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"You Know You've Gotta Help Me out…"

David Gray

Articles:

"You Know You've Gotta Help Me Out . . ."[1]

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ABSTRACT

The actus reus requirement is central to the criminal law. We only punish people for what they do. We do not punish evil thoughts. Neither do we punish people for what they do not do because not acting is, well, not acting. We punish acts but not omissions. Except when we do. We willingly punish not actions that are not performed (or should that be "actions that are not performed," or, perhaps, "not actions that are performed,"—oh my, this is confusing!) by persons laboring under legal duties of various kinds. But why? Are these sotto voce admissions that the act-omission distinction is mere fiction? Or does legal duty, by some

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[1] The Killers, *All These Things That I've Done*, Hot Fuss (2004).

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miracle of moral alchemy, make something out of nothing? The traditional answer, it seems, is to tuck the whole thing away in a box marked "Pandora." Best not to open it. Do nothing (but isn't that an . . . oh dear).

It is time to face the music. The act-omission distinction is grounded in nothing more than a conventional semantic preference. All "acts" can be described accurately and completely as "omissions," and vice-versa. Don't believe me? Check-out Part II. Semantic conventions cannot support a general prohibition on punishing omissions. Just as some "acts" merit criminal punishment and some do not, so, too, "omissions." Drawing these distinctions is a familiar task. When it comes to determining criminal responsibility for "acts," we usually focus on considerations of actus reus, mens rea, and cause. These same tools work perfectly well when determining criminal responsibility for "omissions." No ontological fictions necessary. But the process reveals something interesting. It turns out that cases involving "omissions" often present practical challenges for proving mens rea with respect to both acts and results. One way to overcome these challenges is by appeal to, wait for it . . . legal duties, which impose upon agents epistemic duties and provide juries with grounds for presuming knowledge. This insight not only solves persistent conceptual problems with common law treatments of omissions liability, it also reveals interesting and reassuring internal connections to other areas of the criminal law, including strict liability.

> In his account of the singular and interesting people among whom he was thrown, it will be observed that he chiefly treats of their more obvious peculiarities; and, in describing their customs, refrains in most cases from entering into explanations concerning their origin and purposes. As writers of travels among barbarous communities are generally very diffuse on the subjects, he deems it right to advert to what may be considered a culpable omission. No one can be more sensible than the author of his deficiencies in this and many other aspects; but when the very peculiar circumstances in which he was placed are understood, he feels assured that all these omissions will be excused.[2]

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INTRODUCTION

A mainstay of the common law is criminal sanction is reserved for acts.[3] In the main, failure to act is not subject to criminal sanction.[4] Omissions, while ripe for rotten tomatoes, are not, as a general matter, subject to prosecution.[5] There are some exceptions, of course.[6] The nausea occasioned by a parent's failure to provide basic care to their child is sufficiently strong that we carve out an exception based on that special

3. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW 302 (4th ed. 2003) ("Bad thoughts alone cannot constitute a crime."); GLANVILLE WILLIAMS, CRIMINAL LAW 1 (2d ed. 1961) ("That crime requires an act is invariably true if the proposition be read as meaning that a private thought is not sufficient to found responsibility.").

4. *See* DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 63–64 (2009) (noting that "the dominant rule in American criminal justice (as well as tort law) systems remains that citizens are under no obligation to rescue each other"); LAFAVE, *supra* note 3, at 310 ("Most crimes are committed by affirmative action rather than by non action."); WILLIAMS, *supra* note 3, at 4 ("[I]t is not possible for the law to provide that whoever omits to do so-and-so shall be punishable, because in many cases that would make almost everyone punishable.").

5. *See* MARKEL ET AL., *supra* note 4, at 64 ("In other words, even though the failure to help another person in distress can constitute a moral failing, the criminal justice system does not generally impose liability on those who simply keep on walking."); Paul Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101, 117 (1984) ("Outside the special relationships and conditions described above, American law has not traditionally imposed a general duty to rescue."); Graham Hughes, *Criminal Omission*, 67 YALE L.J. 590, 590–94 (1958) (documenting the relative rarity of omissions liability in the common law). A notable exception, of course, are the various crimes of misprision. *See id.* at 591 (citing COKE, THIRD INSTITUTE 139 (1817 ed.)).

6. *See* Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) ("One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid."); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 899 ("Although the general rule of no sticks, or no duty to rescue, is solidly entrenched in most jurisdictions, many exceptions to this rule have been discovered in the form of 'special relationships' out of which affirmative duties are said to arise.").

relationship,[7] as we do in a few other circumstances where there is a legal connection between the nonagent and the victim that is sufficient to impose a legal duty to act.[8] In the main, however, the rule is that acting to bring about the death of another is homicide, but failure to provide life-saving assistance is not, even where that assistance can be provided without risk or cost.[9] Out of deference to that rule, even in the few American jurisdictions where legislatures have passed "Good Samaritan" laws, punishments for omissions are, as Anthony Woozley has described them, "toothless tigers."[10]

Omissions usually are taught in law school classes as posing special conceptual problems for actus reus—the voluntary act requirement. In what sense can we say that *not* acting is acting? I think we have this all wrong. Rather than posing a conceptual problem for the actus reus requirement, I will argue that omissions are best understood as posing practical challenges for mens rea, the general requirement of proving a culpable state of mind. As I will show, taking this approach has a number of advantages. Foremost, it offers us the opportunity to punish those who are culpable, regardless of whether their conduct would be conventionally described as an act or an omission. It also provides a more coherent and powerful account of common law exceptions to the general prohibition on omission liability.

The argument proceeds in four parts. Part I elaborates the philosophical and policy concerns that underlie the act-omission

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7. *See* MARKEL ET AL., *supra* note 4, at 64 ("The relationship of spouse to spouse and parent to child are paradigmatic, even if not exclusive, examples of status relationships which one owes a duty to rescue sufficient to trigger criminal responsibility . . . ."); Robinson, *supra* note 5, at 102 ("Parents, for example, are generally given the legal duty to care for their children. A Parent may be held liable for criminal homicide, then, where death results from a failure to perform this duty.").

8. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 611–22 (2000) (describing range of special status relationships cited by common law courts as grounds for imposing legal duties to act); Levmore, *supra* note 6, at 899–900. Professor Levmore argues that the number and range of these relationships has and will continue to expand. *See id.*; *see also* DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 157 (1987) ("[T]he important and indisputable point is that the criminal law imposes a *universal* duty not to commit homicide by positive action, but recognizes a duty such that homicide can be committed by omission in only a few circumstances. Since the existence of a legal duty is satisfied trivially in cases of positive action, the question of whether a legal duty exists assumes significance only in cases of omission.").

9. *See* Larry Alexander, *Criminal Liability for Omissions: An Inventory of Issues*, CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121, 121 (Stephen Shute & Andrew Simester eds., 2002).

10. *See* A. D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1274 (1983). As examples, Vermont and Minnesota have had duty to rescue laws that carry a maximum fine of $100. *See* Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 426–27 (1985). Punishments available in cases of omission in some European countries are comparatively more severe. *See id.* at 447–48.

distinction to explain the common law's general reservations about punishing omissions. Part II takes aim at the act-omission distinction, arguing that it reflects nothing more than a semantic preference, which is insufficient to ground moral, much less legal, norms. Part III recognizes that omission offenses do present real challenges for the criminal law. It argues that those challenges attach not to actus reus, however, but, rather, to mens rea. It then suggests how appeals to epistemic duties can serve to resolve these challenges. Part IV describes how this approach to conceptualizing omissions offenses can resolve some persistent conundrums in omission debates.

I. THE LUCKY HITMAN AND THE TELEVISION SAINT

Under the common law, omissions generally are not subject to criminal liability or punishment.[11] Faith to this general rule seems to commit us to some uncomfortable results. As an example, consider this variation on a familiar trope from omissions debates:[12] Dexter is a serial killer. For reasons of his own, he has set his sights on Jimmy. Jimmy is a notoriously bad swimmer who nevertheless spends his mornings relaxing at the end of a dock extending over the deep, clear, blue waters of the Atlantic Ocean along the coast of south Florida. Aware of this opportunity, Dexter plans to kill Jimmy by pushing him off the dock to drown. He hopes that authorities will write-off the death as an accident. (Un)Fortunately for Dexter, when he arrives to commit the act, he finds that Jimmy has already slipped and fallen into the water. Jimmy begs Dexter to toss him the life buoy hanging on a nearby piling. Through the magic of the mind experiment, we know that, with minimal effort, at no cost, and without the slightest risk to his own safety, Dexter can save Jimmy if he tosses him the buoy. Dexter knows this as well. He considers his options, but decides not to deploy the buoy with the deliberate intent that Jimmy drown and die. Jimmy subsequently drowns, precisely according to Dexter's desire and design.[13]

Most of us would be strongly inclined to prosecute Dexter if we could. After all, he went to the scene with murder in his heart, and Jimmy died in just the way Dexter planned. Although Dexter was saved the pleasurable-for-him task of pushing Jimmy into the water, his not tossing

11. *See supra* note 4 and accompanying text.

12. *See* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 296 (1990) (Scalia, J., concurring) (asserting that "[i]t would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide").

13. These hypothetical facts are not far-fetched. *See, e.g.*, Osterlind v. Hill, 160 N.E. 301, 302 (Mass. 1928) (finding the defendant not liable in tort action based on his failure to rescue a drowning friend).

the buoy was motivated by, and expressive of, his intent to kill, at least as much as his act of pushing would have been if only he had arrived when Jimmy was still dry.[14] Dexter's inaction was also just as effective as his planned action. After all, but for Dexter's not tossing the buoy, Jimmy would not have died.[15] All the pieces therefore appear to be in place for a murder charge. Mainline theories of criminal punishment also appear to endorse a prosecution because Dexter is culpable, dangerous, and undeterred.[16] Nevertheless, under the common law and most American statutory schemes, there is no contest that Dexter could not be convicted because we punish people for their doings, not for their not-doings[17]—and Dexter did not *do* anything to kill Jimmy.

