

THE LAW OF OMISSIONS AND NEGLECT OF CHILDREN *

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The sort of omission that is punished by statute is neglect of a duty or obligation. Generally some obligations are thought to be deserving of enforcement. They then properly belong in a society's legal code. Other obligations are merely moral and are outside the purview of law. Thus, only omission of a legally binding obligation is a matter for law enforcement. The question to be considered here is: Should there be an enforced legal duty of parents to support their minor children?^[1]

Liability under the law for a wrongful injury ought to be based on direct connection to an intentional action of a rights-invading sort. Consider the following example, taken from an article by Daniel Dinello: A hospital has two patients, Jones and Smith. Each has only one kidney as a result of previous operations. Jones will die in two hours unless he receives a heart transplant. Smith has a severe kidney infection in his one remaining kidney. If Smith does not receive a kidney transplant, he will die in approximately four hours. When Jones dies, his kidney can be transplanted to Smith, or Smith could be killed, and his heart transplanted to Jones. By hypothesis, circumstances are such that there are no other hearts or kidneys available within the time necessary to save either person.^[2]

In this example, Smith and Jones are receiving all appropriate medical care except for the transplants. Smith is not killing Jones by being slightly healthier.^[3] It is Jones's heart ailment that is killing him. However, if Jones stabs Smith (taking care, of course, not to damage Smith's heart) or the doctors (perhaps acting as Jones's agents) stab Smith, the intentional stabbing is what kills Smith.

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With the importance of causality thus noted, we can now go on to distinguish between commission and omission. Anglo-American law generally follows the idea of causality in making this distinction. The distinction is clear and bold in the traditional reasonings of the law. Francis H. Bohlen writes:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.^[4]

The basis for the distinction goes back to the principle of causality in stressing that misfeasance is an attack upon the victim's rights, whereas nonfeasance lets him alone, but without having received a boon that might have been conferred upon him. Bohlen therefore goes on to say:

The final physical injury to the plaintiff may be the same whether defendant's alleged misconduct is an act of violence or a failure to protect him from the violence of others. But, there is a point intermediate between the plaintiff's actual harm, and the defendant's misconduct, where its consequences are substantially different. In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. 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 . . . By 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.^[5]

At present, a parent or medical professional who omits to provide lifesaving customary medical care for a minor is usually considered criminally liable by the courts.^[6] The crimes committed may include murder, involuntary manslaughter, child abuse, and child neglect. However in *Bradley v. State*,^[7] where the statute spoke of homicide in terms of a positive act, the

procurement of a positive act, or culpable negligence, the court properly took the causal view that an omission or neglect cannot be the basis of an indictment for homicide. The court held that if an act of aggression by a third party, a disease, or an accident were the direct cause of a minor's death, then the parent's failure to provide subsequent medical care did not make the parent liable for homicide (though the parent was probably liable under existing law for neglect of the statutory duty to support).

OMISSIONS

Examination of Anglo-American law shows that neglect of four sorts of legal duty is punished: duty to help the government,^[8] status-based duties, duties arising from creation of peril, and contractual duties.

First let us consider the legal duties which are believed to make it less costly for government officials to run the governmental apparatus. An example would be the duty to pay taxes and keep and provide information relevant to the payment of taxes.^[9] Another example is the duty to register with and cooperate with the system of military conscription.^[10] These examples are intimately intertwined with what Robert Nozick has called "the fundamental question of political philosophy," namely, whether there should be a government at all.^[11]

Without settling this fundamental question, let us note that a legally enforced duty to cooperate with conscription, for example, is not a necessary requisite of maintaining a rule of law in society, and this may well be true of numerous other duties to aid the government.^[12]

The second sort of legal duty that is enforced is the duty (reminiscent of the feudal era and often dating back that far) of carrying out the customary activities of some occupational status.

Sir Anthony Fitzherbert, in his treatise *De Natura Brevium* (1537), lists as known actions on the case a group of cases in which nonfeasance is punished. In this group are obligations attached by custom as an incident to the tenure of a particular estate, to the incumbency of an office, or to the exercise of certain trades and callings. Also in this *assumpsit* group are promissory contracts which

were viewed at that time as no different from the assumption of feudal role-expectations.^[13]

Such persisting status-attached legal duties would include duty of a master to care for a servant or apprentice, duty of a husband to protect his wife,^[14] duty of a licensed professional to care for clients,^[15] duty of an innkeeper to serve all comers, duty of a sea-captain to care for a ship's crew and passengers,^[16] and duty of a parent or guardian to care properly for a child.

