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CRIMINAL LIABILITY OF PARENTS FOR FAILURE TO CONTROL THEIR CHILDREN

INTRODUCTION

The mention of juvenile delinquency usually provokes indignant remarks about parents. "If only they were more responsible or less perverse and exercised control over their children, we would have less delinquency"¹ This reflects the popular notion that parents are responsible for the delinquency of their children.² The notion is applied whether the parent overtly encourages misconduct or simply fails to provide that "something" which would have produced a law-abiding child. After a child commits a delinquent act, a logical step, according to the notion, would be criminal prosecution of the parents under "contributing to delinquency" statutes or related laws. Usually, when parents are prosecuted, they have actively engaged in or encouraged the child's misconduct. Sometimes, however, the laws are applied to parents who have remained passive and allegedly have failed to prevent the misconduct. A parent's liability for such an omission is the subject of this note. Parental criminal liability for failure to control children will be examined with the intent of recommending rational limits and dispelling popular notions about the validity and effectiveness of punishing parents.

In Madison Heights, Michigan, an ordinance declares that "[i]t shall be unlawful for the parent of any minor to fail to exercise reasonable parental control" if the child commits criminal acts as the result of that failure.³ If the minor commits two or more criminal acts within a twelve-month period, the parent "may be deemed guilty" and may be punished with a \$500 fine, a 90-day jail sentence or probation.⁴ According to a

1. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, JUVENILE DELINQUENCY AND YOUTH CRIME 215 (1967) [hereinafter cited as PRESIDENT'S COMMISSION REPORT].

2. In a survey conducted in Chicago, nine of ten adults replied that parents should be held responsible for the delinquency of their children. Kenny & Kenny, *Shall We Punish the Parents?*, 47 A.B.A.J. 804 (1961). This article presents an overview of the present topic with a discussion of the psychological problems involved in juvenile delinquency and parental inadequacy. See also Samore, *Parental Delinquency*, 8 CLEVE.-MAR. L. REV. 568 (1959).

3. MADISON HEIGHTS, MICH., CODE § 8-221 (1970). Madison Heights is a suburb of Detroit. Similar ordinances are in force or are under consideration in Detroit, St. Louis and Washington, D.C.

4. *Id.* § 8-223.

recent magazine article,⁵ parental reaction to the ordinance ranged from optimism to apprehension. The threat of prosecution forced some parents and their children to recognize their mutual responsibilities in the family and community. Other parents overreacted and imposed severe restrictions which further alienated their children. Despite varied responses and some criticism, city officials credited the ordinance with a significant reduction in youth crime.

Some authorities agree that making parents responsible for the misconduct of their children will effect a reduction in delinquency.⁶ Others vehemently disagree:

Of the factors making for delinquency, parental inadequacy is only one of many; others are the high cost of living, poor standards of education, inadequate recreation, and slums, to name only a few. But the only one of these at hand for punishment is the parents.⁷

This conflict probably will never be reconciled; however, a discussion of the rational limits of parental liability will be helpful. In this note, liability for parental omissions will be examined in the context of constitutional standards and the criminal law. The financial responsibility of parents in tort law will be discussed for comparison. Attention will be focused on the liability of a parent after his child has committed a delinquent act. In addition, the concepts of strict liability and vicarious liability will be discussed and shown to be applicable to torts but not crimes of this sort. Throughout, the necessity for competent evidence will be emphasized. Assumptions and presumptions that the parent failed, neglected his duties or caused delinquency will be shown to be invalid by present legal standards if based simply on the fact that the child has committed one or more delinquent acts. Since the discussion is more meaningful in context, non-legal information from the report of the President's Commission on Law Enforcement and the Administration of Justice, *Juvenile Delinquency and Youth Crime*,⁸ will be used

5. Rodgers, *When Children Break the Law*, GOOD HOUSEKEEPING, July, 1971, at 67. In Lapeer, Michigan, a father was convicted of a misdemeanor and fined \$50 under a similar ordinance for failure to meet community standards of supervision and control. The man's son and a companion had caused \$1200 damage to windows with air guns. The case is now on appeal. See *A Father on Trial for What His Son Did*, LIFE, Feb. 18, 1972, at 61.

6. J. Edgar Hoover has been quoted as saying that "[j]uvenile crime could be abated if parents were made to face legal and financial responsibility for the criminal acts of their children." NEWSWEEK, April 2, 1956, at 95.

7. S. RUBIN, CRIME AND JUVENILE DELINQUENCY 25 (3d ed. 1970).

8. Hereinafter referred to as *President's Commission Report*.

to place the issues in proper perspective.

PARENTAL ROLE IN DELINQUENCY

In the *President's Commission Report*, the family was deemed "the first and most basic institution in our society for developing the child's potential"⁹ Thus, the importance of the intra-family relationship in delinquency control is apparent. However, contributing causes of delinquency were also found outside the family. A few of these additional factors were social class, educational level, urbanization, living conditions and social instability.¹⁰ "Bewilderingly complex" cause-and-effect relationships were revealed in studies of delinquency; however, a general principle seemed to emerge that

whatever in the organization of the family, the contacts among its members, or its relationships to the surrounding community diminishes the moral and emotional authority of the family in the life of the young person also increases the likelihood of delinquency.¹¹

In many delinquency situations, certain factors were found to be common: lack of respect and esteem for an ineffective father; embarrassment with low family status in the community; lack of affection; and inconsistent mixtures of permissive and strict discipline.¹² Although parents were at fault in some situations, social forces were believed to have a more pervasive influence and to account for the magnitude of the problem. "It is not parental perversity but parental poverty that is the problem."¹³ Instead of punishment for parents, programs of job training, family planning and improved housing were recommended.¹⁴

Inadequate and irresponsible parents, no doubt, have a detrimental influence on children; however, it is clear that they represent only part of the problem. Other substantial causes can be operating at the same time, and isolation of controlling factors can be difficult. Therefore, the blanket statement that "parents are the cause of delinquency" is neither accurate nor precise. These complexities must be considered in the evaluation or application of statutes that authorize criminal prosecution of parents.

