St. Thomas Law Review

Volume 26
Issue 4 *Summer 2014*

Article 5

2014

The Contract: Between Contract Law and Criminal Jurisprudence

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THE CONTRACT: BETWEEN CONTRACT LAW AND CRIMINAL JURISPRUDENCE

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INTRODUCTION

Contract law is the backbone of civil jurisprudence, and at its center stands the contract itself, in all of its splendor. Literature and case law alike have dealt with fundamental questions relating to the contract: What gives a contract effect? What is its essence? What are the conditions for its formation? When can it be voided? What reliefs are available in cases of breach? Some of the questions that arise in the context of contract law, however, relate on a fundamental level to criminal jurisprudence, one of the foundation stones of public law, in the context of criminal responsibility in the case of a failure to act—an omission. Such a connection between contract law and criminal jurisprudence, with a focus on the contract as a source of the duty to act required in order to convict for an omission, has yet to be fully explored in the literature and case law, and this essay presents an original perspective on this issue.

Criminal jurisprudence draws a significant distinction between an action that causes harm and an omission that causes harm. That is, in order to convict someone of homicide, any action that resulted in a person's death will suffice so long as the other requisite elements of the crime, such as causation and intent, are present. In order to convict someone for an omission, however, it is necessary to identify a duty to act on the part of the defendant and to show that breach of this duty resulted in the death of the victim. The requisite duty to act may flow from obligations under criminal law (such as obligations of parents vis-à-vis their children) or obligations under civil law, but it is generally assumed that such a duty may also

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originate in a contract.[1] That is, in some circumstances, if a person breaches his contractual obligation to act, resulting in someone's death, it may be possible to convict the person of homicide due to his failure to act.

The goal of this essay is to consider which contracts can serve as a source of the requisite duty to act in criminal jurisprudence. The discussion focuses on several questions: First, is a contract able to serve as a source of a duty to act only if it is valid, or can a nonvalid contract serve as a source of such duty as well? Second, can a contract that is valid but not enforceable (that is, only monetary compensation can be recovered in a case of breach) under contract law serve as a source of a duty to act under criminal law? For example, can a contract for personal service serve as such a source, since it is accepted that such a contract cannot be specifically enforced? Finally, assuming a contract that is both valid and enforceable under contract law, can every such contract serve as a source of a duty to act under criminal law, or can only certain types of contracts be able to serve as such source? In this context, the question arises as to whether a contract that benefits a third party (where the third party is the victim) can serve as a source of the requisite duty to act, and if so, under what conditions?

The answer to this question is embedded in the underlying rationale of the distinction between act and omission in criminal jurisprudence. Many scholars have discussed this issue.[2] This essay focuses on two

1. PAUL H. ROBINSON, CRIMINAL LAW 193 (1997).

2. *See generally* the following examples for treatment of the issue from the legal perspective: P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 59–70 (1998); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 593–602 (1978); JOEL FEINBERG, HARM TO OTHERS 159–81 (1984); MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 25–26 (1993) [hereinafter MOORE (1993)]; George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443 (1994); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547 (1998); Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749 (1994) [hereinafter MOORE (1994)]; F. M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 U. PA. L. REV. 1493 (1994); Leo Katz, *Proximate Cause in Michael Moore's Act and Crime*, 142 U. PA. L. REV. 1513 (1994). *See also* the following examples for treatment of the issue from the ethical perspective: Jonathan Bennett, *Whatever the Consequences*, in KILLING AND LETTING DIE 167–91 (Bonnie Steinbock & Alastair Norcross eds., 1994); P. J. Fitzgerald, *Acting and Refraining*, 37 ANALYSIS 133 (1967); Philippa Foot, *Killing and Letting Die*, in KILLING AND LETTING DIE 283 (Bonnie Steinbock & Alastair Norcross eds., 1994); O. H. Green, *Killing and Letting Die*, 17 AM. PHIL. Q. 195 (1980); John Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192 (1974); Tracy L. Isaacs, *Moral Theory and Action Theory, Killing and Letting Die*, 32 AM. PHIL. Q. 355 (1995); SHELLEY KAGAN, THE LIMITS OF MORALITY 83–127 (1991); Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, *in* KILLING AND LETTING DIE 383 (Bonnie Steinbock & Alastair Norcross eds., 1994); James Rachels, *Active and Passive Euthanasia*, in KILLING AND LETTING DIE 112 (Bonnie Steinbock & Alastair Norcross eds., 1994) [hereinafter "Rachels (1975)"]; James Rachels, *Killing and Starving to Death*, 54 PHIL. 159 (1979); Bruce Russell,

central rationales that have been suggested for such a distinction, the liberty rationale and the causation rationale, and on how each affects the determination of which contracts can serve as a source of a duty to act. It is possible to consider the matter from two different perspectives. The first is that for purposes of criminal convictions based on contractual obligations, criminal law leans on contract law; thus, there is a need to consider whether the contract in question is valid and whether it is enforceable. Under the second perspective, however, criminal law is distinct from contract law. Therefore, even where there is no valid contract, or where the contract is valid but unenforceable under contract law, it may be possible to convict a criminal defendant by relying on a duty that springs from the original contract.

The structure of the essay is as follows: Part I presents the general legal premise that enables the conviction of one who has caused harm by an omission in cases where the duty to act originates in a contractual obligation and highlights U.S. case law on this topic.[3] Part II distinguishes between the duty to act that originates in a contract and a similar duty that is mentioned in case law and literature: the actual assumption of responsibility for a potential victim.[4] Part III introduces various scenarios to assist in examining which contracts can serve as a source of a duty to act in criminal jurisprudence.[5] Part IV analyzes these scenarios in terms of the liberty and causation rationales and concludes that it is possible to look at the entire issue from two different perspectives—the contract law perspective and the criminal law perspective.[6]

I. THE CONTRACT AS A SOURCE OF A DUTY TO ACT IN CRIMINAL JURISPRUDENCE

As stated above, criminal jurisprudence distinguishes sharply between conviction for an act and conviction for an omission. When seeking to convict for an act, any act that resulted in harm will suffice to convict, while with regard to conviction for an omission, a defendant can only be convicted if a duty to act is identified. Sources of this duty to act are varied. Such duty to act may flow from a relationship between the defendant and the victim, such as parent-child. A mother who fails to feed

Presumption, Intrinsic Relevance, and Equivalence, 4 J.MED. & PHIL. 263 (1979); Michael Tooley, *An Irrelevant Consideration: Killing Versus Letting Die, in* KILLING AND LETTING DIE 103 (Bonnie Steinbock & Alastair Norcross eds., 1994).