With cases like this in mind, it is tempting to discard the general prohibition on punishing omissions. The trouble, of course, is that once we set foot on these steep slopes, we seem destined to slip onto the rocks of other compelling not-so-hypotheticals. Consider Sally Struthers.[18] Insomniacs know her well. In the wee hours of the morning, flipping through channels, she is there, draped in spotless white linen, kneeling among beautiful children who, by misfortune of birth,[19] live lives even Oliver Twist would pity. She pleads with us. "Won't you help?" The amounts in question are so small . . . pennies, nickels, and dimes. At her invitation, we translate them into our petty luxuries. "For a price of a Coke

14. Conversations about omissions liability are prone to produce labyrinthine grammatical structures. My apologies to readers for this sentence and worse to come.

15. Some readers may balk here, arguing that Jimmy died in the manner he did and at the time he did without Dexter's contributing a link in the metaphorical causal chain. Of course, that begs the question by assuming that only doings, as opposed to not-doings, can qualify as causes-in-fact. We could just as easily say that Jimmy would not have died in the manner he did and at the time he did without Dexter's inaction. Moreover, we say exactly this sort of thing—or must—in those cases where we attribute criminal liability to not-doings perpetrated by persons who have special duties to act in certain ways, but do not, such as parents who fail to feed their children or wage-earners who fail to file income tax returns. I engage these questions at length below. *See infra* notes 100–138 and accompanying text.

16. *See* 18 U.S.C. § 3553(a)(2) (instructing federal judges to take into consideration culpability, the need for deterrence, and the need for incapacitation when imposing a criminal sentence).

17. *See* Alexander, *supra* note 9, at 83.

18. For young readers, Sally Struthers is an Emmy-Award winning actress famous for her portrayal of Gloria Stivic (nêe Bunker) on *All in the Family* from 1972–1978. She was the long-time spokeswoman for ChildFund, in which role she advocated on behalf of efforts to support international child welfare programs.

19. Warren Buffet famously refers to the "ovarian lottery." *See* Joe Wiesenthal, *We Love What Warren Buffet Says About Life, Luck, and Winning the 'Ovarian Lottery,'* BUS. INSIDER (Dec. 10, 2013, 5:04 AM), https://bit.ly/3AoxbDz. John Rawls's famous veil of ignorance mind experiment is meant to challenge social policies that reify these accidents of birth. *See* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999).

or a smoke, keep alive those hungry eyes."[20] We pause, consider our options, and, with a tinge of self-loathing, change the channel.

One morning, a few weeks later, we unhesitatingly trade enough money to feed a village for a cup of coffee—fair trade and shade-grown, of course; we're not monsters after all! With a few moments to spare, we buy the morning paper, the inner pages of which feature a short story on the starvation deaths of hundreds of children in some far-flung place with an exotic name that is somehow familiar. Then it comes to us. That's where Sally Struthers was when she issued her plea. If only we had responded—but we didn't—and now they are dead. We killed them at least as much as Dexter killed Jimmy. Our lack of intent to kill might reduce our liability from murder to manslaughter,[21] but the point is made: if we want to prosecute Dexter for murder, then we seem obliged, out of commitments to logical, moral, and legal consistency, to surrender ourselves at the local police station and to plead guilty to multiple counts of manslaughter.

Similar mind experiments are standard fare in the literature. For example, in his notes on the criminal law of India, Thomas Macaulay asks us to consider a surgeon who refuses to travel "from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die."[22] Macaulay thinks it is obvious that the surgeon cannot be held for homicide. Michael Moore agrees, arguing that the surgeon would not be obliged by the criminal law to make the trip, even if "the journey is not risky, just inconvenient to his other interests."[23] But why?

The answer requires us to go a bit deeper. The reluctance to impose liability for omissions is not merely a nod to common law tradition. It reflects a deep conservatism in the criminal law born of principles basic to Enlightenment liberalism.[24] We hold dear the privilege of all to define and to pursue their own conceptions of the good life, constrained only by the

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20. DAVE MATTHEWS BAND, *Seek Up*, *on* REMEMBER TWO THINGS (Bama Rags 1993).

21. Under the common law, the dividing line between murder and involuntary manslaughter is mens rea. Murder requires malice aforethought while involuntary manslaughter does not. *See* LAFAVE, *supra* note 3, at 775.

22. MICHAEL MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 55 (1993) (quoting Thomas Macaulay, *Notes on the Indian Penal Code, 1837*, *in* WORKS, VII, 494 (1897)).

23. MOORE, *supra* note 22, at 55.

24. *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW, 235 (2009); MOORE, *supra* note 2, at 48; FLETCHER, *supra* note 8, at 602; Robinson, *supra* note 5, at 117; John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382, 400 (1976).

reciprocal rights of others to do the same.[25] The proper role of the criminal law on this view is to describe the contours of freedom and liberty by setting boundaries on license[26]—sometimes standing upon the stilts[27] of negative rights and corollary duties of restraint.[28] Positive rights, and corollary duties to act, seem less comfortable because they occupy—rather than simply constrain—the field reserved for autonomy, violating our Grotian conceptions of ourselves as ethical sovereigns.[29] This skepticism takes the form of a hard distinction between acts and omissions. Thus, we say that there is a difference between killing and letting die, reserving criminal punishment only for those who kill.[30]

Teachers of criminal law maintain a stable of mind experiments like our Sally Struthers case that are meant to imply that abandoning the act-omission distinction would dramatically expand criminal liability, opening almost everyone to homicide charges.[31] There are millions of starving and malnourished children in the world, after all. Millions more die from preventable diseases, accidents, in war, or at the hands of violent criminals. Yet most of us do nothing. Those of us who do something can never do

25. *See, e.g.*, John Stuart Mill, *On Liberty*, *in* JOHN STUART MILL, ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 13 (Mark Philip ed., 2015) ("The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. II, § 6 (drawing a distinction between "liberty" and "license," and arguing that liberty, as governed by the law of reason, dictates preserving both ourselves and the rights of others); *see also* ROBERT NOZICK, FREEDOM, STATE, AND UTOPIA ix (1974) (elaborating a libertarian conception of the state); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (1960).

26. *See supra* note 25 and accompanying text.

27. I allude here to Jeremy Bentham's famous broadside on natural rights. *See* Jeremy Bentham, *Anarchical Fallacies*, *in* 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1843) ("Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.").

28. *See* NOZICK, *supra* note 25, at xi ("[O]nly a minimal state, limited to enforcing contracts and protecting people against force, theft, fraud, is justified. Any more extensive state violates persons' rights not to be forced to do certain things, and is unjustified."). For a brief sketch of this conservative approach to the scope of criminal law, see David Gray & Jonathan Huber, *Retributivism for Progressives*, 70 MD. L. REV. 141 (2010). For a more expansive model of criminal law in democracies, see Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1 (2012).

29. *E.g.*, MOORE, *supra* note 22, at 48; HUSAK, *supra* note 8, at 159; FLETCHER, *supra* note 8, at 602–06; Woozley, *supra* note 10, at 1274. For an example of a thoroughgoing argument for self-sovereignty, see Peter de Marneffe, *Vice Laws and Self Sovereignty*, 7 CRIM. L. & PHIL. 29 (2012).

30. *See* Cruzan v. Dir., Mo. Dep't. Pub. Health, 497 U.S. 261 (1989); FLETCHER, *supra* note 8, at 604–06.

31. *See, e.g.*, WILLIAMS, *supra* note 3, at 2–4 ("[I]t is not possible for the law to provide that whoever omits to do so-and-so shall be punishable, because in many cases that would make almost everyone punishable."); FLETCHER, *supra* note 8, at 604.

enough. Even Mother Teresa, who may have saved thousands, failed to save millions. Thus, if omissions were generally subject to prosecution, then it seems that all of us are mass murderers—or at least mass manslaughterers.[32] Moreover, to avoid liability would require tremendous sacrifice. We would be required to donate all of our time, money, and attention to preventing harm to others, leaving nothing for our own pursuits of the good life, however we choose to define it.[33] Even then, no matter how much we tried, preventable human tragedy would persist.[34] In the face of such possibilities, and perhaps even to maintain psychological barriers against crushing existential guilt,[35] we therefore reserve condemnation for what is not done to debates about ethics,[36] reserving criminal liability for not-doings to a narrow band of people who have assumed special duties of care.[37] Ignoring Sally Struthers may signal a certain lack of virtue, but it is not criminal.[38] Denying our responsibility for death and destruction inflicted by far-away wars may signal "bad faith,"[39] but we remain immune from individual criminal prosecution.[40]

The act-omission distinction and the general prohibition on punishing omissions also play important roles in medical ethics, particularly in

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32. *See* Ernest Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 268 (1980) (describing this slippery slope argument as "the most powerful objection that can be made to the judicial creation and enforcement of a duty to effect an easy rescue").

33. *See* 1 *Timothy* 5:8 (King James) ("But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel."). Abandoning the act-omission distinction might also have the effect of cheapening virtue and demeaning the choices of those who sacrifice for the good of others. *See* Susan Wolf, *Moral Saints*, 79 J. PHIL. 419, 433 (1982).

34. Liam Neeson, playing Oskar Schindler, gave powerful expression to the existential angst that accompanies these profound questions in the waning minutes of *Schindler's List*, when, bereft, he wonders how many more people he could have saved by trading his remaining possessions for lives. *See* SCHINDLER'S LIST (Universal Pictures 1993).

35. *See* JEAN-PAUL SARTRE, BEING AND NOTHINGNESS, 47–70, 553–56 (Hazel E. Barnes trans., 1956).

36. *See* MARKEL ET AL., *supra* note 4, at 64 ("In other words, even though the failure to help another person in distress can constitute a moral failing, the criminal justice system does not generally impose liability on those who simply keep on walking."); WILLIAMS, *supra* note 3, at 3–4 ("It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbors, but should render active services to their neighbors. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good." (quoting Lord Macaulay)); P.J. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 95 (1962) (contending that, when it comes to omissions, "law and morals part company").

37. *See* FLETCHER, *supra* note 8, at 606, 611–22.

38. *Cf.* MOORE, *supra* note 22, at 49–51.