CRIMINAL STATUTES

Criminal prosecution of parents is authorized by a variety of state

9. PRESIDENT'S COMMISSION REPORT 45.

10. *Id.* at 188-221.

11. *Id.* at 45.

12. *Id.* at 46.

13. *Id.* at 215.

14. *Id.* at 216.

and local laws. City ordinances such as in Madison Heights,¹⁵ school attendance laws, curfew ordinances and state "contributing to delinquency" statutes are typical authorities. Under the curfew¹⁶ or truancy¹⁷ laws, it is unlawful for a parent to permit or allow violations. Under the Madison Heights type ordinance or the contributing statutes, it is unlawful to "fail to control" a child or "omit a duty" owed to the child if such failure or omission causes or tends to cause delinquency.¹⁸

The neglect statute is another prevalent law dealing with delinquency and parents. The typical neglect statute imposes upon parents affirmative duties to provide necessities and to refrain from abusing or abandoning the child.¹⁹ When a court finds child neglect because the parent has failed to perform his duties, the issue usually is custody of the child and not punishment of the parent. Consequently, contributing statutes are more pertinent to the present discussion.

The variety of laws available for punishing parents is revealed by the Madison Heights ordinance and the following examples. Under the New York contributing statute, a parent can be prosecuted if "he fails or refuses to exercise reasonable diligence in the control" of his child to prevent him from becoming abused, neglected, delinquent, truant, incorrigible, ungovernable or habitually disobedient.²⁰ An Ohio statute declares that a parent has the "power" to control his child and will be punished if he has "failed or neglected to subject [the child] to reasonable parental control and authority"²¹ The California contributing statute applies to "[e]very person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage" a child to become delinquent or neglected.²² The Madison Heights ordinance, in addition to proscribing certain conduct, includes a provision, similar to a statutory presumption, that the parent "may be deemed guilty" if the child commits more than one delinquent

15. See note 3 *supra* and accompanying text.

16. See, e.g., *City of Eastlake v. Ruggiero*, 7 Ohio App. 2d 212, —, 36 Ohio Op. 2d 345, —, 220 N.E.2d 126, 127 (Ct. App. 1966); 2 T. MATTHEWS & B. MATTHEWS, MUNICIPAL ORDINANCES 422 (1963). See generally Note, *Curfew Ordinances and the Control of Nocturnal [sic] Juvenile Crime*, 107 U. PA. L. REV. 66, 77 (1958).

17. D.C. CODE ANN. § 31-207 (1961).

18. Geis, *Contributing to Delinquency*, 8 ST. LOUIS U.L.J. 59, 67-74 (1963); Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719 (1952).

19. *In re Minor*, 250 F.2d 419 (D.C. Cir. 1957); *Ex parte Hunter*, 45 Cal. App. 505, 188 P. 63 (Dist. Ct. App. 1920); *Nelson v. Clifton*, 202 S.W.2d 471 (Tex. Civ. App. 1947); Sullivan, *Child Neglect: The Environmental Aspects*, 29 OHIO ST. L.J. 85 (1968).

20. N.Y. PENAL LAW § 260.10(2) (McKinney Supp. 1971).

21. OHIO REV. CODE ANN. § 2151.411 (Baldwin 1971).

22. CAL. PENAL CODE § 272 (West 1970).

act in a twelve-month period.²³ No similar provisions were found in a brief survey of contributing statutes.²⁴

Violation of the state contributing statutes is a misdemeanor punishable typically by imprisonment for not more than one year and by fine of up to \$1000.²⁵ The Madison Heights ordinance provides a maximum penalty of a \$500 fine, a 90-day jail term and probation.²⁶ In Ohio, after a child is adjudged delinquent and placed on probation, the parent must deposit a bond (up to \$500) with the court for the duration of the probation if the child's delinquency was attributable to the parent's failure to control him. The bond may be forfeited, in full or in part, following any subsequent finding that a violation of probation or a subsequent delinquent act by the child was due to the parent's failure to control him.²⁷

The broad language of contributing statutes reflects the purpose of protecting the morals, physical health and well-being of minors.²⁸ Because of this broad purpose, defining prohibited adult conduct is difficult. Since delinquency is a "vague and slippery concept,"²⁹ the difficulty is compounded. It is even further complicated because many states do not require an adjudication of delinquency before the adult can be prosecuted.³⁰ These states prosecute if the adult conduct "tends to cause" delinquency because "the preventive feature of this statute is abolished if guilt can only be established after the child becomes delinquent"³¹ These definitional problems are usually encountered in cases involving active adult conduct; however, the difficulties with passive conduct are comparable if not more troublesome conceptually. Generally, "duty" and "reasonable parental control" are left undefined.

Courts attempt to justify the broad scope of contributing statutes and the potential unfairness of the vague and imprecise language with the policy of preventing delinquency and protecting children.³² However,

23. MADISON HEIGHTS, MICH., CODE § 8-223 (1970).

24. The Minnesota contributing statute contained a similar presumption until a 1953 amendment. MINN. STAT. ANN. § 260.315 (1971).

25. See, e.g., CAL. PENAL CODE § 272 (West 1970).

26. MADISON HEIGHTS, MICH., CODE § 8-223 (1970).

27. OHIO REV. CODE ANN. § 2151.411 (Baldwin 1971).

28. *People v. Calkins*, 48 Cal. App. 2d 33, 119 P.2d 142 (Dist. Ct. App. 1941); *Slaughter v. District of Columbia*, 134 A.2d 338 (D.C. Mun. Ct. App. 1957); *People v. Bergerson*, 17 N.Y.2d 398, 218 N.E.2d 288, 271 N.Y.S.2d 236 (1966).

