LOOKING ABROAD TO PROTECT MOTHERS AT HOME: A LOOK AT COMPLICITY BY OMISSION DOMESTICALLY AND ABROAD

I. Introduction ... 425
II. Complicity by Omission for Murder in the U.S.: A Case Study of *People v. Peters* ... 430
  A. *Background* ... 430
  B. *The Law* ... 431
III. Domestic Guidance ... 432
  A. *Domestic Federal Guidance* ... 432
  B. *Further Domestic Guidance: U.S. Model Penal Code* ... 433
IV. The International Perspective ... 435
  A. *English Criminal Law* ... 435
  B. *Canadian Criminal Law* ... 438
  C. *French Criminal Law* ... 439
  D. *Analysis* ... 442
V. Conclusion ... 446

> "A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury."[1] – John Stewart Mill

I. Introduction

For most crimes two elemens need to be proven: the actus reus and the mens rea. Generally, the actus reus of an offense consists of a voluntary act that causes social harm.[2] In cases where the defendant has an affirmative duty to act, however, a defendant's omission of that duty may serve as a substitute for the voluntary act.[3] Affirmative duties to protect are

[1] John Stuart Mill, On Liberty 11 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1985) (1859).

[2] For a thorough discussion of the two elements, *see* Joshua Dressler, Understanding Criminal Law 81-142 (3d ed. 2001). These generalizations are based on American law, and differences in the international law, if any, will be discussed within the relevant section.

[3] Dressler, supra note 2, at 101-102. For purposes of determining criminal liability, failure to act may constitute the breach of a legal duty (1) where expressly provided by statute, (2) where one stands in a certain status relationship to another, (3) where one has assumed a contractual duty to care for another, or (4) where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent other from rendering aid. Commonwealth v. Kellam, 719 A.2d 792, 796 (Pa. Super. Ct. 1998).

often provided by statute and intended to serve social goals.[4] The focus of this paper is the affirmative duty of a mother to protect her child.[5] Under the law of some U.S. state jurisdictions, mothers who fail to prevent harm to their children may be charged as accomplices to the commission of the underlying offense.[6] Mens rea, as it pertains to an offense, is the "particular mental state provided for in the definition of an offense."[7] This paper will advocate for the necessity of a higher, more restrictive mens rea requirement as to the underlying offense for mothers who fail to protect their children from abuses committed by their husbands or boyfriends and who are charged as accomplices.

By definition, an accomplice is a person who assists the primary actor in the commission of a crime.[8] To sustain a conviction as an accomplice, the prosecutor must prove that the defendant acted with the requisite mens rea.[9] Broadly stated, the accomplice must act with the intent to aid in the commission of an offense.[10] A defendant's act may consist of providing assistance by omission if the defendant has a duty to act to prevent harm to another.[11] The mens rea required to sustain a conviction of an accomplice is often separated into two types of intent:[12] the intent to assist the primary party and the intent that the principal actor will commit the offense charged.[13] It is universally agreed that the accomplice must have "some culpability (probably knowledge) with respect to the conduct that constitutes aid or assistance;"[14] in other words, the accomplice must specifically intend to aid in the commission of the criminal act by the

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[4] *See* Kellam, 719 A.2d at 796.

[5] *Id.*

[6] *See*, *e.g.*, People v. Peters, 586 N.E.2d 469, 469-470 (Ill. App. 1 Dist. 1991).

[7] DRESSLER, *supra* note 2, at 117.

[8] *Id.* at 467.

[9] *Id.*

[10] Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1356 (1998).

[11] DRESSLER, *supra* note 2, at 467; *see also* Rex v. Russell (1932) 1993 V.L.R. 59 (Court convicted father as an accomplice to his wife (principal) for failing to dissent while his wife and two children drowned because father had a duty to take steps to stop his wife.)

[12] For a discussion of intent in the common law and the distinction between general intent ([where] the only *mens rea* required is a guilty state of mind) and specific intent (there is an intent to do some future act or achieve some future consequence beyond the conduct that constitutes the *actus reus* of the offense), *see* DRESSLER, *supra* note 3, at 136. The Model Penal Code better defined the levels of culpability in § 2.02. *See also* DRESSLER, *supra* note 3, at 137-140.

[13] DRESSLER, *supra* note 3, at 471-472 (*citing* State v. Harrison, 425 A.2d 111, 113 (Conn. 1979) [and] State v. Neal, 14 S.W.3d 236, 239 (Mo. Ct. App. 2000).

[14] RICHARD J. BONNIE ET AL., CRIMINAL LAW 579 (1997).

principal actor.[15] The more relevant issue for this paper is what culpability is required of the accomplice with respect to the principal actor's underlying conduct;[16] it is often disputed whether it is sufficient for the accomplice to know[17] that the assistance will aid the principal actor but lack the purpose that the crime actually be committed.[18] Another way to describe the dispute is whether the accomplice must actually "intend to promote the criminal venture in the sense of being interested in its success. . .or does it suffice that the accomplice knowingly assist criminal activity by another."[19]

A common example illustrating the difference between knowledge and purpose as the mens rea threshold to impute accomplice liability is that of a gun salesman selling a gun to a murderer: is the gun dealer an accomplice to murder if the dealer sells a gun, in compliance with all rules (presumably including a background check) to a purchaser whom he simply knows will use it for murder, but where the gun salesman sells for profit and is indifferent to the underlying act?[20] The question most scholars ask is whether knowledge of the buyer's final act alone is enough to make the salesman guilty as an accomplice to the murder eventually committed by the buyer (note the indifference of the dealer to whether or not the act is actually committed). If the dealer sold the gun to the murderer seeking to ensure the commission of the murder, he would be said to have the mens rea of purpose as to the crime.[21]

In the case of the gun salesman, the seller is an accomplice by commission in that he is actively engaging in the conduct of selling the gun, which he either (1) knows will be used to commit the murder (knowledge), or (2) sells with the purpose that it be used to commit the murder (purpose). In the classic gun salesman example, the intent requirement is put in place to ensure that the accomplice's "conscious objective is that the underlying crime be committed," thus making the principal's acts his own.[22] Advocates for full accomplice culpability argue that this adoption of the principal's act is what makes it "fair to hold the accomplice as criminally culpable as the principal."[23]

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[15] Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 412 (1999), *citing* WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW, § 6.7 (Westlaw 1998).

[16] BONNIE ET AL., *supra* note 14, at 579.