3. *See* discussion *infra*, Part I.
4. *See* discussion *infra*, Part II.
5. *See* discussion *infra*, Part III.
6. *See* discussion *infra*, Part IV.

her young child will be convicted of manslaughter if the child dies of starvation.[7] Other such relationships that create a duty to act include a spousal relationship. Thus, a person who does not make reasonable efforts to attain proper medical care for his children[8] or his wife[9] may be convicted for this omission if death results. A similar duty may exist in the employer-employee context, such that if an employer fails to warn his employee of a danger, he may be convicted of manslaughter.[10]

An additional source of such a duty to act is explicit legislation. Thus, some scholars maintain that person can be convicted of homicide if he was involved in a car accident and did not stop to help someone who was injured. In this case, the duty to act flows from the law that requires a driver who is involved in an accident to extend assistance to anyone injured in the accident.[11] Similarly, laws require business owners to maintain certain safety equipment, such as fire extinguishers, on their premises. If a business owner breaks such a law, by failing to provide such equipment, and this failure results in someone's death, the owner might be convicted of manslaughter for his omission. Finally, a duty to act may spring from force of contract. As LaFave states:

> The duty to act to aid others may arise, not out of personal relationship or out of statute, but out of contract. A lifeguard employed to watch over swimmers at the beach, and a railroad gateman hired to safeguard motorists from approaching trains, have a duty, to the public they are employed to protect, to take affirmative action in appropriate circumstances. The lifeguard cannot sit idly by while a swimmer at his beach drowns off shore; the gateman must lower the gate when a train and automobile approach his crossing on collision courses. Omission to do so may make the lifeguard or gateman liable for criminal homicide.[12]

Case law shows a childcare contract is an example of a duty to act that originates in a contract. For example, in *People v. Wong*,[13] a couple undertook to care for a three-month-old child. Three weeks later, the Wongs called the parents and informed them that their baby was dead. The

7. *See* WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW 437 (2d ed. 2003).

8. *Id.*; *see also* Robey v. State, 456 A.2d 953, 962–63 (Md. 1983); Commonwealth v. Konz, 450 A.2d 638 , 644 (Pa. 1982).

9. Westrup v. Commonwealth, 93 S.W. 646 (Ky. 1906).

10. LAFAVE, *supra* note 7, at 437–38.

11. *Id.* at 439.

12. LAFAVE, *supra* note 7, at 439; *see also* RICHARD CARD, CARD, CROSS & JONES: CRIMINAL LAW 38 (20th ed. 2012); DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW 72 (13th ed. 2011).

13. People v. Wong, 588 N.Y.S.2d 119 (N.Y. App. Div. 1992), *rev'd*, 619 N.E.2d 377 (N.Y. 1993).

police investigation concluded that the baby died as a result of shaken baby syndrome. The Wongs claimed that they had not shaken the baby; rather their three-year-old son had done so. The court held that even if that was the case, the Wongs could be convicted of manslaughter since they had a duty to care for the child and had breached that duty:

> However, while criminal liability will normally be imposed only for a defendant's culpable act, it may also be imposed when a defendant, with the requisite mental culpability for the crime charged—in this case, recklessness—fails to perform an act as to which a duty of performance is imposed by law. There is no question that the contractual babysitting agreement involved in this case, as well as the voluntary assumption of complete and exclusive care of a helpless child, created legal duties of care which were substantially coextensive with those which would be borne by a parent. These clearly included the duties which the defendants were charged with breaching, i.e., the duty to provide necessary emergency medical care as well as the duty to protect the child, if possible, from physical harm.[14]

Nonetheless, a Pennsylvania court was not comfortable with a conviction of manslaughter for an omission when the duty to act originated in a contract. In *Commonwealth of Pennsylvania v. Pestinikas*,[15] a couple entered into a verbal contract to feed, clothe, and provide medical care to a ninety-two-year-old man. Instead, they transferred him to an isolated location, with no sink or toilet, and did not provide any of the care they had undertaken to provide. Several months later, he died. The couple was indicted and convicted of murder in the third degree. On appeal to the Supreme Court of Pennsylvania, the majority held that it was possible to convict for the omission since defendants had breached the contract between themselves and the victim.[16] However, the dissent felt that a contract could not serve as a source of a duty for the purposes of a homicide conviction. Judge Del Sole stated that:

> Duties which are "imposed by law" do not encompass those which arise out of a contract or agreement. A person who enters a contract does so freely. The duties contained in a contract are those which the person who is entering the contract agrees to undertake voluntarily in exchange for some other consideration. The duties themselves are not

14. *Id.* at 108 (citations omitted), *rev'd on other grounds*, 619 N.E.2d 377 (N.Y. 1993); *accord* Jones v. United States, 308 F.2d 307, 308–10 (D.C. Cir. 1962) (holding that if contract between mother and appellant could be shown, appellant could be convicted of manslaughter for failure to care for a baby born to an unwed mother who was given to appellant to care for and died of malnutrition after several months); State v. Brown, 631 P.2d 129, 130 (Ariz. Ct. App. 1981) (affirming manslaughter conviction of boarding house owner for death of ninety-eight-year-old woman from starvation where owner had undertaken to care for the woman).

15. Commonwealth v. Pestinikas, 671 A.2d 1339 (Pa. 1992).

16. *Id.* at 1343–45.