39. SARTRE, *supra* note 35, at 47–70, 553–56.

40. Karl Jaspers invoked this distinction between criminal and "metaphysical" guilt in his commentaries on German culpability for the Holocaust. *See* KARL JASPERS, THE QUESTION OF GERMAN GUILT 25 (E.B. Ashton trans., 1948).

euthanasia debates.[41] Most jurisdictions stand ready to impose criminal liability on a doctor who gives a terminal patient a fatal dose of a drug with the intention of ending his life.[42] Few states would impose liability if the same doctor, with the consent of her patient and his family, withheld lifesaving care at a critical moment, leading to the patient's death.[43] This distinction between killing and letting die is at the heart of the legally sanctioned practice of advanced directives and "Do Not Resuscitate-Do Not Intubate" (DNR-DNI) orders. If we were to abandon the act-omission distinction, then it seems that physicians who, in compliance with these orders, do not provide life-saving or life-sustaining care would be subject to homicide charges.[44] If a doctor made the mistake of discussing the possibility of a DNR-DNI order with a patient's family, then we could tack on a conspiracy charge as well.[45]

There are counter-examples, of course—many of which are more visceral and compelling than the lucky hit man. The infamous Kitty Genovese case is one.[46] On the apocryphal telling of this American parable,[47] dozens of Ms. Genovese's neighbors in Queens, New York, took

41. *See, e.g.*, BONNIE STEINBOCK & ALASTAIR NORCROSS, KILLING AND LETTING DIE (1994); FLETCHER, *supra* note 8, at 601; Phillipa Foote, *Euthanasia*, 6 PHIL. & PUB. AFF. 85 (1977).

42. The group Death with Dignity maintains a list of the minority of states with physician-assisted suicide laws. *See* DEATH WITH DIGNITY ACTS, https://bit.ly/3lQvsk5 (last visited Sept. 22, 2021).

43. *See, e.g.*, Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 270–77 (1990) (tracing the history of common law right to refuse medical treatment); Airdale NHS Trust v. Bland [1993] 1 All E.R. 821 (Eng.) ("[W]hereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorized as an omission.").

44. *See Cruzan*, 497 U.S. at 284 (upholding right of patients to refuse life sustaining care and for doctors to respect patients' requests if demonstrated on clear and convincing evidence); Barber v. Sup. Ct., 147 Cal. App. 3d 1006, 1022 (1983) (setting aside murder indictment brought against physician who withheld life sustaining care from patient in a persistent vegetative state in keeping with expressed desires of the patient's family).

45. Among others, former-Governor Sarah Palin has appeared ready to take this step. She famously condemned efforts under the then-nascent Affordable Care Act to encourage doctors to have conversations with their patients about end-of-life care as "death panels." *See* Andy Barr, *Palin Doubles Down on 'Death Panels,'* POLITICO (Aug. 13, 2009, 7:05 AM), https://politi.co/3lziqYe.

46. The facts of the Kitty Genovese case have been, and continue to be, debated. *See, e.g.*, Stephanie Merry, *Her Shocking Murder Became the Stuff of Legend. But Everyone Got the Story Wrong*, WASH. POST (June 29, 2016), https://wapo.st/3lJ6Iuf. But the significance of the initial telling, which advanced a narrative of urban indifference and moral isolation, continues to have significant impact as a modern-day parable. *See id.*

47. The claim that thirty-eight witnesses knowingly ignored Ms. Genovese's pleas for help emerged quickly in the days and weeks after the attack. *See* David W. Dunlap, *1964: How Many Witnessed the Murder of Kitty Genovese?*, N.Y. TIMES (Apr. 6, 2016), https://nyti.ms/3ziKsMw. It turns out to vastly overstate the number of people who actually knew what was happening. *See id.* Many others may have assumed that police had been called, complicating the narrative of hard-hearted disinterest that long dominated public

no action[48]—they did not even call the police[49]—as she screamed for help while being repeatedly stabbed during three separate attacks by the same assailant over the course of forty-five minutes.[50] Questioned about his inaction, one witness reported that he "didn't want to get involved."[51] Perhaps he would have been less reluctant if he knew he could be prosecuted for his inaction. The brutal 1983 rape of Cheryl Araujo at a Bedford, Massachusetts, bar provides another example.[52] In that case, a group of men assaulted and raped Ms. Araujo in the full view of other patrons, some of whom encouraged the assault, while others did nothing to prevent or stop it.[53] Despite public calls in cases like these to hold "bad Samaritans"[54] responsible for their inaction, fears of the slippery slope fed by a firmly entrenched culture of "intense individualism [that] took deep and early root in American soil"[55] have prevailed. So, while we might readily condemn those who fail to provide minimal assistance in these cases along dimensions Karl Jaspers has described as "moral" or "existential" guilt,[56] the common law comes down definitively against imposing criminal liability.

But what about the few cases where the common law is willing to punish omissions? We are perfectly comfortable punishing a custodial

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perceptions of the case. *See* Charlotte Ruhl, *Kitty Genovese*, SIMPLY PSYCH. (Apr. 20, 2021), https://bit.ly/2YkEaj4 (noting that witnesses to the Kitty Genovese killing may have "relied on others to intervene or call the police" and that some "called friends who called the police"). Despite its factual inaccuracies, this telling continues to play an important role in public discussions of what Maureen Dowd latter dubbed "Bad Samaritanism." Maureen Dowd, *20 Years After the Murder of Kitty Genovese, the Question Remains: Why?*, N.Y. TIMES (Mar. 12, 1984), https://nyti.ms/3lHXCO7; *see also* Jim Rasenberger, *Kitty, 40 Years Later*, N.Y. TIMES (Feb. 8, 2004), https://nyti.ms/3zjfjIV.

48. In fact, one of Ms. Genovese's neighbors ran to her aid and at least one other neighbor seems to have yelled at her assailant to stop the assault. *See* Merry, *supra* note 46.

49. At least two of Ms. Genovese's neighbors claim to have called the police when they heard her screams, though law enforcement claims to have no record of these calls. *See id.* at 46.

50. The most famous telling of this version of the narrative is in A. M. ROSENTHAL, THIRTY-EIGHT WITNESSES (N.Y. McGraw-Hill ed., 1964).

51. Martin Gansberg, *37 Who Saw Murder Didn't Call the Police; Apathy at Stabbing of Queens Woman Shocks Inspector*, N.Y. TIMES (Mar. 27, 1964), https://nyti.ms/3knCNYS.

52. *See generally* KAREN CURTIS, THE ACCUSER: THE TRUE STORY OF THE BIG DAN'S GANG RAPE VICTIM (Newman Springs Pub., Inc. ed., 2019) (providing a comprehensive history of, and commentary on, the Cheryl Araujo case).

53. The number of persons in the bar at the time became a source of some dispute, but there appears to have been only one person who did anything to help Ms. Araujo. *See* Jonathan Friendly, *The New Bedford Rape Case: Confusion of Accounts of Cheering at Bar*, N.Y. TIMES (Apr. 11, 1984), https://nyti.ms/3ko3UmX.

54. *See* Dowd, *supra* note 47.

55. Morissette v. United States, 342 U.S. 246, 251–52 (1952).

56. *See* JASPERS, *supra* note 40, at 25, 29–31, 41–43.

parent who fails to feed and care for his child[57] or to prosecute wage-earners who fail to file tax returns.[58] Although surely a step over the metaphysical line described by the act-omission distinction, a little extra digging reveals that cases such as these confirm the normative foundations of the general prohibition. Specifically, custodial parents voluntarily assume a special status with respect to their children,[59] and workers choose to trade their labor for pay and in the process enjoy the considerable benefits of public goods.[60] In these circumstances, enforcing duties that inhere to special relationships or highly regulated fields perfects rather than constrains liberty by simply demanding that people abide by their promises, express or implied.[61] Consent, express or implied, does not appear to provide grounds for a more general duty to act.

II. A SEMANTIC ACCOUNT OF THE ACT-OMISSION DISTINCTION

Although libertarian instincts may motivate the act-omission distinction, they offer nothing in the way of metaphysical explanation. There is not much in the literature that can fill the gap.[62] That is a problem. To sustain a claim that acts are subject to criminal liability, but omissions generally are not, proponents must maintain that there is some set of sufficiency and necessity criteria we can use to distinguish acts from omissions in a nontrivial way. Otherwise, there would be very little point to the whole debate. This is precisely the point I want to make here. As this part argues, there is no robust metaphysical or logical distinction between acts and omissions. At best, the act-omission distinction reflects a trivial semantic preference. The consequences of this view for omissions debates are obvious. If there is no non-trivial way to distinguish between acts and omissions, then there is no moral or legal ground for the claim that omissions generally should not be subject to criminal liability. I begin with a brief discussion of action as it is understood by the criminal law.

A. What is an Act?

The act-omission distinction takes an antipodal view of acts and omissions. It is therefore important to spend a few words on the concept of "act" in the criminal law. It is not a transparent matter. A common

57. *See, e.g.*, N.Y. PENAL LAW § 260.10 (Consol. 2021).

58. *See* 26 U.S.C. § 7203.

59. *See* MARKEL ET AL., *supra* note 4, at 64, 85–90.

60. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 16–20 (Oxford U. Press ed., 2002).

61. *See* MARKEL ET AL., *supra* note 4, at 85; LOCKE, *supra* note 25, ch. 8, §§ 119–22.

62. The notable exception is Michael Moore, who appears to hold a teleological view of the act-omission distinction. *See infra* notes 100–112 and accompanying text.

starting point is "a willed bodily movement."[63] One problem with this rather bare definition is that it does not comport with our familiar ways of talking about what we do. For example, imagine that I am in the midst of cooking dinner. When asked, "What are you doing?" I am apt to answer "cooking dinner" rather than describing in atomistic terms all the individual bodily movements entailed in such a project. From a rough plain-language point of view, then, "willed bodily movement" seems too granular.[64] "Acts" are situated in a broader context that requires richer description than is achieved by reference to neuronal firings and muscular twitches.[65]

Granted, it can sometimes be dangerous to rely too much on common language as a source of philosophical insight because it entails some degree of circularity and often obscures, rather than clarifies, knotty philosophical problems. But this particular plain-language insight takes on a bit more weight when we move from the descriptive to the normative to consider the role of "act" in our common practices of praise and blame. For example, it is not in any way a crime to crook one's finger.[66] It is not even a crime to crook one's finger with an arm outstretched. Only when we get to crooking one's finger, with arm outstretched, while holding a gun, that is loaded and pointed at an innocent person, do we begin to describe an "act" that might be worthy of potential praise or blame.[67]

There are some for whom even the added texture of attendant circumstances is not enough to capture what we mean by "act" in fields of praise and blame such as the criminal law.[68] For these folks, result and cause often play a crucial role in defining, say, the act of "killing." They would therefore broaden the definition of "act" to include not just one or a series of "willed bodily movements" and the relevant circumstances that provide context for those muscular contractions, but also the effects in the

63. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 45–46 (Mark Wolfe ed., 1963) (1881) (defining acts as "willed" "muscular contraction[s]"); ALEXANDER & FERZAN, *supra* note 24, at 231–34, 241–42; *see also* FLETCHER, *supra* note 8, at 421 (acknowledging centrality of "willed muscular contraction" in the literature); JOHN AUSTIN, LECTURES ON JURISPRUDENCE § 18 (1885) (defining volitional acts as "movements of our bodies [that] follow invariably and immediately our wishes or desires for those same movements").

64. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 101–04 (Oxford U. Press ed., 1968).

65. *See* MOORE, *supra* note 2, at 280–301 (defending an approach to actus reus based on "complex actions"); FLETCHER, *supra* note 8, at 591–93 (arguing that "willed muscular contraction" is inadequate to account for the full "relational" idea of acts as "interaction[s] among individuals and the role of acting in affecting others").

66. *See* ALEXANDER & FERZAN, *supra* note 24, at 228–29; HOLMES, *supra* note 63, at 46.

67. *See* HOLMES, *supra* note 3, at 46; *see also* MOORE, *supra* note 22, at 280–301; FLETCHER, *supra* note 8, at 591–93.

68. *See* HART, *supra* note 64, at 98–112; WILLIAMS, *supra* note 3, at 16–21.

world attributable to those movements in those circumstances.[69] Seems complicated, but most folks have a pretty good feel for it by the time they get on the school bus.[70]

None of this is knock-down, of course. Theorists of an Austinian stripe can, for example, acknowledge that we commonly talk about our conduct in molecular terms but maintain that metaphysical accuracy requires that, while speaking in metaphors, we keep in mind that we are being imprecise, and perhaps misleading in our use of language. I take this to be a rough version of Michael Moore's "equivalence thesis,"[71] which holds that "any complex action description used in the special part of the criminal law is equivalent to (and thus can be replaced by) a description of some simple act . . . of the accused causing a prohibited state of affairs."[72] Thus, "action," in the sense it is used in legal fields, may well encompass more than a willed bodily movement, but all acts entail at least one willed bodily movement and can be accurately described in atomistic, if tedious, terms. Taking this view, we might defend the act-omission distinction in reference to willed bodily movement as a necessary condition. By definition, "acts" entail willed bodily movements. Likewise, and again by definition, "omissions" entail the absence of a willed bodily movement.[73]

Although there is a tremendous amount of important work that has been done and yet needs to be done in hashing out the finer metaphysical points of what constitutes an "act" within this approach, I will abide Jeremy Bentham's advice that we not be too finicky in our definition lest we "harass [one another] with unsolvable doubts . . . [and] interminable disputes."[74] For present purposes, we will assume for the sake of argument both that "acts" entail at least one willed bodily movement and that "willed bodily movement" is a necessary, sufficient, and non-circular condition for what it is to "act." On this view, omissions are, quite simply, "the absence of any willed bodily movements."[75] For those who maintain the act-omission distinction, this provides an intuitively appealing place to draw the line. As the next Section argues, however, that intuition rests not

69. *See* MOORE, *supra* note 22, at 189–244; HART, *supra* note 64, at 141–42; WILLIAMS, *supra* note 3, at 16.

70. *See Cognitive and Social Skills to Expect from 3 to 5 Years*, AM. PSYCH. ASS'N (June 2017), https://bit.ly/395jvkP (reporting that, between the ages of three and five years old, most children develop the ability to think about events in the course of time, plan their actions, and understand the consequences of those actions).

71. MOORE, *supra* note 22, at 45–46.

72. *See, e.g.*, JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. VII, §§ XIX–XX (1780) (distinguishing between "simple" and "complex" actions).

73. *See* MOORE, *supra* note 22, at 28; FLETCHER, *supra* note 8, at 421.

74. BENTHAM, *supra* note 72, ch. VII, § XX.

75. MOORE, *supra* note 22, at 28.

on metaphysical substance, but on a semantic preference that is not sufficient to justify any kind of thick moral consequences, such as the common law's general prohibition on punishing "omissions."

B. The Act-Omission Distinction as Semantic Preference

The critique of the act-omission distinction I want to advance is pretty straightforward. Borrowing an example from Graham Hughes, imagine that I am sitting at home eating an orange.[76] The convention is to describe that state of affairs positively. Were a friend to call, he might ask, "What *are* you doing?" Keeping to the ways of my tribe, I would tell him that I *am* eating an orange. We need not speak this way, however. Without inviting any logical or descriptive loss, he might just as well ask me what I *am not* doing, which would invite a lengthy reply during which I would list, among other non-feats, climbing Everest, windsurfing among Antarctic icebergs, composing a fugue for timpani, etc.[77] Both ways of talking describe with equal accuracy the state of affairs subject to inquiry. It is just faster, and perhaps more elegant, to say, "I'm eating an orange," rather than, "I'm not climbing Everest; I'm not windsurfing . . . you're not in a hurry right, this is going to take a while . . . I'm not composing a fugue . . . " or, "Me? I'm not doing anything that is not eating an orange," or, perhaps, "I'm doing everything in the set of things that is not, not eating an orange."

It is logistics—not logic—that dictates our fetish for describing our engagements with the world in positive rather than in negative terms. All action implies inaction just as inaction entails action. To put the point in visual terms, the temporary tableaus that comprise our lives are necessarily composed of both negative and positive space. We are accustomed to focusing on the positive because it is more efficient, but that is nothing more than custom. It is convention, not metaphysical, logical, grammatical, syntactic, or semantic necessity that dictates whether we refer to the set of all things done or to the set of all things not done when describing a moment, a concatenation of moments, or even a life.

To say that we do what we do, do not do what we do not do, and therefore do what we do not, not do and do not, not do what we do is to play with tautology, but is far from trivial in the present context. Consider a conventional murder. The deed done, we can look back and say that the killer shot his victim. Alternatively, we could say that he did not climb Everest, eat an orange, go windsurfing, etc., until we completed the set of

76. *See* Hughes, *supra* note 5, at 604.

77. The move I am making picks up where Michael Moore's equivalence thesis leaves off. *See supra* notes 71–75 and accompanying text. It may well be true that we can redescribe any molecular action in atomistic terms; but it is also true that we can describe those atomic units in positive or negative terms.

acts excluded by the shooting. Without digging any deeper, then, it appears that this paradigmatic criminal *act* can be described in either positive or negative terms—as either an act or an omission. The agent *killed*, but he also *failed* to engage in each of the lawful acts that were not pulling the trigger.

To add some dimension, think about what we might say of the killer's obligations in the moments before the deadly bullet is let fly. His arm raised, gun in hand, we can imagine his conscience imploring him *not to* crook his finger. However, without incurring any deficit in the normative accounting, we might also hope that his better angels would beg him to put the gun down, aim away, count to ten, eat an orange, or *do anything other than* crook his finger. At the cusp of his crime, then, we can say that the would-be shooter has an obligation not to shoot or, alternatively, an obligation to do any of the things in the complementary set of conduct that defines shooting by exclusion. Again, convention makes the call rather than logic or any readily apparent normative requirement.

This simple insight puts tremendous pressure on the common law treatment of omissions. Consider again the lucky serial killer. Under the common law, there is no liability if Dexter shrugs, pulls out his orange, and saunters away, leaving Jimmy to drown. This result assumes that there is a difference between acts and omissions such that there is substance to the claim that Dexter did not engage in an act of killing. Our little logic game reveals that this distinction is without ready support. If the trouble is with talking about omissions rather than acts, then we can simply focus on what Dexter did—he walked away and ate his orange—rather than talking about what he did not do, such as not throwing the rescue buoy. If we are limited to talking about negative duties of restraint rather than positive duties to act, then we can say that, in that moment when life and death was decided, Dexter had a duty to refrain from doing each and every thing in the set of acts that is not throwing in the rescue buoy, including walking away, eating his orange, etc. If he violates that duty by engaging in a course of prohibited conduct, then there seems to be no barrier to prosecuting him for murder. Jimmy would be a straightforward victim of Dexter's engaging in a course of prohibited conduct. The fact that the prohibited conduct is eating an orange rather than crooking a finger is a function of circumstance, nothing more.

An advocate of the act-omission distinction might respond by claiming that I have stacked the deck by describing omissions as acts when, in fact, the whole point of omissions is that they are non-acts.[78] True

78. *See, e.g.*, Carolyn Morillo, *Comments on Gorr and Green*, 28 TULANE STUD. IN PHIL. 125, 134 (1979) (maintaining commitment to the proposition that there is a "difference between a decision to *move* my body in some way and the decision *not* to move it").

omissions, the argument would go, by definition entail the absence of a willed bodily movement, not alternative willed-bodily movements. This response fails for at least two reasons.

It is seldom, if ever, the case that we are actually not doing anything at all. In most, if not all, cases where a prosecutor might run up against the prohibition on punishing omissions, the facts will show that the defendant chose to engage in one course of conduct rather than another, even if that conduct is nothing more than *standing there*.[79] So, if the act-omission distinction is limited to cases where a defendant has truly done nothing rather than something, then it is of little, if any, practical significance, and certainly cannot support the broad prohibition on punishing omissions.