29. PRESIDENT'S COMMISSION REPORT 410.

30. *State v. Gans*, 168 Ohio St. 174, 151 N.E.2d 709 (1958), cert. denied, 359 U.S. 945 (1959); *State v. Williams*, 236 Ore. 18, 386 P.2d 461 (1963); *Lovvorn v. State*, 215 Tenn. 659, 389 S.W.2d 252 (1965); Annot., 18 A.L.R.3d 824 (1968).

31. *Lovvorn v. State*, 215 Tenn. 659, —, 389 S.W.2d 252, 256 (1965).

32. Note, *Contributing to Delinquency Statutes—An Ounce of Prevention*, 5 WIL-LAMETTE L.J. 104, 109 (1968); 15 VILL. L. REV. 767, 769-71 (1970).

the statutes are the subject of strong criticism and demands for repeal.³³ Although the contributing statutes are upheld frequently, despite uncertain wording,³⁴ some have been declared unconstitutional because of vague and overbroad language.³⁵

The contributing statutes and related laws represent only one aspect of parental liability. Financial responsibility laws impose tort liability on parents for damage caused by their children. It is instructive to examine this civil liability for comparisons.

CIVIL LIABILITY OF PARENTS

Recent financial responsibility statutes impose vicarious civil liability on parents for the intentional torts of their children.³⁶ Under the common law, a child is liable for his torts although, usually, he is not financially able to pay damages.³⁷ The parent-child relationship has not been considered a basis for vicarious civil liability; consequently, the parent has had no legal responsibility for damage caused by the child.³⁸ Apart from the family relationship, the parent may be liable for the child's intentional torts if he encouraged or ratified the act, if he allowed the child access to a dangerous instrumentality, if he failed to control a child with known dangerous propensities or if he was negligent himself.³⁹ Because of these limitations, many victims cannot recover their losses.⁴⁰

The financial responsibility statutes were enacted supposedly to give innocent victims a chance for compensation.⁴¹ The statutes impose vicarious liability on the parent for damage caused by his child regardless

33. S. RUBIN, *supra* note 7, at 30; Geis, *supra* note 18, at 79-81.

34. Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992, *cert. denied*, 361 U.S. 913 (1959); People v. Deibert, 117 Cal. App. 2d 410, 256 P.2d 355 (Dist. Ct. App. 1953); State v. Barone, 124 So. 2d 490 (Fla. 1960); Commonwealth v. Randall, 183 Pa. Super. 603, 133 A.2d 276 (1957), *cert. denied*, 355 U.S. 954 (1958); 15 VILL. L. REV. 767 (1970).

35. State v. Vallery, 212 La. 1095, 34 So. 2d 329 (1948); State v. Hodges, 254 Ore. 21, 457 P.2d 491 (1969), *noted in* 15 VILL. L. REV. 767 (1970); State v. Gallegos, 384 P.2d 967 (Wyo. 1963).

36. These statutes are analyzed and compared in numerous law review articles. *E.g.*, Comment, *Liability of Negligent Parents for Torts of Minor Child*, 19 ALA. L. REV. 123 (1966); Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037 (1970); Note, *The Pennsylvania Parental Liability Statute*, 29 U. PITT. L. REV. 578 (1968).

37. Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 522 (1961); Glean v. Smith, 116 Ga. App. 111, 156 S.E.2d 507 (1967); W. PROSSER, *THE LAW OF TORTS* 871-73 (4th ed. 1971); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L. REV. 886, 888 (1934); Comment, *Liability of Negligent Parents for Torts of Minor Child*, 19 ALA. L. REV. 123 (1966).

38. W. PROSSER, *THE LAW OF TORTS* 871 (4th ed. 1971).

39. *Id.* at 871-72.

40. *Id.* at 871.

41. *Id.*

of the parent's fault or knowledge of the child's misdeeds.⁴² Because of this, the statutes have been criticized strongly.⁴³ If the statute is properly drafted, the cause of action against the parent is in addition to existing remedies.⁴⁴ In most cases, the liability is limited by the statutes⁴⁵ to a maximum ranging typically between \$100⁴⁶ and \$2000.⁴⁷ Because of this relatively low limit, it has been suggested that the motive is not compensation but prevention of delinquency by pressuring parents.⁴⁸ It has been contended that the statutes will have a "wholesome regulatory effect" on juvenile delinquency;⁴⁹ however, indications have been that no significant reduction in delinquency will be realized.⁵⁰

Until recently, the statutes had withstood constitutional attack because the parent-child relationship was considered to be a reasonable basis for the exercise of state police power.⁵¹ In a recent Georgia case, parental liability regardless of fault or knowledge was considered a deprivation of property without due process of law.⁵² Since the Georgia statute allowed unlimited recovery,⁵³ it was distinguishable from the several limited liability statutes that have been upheld. The Georgia court considered such limited liability to be penal rather than compensatory.

Financial liability statutes go beyond what appears to be reasonable for criminal prosecution.⁵⁴ They impose vicarious liability for the conduct of the child and disregard parental fault. Strict and vicarious liability might be acceptable in tort for the purpose of reparation and compensation for damages.⁵⁵ However, liability without fault does not seem to be acceptable for criminal prosecutions since the purpose is punishment, not compensation.

42. *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961).

43. S. RUBIN, *supra* note 7, at 29; Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037, 1041 (1970).

44. Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037, 1044 (1970).

45. W. PROSSER, *THE LAW OF TORTS* 871 (4th ed. 1971).

46. MINN. STAT. ANN. § 540.18 (Supp. 1970).

47. OHIO REV. CODE ANN. § 3109.09 (Baldwin 1971).

48. *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, —, 130 S.E.2d 645, 650 (1963); 36 WASH. L. REV. 327 (1961).

49. 55 MICH. L. REV. 1205, 1207 (1957).