[17] "Knowledge can be equated with substantial certainty that a result will follow." State v. Weeks, 526 A.2d 1077, 1080 n.1 (N.J. 1987), *citing* Code of Criminal Justice, N.J. STAT. ANN. tit. 2C, § 2-2b(2).

[18] DRESSLER, *supra* note 3, at 474-475.

[19] BONNIE ET AL., *supra* note 14, at 579.

[20] Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1344 (2002).

[21] *See id.*

[22] Rogers, *supra* note 10, at 1351.

[23] *Id.*

In the context of a criminal homicide, a defendant can be found guilty as an accomplice if there is evidence that the defendant actively participated in the actions of the principal or failed to perform a legal duty to prevent those actions, "with the intent that the victim's death. . .would result."[24] An example of an accomplice by omission is a husband who stands by and fails to protect his wife while she is being assaulted. Assuming the husband intends his lack of protection, he may be charged as an accomplice if either he (1) knows that his failure to protect is resulting in his wife being assaulted (knowledge), or (2) fails to protect his wife with the purpose that his failure result in the assault (purpose), depending on the jurisdiction's mens rea requirement. In the context of a person with a legal duty to prevent the criminal conduct, that person will not be charged as an accomplice if the person made a "proper" effort to prevent the act.[25] The requirement of "proper effort" gives a jury leeway to consider any physical infirmities which might mitigate, in this example, the husband's failure to protect his wife from harm.[26] Assuming that the husband failed to make a "proper effort," the purpose/knowledge distinction may be used to measure the extent of his culpability.[27]

This note examines how different jurisdictions deal with the complications involved in determining the mens rea requirement of accomplice liability in circumstances where the actus reus consists of an omission (failure to act). The analysis focuses on cases where the defendant is a mother charged as an accomplice to her child's murder because she left her child at home with a significant other and the significant other's abuse of the child resulted in the child's death. This paper explores why using the knowledge threshold for complicity to murder in the context of a mother's duty to protect her child is particularly controversial, especially because of the severity of punishment that the mother may receive. The result of finding the mother guilty as an accomplice to the underlying murder may make the mother eligible to receive the same significant penalty as the principal actor.[28] Finally, this paper advocates for a mens rea threshold of purpose in omission cases involving a mother failing to protect her child because of the unique relationships existing between the principal party, the "accomplice," the victim in these cases, and the nature of the underlying conduct that, according to courts, provides the mother with "knowledge."

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[24] Tharp v. Commonwealth, 40 S.W.3d 356, 361 (Ky. 2001).

[25] *Id.* at 366-67.

[26] *Id.*

[27] Whether the threshold is purpose or knowledge for this particular example is irrelevant to this paper because this paper specifically advocates that in the fact scenario of a mother's duty to protect her child, only the purpose threshold be used because using knowledge (in that particular circumstance) may lead to catastrophic results.

[28] *See* 40 AM. JUR. 2D *Homicide* § 28 (1999).

The note starts with a case study of *People v. Peters*,[29] an example of a U.S. case which, while purporting to use the purpose threshold, seemingly used the knowledge mens rea threshold. In *Peters*, a mother left her child at home with her significant other, whose abuse resulted in the child's death. The court convicted the mother as an accomplice to murder based on her knowledge of the significant other's past abuse[30] The mother in *Peters*, though not present at the time of the abuse, was given the same punishment as the abuser.[31] The mens rea discussion in this case, and others with similar fact patterns, is especially interesting because the court claims that the defendant intended to assist and promote the abuse of her child, and ultimately the death of her child, by leaving the child at home with her significant other.[32]

After analyzing *People v. Peters*, this note will look to federal law for guidance as to what mens rea standard is appropriate for murder by omission cases, and examine the result of applying federal complicity law to the mother in *Peters*. Further, the note will examine how the U.S. Model Penal Code ("MPC"), the closest analogy to a national criminal code in America,[33] deals with complicity by omission generally and how the mother in *Peters* would be treated under the MPC.

The note will then explore how foreign legal systems approach complicity by omission generally, and how different countries would prosecute the mother in *Peters*. The note will first examine how English law, from which American common law originates, currently deals with the question of what mens rea is required to charge an accomplice acting by omission, focusing on how mothers in the similar situation are treated. Canadian law will then be examined to ascertain how another country with ties to the English common law system approaches the controversial complicity by omission cases. Lastly, for a foreign civil law perspective, the note will look to French law's dealings with mothers in similar circumstances as the mother in *Peters*.

The note will conclude with a discussion of the various approaches used by different jurisdictions and advocate the use of the higher, purpose, threshold for mens rea in complicity by omission cases where a mother is charged as an accomplice based on her failure to protect her child from her significant other. The note considers the mother's psychological mindset and how it may relate to her culpability and analyze the unique nature of the preexisting relationship between the parties involved. The note will also discuss the problems created by the "knowledge" threshold in these cases, especially because it permits a mother to be punished as a

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[29] 586 N.E.2d 469, 470 (Ill. App. 1 Dist., 1991).

[30] *Id.* at 470.

[31] *Id.*

[32] Liang & Macfarlane, *supra* note 15, at 415.

[33] Paul H. Robinson, *An Introduction to the Model Penal Code* (1999), *at* http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf (Mar. 12, 1999).

murderer for her knowledge of conduct that may have been deemed legal "discipline" when it occurred.

II. Complicity by Omission for Murder in the U.S.: A Case Study of *People v. Peters*[34]

A. *Background*

Defendant Barbara Peters was found guilty of murder, aggravated battery of a child, cruelty to a child, and endangering the life of a child under a theory of accountability as an accomplice aiding and abetting the principal actor.[35] The Defendant was sentenced to a 30-year term of imprisonment.[36] Defendant's son, Bobby Peters, was brought to the emergency room on December 17, 1987 at 6:42 AM, where the hospital staff was unsuccessful in resuscitating Bobby; he died of bilateral subdural hematomas resulting from blunt force head trauma at 6:47 AM.[37]

Evidence at trial consisted of testimony from the child's babysitter indicating that Bobby continually had new bruises and burns on his body between July 1987 and October 1987; in October 1987, Defendant fired the babysitter because Defendant suspected her of reporting Defendant to the Department of Children and Family Services (DCFS).[38] The babysitter claimed that she had informed the Defendant of the many bruises, but the Defendant had responded by telling the babysitter that from her knowledge, Bobby was a clumsy boy that fell a lot and that the burns were caused by spilt coffee.[39] Defendant testified in court that her boyfriend cared for the boy when she was at work, and that she accepted his explanations that Bobby was prone to falling down and that he was clumsy; she also told investigators that she did not take Bobby to the hospital because her boyfriend told her that he had already gone to the hospital and obtained a "jar of salve" for Bobby.[40] There is also uncontested testimony that the Defendant was not at home during the fatal assault that directly led to the hospital visit; Defendant took Bobby to the hospital because her boyfriend told her that Bobby turned blue, but testimony shows that she yelled "I told you not to get so angry. . .I told you this would happen" to her boyfriend in the hospital the night of the boy's death.[41] Defendant brought the child to the hospital with several bruises all over his body; accordingly, he was in a condition inconsistent with her explanation that Bobby had fallen from the stairs onto the sidewalk.[42]

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34 586 N.E.2d 469.

