weapons." But the jury was told that it could conclude that respondents possessed the weapons found therein from proof of the mere fact of respondents' presence in the automobile. For all we know, the jury rejected all of the prosecution's evidence concerning the location and origin of the guns, and based its conclusion that respondents possessed the weapons solely upon its belief that respondents had been present in the automobile.[8] For purposes of reviewing the constitutionality of the presumption at issue here, we must assume that this was the case. • • •

In sum, it seems to me that the Court today ignores the teaching of our prior decisions. By speculating about what the jury may have done with the factual inference thrust upon it, the Court in effect assumes away the inference altogether, constructing a rule that permits the use of any inference—no matter how irrational in itself—provided that otherwise there is sufficient evidence in the record to support a finding of guilt. Applying this novel analysis to the present case, the Court upholds the use of a presumption that it makes no effort to defend in isolation. In substance, the Court—applying an unarticulated harmless-error standard—simply finds that the respondents were guilty as charged. They may well have been but rather than acknowledging this rationale, the Court seems to have made new law with respect to presumptions that could seriously jeopardize a defendant's right to a fair trial. Accordingly, I dissent.

8. The Court is therefore mistaken in its conclusion that, because "respondents were not 'hitchhikers or other casual passengers,' and the guns were neither 'a few inches in length' nor 'out of [respondents'] sight,'" reference to these possibilities is inappropriate in considering the constitutionality of the presumption as charged in this case. To be sure, respondents' challenge is to the presumption as charged to the jury in this case. But in assessing its application here, we are not free, as the Court apparently believes, to disregard the possibility that the jury may have disbelieved all other evidence supporting an inference of possession. The jury may have concluded that respondents—like hitchhikers—had only an incidental relationship to the auto in which they were traveling, or that, contrary to some of the testimony at trial, the weapons were indeed out of respondents' sight.

Notes and Questions

1. Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 Am.Crim.L.Rev. 393, 418–19 (1983): "The majority and the dissent differ more in their reading of what the trial judge did than in their approach to presumptions and inferences. Both appear to have examined exactly what the trial judge said and to have asked whether it was a fair statement of what the evidence actually offered could be said to have proved.

"Had the trial judge said to the jury, 'If you believe that the defendants were in the car and weapons were in open view, you could reason from this that the defendants were jointly in possession of the weapons; but this is not the only way to view the evidence, and the important thing is that you must believe beyond a reasonable doubt that a defendant possessed the weapons before voting to convict the defendant,' the entire Court might have viewed this as a fair statement of a possible way of looking at the evidence. Alternatively, had the trial judge said to the jury, 'If you believe that the defendants were in the car where weapons were found, this is sufficient for you to convict them of possession, unless there is some adequate explanation for the defendants' presence,' all members of the Court might have agreed that this statement overstated the significance of evidence of presence in the car, and that the instruction may have produced a conviction for the wrong reason because the jury may have believed the judge was saying that as a matter of law the evidence proved guilt unless some explanation for presence was present.

"Both opinions in *Allen* support the first principle identified above, which complements *Mullaney* and *Patterson*. The government may not evade its responsibility to prove guilt of the offense it charges by relying on a judicial comment that goes beyond a fair assessment of the proof actually presented. In other words, the government may not prove guilt by having a judge tell a jury that something has been proved when it has not. The proof must be evident in the record, and any instruction may not go beyond the proof offered."

2. Allen & DeGracia, *The Constitutional Requirement of Proof Beyond a Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim.L.Rev. 1, 11 (1983): "One result of the *Ulster County* heavy emphasis on the evidence adduced at trial appears to be to transform the analysis of the instructions into a harmless error analysis. • • • A harmless error standard that looks heavily to the facts in the record can permit an instruction to be upheld, and a conviction affirmed, primarily on the basis of facts that a jury did not believe beyond reasonable doubt. The effect is to undercut both the right to a jury trial and the reasonable doubt standard."

SECTION 3. OMISSIONS

STATE v. WILLIQUETTE

Supreme Court of Wisconsin, 1986.
129 Wis.2d 239, 385 N.W.2d 145.