50. Freer, *Parental Liability for Torts of Children*, 53 KY. L.J. 254, 264 (1964).

51. *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Mahaney v. Hunter Enterprises, Inc.*, 426 P.2d 442 (Wyo. 1967); Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037, 1041 (1970); Annot., 8 A.L.R.3d 612 (1966).

52. *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971).

53. GA. CODE ANN. § 105-113 (1968).

54. See note 111 *infra* and accompanying text.

55. Note, *The Pennsylvania Parental Liability Statute*, 29 U. PITT. L. REV. 578, 584 (1968).

CRIMINAL LIABILITY OF PARENTS FOR OMISSIONS

The contributing statutes and related laws impose criminal liability on parents for conduct that causes or tends to cause delinquency.⁵⁶ In the usual case, parents are prosecuted for their own active conduct, such as encouraging delinquent acts or committing sexual acts against the child or in his presence. Such active conduct poses little conceptual difficulty. However, attributing a child's delinquency to the passive conduct of the parent requires analytical attention.

Liability for an omission is predicated on the existence of a duty to act.⁵⁷ Moreover, the accused must have the capacity, means and ability to perform since there is no duty to do the impossible.⁵⁸ The statutes, in essence, impose an affirmative duty to prevent the delinquency of a child, whether the prohibition is "failure to control" or "omission of duty." Therefore, a parent is liable for his passive conduct if he failed to act when he could and should have acted and his action would have prevented the child's misconduct.

Criminal prosecution of parents is valid only within rational limits that are consistent with the criminal and constitutional law. Those rational limits are determined by reasonable definition of the parental duty and satisfaction of the requirements of "true crime."

A "true crime" is typified by commonly known felonies such as robbery and burglary. The contributing offense is a misdemeanor; however, misdemeanors of the type proposed herein are included within the concept of "true crime."⁵⁹ A "true crime" is defined as

a voluntary and intentional violation by commission or omission, by a legally competent person, of a legal duty that commands or prohibits an act for the protection of society, punishable by judicial proceedings in the name of the state.⁶⁰

The elements of a "true crime" are as follows: 1) an act (or omission); 2) mens rea or intent to commit the act (or omission); 3) concurrence of act and intent; 4) causation; and 5) harm.⁶¹

A "strict liability" offense differs from a "true crime" in the sense

56. See note 18 *supra* and accompanying text.

57. R. PERKINS, CRIMINAL LAW 595 (2d ed. 1969) [hereinafter cited as PERKINS].

58. *Id.* at 601.

59. *Id.* at 12.

60. M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESS 50 (1969) [hereinafter cited as BASSIOUNI].

61. *Id.*; J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 18 (2d ed. 1960) [hereinafter cited as HALL].

that the mens rea requirement need not be satisfied.⁶² The defendant is held liable whether he intended to commit a wrongful act or not. In "vicarious liability," a person is held criminally liable for the wrongful acts of another person.⁶³ Vicarious liability cannot be the basis of true crime because the mens rea requirement for criminal responsibility of one person cannot be satisfied by the state of mind of another person. Criminal responsibility is a very personal thing.⁶⁴

The importance of true crime standards for parental liability will be demonstrated in discussing omission of duty, parental attitude and intent (mens rea), causation and proof. It will be argued that strict liability and vicarious liability are inappropriate bases for parental liability.

Omission of Duty

Criminal omissions are subject to the same liability as commissions, although there is some conceptual difficulty in equating inaction with action.⁶⁵ "Nothing in the potentially harmful effects of failure to act entitles omissions to more lenient treatment than commissions."⁶⁶ The duty requirement does not distinguish omissions from commissions because there is a corresponding duty to refrain from committing acts.⁶⁷ However, reference to duty in omissions facilitates the definition of the proscribed conduct since it is difficult to isolate inaction except in terms of obligations left unfulfilled.

A legal duty is required for criminal liability, whereas a moral duty is not considered sufficient.⁶⁸ Legal duties are created by statute, contract or legal relationships such as parent-child or master-servant.⁶⁹ For parents, the legal duty to control their children is created both by the relationship and statutes. The legal duty requirement restricts liability to persons likely to recognize and respond to the duty.⁷⁰ A broader concept, such as moral duty, would impose potential liability on persons less likely to recognize the consequences of their inaction. For example,

62. PERKINS 806.

63. *Id.* at 813.

64. *Commonwealth v. Koczvara*, 397 Pa. 575, 585, 155 A.2d 825, 830 (1959), *cert. denied*, 363 U.S. 848 (1960).

65. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 424 (1965) [hereinafter cited as Frankel]; Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1047 & n.17 (1958) [hereinafter cited as Mueller].

66. Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 614 (1958) [hereinafter cited as Hughes].

67. HALL 193.

68. PERKINS 593; Frankel 390.

69. PERKINS 595.

70. Frankel 397.

of those watching the beating or drowning of a child, only the father (or a lifeguard) has a legal duty to act.⁷¹ Other onlookers have no legal duty to act and are not criminally liable for the consequences of their inaction, even though their inaction may be morally reprehensible.

The duty imposed on parents by the contributing statutes and related laws is presented in broad language; however, it must be narrowly defined in application. A definite legal duty is required.⁷² Fair notice and reasonable standards of guilt are required by the Constitution; consequently, criminal provisions are invalid if they are so vague and indefinite that a man cannot know the consequences of his conduct.⁷³ In addition, a provision cannot be so broad that it includes within its scope both innocent and culpable conduct.⁷⁴

The duty to prevent delinquency must be closely associated with the misconduct of the child.⁷⁵ A broader construction would be unconstitutionally vague and overbroad because the parent would have no idea what affirmative acts were sufficient to fulfill his obligation. Failing to teach the difference between right and wrong may be reprehensible, but it is not a criminal offense. However, if one fails to prevent a criminal act when he has the opportunity, it is another matter. Here, the omission is closely associated with the misconduct, and liability is reasonable. Since any other interpretation would be too broad, "omission of duty" and "failure to exercise reasonable control" must have the same meaning.