35 *Id.* at 470.

36 *Id.*

37 *Id.*

38 *Id.* at 471-472.

39 *Id.* at 471.

40 *Id.* at 473.

41 *Id.* at 474.

42 *Id.* at 474-475.

B. *The Law*

Defendant was found guilty of murder under Illinois' accountability statute: "'A person is legally accountable for the conduct of another when: (c) Either before or during commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.'"[43] The court held that "intent may be gleaned from knowledge" and then stated that "a person who knows that [their] child is in a dangerous situation and fails to take action. . .presumably intends the consequences of the inaction."[44] Although the court stated that it was looking for a "common purpose," the court's reasoning and basis of conviction relied almost exclusively on the claim that Defendant "intended to facilitate the offense because she knew that [her boyfriend] was abusing her son."[45]

The court then found that the evidence indicating Defendant's knowledge of the ongoing abuse and continuing failure to take any action "supports a finding that the defendant intended by her actions to facilitate further abuse to her son and aided [her boyfriend] in the commission of that abuse"[46] Lastly, in response to Defendant's claim that she did not "specifically intend to facilitate" Bobby's abuse, the court responded that "there is no requirement of specific intent in the statute."[47]

Although knowledge of past acts and a failure to prevent may lead to a finding that the defendant had purpose as to the present act, the *Peters* court, by relying solely on that knowledge, seems to have lowered the mens rea threshold from purpose to knowledge. This lowering of the mens rea threshold by the court leads to the unjust consequence of the mother being punished as a murderer despite not being home. Despite the court's finding that the Defendant's actions were blameworthy, the result of the court's holding is to punish the mother as a murderer for reckless (possibly even merely negligent) behavior. Barbara Peters obviously failed in her duty as a mother, but the testimonies of Mrs. Peters and the babysitter seem to suggest that she was negligent: she ignored the possibility of her boyfriend beating her child to death and believed that the child was clumsy and that her boyfriend took the child to the hospital.

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[43] *Id.* at 476 (emphasis added); the *Peters* court permits the *actus reus* to be satisfied by an omission in cases of "custodial parents," finding that they have an "affirmative duty to protect and provide for their minor children."

[44] *Id.*

[45] *Id.* (emphasis added). The court finds the *purpose* as to the principal actor in defendant's *knowledge* of some past abuses, and subsequent failure to prevent future abuses. The court states that it in its finding, it is relying on People v. Ray, 399 N.E.2d 977 (Ill. App. 5 Dist. 1979), but in that case, the mother (1) engaged in past beatings herself and (2) was present at the time of the fatal beating.

[46] *Id.* at 477.

[47] *Id.* (emphasis added).

Whether or not the jury found her testimony credible, it is uncontested that she was not home when the boyfriend fatally beat the child, and although presence during the commission of the crime is not required for accomplice liability[48] it is a factor that should be given strong weight in determining the defendant's culpability and thus whether defendant deserves the same punishment as the principal actor.

III. Domestic Guidance

A. *Domestic Federal Guidance*

The Federal Aiding and Abetting Statute, 18 U.S.C.A. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[49]

The Supreme Court has given limited guidance regarding the mens rea required of the accomplice as to the principal actor's crime. The prevailing view[50] for federal crimes interpreting the federal aiding and abetting statute remains the Supreme Court-approved[51] standard put forth by Judge Learned Hand in *U.S. v. Peoni*.[52] This standard requires accomplices to "in some sort associate [themselves] with the venture, that [they] participate in it as in something that [they wish] to bring about, that [they] seek by [their] action to make it succeed. All the words used – even the most colorless, 'abet' – carry an implication of purposive attitude towards it."[53] This formulation by Judge Hand has commonly been referred to as the "purposeful intent" standard.[54] Judge Hand further emphasized that knowledge as to the action of the principal actor alone is insufficient to convict an accomplice: "[although] knowledge would suffice to establish his liability in a civil suit [i]t will not suffice to establish a criminal liability, because an accessory must make the venture his own;

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48 *Id.*, *citing* People v. Cole, 365 N.E.2d 133, 140 (Ill. App. Ct. 1977).

49 18 U.S.C.A. § 2.

50 For a full discussion of the dispute as to the *mens rea* required of the accomplice as to the principal actor's crime under federal law, *see* Weiss, *supra* note 20.

51 The U.S. Supreme Court approved Judge Learned Hand's "purposeful intent" formula in Nye & Nissen v. United States, 336 U.S. 613 (1949) (defendant was convicted of aiding and abetting making of misrepresentations as to weights, grades, and prices of dairy products sold to the WSA (War Shipping Administration) during World War II; court upheld conviction *citing* 18 U.S.C. § 2 and using Judge Hand's purposeful intent standard in Peoni).

52 100 F.2d 401 (2d Cir. 1938).

53 *Id.* at 402.

54 *See* Weiss, *supra* note 20, at 1371.

the crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose."[55] The purposeful intent standard sets forth the mens rea required for aiding and abetting and is unaffected by the mental state required of the principal actor in committing the underlying crime.[56]

The Supreme Court's approval of the "purposeful intent" standard for accomplice liability demonstrates that the Supreme Court agrees with Judge Hand's belief that the burdensome penalty of accomplice liability requires more than mere knowledge of the principal actor's wrongdoings, especially because the accomplice faces the same punishment as the principal actor.[57] Presumably, since the purposeful intent formulation is primarily applied to crimes with penalties less severe than those for murder, if the formulation was applied to the mother convicted of murder above in *Peters*, a federal court would look for "purposeful intent" on the part of the *Peters* mother. Although the federal court's interpretation requiring purposeful intent for accomplices applies to federal crimes, and not state law cases such as the *Peters* case, the decisions provide guidance from the United States' highest court as to what should be required of an accomplice.