> "imposed by law" they are assumed by the terms of the agreement. Although breach of the agreement may result in some legal recourse, the law will fashion a remedy only if the injured party seeks one. The Pestinikases' omissions which resulted in a breach of their agreement to care for Mr. Kly do not constitute an omission which could be the basis of liability under [Pennsylvania law].[17]

It is possible to explain Judge Del Sole's dissenting opinion in two alternate ways. The first way is to claim that the dissent refused to see a contract as a source of a duty to act for the purposes of conviction for an omission due to a specific problem of interpretation of the criminal law of the State of Pennsylvania.[18] This states:

> (b) Omission as basis of liability.—Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (1) the omission is expressly made sufficient by the law defining the offense; or (2) a duty to perform the omitted act is otherwise *imposed by law*.[19]

From this perspective, the difference of opinion between the majority and the dissent is merely that the dissent understands "imposed by law" to include only duties explicitly set forth in legislation and not duties created by private people by force of contract. Had the legislature used more general language, it would be possible to rely on contract as a source of duty to act for the purpose of a criminal conviction since the reason not to do so here is not fundamental.

On the other hand, the dissent may have felt that it is simply not appropriate to rely on contract as a source of a duty to act in the criminal context, since a conviction for an omission requires the breach of a duty to act that is rooted in the need to protect the general interest of society. Thus, only a statutory obligation can constitute a duty to act, since such obligations are imposed specifically in order to protect this general interest. An obligation that originates in a contract between private individuals, however, cannot serve as a source of the requisite duty to act, since the assumption is that such a duty was not created out of the need to protect society in general. While the legislature has granted rights to parties injured by breach of contract, the obligation in and of itself is created by private individuals and does not reflect the need to protect a general social interest that is required in a criminal law context; thus, such obligation cannot serve as a basis for a duty to act in this context.

17. *Id.* at 1358 (Del Sole, J., dissenting).
18. 18 PA. CONS. STAT. § 301(b) (2013).
19. *Id.* (emphasis added).

II. THE VOLUNTARY ASSUMPTION OF RESPONSIBILITY AS A SOURCE OF A DUTY TO ACT

It is important to distinguish between a contract as a source of a duty to act and a duty to act that develops from the fact that someone took upon himself, voluntarily and with no consideration, the responsibility to care for or protect someone who cannot care for himself (generally a minor or a person with physical or metal disabilities).[20] For example, if someone becomes depressed and lies down on railroad tracks and someone else discovers the person and extends assistance, that person must continue the aid and may not abandon his endeavors and leave the person on the tracks, since his initial extension of aid indicates that he has assumed responsibility for the victim. Leaving the victim on the railroad tracks, once initial assistance has been extended, may lead to conviction for manslaughter. However, if someone offers to take responsibility for another, but prior to actually extending any aid he retracts this offer, he will have a duty to act only if as a result of his offer he intensified the risk to the victim by causing others not to extend assistance.[21]

One example of this principle in case law is *Cornell v. State*.[22] This case involved a mother and her daughter who went out drinking, leaving the daughter's infant in the car while they were in a bar. Around 2:00AM, the daughter met a friend, and the mother agreed to take the baby home. The daughter returned approximately sixteen hours later and discovered that the baby was dead. The drunken mother had taken the baby to bed with her, and an autopsy revealed that the baby had been smothered. The court held that the mother had assumed responsibility to care for the child and had breached the duty incumbent upon her as a result of this assumption of responsibility. Therefore, she was properly convicted of manslaughter by omission.[23]

Similarly, in *Stehr v. State*,[24] the defendant was convicted of killing his stepson (he had not formally adopted the child, but had demonstrated by his actions that he agreed to take responsibility for the child) for failing to make reasonable efforts to get the child medical care. The duty in this case originated in the actual care he had extended to his stepson.[25]

20. MICHAEL ALLEN, CRIMINAL LAW 28–29 (2003); LAFAVE, *supra* note 7, at 440.
21. LAFAVE, *supra* note 7, at 440.
22. Cornell v. State 32 So 2d. 610 (Fla. 1947).
23. *Id.* at 611.
24. Stehr v. State, 139 N.W. 676 (Neb. 1913).
25. *Id.* at 677–78.

In other cases, however, courts have refused to rely upon assumption of responsibility as a source of a duty to act. In *Olp v. State*,[26] the court held that Olp could not be convicted for not providing assistance to his stepson. The court held that even though the defendant had assumed temporary responsibility for the minor, this assumption of responsibility did not create a duty to act as required under criminal jurisprudence:

> The [Alaska] supreme court has never applied this doctrine to criminal cases, however, and has never discussed circumstances under which someone other than a parent may become liable for the support of a child. Under these circumstances, we decline to extend [Alaska's duty to support statute] beyond those individuals expressly made legally responsible for the support of a child by [the statute] . . . .[27]

This position was sharpened in *State v. Miranda*,[28] which involved a twenty-one year old defendant who lived with his girlfriend and her two children (a two-year-old and a four-month-old). The woman and the defendant managed a joint household. The defendant had assumed responsibility to care for the children, even though he did not formally adopt them. One day, the defendant noticed that the baby was having trouble breathing and had turned blue. He tried to resuscitate the baby and got her medical assistance. An investigation revealed that the baby's mother had hit the baby, causing broken bones and bruises on many places on her body. The defendant was charged, among other things, with assault, based on the fact that he was aware of the mother's abuse and did nothing to stop it. The state argued that he had a duty to take care of the baby because, through his actions, he had assumed responsibility for her care. The court rejected this argument: "The facts that the defendant was a member of the household, that he considered himself the stepfather of the baby girl, and that he took on the responsibility of the care and welfare of that child do not establish a legal duty."[29]

While courts have differed in their treatment of a duty to act based in a contract and a duty that flows from the assumption of responsibility for a potential victim, they have not delineated the reasons for such a difference. Both instances involve obligations taken on by someone vis-à-vis the potential victim and not a duty explicitly mandated by law. However, a duty based on an assumption of responsibility creates a close relationship between the defendant and the victim, where such a relationship leads to a duty on the part of the person to continue to protect the victim. And where

26. Olp v. State, 738 P.2d 1117 (Alaska Ct. App.1987).
27. *Id.* at 1118.
28. State v. Miranda, 675 A.2d 925 (Conn. App. Ct.1996).
29. *Id.* at 929.

no actual care has commenced, but there has simply been an undertaking to accept responsibility, the duty arises, as stated, only if the undertaking increases the risk to the victim. In such a case, then the duty arises as a result of the creation or increase of the risk.

