provides no assistance in resolving confusions as regards the definition and function of the doctrine.

Other papers engage with the role of Equity in the Restatement, a matter of particular concern because of the America focus on equitable discretionary remedialism. From a doctrinal perspective R3Rue is found wanting in various respects. McFarlane criticises the Restatement's focus on ends rather than means, particularly as regards its treatment of the constructive trust which he considers is treated as a statement of conclusion rather than a formal concept as in England. The constructive trust is also considered by Ho and Mason, with the former seeking to expand the role of the resulting trust as a proprietary response to unjust enrichment at the expense of the constructive trust, and the latter considering the taxonomy of the constructive trust as a remedy in the Restatement as compared with its different roles in England and Australia.

Finally, two papers adopt an explicitly comparativist approach, with du Plessis considering the meaning of duress in the Restatement and in English and German law, and Danneman providing a short but helpful overview of Book VII of the *Draft Common Frame of Reference* and then considering how that compares with the Restatement in various respects.

It is unclear who this book is aimed at. The editors suggest that they were seeking to stimulate American scholars, judges and practitioners to direct more attention to the law of restitution and unjust enrichment. It is unlikely that this collection of essays will do that, since there is little here that will be of immediate interest to American lawyers. But there are lessons for them to learn, as well as for lawyers in this country too, one of them being that, whilst the US and England might be separated by a common language, we might also be considered to be separated by a common law of restitution.

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Positive Obligations in Criminal Law. by ANDREW ASHWORTH. [Oxford: Hart. 2013. 221 pp. Hardback £45. ISBN 978-1-84946-505-2.]

THROUGHOUT his distinguished career, Andrew Ashworth has been concerned with two aspects of what might be termed "positive obligations" in criminal law. First, there is the question of what positive obligations can be imposed legitimately on citizens, and enforced through the criminal law. Criminal offences that can be committed by omission fall into this category, but there are other examples, such as the duty of citizens to know the criminal law. Secondly, there is the matter of what positive obligations the State owes to its citizens if the criminal law is to be applied justly. For instance, how detailed must the drafting of criminal laws be, and how widely must they be publicised? In this characteristically well-argued and clear book, Ashworth collects together six previously published works (original dates of publication follow the chapter titles in the discussion below) that engage with the tension between these obligations, and supplements them with two new essays and an epilogue. It is useful to have Ashworth's work in this area collected together in one place, and remarkably – despite being almost entirely unedited from their original versions – the chapters fit together well enough. Accordingly, this book has much

to offer students, researchers, policy-makers and judges concerned with the criminal law.

The first chapter, "Is the criminal law a lost cause?" (2000) will be familiar to many already. This is Ashworth's critique of the then New Labour government's enthusiasm for passing new criminal legislation that often neglected normal criminal law principles. Through acting with such alacrity, the State failed to meet its obligations to citizens. Ashworth's impassioned plea for "a set of criminal laws that penalise substantial wrongdoing and only substantial wrongdoing, enforcing those fairly and dealing with them proportionately" (p. 25), and his identification of the ways in which the government of the day undermined this ideal, is difficult to argue with. Furthermore, despite its age, Ashworth's objections remain relevant. Recent research (by Chalmers and Leverick) suggests that the problem of "overcriminalisation" in the United Kingdom may have been massively understated in the past. Additionally, Ashworth's concerns about due process and fairness in dealing with anti-social behaviour will continue to be pressing, even if the present government succeeds in replacing Anti-social Behaviour Orders (ASBOs) with alternative measures. There is thus still much to take from this chapter.

Chapter two is a new and substantial paper (running to fifty pages) on omissions. The starting point for Ashworth is that it makes sense to speak of omissions only when there is a duty to act (p. 31). Much of the remainder of the chapter is spent exploring the various categories of duty that have been, and could be, recognised by Common Law systems, and how the tensions between the positive obligations of State and citizen should affect their limits. Ashworth presents many useful distinctions to help clarify thinking on this topic, with the most valuable being his set of three principles concerning the urgency of the situation, the priority of life over other values, and the opportunity and capacity of the agent to satisfy the duty (first introduced on p. 41). Ashworth analyses a variety of difficult questions about duty and omissions using these principles, which could perhaps have been fleshed out more fully. For instance, the priority of life principle seems at points to apply to other "fundamental" interests (e.g. p. 41). There is not an extensive explanation of what these other interests might be, and presumably this would be a deeply contested question.