Interpreting the federal statute of complicity[58] under Hand's formula, the mother would likely not be guilty of murder for leaving her child home while she was at work based solely on the knowledge of her significant other's past acts unless the court found that the mother, in her omission, sought to "make [the murder] succeed" and had a purposive attitude towards it by making the venture "her own." It is unlikely that evidence of knowledge of some past actions alone would be sufficient to establish a mother's purposeful attitude towards the abuses that led to the death of her child; it is unlikely that the court would find that the mother, in her omission, sought to make the criminal act succeed. However, if there was evidence that the mother participated in the abuses and was present during the fatal abuse, it is more likely that she would be found to possess the requisite "purposeful intent."

B. *Further Domestic Guidance: U.S. Model Penal Code*

Section 2.06(3)(a) of the MPC provides:

> A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he:[S]olicits such other person to commit it; or [A]ids or agrees or attempts to aid such other person in planning or committing it; or having a legal duty to prevent the commission of

[55] United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951).
[56] Weiss, *supra* note 20, at 1376.
[57] Nye & Nissen, 336 U.S. at 619.
[58] 18 U.S.C. § 2(a) (year)

the offense, fails to make proper effort so to do. . ." (emphasis added).[59]

The MPC further defines purpose as a "conscious object to engage in conduct of that nature or to cause such a result. . ."[60] It was only after the intervention of Judge Learned Hand that the MPC rejected the idea of extending accomplice liability to someone who was "merely aware of his contribution to the principal's criminal act."[61] The MPC also contains a provision as to the result element of the primary actor's conduct: "[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability. . .with respect to that result that is sufficient for the commission of the offense."[62]

The MPC Commentary further expounds on their view of complicity by omission:

> The policeman. . .who closes his eyes to a robbery or burglary fails to present an obstacle to its commission that he is obliged to interpose. If his purpose is to promote or facilitate its perpetration, a fact that normally can be proved only by preconcert with the criminals, no reason can be offered for denying his complicity. But if his dereliction is not purposeful in that respect, as when it rests upon timidity or inefficiency, it is unduly harsh to view it as participation in the crime.[63]

The drafters of the MPC originally presented a tentative draft of accomplice liability premised on the culpable mental state of knowledge as a sufficient predicate for establishing the liability of the accessory, but the tentative formula was rejected in favor of the current formulation requiring that the accomplice have the 'purpose of promoting. . .'[64] Therefore, in MPC jurisdictions, an essential element of accomplice liability is that the accomplice has the purpose to promote or facilitate the offense, even in cases of omission.[65]

Under the MPC, the mother in *Peters* would not be found guilty of complicity to murder. The drafters' decision to reject the inclusion of knowledge as a sufficient threshold mens rea to sustain a conviction of accomplice liability, in addition to the drafters' commentary, renders it unlikely that the *Peters* defendant would be found guilty in a jurisdiction that adopted the MPC. The MPC drafters were especially concerned

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[59] MODEL PENAL CODE § 2.06(3)(a) (Proposed Official Draft 1962). (emphasis added).

[60] MODEL PENAL CODE § 2.06(2)(a) (Proposed Official Draft 1962).

[61] *Id.*

[62] MODEL PENAL CODE § 2.06(4) (Proposed Official Draft 1962).

[63] MODEL PENAL CODE § 2.06 (Proposed Official Draft 1962).

[64] State v. Weeks, 526 A.2d 1077, 1080 (N.J. 1987), *citing* STANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 622 (4th ed. 1983).

[65] Weeks, 526 A.2d at 1082.

with accomplice liability in cases of omission, going as far as to say that in cases of complicity by omission almost nothing short of "preconcert with the criminals" should be sufficient to sustain the conviction of accomplice liability.[66] Drafters make it clear that "if the dereliction is not purposeful. . .it is unduly harsh to view it as participation in the crime."[67] The evidence in *Peters* would not sustain the contention that the mother, who was absent during the beating (when she was out with her friends), was absent with the purpose of "promoting or facilitating" the perpetration of the crime. Certainly, there is no evidence that any "preconcert" as to the fatal beating occurred with the abuser in *Peters*.

IV. The International Perspective

A. *English Criminal Law*

English law recognizes "the parent who. . .neglects to protect [his or her child] from abuse" as a "clear case of omission in which it is desirable to have criminal liability."[68] Additionally, English courts deal with the mens rea problem of accomplice liability in a similar way to American courts, using one of three approaches, depending on the court and jurisdiction: (1) charging the accomplice when the accomplice knew of the principal's intentions (knowledge),[69] (2) convicting the accomplice only where it was his or her purpose to further the principal's offense (purpose),[70] or (3) avoiding the law of complicity and charging the accomplice under a special statute geared towards preventing the specific practice concerned.[71]

In the seminal English case *R. v. Reardon*,[72] the principal shot two men at a bar and then turned to the defendant and said "that cunt is still alive . . . lend us your knife."[73] The defendant than lent the principal his knife, with which the principal murdered the two men.[74] The trial judge instructed the jury that "if the appellant had handed over the knife realizing or contemplating that with it M [the principal] would kill or cause

[66] *See supra* note 63.

[67] *Id.*

[68] Andrew Ashworth, Principles of Criminal Law 115 (3d ed. 1999).

[69] *Id.* at 434 (*citing* National Coal Board v. Gamble, 1 QB 11 (1959)).

[70] *Id*. at 440, (*citing* Gillick v. West Norfolk and Wisbeth Health Authority AC 112 (1986) (doctor who supplies contraceptives to a girl under 16, knowing that this will assist her boyfriend to commit unlawful sexual intercourse with a girl under 16 is not an accomplice to the boy's offense because the doctor's purpose was not to help the boy but to protect the girl)).

[71] *Id.* at 435 (discussing a "special offence of selling goods which are likely to be used in the commission of crimes" in the context of the gun salesman who is only interested in profit that sells a gun he knows will be used in a future crime).

[72] (1999) Crim L.R. 392 (Eng. C.A. (Crim. Div.)).

[73] *Id.* at 392.