One is assumed to know the existence of a legal duty;⁷⁶ however, he is not liable for failure to act unless he is aware of the circumstances that give rise to a duty to act.⁷⁷ Innocent ignorance of the circumstances is not criminal. A person "cannot be said in any manner to neglect or refuse to perform a duty unless he has knowledge of the condition of things which require performance at his hands."⁷⁸ For example, a driver is not liable for failing to render aid after an accident if he did not know

71. *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (Ct. App. 1960); Comment, *Criminally Enforceable Duty to Act*, 18 WASH. & LEE L. REV. 311 (1961).

72. *People v. De Leon*, 35 Cal. App. 467, 170 P. 173 (Dist. Ct. App. 1918).

73. *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

74. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Alves v. Justice Court*, 148 Cal. App. 2d 419, 306 P.2d 601 (Dist. Ct. App. 1957).

75. The test of criminal omission is whether a person has the means, ability and capacity to act and whether in fact he is objectively aware that such duty exists as law, and arose, and that his failure to act exhibits a voluntary manifestation.

BASSIOUNI 57.

76. BASSIOUNI 57; HALL 205.

77. BASSIOUNI 57; HALL 205; PERKINS 600.

78. *Westrup v. Commonwealth*, 123 Ky. 95, 101, 93 S.W. 646, 648 (Ct. App. 1906) (manslaughter-negligence).

he had been in the accident.⁷⁹ For parental liability under a curfew ordinance,

the parent or guardian must actually know about the child violating the curfew ordinance, or the circumstances must be such that a reasonably responsible parent should have known that the child was violating the curfew.⁸⁰

To incur liability for failure to protect a child from injury, the parent must know of the danger to the child.⁸¹

Ignorance of the facts giving rise to the duty does not excuse an omission, however, if there is a duty to be informed.⁸² An example is the duty of a train gate keeper to close the gate to cars when a train is coming. He has a duty to know when the train is coming, so his ignorance is not an excuse if he fails to close the gate.⁸³ Within reasonable limits, parental knowledge of prior misconduct of the child could be a basis for a duty to be informed of future conduct. However, the parent should be expressly advised of the duty after the misconduct of the child. Ignorance of this additional duty should be an excuse to liability. Also, the duty must be limited to the same or very similar misconduct and restricted to a short period of time such as two months. If the duty extended beyond similar misconduct, the parent would not know what to guard against. The time limit is necessary because it is unreasonable and probably counterproductive to require a parent to "hover" over a child for an extended period. Subsequent misconduct could occur immediately as an expression of spite or later during a period of complacency. Knowledge of prior misconduct is also a factor to be considered in criminal negligence and will be discussed in the following section.

Causation

Omission of a duty is criminal "only when we are sure that the event was causally connected with the inactivity."⁸⁴ The difficulty in establishing a causal connection is not the existence of the connection

79. *People v. Holford*, 63 Cal. 2d 74, 403 P.2d 423, 45 Cal. Rptr. 167 (1965); *State v. Parish*, 79 Idaho 75, 310 P.2d 1082 (1957); *State v. Glover*, 270 N.C. 319, 154 S.E.2d 305 (1967); Annot., 23 A.L.R.3d 497 (1969).

80. *City of Eastlake v. Ruggiero*, 7 Ohio App. 2d 212, —, 36 Ohio Op. 2d 345, —, 220 N.E.2d 126, 129 (Ct. App. 1966).

81. PERKINS 600.

82. *State v. Irvine*, 126 La. 434, 446, 52 So. 567, 572 (1910) (manslaughter-neglect of railroad rules).

83. *State v. Benton*, 38 Del. 1, 187 A. 609 (1936).

84. *Kirchheimer*, *Criminal Omissions*, 55 HARV. L. REV. 615, 617 (1942).

but the relevance of the expected action to the final outcome as revealed in the following context :

The drowning is not set in relation to the inaction as such, since the process of drowning is neither brought about nor accelerated by the passive attitude of the bystander. We ask, therefore, whether the drowning would have been prevented if the expected action had taken place. When we answer this question in the affirmative, we confirm the relevance of the omission as a cause.⁸⁵

In other words, the accused does not initiate the events leading to the harm, but he allows current forces to take a toll which he could prevent.⁸⁶ The causal relation, however, does not require the omission and the harm to be closely connected in time. For example, failure to correct a hazardous condition is a blameworthy cause of a fire which occurs a long time after the opportunity arose.⁸⁷

Determining whether a child's misconduct has been caused by parental failure to control him is closely related to defining the duty. The parental omission is the cause of the misconduct only if performance of the duty would have prevented the misconduct. The omission of duty, therefore, must be closely associated with the misconduct.

The popular notion that parents cause delinquency is not applicable for determining criminal causation because studies do not reveal a consistent relationship between delinquency and inadequate parents. Many causal factors, such as slum conditions, may be operating at the same time, and isolation of the controlling factor can be difficult. Also, deficiencies in the family relationship that can result in delinquency are frequently vague.⁸⁸ For instance, a strong relationship between delinquency and parental affection has been documented.⁸⁹ However, punishing a parent because he is not affectionate is difficult to contemplate.

Juvenile delinquency is too complex a problem for the public to seek solace in simple solutions. "Delinquency is an integral feature of American society, and is not likely to be eradicated by crash programs."⁹⁰ A community must not be lulled into thinking that delinquency can be cured by arbitrarily shifting the burden to parents. Clearly, if performance of a duty when the necessity arose would not have prevented a child's

85. *Id.* at 618.

86. HALL 196.

87. *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944); HALL 201.

88. See note 8 *supra* and accompanying text.

89. PRESIDENT'S COMMISSION REPORT 199.

90. *Id.* at 427.

misconduct, the failure to perform the duty should not be deemed the cause of that misconduct.