STEINMETZ, JUSTICE.

The issue in the case is whether a parent who allegedly knew her husband had repeatedly abused her two children both physically and sexually, but who took no action to stop the abuse and instead left the children in the father's sole physical custody for hours at a time, can be tried for the direct commission of the crime of child abuse under sec. 940.201, Stats.[1]

• • •

In a criminal complaint issued on November 15, 1983, Terri Williquette, the defendant, was charged with two counts of child abuse, contrary to sec. 940.201, Stats. Count one was based on the defendant's alleged failure to take any action to prevent her husband, Bert Williquette, from repeatedly "sexually abusing, beating, and otherwise mistreating" her seven year old son, B.W. Count two was based on the defendant's alleged failure to take any action to prevent her husband from committing similar acts against the defendant's eight year old daughter, C.P.

• • •

On June 6, 1984, the defendant filed a motion to dismiss the information. She claimed that she could not be charged with child abuse because she did not directly commit the abusive conduct. The circuit court granted the motion to dismiss. The court concluded that sec. 940.201, Stats., applies only to the intentional acts of a defendant who directly abuses a child. Accordingly, the mother's alleged failure to take any action to prevent her husband from abusing the children was not covered by the statute. • • •

The parties disagree as to whether sec. 940.201, Stats., requires a person to directly inflict child abuse in order to violate the statute. The defendant contends that the legislature intended the statute to apply only to persons who directly abuse children. She maintains that the statute

1. Sec. 940.201, Stats., provides as follows:

"940.201 Abuse of children. Whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited, to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22(14) is guilty of a Class E felony. In this section, 'child' means a person under 16 years of age."

does not impose a duty on her to protect her own children from abuse. The state, however, argues that the statute is susceptible to an interpretation which includes persons having a special relationship to children who expose them to abuse. The state relies on the statutory language "subjects a child to cruel maltreatment." The state urges the court to construe this language to cover situations in which a parent knowingly exposes a child to abuse by placing the child in a situation where abuse has occurred and is likely to recur. • • •

There is no statutory definition of "subjects" in sec. 940.201, Stats. We therefore turn to standard dictionary definitions for guidance. Webster's Third New International Dictionary (1967) defines "subject" when used as a verb to mean: "a: to bring under control or dominion • • • b. to reduce to subservience or submission • • • 2a: to make liable • • • 4: to cause to undergo or submit to: make submit to a particular action or effect: expose." • • •

We conclude that the ordinary and accepted meaning of "subjects" does not limit the application of sec. 940.201, Stats., only to persons who actively participate in abusing children. The common meaning of "subjects" is broader than directly inflicting abuse on children. It covers situations in which a person with a duty toward a child exposes the child to a foreseeable risk of abuse. • • •

A person exposes a child to abuse when he or she causes the child to come within the influence of a foreseeable risk of cruel maltreatment. • • • In this case, Bert Williquette's conduct obviously was a direct cause of the abuse his children suffered. However, the defendant's alleged conduct, as the mother of the children, also was a contributing cause of risk to the children. She allegedly knew that the father abused the children in her absence, but she continued to leave the children and to entrust them to his exclusive care, and she allegedly did nothing else to prevent the abuse, such as notifying proper authorities or providing alternative child care in her absence. We conclude that the defendant's conduct, as alleged, constituted a substantial factor which increased the risk of further abuse. • • •

The court also expressly rejects the defendant's claim that an act of commission, rather than omission, is a necessary element of a crime. The essence of criminal conduct is the requirement of a wrongful "act." This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act. LaFave and Scott, *Criminal Law* sec. 26 at 182, states the general rule applicable to omissions:

> "Some statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of conduct producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act, and (2) he can physically perform the act. The trend of the law has been toward enlarging the scope of duty to act."