Some of these legal duties that have their historical origins in obligations of status could be justified in particular situations on creation-of-peril grounds. Thus, a surgeon who cuts into his patient could be held bound to sew up the patient not on a professional-client basis, but on the grounds that the surgeon had brought forth the peril faced by the patient.^[17]

But many of the legal duties, such as those of innkeepers, are clearly status-related.^[18] The duty of a parent to care properly for a child is not based somehow on the fact of generation but on the parent's status *vis-à-vis* the child, for the same duty devolves upon a step-parent, adopting parent, or guardian.^[19]

Even if the legal duty of parents to support their minor children takes the form of a status obligation like that of feudal times, justifications that are advanced for the duty to support rarely depend entirely on the status relationship. After the Enlightenment and the liberal revolutions of the 18th century, status as a basis for obligation has rightly been suspected of being rationally indefensible.

Modern ethical thought rejects status-based legal duties for good reasons. Not only does status-based duty often fly in the face of the principle of causality, but status-based duty also permanently freezes legal rights and duties in traditional categories, despite the inadequacies or illogic of these categories. In the words of Joseph Tussman, "Legitimate tends to mean customary; the obligatory is simply what is done; the 'moral' shrinks to 'mores'."^[20]

For example, the legal reasoning in the 1946 war-crimes indictment of Gen. Tomoyuki Yamashita focused on his status as a military commander and adopted a non-causal theory of crime. Gen. Yamashita was the commander of

all Japanese forces in the Philippines at the close of World War II. After he surrendered, Gen. Yamashita was tried before an American war-crimes tribunal in Manila.

Whereas the war-crimes charges at Nuremberg always alleged that the defendants had directed, planned, or participated in crimes, Gen. Yamashita, in contrast, was convicted of failing to control soldiers under his command. Members of the Japanese armed forces in the Philippines did commit war-crimes. But absolutely no evidence directly implicated Gen. Yamashita in the crimes. He was convicted of breach of a legal duty befitting his status. The dissenting opinion of Justice Frank Murphy correctly emphasized that the principle of personal culpability was disregarded in this judicial travesty.^[21]

The third sort of legal duty that is now enforced by the criminal justice process is duty founded on creation of peril. The criminal law punishes persons who put into motion some force that invades individual rights and who then neglect to halt the force which they originally set in motion.^[22] What is really being punished is the bringing forth of an emergency, as when the pilot of a passenger airplane bails out on a whim, leaving the passengers to crash. Returning to the idea of causality and its central role in the law, we can see that the creator of the peril has effectively committed an invasive act. If he neglects to halt or mitigate the force or effect of that act, then he can rightly be held responsible.^[23]

A person is culpable who omits to halt a force which he originally put in motion. If, for example, a person accidentally starts a fire in a building, then escapes the building, but sees others who could be rescued still in the building, it is his duty to try to aid them.^[24]

While the accidental arsonist created the peril which served as an instrument for invading his victim's rights, the duty of the perpetrator to aid the imperiled in such cases is to be distinguished from a more generalized duty that is sometimes advanced, namely, a duty of everyone to aid the imperiled. According to this view, a person in need has a just, lawful claim on the aid of others.

Some aspects of the welfare state, a duty to

care for a suddenly incapacitated guest,^[25] a mother's duty to bear and nourish a child in her womb, and parents' duty to support a child^[26], are sometimes held to be justified along precisely these lines.

First of all, it should be noted that the supposed legal duty to support, rescue, or aid is not a universal duty that applies to all potential benefactors in all situations at all times. Robert Hale makes this clear in discussing rescues:

If a man falls into a river, it cannot be the legal duty of everyone to aid him — a legal wrong to *abstain* from helping. In the first place, relatively few are in a position to help. Failure on the part of someone to be there, and so be in a position to help, can hardly be a legal, or even a moral, wrong, unless that person has in some way assumed responsibility. Moreover, if there are several passersby, each capable of rescuing the drowning man, it cannot be the legal duty of *all* to do so. If all attempted, they would get in one another's way, and fail in the attempt. If *one* does the rescuing, the others cannot well be accused of legal wrong because they abstained. But on which of them could the law fasten a duty to help? The one who does help would evidently release all others from any duty in the matter. It is not so when the duty is to refrain from something, such as assault and battery. One person may do his duty by *not* assaulting but everyone else remains under a like duty just the same.^[27]

Thus it appears that the supposed duty to aid the imperiled does not have the property of universality, a property which legitimate legal duties (such as the duty *not* to assault) possess because they are generalizations based on the nature of man and reality.^[28] Let us now examine the substance of the proposed duty-to-aid-the-imperiled in greater detail.

The key moral issue is this: In situations where one person's survival absolutely depends upon actions by other persons, may the endangered individual properly demand these services as a right, i.e. independent of, and perhaps in conflict with, the will of the donor?

