, 13 ("And the Lord Spoke all these words: . . . Thou shalt not kill.").

2. An example of a conduct prohibition is burglary, which forbids unauthorized entry into a building with the intent to commit a crime. See, e.g., MODEL PENAL CODE § 221.1 (Official Draft 1980). One commits burglary at the moment an act of entry under these circumstances occurs; liability attaches whether or not the intended crime is actually committed in the building. *Id.* & comment at 61. On the other hand, liability for causing a result depends on the occurrence of the harmful consequence, however accomplished. Thus the various forms of criminal homicide require as a predicate for liability that death actually occur, but they do not specify any particular homicidal acts. See, e.g., *id.* § 210.1(1) ("A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.").

3. Since its earliest stages, Anglo-American criminal law has recognized some form of liability for omissions to prevent harms, principally death. See, e.g., 4 W. BLACKSTONE, *supra* note 1, at *197; 1 E. EAST, *A TREATISE OF THE PLEAS OF THE CROWN* 264-65 (1803); 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 430-31 (1778); 3 J.F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 9-11 (1883).

4. E.g., MODEL PENAL CODE § 2.01(3)(b) (Official Draft 1980) ("Liability for the commission of an offense may not be based on an omission unaccompanied by action unless . . . a duty to perform the omitted act is otherwise imposed by law."). See also G. FLETCHER, *supra* note 1, §§ 8.1-4; J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 190-205, 208-11 (2d ed. 1960); W. LAFAVE & A. SCOTT, *supra* note 1, at 202-12. For additional background and discussion of criminal omissions see G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 3-8 (2d ed. 1961);

is not at all clear what the term "legal duty" means or why it is an apt criterion of criminal liability. Thus lacking a sound conceptual framework for deciding which omissions are criminal, courts have imposed liability for omissions in a divergent, and at times incoherent, manner.

Two fairly recent cases illustrate the definitional confusion in omissions analysis. In *Barber v. Superior Court*,⁵ the California Court of Appeals held that doctors have no legal duty to provide food or drink to certain patients placed in their care. There, the state had brought homicide charges against an internist and a surgeon who had discontinued a comatose patient's intravenous nourishment, allowing him to die. Dismissing the charges before trial, the court held that the doctors were not under a legal duty to continue providing the patient with life sustaining fluids where, in the judgment of both the doctors and the family, there was no reasonable chance that further treatment would provide the patient with benefits that outweighed the treatment's burdens.⁶ Since the doctors had no legal duty to continue treatment, the court concluded that they could stop providing the intravenous fluids without criminal liability, even though death was certain to result.⁷

Fletcher, *Criminal Omissions: Some Perspectives*, 24 AM. J. COMP. L. 703 (1976); Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367 (1965); Glazebrook, *Criminal Omissions: The Duty Requirement in Offenses Against the Person*, 76 LAW Q. REV. 386 (1960); Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Kleinig, *Criminal Liability for Failures to Act*, LAW & CONTEMP. PROBS., Summer 1986, at 161; Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980); Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101 (1984); Smith, *Liability for Omissions in the Criminal Law*, 4 LEGAL STUD. 88 (1984); Wozzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983).

5. 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).

6. *Id.* at 1019, 1021-22, 195 Cal. Rptr. at 491, 493.

To appreciate the court's reasoning, a brief review of the facts is helpful. After routine surgery, the patient unexpectedly suffered a massive heart attack, leaving him comatose with severe brain damage. He was immediately put on life support equipment, but after three days the defendant doctors and their colleagues concluded that his condition was "likely" permanent. When this prognosis was communicated to the family, they requested in writing that the life support equipment be removed. The doctors acceded, but the patient continued to breathe, showing minimal brain activity. Two days later, after consulting further with the family, the doctors ordered removal of the nutrition and hydration tubes, and the patient died.

Examining the question of the doctors' legal duty, the court concluded first that standard medical treatment in this context includes intravenous feeding and hydration, and that removal of the tubes constituted an omission rather than an affirmative act. *Id.* at 1016, 195 Cal. Rptr. at 490. The court then held that whatever duty there may be to begin treatment, there is no duty to continue treatment once "it has become futile in the opinion of qualified medical personnel." *Id.* 1018, 195 Cal. Rptr. at 491. The court, however, explicitly declined to set precise guidelines concerning the difficult questions of when or how this medical determination of futility should be made. *Id.* In the absence of legislative guidance, the court left it to the family (as surrogate for the patient) and the doctors to decide, on the facts of each case, when further treatment would be futile—when it would have no "reasonable chance of providing benefits to the patient, which benefits outweigh the burdens attendant to the treatment." *Id.* at 1019, 195 Cal. Rptr. at 491.

7. *Id.* at 1022, 195 Cal. Rptr. at 493.

Whatever sense the *Barber* decision makes as a matter of medical practice or even public policy, it is difficult to reconcile with California's homicide laws. The doctors intentionally starved their patient to death. Such conduct, unless it is somehow legally justified, falls squarely within the murder prohibition against intentional killing.⁸ The only viable theory of justification on these facts would be some variety of euthanasia, but California law does not recognize any form of legal euthanasia.⁹ Nevertheless, the *Barber* court declined to hold the doctors criminally liable for their omission, resulting in a troublingly narrow definition of omission liability.

In contrast, a Maryland trial court in *Pope v. State*¹⁰ adopted a broad view of "legal duty" which resulted in an expansive imposition of criminal liability for omissions. In this case, a woman was prosecuted as a principal for homicide after she stood by in her home and did nothing to stop an infant's deranged mother from beating her child to death. Though the trial court ultimately acquitted the woman of the homicide charges, it refused to dismiss or direct a verdict on those counts, concluding that the defendant was under a legal duty to intercede. Her failure to do so, if proven to have been accompanied by the necessary intent, could thus have been the basis for homicide liability.¹¹

The trial court's holding seems well beyond what society generally would expect as an enforceable standard of conduct in such circumstances. While Mrs. Pope's conduct raises serious ethical and moral

8. See CAL. PENAL CODE § 187 (West Supp. 1988) ("[m]urder is the unlawful killing of a human being . . . with malice aforethought"); see also *infra* notes 135-37 and accompanying text.

9. *Barber*, 147 Cal. App. 3d at 1012, 195 Cal. Rptr. at 487.

10. 284 Md. 309, 396 A.2d 1054 (1979).

11. The defendant was originally indicted for first degree murder, second degree murder, manslaughter, felonious child abuse, and accessory-after-the-fact murder, as well as other charges not here relevant. All were based on the defendant's failure to stop the child's mother from beating the child to death. *Id.* at 312 n.1, 396 A.2d at 1057 n.1. Prior to trial, the prosecution nol prossed the first degree murder count, and the court granted defendant's motion to dismiss the accessory-after-the-fact murder count, but presumably declined to dismiss the remaining charges. Defendant waived her right to a jury trial and was tried by the court.

The court acquitted her of second degree murder and manslaughter but convicted her of child abuse. *Id.* at 312 n.2, 396 A.2d at 1057 n.2. It appears that the court's acquittal of defendant on the homicide charges was not based on the absence of a legal duty to act because, in convicting her under the child abuse statute, the court found that the defendant had an affirmative duty to act to prevent harm to the child. Under Maryland law, a person who is obligated by that statute to protect a child and who fails to prevent the child's death is guilty of homicide if he or she has the requisite intent. See *Palmer v. State*, 223 Md. 341, 351-52, 164 A.2d 467, 483 (1960). The court therefore must have acquitted defendant on the homicide counts due to lack of intent, not lack of "legal duty."

On appeal, the Maryland Court of Special Appeals reversed the child abuse conviction, holding that the evidence was insufficient to support the trial court's findings either (1) that the defendant had a duty to act under the child abuse statute; or (2) that she was an accomplice to the mother's abuse of the child. 284 Md. at 327, 396 A.2d at 1065-66. The Maryland Court of Appeals granted further review, affirming the reversal of the child abuse conviction on the same rationale. *Id.* at 331-33, 396 A.2d at 1067-68.

questions, it is difficult to think of her failure to act as homicidal. Indeed, had she been convicted, she may have had a strong claim that she had been denied fair warning that her conduct constituted criminal homicide.

The disparity between the *Barber* and *Pope* holdings demonstrates the need for coherent and predictable limits to criminal omission liability. In one instance, a court has held that no legal duty attaches to one who assumes a position of professional care and then deliberately deviates from the established course in rendering that care, while a different court has imposed a duty to act on one with no formal relation to the victim and no established practice of providing assistance. The purpose of this Article, then, is to explore the conceptual basis for punishing omissions in order to discover reasoned limits for its application. This Article first examines the conventional doctrine of criminal omissions and its dependence on the concept of "legal duty." It suggests that the conventional "legal duty" requirement was developed principally to set clear limits on imposing omission liability. This approach, however, is conceptually flawed, for it achieves certainty without regard to the function of the underlying criminal prohibition, which is to punish, and thereby hopefully to prevent, conduct which produces particular harms. It follows that criminal liability can only attach to omissions that have "caused" one of those harms. The proper function of the duty requirement therefore is not simply to limit liability; rather, its main purpose should be to define the causal relationship between failures to act and specific harms. A duty that gives rise to criminal omissions liability should exist only when the societal expectation of preventive action is so strong that an omission can be said to have "caused" the proscribed harm. Under this approach, the content of the otherwise amorphous "legal duty" concept becomes a function of the common-sense meaning of causation, a notion which, if not absolutely precise, is at least conceptually consistent and in broad contour widely understood. Once the relationship between duty and causation is made explicit, individuals may modify their behavior accordingly or at least have fair warning when they will be punished for failing to act.

This Article concludes by proposing an alternative to conventional criminal omissions analysis. Reliance on duty as a causal link between an omission and a harm is only necessary if we continue to distinguish between "acts" and "omissions." This Article suggests that such a distinction is illusory and unhelpful. The act/omission dichotomy is a product of our inclination to think of causation solely in terms of physical cause and effect. In assessing causal responsibility, we tend to look only at the conduct that immediately and directly precedes a harm—the conduct that has "physical impact." Causal concepts, however, need not be based solely on physical proximity, and thus there is no reason to

focus exclusively on the actions or inactions that immediately precede a harm. If we confine our attention only to conduct that temporally and physically precedes the harm, some conduct will appear omissive. This characterization, in turn, requires that we apply concepts of legal duty in order coherently to address the causation inquiry. If, however, we examine the whole of a particular actor's course of conduct vis-a-vis a harm that she is said to have caused, we can assess whether the criminal prohibition that proscribes that harm fairly applies to her course of conduct. We thus can avoid the often difficult and arbitrary tasks of determining whether conduct is an "act" or an "omission" and, in the latter case, whether there is a "legal duty" to act.

I

THE CONVENTIONAL APPROACH

A. *The Duty Requirement*

Early authorities recognized the difficulties of setting precise limits on criminal liability for failures to act.¹² More than 100 years ago, Sir James Fitzjames Stephen summarized the dilemma in his *History of the Criminal Law of England*: "Whether a person, who being able to save the life of another without inconvenience or risk refuses to do so, even in order that [the victim] may die, can be said to have killed him is a ques-

12. See, e.g., T. MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS 157-58 (1837); 3 J.F. STEPHEN, *supra* note 3, at 10. The problems of ill-defined limits do not arise in all cases of criminal omissions. Legislatures may impose a duty to act, and the liability that results from failing to act, assuming sufficient notice, presents no special problems of limits or fair warning. For example, taxpayers may be required to file income tax returns on pain of criminal penalties. 26 U.S.C.A. § 6011 (West Supp. 1987). Similarly, building owners may be required by statute to protect others by maintaining fire prevention and extinguishing equipment in public buildings or dwellings. See, e.g., CAL. HEALTH & SAFETY CODE §§ 13113.7-.8 (West 1984 & Supp. 1988). People may even be required to take affirmative steps to save the life of someone in peril. For example, a Vermont statute provides:

(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 others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

.....
 (c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

VT. STAT. ANN. tit. 12, § 519 (1973).

Violations of such specific statutory duties, sometimes called "direct" or "pure" omissions, see, e.g., J. HALL, *supra* note 4, at 198-99, lead to criminal liability whenever one fails to comply with the statutory duty to act, whether or not any harm results. See also W. LAFAYE & A. SCOTT, *supra* note 1, at 202. Direct criminal omissions are not the subject of this Article.

Statutory duties to act can also provide the basis for criminal liability for failure to prevent a particular harm. For example, a violation of a statute prohibiting child neglect might give rise to homicide liability if the child dies. See, e.g., *Palmer* 223 Md. at 351-52, 164 A.2d at 483. Such duties may be more definite than their common law counterparts, but neither their statutory origin nor the precision with which they may be defined answers the question of whether any particular statutory duty to act is properly the basis for criminal liability for failing to prevent a harm.

tion of words, and also a question of degree."¹³ Authorities agreed from the outset that there were certain core omissions that were properly regarded as criminal, perhaps the paradigm being a parent's failure to rescue his or her child.¹⁴ They also agreed that the law neither could nor should punish all such omissions.¹⁵ The problem, of course, was where to draw the line. Stephen framed the issue so:

A man who caused another to be drowned by refusing to hold out his hand to save him probably would in common language be said to have killed him, and many similar cases might be put, but the limit of responsibility is soon reached. It would hardly be said that a rich man who allowed a poor man to die rather than give, say £5, which the rich man would not miss, in order to save his life, had killed him, and though it might be cowardly not to run some degree of risk for the purpose of saving the life of another, the omission to do it could hardly be described as homicide. A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child.¹⁶

As noted, the doctrinal solution to this problem of scope was to pun-

13. 3 J.F. STEPHEN, *supra* note 3, at 10.

14. See, e.g., *Regina v. Downes* [1875], 1 Q.B.D. 25, 29-30; J. HALL, *supra* note 4, at 208-09. Professor Graham Hughes suggests that the concept of criminal liability for a failure to perform a legal duty came from nineteenth century England, which imposed manslaughter liability on neglectful parents whose children died, while at the same time confining the duty to render aid so that it could not be applied generally. Hughes, *supra* note 4, at 620-21.

15. Some have argued for imposing a general duty to save another's life if the rescue involves no risk. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 422-23 & n.1 (W. Harrison ed. 1948) (1st ed. 1789); 4 E. LIVINGSTON, *A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA* bk IV, tit. II, ch. 3, § 4, arts. 6-7 (Washington 1828) (categorizing as criminal homicide the failure to prevent another's death if it was possible to do so without danger of personal injury or pecuniary loss).

Most authorities, however, have followed the approach articulated by Lord Thomas Macaulay, President of Great Britain's Indian Law Commission, in the Commission's commentary on the proposed Penal Code for India that the Commission published in 1837. In addressing the problem of punishing omissions to act, he said:

Two things we take to be evident; first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omissions ought not to be punished. . . . It is difficult to say whether a penal code which should put no omissions on the same footing with acts, or a penal code which should put all omissions on the same footing with acts would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

It is plain, therefore, that a middle course must be taken. But it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include.

T. MACAULAY, *supra* note 12, at 158.

16. 3 J.F. STEPHEN, *supra* note 3, at 10.

ish the omission only if the actor was under a "legal duty" to act.¹⁷ But while Stephen pronounced this formulation "a perfectly distinct line" for identifying those omissions that constitute criminal homicide,¹⁸ the requirement that a duty be legal solves little by itself. "Legal duty" in this context cannot mean a duty enforceable by the criminal law, for such a requirement would be tautological.¹⁹ Assuming, then, that "legal" refers to some other body of substantive law, the obvious question, which has received surprisingly little attention,²⁰ is: what other law?

17. For example, Article 294 of the Indian Penal Code proposed by Macaulay's Commission provided:

Whoever does any act or omits what he is legally bound to do, with the intention of thereby causing, or with the knowledge that he is likely thereby to cause the death of any person, and does by such act or omission cause the death of any person, is said to commit the offence of "voluntary culpable homicide."