The comments to this section then state the traditional rule that a person generally has no duty to rescue or protect an endangered person unless a special relationship exists between the persons which imposes a legal duty to protect:

> "For criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty. As we have seen, some criminal statutes themselves impose the legal duty to act, as with the tax statute and the hit-and-run statute. With other crimes the duty must be found outside the definition of the crime itself—perhaps in another statute, or in the common law, or in a contract.
>
> "Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself. He need not shout a warning to a blind man headed for a precipice or to an absent-minded one walking into a gunpowder room with a lighted candle in hand. He need not pull a neighbor's baby out of a pool of water or rescue an unconscious person stretched across the railroad tracks, though the baby is drowning or the whistle of an approaching train is heard in the distance. A doctor is not legally bound to answer a desperate call from the frantic parents of a sick child, at least if it is not one of his regular patients. A moral duty to take affirmative action is not enough to impose a legal duty to do so. But there are situations which do give rise to a duty to act:
>
> "(1) *Duty based upon relationship.* The common law imposes affirmative duties upon persons standing in certain personal relationships to other persons—upon parents to aid their small children, upon husbands to aid their wives, upon ship captains to aid their crews, upon masters to aid their servants. Thus a parent may be guilty of criminal homicide for failure to call a doctor for his sick child, a mother for failure to prevent the fatal beating of her baby by her lover, a husband for failure to aid his imperiled wife, a ship captain for failure to pick up a seaman or passenger fallen overboard, and an employer for failure to aid his endangered employee. Action may be required to thwart the threatened perils of nature (*e.g.* to combat sickness, to ward off starvation or the elements); or it may be required to protect against threatened acts by third persons."

The requirement of a legal duty to act is a policy limitation which prevents most omissions from being considered the proximate cause of a prohibited consequence. In a technical sense, a person's omission, *i.e.*, whether the person fails to protect, warn or rescue, may be a substantial factor in exposing another person to harm. The concept of causation, however, is not solely a question of mechanical connection between events, but also a question of policy. A particular legal cause must be one of which the law will take cognizance. The rule that persons do not have a general duty to protect represents a public policy choice to limit criminal liability.

The requirement of an overt act, therefore, is not inherently necessary for criminal liability. Criminal liability depends on conduct which is a substantial factor in producing consequences. Omissions are as capable of producing consequences as overt acts. Thus, the common law rule that there is no general duty to protect limits criminal liability where it would otherwise exist. The special relationship exception to the "no duty to act" rule represents a choice to retain liability for some omissions, which are considered morally unacceptable. • • •

We next address the scope of the "legal duty" exception to the rule regarding criminal liability for omissions. Like most jurisdictions, Wisconsin generally does not require a person to protect others from hazardous situations. When a special relationship exists between persons, however, social policy may impose a duty to protect. The relationship between a parent and a child exemplifies a special relationship where the duty to protect is imposed. We stated the rule applicable to the parent and child relationship in *Cole v. Sears, Roebuck & Co.*, 47 Wis.2d 629, 634, 177 N.W.2d 866 (1970):

> "'It is the right and duty of parents under the law of nature as well as the

common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent. The child has the right to call upon the parent for the discharge of this duty, and public policy for the good of society will not permit or allow the parent to divest himself irrevocably of his obligations in this regard or to abandon them at his mere will or pleasure. . . .'"

From the above discussion, we conclude that a parent who fails to take any action to stop instances of child abuse can be prosecuted as a principal for exposing the child to the abuse, contrary to sec. 940.201, Stats. Consistent with the common law rule, however, we do not hold that all persons, regardless of their relationship or lack of relationship to an abused child, violate the child abuse statute by failing to take remedial action to protect the child. Finally, when liability under sec. 940.201, depends on a breach of the parent's duty to protect, the parent must knowingly act in disregard of the facts giving rise to a duty to act. The "knowingly" requirement is necessary for a breach of the parent's duty to protect; it is not imposed as an element of sec. 940.201. • • •