Relatedly, the claim that omissions entail the complete absence of all willed bodily movements seems to rest on yet another set of conventional semantic preferences with little or no metaphysical, much less normative, foundation. After all, most cases of doing nothing can just as easily be described as doing something, as where a police officer orders a suspect to "Freeze!" Has the officer ordered the suspect to do something? Has she ordered him to do nothing? Or has she simply ordered the suspect not to do anything in the set of actions that would be regarded as not "freezing," while still allowing for a range of actions such as standing, breathing, blinking, etc., which are perfectly consistent with "freezing?" As George Fletcher has vividly put the point: "It is as much an act of will for the guards at Buckingham Palace to stand motionless as it is for tourists to stroll back and forth in front of them. Conscious non-motion is a greater assertion of personality than casual acting."[80]

There is a related defense of the act-omission distinction that deserves brief attention at this point. We commonly describe acts using active verbs in the active voice.[81] By contrast, we usually use passive verbs in the passive voice when describing omissions.[82] This is, of course, pretty loose soil upon which to build a descriptive, much less normative, distinction between acts and omissions. As Michael Moore has pointed out, there is a difference between arguments built on ordinary language, and arguments

79. *See, e.g.*, Pope v. State, 284 Md. 309, 316 (1979) (discussing the fact that the defendant went to church rather than providing aid to an infant child). *See also infra* notes 129–34 and accompanying text.

80. FLETCHER, *supra* note 8, at 421. One is reminded here of the famous quip often repeated by financial advisors: "Don't just do something, stand there!" *See* Chris Barth, *Bogle to Investors: "Don't Do Something; Stand There!,"* FORBES (Aug. 9, 2011, 2:21 PM), https://bit.ly/3nuIOVT.

81. *See* MOORE, *supra* note 22, at 24; FLETCHER, *supra* note 8, at 601, 610, 626.

82. *See* FLETCHER, *supra* note 8, at 582 ("[T]he failure to intervene does not cause death in the same sense that shooting or strangling the victim does. Failing to intervene does not 'taint' the passive party . . . .").

built on "idiomatic" language.[83] Ordinary language philosophy explores common ways of speaking and writing to plumb the metaphysical and normative assumptions that lie beneath.[84] That is an affair quite different from building a metaphysics upon idiom, which may well bespeak a deeper truth, but may also be a mere contingency of practice or, worse, misleading by virtue of a linguistic version of the naturalist fallacy[85]—that we say it does not make it so. That distinction is particularly apparent in this circumstance, where we find that most omissions can be described in active terms without stretching our idiomatic predispositions. For example, "failure to report income" on a tax return might just as easily be described as "hiding income."[86] Given the ready ability to substitute active verbs for passive—and vice versa—there seems little reason to rest the act-omission distinction on conventional use of verb and voice.

In a similar vein, one might object to the idea of abandoning the act-omission distinction because there is nothing criminal about eating an orange or walking down a pier. This goes nowhere. There is nothing inherently criminal about crooking a finger either. In fact, I'm doing it now . . . and now . . . and will again thousands of times more before this Article is through. There is also nothing inherently wrong with crooking my finger with a gun in my hand if it is not loaded, or even if it is, so long as I am not aiming at anyone, or even if I am, so long as it is in the midst of war, or even if it is in peacetime, so long as my target is attempting to kill me, etc. Crooking a finger only starts to look illegal when there is a loaded gun in my hand and it is pointed at an innocent person. Similarly, the perambulatory enjoyment of citrus fruits is not normally criminal, but may well be in the right circumstances. It would certainly be homicide if, while walking along and eating his orange, Dexter stepped on a helpless baby lying in his path rather than stopping, walking around, or doing anything

83. MOORE, *supra* note 22, at 24. Ordinary language philosophy is a tradition within analytic philosophy that understands most philosophical problems as linguistic in character, which leads adherents to the use of linguistic analysis as the primary, or perhaps only proper, philosophical method.

84. *See id.*

85. I refer here to Hume's elaboration of the "is-ought" problem in *A Treatise of Human Nature* rather than G. E. Moore's "naturalistic fallacy," *Principia Ethica* (1903), which aims more precisely at Bentham's utilitarianism. *Compare* DAVID HUME, A TREATISE OF HUMAN NATURE Book III, pt. 1, § 1 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2011) (1739), *with* G. E. MOORE, PRINCIPIA ETHICA §§ 10–12 (Dover Publ'ns ed., 2012) (1903).

86. The reader might argue that failure to report does not suggest intent, while hiding income or keeping it secret does. I agree. This response rightly moves the conversation away from actus reus to mens rea. That is precisely where the conversation about omissions belongs.

in the set of acts that is not stepping on the child.[87] So, too, it is homicide if he walks away from Jimmy, eats his orange, stops to ponder his purpose in life, or does anything in the set of acts that will cause Jimmy's death in the given circumstance. Context matters,[88] but that is true whether we choose to describe the conduct in question in positive or negative terms.[89] Actions conventionally described as doings and those conventionally described as non-doings are both morally neutral absent relevant context.

Another line of arguments erected in defense of the act-omission distinction focuses less on the metaphysics of action and more on the normative and practical consequences of imposing responsibility for conduct conventionally described as omissions.[90] For example, one might argue that the act-omission distinction plays an important normative role in our day-to-day practices of allocating praise and blame. We tend to hold agents responsible for their acts, but not their failures to act, the argument goes, so the rules allocating criminal punishment should as well. The descriptive claim here is certainly subject to dispute. Most of us routinely hold those around us morally responsible for their non-doings—failing to do the dishes or pick-up the milk, etc.—but even if we assumed it was true, this response does not advance the argument in favor of an act-omission distinction. To the contrary, it just begs the question by assuming that any act-omission distinction underlying our common practices is itself well-grounded.

There are other defenses of the act-omission distinction that focus on the consequences of its abandonment. For example, one might be concerned that abandoning the act-omission distinction would dramatically expand the scope of the police power, opening the door to more state interference with liberty interests.[91] While true, this objection depends on a smuggled normative claim: that the interference on liberty interests is unjustified. But criminal prohibitions are not suspect simply because they constrain conduct. In fact, the whole point of criminal prohibitions is to limit the scope of permitted conduct. It would be odd, indeed, to object to the criminal prohibition on murder simply because it seeks to stop people from perpetrating murder![92] In theory, at least,

87. Or, if you prefer, it would be homicide if Dexter, finding himself by dint of blameless accident standing on the quivering chest of a child, eats an orange rather than steps away, leading to the child's death.

88. *See* Hughes, *supra* note 5, at 604–06.

89. *See* HUSAK, *supra* note 8, at 157.

90. *See* MOORE, *supra* note 22, at 25 (citing P.J. Fitzgerald, *Voluntary and Involuntary Acts*, *in* OXFORD ESSAYS IN JURISPRUDENCE 11 (A.G. Guest ed. 1961)).

91. *See* JOEL FEINBERG, HARM TO OTHERS 7–16, 163–65 (1984) (discussing these concerns).

92. I do not mean to make light of any suggestion that our criminal codes are bloated or that we presently punish a wide variety of conduct that should not be subject to criminal liability. I have no doubt that this is true. *See* Gray & Huber, *supra* note 28, at 152–60

criminal prohibitions are justified on grounds that they reflect categorical moral rules,[93] natural law,[94] fundamental liberty interests,[95] or the considered will of a legitimate political order.[96] There is no reason in the abstract to think that criminal prohibitions on murder performed by conduct conventionally described in negative terms cannot meet these same conditions of legitimacy simply because the conduct is conventionally described in negative terms. So, the question we should ask when critiquing a criminal prohibition is not whether it targets conduct conventionally described in negative terms or positive terms, but, instead, whether it is justified in light of background commitments to law, justice, and liberty.

Relatedly, one might be concerned that the most likely targets of any expanded police authority secondary to abandoning the act-omission distinction will be members of groups already burdened by unequal application of state force.[97] This is concerning, no doubt, but, note that it functionally abandons the act-omission distinction as anything more than a practical constraint on the abuse of police power. If that is right, then we should stop wasting our time on proxies and get down to the real source of the concern. I am not sure we advance the cause of racial justice in our criminal justice system by hiding behind chimera or withdrawing from prohibitions on conduct that deserves moral opprobrium and criminal sanction. We should, instead, confront directly the social, cultural, and institutional causes of inequality in our criminal justice system with the goal of ensuring the fair and neutral enforcement of justified legal prohibitions.[98] We should not shy away from criminalizing conduct that should be subject to criminal sanction simply because many of our public institutions, including our criminal justice system, often reproduce background inequalities. We should, instead, take action to reform those institutions and the background conditions they engage.[99]

(arguing that retributivists should favor a more parsimonious criminal code). We should, therefore, embrace contemporary efforts to pursue more parsimonious criminal codes while still recognizing that there is a place for criminal law and punishment in a just society.

93. *See* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1659–65 (2010) (explaining the role of Immanuel Kant's categorical imperative in determining criminal prohibitions and punishments).

94. *See, e.g.*, LON FULLER, THE MORALITY OF LAW 33–38, 95–105 (Yale Univ. Press 1964) (elaborating a theory of natural law based on law's internal moral logic); THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, Q. 90–97 (R.J. Henle, S.J. trans., 1993).

95. *See, e.g.*, LOCKE, *supra* note 25, ch. IX–XI.

96. *See, e.g.*, Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 22–66 (2012).

97. I am in debt to Anne Coughlin for pressing this point.

98. This qualification is critical. *See supra* note 92 and accompanying text.

99. I allude, here, to philosopher Michel Foucault's famous "Regime of Truth," in which he describes the mutually supporting relationships of truth claims, institutions, and

C. The Cause Requirement and the Act-Omission Distinction

Perhaps in response to some of these concerns, Michael Moore has suggested that the act-omission distinction rests not in actus reus strictly, but with the results of action. On his view, omissions do not *cause* anything, and certainly do not bring about the sorts of harms that give rise to moral blame or criminal liability.[100] George Fletcher at times has endorsed a similar position, arguing that "the critical distinction between commission by act and commission by omission is not to be found in the contrast between bodily movement and standing still. The issue is imposing liability in the absence of the actor's causing the required result."[101] On this view, actions cause results. At best, failures to act leave the world the way it is or let it become what it was going to become anyway. It is by imposing ourselves on the world that we can be said to act; and it is only by reference to that imposition that we guard the boundaries of criminal liability.[102]

This is a worthy reply, no doubt. Setting aside regulatory offenses, the conservative core of criminal law in the liberal tradition centers around, and is exhausted by, prohibitions against causing or attempting to cause undesirable results.[103] Murder, manslaughter, rape, arson, battery, theft, fraud—these are the paradigms of first-year criminal law because they reflect our interests in using the criminal law to protect innocent persons from harm and to punish those who produce those harms. These crimes constitute impositions on the world as it is. They change the trajectories of events. We can, reflecting back, say that, but for the conduct constituting these crimes, the undesired result would not have occurred in

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effects of power. *See* MICHEL FOUCAULT, *Truth and Power*, *in* THE FOUCAULT READER 74 (Paul Rabinow ed., 1984).