T. MACAULAY, *supra* note 12, at 67.

In the accompanying commentary, Macaulay was almost apologetic in suggesting "legal duty" as the criterion for whether omissions should carry homicide liability:

But it is with great diffidence that we bring forward our own proposition. It is open to objections: cases may be put in which it will operate too severely, and cases in which it will operate too leniently: but we are unable to devise a better.

What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect, shall be punishable in the same manner; provided that such omissions were, on other grounds, illegal. An omission is illegal . . . if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

. . . .
 We are sensible that in some of the cases which we have put our rule may appear too lenient. But we do not think that it can be made more severe, without disturbing the whole order of society.

Id. at 159. In the end, he defended his "legal duty" proposal more for the certainty it provided than for the appropriateness of punishing particular persons:

It is evident that to attempt to punish men by law for not rendering to others all the service to which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation. Now, no circumstance appears to us so well fitted to be the mark as the circumstance which we have selected. It will generally be found in the most atrocious cases of omission: it will scarcely ever be found in a venial case of omission: and it is more clear and certain than any other mark that has occurred to us. That there are objections to the line which we propose to draw, we have admitted. But there are objections to every line which can be drawn, and some line must be drawn.

Id. at 160. See also J. HALL, *supra* note 4, at 190-93; Frankel, *supra* note 4, at 376-84; Hughes, *supra* note 4, at 620-27.

The Model Penal Code adopts this same legal duty formula in its omissions provision, albeit somewhat more generally. MODEL PENAL CODE § 2.01(3) (Official Draft 1980).

18. 3 J.F. STEPHEN, *supra* note 3, at 10.

19. See J. HALL, *supra* note 4, at 193; Frankel, *supra* note 4, at 369; Hughes, *supra* note 4, at 620.

20. The commentary to the Model Penal Code typifies the off-handed treatment usually given the duty requirement.

3. *Omissions.* Subsection (3) states the conventional position with respect to omissions unaccompanied by action as a basis of liability. Unless the omission is expressly made sufficient by the law defining the offense, a duty to perform the omitted act must have been

One answer would be to look to the civil law as a solution; Stephen, along with his influential contemporary Lord Thomas B. Macaulay, proposed that a "legal duty" is any civilly enforceable obligation.²¹ Unfortunately, the civil law definitions of various duties, taken principally from tort and contract, are of little help in the criminal context. Even assuming general agreement on what duties should be civilly enforceable, criminal law makes no pretense of enforcing all such duties.²²

The courts' reluctance to enforce criminally all civil duties is appropriate. Given that contract and tort law is primarily compensatory, it would be absurd to suggest that every breach of a civilly imposed duty should also be criminally punished if that breach has led to a criminally proscribed harm.²³ Suppose, for example, that a paving contractor is late delivering the asphalt necessary to repair a road that provides the principal means of access to a hospital. Few would suggest that the contractor is guilty of manslaughter if an ambulance is thereby delayed, resulting in the death of a heart attack victim.²⁴ Similarly, if a police officer stops a drunk driver but permits him to go on his way, neither the officer—nor the town that employs her—is guilty of homicide if the driver later kills himself in a collision, even if the officer was negligent in failing to detain

otherwise imposed by law for the omission to have the same standing as a voluntary act for purposes of liability. [Footnote: The "duty imposed by law" may be a statutory duty, a contractual duty, or a duty arising from tort law.] It should, of course, suffice, as the courts now hold, that the duty arise under some branch of the civil law. If it does, this minimal requirement is satisfied.

It is arguable that focus on civil duty should not be the crucial criterion for whether an omission can be the basis of criminal liability, but that standard is the one that best deals with most situations in which criminal liability would clearly be appropriate and also gives adequate warning of what omissions may be the basis of such liability. [Footnote: It is possible that developments in the law of torts could render this standard much more open-ended than it presently is.] It is also arguable that affirmative duties to act should be enlarged in scope, especially when action is required to prevent bodily injury. This is a problem to be faced, however, in the definition of particular offenses, not in this section of the Code.

MODEL PENAL CODE § 2.01(3) comment 3 (Official Draft & Revised Comments 1985) (footnotes in original) (some footnotes omitted).

21. T. MACAULAY, *supra* note 12, at 159; 3 J.F. STEPHEN, *supra* note 3, at 10.

22. See, e.g., J. HALL, *supra* note 4, at 193; Hughes, *supra* note 4, at 620; cf. G. WILLIAMS, *supra* note 4, at 7 (arguing that criminal law should not be used to enforce civil duties).

23. See G. FLETCHER, *supra* note 1, at 616. H.L.A. Hart, in discussing the difference between criminal and civil law, suggests that while the criminal law has basically a command function, establishing generalized rules of conduct that are either obeyed or not, other legal rules do not have this command feature as their primary characteristic. Their function is to facilitate the realization of mostly private choices and goals by providing a mechanism through which individuals can structure rights and duties. H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 60-61 (1983).

24. See, e.g., *Regina v. Pocock*, 117 Eng. Rep. 1194, 1196 (1851) (local trustees appointed to repair roads held not indictable for manslaughter even though their neglect of this duty resulted in an injury due to the poor condition of one such road); see also Williams, *Causation in Homicide*, 1957 CRIM. L. REV. 429, 434-35 (commenting on *Pocock*). But see Frankel, *supra* note 4, at 384-390 (arguing that legal duties constitute objective societal expectations and thus are an appropriate basis for both legal and moral culpability).

him.²⁵

Stephen suggested that liability be limited to the neglect of those civilly enforceable duties aimed at preserving life.²⁶ While this approach may narrow the problem somewhat, it does not eliminate it. First, it is by no means clear what constitutes a "life-preserving" duty or when it attaches.²⁷ The police officer in the above hypothetical surely is under some general duty to preserve life, but we still feel uncomfortable about imposing homicide liability for her failure to detain the drunk. Moreover, to limit our attention to life-saving duties that are independently enforceable under civil law arbitrarily limits the scope of criminal omissions; there may be appropriate duties to preserve life that are not civilly enforceable.²⁸

25. As Glanville Williams suggests, imposing criminal liability (in most cases, homicide) on public servants for failure to execute properly their public duties seems too severe a penalty. *See* Williams, *supra* note 24, at 435; *see also* Frankel, *supra* note 4, at 399 & n.104 (concluding that, although not an easy case, a police officer should not suffer a manslaughter conviction when neglect of his or her duty leads to a death, because such punishment would be "inexpedient").

Of course, to the extent public servants act outside the proper scope of their duties and cause harm such as death, they may be subject to criminal prosecution. *See, e.g.*, MODEL PENAL CODE § 3.07 & comment 3(c) (Official Draft and Revised Comments 1985) (limiting a public officer's authority to use deadly force). In appropriate cases, public officials and the governmental bodies that employ them may also suffer civil liability for harms caused by their neglect of duty. *See, e.g.*, *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984) (holding that a town may be liable for wrongful death damages as a result of police officer's failure to detain a drunk driver who subsequently struck and killed a man and his child).

26. *See* 3 J.F. STEPHEN, *supra* note 3, at 10 ("Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the preservation of life.").

27. Stephen presents his complete list of such duties:

A duty in certain cases to provide the necessaries of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life.

Id. As a tool for predicting what duties give rise to criminal liability, however, Stephen's list helps little. For example, it is not clear how one decides prospectively which contractual duties are "dangerous to life" if unperformed. Would the contract to repave a road fall into that category, given that every road is part of the shortest route to the nearest hospital for some people?

28. Indeed, Stephen's list of life-preserving duties, *see supra* note 27, seems to include examples of life-preserving duties that are not civilly enforceable. Last on Stephen's list is a "duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life." *Id.* If a person gratuitously undertook to provide food so that another could avoid starvation, but then withdrew or terminated that offer of assistance before completion, that offer likely would not be civilly enforceable (assuming no alternative source of the food and thus no detrimental reliance). Nevertheless, this gratuitous undertaking fits within Stephen's list of circumstances that give rise to life-preserving duties.

This example is by no means far-fetched. In *Regina v. Instan* [1893] 1 Q.B. 450, 1891-94 All E.R. 1213, the court held that, despite the lack of evidence implying a contract for care, a niece living with her elderly aunt was properly convicted of manslaughter for failing to feed or seek treatment when the aunt fell ill and subsequently died. For a further discussion of *Instan*, *see infra* notes 45-50 and accompanying text.

In the end, any effort to squeeze civil duties, life-saving or otherwise, into a mold categorically suitable for defining criminal omission liability must fail, because there is no conceptual link between such duties and the underlying criminal prohibition against causing harm. On the other hand, it is easy to appreciate the temptation to look to the civil law as a way to limit criminal omission liability, because such a "legal duty" requirement seems, at least on the surface, both easy to understand and far superior to having no limiting principle at all. But, as pointed out above, relying on external sources of law to determine which omissions are criminal not only is conceptually unsatisfactory, but also leads to decisional confusion and unfairness.

B. Conventional Sources of Legal Duties

The courts have avoided, to some extent, the problems that result from ambiguity in the meaning of "legal duty" by applying that concept conservatively in the criminal context.²⁹ Five or six categories have emerged from the decisions. These duties already have been extensively cataloged in the literature,³⁰ but for our purposes they bear summarizing:

(1) *Duty based on relationship.* Relationships in which one party depends on the other to provide care often give rise to a criminally enforceable duty to provide such care. Examples of duties arising from a person's status include a parent's duty to provide minor children with necessities³¹ and protection,³² a duty to care for one's spouse,³³ and a ship captain's duty to aid his or her crew.³⁴

(2) *Duty arising from contract.* An express contract to provide services creates an obligation to perform those services properly. Where those services are closely related to protecting or caring for dependent

29. As one commentator put it, "[t]he duty to act is obvious when the law adopts only moral convictions the acceptance of which has never been denied within the community, as, for instance, in the duties arising from the relation between parents and children." Kirchheimer, *supra* note 4, at 621.

30. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 1, at 203-07; Kirchheimer, *supra* note 4, at 621-36; Robinson, *supra* note 4, at 112-18.

31. E.g., Commonwealth v. Michaud, 389 Mass. 491, 496, 451 N.E.2d 396, 399 (1983) (duty to provide food); People v. Lynch, 47 Mich. App. 8, 16-17 & n.7, 208 N.W.2d 656, 660 & n.7 (1973) (same); Commonwealth v. Barnhart, 345 Pa. Super. 10, 18-19, 497 A.2d 616, 620-21 (1985) (duty to obtain medical aid); State v. Barnes, 141 Tenn. 469, 471-72, 212 S.W. 100, 100-101 (1919) (same); State v. Williams, 4 Wash. App. 908, 912, 484 P.2d 1167, 1170-71 (1971) (same).

32. E.g., State v. Palmer, 223 Md. 341, 343, 351-52, 164 A.2d 467, 468, 473 (1960) (mother's duty to protect child from abusive boyfriend); Commonwealth v. Howard, 265 Pa. Super. 535, 538, 402 A.2d 674, 676 (1979) (same); Rex v. Russell 1933 Vict. L.R. 59 (father's duty to protect children from mother, who was drowning them).

33. E.g., State v. Mally, 139 Mont. 599, 605-06, 366 P.2d 868, 871-72 (1961) (husband's duty to provide medical attention for helpless wife); Commonwealth v. Konz, 498 Pa. 639, 644-46, 450 A.2d 638, 641-42 (1982) (wife's duty to provide medical assistance for husband recognized but held not to extend to circumstances in which husband expressly declines such assistance).

34. E.g., United States v. Knowles, 26 F. Cas. 800, 802 (N.D. Cal. 1864) (No. 15,540).

persons, courts have imposed criminal liability when a failure to provide the services leads to a prohibited harm such as death.³⁵ Further, at least one court has found, in the absence of an express agreement, an implied contract to provide necessities or essential care to a dependent person that give rise to a legal duty to provide such care.³⁶

(3) *Duty of landowner and duty to control others.* These two duties are based on related tort principles. Although the cases are few, violation of the landowner's duty to keep safe premises or the master's duty to ensure that his or her servants do not injure others can, in appropriate circumstances, lead to criminal liability.³⁷

(4) *Duty arising from creation of peril.* If a person acts culpably to imperil another, he or she has a legal duty to rescue the victim.³⁸ The cases are split on whether a duty to rescue arises if someone innocently or accidentally imperils another.³⁹

35. *E.g.*, *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (longterm baby-sitter under duty to feed infant); *State v. Brown*, 129 Ariz. 347, 350, 631 P.2d 129, 131-32 (Ct. App. 1981) (operator of boarding home under duty to feed and care for elderly patient); *People v. Montecino*, 66 Cal. App. 2d 85, 100-01, 152 P.2d 5, 13 (1944) (private home-care nurse under duty to provide or obtain necessary medical care for elderly patient). Although most contract cases involve a duty owed to a contracting party, the legal duties enforceable at criminal law may in some circumstances extend to third parties. *See, e.g.*, *State v. O'Brien*, 32 N.J.L. 169, 172 (1867) (railroad switchman's obligation as an employee to do his job properly extended to the public).

36. *See Davis v. Commonwealth*, 230 Va. 201, 335 S.E.2d 375 (1985). In *Davis*, an adult woman lived with her totally disabled elderly mother. The mother had given written authorization for her daughter to obtain and use food stamps on her behalf and to receive, as her representative, her social security benefits, which were used to pay both the mother's and the daughter's household expenses. The daughter also had informed a number of persons that it was her responsibility to provide total care for her mother. *Id.* at 203-04, 335 S.E.2d at 377. When the mother died of exposure and starvation, the daughter was prosecuted and convicted of homicide for failing to provide such care. The trial court found an implied contract between the daughter and her mother sufficient to convict the daughter of involuntary manslaughter. *Id.* at 205, 335 S.E.2d at 378.

37. *E.g.*, *Brown*, 129 Ariz. at 350, 631 P.2d at 132 (owner of boarding home under criminally enforceable legal duty both to ensure that the premises are being safely operated and to see that employees are able to, and actually do, provide necessary care); *Commonwealth v. Welansky*, 316 Mass. 383, 397, 55 N.E.2d 902, 909 (1944) (nightclub operator under criminally enforceable obligation to provide safe premises for patrons). For a detailed discussion of *Welansky*, see *infra* notes 139-43 and accompanying text. *Cf.* *State v. Reitze*, 86 N.J.L. 407, 409, 92 A. 576, 577 (1914) (recognizing a possible duty of innkeepers to ensure that guests are not injured on hotel premises, but holding that even if such a duty exists, defendant was not criminally liable for failure to escort a drunken patron to his wagon where he fell and broke his neck).

38. *E.g.*, *Flippo v. State*, 258 Ark. 233, 238, 523 S.W.2d 390, 393 (1975) (man who negligently shot another in hunting accident under a duty to seek medical aid for victim); *Jones v. State*, 220 Ind. 384, 387, 43 N.E.2d 1017, 1018 (1942) (defendant under duty to save a girl who had fallen into a stream while running from defendant after he had forcibly raped her); *see Reitze*, 86 N.J.L. at 409-10, 92 A. at 577-78 (holding that while an innkeeper was statutorily prohibited from serving further alcohol to an intoxicated patron, he could not be held criminally liable for a death for failure to discharge this "duty" properly).