The enactment of sec. 940.34, Stats.,[6] subsequent to the commencement of this prosecution also does not indicate that the defendant was previously immune from criminal liability for her conduct. Section 940.34 is a "Good Samaritan" law which imposes criminal liability on "[a]ny person who knows that a crime is being committed and that a victim is exposed to bodily harm" but fails to summon help or provide assistance to the victim. The new statute does not deny the prior existence of a parent's duty to protect. We acknowledge that a parent now could be charged under either statute. Section 939.65, however, provides that if an act forms the basis for a crime punishable under more than one statutory provision, then the state can prosecute under any or all such provisions. • • •

HEFFERNAN, CHIEF JUSTICE (dissenting). • • •

The majority correctly asserts the criminal conduct can be predicated upon the failure to act when action is required by law. The problem is that nothing in the statutes remotely suggests that a parent has the legislatively prescribed legal duty to act in the instant circumstances or that the omission of the alleged duty will result in criminal sanctions. Certainly, I agree with the majority who, after reciting the catalog of horrors perpetrated upon these children, asserts, citing *Cole v. Sears, Roebuck & Co.*:

> "An omission to do this [care for and protect children] is a public wrong which the state, under its police powers, may prevent."

6. Sec. 940.34, Stats., provides as follows:

"940.34 Duty to aid endangered crime victim. (1) Whoever violates sub. (2) is guilty of a Class C misdemeanor.

"(2) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim. A person need not comply with this subsection if any of the following apply:

"(a) Compliance would place him or her in danger.

"(b) Compliance would interfere with duties the person owes to others.

"(c) Assistance is being summoned or provided by others.

"(3) If a person renders emergency care for a victim, s. 895.48 applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance."

The problem with this position is that it begs the question. Of course, the state has the police powers which may be exercised for that very purpose. The omission can be categorized as a public wrong which the legislature *may* prevent. But the police power is a power of the legislature. It is not an independent power conferred upon courts. Courts may validate a legislature's conduct by recognizing the legislature's police power, but courts cannot supply that exercise of power where there is no evidence that the legislature so intended to act.

We return to the fundamental defect in the position of the state. There is no evidence that the legislature intended to exercise its police power in the manner urged here. I reiterate, if it desired to do so, the appropriate statutory language was not beyond the capabilities of the legislature. • • •

One real problem revealed here is that the court does not have the investigative facilities to decide what ought to be done in a broad spectrum of cases involving child abuse. We do not have the legislature's fact-finding process to justify our determination of what the criminal law should be. We are assuming, without being sure, that the legislature, had it confronted the problem posed here, would have concluded, as the majority guesses it would have concluded, that the conduct of Terri Williquette was just as culpable as that of her husband, who was overtly and cruelly sodomizing and torturing the children. While that assumption could be correct, it is not an assumption that a court should make. We do not know how the legislature would have treated the present facts. Nor do we have the authority as a court to reach that conclusion. We are not the branch of the government that has been designated by the constitution to determine what conduct is criminal. Yet, in this case, we come forward with our own definition of criminality. While to do so may give the proponents of this court-made legislation a self-satisfied glow of rectitude, in reality we are by this opinion usurping the legislative prerogative to make the criminal law. While we have responsibilities in the formulation of the common law, the wise sages of our jurisprudence have long recognized that, unless conduct is clearly and unequivocally declared to be criminal by the legislature, a court should restrain itself—even from the impulse to do what it believes to be morally justified. • • •

Notes and Questions

1. Considering the principles discussed in *Williquette*, did the court err in *Commonwealth v. Konz*, 498 Pa. 639, 450 A.2d 638 (1982), in reversing the conviction of Mrs. Konz and Erikson for involuntary manslaughter (causing death by reckless conduct) on the following facts?

"Reverend Konz was a thirty-four year old diabetic and had, for seventeen years, administered to himself daily doses of insulin. On March 4, 1974, however, following an encounter on campus with a visiting evangelist speaker, Reverend Konz publicly proclaimed his desire to discontinue insulin treatment in reliance on the belief that God would heal the diabetic condition. He assured the president of the College and members of the student body that he would carefully monitor his condition and would, if necessary, take insulin. On only one or two occasions did the Reverend thereafter administer insulin. On March 18, 1974, however, Erikson and Reverend Konz formed a pact to pray together to enable the latter to resist the temptation to administer insulin.