After proof that an omission of duty has caused a child's misconduct, mens rea, the distinguishing feature between true crime and strict liability, remains to be proved. The attitude of the parent is the key factor in determining whether punishment is warranted.

Parental Attitude or State of Mind

Guilt for any true crime requires the concurrence of perpetrating conduct and criminal intent or mens rea.⁹¹ The requirement of mens rea is the distinguishing feature between true crime and strict liability.⁹² In contributing cases, mens rea is usually required for conviction, thus precluding strict liability.⁹³ Although these cases generally involve acts of commission, particularly sex-related offenses, there is no reason to distinguish omissions and commissions on the basis of mens rea.⁹⁴

The criminal intent or general mens rea requirement of true crime has been described as the "awareness of evil, *the sense of doing something which one ought not . . .*"⁹⁵ For crimes of omission, an "adequate mens rea" has been described as an "attitude of self-centered thoughtlessness and disregard for the rights of others *despite the capacity and opportunity* to realize and respect these rights . . ."⁹⁶ The mens rea requirement for an omission is satisfied by recklessness where the consequences are foreseen but not desired and by intentional omission where the consequences are known, desired or foreseen to a certainty.⁹⁷ As the "adequate mens rea" definition and the reference to recklessness suggest, criminal negligence satisfies the mens rea requirement.

Criminal negligence, like negligence in tort, is determined by comparison with a standard of conduct.⁹⁸ That standard is the exercise of due care and caution as represented by the conduct of a reasonable man under the circumstances.⁹⁹ The civil or tort law requires conformity with

91. PERKINS 834.

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

93. *State v. Cutshaw*, 7 Ariz. App. 210, 437 P.2d 962 (Ct. App. 1968); *Slaughter v. District of Columbia*, 134 A.2d 338 (D.C. Mun. Ct. App. 1957); Annot., 31 A.L.R.3d 848 (1970).

94. HALL 201; Mueller 1100.

95. Mueller 1060.

96. *Id.* at 1063.

97. Hughes 603.

98. PERKINS 754.

99. *Id.*

Negligence is any conduct, except conduct intentionally or wantonly disregardful of an interest of others, which falls below the standard established by law for

this standard and awards damages for slight deviations from it. On the other hand, the criminal law requires a very substantial deviation from the standard for guilt.¹⁰⁰ Although the concept of criminal negligence appears most frequently in manslaughter cases, it applies to other situations also.¹⁰¹ For criminal negligence, a disregard of a danger to life or limb or some other substantial harm is probably required. In the family situation, if the parent knows that the child has committed serious acts in the past or is likely to in the future, the parent probably would be criminally negligent if he did nothing to prevent a recurrence.

Ignorance or mistake of fact is an excuse for most true crimes.¹⁰² This essentially negatives the presence of mens rea. The excuse is allowed if the mistake was honest and reasonable and if the conduct of the accused would have been lawful and proper if the facts had been as he reasonably supposed. For omissions, ignorance of the facts that give rise to the duty to act is an excuse to liability although the person is presumed to know of his legal duties.¹⁰³ Unless a person knows of the necessity to act, he is not conscious of his wrongdoing.¹⁰⁴ If the ignorance of fact is due to criminal negligence, however, the ommitter is not excused.¹⁰⁵

The attitude of the parent is the key factor in determining whether liability is warranted. If he knows of the necessity to control his child, has the opportunity to control him and fails or refuses to do so, his state of mind satisfies the mens rea requirement, and he should be criminally liable. If the parent shows disregard or lack of concern for the conduct of his child, he may be criminally negligent and liable. If he has notice of prior misconduct of the child, this is a factor to be considered in determining reasonable conduct under the circumstances.

Strict Liability

Strict liability is applied in "public welfare offenses" such as traffic violations and sale of adulterated food.¹⁰⁶ These are government regulations that would be difficult to enforce without small penalties in the form of fines. The primary purpose of the penalties is to enforce the regulations, not to punish blameworthy conduct. Some courts disregard

the protection of others against unreasonable risk of harm.

PERKINS 753 (footnote omitted).

100. HALL 204; PERKINS 757.

101. PERKINS 757.

102. *Id.* 939-41.

103. See note 77 *supra* and accompanying text.

104. Frankel 394.

105. HALL 204; PERKINS 757.

106. HALL 347; PERKINS 801.

mens rea entirely, while others impose a lesser standard of blameworthiness than is present in true crime.¹⁰⁷ In either event, liability is imposed without satisfying the mens rea requirement of true crime. Liability is not so strict as to be absolute; however, in most cases, ignorance or mistake of fact is not an excuse.¹⁰⁸ Because of the difference in purpose and definition, strict liability should not be applied to true crimes¹⁰⁹ and should not be a basis for imprisonment.¹¹⁰

Strict liability is applied, in a limited way, to contributing offenses in some jurisdictions.¹¹¹ Mens rea is not required in the sense that mistake as to the age of a child is not an excuse. These mistake cases usually involve liquor or sex-related offenses. Since age is a definitional requirement peculiar to delinquency, the decisions should not be applied to prosecution of parents.

Under strict liability, the parent may be held liable without knowledge of the facts giving rise to the duty to control the child, since ignorance or mistake of fact is not an excuse.¹¹² Undoubtedly, a conviction may be achieved more easily if the prosecution can avoid the burden of proving mens rea or disproving a reasonable mistake. However, the problems of proving a true crime seem to be an insufficient reason to impose strict liability on parents for omissions that otherwise could be innocent.