In an article entitled "A Defense of Abortion", Judith Jarvis Thomson presents an example which illuminates the problem. Suppose that you wake up one morning and find yourself back to back with an unconscious violinist — a well-known and now unconscious violinist.^[29]

He has been diagnosed as having a fatal kidney disease, and the Society of Music Lovers has surveyed all medical records and ascertained that only you have the correct blood type.

The Music Lovers have now kidnapped you as a consequence, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as yours.

A hospital official tells you that since the violinist is attached to you, to unplug him would be to let him die. But, the official assures you that after nine months, the violinist will be cured, and you can be released from this bondage.

Thomson also presents a different example. Suppose that I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow. Now it would be very nice of Fonda to fly a thousand miles to do this. But do my friends have a right to make him do it? In response to this issue, Macaulay once wrote:

It will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die.¹³⁰

Thomson offers yet a third example that illustrates the difference between charitable behavior and justice and is directly applicable to the abortion question. She says: Suppose a boy and his younger brother have jointly been given a box of chocolates for Christmas. Then suppose that the older brother walks off with the box and refuses to let his brother have any of the candy.

This is injustice, because the older brother is taking what the younger brother is entitled to. The younger brother has been given just title to half the candy, and the older brother is now stealing it from him.

Now, however, suppose a new situation in which the box of chocolates was given solely to the older brother. The younger brother is enviously watching the older brother eat the candy.

Someone might say to the older brother: "You ought not to be so mean. You ought to give your brother some of the chocolates."

We may agree, if only for the sake of argument, that the suggestion is morally appropriate, but it does not follow from this that the younger brother has a right to some of the candy.

Many might say that the older brother was being stingy. But if we were being precise about our language, we would not say that he was unjust, for in this case the older brother holds valid title to the candy.

On another occasion, Thomson writes:

There are many, many things we ought not to do to people, things such that if we do them to a person, we act badly, but which are not such that to do them is to violate a right of his. It is bad behavior, for example, to be ungenerous and unkind. Suppose that you dearly love chocolate ice cream but that, for my part, I find that a little of it goes a long way. I have been given some and have eaten a little, enough really, since I don't care for it very much. You then, looking on, ask, "May I have the rest of your ice cream?" It would be bad indeed if I were to reply "No, I've decided to bury the rest of it in the garden." I ought not to do that: I ought to give it to you. But you have no right that I give it to you, and I violate no right of yours if I do bury the stuff.¹³¹

In the case of abortion, the woman holds valid title to her own body. The fetus, if we grant its personhood, has title to its body. But, I would argue, the woman has not transferred title to supportive nourishment to the fetus nor can the woman rightfully be forced into the servile status of involuntarily nurturing the fetus. If the woman wants to unplug the fetus attached to her body, it is her absolute right to do so.

Some may be displeased by Thomson's analogy between a fetus and a sick violinist. Yet we must recall that by hypothesis the fetus is a person from the moment of conception, and recall that this "person" attaches itself to the body of the mother after conception. This person burrows into the wall of the womb. Then, this person expands like Alice-in-Wonderland in the rabbit's house. This is all quite like (in terms of its aggressive character) the case of the violinist attached back-to-back to the kidnapped blood donor.

Hence it is a misreading of the situation to say that the mother created peril aimed at the fetus. It is the fetus which has attacked the mother. Once the mother has freed herself of the fetus, the fetus dies on its own, when the method of

abortion removes the fetus intact, not because of force directed against it by the mother.

Just as the supposed duty to aid the imperiled is unsatisfactory as a moral basis for imposing a legal duty to support a fetus (thought of as a person) on a mother, the same supposed duty is unsatisfactory as a basis for imposing a duty to support children on parents.

In any case, Anglo-American law has not recognized a general duty to aid the imperiled. Instead the parental duty to support a child is a status-determined duty. It is similar to the status-determined duty of a husband to support his wife. Such rules based on status have meant that radically different treatment is owed others, depending on their status.

Illustrative of this is the 1907 Michigan case of *People v. Beardsley*.¹³²¹ Beardsley had spent the weekend in his apartment with a woman while his wife was away. In the course of events, the woman took some narcotic drugs (against Beardsley's wishes) which put her into a coma, shortly before the wife was expected to return. Beardsley was quite drunk at this point, but he got a friend to move the woman to another apartment. Because there was considerable delay in getting a doctor, the woman died. The appeals court reversed the conviction of Beardsley for manslaughter, saying that Beardsley was under no duty to care for the woman.