In fact, what becomes clear from Ashworth's extremely balanced analysis is that questions involving omissions liability are seldom going to be easy. Take the example of an offence consisting in the failure to report a serious offence committed by another person (p. 62). First, there is the question of how to resolve conflicts between values such as family loyalty and the civic obligation to assist the State in the investigation and prosecution of wrongdoers. Should a person have to report his wife's shoplifting to the police, on pain of criminal punishment if he fails to do so? Ashworth might be sympathetic to the husband's reluctance to report this offence, but he seems unimpressed, in general, by such arguments where "serious" offences are involved (p. 63). This kind of value conflict might be resolved differently by different individuals in different circumstances, reflecting the reality of how complicated criminalisation decisions about offences of omission can be.

A second, connected issue concerns the indeterminacy of language. Just what is a "serious" offence? Ashworth thinks that offences against the person fall into this category, whilst a simple theft will not (p. 64). What about a burglary? Given the additional ingredient of violation of personal space (assume it is a residential property and the householder is out at the time of the

offence), this might be a "serious offence", but it is not typically conceived of as being an offence against *the person*. The difficulty is that any answer to the question of what constitutes a "serious offence" is likely to be contentious, but a clear answer is necessary to ensure that citizens can plan their conduct in accordance with the criminal law's demands. The rule of law requires that the State is very clear about the circumstances in which a duty arises, at least on Ashworth's presentation of it in this chapter (pp. 66–68).

A similar problem is raised when considering what a citizen must do to *satisfy* a duty imposed upon her by law. If she must take "reasonable steps", then again there are difficult (irresolvable?) questions about what this means in concrete circumstances. Although legislatures could provide some idea of factors that are relevant to these questions (p. 68), they cannot cover every eventuality.

If fair warning is taken as seriously as Ashworth wants it to be in chapter two, then those drafting offences of omission will find their task very difficult, and might wonder whether an alternative approach might solve more easily the relevant social problem. This is what Ashworth wants: to make the legislature and judiciary think very carefully about the obligations being imposed upon citizens and enforced through the stigmatic criminal sanction, and to consider whether alternative measures would be preferable. It would no doubt do much good if policy-makers and members of the judiciary were to read this chapter.

The points about the rule of law, and its relationship with the State's role in punishing culpable wrongdoing, are taken up in chapter three, "Ignorance of the criminal law, and duties to avoid it" (2011). Citizens, Ashworth contends, should take *reasonable* steps to discover the law (note again the difficulties raised by "reasonableness"). The State ought, reciprocally, to take *reasonable* steps to ensure that the law is accessible, clear and not applied retrospectively (duties supported in part by Art 7 of the European Convention on Human Rights). Ashworth shows persuasively and practically how English common law's assertion that "ignorance of the law is no excuse" is "a preposterous doctrine, resting on insecure foundations within the criminal law and on questionable propositions about the political obligations of individuals and the State" (p. 81).

In this chapter, it becomes clear that Ashworth's strict approach to fair warning, which dominated chapter two, is reserved most particularly for the imposition of criminal liability for omissions. Omissions offences criminalise failures to comply with a duty, and there is a particular sense of injustice when someone is convicted in circumstances where she cannot ascertain easily her obligations. The offence of "gross negligence" manslaughter is particularly relevant here. In English law, a person might be convicted because of their "grossly negligent" (hardly the most certain of concepts itself!) failure to carry out a range of duties, which caused the death of a human being. These duties are found mainly in court decisions, which even interested citizens can seldom access, let alone interpret properly. Short of buying a criminal law textbook, such a citizen might well be unsure of the situations in which she will be expected, on pain of punishment, to act. (Even then, the boundaries of some duties remain unclear at common law.) She might be caught by surprise by criminal liability, which is a particularly worrying instance of unfairness. In other areas, however, it appears that Ashworth's conception of fair warning can give moderate leeway to other concerns, such as security. This nuanced approach reflects Ashworth's antipathy towards "bright line" distinctions in criminal theory.

The theme of fair warning is continued in "Should strict liability be removed from all imprisonable offences?" (2010). Offences of strict liability, Ashworth argues, do not require the prosecution to prove that the defendant adverted to the wrongfulness of her conduct, and thus that she was fairly warned about the prospect of liability. This is another failure of the State's positive obligation to avoid "ambushing" citizens with liability. Additionally, the censure attendant upon conviction for a strict liability offence may be undeserved, and a deprivation of liberty following conviction might be disproportionate. For Ashworth, strict liability should thus not be used in imprisonable offences, and the very least that should be required is *negligence* as to each offence element (though this conclusion, at p. 116, is tentative). This chapter is useful both for its positive case and for its outlining of the various arguments *for* strict liability.