Under some curfew ordinances, parents apparently are held strictly liable for a violation by the child.¹¹³ Apparently, the purpose is to "enlist" the support of parents in enforcing the curfew. In some communities it is not a defense that the parent did not have knowledge that the child was violating the ordinance. Other communities apply an objective test of knowledge which is satisfied by a showing that the parent should have known of the curfew violation. In either case, the requirements of true crime are not met; therefore, punishment of the parent, even by small fine, does not seem to be proper. In addition, it does not appear to be likely that application of strict liability will have more of a deterrent or persuasive effect on parents than adherence to the traditional standards of true crime.

107. PERKINS 806.

108. *Id.* 802.

109. *Morissette v. United States*, 342 U.S. 246, 263 (1952); HALL 336; PERKINS 797.

110. PERKINS 794.

111. *Anderson v. State*, 384 P.2d 669 (Alaska 1963); *State v. Hardy*, 232 La. 920, 95 So. 2d 499 (1957); Annot., 31 A.L.R.3d 848 (1970).

112. See note 108 *supra* and accompanying text.

113. Note, *Curfew Ordinances and the Control of Nocturnal [sic] Juvenile Crime*, 107 U. PA. L. REV. 66, 77-78 (1958).

The "public welfare offense" with strict liability has been criticized as an inappropriate means for the enforcement of general regulations for the safety, health and well-being of the community.¹¹⁴ Holding parents strictly liable for omissions seems to be even less appropriate. Protection of the general public may justify strict liability for a restaurant owner who inadvertently sells adulterated food, since the business involves intimate contact with the public. There seems to be no similar justification for regulation of families by strict liability.

Vicarious Liability

Criminal liability for the conduct of another, vicarious liability, is not consistent with the requirements of a "true crime."¹¹⁵ Unlike true crime, the conduct and state of mind of the accused are not controlling considerations.¹¹⁶ In effect, an innocent person is liable for the culpable conduct of another.¹¹⁷

Vicarious liability, like strict liability, is applied in the "public welfare offenses." Usually, the accused is the employer of the wrongdoer and is liable if the employee commits the act within the scope of employment.¹¹⁸ Punishment is limited to fines because imprisonment for the conduct of another is a violation of the due process requirement of the Constitution.¹¹⁹

The temptation to discard prison sentences and impose vicarious liability on parents is strong, but it should be overcome. Under the contributing statutes, the purpose is to protect the child. This purpose does not seem to be served by punishing parents for passive conduct that is not criminal. If vicarious liability is imposed, the parent is likely to be more alienated than deterred or spurred to control his child. In effect, the parent is punished for being related to the delinquent child. The parent should only be prosecuted by the standards of true crime under which liability is based exclusively on personal causation.¹²⁰

Proof and Presumptions

It is difficult to prove that the passive conduct of a parent was a cause of a child's misconduct or that the parent knew of the necessity to

114. HALL 345.

115. See note 63 *supra* and accompanying text.

116. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 723 (1930).

117. Mueller 1070.

118. PERKINS 814.

119. *Commonwealth v. Koczwar*, 397 Pa. 575, 155 A.2d 825 (1959), *cert. denied*, 363 U.S. 848 (1960).

120. *Id.* at 585, 155 A.2d at 830.

act. Consequently, there is a great temptation to presume causation and knowledge after proof of the child's conduct.

Statutory presumptions are considered valid only if the proved fact and the presumed fact are related by some rational connection.¹²¹ This standard serves as a guide for legislative investigations into the validity of presumptions in new laws. In a recent criminal case, the Supreme Court demanded "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."¹²²

A parent should be presumed to know that he has a legal duty to control his child. However, he should not be presumed to know the facts which give rise to the duty to act.¹²³ A statutory presumption of knowledge would involve the untenable conclusion that most parents know what their children are doing at all times. Even if the parent has knowledge of a prior offense, he will not necessarily have forewarning of a subsequent offense. To presume a causal relation between the child's conduct and a parental omission is unsound because reported evidence does not support the presumption with certainty.¹²⁴ Even if the parent had knowledge of a prior offense, it is not reasonable to presume that he could have prevented the subsequent misconduct, since the child is not within the direct control of the parent at all times. Proof of the child's conduct should be considered by the jury as circumstantial evidence only, without presumptions.

The prosecution receives an unfair advantage from the added weight of a state authorized permissive presumption.¹²⁵ Even though the presumption can be rebutted, its existence obscures the tenuous foundation on which it rests. The initial appeal and "apparent" validity tend to discourage any thoughtful consideration of whether the presumption is indeed true. The prosecution is allowed to avoid the difficult task of connecting the child's misconduct to some aspect of the complex family relationship. On rebuttal, the parent must face that same task. There seems to be no apparent reason for simplifying the case for the prosecution.

The Madison Heights ordinance contains a provision that a parent

121. *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910).

122. *Leary v. United States*, 395 U.S. 6, 36 (1969).

123. See note 77 *supra* and accompanying text.

124. See note 9 *supra* and accompanying text.

125. The statutory presumption is permissive in that the jury is not required to presume violation from the proved fact. Otherwise, the presumption would interfere with the requirement that the jury find guilt beyond a reasonable doubt. Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 343 (1970).

“may be deemed guilty” of failure to exercise reasonable parental control if the child commits more than one criminal act in a twelve-month period.¹²⁶ Another section provides for notice to the parent of his responsibility under the ordinance after his child has been arrested.¹²⁷ Together, these sections seem to create a presumption of knowledge and causation. In the discussion above, such presumptions were shown to be improper. Another construction of the provisions is that a special duty is imposed on the parent to keep informed about the conduct of the child.¹²⁸ However, the duty is not confined to a short period or to conduct which is similar to the initial offense. Even if so confined, the provisions would seem to impose strict liability. With the special duty to have knowledge, it is no excuse to plead ignorance of the circumstances that give rise to the duty to control. However, omission of the special duty should be treated as a true crime; consequently, the mens rea requirement must be satisfied.