In contrast, when a duty to act originates in a contract, it is not as clear why such a duty arises. First, it is possible to argue that here, too, the duty flows from the relationship created by the contract. That is, it is not the act of undertaking itself that creates the duty to act; rather, the creation of a relationship between the defendant and the victim is what creates this duty to act. The difference between a duty based on assumption of responsibility and a duty based upon a contract is that with regard to a contract, the duty arises even before the person has begun to assist the victim, while with respect to a duty based on the assumption of responsibility, the duty to act arises only once the person has demonstrated this assumption of responsibility by his actions, thus creating the relationship between the defendant and the victim. Another possibility is that when a contract is made, the duty to act flows from the contractual obligation in and of itself. From this perspective, even if the contract does not create a close relationship between the defendant and the victim, the contract can serve as a source of a duty to act under criminal jurisprudence.

Both of these options are consistent with the approach that no duty to act results from the voluntary assumption of responsibility (*Olp* and *Miranda*), since it is possible to claim either that no close relationship is created by the voluntary assumption of responsibility, while a contract does indeed create such a relationship, or that a contractual obligation is simply more binding than the voluntary assumption of responsibility with no consideration.

III. FIVE SCENARIOS

Assuming a contract can serve as a source of a duty to act in criminal jurisprudence, the question arises whether all contracts can serve as the source of such duty. Considering several scenarios will assist in clarifying this matter.

In the first scenario, hereinafter referred to as "**Drowning 1**," A, a good swimmer, undertakes personally to save B from drowning. B enters the water and encounters difficulty, but A does not save him. B drowns. In the second scenario, hereinafter referred to as "**Drowning 2**," A, a good swimmer, undertakes personally to save B from drowning. Before B enters the water, A tells him that he intends to breach this contract and will not

save him. B enters the water and encounters difficulty. A does not save B. B drowns.

In the third scenario, hereinafter referred to as "**Drowning 3**," B owns a beach and has a legal obligation to appoint a lifeguard for this beach. He contracts with A, a good swimmer, to act as lifeguard and to save anyone who encounters difficulty. C, who is not aware of the contract between A and B, enters the water and encounters difficulty. A does not save C. C drowns. In the fourth scenario, hereinafter referred to as "**Drowning 4**," B owns a beach. He has no obligation under the law to provide a lifeguard. Nonetheless, B hires A, a good swimmer, to act as lifeguard and to save anyone who encounters difficulty. C, who is not aware of the contract between A and B, enters the water and encounters difficulty. A does not save C. C dies.

Finally, in the fifth scenario, hereinafter referred to as "**Supervision**," A promises the parents of baby B to stay with and care for B for a month, while the parents are abroad. The parents promise to pay A $500 per week. After two weeks, the payments stop. A cancels the contract on the grounds of breach of contract and leaves B's apartment. Several hours after A leaves, a fire breaks out, and B dies.

Drowning 1 resembles the two cases discussed in Part I (*Wong* and *Pestinikas*), in that there is a contract, the victim takes a risk (in **Drowning 1** he has entered the water; in *Wong* and *Pestinikas*, the victim had been left in the care of the defendants) in reliance on the contract, and the only one available to avert the risk is the party who undertook to do so. However, the other four scenarios are different, and perhaps they should be treated differently in legal terms.

In **Drowning 2**, A does indeed undertake to save B, but in this case, even before B enters the sea, it is made clear to him that A will not uphold the contract. This is in clear contrast to *Wong*, where the parents had dropped off the baby, and *Pestinikas*, where the parties had left the victim without care or supervision. In **Drowning 3**, the victim is not a party to the agreement made between the lifeguard and the owner of the beach; in fact, he is not even aware of the existence of such agreement. Thus, the victim does not enter the sea in reliance on the contract. On the other hand, in *Pestinikas*, the victim was a party to the contract, and while in *Wong* the parents were the contracting parties, not the baby, the age of the baby and the familial relationship between the baby and its parents implies that the victim, represented by his parents, entered the contract in reliance on the Wongs' undertaking. While the victim in **Drowning 4** is again not a party to the contract or even aware of the contract, in this case, the owners of the

beach have a duty under the law to appoint a lifeguard. Finally, in **Supervision**, the parents breached the contract, thus technically entitling A to cancel it, as opposed to the situation in both *Wong* and *Pestinikas*, where there were valid contracts in place.

The question that arises in all of these scenarios is whether the contract can serve as a source of a duty to act for the purposes of a homicide conviction, or whether there are crucial distinctions between the scenarios such that in some of the scenarios the contract can serve as a source of a duty, while in others it cannot.

IV. RATIONALES FOR THE DISTINCTION BETWEEN ACTION AND OMISSION: LIBERTY OR CAUSATION

In order to answer the question posed at the end of Part III, we must first take a step back and ask a more basic question: Why do we distinguish between act and omission in criminal jurisprudence? This distinction is not self-evident, especially on the moral plane, and many philosophers maintain that all else being equal—that is, same intent, same cost to prevent death, same result—there is no distinction between act and omission. James Rachels, for example, argues that there is no moral difference between one who actively drowns his cousin in order to inherit and one who, for the same reason, stands by while the child drowns when he could easily have saved him.[30]

1. THE LIBERTY RATIONALE

a) Presentation of the rationale and its application to the scenarios

One of the central rationales for distinguishing between act and omission rests on liberty of action.[31] Under this rationale, the prohibition against an act that causes harm does not significantly infringe upon liberty of action, since all that is required is to refrain from a particular act. On the other hand, prohibiting omissions that cause harm does infringe significantly upon liberty, since such prohibition creates a situation in which at any given moment a person must interrupt his pursuits in order to prevent harm to another. Thus, if it were possible to convict people of result crimes for causing harm by omission, even in the absence of any

30. *See* Rachels (1975), *supra* note 2, at 115–16.