[74] *Id.*

really serious injury intending to cause really serious injury then the appellant was responsible for the consequences of M's action and if M killed two people then the appellant would be guilty of both murders."[75] Upholding the conviction, the Appellate Court extended accomplice liability to situations where "there is no common purpose" and only knowledge, citing the example where a gun salesman interested only in the profit who, "knowing" that the buyer intends to commit a murder, sells the gun anyway.[76] In terms of knowledge, English courts have struggled with what knowledge is sufficient, whether mere suspicion or broad knowledge of some criminal intention, and at least one court has concluded that "the minimum condition for accomplice liability is knowledge that the principal intends to commit a crime of the type actually committed."[77]

English courts generally recognize complicity for failure to act in circumstances where the party had a duty to act.[78] One court suggested that the accomplice's liability should be based on whether the accomplice, by not intervening, encouraged and "intended to encourage" the principal offender.[79] But English courts generally tend to be "restrictive. . .towards liability for omissions."[80] England's restrictive view on omission liability may explain why there is no reported case in which a mother has been charged with complicity to murder due to an omission of her duty to protect and the resulting death of her child.[81]

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[75] *Id.* (emphasis added).

[76] *Id.*

[77] *Id.* at 441, *citing* Bainbridge, (1960) 1 QB 219. Further developments on 'knowledge of the type' of crime include Maxwell v. DPP for Northern Ireland, (1978) 3 All ER 1140 (finding that the accomplice is liable so long as he contemplated that the offense committed was one of the possible offenses and he intentionally assisted). *Id.* at 442.

[78] *See* K.M. Smith, A Modern Treatise on the Law of Criminal Complicity 39 (1991).

[79] AP Simester & GR Sullivan, Criminal Law Theory and Doctrine 204 (2d ed. 2003) *citing* Foreman and Ford, Crim. L.R. 677(1988) (a case in which a prisoner was struck when only the two defendants were in the jail cell but the evidence could not establish which of the officers caused the actual bodily harm; the court held that if the jury found that the defendant was assaulted and was not sure by whom, both defendants had to be acquitted unless they were sure in respect of each that he either committed the assault or encouraged the other by "failing to intervene or report").

[80] *Id.* at 436.

[81] An extensive search for a single case in which a mother was convicted as an accomplice to murder has turned up nothing. Additionally, a leading English criminal law text-book, AP Simester & GR Sullivan, Criminal Law, Theory and Doctrine 204-205 (2d ed. 2003) (discussing complicity by omission states that a parent being charged as an accomplice is "plausible"); *see also id.* at 205, note 75 (without *citing* to any specific instances).

In *R. v. Sharon Louise Creed*,[82] the facts were almost identical to those in *Peters*: the mother lived with a man, not the child's father, who frequently assaulted the child. On the fateful day when the abuse resulted in the child's death, "she received a telephone call at work and returned immediately home."[83] A half-hour after returning home, the mother called the ambulance and the child was taken to the hospital.[84] The child was dead on arrival, with a post-mortem examination revealing the cause of the death to be a hemorrhage to the intestines, a fractured rib and a "split liver."[85] The prosecution charged the woman with failing to protect the child over the seven months that her significant other abused the child and with causing "unnecessary suffering by delaying calling for an ambulance."[86] The court concluded that the woman acted with "utter selfishness" in choosing to pursue a relationship with this man over the interests of the child, and upheld her conviction as a principal of "two offences of cruelty to a child. . .a total sentence of five years," whereas the principal actor was convicted of murder and received 25 years.[87]

As the *Peters* court had done, the Sharon court noted that the mother "had known that [her daughter] was being subjected to violence by [her significant other]," citing evidence of numerous bruises that her daughter received throughout the boyfriend's stay, one of which was pointed out to her by doctor in an un-related trip to the hospital.[88] The doctor who noted the bruising even scheduled an appointment for the mother to take her daughter to a doctor specializing in child care, but the mother missed that appointment.[89] In fact, in Sharon, the significant other had previous convictions for violence, including one for attempted murder and the mother was aware of these circumstances.[90] In another case, *R. v. Tina Marie White*,[91] there was evidence that the mother was at home but not physically present during the fatal abuse, and that the mother had encouraged prior beatings and likely beat the child herself; the Court of Appeals upheld the manslaughter conviction of the mother on the basis that she failed to protect her child on the night of the fatal abuse.[92]

Although it is possible that the mother in *Peters* could be charged as an accomplice to murder under English law due to its similarity to American law, there are many factors that make such a conviction highly unlikely:

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[82] (2000) 1 Cr. App. R.(S.) 304.
[83] *Id.* at 304.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 306.
[89] *Id.*
[90] *Id.*
[91] (1995) 16 Cr. App. R. (S.) 705.
[92] *Id.* at 706.

(1) there are no reported cases charging the mother who fails to protect as an accomplice to murder, (2) a case, Sharon Louise Creed, with an identical fact pattern resulted in conviction for "two offences of cruelty to child," resulting in a five year sentence for the mother, and (3) another case, Tina Marie White, where the mother was more culpable than the *Peters* mother but was convicted only of manslaughter.

B. *Canadian Criminal Law*

Another country that has adopted many of its common law legal traditions from England is Canada.[93] In Canada, generally, an omission will not suffice to ground criminal liability, even where the omission consisted of a failure to prevent death.[94] Like American courts, Canadian courts also recognize a common law exception, finding omission sufficient in circumstances involving general relationships of care and protection.[95] Section 21(1) of the Canadian Criminal Code reads: "Every one is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it."[96]

In the case *R. v. Popen*,[97] the facts were similar to *Peters* in that the parent accused of accomplice liability was not at home during the fatal abuse.[98] The defendant in *Popen* was the father, and the principal actor was the mother.[99] The mother took the unconscious child to the neighbor on August 11, 1976, claiming that the child had fallen off the back porch; the child suffered severe brain hemorrhages and was dead on arrival at the hospital.[100] The examining doctor noted many bruises on the child's body that had accumulated over a few days before death, including blows to the face and vaginal and rectal bleeding.[101] A year prior to the fatal blow, the child had been hospitalized for abuse and removed from her parent's house by the Children's Aid Society, but had soon been returned.[102] There was no evidence that the defendant inflicted the injuries or that he was present when the injuries occurred; in fact, defendant was at work when the abuse occurred.[103] The prosecution's position was that the defendant was aware of his wife's abusive behavior and was

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93 ERIC COLVIN, PRINCIPLES OF CRIMINAL LAW 2 (Thomson Professional Publishing Canada 1991) (1986).

94 *Id.* at 72.