39. *Compare Commonwealth v. Cali*, 247 Mass. 20, 24-25, 141 N.E. 510, 511 (1923) (defendant under duty to try to extinguish a fire that he accidentally set to his house and thus was guilty of arson when he did not) *with King v. Commonwealth*, 285 Ky. 654, 659, 148 S.W.2d 1044,

(5) *Duty arising from voluntary assumption of care.* This category of legal duty is often the trickiest, because some of the "duties" that have been so categorized are not clearly "legal," and thus it requires a more extended discussion. Under ordinary tort principles, a passerby who offers assistance to an accident victim must proceed with due caution and care in rendering that aid.⁴⁰ A volunteer's culpable failure to act, once she has begun to help, violates that "legal duty" of care. If it leads to a criminal harm, she could be charged with a criminal omission.⁴¹ More problematic are the cases in which the volunteer apparently does nothing at all to fulfill an assumption of care. For example, if a rich man volunteers to feed a starving beggar but changes his mind before giving any aid, does he become criminally responsible if the beggar subsequently dies of starvation? Under the conventional approach, he would not. The tort principles used above would not apply, since the "volunteer" had not actually provided any assistance. Further, contract law would not bind the volunteer, since even if there were some sort of offer and acceptance, the agreement, being wholly executory, would not be enforceable unless supported by consideration or detrimental reliance.⁴²

Most courts, implicitly following the notion of detrimental reliance, have limited this form of legal duty to situations in which, after voluntarily assuming care, the volunteer acts in a way that deters others from rendering aid.⁴³ In the above example, if the rich man's offer caused another willing rescuer to desist, he would be under a legal duty to fulfill his gratuitous pledge of aid because the deprivation of other assistance places the victim in a more vulnerable position than before.⁴⁴

1047 (1941) (defendant who, in lawful defense of a third person, shot and wounded an attacker was under no duty to seek medical attention for the wounded assailant).

40. Though a passerby is not required to offer assistance, the volunteer who nevertheless renders aid is liable in tort if he either intentionally or negligently worsens the injured party's situation. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 378-82 (5th ed. 1984).

41. See W. LAFAVE & A. SCOTT, *supra* note 1, at 205-06. Lest this seem too harsh for the good samaritan, recall that criminal homicide requires not only an act or omission, but also the *mens rea* of at least culpable negligence. See, e.g., MODEL PENAL CODE §§ 2.02(2)(d), 210.1 (Official Draft 1980).

42. RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 90 (1981). See *supra* note 36 and accompanying text for discussion of duty arising from implied contract.

43. E.g., *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) ("where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid" there is a "legal duty" to provide the care).

44. E.g., *Filippo v. State*, 258 Ark. 233, 238, 523 S.W.2d 390, 393 (1975) (defendant who assured a shooting victim's father that he would call an ambulance, thus causing the father not to seek help, is under a legal duty to seek help as quickly as possible).

Purely as a matter of contract law, it is not clear that a gratuitous offer of assistance becomes specifically enforceable simply because the victim is made worse off by nonperformance. At least in the case of the starving beggar, there may not have been any act of forbearance by the offeree, even though another rescuer unilaterally turned away once it seemed apparent that there was no longer a need for help. The case may not, therefore, fit exactly into the mold of detrimental reliance under

There remain a few voluntary assumption of care cases involving neither badly rendered care nor a detrimentally secluded victim. In these cases, perhaps the most famous being *Regina v. Instan*,⁴⁵ intuition suggests a duty that has no clear source in external law. In *Instan*, an elderly aunt lived with and provided for her niece. Initially, the aunt was healthy and self-sufficient, but she became ill and eventually immobilized by gangrene in her leg. The jury apparently found that the niece had agreed to care or seek assistance for her aunt.⁴⁶ The niece neither provided nor sought the necessary help, and the aunt subsequently died from complications. The appellate court affirmed the niece's conviction for manslaughter, holding that under the circumstances she had failed to fulfill a legal duty to care for her aunt.⁴⁷

To support its finding of a legal duty, the court did not rely on any explicit external law such as contract.⁴⁸ Rather, the court derived a legal duty out of what it saw as the clear moral obligation of the niece:

A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the

contract law. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Nevertheless, in contributing to the victim's peril by secluding him or her from other possible sources of aid, the person who volunteers to assist seems akin to one who creates peril and thus has a duty to rescue. See *supra* notes 38-39 and accompanying text. In any event, in cases of serious criminal harm, voluntary assumption of care coupled with the seclusion of the victim seems entirely acceptable as a predictable and sensible basis for a duty to act enforceable at criminal law. See G. FLETCHER, *supra* note 1, § 8.3.3; Kirchheimer, *supra* note 4, at 621.

45. [1893] 1 Q.B. 450, 1891-94 All E.R. 1213.

46. The court instructed the jury that if it found, under the circumstances, that the defendant niece had impliedly undertaken either to attend to her aunt or to communicate her aunt's helpless condition to persons outside the house, they could convict. *Id.* at 452, 1891-94 All E.R. at 1213-14. In view of the guilty verdict, the jury presumably found such an undertaking.

47. *Id.* at 454, 1891-94 All E.R. Rep. at 1214.

48. A close reading of the case supports the conclusion that the niece was under no contractual duty, express or implied, to assist her aunt. Although the jury apparently found that the niece had undertaken to care for her aunt, it also appears that this undertaking was impliable only after her aunt lay helpless on her deathbed. *Id.* at 452, 1891-94 All E.R. at 1213-14. In such circumstances, the aunt presumably would have been unable to seek help elsewhere and thus unable to claim detrimental reliance sufficient to serve as a substitute for consideration. Similarly, if the niece's undertaking occurred when the aunt was already bedridden in a place where she could not receive visitors, it is difficult to charge defendant with responsibility for secluding her from other possible aid. See *supra* notes 43-44 and accompanying text.

Furthermore, if, as it appears, the aunt had been providing her niece with room and board as a gift, a deathbed undertaking by the niece to provide some assistance to her benefactor would not have converted that past benefit to valid consideration that would have rendered the undertaking specifically enforceable. See RESTATEMENT (SECOND) OF CONTRACTS § 86 comments a, e (1981). Other commentators similarly have read *Instan* as other than a contract duty case. See G. FLETCHER, *supra* note 1, at 615 (contract, if there was one, is important only as evidence of an undertaking of care by the niece); Robinson, *supra* note 4, at 116 & n.85 (duty based on "relationship of mutual reliance").

food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common law duty imposed upon the prisoner which she did not discharge.

The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has willfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty.⁴⁹

The case thus states a duty to aid a helpless person founded on the moral imperative of the victim's glaring need and the relative ease with which aid could be rendered.⁵⁰ This duty, although yielding what to the court was plainly the correct result, departs from the conventional approach of limiting criminal omission liability to those instances in which the duty is otherwise legally enforceable. While avoiding the rigidity that results from reliance on external law as a source for duty, *Instan's* dependence on "moral obligation" to define omission liability resurrects the definitional uncertainty that the legal duty doctrine was intended to avoid.

49. *Instan*, [1893] 1 Q.B. at 453-54, 1891-94 All E.R. at 1214.

50. Professor Graham Hughes sees this decision as the high-water mark of the law's reflection of progressive social values. See Hughes, *supra* note 4, at 621 & n.112.

In similar cases, other courts have insisted on a more restrictive approach to duty, even though the results can be stark in their lack of humanity. The most famous such case is *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907), concerning a married man who had spent the weekend at home engaged in a drunken tryst with his mistress. When, at the end of the weekend, the woman ingested some morphine tablets and passed into a stupor, the man removed her to a nearby apartment so that his returning wife would not discover her. The woman never regained consciousness and subsequently died. Yet, the Michigan Supreme Court set aside the man's manslaughter conviction for his failure to seek aid. The court held that defendant's moral obligation to care for the stricken woman was not a legal duty because the deceased "was a woman past 30 years of age . . . had been twice married . . . [and was] accustomed to visiting saloons and to the use of intoxicants." Further, "it appear[ed] that she went upon this carouse with respondent voluntarily, and so continued to remain with him." *Id.* at 214, 113 N.W. at 1131.

This court's reading of "legal duty" seems cramped at best. The court easily could have based a "legal duty" on the defendant's responsibility as a host, coupled with his subsequent act of secreting the woman's unconscious body for the specific purpose of preventing her detection. See *supra* notes 37 & 43-44 and accompanying text. The decision has been roundly criticized, although more for its outcome than its failure to find an appropriate category of duty. See, e.g., Hughes, *supra* note 4, at 624 ("In its savage proclamation that the wages of sin is death, [*Beardsley*] ignores any impulse of charity and compassion. It proclaims a morality which is smug, ignorant and vindictive.").

While *Beardsley* has attracted the most attention, there have been other cases in which courts have found no legal duty to rescue on the part of a person who fails to rescue a suddenly endangered companion during the course of a mutual endeavor. E.g., *State v. Berry*, 36 N.M. 318, 323, 14 P.2d 434, 437 (1932) (holding mountain travelers under no duty to rescue companion who fell off a sled in a blizzard and froze to death).

C. *Limitations of the Conventional Approach*

Instan, then, highlights the conceptual limitations of the conventional approach. In core cases, relying on the notion of legal duty to define omission liability seems acceptable, for it provides a measure of certainty without violating our intuitive sense of how people ought to act. But in the 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. 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.

Such duty analysis, however, creates a false choice, for both these alternatives suffer from the same fundamental defect: neither considers any conceptual link between the duty requirement and the causal nature of the criminal prohibition in which omission liability necessarily arises. Both ignore the critical underlying premise that criminal omissions can occur only in "cause-and-result" crimes, that is, crimes that proscribe the causation of a particular harm. Any concept—including duty—utilized to define the limits of such omission liability must fairly reflect the element of causation. Rather than searching for a duty cognizable in some external body of law, as does the conventional doctrine, or based on vague moral intuition, as does *Instan*, the key to determining criminal omission liability lies in deciding which omissions can fairly be said to cause prohibited harms. Quite simply, that is the essence of the criminal prohibition giving rise to omission liability.

II

OMITTERS AS "CAUSERS"

The notion that a failure to act can "cause" a result at first blush sounds odd, and some have suggested that the very idea of causation analysis is misplaced in the omissions context.⁵¹ Such an argument is

51. See, e.g., *Bradley v. State*, 79 Fla. 651, 655-56, 84 So. 677, 679 (1920) (manslaughter conviction of father based on his failure to seek medical attention for burned child reversed on grounds that the child's death was caused by the burns and not by the lack of treatment); *State v. Lowe*, 66 Minn. 296, 299-300, 68 N.W. 1094, 1095-96 (1896) (third degree murder conviction based on defendant's failure to fulfill his contractual obligation to obtain medical treatment for woman during and after childbirth reversed because it was not alleged that the defendant's neglect had caused the woman's fatal illness); see also Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 220-21 (1908):

In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him. . . . [B]y failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation.

merely semantic. Of course, there are failures to act that cannot be said to have caused ensuing harms, but there are other omissions that just as plainly are the cause of proscribed harms. The parent who fails to feed his or her infant, allowing the child to die of starvation, has without a doubt caused that death.⁵² The problem, then, is to develop a coherent way to distinguish between those omissions that "cause" harm and those that do not.

Let us examine a situation similar to Stephen's hypothetical drowning child case.⁵³ Assume that four able-bodied men, *A*, *B*, *C*, and *D*, are standing beside a pool in which a young girl is obviously drowning. One of them, *A*, is a stranger who has just pushed the child into the pool. Each could easily have saved the child but none does, and the child drowns. Assuming mens rea and lack of justification on the part of each, *A* is liable for homicide because his push caused the child to die in the water. If the other men are similarly to be liable for homicide, it must be because their respective failures to rescue the child also caused her death.

It is plain that if any of the observers had pulled the child out before her lungs filled with water, the criminal harm of death would not have occurred. The failure of each to do so is thus a "cause in fact,"⁵⁴ an antecedent condition "but for" which the child's death would not have occurred.⁵⁵ If causing a particular result is a crime, the actor must have

The view that, due to apparent lack of physical impact, an omission to act cannot cause a result was developed fully by early German commentators. See Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 779 & n.35 (1958) and sources cited therein. It also appeared in the developing stages of English criminal theory. See Frankel, *supra* note 4, at 373 & nn.19-20; Williams, *supra* note 24, at 434.

This argument occasionally surfaces today, although typically in a more sophisticated and narrow form. See, e.g., G. FLETCHER, *supra* note 1, at 371:

It was not until the mid-nineteenth century that Anglo-American courts began to convict persons of criminal homicide for failing to render aid and letting another person die. These are cases . . . where the actor is liable even though he has not caused the death of the victim. Of course, a bystander may cause death in the trivial sense that "but for" his failure to act, the victim would not have died. But there is no causing of death in the sense implicit in the tradition of homicidal tainting.

(citing *Regina v. Instan*, [1893] 1 Q.B. 450, 1891-94 All E.R. 1213, discussed *supra* text accompanying notes 45-50).

52. *E.g.*, *Regina v. Downes* [1875] 1 Q.B.D. 25, 29-30; see also Kirchheimer, *supra* note 4, at 621 & nn.26-27. Even Professor Fletcher, who argues that failures to act do not cause harms in the same direct sense as what he calls affirmative acts, see *infra* note 99, apparently concedes that a parent who starves his or her child directly causes its death. See G. FLETCHER, *supra* note 1, at 601. To argue that lack of food, not the omission, caused the death is to argue that the bullet in the brain caused the death, not the person who shot it.

53. See *supra* text accompanying note 16.

54. See, e.g., Williams, *supra* note 24, at 430-31.

55. See, e.g., Mueller, *Causing Criminal Harm*, in *ESSAYS IN CRIMINAL SCIENCE* 169, 173 (G. Mueller ed. 1961). Of course, this analysis assumes the ability of the potential rescuers *B*, *C*, and *D* to prevent the child's drowning. If any is unable to do so, due to personal or external circumstances, his failure to intercede would not be a "but for" cause of the child's death. See W. LAFAVE & A. SCOTT, *supra* note 1, at 210.

caused the result in this factual or "but for" sense in order to be held liable.⁵⁶ Causation in Anglo-American criminal law, however, requires more than just "but for" causation.⁵⁷ By applying a variety of theories of proximate cause, the law differentiates among the many possible "but for" causal forces, identifying some as "necessary conditions"—necessary for the result to occur but not its direct "cause"—and recognizing others as the "direct" or "proximate" cause of the result.⁵⁸ The law of proximate cause thus attributes causal responsibility for a criminal harm to some acts but not others even though the harm in question could only have resulted from all of the conduct taken together.

While much of proximate cause analysis has been framed in language that rings of actual or physical causation,⁵⁹ this inquiry is hardly objective. On the contrary, the selective dissociation of particular actors from results to which their actions have been "but for" causes is necessarily an evaluative determination.⁶⁰ In understanding how courts

56. See MODEL PENAL CODE § 2.03 & note (Official Draft 1985); J. HALL, *supra* note 4, at 282-83; H.L.A. HART & T. HONORÉ, CAUSATION IN THE LAW 109-29 (2d ed. 1985); W. LAFAVE & A. SCOTT, *supra* note 1, at 278-81; see also *Commonwealth v. Fox*, 73 Mass. (7 Gray) 585, 586-87 (1857) (conviction of defendant for murdering his ill wife requires proof that the death would not have occurred at the time but for his assault and battery).

57. See J. HALL, *supra* note 4, at 282-84; H.L.A. HART & T. HONORÉ, *supra* note 56, at 110-11; W. LAFAVE & A. SCOTT, *supra* note 1, at 278, 281-83; Mueller, *supra* note 55, at 173, 186-87; Williams, *supra* note 24, at 430, 433-34; see also *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 304-06, 414 N.E.2d 660, 665-66, 434 N.Y.S.2d 159, 164-65 (1980) (simple "but for" causation insufficient to show criminal liability for employee deaths in plant explosion), *cert. denied*, 450 U.S. 1031 (1981).