31. *See* A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 65–66 (2007); *see also* DAVID ORMEROD, *supra* note 12, at 65; A.P. Simester, *Why Omissions Are Special*, 1 LEGAL THEORY 311, 334 (1995).

specific duty to act, people would have to abandon their daily lives and embark upon various rescue missions.[32] To illustrate, in Smith's neighborhood, lives John, who is in mortal danger. Smith is aware of this fact. If Smith could be convicted for failing to save John, even in the absence of any specific duty to act, then any time John calls Smith, he must drop whatever he is doing in order to assist John or risk being convicted of manslaughter or negligent homicide.

Since the legal system must permit people to conduct their normal lives, criminal jurisprudence has determined that people can be convicted for an omission only if a duty to act can be identified. The duty to act in the case of omission serves to limit the number of situations in which a person must act in order to prevent harm in general and death in particular, therefore limiting the infringement upon liberty and enabling man to live his life and pursue his goals at his discretion.

Under this analysis, anything that imposes a duty to act—whether by force of criminal or civil law—can serve as a basis to convict of result crimes in general and homicide in particular. The reason is that by imposing a duty to act, the legislature has determined that in this situation, the consideration of liberty is to be set aside. Once liberty is set aside, there is no distinction between an act that causes harm and an omission that causes identical harm. Consequently, it is possible to convict anyone who causes harm of the relevant crime.

If we apply this liberty rationale to our scenarios, we can conclude, at least on the surface, that in all of the first four scenarios (**Drowning 1-4**), it would be possible to convict A of homicide. The reason is that in all of these scenarios, there is a duty incumbent upon A (vis-à-vis B) to fulfill the contract. Therefore, one can argue that the legislature has decided that in such situations considerations of liberty are to be set aside, and there is no

32. *See* George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1450–51 (1994) (presenting a different rationale in the context of the liberty theory). Some contend that criminal law limits crimes of omission as they restrict personal liberty more than classifying particular acts as criminal. The contention is that prohibiting omission allows an individual to perform a particular act, but it prevents him from doing multiple other ones. However, prohibiting a particular act limits only that act itself and does not prevent the performance of multiple other ones. Critics of this theory contend that it is inaccurate to state that criminalizing omission causes more loss of liberty than crimes of action. The issue of loss of personal liberty relates to the person who is the object of the crime and to his preferences. For example, the prohibition against smoking does not affect a person who has no interest in smoking, but it severely restricts the liberty of a chain smoker. The fact that the latter can sing or dance instead of smoking does not prevent the loss of personal liberty. In contrast, the consideration mentioned in the text provides that with respect to result crimes (which do not generally involve defined conduct), the need to act is frequent and recurring and therefore results in extreme loss of personal liberty.

bar to conviction of A for homicide due to omission. In **Supervision**, however, the original contract may not be able to serve as a source of a duty to act, since the contract is canceled under law, and A no longer has any duty to act. Thus, in this scenario the consideration of liberty remains in force, and A cannot be convicted.

b) Unenforceable contracts: The relationship between relief and right

It is possible to critique this last conclusion and say that the scenarios, as well as *Wong* and *Pestinikas*, may involve valid contracts, but they are contracts for the specific performance of personal services. As such, under contract law it is not possible to enforce the contract by forcing the party to perform the service; rather, the breaching party is required to provide monetary compensation to the injured party. The reason for this is protection of individual rights.[33] Contract law is not interested in forcing upon someone a personal relationship as this could significantly infringe upon his liberty. Therefore, just like contract law cannot force an author to continue to write a book, an architect to complete a blueprint for his friend's home, or a lawyer to continue to work in a law firm, it cannot obligate someone to save his friend or to continue to work as a babysitter or lifeguard when he does not wish to do so.

A claim that can arise in this framework is: Contracts that are unenforceable under contract law cannot serve as a source of a duty to act in criminal law, since there is no actual duty to act but rather a duty to compensate.[34] In order to evaluate this claim, we must examine the connection between the relief in case of breach of contract and the contractual right in and of itself. Specifically, what is the legal significance of not enforcing a contract in cases of contracts for personal service?

There are two main possibilities. Under the first option, the legislature's decision not to provide the relief of enforcement for contracts for personal services means that contracts of this type can be fulfilled in one of two ways, provision of the service or payment of compensation that will put the injured party in the position he would have been in had the service been provided. Thus, payment of compensation constitutes

33. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 12.5–12.6 (4th ed. 2004); DANIEL FRIEDMAN AND NILI COHEN, CONTRACTS 197 (2011); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 186 (1986); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 372 (1978).

34. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 297 (1979). "Liberty interests are affected, however, in the case of an individual promisor who performs personal services. In part for this reason, current law does not allow specific performance to be granted in this case." *Id.* at 297.

fulfillment of the contract rather than relief for breach. This approach assumes that the 'relief' available establishes the very essence of the contractual right. As such, the relief is a full substitute for the right itself.[35]

The position that with regard to contracts for personal service there is no duty to act but merely a duty to monetary payment unless the service is provided was implied by Randy Barnett,[36] who maintains that it is not possible to transfer the right to personal service but only the right to payment:

> What should happen if *A* breaches a commitment to provide personal services by refusing to perform as agreed? Can a commitment by *A* to *B* that *A* will do something for *B* constitute a valid contract? If the right to the future control of one's person is inalienable, the personal services in question cannot be the subject of a valid rights transfer agreement. Therefore, if a promise to provide personal services is only a commitment to exercise inalienable rights, then it is unenforceable. By breaching his promise to *B, A* may commit a morally bad act. He has not, however, committed a legally cognizable wrong.
>
> Alternatively, a contract "to provide personal services" might accurately be construed as a commitment to transfer alienable rights to money damages (or other alienable resources) on the condition that specified personal services are not performed as promised . . . . In essence, the true commitment in an enforceable agreement to provide personal services would be: "I'll do X for you and, if I fail to perform X, you will have the right to money damages."[37]

Under the second option, a contract for personal service does impose a legal duty to fulfill the contract by providing such service, and the other party has the right to provision of that service. However, that party does not have the legal power to demand enforcement of the contract. Thus, payment of compensation is a relief rather than an intrinsic part of the original contract.[38]

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35. *See* FRIEDMAN & COHEN, *supra* note 33, at 197–98; Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 52–53 (1936); Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 992 (1997).