95 *Id.* at 73.

96 *Id.* at 366., *citing* Criminal Code, R.S.C. 1985, C-46 § 21(1).

97 *R. v. Popen*, 1981 CarswellOnt 1095 (Ontario Ct. App.).

98 *Id.* para. 1.

99 *Id.* para. 1-2.

100 *Id.* para. 4-5.

101 *Id.* para. 5.

102 *Id.* para. 10.

103 *Id.* para. 12.

therefore party to his wife's offenses under 21(1)(b) of the Canadian Criminal Code (above).[104] The court rejected culpability under 21(1)(b), which requires purpose:

> After giving this matter our most careful consideration, we are of the view that there was no evidence that the appellant had done or omitted to do anything for the purpose of aiding his wife inflict the injuries to the child. Even if the appellant's omission to take action to prevent his wife mistreating the child had the effect of assisting the wife, we are all of the view that there was no evidence upon which a jury could reasonably find that the appellant's inaction was for the purpose of assisting his wife and there was, consequently, no basis for the application of section 21(1)(b).[105]

The Popen court instructed that given the proper charge, the jury could find that the defendant was negligent in failing to protect his child from his wife's mistreatment.[106] Also, the court concluded that the defendant may be independently (distinct from his wife's offense) guilty of manslaughter if he knew, recklessly disregarded, or was negligent to the fact that his wife was abusing their child.[107]

In situations where a parent fails to protect their child from an abusive spouse, Canada has elected to set the threshold for accomplice liability at purpose.[108] Short of a finding of purpose, the defendant parent would likely be charged with manslaughter and negligent failure to protect.[109] Under the holding in Popen, with facts substantially similar to *Peters*, the *Peters* mother would likely not be convicted as an accomplice to murder in Canada unless the Canadian court found that in failing to take action, the mother's purpose was to assist her husband in committing the crime.

C. *French Criminal Law*

The scope of "duty to rescue" is strikingly different in common law and civil law jurisdictions.[110] In civil law countries, such as France, the duty to rescue or protect is not limited to those with a special relationship to the victim, like a mother-child relationship, but extends to every person; every person has the duty of "easy rescue."[111] The text of the French "duty to rescue" statute, codified as Article 223-6 of the 1994 French Penal Code reads:

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[104] *Id.*
[105] *Id*. para. 13.
[106] *Id*. para. 16.
[107] *Id*. para. 16-18.
[108] *Id*. para. 13.
[109] *Id*. para. 16-20.
[110] Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451, 451 (2000).
[111] *Id.* at 452.

> Any person who willfully abstains from rendering assistance to a person in peril when he or she could have rendered that assistance without risk to himself, herself, or others, either by acting personally or by calling for aid, is liable to the same penalties [i.e., five years imprisonment and a 500,000 francs fine].[112]

Commentators believe that a primary reason for imposing such a broad duty to perform easy rescues is to fill the gap created by France's reluctance to recognize "commission by omission" and the limitations placed on accomplice liability, such as the affirmative-action requirement.[113] For example, in common law jurisdictions, if a parent, having an affirmative duty to protect her child, watches her child drown, the parent may be charged, depending on their mens rea, with either murder or manslaughter.[114] In France, however, parents who watch their children drown under similar circumstances cannot normally be convicted of a voluntary homicide offense.[115] French courts do not interpret active verbs such as "murder" to cover omissions, even if the defendant had an affirmative duty to protect.[116] For accomplice liability, the French Code requires that the prosecution prove that the defendant has "aided, assisted, or facilitated the commission of the offense" and the proof must "include an 'affirmative act.' Inaction does not suffice for accomplice liability."[117] The penalty for an accomplice in France may either be the same as the principal or lighter, depending on the court's discretion.[118] France recognizes a class of crimes termed "involuntary homicide offenses"[119] for cases where a person has caused death to another without having the intent "to kill;" these offenses are described as involuntary because although the act was voluntary, the result was not. Article 221-6, the Ordinary Involuntary Homicide statute, reads: the "fact of causing. . .by ineptitude, carelessness, inattention, negligence or a breach of an obligation of security or of care. . .the death of another constitutes an involuntary homicide."[120] The punishment set forth by the statute is three years in prison and a FF300,000 fine, which increases to five years in prison and a FF500,000 fine if the breach of an obligation is "obviously deliberate."[121]

In other civil law countries, such as Germany, courts have developed a large body of case law finding that a defendant's omission was sufficient

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[112] *Id.* at 460-461.
[113] *Id.* at 463.
[114] *Id.*
[115] *Id.* at 463-464.
[116] *Id.* at 464.
[117] *Id.*
[118] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 157 (2002).
[119] *Id.*
[120] *Id.*
[121] *Id.* at 157-158.

to hold the defendant responsible for murder.[122] In 1975, the German legislature codified the longstanding approach of German courts in a provision allowing courts to find a duty to act and to find a defendant responsible for the substantive offense, if "principles of right require him to make sure that the result does not occur and if the failure to act is [morally] equivalent to bringing about the prohibited result by affirmative conduct."[123]

The leading French case rejecting liability for commission by omission is the case of the Imprisoned Woman of Poitiers.[124] The imprisoned woman (the victim) became a recluse in her parent's home when she was in her twenties; her mother provided the victim with adequate food, but did not provide her with adequate care.[125] After thirty years as a recluse, the victim was discovered by police (alerted by an anonymous letter), insane and living "under conditions of indescribable filth," including excrement-matted hair and her bed infested with worms.[126] The mother could not be tried for her actions because she died shortly after her daughter was found.[127] The prosecution proceeded to charge the victim's brother, Marcel, who lived across the street from his mother.[128] The prosecution charged the brother with the French equivalent of assault and battery,[129] which carried a maximum sentence of five years.[130] The evidence indicated that the defendant visited his mother almost daily and read his sister newspapers.[131] After the trial court found the brother guilty and sentenced him to fifteen months in prison, a leading French legal scholar published a "pamphlet criticizing the trial court's decision" arguing that the French assault and battery statute required an active commission and did not cover the commission of the offense by omission.[132] The Appellate Court, persuaded by the reasoning in the pamphlet, overturned the conviction, holding that there could be "no violence

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[122] Tomlinson, *supra* note 110, at 464.

[123] *Id.*

[124] *Id.* at 464-465, *citing* ANDRE GIDE, LA SEQUESTREE DE POITIERS, 1997 (Folio paperback) to which the author, Edward Tomlinson, turned to for most of the facts of the case because French cases generally do not recite facts.