100. *See* MICHAEL MOORE, CAUSATION AND RESPONSIBILITY 139–44 (2009) [hereinafter MOORE, CAUSE]; MICHAEL MOORE, PLACING BLAME 273–74 (1997) [hereinafter, MOORE, PLACING BLAME]; MOORE, *supra* note 22, at 28–29, 267–78.

101. FLETCHER, *supra* note 8, at 423. Fletcher later appears to withdraw from this position. *See id.* at 602 ("[I]n view of the relative ambiguity of causation, we should not insist on a precise correlation between causing death, on the one hand, and affirmative verbs of killing, on the other. There might be some cases of 'letting die' that could arguably be described as causing death."); *see also* HUSAK, *supra* note 8, at 160–61 (noting that Fletcher ultimately allows that "both positive actions and omissions *can* be causes, though in somewhat different senses").

102. *See, e.g.*, MOORE, *supra* note 22, at 26; HUSAK, *supra* note 8, at 158–71; *cf.* ALEXANDER & FERZAN, *supra* note 24, at 235.

103. *See* FEINBERG, *supra* note 91, at 10–14 ("In short, state interference with a citizen's behavior tends to be morally justified when it is reasonably necessary (that is, when there are reasonable grounds for taking it to be necessary as well as effective) to prevent harm or the unreasonable risk of harm to parties other than the person interfered with.").

the way that it did at the time that it did.[104] By contrast, omissions do not produce this kind of teleologicus interruptus. Thus, Dexter's decision not to save Jimmy cannot be punished because Dexter did not impose his will on the world; his conduct did not change the course of events.[105] The most we can say is that the world as he found it happened to suit his tastes, preferences, and desires—like a nice sunrise. Although we might accuse him of serious character flaws for taking joy in watching another drown, we cannot hold him responsible for that result any more than I can be held responsible for the glorious sunrise I admired this morning from our kitchen table.[106]

The animating premise behind this account of acts and omissions is that the world tends toward certain states of affairs. Agents interact with the world to forestall, accelerate, or alter the natural course of events. Conduct that causes or attempts to cause these sorts of alterations in the telos[107] to which the world would otherwise gravitate are "acts."[108] Conduct that simply lets the world be as it will be are "omissions." As Moore puts the point, "whatever makes the world morally worse [or better] (from some baseline state of affairs) is an action; whatever does no more than return things to the baseline state of affairs is an omission."[109] This same view is common in euthanasia debates, where the distinction between killing and letting die does a tremendous amount of work.[110]

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104. This, of course, reflects the prima facie requirement to prove "cause-in-fact" in cases where crimes involve result elements. *See* HUSAK, *supra* note 8, at 60–61 (surveying the cause requirement in "orthodox criminal theory"). Husak is ultimately skeptical of this requirement, preferring "control" over potential harm instead of cause as a criterion for criminal responsibility. *See id.* at 97–111, 169–70. For an extended analysis of cause-in-fact as applied to omissions, see MOORE, *supra* note 22, at 267–78.

105. *See* MOORE, *supra* note 22, at 26; HOLMES, *supra* note 63, at 219; Marc Stauch, *Causal Authorship and the Equality Principle: A Defense of the Acts/Omissions Distinction in Euthanasia*, 26 J. MED. ETHICS 237, 237–40 (2000).

106. Some readers may accuse me here of false humility, noting the role of particulate matter released by human activities in the production of intense red-hues at sunset and sunrise. *See* Coco Ballantyne, *Fact or Fiction?: Smog Creates Beautiful Sunsets*, SCI. AM. (July 12, 2007), https://bit.ly/39jKfyd. But let us not let facts get in the way of enchanting prose.

107. The idea of τέλος as the end or perfection of a living thing, a system, a human life or history has its origins in Aristotle's *Metaphysics*. *See, e.g.*, ARISTOTLE, METAPHYSICS l. 9, ll. 1050a9–20; *see also* ARISTOTLE, PHYSICS l. 2, ll. 194a28–29; ARISTOTLE, POLITICS l. 1, ll. 1253a1–5.

108. *See* MOORE, *supra* note 22, at 26; HOLMES, *supra* note 63, at 219.

109. MOORE, *supra* note 22, at 26. Non-doing vs. refraining gets to Hughes's focus on mental connection to duty. For an elaboration of the differences between refraining and letting happen and a limitation of moral conclusions to refraining, see generally Douglas N. Walton, *Omitting, Refraining and Letting Happen*, 17 AM. PHIL. Q. 319 (1980), and Myles Brand, *The Language of Not Doing*, 8 AM. PHIL. Q. 45 (1971).

110. *See* Stauch, *supra* note 105; F. M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 U. PA. L. REV. 1493, 1497 (1994). For a classic and trenchant critique of this distinction, see generally James Rachels, *Killing and Starving to Death*, 54 PHIL. 159

While initially appealing, the teleological account of the act-omission distinction raises more questions than it answers. For example, there is very little, and perhaps nothing of consequence in the present context, that happens to us that does not entail some human cause at least in the "but-for" sense, and often proximately as well.[111] Having left the state of nature long ago, we live inescapably in the world of human affairs. In light of this most fundamental of existential truths, the idea that there is a natural telos or other reference point we could use to draw a moral "baseline" through the world seems to require donning blinders.[112]

But suppose that we could construct a conceptually coherent account of the baseline. We would still face a serious normative challenge. The act-omission distinction is not morally neutral. In the common law, and in many moral systems, the whole point is that acts are blameworthy and omissions are not.[113] To make that leap, the teleological justification of the act-omission distinction would need to somehow tell a story of normative superiority for the baseline that did not run afoul of the naturalist fallacy.[114] Moreover, in most cases where we might want liability to attach to conduct conventionally described in negative terms, the baseline is pretty grim. Would Jimmy feel better if, over his dying gasps, he heard a lengthy disquisition from Dexter explaining that this is the natural way of things? Or would he use his last breaths to argue that Dexter's humble sighs of "Who am I to interfere?" reflect the rankest sort of moral abdication?[115]

Beyond these threshold concerns, the general requirement to show factual cause does not appear to provide substantial grounds for maintaining a general act-omission distinction. Steadfastly ignoring modern physics, the criminal law imagines that, for any state of affairs, we can describe a chain of preceding events that led inexorably to that end. For any link in that chain of necessity we say that "but for" that act, the unhappy state of affairs would not have come to pass. Any person whose

(1979). *But see* FLETCHER, *supra* note 8, at 602 ("There might be some cases of 'letting die' that could arguably be described as causing death.").

111. One might argue that birds chirping at sunrise provide a perfect counter example. But, even here, the hand of man lies heavy. The species of birds populating many regions would now trace in some part to the effects of global warming, which, in turn, is at least in part traceable to human activities. Glorious sunrises are even more attributable to human activities given that these are products of particulate matter in the atmosphere, much of which we put there. At any rate, these are unrevealing side debates. Unless there is some reason to assign responsibility for what appears to be a truly natural phenomenon, we can afford to set that phenomenon aside for present purposes as inconsequential.

112. *See* MOORE, *supra* note 22, at 27.

113. *See* HUSAK, *supra* note 8, at 164, 173–76.

114. *See supra* note 85.

115. *See* JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 707–11 (Hazel E. Barnes trans., 1975) (1946).

conduct constitutes one of those necessary links is prima facie a candidate for criminal sanction.

There is some confusion of metaphors at work, but the analytical tool juries are invited to apply in making determinations of cause-in-fact is the counterfactual.[116] As is implied in the language of "but-for-cause," the finder of fact in criminal trials is asked to imagine the world as it would have been had the defendant not done what he did. With some technical exceptions, if the harm would have accrued anyway, in the manner it did at more or less the same time, then charges will not lie.[117] As is evident at this point, however, that test in no way excludes liability for conduct conventionally described in negative terms. Returning to Dexter, it is perfectly plausible to say that "but for" his walking away, eating his orange, etc., Jimmy would not have died by drowning that morning.[118] It is therefore difficult to see how cause-in-fact can provide much support for defenders of the act-omission distinction.[119]

Paul Robinson offers a quite different objection that is germane at this point of the discussion. He contends that the problem "with causation by omission generally, is that every other person in the world also satisfies the but-for cause requirement."[120] This does not quite turn the trick either, however. As Douglas Husak has pointed out, any action, whether conventionally described in positive or negative terms, entails the ability to have an effect, which usually requires actual or constructive presence.[121] So, Dexter's eating an orange is a but-for cause of Jimmy's drowning precisely because Dexter was on the scene, could have tossed-in the buoy, but chose not to. By contrast, Sally Struthers was not a but-for-cause of Jimmy's death because she was on the other side of the world saving vulnerable children and therefore could not have done anything about Jimmy's drowning.

Even if Robinson is right, his objection really runs against the cause-in-fact requirement generally. The number of links in a causal chain is limited, if at all, only by the imaginative capacities of the observer. For example, but-for Dexter's maternal grandparents' giving birth to his mother, Jimmy would not have died in the way he did at the time he did.

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116. For a robust critique of counterfactual causal analysis, see MOORE, CAUSE, *supra* note 100, at 371–425.

117. *See* LAFAVE, *supra* note 3, at 353–55.

118. *See* Kleinig, *supra* note 24, at 393.

119. For a similar argument, see O. H. Green, *Killing and Letting Die*, 17 AM. PHIL. Q. 195, 202 (1980); *cf.* ALEXANDER & FERZAN, *supra* note 24, at 235 (arguing that "but for" cause can be made-out when the victim relies on the promise of being saved by a conventionally-described non-actor).

120. PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 461 (1984) (cited and quoted in HUSAK, *supra* note 8, at 162).

121. *See* HUSAK, *supra* note 8, at 162–63.