The fact that it is neither genetic ties nor need, but "feudal"-type status which governs such cases is shown by *Rex v. Smith* where a sister was found not to have a duty to care for her mongoloid brothers. In contrast, one can see the importance of status in *Stehr v. State*,¹³⁴¹ where, under current legal doctrine, a stepfather had a positive legal duty to care for a stepchild even without an adoption.¹³⁵¹

A third legally enforceable duty has been contractual obligations. The present author, however, has maintained elsewhere that the only properly enforceable contracts are those in which transfers of property title have been agreed upon. Mere promises or induced expectations should not be legally binding; only the agreed-upon transfers of property.¹³⁶¹

ABANDONED RESCUES

In addressing the question of whether there is an enforceable parental duty to support, we have thus far considered such conventional duties as legal duties imposed on persons by the government for the government's convenience, and legal duties imposed on persons when they are in a certain status or customary role. We have also considered the natural legal duty of a creator of peril to aid his victim and the supposed natural legal duty of all to aid those in need.

Yet a major notion of legal obligation remains: the obligation of contracts. It was pointed out earlier that Fitzherbert's 16th-century legal treatise *De Natura Brevium* grouped status-determined duties together with contracts. While this seems preposterous to moderns accustomed to Maine's account of the evolution from status to contract, Fitzherbert's classification is not so bizarre as it at first seems. The source of the similarity between status and contract lies in the fact that much of the law of contracts treats contracts as acts of assuming a status rather than as exchanges of titles to goods.

Some persons believe that the obligation to support children stems from a contract or implied contract between the parents themselves or between the parents and children. Before turning to the problem of implicit contracts, it should from the first be clear that no transfer of property title has occurred in such alleged contracts, and that therefore they should not be legally binding.

Before discussing implicit contracts, let us consider the intriguing case of "abandoned rescues".

Some have argued that abandoned rescues are a special case of duty to aid the imperiled in which the law ought to enforce the duty.¹³⁷¹ I am treating this question here rather than with the duty to aid the imperiled because I think contract theory governs many such cases. Imagine a situation in which person A begins to act in a way that leads other potential benefactors to believe that A will aid person B (who is in peril). In this situation these other potential benefactors might well decide not to act to aid B

because they expect A to do so. However, in the hypothetical situation, A does not follow through. Person A seems to abandon the task he had appeared to be engaged in. In fact, person A even stops too late for the other potential benefactors to now undertake the rescue of B on their own. The question is whether person A has invaded anyone's rights, either those of the person in peril or those of the potential benefactors.

The hypothetical situation I have been describing here may seem too abstract. If so, imagine a situation in which a person is drowning in view of a beach crowded with persons. One person acts as if he plans to rescue the drowning person, so the others make no effort to rescue. But the person who was acting as if he were going to help, in fact does not help. It is too late for the others to save the drowning person. Has a crime been committed?

Those who would contend that abandoned rescues should be treated as crimes are relying too heavily upon slippery notions of tacit contract and one's legal right to have one's mere expectations fulfilled.

Few would contend that the rescuer (A) of a person (B) stranded on a cliff or drowning in the surf should be legally compelled to continue the rescue once A has decided that additional efforts are too costly or risky to A. Such an assessment by A must be in terms of A's own values. Marc Franklin offers the example of a person who swims out to rescue a drowning person, gets within five feet, sees that the drowning person is a personal enemy and then decides to turn back.¹³⁹¹

In the hypothesis, A has not physically attacked the other potential benefactors in an effort to stop them from aiding B. The other potential benefactors do not have a legitimate right that their mere expectations will be fulfilled. If the other potential benefactors do not trust A's judgement, they can attempt to make a bilateral title-transfer contract with A. Person B (especially if he is on a cliff rather than swallowing water in the surf) can likewise attempt to make a bilateral contract with A if the situation seems to demand it.¹³⁹¹ It does not appear that the abandonment of a rescue effort *per se* violates anyone's rights.

IMPLIED CONTRACTS

As a final matter in our consideration of the law of contracts, we must examine the notion of implied contract. At present, persons do not usually sign formal contracts to deliver nourishment to a fetus or items that will support a child. Given this situation, moral opponents of abortion or child neglect speak of tacit consent, implicit promises, and implied contracts.¹⁴⁰¹ Hence we must turn briefly to the nature of implied contracts.

In 1893 in *Regina v. Instan*, a British court found that there was a contracted undertaking in a situation in which an aged woman lived with and financially supported her niece. There was no formal assumption of the task, but the court inferred a contract to care for the aunt as implicit in the situation. Because this court-constructed tacit contract was an *assumpsit* contract for personal services, the court's holding would certainly have been invalid in a legal system governed by the title-transfer approach to contracts.