[125] *Id.* at 465.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] The applicable statute, Article 309 of the French penal code, punished any person who 'intentionally wounds or strikes, or commits any other violence or assault resulting in the impairment of the [victim's] well-being." *Id.*, *citing* an 1863 amendment to the 1810 Penal Code, translation found in 1 AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 107 (1960) (translated by Jean F. Moreau).

[130] Tomlinson, *supra* note 110, at 465.

[131] *Id.* at 466.

[132] *Id.*

or assault without an act of violence;" the court added that although it found the brother's actions deserving of severe blame, his actions were not subject to penal sanctions.[133] French commentators have uniformly approved the decision by the Appellate Court, rejecting liability for commission by omission, and agreeing with the general principle that only the legislature may create criminal offenses.[134] Although commission by omission is not a part of French criminal law, many defendants with a duty to act are prosecuted for substantive offenses in which negligence is sufficient for guilt.[135] French courts, therefore, view omissions as negligent conduct and punish them as such.[136]

The leading French case requiring an affirmative action on the part of the accomplice involves a farmer who knowingly sells an infected cow to a butcher.[137] The butcher proceeded to slaughter the cow in front of the farmer and his family and subsequently died from the infection transmitted by the cow.[138] The court convicted the farmer of involuntary manslaughter but ruled that the family who silently observed could not be convicted of that offense regardless of their knowledge because of the lack of an affirmative act.[139]

French courts reject both commission by omission and accomplice liability by omission altogether and convict defendants who fail to protect under various negligence statutes, such as the involuntary homicide statute discussed above, with penalties far less than what would be given to an accomplice to murder or a murderer. In France, the mother in *Peters* would likely be charged with, at most, involuntary homicide, under which she would receive three or five years depending on how "deliberate" the breach of her obligation was found to be. She would not be charged as an accomplice to murder, under which she may receive the same penalty as the murderer.

D. *Analysis*

A review of the various jurisdictions, both domestic and international, strongly indicates that the *Peters* court was unduly harsh on the defendant. Using only knowledge of the significant other's past conduct as the basis for upholding a conviction of the mother as an accomplice to murder punishes the mother disproportionately to her culpability. While the actus reus of failing to protect her child may have been present, relying only on the mother's knowledge of her significant other's past conduct to establish the mens rea for accomplice liability to murder is problematic.

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133 *Id.*
134 Tomlinson, *supra* note 110, at 467.
135 *Id.*
136 *Id.*
137 *Id.* at 468.
138 *Id.*
139 *Id.*

While a purpose can arguably be inferred from such knowledge, as the court ultimately holds, there remains a lack of evidence establishing a "common purpose" between the mother and the significant other. It seems then that the *Peters* court is blurring the line between purpose and knowledge.

All of the other jurisdictions examined above that punish accomplice liability by omission rejected using knowledge as the applicable standard because they were concerned about the slippery-slope the lower threshold would create. *Peters* is an example of what the other jurisdictions were concerned about. The *Peters* court, in reaching its determination, wrongfully relied on a case in which the mother not only was present during the fatal beating, but evidence also showed the mother abused the child herself. The additional facts are more likely to point to a shared common purpose as to at least abuse of the child. If the actions of the Peters mother demonstrated a greater interest as to the abuse, established by additional evidence such as encouragement, presence, or actual past assistance, jurisdictions would be more likely to say she had purpose as to the underlying offense.

There are still other reasons why permitting convictions based only on knowledge may result in miscarriages of justice. Many Americans still believe that some form of physical discipline for children is acceptable.[140] The difference between "discipline" and "abuse" can be elusive and is often defined in terms of the outcome rather than intent.[141] Due to the ambiguous nature of the difference between discipline and abuse and its application to the father/caretaker-child relationship, the mother's knowledge of the father's past "discipline" could be imputed to the mother as her knowledge of past "abuse." The court may then contend that a mother's knowledge of past disciplinary action by the father, and her subsequent failure to protect her child from that (legal) action constitutes the requisite "knowledge" to charge her as an accomplice to murder.[142] The result of this finding may be that the mother receives the same penalty as the principal.[143] If the mother and father share a common purpose, it is much more fathomable to punish them equally. It would, however, be absurd to give the mother the same penalty as a significant other who fatally abused the child when she was not home, based solely on her knowledge of some past, legal, actions of the significant other. If the

140 *See* Steven L. Nock, *Is Spanking Universal? (Comments on Murray Straus),* 8 VA. J. SOC. POL'Y & L. 61, 62 (2000).

141 *See* California State University, Fullerton, Department of Psychology *at* http://psych.fullerton.edu/clindquist/dv/discipl.html (last visited September 27, 2004) (*citing* Washington's definition of "abuse" as constituting actions resulting in "broken bones, burns, cuts, internal organ damage, or substantial bruises.")

142 *See, e.g.,* Peters, *supra* note 29.

143 *Id.*

mother and father share a common purpose, it is much more fathomable to punish them equally.

Another concern with the holding in Peters is that courts are generally reluctant to give strong weight to whether the woman has been battered herself.[144] In *State v. Williams*,[145] a New Mexico court convicted Jeanette Williams of child abuse for failing to protect her four-year-old daughter from her husband's abuse.[146] At the time of the abuse, Jeanette had been previously beaten by her husband, the husband had threatened the life of Jeanette and her daughter, and Jeanette was five-months pregnant.[147] The Appellate Court affirmed the conviction by stating that even if Jeanette could not have stopped her husband, that circumstance did not "prevent her from seeking help."[148] Jeanette's case is not uncommon; for example, in *Campbell v. State*,[149] a mother was found guilty of felony child endangerment for not protecting her daughter from burns caused by her live-in boyfriend while she was at work, even though she had been severely beaten by the boyfriend in the past[150] and took her child to the hospital as soon as she got home.[151]

In the type of situation where the mother is charged for failing to protect her child, the courts may be punishing a mother for doing (maybe wrongly) what she believes is best; she may be staying out of the way of the abuse because she believes this is the only way to avoid greater abuse to the child or herself (i.e. duress).[152] And although the mothers in Williams and Campbell were charged with crimes less than murder (child abuse and felony child endangerment, respectively), the courts' reasoning, although not explicitly, was broad enough to indicate that either mother could have been convicted of murder if the beating by their respective husbands had resulted in the deaths of the children.[153] Mothers often believe that their abusive mate will further abuse the child if the abuse is reported; still others believe that they will be abused if they

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[144] Heather R. Skinazi, *Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect"*, 85 CAL. L. REV. 993, 993 (1997).