But-for Jimmy's nursemaid's choosing a landscape painting featuring an ocean sunrise for his nursery, he would not have been on the dock that day. And on. It is in recognition of this feature of the cause-in-fact requirement that we treat it as a necessary, but not sufficient, condition for proving that a criminal defendant caused a result.[122] Proximate cause, sometimes, tellingly, referred to as "moral" or "legal" cause, plays a dispositive role in selecting among the virtually infinite causes-in-fact for a particular result those whose agents are candidates for criminal punishment.[123] So, simply pointing out that but-for-cause captures both culpable and non-culpable agents does not provide grounds for a general distinction between acts and omissions.

Aha! Okay. So, what about proximate cause? Does proximate cause provide grounds for distinguishing between acts and omissions? Proximate cause is a thorny concept for neophytes and long-time initiates to the common law alike, but for present purposes a gloss will do.[124] As we just saw, there are many causes-in-fact in the chain of events leading to any results. When determining criminal liability, we whittle-down that group of candidates by looking at where a defendant's conduct lies on the chain, how objectively foreseeable the terminal event is from the defendant's position in the chain, and the intervening conduct of other agents.[125] These additional requirements do not provide support for a general act-omission distinction either individually or in the aggregate.

Just as we saw in the case of cause-in-fact, it is hard to see how the requirement to show proximate cause can justify a general act-omission distinction. Let us take proximity first. Although some conduct conventionally described in negative terms may well be quite remote in time and space from a subsequent harm,[126] this will not always be the case. Dexter provides us with an easy example. In our hypothetical, Dexter's walking away was the very last link in the chain leading to Jimmy's death. Given that some omissions, like some acts, will be very late in a chain of causation, it is hard to see why proximity as a factor of proximate cause could provide grounds for maintaining a general act-omission distinction.

The foreseeability requirement likewise fails to provide good grounds for maintaining a general act-omission distinction. Foreseeability

122. *See id.*

123. *See* LAFAVE, *supra* note 3, at 332, 336.

124. By far the most comprehensive analysis of causation in the criminal law is Michael Moore's *Causation and Responsibility*. *See* MOORE, CAUSE, *supra* note 100.

125. *See* LAFAVE, *supra* note 3, at 336–38.

126. Gideon Rosen has argued that these extended causal histories are both ubiquitous and grounds for general skepticism about moral responsibility. *See generally* Gideon Rosen, *Skepticism About Moral Responsibility*, 18 PHIL. PERSP. 295 (2004).

in the context of proximate cause analysis is an objective standard.[127] It is easy to imagine any number of cases where conduct conventionally described in negative terms would be the sort of activity that a reasonable person would foresee leading to tragic results. Here again, Dexter provides an easy example. There is no real contest that any reasonable person in his position would foresee that Jimmy's death would occur as a consequence of his walking away. Although that will not be true in all cases of conduct conventionally described in negative terms, neither will it always be true in cases of conduct conventionally described in positive terms. It will depend on the facts, which is the point. Whether conventionally described in positive or negative terms, some conduct is criminal and some is not.

Intervening agency as a factor of proximate cause presents a more complicated problem for conduct conventionally described in negative terms, but ultimately offers no firm ground for maintaining the act-omission distinction. As a preliminary matter, act-omission proponents might argue that omissions cannot "cut" the causal chain initiated by upstream actors and therefore cannot stand as an intervening cause.[128] Our semantic critique makes evident the fact that this just begs the question. Just as is true with acts conventionally described in positive terms, it will be comfortable to describe some acts conventionally described in negative terms as cutting a causal chain and not so for others. Here again, facts matter. For example, in a case familiar to most law students, *Pope v. State*,[129] the Maryland Court of Appeals held that Mrs. Pope could not be charged with homicide based on her alleged failure to seek medical attention for three-months-old Demiko Norris—who was savagely beaten by her mother while they were staying in Pope's home—because the mother was present and therefore had primary responsibility to call for assistance.[130] In so holding, the court implied that Pope could have been charged if Demiko's mother had beaten her and then left the scene, putting Pope in the sole position to provide or summon assistance.[131] The judges apparently would have been perfectly comfortable with the proposition that Pope's deciding to engage in conduct that was not providing or summoning assistance to a beaten and dying infant would have broken the chain of events initiated by Demiko's mother if she had absented herself.

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127. *See* MOORE, CAUSE, *supra* note 100, at 98–100 (explaining the role of proximate cause as an objective test in relation to subjective standards of mens rea); LAFAVE, *supra* note 3, at 353–59 (offering the same explanation).

128. *See* LAFAVE, *supra* note 3, at 347 (explaining intervening agent rule).

129. Pope v. State, 284 Md. 309 (1979).

130. *See id.* at 314–16, 329–30; *see also* MARKEL ET AL., *supra* note 4, at 64–65 (examining the signaling function in omissions liability).

131. *See Pope*, 284 Md. at 329–30; *see also* Commonwealth v. Cardwell, 515 A.2d 311, 316 (Pa. Super. Ct. 1986) (holding a mother's failure to protect her daughter from assaults by the daughter's stepfather was grounds for charge of child abuse).

The fact that courts—and we as a moral linguistic community—are perfectly comfortable with the idea that conduct conventionally described in negative terms can satisfy the factual and proximate cause requirements that attach to result elements is further evidenced by the fact that we do assign criminal responsibility for some omissions. As the *Pope* court reports, the common law has long allowed for punishing conduct described in negative terms in cases where the defendant had a legal duty to act.[132] So, if Pope was Demiko's mother, if she had a contractual or statutory obligation to provide care to Demiko, if she had assumed responsibility for Demiko's care, or if she had created the perilous condition, then she would have been subject to homicide charges.[133] The requirement to show factual and proximate cause would not, under well-established law, negate the possibility of criminal liability.[134]

Other concerns with intervening agency as a factor of proximate cause point to the slippery slope we discussed earlier. For example, proponents of the act-omission distinction might argue that, if conduct conventionally described in negative terms can be said to break the chain of cause initiated by conduct conventionally described in positive terms, then we would be committed to inculpating relatively innocent agents while excusing truly bad actors. Alluding to the Sally Struthers problem, they might even suggest that treating omissions as interventions would excuse all primary agents given that the chains of events leading to most harms leave at least some space between act and harm into which we could pack missed opportunities for others to intervene. To see the point, imagine that Dexter found Jimmy on dry land, pushed him into the water with intent to kill, and then left Jimmy to his fate. Minutes later, Tom, an innocent passerby, sees Jimmy struggling in the water, considers throwing in the life buoy, but decides to twiddle his thumbs instead. If Tom's omission can break the causal chain, then it seems that we are committed to the uncomfortable consequence that Dexter cannot be charged with murder, though he likely would remain guilty of attempted murder. Surely we do not want to endorse a theory of criminal liability that allows a murderer to escape the full consequences of his intentional wrongdoing if his victim survives for an hour after a mortal attack during which time others fail to seek or provide assistance. Then again, the alternative—

132. *See Pope*, 284 Md. at 324–25; *see also* LAFAVE, *supra* note 3, at 312–16 (describing legal duties that ground omission liability under the common law); MARKEL ET AL., *supra* note 4, at 64; HUSAK, *supra* note 8, at 157; FLETCHER, *supra* note 8, at 611–22; Robinson, *supra* note 5, at 111–17.

133. *See Pope*, 284 Md. at 328–31 (covering traditionally recognized legal duties to act); LAFAVE, *supra* note 3, at 312–16.

134. *Cf.* MOORE, CAUSE, *supra* note 100, at 140–41 (acknowledging this feature of the common law and pointing out that the presence of legal duties cannot distinguish between omissions that meet the cause requirement and those that do not).

providing a blanket excuse for those flint-hearted passersby—does not seem like a particularly desirable alternative either. Fortunately, this is a false dilemma.

These sorts of conundrums are not unique to conduct conventionally described in negative terms. For example, the Connecticut Supreme Court in *State v. Shabazz* affirmed the conviction of a defendant who was denied the opportunity to present evidence at trial that his victim would have survived a mortal stabbing but for negligent surgical intervention.[135] Relying on well-established common law, the court held that:

> Where a wound, either operating directly or indirectly, by causing some other condition which produces death, has been a substantial factor in causing a death, it is still to be regarded as the cause of the death even though some negligence in the treatment of the wounded man by physicians and others is also a contributing factor. Gross maltreatment by attending physicians constitutes a defense only in the exceptional case where that maltreatment is the sole cause of the victim's death.[136]

Courts have also long applied this rule in cases where the alleged superseding conduct is conventionally described in negative terms. For example, Matthew Hale reports as early as 1716 that:

> If a man receives a wound, which is not in itself mortal, but either for want of helpful application, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that would, tho it were not the immediate cause of this death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is the *causa causati*.[137]

Given these well-established rules, there seems no reason to worry over the possibility that Tom's thumb twiddling would bar prosecuting Dexter for murder.[138] We will instead ask more sensible questions about who, by virtue of their culpable conduct, deserves punishment.

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135. *See* State v. Shabazz, 246 Conn. 746, 750 (1998).

136. *Shabazz*, 246 Conn. at 753; *see also* WAYNE R. LAFAVE, CRIMINAL LAW § 6.4(f)(5) (5th ed. 2011) (explaining intervening agent rule in relation to medical negligence).

137. SIR MATTHEW HALE, PLEAS OF THE CROWN 428 (1716).

138. The reader might be concerned that, by appealing to this line of doctrine, I have helped myself to a rule that is ultimately grounded in the act-omission distinction. After all, the critique might go, these cases deal with circumstances where the primary agent engaged in an act, and the subsequent medical negligence was nothing more than an omission. The facts in these cases do not support this view, however. In each of these cases, the physicians engaged in action. Surgery is far from being a non-act. One might argue that

Prosecutors routinely make challenging charging decisions in cases involving multiple defendants. They do so by looking at the individuals' conduct, mens rea, and relationship to a criminal enterprise or goal. The task is no different in cases where one defendant engages in culpable conduct conventionally described in positive terms, and a second subsequent defendant engages in conduct conventionally described in negative terms. Returning to our hypothetical, a prosecutor might charge Dexter with murder, or she might charge Tom with murder, or she might charge Dexter with attempted murder and Tom with murder, or she might charge Dexter with attempted murder and Tom with manslaughter, or she might choose some other permutation based on the facts of the case and her best professional judgment. This seems a perfectly reasonable result, and is certainly more attractive than maintaining the act-omission distinction, which would effectively bar her from prosecuting Tom with anything, no matter how reprehensible his decision to twiddle his thumbs might have been.