58. See 2 J. BISHOP, BISHOP ON CRIMINAL LAW §§ 637-639 (9th ed. 1923); J. HALL, *supra* note 4, at 257-84; H.L.A. HART & T. HONORÉ, *supra* note 56, chs. 12-14; W. LAFAVE & A. SCOTT, *supra* note 1, at 287-99; 1 F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 751 (7th ed. 1874); Ryu, *supra* note 51, at 784-86; see also *People v. Calvaresi*, 188 Colo. 277, 283, 534 P.2d 316, 319 (1975) (physician's negligent treatment of nonmortal shooting wound is not a "supervening cause" relieving the defendant shooter of causal responsibility for the victim's death, though recklessness would be a defense) *superseded by statute as reported in* *People v. Bettis*, 43 Colo. App. 104, 106, 602 P.2d 877, 878 (1979); *State v. Cox*, 82 Idaho 150, 155, 351 P.2d 472, 474-75 (1960) (fact that a physician might have treated a collision victim more skillfully is not an "efficient intervening cause" that would relieve defendant driver of causal responsibility for the victim's death); *Stephenson v. State*, 205 Ind. 141, 187-90, 179 N.E. 633, 649-50 (1932) (victim's taking of poison following vicious assault and rape was act of an irresponsible person and thus not the "voluntary intervening act" of a responsible actor that would relieve defendant of causal responsibility for the victim's subsequent death), *writ of error dismissed*, 205 Ind. 194, 186 N.E. 293 (1933); *Hubbard v. Commonwealth*, 304 Ky. 818, 822, 202 S.W.2d 634, 636-37 (1947) (defendant's actions in resisting arrest, which so excited the arresting officer that the officer died of a heart attack, held "too remote" to be the cause of death); *People v. Kibbe*, 35 N.Y.2d 407, 413, 321 N.E.2d 773, 776-77, 362 N.Y.S.2d 848, 852 (1974) (defendant's act of leaving an underclothed, helplessly drunken robbery victim on an icy road late at night held a "sufficiently direct cause" of the victim's death when he was subsequently struck and killed by a truck); *State v. Johnson*, 56 Ohio St. 2d 35, 40-41, 381 N.E.2d 637, 640-41 (1978) (physician's removal of a brain dead assault victim from a respirator not an "independent intervening cause" that would relieve the defendant of causal responsibility for the victim's death).

59. See cases cited *supra* note 58.

60. See, e.g., MODEL PENAL CODE § 2.03 & comment (Official Draft 1985); Ryu, *supra* note 51, at 783-84. Any idea that the proximate cause inquiry is factual or objective vanished under the

decide whether and to what extent a failure to act is the legal cause of a harm, it is important to explore the nature and purpose of this evaluative approach to causal attribution.

A. Proximate Cause

Theoretically, criminal law could abandon the concept of proximate cause, relying simply on "but for" causation to establish causal responsibility for criminal harms. The doctrine of mens rea and the voluntariness and responsibility doctrines of actus reus would then determine which causal agents of a particular harm should bear the criminal responsibility.⁶¹ Popular notions of causation, however, are not so expansive, and to rely exclusively on a but for approach in determining causal responsibility in cause-and-result crimes might lead quickly to Draconian results.

The potential distortions of a but for approach, however, may not be readily apparent in the typical cause-and-result case. There, the application of the term "cause" is so intuitive that causal attribution is not seriously at issue. A person points a loaded gun at the chest of another person and pulls the trigger. The bullet passes through the victim's heart, destroying arterial and muscle tissue and stopping the blood flow to the victim's vital organs, thus killing the victim. In attributing causal responsibility to the shooter, most people would agree that she caused

hard gaze of the Legal Realists more than a half century ago. See Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 201 (D. Kairys ed. 1982). The classic treatment, of course, is *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928): "What we . . . mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Id.* at 402, 162 N.E. at 103 (Andrews, J., dissenting)

61. This is the "theory of condition," given sophisticated treatment by turn of the century German theorists. See sources discussed in Ryu, *supra* note 51, at 787-88. German courts, however, never applied the theory in its classic formulation. *Id.* In the United States, at least two jurisdictions, Alabama and Texas, have included a causation provision in their criminal codes providing for nothing more than "but for" causation, if read literally. This requirement, adopted in virtually identical form by both states, provides: "A person is criminally liable if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was sufficient to produce the result and the conduct of the actor clearly insufficient." ALA. CODE § 13A-2-5 (1982); see also TEX. PEN. CODE ANN. § 6.04 (Vernon 1974). Nevertheless, the respective commentary accompanying both provisions, as well as the decisions interpreting and applying them, make it plain that neither state intended to, or did, abrogate proximate cause analysis. See ALA. CODE § 13A-2-5 commentary at 29-30 (1982); Searcy, *Forward*, TEX. PEN. CODE ANN. at xxiii (Vernon 1974); see also *Lewis v. State*, 474 So. 2d 766, 770-71 (Ala. Crim. App. 1985) (decendent's playing Russian Roulette by himself was a "supervening, intervening cause sufficient to break the chain of causation," thus relieving defendant—who taught decendent the game—of negligent homicide liability); *Westbrook v. State*, 697 S.W.2d 791, 793 (Tex. Ct. App. 1985) (given the absence of legislative guidance concerning what "clearly sufficient" and "clearly insufficient" mean in replacing the traditional proximate cause requirement, causation should simply be left to the jury); *Barnette v. State*, 709 S.W.2d 650, 651-52 (Tex. Crim. App. 1986) (discussing a theory of "alternative cause" which would, in circumstances not well articulated, relieve a but for causer of causal responsibility).

the victim's death by pulling the trigger, even though that act was one of many necessary conditions but for which the victim would not have died.⁶²

There plainly are cases, however, in which we would not say that the shooter caused the victim's death, even though the shooting was a but for cause of that death. For example, assume that the shooter, fully intending to kill, shot at the victim but missed. To escape further assault, the intended victim fled in an airplane which then crashed, killing him. To be sure, by engaging in a voluntary act—squeezing the trigger of the gun—with intent to kill the victim, the shooter is guilty of attempted murder or assault with intent to kill,⁶³ but we would not think of her as guilty of murder.⁶⁴ If, however, but for causation were sufficient to establish the cause of a harm, we must conclude that the shooter's act of firing the gun caused the victim's death, and thus that she is guilty of murder.

The purpose of proximate cause analysis is to avoid such unfair results. It seeks to align causation principles applied in cause-and-result crimes with everyday commonsense concepts of causation, in short, to draw a sensible and predictable line between cause and condition, even in complex cases involving numerous necessary conditions.⁶⁵ For example,

62. Working backwards in time from the harmful result, there is almost a limitless number of factors one could identify as necessary conditions to that result. In this example, conditions necessary to the result, but plainly irrelevant to the legal attribution of causal responsibility, would include both physical factors—such as the speed and mass of the bullet—and human conduct—such as the manufacture and sale of the weapon. See J. HALL, *supra* note 4, at 250-51. But given the concern of criminal law with human conduct, we are not primarily concerned here with physical forces, except as they might be said to displace human causal responsibility. See Ryu, *supra* note 51, at 783-84; cf. *infra* notes 71-74 and accompanying text.

63. See H.L.A. HART & T. HONORÉ, *supra* note 56, at 395; W. LAFAVE & A. SCOTT, *supra* note 1, at 282 (both sources noting the interrelationship between the doctrines of attempt and causation as limits on harm-causing and harm-risking liability).

64. Commenting on a similar hypothetical (the intended victim flees in a train, only to die in a train wreck), Professors Hart and Honoré assert that "[i]n such an extreme case most people would not only refuse to say that the man had caused [the victim's] death but would recoil at the prospect of punishing him with the same severity as that reserved for murder." H.L.A. HART & T. HONORÉ, *supra* note 56, at 395; see also *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 307, 414 N.E.2d 660, 666, 434 N.Y.S.2d 159, 165 (1980) (citing as a paradigm of insufficient proximate cause the example of a drunken robbery victim who, left in the snow to die of exposure, instead was killed by a landing airplane or a hunter's stray bullet), *cert. denied*, 450 U.S. 1031 (1981); W. LAFAVE & A. SCOTT, *supra* note 1, at 287.

65. As a simple but fundamental matter of fair warning, since causation is an element of a crime, causation must be interpreted consonant with the common understanding of its meaning (at least insofar as such a commonsense meaning exists). See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (discussed *infra* note 105 and accompanying text); see also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 95-96 (1968). Some have argued, however, that the common sense usages of cause are too ill-defined to provide adequate guidance to proximate cause analysis. See, e.g., Ryu, *supra* note 51, at 775, 786. Professors Hart and Honoré respond to this criticism, observing:

Whatever difficulties attend the notion of causation, we do after all succeed in communicating with each other satisfactorily over a great area of discourse where we use

assume that a shooting victim is merely wounded instead of killed. During routine treatment of the wounded victim's injury, however, a doctor makes a mistake in surgery, the wound is exacerbated, and the victim bleeds to death. In such a case, assuming that the victim normally would have survived the shooting wound, the doctor's mistreatment and the act of squeezing the trigger were both but for causes of the victim's death. The hard question is: which one of these necessary conditions was the cause of death?⁶⁶ A proper answer to this question of causal attribution requires understanding both the characteristics of commonsense notions of causation and the degree to which the criminal law incorporates these concepts in its causation analysis.

B. *The Common Sense Paradigm of Cause and Effect*

The paradigm of causation applicable to cause-and-result crimes is physical cause and effect—a force setting in motion an object previously at rest.⁶⁷ For example, when a person strikes a billiard ball with a cue stick, we think of that action as causing the effect of the ball's ensuing

this notion; we manage to agree in our judgments about particular cases of causation in a very large number of cases We must not think of a common-sense notion as necessarily a matter of mere impression, or so intuitive that it cannot be further elucidated, at least in its application to standard cases, however vague a penumbra may surround it. Common sense is not a matter of inexplicable or arbitrary assertions, and the causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on storable principles The ordinary man has a quite adequate mastery of various concepts within the field of their day-to-day use, but, along with this practical mastery goes a need for the explicit statement and clarification of the principles involved in the use of these concepts.

H.L.A. HART & T. HONORÉ, *supra* note 56, at 26.

To speak of common-sense usages of causal principles does not, of course, exclude consideration of more developed or specialized approaches to causation, such as those of philosophy or science. See Ryu, *supra* note 51, at 776 (summarizing significant examples of such sophisticated causal views). Indeed, the common understanding of causal concepts necessarily incorporates the lay appreciation of a variety of sophisticated perspectives, which together help to form and inform the amalgam of our culture. See J. HALL, *supra* note 4, at 290.

66. The verb "cause," of course, has linguistic equivalents such as "kill" in which the concept of causation is subsumed. Some have argued forcefully that criminal law should not punish according to harm actually caused but rather on the basis of risk created. See G. WILLIAMS, *supra* note 4, at 136; Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1600-03 (1974). But see H.L.A. HART & T. HONORÉ, *supra* note 56, at 395-96; Michael & Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1294-98 (1937); Ryu, *supra* note 51, at 796-99 (all justifying more severe treatment of a defendant whose acts resulted in more serious harms). This issue is beyond the scope of this Article. It is enough to note here that whatever its legitimacy, virtually every system of criminal law to some extent punishes on the basis of actual results. See MODEL PENAL CODE § 5.05 comment (Official Draft 1985) (summarizing the grading of attempts in American jurisdictions).

67. See J. HALL, *supra* note 4, at 253; H.L.A. HART & T. HONORÉ, *supra* note 56, at 27-32. It is instructive, although surely not dispositive, that dictionary definitions of cause reflect this physical cause and effect notion. The Oxford English Dictionary gives as its first general definition of cause, "[t]hat which produces an effect; that which gives rise to any action, phenomenon, or condition. Cause and effect are correlative terms." 2 OXFORD ENGLISH DICTIONARY 195 (1933) (italics in original).

movement. If that ball hits another ball and the second ball moves, we similarly attribute this second ball's movement to the same causal force. This causal attribution comes easily, though we recognize that a number of other conditions, such as the weight, shape, and mass of the balls, are also necessary conditions to the total effect we see. These conditions do not alter our perspective because they are simply part of the normal or "at rest" setting in which the striking and subsequent movement of the balls occurred.

When simple physical systems interact, we can describe cause and effect with relative certainty. It is more difficult to apply this cause and effect paradigm directly to complex human interactions. To determine whether a harm ought to be causally attributed to particular human conduct, we generally analogize to the physical cause-and-effect paradigm.⁶⁸ This process of analogy involves a careful search for the impetus that changed the "at rest" conditions. In the drowning child hypothetical, for example, the physical push against the child is said to cause her fall into the pool and thus her subsequent death. The child's wandering in the pool's vicinity and the builder's building of the pool also caused her death, but, though both are necessary conditions but for which the drowning would not have occurred, they are not seen as causes of the child's death. The common sense difference between the two is that the push alters the status quo, analogous to striking the cue ball, while the existence of the pool and the child's proximity to it represent the "at rest" state of affairs, analogous to the weight, shape, and mass of the balls. In other words, when we ask what event caused an apparent result, we seek to identify the act that disturbed the previous "at rest" conditions—the normal state of affairs—so as to produce that result.⁶⁹

Common sense judgments about causation depend on how we define "normal" and what we view as intrusive. Plainly these judgments are relative and vary with the scope of the causal inquiry—the time frame of the inquiry and the circumstances considered. For example, if we knew more about the circumstances surrounding the child's drowning, we might not regard either the existence of the pool or the child's wandering nearby as the normal or "at rest" state of affairs. Instead, we might conclude that either of these factors was a "cause" and not merely a condition of her drowning.⁷⁰ Moreover, the characterization of particular

68. See H.L.A. HART & T. HONORÉ, *supra* note 56, at 27-28, 33.

69. *Id.* at 29-32.

70. For instance, assume that *A*, the person who pushed the child, is a deranged and unpredictably violent man who has been committed to a mental hospital. *B*, the father, knows *A* and his history. On this day, *B* and his young child are visiting *A* at the hospital where there is the pool. If *B* leaves the child playing beside the pool, telling *A* to watch after her while he runs a few errands off the hospital grounds, the child's wandering at pool's edge is hardly normal or part of the ordinary background of events. Rather, it is a departure from normality that links the child's death to the

circumstances and conduct as normal and thus "at rest," or abnormal and thus intrusive, is anything but absolute. The distinction between normal and abnormal implicates estimates of probability⁷¹—how likely it is that a particular condition will in such circumstances occur—and relative value judgments, including considerations of blame.⁷²

Let us reexamine, in light of this causation analysis, the case of the wounded shooting victim who died as a result of improper medical treatment. To assess whether the shooter is causally responsible for the death, we must decide whether the events occurring after the shooting were more like normality, and thus fairly chargeable to the shooter, or more like a subsequent intrusive force, disturbing the victim's normal recovery. In short, we ask whether it was sufficiently likely that malpractice would have occurred after the shot.⁷³ What is "sufficiently" likely is in turn a function of: (1) the probability that malpractice would occur in these circumstances; and (2) the relative value judgment about whether—in light of the shooting and the nature of the subsequent malpractice—such malpractice more resembles normality or abnormality.⁷⁴

father's earlier conduct. See, e.g., *Palmer v. State*, 223 Md. 341, 351-53, 164 A.2d 467, 473-74 (1960) (holding that a mother's failure to remove a child from her home where the child was subjected to severe beatings by the mother's boyfriend was a proximate cause of the child's resulting death).

Further, assume that the operators of the hospital, knowing that the grounds would be utilized for unsupervised visiting between psychotic individuals and their loved ones, including children, constructed the pool in an easily accessible area without any protective barriers. This conduct, permitting an obvious hazard to exist in the presence of small children and unpredictable mental patients, might be seen as the cause of the child's death, although admittedly this seems more far-fetched. Cf. *Regina v. Bengel* [1865] 4 F. & F. 504, 509-10, 176 Eng. Rep. 665, 667-68 (routine maintenance of railroad track held, in homicide case, to be the cause of a train wreck and ensuing deaths when, due to the mistake of defendant foreman, work was in progress when train arrived).

