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Criminal omissions - the conventional view

GLANVILLE WILLIAMS.*

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***L.Q.R. 86** THIS is a reply, by one who now discovers himself to be a conventionalist, to Professor Ashworth's piece "The Scope of Criminal Liability for Omissions."¹ Ashworth stages the debate as a conflict between two contrasting approaches to the subject of criminal omissions: one, the "conventional view" (which he seems to regard as selfish and callous), and an opposing (virtuous) approach dubbed the "social responsibility view." For several pages it is not clear whether Ashworth wears the halo of "social responsibility" unblemished, but it later transpires that he does. The opposing "conventional view," to which I would subscribe if it were presented with due moderation, is stated by Ashworth in terms of narrow nineteenth-century individualism, so that few people nowadays would wish to support it; but to present the argument in this way is merely shadow-boxing.

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

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

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

If there is no fundamental moral distinction between killing and letting die (in breach of duty), it is a fact that has been missed by members of the medical profession, who see a great difference between the two. Whereas killing your patient is absolutely taboo, according to the present law and official medical ethics, letting your ***L.Q.R. 87** patient die is qualifiedly permissible,

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

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

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

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

The case for the conventional view

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

Secondly, our attitudes to wrongful action and wrongful inaction differ. There may be instances where our blood boils at the same temperature on account of both, but these are very exceptional. The only likely instance that comes to my mind is that of parents who are charged with killing their baby (i) by smothering it or (ii) by starving it to death. In this instance we are likely to feel more angry and sad about the slow starvation (an omission) than about the comparatively ***L.Q.R. 88** merciful infliction of death with a pillow. But on other occasions we almost always perceive a moral distinction between (for example) killing a person and failing to save his life (the former being the worse); and similarly between other acts and corresponding omissions.

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

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

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

Fifthly, and perhaps most important of all, the law enforcement agencies (including the courts) have their work cut out to deal with people who offend by active conduct. The prisons, it is scarcely ***L.Q.R. 89** necessary to recall, are packed with them. To extend the campaign by attempting to punish all (or large groups of) those who contribute to the evil result by failing to co-operate in the great endeavour of producing a happier world would exceed the bounds of possibility.

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

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

ASHWORTH'S THREE PROPOSALS

In an endeavour to lock horns with my friend on the issues that divide us, I pass to the end of his article where he summarises his proposals for "three general duties on the basis of a 'social responsibility' approach to the criminal law--the duty to assist those in peril, the duty to take reasonable steps towards law enforcement, and the duty to ensure the health and welfare of one's children." As to the first, I would support a proposal to create a duty of "easy rescue," but would not give a blank cheque on the subject. Imprisonment as a means of enforcing the duty should be ruled out, because imprisonment creates great distress and is a poor way of trying to add to the sum of human happiness, unless the advantages of it are much clearer than they are in this instance. A purely moralistic approach, attempt ***L.Q.R. 90** ing to calibrate the degree of moral turpitude in omitting with the tragedy of the fatal result, as though the defendant had recklessly acted to cause the result instead of merely failing to prevent it, leads to the kind of judicial cruelty practised upon Mr Stone.² So my support would be given only on condition that the maximum penalty is a fine and/or community service, the preferred outcome being either a discharge with a warning or an order for some kind of education or training. And I doubt whether the proposal would rank high in the list of priorities for new criminal legislation. At the moment we should be thinking about what new legislation is needed if we are to have a satisfactory criminal code, and the creation of an offence of failing to make easy rescue would have little bearing on this.³

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

Ashworth's third proposal, a "duty to ensure the health and welfare of one's children," is present law, since neglect of the duty can found a charge of manslaughter or wilful neglect. But, as for manslaughter, decisions of the lords have given this crime such an intoler ***L.Q.R. 91** ably wide scope that a self-respecting prosecutor can hardly use it, except in the most glaring cases. (Ashworth agrees in dismissing it from consideration on the present issue.)

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

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

An appeal was taken, but only against sentence: no appeal was taken against conviction, presumably because it was thought to be hopeless; and the Court of Appeal did not invite counsel for the *L.Q.R. 92 appellant to add an appeal against the conviction (as it could have done). Yet in no intelligible sense of the word was the father's conduct "wilful." He obviously did not foresee what would happen, and there was absolutely no ground for inferring that he did not care whether the children were at risk or not. The conviction was, therefore, contrary to Sheppard.

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

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

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

*L.Q.R. 93 The working of the offence shows the Government's lack of wisdom in raising the maximum sentence to 10 years for an offence of neglect where there is no purpose to injure.⁶ Ministers continually bewail the rise in the prison population, yet raise maximum punishments for no better reason than to convince the general populace that they are trying to control crime. For serious cases of child cruelty the rise was unnecessary, because these cases could be more than adequately dealt with as ordinary offences against the person. For cases of child neglect by omission without intention to harm the new sentence is

pitched much too high. Moreover, it should be obvious that sending an incompetent parent to prison is far from being the best way of improving his standards, or of improving children's conditions of life. The public money spent on prosecuting (and defending) the lone parent in the hair drier case, and keeping him in jail, would have made a contribution to the funds available for helping single parents to grapple. But no one tries to make a cost-benefit analysis of the criminal process as compared with social help. Failing better knowledge of what we are doing, inadvertent negligence by an omission to take care, without foresight of the harmful result as a high probability, should never carry a custodial sentence, and, failing more enlightened legislation, the Court of Appeal should establish sentencing principles to make sure that it does not.

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

Summary



THE "SOCIAL RESPONSIBILITY" VIEW

Having opposed one of Ashworth's three favoured offences, and doubted the other two in the unrestricted form in which he states them, I turn now to the earlier remarks in which he formulates his general attitude, based, as he sees it, on "social responsibility." His ***L.Q.R. 94** most challenging proposition is that a statute that *prima facie* penalises only acts should be extended by judicial construction to omissions in breach of duty.