"Mrs. Konz was informed of the prayer pact, and, on the morning of Saturday, March 23, 1974, when her husband evidenced symptoms of insulin debt, she removed his insulin from the refrigerator

and concealed it.[2] Later that day, the Reverend attempted to obtain insulin from the refrigerator, and, upon discovering that the medicine had been removed, strongly indicated that it should be returned. He then attempted to proceed from room to room but his passage was blocked by Erikson. Harsh words were exchanged, and Erikson, after kneeling in prayer, forced the Reverend into a bedroom where, accompanied by Mrs. Konz, Erikson and the Reverend conversed for approximately one half hour. During that time, the Reverend tried to telephone police to obtain assistance but was prevented from doing so by Erikson and Mrs. Konz, who, during a struggle with the Reverend, rendered at least that telephone permanently inoperable.[3] Immediately after this confrontation, the Reverend, his wife, and Erikson returned amicably to the kitchen for coffee, and no further request for insulin was ever made. In addition, the Reverend approached his aunt who resided in the same household and stated, in an apparent reference to the preceding confrontation with Erikson, that 'It's all settled now,' and told her that there was no cause for concern. He also told his eleven year old daughter that 'Everything is fine,' and indicated to her that he did not intend to take insulin. The Reverend then departed from the house, accompanied by Erikson, and returned an hour later. As the day progressed, Reverend Konz cancelled his speaking commitment for the following day and drove his wife to an institution having hospital facilities to pick up a close friend who was a practical nurse. Late on Saturday night, while waiting inside the institution for the nurse to complete her duties, the Reverend appeared very fatigued and complained that he was developing an upset stomach. Both of these conditions were symptomatic of lack of insulin, but neither the Reverend nor his wife requested that insulin, which was available at the institution, be administered. With regard to the Reverend's condition at that time, the nurse observed that he travelled with unimpaired mobility, and that he was conversant, rational, and cognizant of his environs. Nevertheless, he made no mention of a need for insulin, and the nurse made no inquiry as to such a need because the Reverend had on a previous day become very upset at her inquiry as to his diabetic condition.

"Upon returning home from this errand, Reverend Konz experienced increasing illness, vomiting intermittently Saturday night and Sunday morning, and remained in bed all day Sunday except for trips into the bathroom. On Sunday afternoon visitors arrived at the Konz residence. The Reverend, recognizing their voices, called to them from his room to inquire whether they wished to see him; having been informed of the Reverend's nausea, however, the visitors declined to stay. As the Reverend's condition worsened and he became restless, his wife and Erikson administered cracked ice but did not summon medical aid. The Konz's eleven year old daughter then inquired as to why a doctor had not been summoned but Mrs. Konz responded that her husband was 'going to be getting better.' Late Sunday night or early Monday morning everyone in the household fell asleep. On Monday morning at approximately 6 AM, while the others were still asleep, Reverend Konz died of diabetic ketoacidosis."

2. In *State v. Tennant*, ___ W.Va. ___, 319 S.E.2d 395 (1984), the defendant, convicted under a hit-and-run statute requiring that the "driver of any vehicle involved in an accident resulting in injury shall immediately stop such vehicle" and identify himself and give aid, successfully argued on appeal that the jury should have been instructed that the defendant must have known of the accident. "A commonly given reason for this interpretation is summarized in [a case] where the Alaska Supreme Court concluded: '[W]e cannot believe that the legislature could have intended that persons who unknowingly fail to stop and render assistance could be subject to serious criminal penalties.' Similarly, the Virginia Supreme Court stated:

> 'The duty imposed upon the driver of a vehicle involved in an accident is not passive. It requires positive, affirmative action; that is, to stop and give the aid and information specified.
>
> 'How can a person perform these affirmative acts unless he knows that his vehicle has struck a person or an object? Knowledge necessarily is an essential element of the crime.' "