36. *See generally* Randy E. Barnett *supra* note 33, at 197.

37. *Id.*

38. *See* Dalia Even, *The Implications of the "right" to Relief for Breach of Contract,* 6 TEL AVIV L. REV. 121, 129 (1978-1979).

> In most cases in which it is desirable to permit a party to a contract be released from the contract, the injured party does not have the power to enforce—and the breaching party is immune from enforcement. Thus, it is possible to preserve the balance between the stance that contracts must be fulfilled and the stance that there are circumstances in which it is desirable to permit a person to be released from contractual obligations, subject to a duty to compensate for damage caused. How do we achieve this? The idea that contracts must be fulfilled is preserved by the fact that the law does not grant the breaching party the power to be released from the contract

Professor Meir Dan-Cohen developed this approach with regard to the Penal Code by distinguishing between conduct rules and decision rules.[39] Conduct rules are aimed at the general public and instruct it how to behave. On the other hand, decision rules are aimed at office holders who apply the law to those who breach the conduct rules. A conduct rule may prohibit a particular activity, while a decision rule can provide for no punishment for breaking the rule in question.[40] According to Dan-Cohen, there is an acoustic separation between conduct rules and decision rules with the goal of persuading people to act in a particular way while holding back information such as the possibility of flexible consequences of breaches of the conduct rules.[41] This position allows us to understand that while on the one hand A is not permitted to kill B, even under duress, we may not punish A for doing so. Therefore, conduct rules and decision rules do not necessarily match precisely.

This position can be applied to contract law, specifically to contracts for personal services. On the one hand, a contract for personal service imposes the obligation to perform the contract, while on the other hand, notwithstanding this obligation, a court will not enforce it.[42] Thus, the contractual relief does not necessarily indicate the nature and scope of the original right.

These two perspectives are also relevant in the context of the American position that the main relief for a breach of contract in general (other than exceptions such as special resources or real property) is compensation rather than enforcement. Thus, according to Schwartz and Markovits, payment of compensation is actual fulfillment of the contract to

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> unilaterally, and he does not have the right to be released. As such, he is obligated not to be released; that is, he must fulfill his obligations, and the injured party has the right to demand this. Right in the narrow sense, that is. The injured party has no power to realize this right by enforcement; thus, the breaching party is immune to a demand of enforcement. However, since the right in its narrow sense does exist for the injured party, and it was breached, the injured party has a different power—the right to demand compensation. This binds the breaching party, and he is not immune from it; thus, the second stance is realized. Although the breaching party is released from fulfilling the contract by a unilateral act, and it is impossible to force him to actually perform, he is subject to a demand for compensation.

Id.

39. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

40. *Id.* at 629.

41. *See id.* at 630–31. Although in the legal world, absolute acoustic separation does not actually exist. *Id.* at 630.

42. *See generally* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 300–14 (1991) (applying Dan-Cohen's position to contract law).

the same extent that performance fulfills the contract, so when a party pays compensation, the term breach is not correct:

> The dual performance hypothesis, by contrast, holds that the typical promisor makes a promise in the alternative: to deliver goods or services in return for a price *or* to make a monetary transfer to the promisee in place of delivery. On this view, the promisor "breaches" only when she fails to comply with either aspect of her promise: that is, she fails to deliver *and* she refuses to pay. Put another way, a promisee does have a right but it is either to the delivery of the promised goods or services *or* to the delivery of the promised money, at the promisor's discretion. The failure to deliver the goods or services simpliciter thus is not a breach.[43]

Similarly, Jules L. Coleman explains the position of Justice Holmes:

> On this view, in contracting to deliver goods to or provide services for Smith, Jones incurs an obligation whose content is a disjunction: a duty either to perform as promised or to pay damages to Smith. So construed, Jones can discharge his obligation either by performing or by paying damages ex post.[44]

On the other hand, Coleman is of the opinion that even in American jurisprudence, which waves the banner of the efficient breach doctrine, the primary obligation is actual fulfillment of the contract and the lack of this fulfillment constitutes an infringement. Compensation is a relief that heals the breach but is not actual fulfillment of the contract.[45]

c) Implications in the realm of criminal jurisprudence

In the contract law context, it makes no real difference which of these two perspectives is adopted, since in any case contracts for personal service will not be enforced, and the relevant relief is compensation. However, there are real-world legal ramifications with respect to the use of such contracts as a source of a duty to act in the realm of criminal jurisprudence.

Under the first option, when someone dies as a result of failure to perform under a contract for personal service, it is not possible to view the contract as a source of a duty to act. Such contracts cannot impose a duty since it can actually be fulfilled by the payment of compensation. However, under the second option, such contracts may serve as a source of a duty to act since, although the injured party has no power to compel

43. ALAN SCHWARTZ & DANIEL MARKOVITS, THE MYTH OF EFFICIENT BREACH, FAC. SCHOLARSHIP SERIES, PAPER 93 7–8 (2010).

44. Jules L. Coleman, *Some Reflections on Richard Brooks's "Efficient Performance Hypothesis,"* 116 Yale L.J. Pocket Part 417 (2007).

45. *Id.*

performance under contract law, there is a legal duty to perform, that is, a duty to act. Thus, while a court will not enforce the contract, the primary duty to act arising from the contract itself serves as the source of the duty to act in the criminal context.

The reason for the dissonance between contract law and criminal law in this regard comes from the underlying rationales respective to each of these two spheres. In contract law, the force of the contract stems from the assurance provided by the one who obligates himself to perform.[46] The legislature has determined that when human liberty is infringed upon in a significant manner, we will not force a party to fulfill the contract. In a contest between the value of keeping contractual assurance and human liberty, human liberty will triumph. However, the rationale underpinning criminal law is the prevention of harm to others.[47] Thus, despite the fact that the contract cannot be enforced under contract law due to liberty considerations where harm has occurred, it is possible to use the contract as a source of a duty to act for the purposes of securing a criminal conviction.