71. See Wechsler & Michael, *A Rationale of the Law of Homicide I*, 37 COLUM. L. REV. 701, 724 (1937) ("Indeed, it may in general be ventured that the only firm thread on which the causality cases can be strung is that of probability."). Courts routinely utilize some variant of probability in proximate cause analysis. See, e.g., *Parsons v. State*, 21 Ala. 300, 302 (1852) (natural consequences); *In re J.N.*, 406 A.2d 1275, 1282 (D.C. 1979) (whether physician's treatment of victim was a normal or abnormal medical response); *People v. Flenon*, 42 Mich. App. 457, 461-62, 202 N.W.2d 471, 474 (1972) (foreseeability); *People v. Kibbe*, 35 N.Y.2d 407, 412-13, 321 N.E.2d 773, 776, 362 N.Y.S.2d 848, 851-52, (1974) (probability, foreseeability of death).

72. See, e.g., J. HALL, *supra* note 4, at 288-89; Mueller, *supra* note 55, at 181-83. Professors Hart and Honoré, however, insist that considerations of moral judgment or responsibility have no place in commonsense causal judgments. See H.L.A. HART & T. HONORÉ, *supra* note 56, at 65-68, 403-05. Yet, the sort of commonsense empiricism that informs causal attribution can, and does, include such concepts as moral responsibility and retributive justice as distinct from legal culpability.

73. Compare *Baylor v. United States*, 407 A.2d 664, 668-69 (D.C. 1979) with *People v. Stewart*, 40 N.Y.2d 692, 698-99, 358 N.E.2d 487, 491-92, 389 N.Y.S.2d 804, 808-09 (1976); see also *infra* note 80. Of course, the conclusion that the shooter is not causally responsible for the victim's death does not mean that he or she will be fully exonerated. Assuming the requisite intent, he or she may still be guilty of attempted murder or some other inchoate crime. See *supra* note 63 and accompanying text.

74. The level of certainty sufficient to establish the causal link is an issue properly left to the jury. This allows the factfinder the latitude to decide, after looking at all of the facts in each particular case, what conduct is normal or status quo and what is abnormal or intrusive. Thus,

Having observed that a common sense approach to causation is not categorical, we should take care not to overstate its difficulties.⁷⁵ Society seems able, after all, to find broad areas of agreement in everyday causal judgments, both simple and complex.⁷⁶ Moreover, despite proximate cause doctrines using such apparently objective terminology as "super-vening causes," "concurrent conditions," and "chains of causation,"⁷⁷ courts have tended, by and large, to use a commonsense approach.⁷⁸ For example, in our hypothetical case of a nonmortal gunshot wound made fatal by improper medical treatment, many courts would treat the question of whether the shooter caused the victim's death as an issue of intervening cause. If the physician's malpractice is determined to be merely negligent, then it would probably be deemed a mere "concurrent condition," not an intervening cause sufficient to interrupt the chain of causation between the defendant's shot and the victim's death.⁷⁹ If, on the other hand, the doctor's malpractice was seen as grossly negligent or

when deciding that the shooter who *tried* to kill the victim is causally responsible for the victim's death, characterizing even serious medical malpractice as more normal than abnormal does not necessarily offend common sense. See *infra* notes 82-83 and accompanying text.

75. There are, of course, critics of the commonsense approach to causal attribution. Some commentators, for example, suggest that the entire causation inquiry is little more than a mask for covert policy judgments concerning the imposition of liability. See, e.g., L. GREEN, RATIONALE OF PROXIMATE CAUSE 4-5, 39-43 (1927); Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 252-53, 259 (1950); Horwitz, *supra* note 60, at 211. Moreover, even among commentators who continue to believe that legal causation has a meaningful role to play in criminal law theory, there is disagreement with the commonsense approach.

Some, including Professors Hall and Ryu, take a teleological approach, arguing that the assessment of causal responsibility for criminal harms must primarily be accomplished by reference to the actor's culpability. While their specific proposals vary somewhat, they agree that causal determinations must involve some aspect of culpability, given the dual blame/deterrence orientation of criminal law. Thus, they view the causal assessment as imputing criminality to particular conduct. See J. HALL, *supra* note 4, at 254-84; Ryu, *supra* note 51, at 783-86, 796.

Proponents of the teleological approach, however, do not suggest that causation analysis should merge with the question of *mens rea*. Professor Hall advocates retaining the distinction between causation and *mens rea*, and concedes that there are commonsense conceptions of causation that are reflected in "legal causation." See J. HALL, *supra* note 4, at 249-54. Nevertheless, he argues that such commonsense notions must be modified and guided by rules of liability which, though assertedly not identical to the *mens rea* judgment, reflect penal policy. *Id.* at 249-51, 283-84. But he is never very clear about what those guiding rules of liability are, and in the end, despite his assertions to the contrary, Hall's concept of causation merges into the general culpability inquiry. *Id.* at 250-51, 283-84. Others have reached similar conclusions about Hall. See, e.g., Mueller, *supra* note 55, at 184-85; cf. W. LAFAVE & A. SCOTT, *supra* note 1, at 209 and n.50.

76. See *supra* note 65 and accompanying text; see also J. HALL, *supra* note 4, at 288 (noting that in everyday life we easily draw the distinctions between causes and conditions).

77. See *supra* note 58 and accompanying text. Professors LaFave and Scott provide a concise summary of the basic common law proximate cause doctrines. W. LAFAVE & A. SCOTT, *supra* note 1, at 287-94.

78. See H.L.A. HART & T. HONORÉ, *supra* note 56, at 130-32.

79. See, e.g., *People v. Calvaresi*, 188 Colo. 277, 283, 534 P.2d 316, 319 (1975), *superseded by statute as reported in* *People v. Bettis*, 43 Colo. App. 104, 106, 602 P.2d 877, 878 (1979); *Wright v. State*, 374 A.2d 824, 828-29 (Del. 1977).

intentional, a court might well characterize it as a "supervening" or "independent intervening" cause, thus relieving the shooter of causal responsibility for the death.⁸⁰

The doctrinal distinction between simple negligent medical treatment and gross or intentional malpractice fits the commonsense analysis discussed above.⁸¹ Simple negligence, although hopefully unusual, is sufficiently ordinary that we more properly classify it as part of the normal background rather than an intrusion, at least in the context of the shooting. We usually come to the opposite conclusion for intentional or grossly negligent malpractice. Although certainly a rough and value-laden judgment, intentional or grossly negligent malpractice seems sufficiently extraordinary, both in a probabilistic and a normative sense,⁸² to be classified as an intrusion into the status quo.⁸³

80. See, e.g., *People v. Stewart*, 40 N.Y.2d 692, 696-99, 358 N.E.2d 487, 491-92, 389 N.Y.S.2d 804, 807-08 (1976) (physician's performance of unrelated surgical procedure during surgery to repair stab wound constituted "grave neglect, possibly gross negligence," which was a "direct" cause of death, thus relieving defendant of causal responsibility); see also *Baylor v. United States*, 407 A.2d 664, 669-70 (D.C. 1979) (stating as dictum: "gross maltreatment of the wound, which was the sole cause of death, is available as a defense to a charge of homicide, because the wound was not the proximate cause of death") (emphasis and citation omitted); *People v. Flenon*, 42 Mich. App. 457, 461-62, 202 N.W.2d 471, 474-75 (1972) (grossly negligent treatment of a nonmortal wound that leads to death relieves the assailant of causal responsibility, but this rule is inapplicable to the facts of the case).

This sample of opinions demonstrates that courts are not wont to relieve a person of responsibility for death that results from his or her infliction of an ultimately fatal wound even when intervening medical malpractice is involved. Only in cases like *Stewart*, in which the malpractice appears to have occurred in a medical procedure unrelated to the injury inflicted by defendant, are courts willing as a matter of law to relieve the defendant of causal responsibility. In the usual case where treatment of the injury somehow goes awry, malpractice will not suffice to negate proximate cause. Thus in *Baylor*, the government's pathologist testified that if the victim, who had been struck in the side by a blunt object, had not been left waiting in the emergency room for two hours without attention, she probably would have recovered from her spleen injury instead of dying two weeks later of complications. Yet, the court held that even this blatant malpractice did not relieve the attacker of causal responsibility for the victim's subsequent death. *Baylor*, 407 A.2d at 670.

81. By suggesting that various doctrinal strands of proximate cause can be reconciled with sensible criminal causation analysis, I do not presume to defend all proximate cause rules, either in the abstract or in particular application.

82. See *supra* notes 71-72 and accompanying text.

83. Unfortunately, the doctrinal reliance on "objective" terminology in assessing proximate cause may well obscure this commonsense analogical process of causal attribution. Faced with this problem, the drafters of the Model Penal Code turned away from "the encrusted precedents on proximate causation" MODEL PENAL CODE § 2.03 comment 135 (4th Tent. Draft 1955), and cast the issue of causal attribution in terms that require the jury to decide on an almost intuitive basis. Professor Mueller suggests that this is the way juries decide causation issues anyway, regardless of how they are instructed. Mueller, *supra* note 55, at 173; see also Williams, *supra* note 24, at 430 (suggesting that causation judgments by a factfinder are of necessity at least in part intuitive). The Code provides that when conduct is a "but for" cause of a result that occurred in a way other than intended or risked, that conduct is treated as the cause of the result only if the result is the same kind of harm intended or risked and the harm "is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." MODEL PENAL CODE §§ 2.03(2)(b), (3)(b) (Proposed Official Draft 1962) (brackets in original).

To summarize, the purpose of proximate cause analysis is to ensure that causal judgments, even in complex cases, reflect commonsense notions of cause and effect. To achieve this objective, the law necessarily relies on probabilistic and normative judgments⁸⁴ to bridge the gap between the physical paradigm and nonphysical causal patterns in human conduct. These assessments of causal responsibility often appear awkward and imprecise, but as long as criminal law punishes the causation of harm, they are unavoidable.

C. *Proximate Cause and Omissions*

As noted, it seems at first inappropriate to apply commonsense causation analysis to an individual's failure to engage in particular conduct. If one focuses solely on the circumstances of an omission at the time directly preceding the harm, the omission often appears not to have affected the at rest state of affairs. For example, a person sitting in the park while a nearby flower dies from lack of water is usually not considered to have caused the plant's demise, even if a full watercan sits nearby.⁸⁵ If watering the plant would prevent its death, the failure to water is a necessary condition of death. The plant's status quo, however, is lack of water, and the person—by sitting—simply lets nature take its course. Having apparently done nothing to disturb the status quo, he could not have "caused" the death.

The difficulty in conceptualizing an omission as a causal force is that omissions do not seem to fit within the parameters of the physical cause and effect model. In the physical paradigm, there is a direct and identifiable chain of events through which the actor can readily be seen as intervening and changing what existed before. In cases of omission, however, the actor does not physically alter the status quo, but rather appears simply to permit the preexisting state of affairs to continue.⁸⁶ Without direct physical involvement in the causal process leading to a particular result, an ommitter seems no more causally responsible for the result than anyone else. So in the drowning child example, the bystanders appear indistinguishable from all persons who did not act to save the child,⁸⁷ while the

84. See *supra* notes 71-72 and accompanying text.

85. Professors Hart and Honoré use this example to illustrate what they see as "[t]he most respectable objection to treating omissions as causes." H.L.A. HART & T. HONORÉ, *supra* note 56, at 38.

86. See *supra* note 51.

87. This overstates the universality of apparent causal responsibility for failing to act. As Professor John Kleinig observes, failures to prevent a harm should not be equated with all "nonacts," a "nonact" being defined as the failure of each person in the universe to act to prevent that harm. Omissions consist of that relatively narrow class of nonacts that have some connection to the harm, a connection that is missing for all other conduct that did not prevent the harm. See Kleinig, *supra* note 4, at 169. In the example of the drowning child, saying that *A*, *B*, *C*, and *D*, standing as they were around the pool, omitted to save her makes sense, while saying that someone

one who pushed her is said to have caused the girl's death.

Such a view of causation is flawed because its inquiry is too limited. It depends on a definition of the status quo as the existing physical state of affairs at the precise time of the omission, much as if we took a picture of the scene at the moment before the omission and then compared it to a similar picture taken immediately thereafter, searching for a change in circumstances physically attributable to the omissive conduct.⁸⁸ Our everyday notions of causation, however, are not so limited because we understand that the status quo encompasses more than the physical state of affairs at a given time.⁸⁹ Indeed, in everyday usage the status quo is taken to include expected patterns of conduct, including actions designed to avert certain unwanted results. When, for example, a driver parks a car on a steep hill, it is normal to set the parking brake and put the car in gear. If the driver forgets to do so and the car subsequently rolls down the hill, smashing into another car, we would say that the failure to park properly was a departure from the status quo. This failure, not the visibly steep hill or the predicate act of pulling the car to the curb, was the cause of the collision.

Once we realize that a particular undesirable state of affairs can be avoided by taking certain precautions, we usually incorporate these precautions into what we see as the normal or at rest state of affairs. A failure to engage in the preventive conduct in these cases can thus be seen as an intervention that disturbs the status quo.⁹⁰ When such a failure to act is a necessary condition (a "but for" cause) of a particular harm, then that failure fairly can be said to cause that harm. In the above example, the driver's failure to park the car in a proper manner caused the accident as surely as if he had actually driven his car into the other.

At this level of analysis, omissions are rightly viewed as fitting the classic cause-and-effect model, but this analysis still does not differentiate among various persons who should engage in preventive conduct. To say that the status quo includes all preventive conduct simply makes the causal responsibility of omitters universal among those who reasonably could have prevented the harm. Under this view of causation, a passen-

without such knowledge and ability omitted to save her does not. Failures to engage in particular conduct thus, in Kleinig's words, have "an attribution element," arising from a knowledge of and ability to avert the harm, that is not shared by all other omissive conduct. *Id.* The universe of "omitters" so qualified is thus limited to those who have relevant knowledge and ability, though not necessarily those standing within sight of the child. *See, e.g.,* the hypothetical discussed *supra* note 70.

88. This articulates the discredited concept of negative causation. *See* H.L.A. HART & T. HONORÉ, *supra* note 56, at 30 & nn.3-4, and sources cited therein.

89. *See* J. HALL, *supra* note 4, at 195-97; H.L.A. HART & T. HONORÉ, *supra* note 56, at 30-31; Hughes, *supra* note 4, at 627; Ryu, *supra* note 51, at 779.

90. *See* J. HALL, *supra* note 4, at 626; H.L.A. HART & T. HONORÉ, *supra* note 56, at 36.

ger in the car would have caused the accident since she could easily have set the emergency brake or instructed the driver to do so.

At first blush, it may seem attractive to apply an undifferentiated causal responsibility to those able to prevent serious harms, leaving the doctrines of *mens rea* and *actus reus* to determine criminal responsibility.⁹¹ For example, in the drowning child hypothetical, there is nothing terribly troubling about holding anyone who reasonably could have saved the child but did not try causally responsible for the ensuing death. But viewing causation questions from this perspective misses the issue. The causal question for determining criminal responsibility should not be answered on the basis of moral indignation but should instead be sharply focused on whether we can fairly say that the respective omission of each bystander "proximately caused" the child's death. It may be that society is ready to assign causal responsibility to each, but as we have seen, it would be unacceptable to base this decision on no more than but for causation.⁹² A failure to act to prevent a harm is not in every case a departure from normality or a disturbance of the status quo. Returning to the example of the wilting flower in the park, society is not ready to attribute causal responsibility for the flower's death to the omitting bystander. It simply is not the ordinary routine, the status quo, for every person to engage in conduct that will prevent identifiable harms, even if the preventive conduct involves no appreciable risk or expenditure of resources by the potential actor.⁹³ Thus we do not categorize every failure to act as the cause of an ensuing harm.

Nevertheless, we do expect certain persons to engage in particular types of preventive conduct as a matter of routine. Because of this expectation, we perceive any failure of those persons to take prescribed actions as a departure from normality. While we do not see the bystander's failure to water the flower as the cause of its withering away, we take a different view of such a failure by the park's gardener. We expect that the gardener will take reasonable steps to prevent the flower's demise, that is, his preventive conduct represents normality. A departure from that status quo—his failure to water—is thus more than a necessary condition of the flower's death: it causes that result every bit as much as the act of an intruder pulling the plant from its soil.⁹⁴

Of course, society's expectation of particular preventive conduct

91. As noted above, this was Bentham's position, as well as that of his American disciple, Edward Livingston. See *supra* note 15. That sentiment is still echoed today. See, e.g., Glazebrook, *supra* note 4, at 411; Hughes, *supra* note 4, at 626, 628.