[145] 670 P.2d 122 (N.M. Ct. App. 1983).

[146] Skinazi, *supra* note 144, at 994.

[147] *Id.*

[148] *Id., citing* Williams, 670 P.2d. at 124.

[149] 999 P.2d 649 (Wyo. 2000), *in* Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 272-274 (2001).

[150] Casey (the mother) testified that she had been beaten by her brother since she was seven, by her stepfather as a teenager, and was violently assaulted by her live-in boyfriend with knives and guns. Fugate, *supra* note 149, at 272 n.2, *citing* Campbell v. State, 999 P.2d 649, 655 (Wyo. 2000).

[151] Fugate, *supra* note 149, at 272-274.

[152] Skinazi, *supra* note 144, at 996; for a full discussion of why the duress defense should apply to women in failure to protect cases, *see* Skinazi, *supra* note 144.

[153] *Id*. at 1036.

report anything to the authorities.[154] Finally, mothers may also believe that informing the authorities will not solve anything.[155] The abuser in such cases is usually a part of the family (mother's boyfriend or husband) and the mother may believe that she "needs" the abuser for companionship and/or a father-figure for their child.[156] There is grave concern in concluding that the mother had knowledge that her failure would result in death of her child, when her failure to act, under these psychologically-strained circumstances, is likely attributable to outside factors.

The "proper effort" requirement is the protection that mothers are expected to rely on to make sure they are not being punished for just not doing more; what is expected of them is what is "proper," considering the circumstances. Relying solely on the protection that juries are weighing all the facts to determine whether the mother made the "proper effort" fails to account for the mother's psychological state.[157] Juries, looking at an abused or dead child on the one hand and a mother who failed to protect their child on the other, may not be appropriately weighing all the relevant factors in determining whether any particular mother's efforts were "proper" but instead may be more harsh on the mother, reasoning that if the mothers had simply done more the child would not be hurt. Many of these women are psychologically abused and repressed women that have suffered from the significant other's abuse themselves and may have been too afraid to stop their husbands when, in their disturbed psychological state, they think the husband is "disciplining" their children.[158]

Although the psychological circumstances in these cases are similar to Battered Women Syndrome cases, where women react to beatings received from abusive partners with physical violence against the partners, numerous courts have held that the Battered Woman defense is inapplicable here because the crimes are against the children.[159] This leaves the battered mother facing charges of abuse, perhaps even murder, and relying on the jury to understand her state of mind after being severely abused by her husband, simply by looking for "proper effort," where a deeper psychological problem may be present; if the mother has been severely abused herself and has failed to seek help, it may be that her failure to seek outside help for her children is not a proper indicator of her culpability due to her disturbed mental state. Although mothers are blameworthy due to their failure to report the initial abuses, their level of blameworthiness does not amount to that of a murderer.

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[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Fugate, *supra* note 149, at 280, note 34 (discussing cases where the mother has raised the BWS defense and academic response to the Court's rejection of the defense in failure to protect cases).

An alternative is excluding the unique case of mothers failing to protect from the scope of accomplice liability, and instead enacting a statute specifically dealing with mothers in these situations. Washington has declined to extend accomplice liability of the underlying crime to parents who fail to perform their duty of protecting their children.[160] Instead of extending accomplice liability to cases of omission, the state legislature has elected to impose liability in other criminal statutes for omissions to act.[161] An example of such legislation is a first degree criminal mistreatment statute.[162] Although the Washington statute which punishes reckless behavior by the caregiver may be appropriate for the Peters mother, it would be far too lenient if the Peters mother had encouraged and possibly participated in the abuse of the child. While accomplice liability for mothers clearly acting with purpose proportionately punishes mothers, loosely interpreting purpose by allowing it to be inferred from sole knowledge of past acts leads to tremendous injustices of the type seen in Peters.

V. Conclusion

The court, in essence, finds the Peters mother is just as culpable as (1) the principal actor and (2) another mother who is acting in concert with her significant other, either encouraging his fatal abuse or partaking in it herself. Punishing the mother as a murderer is unjust in this case, particularly because the mother was not present during the fatal abuse and the mother's statement at the hospital telling her significant other that he should not get so angry, used by the court to establish knowledge of past abuse, actually demonstrates that the mother told her significant other not to abuse the boy. The statute requires a "common purpose" to ensure that the accomplice is as culpable as the principal actor since she will be receiving the same punishment. The Peters case wrongly seems to turn, instead, on a judgment that the mother's actions were not "enough, "making her culpable, but not as culpable as the principal actor. While I agree that the mother should have done more and is deserving of punishment, the Peters mother is not deserving of the same punishment as the

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[160] *See* State v. Jackson, 976 P.2d 1229, 1233 (Wash. 1999).

[161] *Id.* at 1234.

[162] *Id.*, *citing* Washington Criminal Code Chapter 9A.42.020, which states:

> A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life. RCW 9A.42.020 (emphasis added).

Chapter 9A.08.010 further defines a person as being reckless when "he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation."

principal actor. Peters demonstrates the injustice that results when the purpose mens rea threshold is stretched.

The other jurisdictions that recognize liability for an accomplice by omission adhere either to a purpose standard or have removed mothers failing to protect from accomplice liability and prosecute under separate statutes. Although knowledge may be arguably acceptable in some other cases of complicity, especially those where the actus reus constitutes a commission such as that of the sale of a gun, the unique relationships present in cases involving omission by a mother in the death of her child need more protection.

Courts must be especially careful to apply the stricter, purposeful intent, standard with the unique relationships involved cases involving the mother, her child and her significant other. The mother may believe that the significant other is "disciplining" the child, she may not be psychologically stable due to severe abuse herself, and the principal actor is someone who shares the duty to protect the child, a fellow care-giver. While any one of these factors may not be important in a case, they demonstrate that a mother's situation in failing to prevent harm to her child provides unique challenges in determining the mother's culpability, especially where the principal actor is the mother's significant other. If, however, the mother meets the threshold of purpose, often demonstrated by encouragement, presence, and past severe abuse, the mother is far more culpable than the Peters mother who was not even in the house when the fatal abuse occurred. This is the protection that most jurisdictions provide to the mother, and the least that the Peters mother deserved.

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