But even within the terms of the *assumpsit* approach itself, there are difficulties with the notion that a contract is somehow "implicit in action". Joseph Tussman writes: "The question of tacit consent is the question of whether there are some actions, including perhaps, the failure to act, which can properly be regarded as the equivalent of . . . express consent."¹⁴¹¹

The example of the person who goes into a restaurant, sits down at a table, orders a meal, and eats it comes to mind. The custom of regarding this as an implicit contract to pay for the meal is not an unreasonable one. But it should be borne in mind that a formal and perfectly legitimate written contract could easily be introduced into this picture.

The danger is that to argue that the contract is somehow "implicit in action" can easily prove too much. For example, Hobbes argued that if a slaveholder did not chain his slaves at all times but allowed them to roam about a bit, then this trust of his slaves by the slaveholder obligated the slaves to obey the slaveholder's every wish. Hobbes carried this over to the political realm where he argued that because the inhabitants of a territory went around acting as if they enjoyed

the king's peace, they thereby obligated themselves contractually to obey him as their absolute sovereign.¹⁴²¹

Locke's great adversary, the patriarchalist theorist Robert Filmer, noted that if tacit acceptance is the standard according to which one decides whether an obligation exists, an obligation will always exist to any regime in power. There will be no way to differentiate in behavioral terms between popular assent to a Lockean regime and acquiescence in the face of domestic usurpers or foreign conquerors.¹⁴³¹

Moving from the question of political obligation to the question of obligation to support, let us consider the case of a person who by a voluntary act rescues a child from otherwise certain death in a flaming auto wreck that kills the child's natural parents.

Like the natural parents, the rescuer has, by a voluntary act, given life (in a sense) to the child, but is it reasonable to say that the rescuer now somehow owes to the child, the child's maintenance? This would seem to be a sort of monstrous involuntary servitude that is being foisted upon a rescuer.

While our digression has at times carried us somewhat far from the parental duty to support, the problem with implicit contracts has been illuminated in the process. The basic problem is that unless a formal contract should be substituted without controversy, deriving obligations from implicit contracts looks very much like simply imposing obligations on others by force. Then we are no longer talking about contract and consent but about might defining right.

Still, we must examine the actual contractarian case against abortion and child neglect. For contractarians, whatever claim the fetus has to support must stem from the mother's supposed consent to its presence. At the outset, there is some question as to whether it is proper to call sexual activity a consciously purposive act intending procreation. Surely, for most people most of the time, sexual activity is not engaged in for this purpose.¹⁴⁴¹

In addition, contractarians must logically exclude any duty to support where the fetus is the result of rape. Anti-abortion contractarian Thomas Johnson writes:

Are there other circumstances that might arise which would, or could, legally and morally permit an expectant mother to undergo an abortion? The answer is yes — in cases of legally proven (which is sometimes difficult), unwillingly engaged-in acts of rape or incest. When an individual does not commit an act of his own free will, he (or she) cannot be held responsible for the consequences of this act.¹⁴⁵¹

Thus, the contractarians who oppose abortion and child neglect do not start with the rights of persons and then consider whether withdrawal of support is criminal or noncriminal. Instead, they begin with the generation of obligations via implied contracts.

Judith Jarvis Thomson notes that these contractarians may also have to exclude duty to support in cases where fetuses result from accidental pregnancy and imperfect contraception as well as in cases of rape.¹⁴⁶¹ Thomson says that if a room were stuffy and she raised a window to air it out, and a burglar climbed in, it would be inappropriate to say:

"Ah, now he can stay, she's given him a right to the use of her house — for she is partially responsible for his presence there, having done voluntarily what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars enter buildings."

Thomson goes on to point out that it would be still more inappropriate to say this if she had had bars installed outside her window, and a burglar were able to enter only because of a defect in the bars. The total inappropriateness remains if we imagine that it is not a burglar who climbs in, but an innocent person who blunders or falls in.

I would extend this critique of the contractarians to cover intentional pregnancy. A contract surrendering control over one's body should be legally voidable because enforcement of such a contract would be alienation of a person's will.

To illustrate this point concretely, consider the case of a patient who gives explicit consent to electroshock therapy. But after one treatment, the patient withdraws his consent to further shock therapy.

If the hospital staff persist in treating him against his will, they should be punished for assault and battery.

In a non-slave society, one cannot properly give up control of one's body to others via contract; one is naturally the inalienable

proprietor of one's will.

A woman who intentionally embarked on pregnancy might learn that a fetus is deformed, is of an unpreferred gender, or she may simply change her mind about child-bearing. Just as the patient's right over his own body rules out involuntary electroshock, so the woman's self-ownership rules out involuntary support. Similarly, a parent's self-ownership, a parent's inalienable ownership of his or her own will, and a parent's right to dispose of his or her own personal services rule out construing sexual intercourse as an implied contract to put one's personal services at the disposal of a child.