3. In *United States v. Spingola*, 464 F.2d 909 (7th Cir.1972), the defendant, secretary-treasurer of a trade union, was convicted on three counts of failing to file timely annual financial reports for the fiscal years 1966, 1967 and 1968 on behalf of the union. The trial court excluded evidence by which the defendant sought to show that the late filings were due to the inability of the union's office staff to bring its accounting records up to date, as was necessary in order to prepare the reports, that the needed records were in the possession of the government for extended periods, and that he was unable to complete the reports by himself. In reversing, the court of appeals noted that defendant's defense "is perhaps best characterized as the defense of physical impossibility—that, while the law imposed upon him a duty to file the annual financial report of his union, he possessed neither the sophistication necessary to prepare it himself nor the ability to compel its timely preparation by others. Genuine impossibility is a proper defense to a crime of omission."

4. In *Davis v. Commonwealth*, 230 Va. 201, 335 S.E.2d 375 (1985), the defendant was convicted of involuntary manslaughter on a finding that the death of her senile and disabled mother, Emily Carter, resulted from defendant's failure to provide heat, food, liquids and other necessities. In response to defendant's claim on appeal that she violated "at most a moral duty," the court stated: "The evidence makes clear that Davis accepted sole responsibility for the total care of Carter. This became her full-time occupation. In return, Carter allowed Davis to live in her home expense free and shared with Davis her income from social security. Additionally, Carter authorized Davis to act as her food stamp representative, and for this Davis received food stamp benefits in her own right. From this uncontroverted evidence, the trial court reasonably could find the existence of an implied contract. Clearly, Davis was more than a mere volunteer; she had a legal duty, not merely a moral one, to care for her mother."

5. In *Commonwealth v. Cali*, 247 Mass. 20, 141 N.E. 510 (1923), the defendant was convicted of having burned a building with intent to injure the insurer. The defendant's testimony was that he started the fire accidentally. The trial judge instructed the jury that if that was so but the defendant thereafter, with the requisite intent, failed to extinguish the fire though it was within his power to do so, he could be convicted. On appeal, the court held the instruction was proper.

6. In *State v. Harrison*, 107 N.J.L. 213, 152 A. 867 (1931), defendant was employed by a railroad as a crossing gateman. The defendant failed to lower the crossing gate when he was warned of the approach of a train, as a result of which Goble drove onto the tracks with his car and was struck and killed by the train. On appeal, the defendant's conviction of manslaughter was affirmed. "Certainly such failure of

2. The insulin was returned to the refrigerator sometime prior to Sunday night.

3. There was testimony as to the existence of two telephones in the residence.

duty justified a finding of gross negligence."

R. Moreland, *Law of Homicide* 177 (1952), observes: "The decision in the *Harrison* Case has been vigorously criticized in a note. It is argued that in many of the cases where an omission to act has been punished there has been a helplessness created as a result of the contract that would not have resulted but for the agreement. Thus, passengers on an excursion steamer are lulled into a sense of security by their belief that the master of the boat and regularly appointed inspectors have carried out their contractual duties to inspect life-preservers and life-boats. In fact, most of them would not dare take such a trip except for the known fact that such equipment is supposed to be checked and inspected. They are helpless if the contracts are not carried out."

7. In *Moreland v. State*, 164 Ga. 467, 139 S.E. 77 (1927), the defendant was convicted of manslaughter upon evidence showing that the defendant was a passenger in his car while his chauffeur drove at an excessive speed, causing an accident in which a person was killed. In affirming the conviction, the court stated: "It would be the owner's duty, when he saw that the law was being violated and that his machine was being operated in such a way as to be dangerous to the life and property of others on the highway, to curb and restrain one in his employment and under his control, and prevent him from violating the law with his own property."