92. See *supra* notes 64-63 and accompanying text.

93. For a suggestion as to why this is so, see *infra* note 100 and accompanying text.

94. See H.L.A. HART & T. HONORÉ, *supra* note 56, at 38; see also J. HALL, *supra* note 4, at 195-96 (characterizing the omission as "wrongly allowing the forces of physical causation to operate" when one has a duty to act); cf. G. FLETCHER, *supra* note 1, at 606, 611 (characterizing the

could be described as merely another formulation of "duty." The causation analysis described here, however, differs from the conventional approach since a person's "duty" in a particular context—how one is expected to respond to the threat of a specific harm—is not determined solely by looking to external legal doctrines. Rather, the duty is a function of how society defines the status quo for that situation at that point in time, a determination based both on probabilistic and normative factors. A "duty" sufficient to support criminal sanctions must be founded on both an empirically valid expectation that persons in similar circumstances will act to prevent a harm—the probability aspect of normality—and also a deeply ingrained common understanding that society relies on that individual to prevent the harm—the normative aspect of normality. Thus parents have a "duty" to prevent harm to their children because empirically, almost all parents act this way, and normatively, our society would consider it reprehensible if they did not.⁹⁵ It is this combination of deviance—departing from a pattern of regular performance—and reprehensibility—being blameworthy—that makes us conclude that failure to act caused the harm.⁹⁶ The preceding formulation does not, by any

duty requirement in criminal omissions as a "surrogate" for proximate cause, but not viewing duty as a conceptual part of causation analysis).

95. See H.L.A. HART & T. HONORÉ, *supra* note 56, at 38.

96. The words "reprehensible" and "censure" do not necessarily have moral content. They merely indicate that society attributes to the omission a connection to the harm which, assuming the requisite *mens rea* and *actus reus*, will give rise to society's censure for violating its law against causing that harm. See H.L.A. HART, *supra* note 23. Of course, to the extent that the common view of causation is colored by notions of moral responsibility and retribution, then "reprehensible" and "censure" as used here similarly take on that color. See *supra* notes 70-72 and accompanying text.

In apparent contrast to the causation perspective suggested here, the more conventional view of omissions generally sees the source of the duty not as a function of causation but purely as a question of policy. See, e.g., Frankel, *supra* note 4, at 390; Glazebrook, *supra* note 4, at 411; Kirchheimer, *supra* note 4, at 629-30. Professor Hughes states the view succinctly:

This classification [of recognized legal duties] is probably neither exhaustive nor exclusive, but it does indicate the sphere in which most present offenses of omission are found and the policy which underlies their creation. To state that policy briefly, in the immense complexity and interdependency of modern life, those who elect to pursue certain activities or callings must, for the welfare of their fellow citizens, submit to a host of regulations, some of which will naturally and properly impose positive duties to act.

Hughes, *supra* note 4, at 600. Hughes recognizes that this policy is at best amorphous, and that, at least in the decisional law, no discernible principle for defining enforceable duties has emerged. He suggests, following Bentham, that the sensible policy line would be to make criminal any failure to save a life where the victim's peril is clear to the actor and the required preventive conduct involves little or no risk to the actor. *Id.* at 631-34 & n.158, see also Glazebrook, *supra* note 4, at 411 ("A legal system might impose liability wherever a reasonable person would and could have come to the aid of another, and the criminal intent was present."). Professor Frankel, on the other hand, sees value in an externally recognized legal duty as a basis for criminal liability, because the actor's violation of a formally recognized obligation to act eases the ascription of culpability for omissions. In apparent recognition of the conceptual rigidity of that approach, however, he would include as enforceable duties "strong moral obligations to act." Frankel, *supra* note 4, at 390. Professor Kirchheimer, although he does not make the conceptual link to causation, probably comes closest to the position suggested here. He argues that enforcing duties beyond those based on recognized and

means, intend completely to disconnect the cause-related notion of duty from externally cognizable legal duties. The very fact that a body of law, for example contract law, has formalized and thus made obligatory a particular standard of conduct suggests a regularity of performance. But since regularity of performance does not alone constitute "normality," as that term is here used, not all legal duties necessarily provide a basis for criminal omission liability.⁹⁷ Moreover, the above causal analysis conceptually does not require that a duty or expectation of conduct be a formal legal duty. A particular failure to act might so deviate from the status quo that we fairly can say that it caused an ensuing harm, even though we are unable to squeeze this criminally enforceable expectation of action, this duty, into a tort or contract theory.⁹⁸

Once the concept of duty is recognized as a function of causation, the determination of which failures to act bear causal responsibility flows naturally from the criminal proscription.⁹⁹ Only those individuals whose failure to act is inconsistent with the common expectation that they will

accepted relationships must ultimately reflect what he calls "living convictions put into practice by smaller and more intimate communities." Kirchheimer, *supra* note 4, at 630. Only when communal "value structures" underlie the requirement that particular persons must engage in preventive conduct will criminal enforcement of such duties be valid. *Id.*

Kirchheimer seems correct. Although many people believe that it is unthinkable for someone not to try to save another's life when it involves no risk to the saver, until that view is so widely accepted—until it so embeds itself in the value structures that inform the way we live, not just the way we talk—that we freely consider the failure to take such an action as the cause of the victim's death, there is no basis for inferring a criminally enforceable duty to act. The legislature may certainly do so prospectively, but the courts may not retrospectively.

97. The substantial overlap between causal expectations of conduct and externally recognized duties, *see, e.g.*, Frankel, *supra* note 4, at 390, may have played a large part in leading us, erroneously, I suggest, to equate the two. Professor Hart draws an apt distinction between laws that command (generally speaking, criminal law) and laws that, in his words:

provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law. . . . Such rules, unlike the criminal law, are not factors designed to obstruct wishes and choices of an antisocial sort. On the contrary, these rules provide facilities for the realization of wishes and choices."

H.L.A. HART, *supra* note 23, at 60-61. Given this distinction between criminal law and other law, obligations arising under noncriminal law should only assume a command function when their violation is so abnormal—that is, deviant and reprehensible, *see supra* notes 95-96 and accompanying text—that causal attribution is appropriate if a harmful consequence results.

98. For example, we might characterize a skier, who without notifying anyone leaves her injured companion in a darkening icy ravine, as acting so beyond what is normal that her failure to summon aid fairly "caused" her companion's death. Similarly, a healthy niece who permits her invalid aunt to perish from gangrene without seeking available medical treatment seems causally responsible for that death. *See Regina v. Instan* [1893] 1 Q.B. 450, 1891-94 All E.R. 1213, discussed *supra* notes 45-50 and accompanying text. Yet neither of these expectations of preventive action are necessarily enforceable in contract or tort.

99. *See* J. HALL, *supra* note 4, at 196-97. *But see* G. WILLIAMS, *supra* note 4, at 4 (stating the traditional view that "[t]he law relating to omissions is not co-extensive with law relating to acts"); G. FLETCHER, *supra* note 1, at 585-606 (similarly arguing for distinguishing between acts and omissions, characterizing liability for the former as "direct" and for the latter as "derivative").

prevent a particular harm can be said to cause that harm. Other omitters, however culpable from a moral standpoint, are merely observers, not causers, of the harm.

The drowning child hypothetical is illustrative. Assume that the three other individuals who do not save the child's life are *B*, the child's parent; *C*, the child's baby-sitter; and *D*, a stranger who happened by as the child fell into the water. *B* and *C* certainly are expected to protect the child from harm. The failure of each to try to save the child thus violates that expectation or duty, and we naturally perceive these omissions as causes of the child's death, without regard to whether that duty is legal or not.

D's failure to try to save the child, on the other hand, is far more problematic. While we may agree that even a bystander is morally obligated to try to save the child, most of us would probably not think of *D* as having caused the child's death, at least in the sense that along with *A*, *B*, and *C* he is a proper subject for homicide liability. The explanation for this conclusion perhaps lies in the notions of individual freedom and autonomy that pervade our society. These notions suggest an atomistic approach to life where, absent a special relationship, each person is responsible for his own welfare, and thus a person's decision to "mind his own business," cannot be said to affect the welfare of others.¹⁰⁰

Of course, what society sees as "minding one's own business," and thereby avoiding liability for another's harm, is plaiully subject to change.

100. This tradition of individualism obviously informed Lord Macaulay's restrictive approach to omission liability in his Indian Penal Code proposals of a century ago. "We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation." T. MACAULAY, *supra* note 12, at 160. Moreover, despite what are perhaps overly optimistic views (at least from the moralist's perspective) to the contrary, *cf.* Hughes, *supra* note 4, at 625-26 ("[A] view of moral responsibility is surely outmoded which imposes liability on the father who does not warn his child of the precipice before him, but not on a stranger who neglects to warn the child . . ."), this emphasis on the individual appears to persist through the present. *See* J. HALL, *supra* note 4, at 210-11; Wechsler & Michael, *supra* note 71, at 725 & nn.105-06.

The continued vibrance of individual autonomy and freedom to act, even in ways concededly immoral, seems more than just an embarrassing relic of an outmoded laissez-faire tradition. *See* Frankel, *supra* note 4, at 378-84. While capable of overextension, this emphasis on the individual reflects an important counterbalance in our society to the often overpowering urge to prevent harm. Suggesting that causal judgments should be more than a mere reflection of moral intuition, Professors Hart and Honorè stated:

Always to follow the private moral judgment here would be far too expensive for the law: not only in the crude sense that it would entail a vast machinery of courts and officials, but in the more important sense that it would inhibit or discourage too many other valuable activities of society. To limit the *types* of harm which the law will recognize is not enough; even if the types of harm are limited it would still be too much for any society to punish or exact compensation from individuals whenever their connection with harm of such types would justify moral censure.

H.L.A. HART & T. HONORÈ, *supra* note 56, at 66-67 (emphasis in original).

There may have been a time, for example, when operating a manufacturing enterprise in a manner dangerous to one's employees was "one's own business," beyond the reach of criminal law.¹⁰¹ Today such manufacturers can usually be reached by criminal sanctions.¹⁰² Similarly, some day it may be that *D*, the bystander, will not be able to stand by with impunity and watch the child drown. But the fact that shifting value judgments form the basis for punishing the causation of harm, does not invalidate the application of criminal sanctions. The issue is not whether we may ever base punishment on impermanent value judgments, but whether at a given time a particular value is so well understood and accepted as a basis for punishment that we may fairly impose criminal liability on those who fail to act accordingly. Put in the context of criminal omissions, the question becomes: will basing criminal liability on commonsense notions of causation give fair warning that certain conduct is criminal?

C. *The Fair Warning Question*

The requirement of fair warning generally mandates: (1) that the State identify conduct that it deems criminal prior to enforcement; and (2) that criminal prohibitions be sufficiently clear that persons of com-

101. As pointed out by Professor Frankel, 19th century prosecutions for deaths resulting from industrial accidents looked to particular individuals, not the enterprise generally, in meting out judgments of responsibility. The defendants typically were those employees with direct supervisory responsibility over the aspect of the enterprise that went awry, not the owners of the operation. See Frankel, *supra* note 4, at 381 & n.45. Frankel views this as a policy decision to limit the scope of the law of manslaughter in order to protect the owners of such enterprises and encourage commercial and industrial endeavors. *Id.*; see also Horwitz, *supra* note 60, at 211 (noting that the abandonment of the early doctrine of "objective causation" permitted courts to assign causal responsibility based on what they considered a fair distribution of risk).

Notwithstanding this policy argument, it seems plausible that the unwillingness to proceed criminally against the owners was also a manifestation of the then-prevalent notion of causation. Typically, the voluntary human act most temporally and physically proximate to the ultimate harm was conceptualized as superseding all prior causal forces. See, e.g., 3 J.F. STEPHEN, *supra* note 3, at 8. This usually meant the act of the employee. Although 19th century theorists recognized that policy ideals could limit the scope of homicide liability, *id.* (recognizing the rule that potential homicide liability expires a year and a day after the act as such a policy limit), they emphasized that "killing," within the homicide proscription, meant "causing death directly." *Id.* at 3.

102. See Comment, *Corporations Can Kill Too: After Film Recovery, Are Individuals Accountable for Corporate Crimes?*, 19 LOY. L.A.L. REV. 1411 (1986) (collecting cases of homicide prosecutions of corporations and their officers for harms resulting from negligent operations); see also Note, *The Application of Criminal Homicide Statutes to Work-Related Deaths: Mens Rea and Deterrence*, 1986 U. ILL. L. REV. 969, 977-99 (arguing that application of homicide liability, assuming the requisite *mens rea*, will deter employers from maintaining dangerous workplace conditions). Nevertheless, examples of the old reticence remain, as exemplified by the New York Court of Appeals opinion in *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 303-04 & n.1, 414 N.E.2d 660, 664 & n.1, 434 N.Y.S.2d 159, 163 & n.1 (1980) (suggesting, but finding it unnecessary to decide, that New York's manslaughter statute should not be construed to apply to manufacturing operations), *cert. denied*, 450 U.S. 1031 (1981).

mon understanding can know what conduct they must avoid.¹⁰³ The fair warning requirement protects against unduly vague (and hence potentially distortable) criminal statutes and, similarly, forbids courts from applying facially clear criminal statutes to conduct not fairly within the ambit of those statutes.¹⁰⁴ Professor Packer has called this statutory construction aspect of fair warning "a junior version of the vagueness doctrine."¹⁰⁵

Criminal omission analysis raises the statutory construction aspect of fair warning. When a court decides that a defendant omitter is criminally liable for a particular harm, it is in effect applying the statutory prohibition against causing that harm to a past omission. This necessarily retrospective identification of an omission as the cause of a harm requires that the criteria by which causation is established—societal expectations of preventive conduct—be sufficiently clear and predictable to give fair warning.

Fair warning, of course, does not require absolute certainty. Indeed, the law has long relied on imprecise value judgments when setting liability limits in manslaughter and negligent homicide cases.¹⁰⁶ Assuming causation is established, the laws proscribing these unintentional forms of

103. For cases discussing the fair warning requirement, see, for example, *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Parker v. Levy*, 417 U.S. 733, 774-75 (1974) (Stewart, J., dissenting); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926). As these cases indicate, the requirement of statutory clarity generally has been analyzed under the vagueness doctrine.

104. See G. WILLIAMS, *supra* note 4, at 586. As Dr. Williams points out, fair warning principles do not require that courts read criminal statutes as restrictively as possible, but only that the terms be given a reasonably sensible construction consistent with their purposes. *Id.* at 588-89.

105. H. PACKER, *supra* note 65, at 95. In a well-known example, *McBoyle v. United States*, 283 U.S. 25 (1931), the Supreme Court reviewed a conviction for interstate transportation of a stolen motor vehicle. The motor vehicle in question was an airplane, and defendant argued that the statutory term "vehicle" did not fairly include an aircraft. Justice Holmes, writing for the Court, agreed:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27.

Some courts have held that a strict construction of criminal statutes is required not only to satisfy fair warning, but also to avoid judicial encroachment on the legislative power to define crimes. See, e.g., *Keeler v. Superior Court*, 2 Cal. 3d 619, 631-33, 470 P.2d 617, 624-26, 87 Cal. Rptr. 481, 488-90 (1970). This concern, however, is virtually irrelevant in the context of construing statutes that are not unacceptably vague on their faces. After all, the legislature in such cases has defined a crime with a fair degree of precision—in *McBoyle*, the interstate transportation of stolen motor vehicles. If courts interpret the legislative proscription within the common understanding to include a particular kind of conduct, the legislative mandate and the requirement of sufficient legislative crime definition are satisfied. See G. WILLIAMS, *supra* note 4, at 586-90; see also H. PACKER, *supra* note 65, at 94-95.