Moving on from strict liability, Ashworth considers the related concept of *constructive* liability in "A change of normative position: determining the contours of culpability in criminal law" (2008). This chapter is an attack on what has been termed "moderate constructivism" – essentially the idea that once a defendant has (often intentionally) committed a particular "gateway" wrong, he can be held responsible for unforeseen consequences stemming from it. Even if citizens are warned fairly about such doctrines ("Do not commit offence *x*, or we will hold you responsible for even unforeseen consequences!"), this does not mean that they are fair (p. 141). Ashworth's engagements with John Gardner and Jeremy Horder (the main proponents of "moderate constructivism") are clear enough, but this is perhaps the only chapter in *Positive Obligations in Criminal Law* where novices might struggle to keep up. Those who are already familiar with the positions of Gardner and Horder will find it far easier to appreciate the nuances of the debate.

Continuing with the idea that fair warning does not necessarily mean fair law, "The unfairness of risk-based possession offences" (2011) examines whether offences can be justified where they criminalise obvious risks and dangers that *might* follow from the defendant's otherwise ambiguous conduct (e.g. possessing a firearm). Ashworth demonstrates well how these offences tend to be inconsistent with general principles of criminal law, and – additionally – how they deny the defendant the opportunity to choose not to use the relevant item in a risky or dangerous manner. The key, for Ashworth, is the defendant's intention: what does she mean to do with her possession later (p. 169)? In the absence of proof of an intention to act dangerously or riskily, he suggests that the State cannot intervene legitimately unless the possession is intrinsically dangerous and stored negligently, or the defendant breaches licensing requirements. Even if this chapter does not convince everyone, its discussion of recent literature on risk-based possession offences is useful and accessible.

The final chapters of the book are less obviously connected, but remain interesting and engaging. Chapter seven, "Child defendants and the doctrines of the criminal law" (2010), documents the various ways in which the criminal law *ought* to expect less of the young, for instance in terms of their duty to know the law, and their capacities for self-control. Chapter eight's new survey of the Strasbourg jurisprudence on Articles 2, 3, 4 and 8 of the European Convention on Human Rights shows that arguments about the State's positive obligations to utilise the criminal law to protect citizens' rights will only increase in the future. This chapter demonstrates how important the difficult areas covered in this book are, before the short epilogue ties various threads together.

What comes across throughout this book is how reasonable, principled and practical Ashworth is. Unlike some of the more hard line "subjectivists", at various points he leaves open the possibility of allowing negligence/gross negligence to secure culpability, and envisages other *principled* departures from other tenets of "subjectivism", in appropriate circumstances (e.g. p. 133). In contrast with wilder accounts of retributivism, Ashworth is unwilling to ignore entirely the need for the criminal law to deter wrongdoing in practice (p. 150). Furthermore, Ashworth's perspectives on the need for "fit" between theory and the real world (p. 154) demonstrate that he is wedded not to extreme arguments, but instead willing to adopt a far more nuanced "reflective" position. The result is a fairly non-aggressive text, which might mean that some positions adopted in *Positive Obligations in Criminal Law* will not bowl sceptics over. It is, however, impossible to not be stimulated by this important book.

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Wickedness and Crime: Laws of Homicide and Malice. by PENNY CROFTS. [London: Routledge. 2013. 285 pp. Hardback £80. ISBN 978-0-415-82015-8.]

To be convicted of murder under Scots law, a person must kill a human being with "wicked" intention or "wicked" recklessness. To outsiders this must sound, at best, quaint and, at worst, ridiculous. Most modern Anglo-American systems of criminal law have sought to sanitise the language of criminal responsibility and liability to ensure the law is more certain and less open to moral disagreements about right and wrong. Consider the *mens rea* of murder in English law – traditionally "malice aforethought". This is conceived of nowadays in terms of the defendant's intention to kill or cause serious bodily harm. Such an intention can exist where the defendant meant to bring about the death/serious harm, or knew this was virtually certain to result from her actions. The caveat "can" recognises that the jury might refuse to "find" intention in cases of virtual certainty, which leaves them some moral space. Despite this, the *mens rea* of murder in English law is now, to a great extent, based on factual questions: did the defendant mean to bring about death/serious harm, or did she know it was virtually certain to occur? Vaguer questions about "wickedness" and "malice" are avoided.

Penny Crofts thinks that the erosion of express moral standards, such as "wicked" or "malice", should be mourned. In *Wickedness and Crime*, she contends that these morally loaded concepts reflect the very point of criminal convictions: to censure *the defendant*, and declare her own personal/individual badness or wickedness. This is an engaging and well-researched book, even if its conclusions are controversial.

Before looking to the book's specific chapters, and raising some general concerns, it should be pointed out that this book has a number of strengths. First, Crofts is refreshingly sceptical about many supposed orthodoxies. Her criticisms of certain forms of "subjectivism" (essentially the idea that criminal culpability is a cognitive matter) are particularly useful. Secondly, the book uses historical analysis, legal doctrine, legal theory and philosophy to good effect (even if – as suggested below – her literary sources are sometimes