PROSPECTS OF REDUCED DELINQUENCY

If parental liability for omissions is limited as proposed, it is doubtful that any significant reduction in total delinquency will be realized. Prosecutions probably will deter similar omissions to the same extent that deterrence is a factor in reducing the incidence of any crime. However, because of evidentiary difficulties, there probably will be few prosecutions or convictions. In effect, the proposed limitations will preclude implementation of the popular notion that parents cause delinquency. Therefore, authorities will be free to pursue more constructive solutions to delinquency.

If liability is extended beyond the proposed limits, prosecution may have little constructive effect, and delinquency rates probably will not be affected. Tension in the home may increase. Other family members, particularly children, may be deprived of support because of the economic strain of a fine or jail sentence on a parent. A child may use the statute as a weapon against his parent. Public condemnation, though a motivating factor for most middle class parents, may be less effective in inner-city areas where peer group pressure and status are less influential on adults. Standards of reasonable control may vary with educational, social, racial and ethnic background. Parents might be unwilling to seek help with a delinquent child for fear of prosecution. Lack of enforcement could foster disrespect for the law.

126. MADISON HEIGHTS, MICH., CODE § 8-223 (1970).

127. *Id.* § 8-222.

128. See note 55 *supra* and accompanying text.

Experience in New York indicates that punishing parents does not reduce delinquency.¹²⁹ Even the limited purpose of reducing truancy could not be achieved.¹³⁰ An anti-vandalism law with parental liability was opposed by judges because the strain on the parent-child relationship made rehabilitation more difficult.¹³¹ In a celebrated case, a mother was prosecuted because she was indifferent and irresponsible, because she failed to provide a home and encourage school attendance and because her son shot at people in the street.¹³² The public reaction was strong and negative. Her conviction was reversed (for admission of hearsay), and the police program to punish parents of delinquents was discontinued.

Prosecution of parents in Ohio over a ten-year period produced no reduction in delinquency.¹³³ The problems of proof and the subtleties of causation were too great for punishment of parents to be effective in reducing delinquency.¹³⁴ There was no evidence that punishment deterred other parents from committing similar acts.¹³⁵ Where the parental conduct consisted primarily of omissions, punishment as a method of control was "so impracticable as to be worthless."¹³⁶ However, punishing parents did tend to satisfy "the blood-lust, the punitive-vindictive appetite of self-righteous nondelinquent parents, irritated, aggravated public authorities, and a substantial portion of the general public."¹³⁷

One writer casts aside punishment of parents as a solution to delinquency in the following words: "Wherever the concept takes hold that parents who fail should be punished, it should be exposed as a delusion; wherever it has been put into practice, it should be banished as quackery."¹³⁸

SUMMARY AND CONCLUSION

Many people subscribe to the notion that parents are responsible for juvenile delinquency even though the parents do not overtly encourage

129. Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BROOKLYN L. REV. 172, 182-86 (1955).

130. *Id.* at 182.

131. *Id.* at 186.

132. *Human v. Rivera*, 272 App. Div. 352, 71 N.Y.S.2d 321 (1947). See Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BROOKLYN L. REV. 172 (1955); Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719 (1952); 4 N.Y.U. INTRA. L. REV. 230 (1948-1949); 30 ST. JOHN L. REV. 317 (1956).

133. Alexander, *What's This About Punishing Parents?*, 12 FED. PROB. 23 (1948)

134. *Id.* at 27.

135. *Id.* at 28.

136. *Id.*

137. *Id.*

138. Rubin, *Should Parents Be Held for Juvenile Delinquency?*, 34 FOCUS, March, 1955, at 35, 38.

misconduct by their children. Since a "good family life" is obviously advantageous to a child's development, it is reasoned that the parent must have failed to do "that something" which would have avoided the problem. Consequently, punishment is advocated for those parents whose children become delinquent.

Researchers confirm that inadequate parents are a cause of delinquency; however, they report that many other causes of equal import can be operating at the same time. Obviously, then, a summary condemnation of parents with delinquent children is ill-founded. Since delinquency cannot be traced with consistency to inadequate parents, this popular notion of causation is not a fitting basis for criminal liability. Moreover, since studies show that it is difficult to isolate "that something" that the parent could have done to avoid the problem, he should not be punished for not doing it. It is only when the action of a parent could have prevented the child's misconduct that his inaction should be deemed the cause. This situation arises when a parent has the opportunity to control the child and fails to do so.

An affirmative duty to control their children is imposed on parents by a variety of state and local laws. Failure to perform the duty subjects the parent to criminal prosecution. Under these laws, a parent can be liable for his own omission, but he cannot be liable vicariously for the conduct of his child. Such vicarious liability is unconstitutional. For his own inaction, the parent should be liable in only three situations: 1) he knew that the child was going to commit the act, had the ability to stop it and failed to do so; 2) he did not know of the conduct of his child but had a special, limited duty to be informed and failed to comply; or 3) he was so indifferent to the conduct of his child that he was criminally negligent. In these situations, the parent should only be convicted after proof that he was aware of his own wrongdoing or was indifferent to the consequences of his inaction. Unless the parent had this attitude, conviction is not warranted. A conviction without proof of the parent's state of mind (*mens rea*) would be an imposition of strict liability which is not appropriate for true crimes. In addition to limiting the liability as described, presumptions which simplify the proof against the parent should not be allowed.

The criminal liability of a parent must be limited as described above to comply with constitutional and criminal law. Beyond such legal considerations, the limitations are necessary if prosecuting parents is to have any constructive influence on delinquency control. A parent who is imprisoned or fined on the basis of strict or vicarious liability is likely to be more alienated than deterred or reformed. The parent who is

convicted because the prosecutor, judge and jury had some vague notion that he caused the delinquency of his child is not likely to know what reforms are necessary. Punishment places a burden on the parent and the remaining members of a family already plagued with a rebellious child and possibly a variety of other social problems. Within the proposed limits of liability, punishment is imposed where it is warranted and where it is most likely to effect a reduction in delinquency.