Furthermore, while it makes sense to say that if the duty to support arises from the child's being in need, then the duty could be said to be fulfilled once the child is capable of self-support, this explains only how the obligation is dissolved if it is grounded on need. (It also means that parents would be obligated to support for life a child that could never support itself because of its native defects.) If the duty to support arises from the creation of the child, as the contractarians argue, then one wants to know why the obligation to support stops at the age of majority. The parents are still the creators of the child. Why aren't they then obliged to support the child forever?

The position sketched in this paper indicates that parental omissions in cases of abortion and child neglect violate no one's rights. This position has been defended somewhat in isolation from a full-blown theory of children's rights. But it is, at least, consistent with the standard libertarian account of such rights.^[47]

Under this conception of the status of children, because parents have produced a child, they have a right to the initial custody of the child (stemming from a simple extension of the Lockean labor-mixture homesteading principle to the production of children).

Parents have a right to initial custody, but if they decide to physically abuse or to abandon a child or fetus, parents cannot rightfully prevent an outsider from taking on support of the child. A market in rights to adopt children would also be consistent with this account of the proper status of children.

While the children live on the parents'

property, the parents have the right to set conditions (e.g. curfew hours) on the continued use of that property, provided that these conditions do not violate the child's right to self-ownership. (For example, physical child abuse would be an invasion of a child's rights.)

Once children leave or run away from their parents (which they have an absolute right to do), the same principles of justice ought to apply to them as apply to any other person, including the right to make mistakes in self-regarding actions.

This brief account of the fuller libertarian theory of the status of children should not be regarded as a complete account or satisfactory defense of that full theory. But it does show that the view of omissions defended here is consistent with a larger integrated theory.

We have considered the hypothesis that there should be an enforced legal duty of parents to support their minor children. Having found the various reasons advanced in support of this duty inadequate, we can only conclude that no such duty exists. The burden of proof must rest on the advancers of hypotheses. Until some new compelling defense of the duty to support is offered, one has to regard the notion of a legal duty of parents to support their children as without merit.

NOTES

1. Under Anglo-American law, parents have no common law duty to support and maintain a minor child. The duty was originally imposed statutorily by the poor laws. *Hammond v. Corbett*, 50 N.H. 501, 9 Am. Rep. 288 (1872). In *Gordon v. Potter*, 17 Vt. 348 (1845), the court quotes English cases showing that while there may be a mere moral obligation to support and maintain a minor child, a parent cannot be made liable for necessities furnished to his child without his contractual agreement. See also *Raymond v. Loyl*, 10 Barb. 483 (N.Y. 1851); *Kelley v. Davis*, 49 N.H. (1870); *Freeman v. Robinson*, 38 N.J.L. 383 (1876); *Jackson v. Mull*, 6 Wyo. 55, 42 Pac. 603 (1895); *Strange v. Strange* 222 Ga. 44, 148 So. 2d 494 (1966).
2. Daniel Dinello, "On Killing and Letting Die" *Analysis*, Vol. 31, No. 3 (January, 1971), pp. 85-86.
3. On consequentialism, see G.E.M. Anscombe, "Does Oxford Moral Philosophy Corrupt the Youth," *Listener*, Vol. 57, No. 1455 (14 February, 1957), pp. 267-268, 271; also Anscombe, letter to the editor, 4 April 1957, p. 564.
4. Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," *University of Pennsylvania Law Review*, Vol. 56, No. 4 (April, 1908), p. 219.