106. See 4 W. BLACKSTONE, *supra* note 1, at *191-93; 1 E. EAST, *supra* note 3, at 262; 1 M. HALE, *supra* note 3, at 472; see also Kirchheimer, *supra* note 4, at 638 ("there exists a boundary line between civil and criminal negligence which has to be redetermined by each new jury"); cf. Weschler

homicide define criminal conduct solely on the basis of the actor's culpability.¹⁰⁷ The specific formulation of these culpability judgments may vary, from the time-tested formulation of East—"whether common social duty would, under the circumstances, have suggested a more circumspect conduct"¹⁰⁸—to the more rigorous and formalistic assessment of justification and risk incorporated in the Model Penal Code.¹⁰⁹ In each formulation, the distinction between lawful conduct and some form of culpable homicide depends on how society balances the value of protecting life with the value of promoting useful activity and individual freedom of action. In the words of the commentators to the Code: "There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned."¹¹⁰

This kind of raw value judgment, as difficult as any particular one might be to predict, has always provided an acceptably clear standard of criminal liability.¹¹¹ So long as there is a common understanding within society as to the bounds of particular criminal liability, the criteria of that liability need not be perfectly precise in order to satisfy the requirement of fair warning (at least where a more precise formulation is not possible).¹¹²

As the preceding discussion suggests, principles of fairness are satisfied by the relatively open-ended value balance that defines homicide liability. By implication, then, the more narrowly focused value judgments inherent in our analysis of omission liability should not offend fair-warn-

& Michael, *supra* note 71, at 751 n.175 (noting the similarity between the vagueness that attends punishing omissions and the vagueness in criminal liability for negligence).

107. See, e.g., CAL. PENAL CODE § 192 (West Supp. 1988); N.Y. PENAL LAW §§ 125.10-20 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 2504 (Purdon 1983); WASH. REV. CODE ANN. § 9A.16.030 (1987).

108. 1 E. EAST, *supra* note 3, at 262; see 1 M. HALE, *supra* note 3, at 471-77; see also O.W. HOLMES, THE COMMON LAW 56-57 (1881) ("the test of murder is the degree of danger to life attending the act under the known circumstances").

109. MODEL PENAL CODE § 210.4 comment 3 (Official Draft & Revised Comments 1980), § 2.02 comments 3, 4 (Official Draft & Revised Comments 1985). In determining culpability, the Code explicitly requires assessment, from the actor's perspective, of the likelihood that his or her conduct will cause another's death. The Code then requires the factfinder to determine whether, given that risk of death, the actor was nevertheless justified in proceeding with the conduct in question. See *id.* § 2.02(2)(c), (d) ("recklessly" and "negligently" defined). The jury thus must decide whether the defendant created such a substantial and unjustifiable risk of death that, given the nature and purpose of his or her conduct and the circumstances in which that conduct occurred, the defendant's act was a gross deviation from law-abiding or reasonable conduct. *Id.* For a summary of statutory and common law approaches to defining manslaughter and negligent homicide, see *id.* §§ 210.3-4 comments 1, 2 (Official Draft & Revised Comments 1980).

110. *Id.* § 2.02 comment 3 (Official Draft & Revised Comments 1985).

111. See sources cited *supra* note 106.

112. See, e.g., United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (requiring "sufficiently definite warning" measured by "common understanding and practices").

ing principles. The value judgment called for in the omission inquiry is relatively specific: whether or not, in particular circumstances, particular persons are so commonly expected to take protective action that their failure to do so makes them causally responsible for ensuing harms. In order to satisfy the warning requirement, society's recognition of causal responsibility must be so widespread that it is fair to charge the actor with a post hoc awareness and appreciation of that expectation. Thus, the fair warning requirement mandates that we draw a causal link between certain omissions and proscribed harms only when this causation judgment is one that the "common mind" accepts.¹¹³

If courts adhere to the commonsense causation analysis developed above, then by definition the fair-warning problem would disappear. At any one time, there is a sufficiently definite understanding in the community, the "common" understanding, concerning how people are expected to act. When a person's conduct violates these community norms, he or she is fairly on notice of that violation, and thus criminal judgments based on these norms do not offend the principles of fair warning.¹¹⁴

Commentators have objected that omissions cases inherently raise unique problems of notice; at least one commentator has even argued that omissions should never be punished absent actual knowledge of the duty.¹¹⁵ These objections are miscast. Merely because an omittor does

113. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931); see also *supra* notes 104-05 and accompanying text. Of course, to the extent that the expectation of preventive conduct has coalesced into a formal duty under external law, notice is more easily imputed. See Frankel, *supra* note 4, at 397.

114. See *Nash v. United States*, 229 U.S. 373 (1913) (upholding against a vagueness challenge the criminal provisions of the Sherman Act). In addressing the defendants' contention that punishing "unreasonable" restraints on trade ran afoul of the fair warning requirement, Justice Holmes, speaking for the Court in *Nash*, wrote:

[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw."

Id. at 377 (quoting *Commonwealth v. Pierce*, 138 Mass 165, 178 (1884)).

"The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. If he did no more than drive negligently through a street he might get off with manslaughter or less. And in the last case he might be held although he himself thought that he was acting as a prudent man should.

Id. (quoting 1 E. EAST, *supra* note 3, at 262) (citations omitted)).

Of course, if the legislature itself creates a duty in particular circumstances to save another person, see, e.g., VT. STAT. ANN. tit. 12, § 519 (1973) (quoted in full *supra* note 12), the fair notice problem almost certainly disappears. But see *Lambert v. California*, 355 U.S. 225 (1957) (municipal ordinance violates fair warning requirement); see also *infra* note 117.

115. See, e.g., Hughes, *supra* note 4, at 601-02.

not act affirmatively does not mean he lacks notice that his conduct is criminal. For example, we would not say that the idle baby-sitter in the drowning child hypothetical should escape prosecution merely because, as a passive actor, he could have no idea that such conduct was criminal. Rather, the problem of notice with respect to omissions derives from the apparent distance of the ommitter from harm in question. The ommitter, standing physically apart, does not seem to be doing anything connected to the harm. But we characterize someone as a harm-causing ommitter, not because of the physical connection found in the traditional cause and effect paradigm, but because of an expectation of preventive conduct by that ommitter wherever he or she physically may be.¹¹⁶ When such an expectation is widely recognized, a court's determination that the failure to act caused the result raises no fair-warning problem.

The less widely accepted the expectation is, of course, the more problematic notice becomes—the more unsure we are that it is fair to hold the ommitter causally responsible.¹¹⁷ But this is no different from affirmative acts. There plainly are limits to all causal attribution beyond which, as a matter of law, a jury is not permitted to go.¹¹⁸ In short, both acts and omissions, if held criminal, are no more than patterns of con-

116. See *supra* notes 93-96 and accompanying text.

117. Fair notice is always a potential problem when a criminal prohibition, even a clear one, is applied to conduct not on its face plainly criminal. In *Lambert v. California*, 355 U.S. 225 (1957), the Supreme Court invalidated as violative of due process a Los Angeles ordinance requiring convicted felons to register with the police within five days of entering the city. The defendant, who was new to Los Angeles, knew nothing of the ordinance and failed to comply. Justice Douglas, writing for the Court, observed that, unlike most registration statutes or ordinances, violation of this ordinance required only one's presence in the city, unaccompanied by any other activity. He reasoned that since there was nothing about "mere presence" that in normal circumstances would move someone to inquire as to such a statutory requirement, it was fundamentally unfair to punish for its violation unless it was a knowing violation. *Id.* at 229-30. Although Douglas focused on the defendant's lack of activity—a fact that Justice Frankfurter attacked, arguing that the Court was creating a constitutional difference between misfeasance and nonfeasance, *id.* at 231 (Frankfurter, J., dissenting)—the thrust of Douglas' point was not that the defendant was inactive during her stay in Los Angeles, but that she had engaged in no conduct fairly connected with any need to check in with the police. She was quintessentially "minding her own business," and the fact that the city's ordinance book had two or three lines of type saying she should register with the police did not fairly warn her of her duty.

Although *Lambert* was a constitutional decision—perhaps because there was no other basis on which the Court could review—similar notice analysis has been utilized to decide whether regulatory statutes require the defendant's knowledge of the regulation as an element of its violation. Compare *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) with *Liparota v. United States*, 471 U.S. 419, 426-27, 430 (1985).

118. As developed above, proximate cause analysis sets these limits. See *supra* notes 57-58, 80 and accompanying text. To the extent that foreseeability of the harm operates as a limit on causation, see *supra* note 71, the question of how far causal attribution should be extended seems related to, if not explicitly, a problem of notice. See O. W. HOLMES, *supra* note 108, at 55:

All foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known.

duct to which criminal harms have been causally attributed. So long as the common understanding of cause and effect is fairly reflected in such attribution, the requirement of fair warning is satisfied as to either.

III

AN INTEGRATED APPROACH TO OMISSIONS

As developed above, the proper way to analyze criminal omissions is to examine whether the actor's conduct, given the circumstances in which it occurred, can fairly be said to have caused the proscribed harm. This formulation derives from the nature of the criminal proscription, which punishes the causing of particular harms. The simplicity of this analysis, however, has been obscured by the doctrinal insistence that criminal law draw ultimately unhelpful distinctions between active and "omissive" conduct. The act/omission distinction requires identifying a duty to perform the omitted acts in order to forge an intelligible causal link between the so-called omission and the criminal result. This duty in turn must be of determinate origin to maintain predictability and thus provide fair warning. As we have seen, the doctrinal response to the fair warning issue has been that the duty must be a "legal duty," without a great deal of attention to the meaning, if any, of that term.

The doctrinal analysis is at best unnecessary, for its conceptual foundation—the notion that there is a distinction between acts and omissions—is inherently flawed. However labeled, the criminal law ultimately proscribes and punishes conduct. Conduct causally attributed to a particular harm is characterized as an omission only because too little of the actor's conduct has been analyzed. If the inquiry focuses solely on the conduct that immediately precedes the harm, certainly that conduct often will appear passive or omissive with respect to the harm. There is, however, no sound reason to limit the notion of causality to conduct that is temporally and physically proximate to the harm.¹¹⁹

Even in conventional "acts," the last few actions of the actor do not necessarily constitute the entire course of conduct relevant to the analysis of causation. If the driver of an automobile suffered an epileptic seizure and lost control of her vehicle, consequently striking and killing a pedestrian, she might argue that, because she was unconscious at the moment she hit the victim, she engaged in no voluntary act that caused the harm.¹²⁰ If we focus our conduct inquiry exclusively on her driving at

119. The tendency, in assessing causal responsibility, to look only to the actor's last few actions is probably attributable to the central role that the physical cause and effect paradigm plays in our notions of causation. In this paradigm, it is typically the last few actions that cause the change in the status quo. *See, e.g.*, 3 J.F. STEPHEN, *supra* note 3, at 3 ("[k]illing may be defined as causing death directly, distinctly, and not too remotely").

120. Such cases have arisen. *See, e.g.*, *Tift v. State*, 17 Ga. App. 663, 88 S.E. 41 (1916); *State v.*

the time the pedestrian died, her claim appears tenable. In seeking to determine the cause of the pedestrian's death, however, the relevant course of conduct is plainly the driver's entire operation of the vehicle, not just her last few unconscious moments. From this broader perspective, the fact that she began to drive, knowing of her epilepsy, is every bit as much the cause of death as would be the actions of an alert but reckless driver who misjudged his ability to negotiate a turn, thereby striking and killing the pedestrian.¹²¹ In this case, or any case, we simply cannot properly evaluate the actor's causal responsibility without examining all of the conduct relevant to the harm.

By analyzing cases in terms of omissions, traditional doctrine artificially narrows the definition of conduct to that which immediately precedes the harm. If instead we examine the entire course of conduct relevant to a harm, we can avoid the confusion that often arises in "omissions" analysis. Take, for example, *Barber v. Superior Court*,¹²² discussed earlier in this Article.¹²³ Recall that in *Barber* the defendant doctors had discontinued intravenous feeding and hydration, thereby allowing their comatose patient to die. In applying conventional omissions analysis, the court focused solely on the last thing the doctors did, that is, the removal of the patient's nutrition and hydration tubes, as the relevant conduct.¹²⁴ The court then had to decide whether that conduct was an "act" or an "omission." If it was an "act," the doctors would be guilty of murder, for by that "act" they had intentionally killed their patient without legal justification.¹²⁵ Only by characterizing the doctors' conduct as an "omission" could the court avoid this automatic result and become free to engage in a more contextual analysis of the doctors' homicide liability. Analogizing to the provision of "heroic" life support," the court decided that the conduct was an omission.¹²⁶ This conclusion required the court then to face the question of duty. The doctors were certainly under a duty to treat their patient according to professional standards of care, and this duty was "legal."¹²⁷ The difficult issue for the

Gooze, 14 N.J. Super 277, 81 A.2d 811 (App. Div. 1951); *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956).

121. The courts in *Tift*, *Gooze*, and *Decina* all attributed causal responsibility and decided the cases along similar lines. See *Tift*, 17 Ga. App. at 664, 88 S.E. at 41; *Gooze*, 14 N.J. Super. at 285-87, 81 A.2d at 815-16; *Decina*, 2 N.Y.2d at 139-40, 138 N.E.2d at 803-04 157 N.Y.S. 2d at 564-66.

122. 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).

123. See *supra* notes 5-9 and accompanying text.

124. *Id.* 147 Cal. App. 3d at 1012-16, 195 Cal. Rptr. at 487-90.

125. *Id.* at 1012, 195 Cal. Rptr. at 487.

126. *Id.* at 1016, 195 Cal. Rptr. at 490. If it seems awkward to characterize the act of turning off a switch or pulling out a tube as an "omission," that discomfort reflects the artificiality of the omission approach to causal attribution. The doctor was plainly engaged in a course of conduct *vis-à-vis* the patient, the last act of which was the removal of the tubes.

127. *Id.* at 1017, 195 Cal. Rptr. at 490.

court was whether the doctors' denial of nutrition and hydration to this patient five days after he became comatose violated that "legal duty." To decide that the doctors did not violate their duty to treat their patient properly, and thus that they did not murder him, the court held: (1) that providing nutrition and hydration to the patient constituted "medical treatment;"¹²⁸ (2) that the doctors' duty to provide medical treatment did not encompass ineffective or futile treatment,¹²⁹ and (3) that provision of nutrition and hydration to this patient in these circumstances was futile or ineffective.¹³⁰

This traditional approach to determining criminal liability in *Barber* is plainly flawed. By fragmenting causation analysis into separate questions of "acts," "omissions," and "legal duty," the conventional approach makes the doctors' homicide liability turn on such superficial distinctions as whether pulling out a tube is an "act" or an "omission" and whether intravenous feeding is a "medical procedure" (and thus treatment) or a "typical human way [] of providing nutrition" (and thus feeding, which the doctors as caretakers would have had a duty to perform).¹³¹ If courts force the liability analysis into these discrete categories, which are only tangentially connected to the underlying criminal prohibition against causing harm, they risk allowing the analysis to stray from its purpose—assessing the causal connection between the actor's conduct and the particular harm.¹³² Worse still, fragmenting the liability issue permits a court, bent on a particular outcome, to truncate the rele-

128. *Id.* at 1016-17, 195 Cal. Rptr. at 490. The basis for this conclusion was that intravenous feeding seems more like a medical procedure than like "typical human ways of providing nutrition and hydration." *Id.* This classification of feeding as treatment is, in one sense, the linchpin of the decision. If the doctors failed to feed—as opposed to failed to treat—their patient, it is far more difficult to hold that they as caretakers had not violated a "legal duty" to their patient. See, e.g., cases discussed *supra* notes 36-37 and accompanying text.

129. 147 Cal. App. 3d at 1017-18, 195 Cal. Rptr. at 491.