Nonetheless, even under the first option, it may be possible to rely on a contract for personal service as a basis for criminal conviction since courts can create sources of obligations of their own initiative without identifying such a duty in the law.[48] Thus, even if there was no specific duty to act under a contract for personal service (since payment of compensation is also considered fulfillment of the contract), the court can hold, as a matter of criminal law, in cases risking human life, that the person performing has a duty to act. However, in such situations, the duty to act does not arise from the contract itself but from the court's power to create such a duty.

In summary, under the first option (assuming that courts cannot create duties on their own initiative), a contract for personal service cannot serve as a source of a duty to act in the criminal context. Therefore, it is not possible to convict in any of the scenarios since in all five cases there is no duty to act under contract law. Thus, *Wong* and *Pestinikas* are open to criticism since they were based, at least partially, on contracts that did not create a duty to act. Under the first option where the assumption is that

46. *See* Charles Fried, *Contract at Promise, in* FOUNDATIONS OF CONTRACT LAW 9–11 (Richard Craswell & Alan Schwartz eds., 1994); *see also* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 9–17 (1981).

47. MICHAEL J. ALLEN, CRIMINAL LAW 3 (7th ed. 2003); FEINBERG, *supra* note 2, at 11–12.

48. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 89–91 (2d ed. 1995); LAFAVE, *supra* note 7, at 439–40; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 664 (3d. ed. 1982). It is doubtful, however, whether the court would apply such a duty to the case at hand or only going forward.

courts can create duties on their own initiative, while a contract for personal service cannot serve as a source of a duty to act in the criminal context, in some of the scenarios, a court might find a duty to act and thus convict a breaching party of homicide.

Under the second option, since there is a duty to act, even though the injured party has no power to enforce the contract under contract law, the liberty theory allows for a homicide conviction of the breaching party in all four of the **Drowning** scenarios. In **Supervision**, however, there is no duty to act, thus no ability to convict.[49]

2. THE CAUSATION RATIONALE

Some argue that the distinction between act and omission in criminal jurisprudence does not rest on liberty of action but on the causal difference between act and omission. Under this approach, when A drowns B, A causes the death of B, since there is a causal connection between A's act and the death of B. On the other hand, when A fails to prevent B's drowning, A's failure to act does not have a causal connection to B's death (at a minimum the causal connection is indirect) since A did nothing. Under this approach, one concludes it was the waves that caused B's death, not A's failure to act.

Moore sharpens this distinction:

> Omissions do not cause anything, then when I omit to prevent some harm I do not make the world worse . . . only when I cause that harm to occur—through my actions—do I worsen the world. [50]

As such, he claims that an act can create change in the world and cause harm by worsening the victim's situation, while an omission does not create change in the world and, consequently, cannot worsen the condition of the victim; at most it leaves it where it was.

According to Moore, since there is a causal difference between an act that causes harm and an omission that simply fails to prevent harm, only significant duties, which spring from the relationship between the defendant and victim (such as parent-child) or between the defendant and a source of danger (for example, when the defendant owned a weapon and did not take action to lock it up) can serve as a source of a duty to act for the purposes of criminal conviction. On the other hand, other duties are not punishable under criminal law and cannot serve as a source of the required

49. Here, too, a court might find a duty of its own initiative in spite of the parents' breach of contract.

50. MOORE (1993), *supra* note 2, at 28–29.

duty to act for conviction of a result crime in general and homicide in particular. Thus, a father who fails to save his son from mortal danger can be convicted of manslaughter, while A who fails to save B (where there is no such relationship), perhaps in identical circumstances, cannot be convicted.

Thus, in contrast to the liberty rationale, which maintains that the need to identify a duty to act with regard to omission springs from the desire to limit the infringement upon human liberty, the causation rationale requires identification of such a duty to act in order to convict for result crimes in cases of omission to compensate for the weak causation. Thus, according to Moore, a doctor who fails to provide medication to his patient should be convicted of manslaughter not because there is a causal connection between the doctor's action and the death of the victim but because he breaches his duty to act. It is not that the duty to act creates the causal connection—if there is no causal connection in the absence of the duty to act, such a duty cannot change this.[51] Rather, with regard to an omission the causal explanation is that if the person had fulfilled his obligation the harm would not have occurred.[52]

If we apply the causation rationale to our scenarios, assuming there is a duty to act, we see that this approach leads to different results than the liberty analysis:

In **Drowning 1**, A can be convicted, but the duty to act that he has breached is not rooted in the contract but in the fact that he has created a dangerous situation for B. B enters the sea only due to his reliance on A, and this reliance can be seen as a creation of risk by A. While B's reliance is due to the contract, A's duty to act is not created by the contract itself but from B's reliance that causes him to enter a dangerous situation. In the absence of such reliance, A's contractual duty to B could not serve as the basis of a criminal conviction. This scenario is similar to a situation in which A digs a pit on his property and fails to warn B of the presence of the pit. A's creation of the pit imposes upon him a duty to prevent B from falling into it.

In **Drowning 2,** A cannot be convicted of homicide even though he has a contractual duty to save B for two main reasons. First, when A tells B he intends to breach the contract, they become "strangers" (such that a contractual duty to act cannot serve as a basis for a homicide conviction). Second, when A tells B he intends to breach the contract, he breaks the

51. *Cf.* Moore (1994), *supra* note 2, at 1784–85.
52. *Id.* at 1784.

causal connection, which is already weak, between A's conduct and B's death. In this case, B assumes the risk, and A cannot be convicted of B's death.

In **Drowning 4**, it is doubtful whether it is possible to convict A of homicide. As stated, under the causation rationale only a significant duty stemming from the relationship between defendant and victim or defendant and a source of danger can serve as a basis for a homicide conviction. Here, there is no direct connection between A and the victim, since the victim is not a party to the contract. Similarly, it is doubtful whether this contract creates a significant relationship between A and the source of danger, since A does not own the beach, and the law does not impose any duty to appoint a lifeguard on this beach. The duty to act springs from a private initiative on the part of the owner of the beach, and it is doubtful whether this initiative creates a significant duty with regard to A such that breach can lead to criminal conviction.