8. Wehrwein, *'Samaritan' Law Poses Difficulties*, Nat'l L.J., Aug. 22, 1983, p. 5, col. 1: "Minnesota's new law that imposes a fine on bystanders who don't aid people in peril could pose some problems for prosecutors and insurance companies—if it is ever put to use. • • •

"The law, which took effect Aug. 1, requires a bystander to render 'reasonable assistance' during an emergency to anyone who is 'exposed to or has suffered grave physical harm.' The statute includes in its definition of reasonable assistance such acts as calling the police and getting medical help, but it does not require a bystander to do anything that involves 'danger or peril to himself or others.' • • •

"The bill's sponsor, Democratic state Rep. Randy Staten, said he was moved to introduce the bill by reports of the gang rape earlier this year of a woman in a New Bedford, Mass., barroom who was hoisted onto a pool table and repeatedly assaulted while spectators stood by and some reportedly shouted 'go for it!' More recently, a 14-year-old St. Louis girl was raped last month while bystanders did nothing for 40 minutes until an 11-year-old boy called police. Last week, Mr. Staten also cited this incident as an example of the kind of conduct his bill would prevent.

"The traditional common-law rule that a bystander has no duty to aid an endangered person would permit 'totally unacceptable conduct for civilized society,' Mr. Staten said. One example of such conduct, he said, would be an expert swimmer ignoring the plight of a drowning child. • • •

"France, the Netherlands, West Germany and other European countries impose the duty to assist in their criminal statutes and hold those who fail to render help civilly liable."

9. Schroeder, *Two Methods for Evaluating Duty to Rescue Proposals*, 49 Law & Contemp.Probs. 181, 192, 194 (1986): "The relative lack of causal cut-offs between failures to act and harms, as compared with those available in our normal understanding of actions, places tremendous pressure on the concept of 'reasonable expectations' within the definition of failures to act, because that limiting concept may be about all that will stand between us and legal responsibility for many, many harms that we could have prevented. The usual hypotheticals enter in here to press our intuitions about whether that line can be held. As Richard Epstein questions, if a strong swimmer is legally liable for failure to make an easy rescue of a drowning infant in a swimming pool, will you be similarly liable for failure to donate $10 to African relief if you are substantially certain that that $10 will prevent a death through starvation? Similarly, as a note pinned recently to a bulletin board at Duke University Law School queried, if you make $45,000 per year as an entry level associate at a corporate law firm and can live securely on $20,000, are you legally answerable for the deaths of one hundred Africans, on the assumption that $250 per year would sustain a life indefinitely? Or, as someone asked in a penned response to the original note, if you go to work for legal services at $20,000 a year, but could have taken a job with a corporate law firm and then donated your surplus $25,000 to relief organizations, are you still culpable? • • •

"[W]hile it may be true that a firm, albeit somewhat arbitrary, line delimiting rescues to which a legal duty attaches would be superior to a legal regime wholly without such a duty • • •, it is nevertheless important to isolate those criteria that influence where that line ought to be drawn. These criteria serve at the least as counsel to a conscientious legislator, and also clarify what we actually believe separates the case involving the drowning child and the strong swimmer from the ten dollar charitable contribution. What functions, in other words, to make certain expectations about rescue reasonable to a degree that warrants legal sanction for a failure to rescue? • • •

"Some of those principles appear in the Vermont statute requiring easy rescue, which is often cited as a model. It reads:

> A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others."

SECTION 4. ONE ACT OR RELATED ACTS AS A BASIS FOR MULTIPLE CHARGES, PROSECUTIONS AND SENTENCES

GORE v. UNITED STATES

Supreme Court of the United States, 1958.
357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a prosecution under an indictment containing six counts for narcotics offenses. Four counts were based on provisions of the Internal Revenue Code of 1954 and two counts on the Narcotic Drugs Import and Export Act, as amended. The first three counts derive from a sale on February 26, 1955, of twenty capsules of heroin and three capsules of cocaine; the last three counts derive from a sale of thirty-five capsules of heroin on February 28, 1955. Counts One and Four charged the sale of the drugs, on the respective dates, not "in pursuance of a written order" of the person to whom the drugs were sold on the requisite Treasury form, in violation of § 4705(a) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 4705(a). Counts Two and Five charged the sale and distribution of the drugs on the respective dates not "in the original stamped package or from the original stamped package," in violation of § 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 4704(a). Counts Three and Six charged facilitating concealment and sale of the drugs on the respective dates, with knowledge that the drugs had been unlaw-