- See also P. J. Fitzgerald, "Acting and Refraining," *Analysis*, Vol. 27, No. 4 (March, 1967), pp. 138-139.
5. Bohlen, pp. 220-221. Compare Daniel C. Maguire, *Death By Choice* (Garden City, N.Y.: Doubleday, 1974), pp. 116 ff.
 6. In the 19th century, courts decided that while parents could be found guilty of manslaughter if neglect of a child led to his death, those who did not have the status of parent did not have a positive duty to aid. Graham Hughes, "Criminal Omissions," *Yale Law Journal*, Vol. 67, No. 4 (February, 1958), p. 620.
 7. 79 Fla. 651, 84 So. 677 (1920).
 8. The Supreme Court has held that the Thirteenth Amendment did not outlaw enforcement of duties imposed on the individual by the state. *Butler v. Perry*, 240 U.S. 328 (1916).
 9. *Porth v. Broderick*, 214 F.2d 925 (10th Cir. 1954).
 10. The similarity between duties to the state and feudal status duties is illustrated by the case of the draft. The obligation to serve in the military was a primary one in feudal England. See Lionel H. Frankel, "Criminal Omissions: A Legal Microcosm," *Wayne Law Review*, Vol. 11, No. 2 (Winter, 1965), p. 372n.16. Also see John V. Murra, "On Inca Political Structure," in *Systems of Political Control and Bureaucracy in Human Societies*, ed. by Vern F. Ray (Seattle: University of Washington Press, 1958), pp. 30-41; and Sol Tax, "War and the Draft," *Natural History* Vol. 76 (December, 1967), pp. 54-58.
 11. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 4.
 12. For example duty to report treasonous activities, jury duty, duty to testify when under subpoena, duty to register firearms purchases, duty to register the passing of \$1000 bills, and duty to report felonies. On the latter as originating in the feudal era duty to raise the hue and cry, see Louis Waller, "Rescue and the Common Law: England and Australia," in *The Good Samaritan and the Law*, ed. by James M. Radcliffe (Garden City, N.Y.: Doubleday, 1966), pp. 150-151.
 13. Bohlen, pp. 223-225.
 14. See *Territory v. Manton*, 7 Mont. 162, 8 Mont. 85.
 15. For a placement of this duty in its medieval context, see R. H. Tawney, *The Acquisitive Society* (New York: Harcourt Brace, 1920), pp. 91 ff.
 16. *United States v. Knowles*, 26 Fed. Cas. 801 (N.D. Cal. 1864).
 17. Concerning the obligations of surgeons, see Oliver Wendell Holmes, Jr., *The Common Law*, ed. by Mark DeWolfe Howe (Boston: Little Brown, 1963), pp. 218-219. The incident on which the novel *Lord Jim* was based can be more fruitfully analyzed if the distinction between status-based duties and duties stemming from the creation of peril are borne in mind. See Norman Sherry, ed., "Sources," in Joseph Conrad, *Lord Jim*, ed. by Thomas C. Moser (New York: Norton 1968), pp. 319-326, for the court of inquiry report on the abandonment of the "S. S. Jeddah."
 18. Duties of innkeepers are found in the Civil Rights Acts of 1875 and 1964.
 19. Richard V. Mackay, *Guardianship Law* (New York: Oceana, 1948), p. 16.
 20. Joseph Tussman, *Obligation and the Body Politic* (New York: Oxford University Press, 1960), p. 6. Compare F. H. Bradley, "My Station and Its Duties," *Ethical Studies* (London, 1876).
 21. A. Frank Reel, *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949), p. 242; *In re Yamashita*, 327 U.S. 1 (1946); J. Woodford Howard, *Mr. Justice Murphy* (Princeton, N.J.: Princeton University Press, 1968), pp. 367-377; Fowler V. Harper, *Justice Rutledge and the Bright Constellation* (Indianapolis, Ind.: Bobbs-Merrill, 1965), pp. 180-195; Orvill C. Snyder, "Liability for Negative Conduct," *Virginia Law Review*, Vol. 35, No. 4 (May, 1949), pp. 446-448. Compare Don B. Kates, Jr., "Vicarious and Negligence Liability of Police Superiors in Section 1983 Suits," *Clearinghouse Review*, Vol. 7, No. 7 (November, 1973), pp. 415-416.
 22. On this point, see Barton H. Thompson, Jr., "The Model Statute of Omissions" (unpublished ms., 1972), p. 3. Compare H. L. A. Hart, and A. M. Honore, *Causation in the Law* (London: Oxford University Press, 1959), pp. 28, 47, 396-398.
 23. This approach follows in part the approach of the German jurist Julius Glaser and is in general accord with Anglo-American law. See Hughes, p. 627. Unless creations of peril are thus narrowly construed any act with unpreferred consequences for some individual will have to be regarded as creating an obligation.
 24. Hughes, p. 624. The duty of a party to an automobile accident where there has been an injury to stay on the scene of the accident can be viewed as a duty under the creation of peril doctrine in cases where the attending party is at fault. Where the attending party is not at fault, he is being compulsorily conscripted into first aid work. This duty enforced in hit-and-run statutes serves to cut down law enforcement expenses. See A. M. Linden, "Tort Liability for Criminal Nonfeasance," *Canadian Bar Review*, Vol. 44, No. 2 (March, 1966), p. 48.
 25. American Law Institute, *Restatement of Torts*, Second (St. Paul, Minn.: American Law Institute, 1965), sec. 197, illustration D. I believe that moral opponents of abortion are mistaken in relying upon this tort law doctrine. See John T. Noonan, letter to the editor, *National Review*, 8 June 1973, pp. 611-612; and George Steven Swan, "Libertarian Abortion: A Contradiction in Terms," unpublished ms., pp. 7-8; Eric Mack, "Notes on the Moral Legitimacy of Abortion," *Individual Liberty* (September, 1974), p. 4. The duty-to-guest doctrine is based on the decision of the Minnesota Supreme Court in *Depue v. Flatau*, 100 Minn. 299, 111 N.W.1 (1907). Legal scholars have grouped this case with voluntary doctoring cases in standard legal reference material. See 64 ALR2d 1181. They have done so because the rule under which the court decided the case is more nearly a rule recognizing the duty of a creator of peril than it is a rule imposing a duty to aid the imperiled. The judge's opinion was based on the notion that where a person is so circumstanced with respect to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that other person, the duty arises to exercise reasonable care under the circumstances to avoid the injury. This rule is in accord with the principle of causality and sets forth the duty of a creator of peril under certain circumstances. I believe the Minnesota court misapplied this quite reasonable rule in the *Depue* case. From this has arisen the confusion in the second *Restatement of Torts* and in the writings of anti-abortionists.