In **Drowning 3,** the situation may differ as there is a legal duty imposed upon the owners of the beach to appoint a lifeguard, and the appointment of A fulfills this duty. Where the legislature has determined that someone is to be appointed to guard bathers, this duty creates a direct connection between that person and the source of the danger; therefore, breach of the duty in this case may lead to conviction of A for B's death.

Several court decisions have dealt with the situation in which the victim is not a party to the contract, as is the case in **Drowning 3** and **Drowning 4**. For example, in *State v. Benton*,[53] the defendant worked for Pennsylvanian Railways and in accordance with the contract between the parties he was obligated to be responsible for a railroad crossing. It was alleged that the defendant did not activate the stop light warning drivers that a train was about to pass. As a result, there was a collision between a train and the victim's vehicle, and the victim was killed. The court convicted the defendant of involuntary manslaughter even though the employment contract was between the defendant and the railway company, not between the defendant and the victim.[54] Similarly, in *State v. Harrison*,[55] the court convicted appellant of manslaughter because he forgot to close the barrier and as a result there was a collision and a person was killed.

Despite these cases, there is no unanimity with regard to the question of whether every contract to benefit a third party can serve as a source of a

53. State v. Benton, 187 A. 609 (Del. O. & T. 1936).
54. *Id.* at 610, 613; *see* LAFAVE, *supra* note 7, at 439; ORMEROD, *supra* note 12, at 72.
55. State v. Harrison, 152 A. 867 (N.J. 1931).

duty to act for purposes of criminal conviction. In *Rex v. Pittwood*,[56] an English case, appellant was employed by a railway company to guard a crossing. Appellant forgot to close the barrier before leaving for his lunch break. While the barrier was up, a cart was run over by a train. Appellant claimed that his duty was to his employer and not to the public. The court convicted him of homicide but it is not clear as to the reason. It seems that Judge Wright in *Pittwood* held that appellant should be convicted because he had breached a duty that arose out of the contract between him and the company. The fact that the public was not a party to the contract was not relevant because appellant undertook a duty to protect the public and his breach caused someone's death.[57] But it might be alleged that a defendant can be convicted only if there was a legal obligation to have a guard at the barrier and appellant's appointment fulfilled this duty.[58] Under this approach, then, a contract benefiting a third party can be the basis of conviction of the breaching party only when there is a duty under law to protect the third party and the one who breached was appointed to fulfill this obligation. On the other hand, if there is no duty under law, a contract benefiting a third party cannot serve as a source of a duty to act for the purpose of criminal conviction for an omission.[59]

This difference of opinion may be related to the rationale that distinguishes between act and omission. Under liberty analysis, any contract can serve as a source of the requisite duty to act. Hence, even in the absence of an obligation mandated by law, a contract benefiting a third party can serve as a source of a duty to act. On the other hand, under causation analysis, only contractual duties that exist in the context of a direct relationship between a defendant and either the victim or the source of danger can serve as the source of the requisite duty to act. Therefore, a contract benefiting a third party will serve as a source for the duty to act only if the duty is rooted in law.

At first glace, in **Supervision**, it seems that this contract cannot serve as a source of a duty to act since the contract is not valid. However, the

56. R v. Pittwood (1902) 19 TLR 37.

57. *Id.* at 20.

58. *See* LaFave, *supra* note 7, at 439–40 n.23 (discussing R. v. Smith, 11 Cox CC 210 (1869)); *see also* SIMESTER & SULLIVAN, *supra* note 31, at 69 n. 37 (discussing R. v. Smith, 11 Cox CC 210 (1869)).

59. *See* SIMESTER & SULLIVAN, *supra* note 31, at 69.

> Consider a hypothetical case in which D, a nurse, has signed a contract that contains a term requiring her to intervene and save people at large—that is, even when off duty and away from the hospital. In such a case, D's failure to rescue someone when at the beach may be a breach of contract, but surely would not be a criminal offence.

Id.

duty to act may arise not from the contract but rather from the fact that A assumed the responsibility to care for the child (as discussed above in Part II) and cannot back out of this responsibility, regardless of whether there is any breach of contract. On the other hand, A agreed to assume responsibility over the child only on condition that parents pay, so perhaps when they breached their obligation, A's responsibility ended and responsibility for the child returned to the parents.

The analysis of these scenarios suggests that in contrast to the results of applying the liberty rationale, under the causation rationale the duty to act in cases of contracts to save is not based in the contractual obligation. Rather, such duty to act may come from the fact that the contract created a risk (**Drowning 1**) or from a law that requires a lifeguard and a contract that satisfies this law (**Drowning 3**). Where a contract neither creates risk nor embodies the fulfillment of an obligation under law, courts cannot convict for omissions.

CONCLUSION

This essay breaks new ground with regard to legal thinking about the contract as a source of a duty to act in criminal jurisprudence by examining the connection between contract law and criminal law. The central question is: Which contracts can serve as a source of a duty to act in criminal jurisprudence? This question has not been addressed explicitly in case law and has yet to be considered seriously in legal literature. This essay examines the issue in light of two central rationales for the distinction between act and omission in criminal jurisprudence—liberty and causation. It demonstrates that there is debate with regard to whether contracts for personal service can serve as a source of a duty to act in criminal jurisprudence. On the one hand, since such contracts are not enforceable in contract law, they must not be able to create a duty to act in criminal law. On the other hand, however, perhaps such contracts do indeed impose a legal duty to carry out the terms of the contract even if the law does not enforce them in the contract law context. Therefore, even if contractually they cannot be enforced, they may serve as a source of a duty to act in criminal law.

Furthermore, liberty analysis and causation analysis lead to different results with regard to the five scenarios presented. Assuming that a contract can serve as a source of a duty to act, under liberty analysis any valid contract can serve as a source of such duty, since the legislature has already determined that the consideration of liberty is set-aside in the relevant situation. However, under causation analysis, the duty to act in

such situations does not spring from the contractual obligation in and of itself but rather from either a creation of a risk caused by the contact (**Drowning 1**), the existence of a duty to act under law (**Drowning 3**), or assumption of responsibility (**Supervision**). Thus, under causation analysis, in **Drowning 2** and **Drowning 4**, where there is no legal obligation, A does not create the risk, and there is no actual assumption of responsibility, there can be no criminal responsibility.