130. *Id.* at 1018-22, 195 Cal. Rptr. at 491-93.

131. *Id.* at 1016-17, 195 Cal. Rptr. at 490.

132. The famous *Beardsley* case is an example of how a court's overly rigid dependence on the external legal duty doctrine caused a skewed result. *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907); see also *supra* note 50. In *Beardsley*, the Michigan Supreme Court reversed a manslaughter conviction for failure to seek medical aid for a weekend guest who had consumed too much alcohol and drugs. The court held that the defendant was under no legal duty to render the guest any assistance. In reaching this conclusion, the court examined the two external legal doctrines that could give rise in such circumstances to a legal duty—husband/wife and assumption of care of one who is helpless—and concluded that neither applied. *Id.* at 210-15, 113 N.W. at 1130-31.

Strictly speaking, the *Beardsley* court may have been correct that defendant was not under any civilly enforceable duty to render aid. But if we examine all of defendant's conduct with respect to his guest over that weekend—inviting her to his home to consume a substantial amount of alcohol, failing to summon medical assistance when she collapsed, and then shifting her to another apartment to avoid detection—there is ample room to conclude that his conduct caused her death. It seems absurd that a jury should be foreclosed as a matter of law from so deciding, but that is in effect what the court held.

vant time period in order to reach a result that would be far less defensible if viewed from the overall perspective of the actor's causal liability for a particular harm.¹³³ Courts can avoid such distortion if, without reference to acts, omissions, or duties, they simply ask the broader question of whether the actor caused—as that word is intended to be used in the criminal statute—the particular proscribed harm.

In *Barber*, if we look only at the doctors' act of removing the intravenous tubes, it is difficult to distinguish the doctors from a hypothetical intruder who pulled out the tubes. The doctors and the intruder, however, clearly are different; the doctors acted within a sophisticated treatment context. Thus, a proper assessment of the doctors' causal responsibility must go beyond the simple act of removing the tubes and focus on the full treatment rendered, including all of the circumstances in which that treatment was sought and given, not just on the doctors' last few actions.

The proper question in a case such as *Barber* is: was the patient's death caused by his coma-inducing heart attack, thereby making the doctors' post-operative conduct (including the decision to stop feeding) causally irrelevant to the patient's inevitable death? Or, alternatively, did the doctors' act of discontinuing nutrition so alter the patient's status quo that it caused his death?¹³⁴ From the broader perspectives of ethics, morals, or philosophy, these questions, as well as the underlying issue of how to deal with permanently comatose persons, concededly are not easy. Nevertheless, in the narrower context of applying California's homicide prohibition, the answers seem less difficult. Since the patient in *Barber*, even in his comatose state, was by California law alive and in no imminent danger of death when the doctors cut off his nutrition and hydration,¹³⁵ it is difficult to avoid concluding that the doctors caused his death. Given that euthanasia is not legally justified in California,¹³⁶ such intentional conduct seems unavoidably to constitute criminal

133. Arguably, this is exactly what the California Court of Appeal did in *Barber*. See discussion *supra* notes 129-31 and accompanying text.

134. It is important to keep the causation issue separate from the issues of *mens rea* and justification. If the doctors' conduct was not legally a cause of death, these latter issues are irrelevant. Only if the doctors' acts are seen as causally connected to the patient's death is it necessary to examine the further issue of (1) whether through treatment the doctors negligently, recklessly, or purposely caused the death, and if so (2) whether they were nevertheless justified in that course of action.

135. *Barber*, 147 Cal. App. 3d at 1013, 195 Cal. Rptr. at 488. At the time the patient died, California by statute defined death as "a total and irreversible cessation of brain function." Act of Sept. 27, 1974 ch. 1524, § 1, 1982 Cal Stat. 3430, *repealed by* Act of Sept. 7, 1982, ch. 810, § 1, 1982 Cal. Stat. 3098, 3098. The current version defines death as "irreversible cessation of all functions of the entire brain." CAL HEALTH & SAFETY CODE § 7180 (West Supp. 1988). With minimal brain function, the patient faced, in the words of the court, "an indefinite vegetative existence." *Barber*, 147 Cal. App. 3d at 1013, 195 Cal. Rptr. at 488.

136. *Barber*, 147 Cal. App. 3d at 1012, 195 Cal. Rptr. at 487.

homicide.¹³⁷

If the result in *Barber* derived from our analysis appears unduly harsh or unfair, that is not the fault of causal analysis. Indeed, it is only through such a particularized and unified analysis of the doctors' behavior that we can be sure of fairly gauging the doctors' causal responsibility for ending that comatose life. Rather, if we are troubled, our quarrel is with the underlying legislative judgments that a permanently comatose patient is "alive" within the meaning of the laws and that ending such a life is criminally prohibited by those laws. Any modification of these fundamental judgments ought to be made by the representative legislature and not by a court under the cover of "legal duty" analysis.

The proposed approach to defining relevant criminal conduct—examining an actor's course of conduct rather than a single discrete act—is hardly novel. Courts have long used this analysis in negligent homicide or manslaughter cases.¹³⁸ Defendants in these cases seem chargeable with causing death either by failing to engage in preventive or precautionary conduct or by acting recklessly or negligently. It is merely a question of characterization; the underlying conduct is the same either way.

For example, in *Commonwealth v. Welansky*,¹³⁹ the owner/operator of Boston's Coconut Grove night club was convicted of several counts of manslaughter after nearly 500 persons perished in a fire in his club. The conviction rested mainly on the owner's failure to provide adequate fire escapes, considering the extremely crowded conditions in the club.¹⁴⁰ Most of the manslaughter counts were predicated on the theory that the defendant recklessly disregarded his duty of care to his patrons. A few counts, however, proceeded on an affirmative act theory that defendant "assault[ed] and beat" certain victims (by inviting them onto the premises and subjecting them to fire), thus killing them "by wilfully, wantonly and recklessly maintaining, managing, operating and supervising the said premises."¹⁴¹ Defendant was convicted of counts based on both theories.

137. See CAL. PENAL CODE § 187 (West Supp. 1988) ("[m]urder is the unlawful killing of a human being . . . with malice aforethought"). In the face of this unambiguous statutory prohibition, it is troubling for the court to claim lack of legislative guidance and then to create a judicial exception to murder.

138. See, e.g., *People v. Long*, 15 Cal. 2d 590, 103 P.2d 969 (rendering medical care), *cert. denied*, 311 U.S. 698 (1940); *State v. Gooze*, 14 N.J. Super. 277, 81 A.2d 811 (1951) (operating an automobile); *People v. Cleinente*, 146 A.D. 109, 130 N.Y.S. 612 (1911) (conducting blasting operations), *aff'd*, *King v. Bissell*, 207 N.Y. 602, 101 N.E. 1107 (1913); *State v. Green*, 38 Wash. 2d 240, 229 P.2d 318 (1951) (hunting); see also *supra* note 102 and accompanying text (noting the possible addition of manufacturing operations to this list).

139. 316 Mass. 383, 55 N.E.2d 902 (1944).

140. *Id.* at 387-93, 55 N.E.2d at 905-07.

141. *Id.* at 395, 55 N.E.2d at 908. The prosecution also proceeded with respect to other counts on a straight misdemeanor manslaughter theory, alleging simply that the defendant assaulted and beat particular victims and that the victims thus died. *Id.* The different approaches cannot be

In reviewing defendant's challenge to the sufficiency of the charges and their supporting evidence, the Massachusetts Supreme Judicial Court did not treat the "act" and "omission" counts separately. Instead, the court analyzed the defendant's liability by examining the owner's entire course of conduct with respect to the victims. Whether defendant's activities were characterized as a failure to engage in expected preventive conduct, or as a series of affirmative acts in maintaining his building, the defendant's causal responsibility for the deaths of his patrons derived directly from his conduct with respect to the persons who entered his club. The court thus upheld all of the convictions based on the "wanton or reckless" way in which the building was maintained and the club operated.¹⁴²

One may argue that the *Welansky* court's analysis is appropriate for instances in which the actor has engaged in specific and identifiable "affirmative" conduct, such as rendering medical treatment or operating a nightclub. This would suggest that our analysis applies only to conduct that in the end may not be truly omissive, but that all other "true" omissions should not be analyzed in these terms.¹⁴³ An examination of other kinds of omissions, however, demonstrates that they too are more properly analyzed under this broader "course of conduct" perspective.

The liability of *B* and *C* in the drowning child hypothetical also derives solely from the course of conduct of each with respect to the child. Since *C*, the baby-sitter, has agreed to accept a particular responsibility for the child's welfare, it is appropriate to measure his criminal liability for allowing the child to die in the context of the baby-sitting activity.¹⁴⁴ Indeed, the relationship between the parents, the baby-sitter, and the child clearly imposes an expected course of conduct on the baby-

explained by a difference in defendant's conduct with respect to particular victims; it seems rather that the prosecutor wanted to be sure that some manslaughter theory would hold up, and so he proceeded not only on a conventional omissions theory but also on a wanton reckless act theory (calling the act an assault), see Brief for Plaintiff at 36-37, *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944), and on a misdemeanor manslaughter theory.

142. *Welansky*, 316 Mass. at 401, 55 N.E.2d at 912.

143. Professor Fletcher argues that there is a sharp distinction between causing harm through affirmative acts (the liability for which he characterizes as "direct") and letting harm occur by failing to intervene (the liability for which he calls "derivative"). G. FLETCHER, *supra* note 1, at 581-634. He concedes, however, that at least some cases involving apparent failures to take action, such as *Welansky*, can be treated as cases of affirmative risk creation. *Id.* at 621 n.30. He further acknowledges that liability for "core" failures such as parents failing to feed their children are more "direct" than "derivative." *Id.* at 596, 601.

144. Of course, if the baby-sitting agreement remains wholly executory—the baby-sitter not actually assuming responsibility from the child's parent notwithstanding his agreement—then it is not appropriate to hold the baby-sitter criminally liable for the child's death, even if proper performance would have prevented it. For example, if the parent hired the baby-sitter to meet him at poolside, but the baby-sitter did not arrive as agreed, the baby-sitter could hardly be saddled with homicide liability if the parent went on his way and the child fell into the pool and drowned. While the sitter may have been delinquent in discharging his contractual responsibilities, he simply cannot

sitter. This expectation, by the parents and by society, imposes liability when there is a faulty¹⁴⁵ discharge of that assumed obligation. Thus, *C*'s liability arises from his conduct while baby-sitting, not his legal duty as a baby-sitter, and ought so to be analyzed.

Similarly, the liability of *B*, the child's father, results from how he conducted his parenting. His election to stand by while his daughter drowned seems just as much a cause of her death as would his pushing the child into the pool in the first place. This result derives from the socially pervasive expectation that being a parent means acting to save one's child. If the idea that parenting is a discrete course of conduct which may be an appropriate basis for criminal liability seems odd,¹⁴⁶ consider the case of *Palmer v. State*.¹⁴⁷ In *Palmer*, the Maryland Court of Appeals affirmed a mother's manslaughter conviction where she permitted her lover to beat her child to death. The court noted the mother's duty to care for and protect her child,¹⁴⁸ but it did not analyze her criminal liability for the child's death by focusing on that duty and then examining whether she failed to perform the required acts. Rather, the court looked to the whole of her parental conduct under the circumstances, conduct it saw as generally limned by an "affirmative" obligation of care.¹⁴⁹ Accordingly, the court held that the defendant's "conduct and actions, . . . compelling this poor little defenseless urchin to remain in an environment where she was subjected to merciless, inhumane and inordinate brutality . . . displayed 'a wanton or reckless disregard for human life.'"¹⁵⁰

Of course, not every ommitter has engaged in a course of conduct relevant to an ensuing harm. A prime example is *D* in the drowning child hypothetical, or Mrs. Pope in the case where the woman watched a mother kill her child.¹⁵¹ It is difficult to see the conduct of either, vis-a-vis the respective child victims, as anything more harm-connected than bystanding. This is because we cannot say that society so expects the bystander in such circumstances to prevent the child's death that the

be said as a matter of common sense to have thereby caused the child's death. See G. FLETCHER, *supra* note 1, at 615-16.

145. "Fault" is used here in the causal sense, that is, as an interruption of normality represented by the contractually based expectation of preventive conduct. See *supra* notes 95-96 and accompanying text.

146. See, e.g., G. FLETCHER, *supra* note 1, at 586-87. While Professor Fletcher sees a difference between a parent's failure to provide proper care and affirmative risk creation, he nevertheless concedes that the negligent parent's liability for resulting harm to his or her child is indistinguishable from that of "affirmative" actors who cause harm. *Id.* at 596, 601.

147. 223 Md. 341, 164 A.2d 467 (1960).

148. *Id.* at 343, 164 A.2d at 468.

149. *Id.* at 351-52, 164 A.2d at 473.

150. *Id.*

151. See *supra* notes 10-11 and accompanying text.

bystander's failure to do so "caused" the death. The lack of expected interaction between the parties prevents us from concluding that the bystander is causally responsible. However troubling from a moral perspective, both *D* and Mrs. Pope seem free to mind their own business. In our society, since bystanding, or mere presence, does not involve other persons and thus cannot have causal impact on others,¹⁵² we do not hold this type of ommitter criminally liable for preventable harms.

There is no precise formula in causal analysis for identifying what course of conduct is relevant to a harm. But that indeterminacy is unavoidable, as there is no set way to cause particular harms. It may be a single squeeze of a trigger;¹⁵³ it may be driving a car over several hours;¹⁵⁴ it may be operating a night club over several months or even years.¹⁵⁵ The only common element of these causal sequences is that when we examine all the defendant's conduct relevant to the harm in question, we fairly can say, by reference to common sense, that the particular series of acts caused the harm. Given the nature of the criminal prohibition, we can be no more determinate; given the causation analysis developed above, we need not be more determinate.

CONCLUSION

Criminal laws that prohibit individuals from causing certain harms forbid particular results, not particular conduct. There is no reason—and no legal basis—for excluding the failures to prevent harms from the law's ambit. While initially it may seem odd to speak of an omission as the cause of a harm, there surely are omissions, like the failure to feed one's child, that as a matter of common sense seem to have caused an ensuing harm such as death. We have thus long accepted criminal punishment of such omissions, but the limits of this criminal liability nevertheless remain murky.

Conventional doctrine, in apparent adherence to the tentative suggestions of Lord Macaulay over 100 years ago,¹⁵⁶ looks to a legal duty to act to determine which omissions are criminal. This approach is misguided. The apparent determinacy offered by the term "legal duty" is illusory, and the whole idea of using legal duty as a criterion for criminal-

152. See *supra* note 100 and accompanying text. Of course, to the extent that attitudes change and society does come to expect the bystander to rescue (at least where there is no reasonable risk or cost to the rescuer), then *D* and Mrs. Pope could fairly be charged with causal responsibility for the deaths that occurred as they stood by. See *supra* notes 100-02 and accompanying text.

153. See *supra* note 62 and accompanying text.

154. *E.g.*, *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 156 N.Y.S.2d 558 (1956), discussed *supra* notes 120-21 and accompanying text.

155. *E.g.*, *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944), discussed *supra* notes 139-43 and accompanying text.

156. See *supra* note 17.

ity risks reaching wrong results because that term has no conceptual link to the relevant criminal prohibition—the causation of particular harms.

Since we are punishing omitters for causing prohibited harms, the sensible way to clarify the limits of such criminality, and thereby to provide fair warning of which omissions are criminal, is by explicit reference to causation. To be sure, such a measure of criminality is imprecise. There are, however, commonly accepted notions of causation, related to the paradigm of cause and effect, that provide clear basis for determining which omissions caused a harm.

While it is possible to identify these omissions by using a conventional approach that distinguishes between acts and omissions and then relies on duties as criteria of criminality, this approach is subject to analytic distortion and incorrect results. The better approach is to eschew the doctrinal distinction between acts and omissions and instead simply inquire whether the actor's conduct caused the harm proscribed. That, after all, is the question.