26. There is some question as to why a duty to support based on need or peril *per se* should devolve upon the child's parents. One could argue that it devolves upon whatever adult is closest to the child at any one time. There are other plausible bearers of such a duty.
27. Robert L. Hale, "Prima Facie Torts, Combination, and Non-Feasance," *Columbia Law Review*, Vol. 46, No. 2 (March, 1946), pp. 214-215.
28. Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973), pp. 150-151; Maurice Cranston, *What Are Human Rights?* (New York: Basic Books, 1962), pp. 36-42.
29. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, Vol. 1, No. 1 (Fall, 1971), pp. 47-66.
30. Thomas Babington Macauley, *Introductory Report upon the Indian Penal Code*, in *Miscellaneous Works* (New York: Harper, n.d.), Vol. 4, p. 252.
31. Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs*, Vol. 4, No. 4 (Summer, 1975), p. 297.
32. 150 Mich. 206, 113 N.W. 1128 (1907).
33. 2 C. & P. 449, 172 Eng. Rep. 203 (Gloucester Assizes, 1826).
34. 92 Neb. 755, 139 N.W. 676 (1913).
35. On this subject see Robert G. Frank, "Criminally Enforceable Duty to Act," *Washington and Lee Law Review*, Vol. 18, No. 2 (Fall, 1961), pp. 312 ff.
36. Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *The Journal of Libertarian Studies*, Vol. 1, No. 1 (Winter, 1977), pp. 3-13.
37. B. Thompson, p. 2.
38. Marc A. Franklin, *Injuries and Remedies* (Mineola, N.Y.: Foundation Press, 1971), p. 401.
39. Compare R. Nozick, "Coercion," in *Philosophy, Science and Method* ed. by S. Morgenbesser, P. J. and M. White, and P. Suppes (New York: St. Martin's Press, 1969), pp. 449-450. Nozick argues (p. 450) that whether the imperiled person has led a moral life should govern the potential rescuer's moral decision to aid or neglect. Without agreeing with Nozick's moral outlook in its entirety, one can agree that the moral history of the imperiled person might properly figure in the potential rescuer's assessment of whether rescue was worthwhile. The key legal question under normal circumstances is not the clean hands of the imperiled person, but the clean hands of the rescuer *vis-a-vis* the imperiled person. Nozick's dependence on expectations rather than rights for his notion of coercion can be criticized along the lines taken in the paper on contracts mentioned above.
40. For example, see Ronald M. Green, "Abortion and Promise-Keeping," *Christianity and Crisis*, Vol. 27, No. 8 (15 May 1967), p. 110.
41. Tussman, p. 35.
42. Hobbes, *Leviathan* (Oxford: Basil Blackwell, n.d.), pt. I, chap. 14, p. 86.
43. Gordon J. Schochet, *Patriarchalism in Political Thought* (Oxford: Basil Blackwell, 1975), p. 127. Bentham, while having a wholly different notion from Filmer of what constituted an illegitimate regime, also attacked the contractarian notion of virtual consent. See Jeremy Bentham, *Truth versus Ashurst*, in *Works*, ed. by Bowring (Edinburgh: William Tait, 1843), Vol. 5, p. 235.
44. Graham Hughes notes that the fathering of children may "possibly" be intentional. "Criminal Omissions," *Yale Law Journal*, Vol. 67, No. 4 (February, 1958), p. 599.
45. Thomas L. Johnson, "Abortion: A Metaphysical Approach," *The Freeman*, Vol. 22, No. 8 (August 1972), p. 503. Green, p. 110.
46. J. Thomson, "Defense of Abortion," pp. 58 ff.
47. Murray N. Rothbard, "Kid Lib," in *Egalitarianism as a Revolt against Nature* (Washington, D.C.: Libertarian Review, 1974), pp. 88-95; Walter Block, *Defending the Undefendable* (New York: Fleet Press, 1976).