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

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

Ashworth appears to say that the question of omissions liability can arise only if a duty is first established. "Clearly there must be a duty in existence before it is proper even to speak of an omission" (at p. 434). This is not so. The opinion overlooks the fact that a statute imposing a penalty for an omission creates the duty to act at the same ***L.Q.R. 95** time as it penalises the omission. They are two sides of the same coin. Generally there is no difficulty in deciding who is under the duty to act, because he is specified in the penal statute in question. But there may sometimes (not always) be difficulty in deciding who is meant to be protected by the duty to act, and here the courts are on their own if the statute is silent. Ashworth discusses various possible heads of duty and classes of beneficiaries, but it would not be practical to enact that duties of positive action are owed only to people within the categories he discusses. Everything depends upon the particular duty. It might, for example, be possible to define "members of the same household" as beneficiaries of a duty to supply food and obtain medical assistance during illness, but this category of beneficiaries would be inapplicable to the duty to pay taxes or file accounts.

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

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

This passage appears to be dealing with a question of legislative policy, and in this context it is irrelevant and unhelpful to take a swipe at the linguistic argument. *Of course* the linguistic argument is inapplicable on a question of legislative policy. The linguistic argument comes into play after the legislation has been passed, and presupposes that the verb used by Parliament is an "active" one, primarily applying to positive acts. The linguistic argument is simply a statement of the principle that the normal function of the courts is to apply penal legislation as it stands, reading words in their ordinary meanings, not to play fast and loose with language in order to extend *L.Q.R. 96 criminal prohibitions. Ashworth's object seems to be to encourage the courts to do just this.

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

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

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

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

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

The discussion of this subject has a history. The Criminal Law Revision Committee considered it on its fourteenth reference, and made two proposals. First, liability for omissions in the sphere of offences against the person should be confined to murder, manslaughter, causing serious injury with intent (i.e. s.18 of the Offences *L.Q.R. 97 against the Person Act 1861), and offences of unlawful detention. But, secondly, as regards these offences the courts should be left with unfettered discretion to decide when there is a duty to act and for whose benefit the duty is imposed. I was a member of the committee, and was the sole dissentient on the second proposal. (We were unanimous on the first.)⁸ In the light of the hair drier case I would now want to add a provision severely restricting sentencing powers in respect of manslaughter by omission where there was no intention to cause harm. Also, I am of opinion that if we have a code there should be analogous restrictive provisions for other offences of omission, e.g. omissions in sexual and property offences.

The academic team that produced the first version of the Draft Code proposed to enact the committee's recommendations, except that they made a valiant effort to put into statutory form a list of persons who are under a duty to act to save people from being killed, seriously injured or detained, and also a list of beneficiaries of the duty.⁹ These proposals, together with those of the Criminal Law Revision Committee, were jettisoned by the Law Commission in Mark 2 of the code, which now contains virtually no provisions on the subject of criminal omissions, except that particular offences are redrafted in terms of "causing"

a result, to facilitate their interpretation to include omissions. The judges are to be left to make their own decisions as to duty-holders and beneficiaries as cases arise. I regard this perverse decision as directly contrary to the purpose of a criminal code.

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

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

***L.Q.R. 98** The other point relates to the burden of proof. This has been given topicality by the proposal in the Draft Code to replace the rule in *Morby*¹⁰ (that the prosecution must prove that a criminal omission caused the death or other result that is charged, and therefore must prove that the result would not have occurred but for the omission) by a rule requiring it merely to prove that the omission "might" prevent (might have prevented?) the occurrence of the harm.¹¹ This would be a change in the substantive law, which the commission normally eschews, and a retrogressive change at that. It is extraordinary to propose that the criminal liability of omitters should be made more stringent than the criminal liability of doers; and I have criticised the proposal on this ground.¹² Ashworth, however, supports it, on what to me is the mysterious argument that "so long as we are satisfied that under certain circumstances an act and an omission are morally equivalent, then under those circumstances no separate causal enquiry is necessary, for a sufficiently close link exists" (at p. 105). Take two hypotheticals. (i) Parents abuse child, who dies, but the child had a heart condition; the death might have been caused by the abuse, but it might well have been caused by the heart condition irrespective of the abuse. Parents not guilty of homicide, and no one has suggested otherwise. (ii) As above, but the parents were guilty not of positive abuse but of a reckless (or intentional) omission. According to the Law Commission (and the academic team) the parents should be guilty of homicide if the parents' omission might have caused the death even though it is not proved to have done so; and Ashworth's explanation is that there is now a "close link" between the omission and the death. On what evidence?

GLANVILLE WILLIAMS.



Footnotes

1 (1989) 105 L.Q.R. 424.

2 [1977] Q.B. 354.

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

4 [1981] A.C. 394.

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

6 Criminal Justice Act 1988, s.45.

7 Although Ashworth may appear to be an out-and-outer on the subject of omissions, there is one limitation upon which I agree with him strongly. Ashworth concedes that if it is decided to impose criminal liability for omissions, this should not be done (as the present law does to some extent, and as the Draft Code proposes to do even more) by making the omitter liable as an accomplice to the active doers. He writes: "To regard the bystander's non-intervention as complicity in the crime being committed surely over-stretches a concept which

is already considerably extended" (at p. 456). There should be "discrete offences, replacing some aspects of the law of complicity" (at p. 458). My arguments in criticism of the present law on these matters will appear in the *Criminal Law Review*.

8 Cmnd. 7844 (1980), at pp. 108-110

9 Law Com. No. 143 (1985), cl. 20.

10 (1882) 15 Cox. 35.

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

12 7 L.S. 107.