As I will argue below, I think prosecutorial discretion in cases like these should be informed by mens rea considerations rather than being determined by artificial actus reus rules. For example, if Dexter pushes Jimmy into the water with intent to kill, then he should be held for murder or attempted murder even if Tom later twiddles his thumbs rather than throwing Jimmy a lifebuoy. This is the result endorsed by the common law, as it is reflected in *Shabazz* and Hale's commentaries. Contrariwise, if Tom accidentally pushes Jimmy into the water, leaves the scene, and Dexter subsequently arrives in time to eat his orange with the intention that Jimmy die as a result, then we might prefer to charge Dexter with murder and Tom with reckless endangerment. These preferences do not justify a general act-omission distinction, however. They instead signal important moral distinctions drawn based on defendants' culpability. That shift—from actus reus to mens rea—highlights another potential challenge in cases involving conduct conventionally described in negative terms: proving mens rea. Let us turn to that topic now.

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performing surgery in a negligent manner is an omission in that it marks the physician's failure to perform in a non-negligent manner, or that exposing a patient to Methicillin-resistant Staphylococcus aureus ("MRSA") is an omission in that it is a failure to use proper sterile technique, but that would just prove my overall thesis, which is that act-omission distinction reflects nothing more than semantic preference. The objection does focus our attention on the fact that determining proximate cause is fundamentally a normative enterprise. The role of the proximate cause requirement is to pick from among numerous factual causes those worthy of moral and legal sanction. On this score, there are very good normative reasons to prefer punishing Shabazz rather than a surgeon who missed the chance to save the life of Shabazz's victim. That is where the conversation lies, however. We should not hide our moral assessments behind imagined distinctions between acts and omissions.

III. THE ROLE OF EPISTEMIC DUTIES IN THE COMMON LAW OF OMISSIONS

Without a coherent way to mark the act-omission distinction, defenders of current liability arrangements under the common law seem to be in somewhat of a pickle. If the only difference between conduct conventionally described in positive terms and conduct conventionally described in negative terms is idiosyncratic semantic preference, then we seem to be committed to a rather dramatic expansion of the criminal law. Although extending the scope of criminal liability to encompass cases like the lucky hit man might not cause too much dyspepsia, the bile rises at the prospect of punishing failures to rescue more broadly, including our own constant failures to provide life-saving assistance to those who suffer and die every day around the block and around the world.[139] For fear of these results, the traditional solution has been to double-down on the act-omission distinction by constructing ever more elaborate accounts of action.[140] As Part II showed, this is a fool's errand.[141] Believing in elves for fear of having to adjust related beliefs, norms, and practices if we face the truth[142] cannot conjure elves into existence. Further, maintaining false beliefs out of an interest in preserving an existing and even convenient (to some) worldview can be quite dangerous.[143] The better course would be to accept that the act-omission distinction is illusory and then determine the consequences for our normative practices of praise and blame, including the criminal law.

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139. This possibility is a frequent player in defenses of the act-omission distinction. *See, e.g.*, FLETCHER, *supra* note 8, at 602–06; WILLIAMS, *supra* note 3, at 4–6 (recounting Lord Macaulay's parable of the surgeon).

140. *See, e.g.*, MOORE, *supra* note 22, at 169–301 (elaborating a theory of complex actions); FLETCHER, *supra* note 8, at 421–26 (wrestling with the definition of actions as willed bodily movements).

141. As has been argued here, however, these paraded horribles cannot help us make sense of the distinction itself. *See supra* notes 76–98 and accompanying text.

142. I allude here to W.V.O. Quine's famous metaphor, the web of belief, which describes his view that statements are true or false in relation to interconnected systems of belief. *See generally* W.V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20 (1951).

143. Readers in early months of 2021 are amply aware of immediate examples of the dangers of believing lies big and small, including the uncritical acceptance of "alternative facts" constructed to support preexisting world views. These lessons are not new. Human history is filthy with examples of how false ontologies underwrite injustice and atrocity. *See generally* IBRAHIM X KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016) (documenting the creation and history of "race" and racist institutions in western history and the United States); DANIEL GOLDHAGEN, HITLER'S WILLING EXECUTIONERS (1996) (explaining the role of "eliminationist anti-Semitism" in the Holocaust); STEPHEN J. GOULD, THE MISMEASURE OF MAN (1981) (documenting three centuries of race science and the "political contexts" in which it thrived); PLATO, THE REPUBLIC 514a–520a (Paul Shorey trans., 1969) (using the allegory of the cave to reveal the role and danger of false beliefs in society).

The results of abandoning the act-omission distinction are not so radical as adherents might fear. That is due to the fact that we have other normative constraints on our practices of praise and blame that effectively limit the scope of responsibility for conduct conventionally described in positive terms that are equally relevant in the context of conduct conventionally described in negative terms. Among these is the critical role of mens rea in the criminal law. As this part argues, we can draw clear distinctions between conduct that should be punished and conduct that should not be punished by focusing on agent culpability without regard to whether the conduct at issue is described in negative or positive terms.[144] As we shall see, these lines of demarcation allow us to vindicate many of the instincts that have heretofore driven us to the act-omission distinction while also extending the reach of criminal liability to those who, by virtue of their culpable conduct, deserve punishment.

A. Epistemic Challenges in Cases of Omission

Although common morality and the common law alike maintain a requirement for voluntary action, the laboring oar of moral and legal responsibility is pulled by mens rea. Whether as "malice," "scienter," "intent," "knowledge," or "recklessness," we usually require some significant mental connection between agents, their acts, relevant attendant circumstances, and results before ascribing blame.[145] No matter how unlawful the appropriation and asportation of property belonging to another, it is not theft unless the defendant *knows* that the property belongs to someone else.[146] Outside the safe harbor of classroom hypotheticals,

144. Larry Alexander and Kim Ferzan also advocate for a shift toward mens rea. *See* ALEXANDER & FERZAN, *supra* note 24, at 237–38. In their view, however, belief in the existence of a legal duty is a critical requirement for liability based on conduct conventionally described in negative terms, while actual existence of that legal duty does not. Here I will defend the quite different view that knowledge of the opportunity to act is what matters, and that the existence of a legal duty supports a presumption of knowledge about the opportunity to act. Importantly, knowledge of the opportunity to act is essential to mens rea, not actus reus. Eating an orange while a child dies in the shallows nearby is a homicidal act regardless of whether I am aware of his cries for help or not. But if I do not know the child is drowning, then my eating the orange rather than rescuing him is done without knowledge of both the homicidal nature of my act and the likely results. By contrast, if I am aware of the drowning child and choose to eat my orange rather than tossing out a rescue buoy, then I now know that my orange eating is homicidal by nature and in its consequences.

145. *See* Morissette v. United States, 342 U.S. 246, 251–52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."); *see also* MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1985) ("Except as provided in Section 2.05 [strict liability], a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.").

146. *See Morissette*, 342 U.S. at 260–62.

however, it is impossible to know others' minds. This epistemic challenge presents a common problem for criminal practitioners because, as Blackstone reminds us, a tribunal "cannot punish for what it cannot know."[147] This problem is particularly acute in the case of acts traditionally described in negative terms.[148]

Although prosecutors sometimes have a confession or other direct evidence of mens rea, more often they do not. In these cases, tribunals must infer what is in a defendant's mind based on available evidence of attendant circumstances and their own experiences.[149] For example, judges routinely instruct juries that they may presume that a defendant intends the natural consequences of his conduct. Applying this rule, a jury might infer intent to kill when a defendant points a loaded gun at someone's head and pulls the trigger.[150]

The process of inferring mental states based on action in context seems perfectly valid in most cases of conduct conventionally described in positive terms. By contrast, in many cases of conduct conventionally described in negative terms, there seems to be little or no warrant for such inferences. This is in part a function of the probabilities. In cases involving conduct conventionally described in positive terms, the set of acts that are harm-producing is dwarfed by the set of acts that are not. We therefore find no fault in a jury's inferring knowledge or intent if a defendant selects a course of conduct from this limited set because that choice is fairly unequivocal as to mental state. "Of all the things you could have done," we might cry, "you chose to aim that loaded gun at another person and pull the trigger—what on earth could you have intended other than to kill?"

The probabilities are reversed in cases of conduct conventionally described in negative terms. Here, the set of harm-producing conduct dwarfs the set of conduct that is not harm-producing. Selecting a course of conduct from this much larger set is more likely to be equivocal as to mental state, and therefore less likely to support an inference of knowledge or intent. For example, if we saw someone walking along the dock and eating an orange while a gasping swimmer drown in the water below, then we might have trouble inferring anything more than an intent to eat the orange. Contrariwise, if we saw someone select an action from the smaller set of harm-preventing conduct, say throwing a rescue buoy to the

147. 4 WILLIAM BLACKSTONE, COMMENTARIES *21 ("For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward action, it therefore cannot punish for what it cannot know.").

148. *See* ALEXANDER & FERZAN, *supra* note 24, at 235.

149. *See* Smallwood v. State, 343 Md. 97, 104–05 (1996); LAFAVE, *supra* note 3, at 270–72.

150. *See* State v. Raines, 326 Md. 582, 591–92 (1992).

struggling swimmer, then we might rightly infer that he intended to save the drowning swimmer rather than test his throwing arm.

It is important not to make too much of this point. As an epistemic challenge, this general problem of proof does not appear to have any robust metaphysical significance. After all, it is certainly not the case that omissions cannot be intentional. Returning to the point George Fletcher made for us a moment ago, "[i]t is as much an act of will for the guards at Buckingham Palace to stand motionless as it is for tourists to stroll back and forth in front of them."[151] Moreover, via confessions and other statements against interest we sometimes do know what others intend by their acts, whether conventionally described in positive terms or negative. Finally, attendant circumstances and other evidence aliunde sometimes will be more than sufficient to prove culpability for actions conventionally described in negative terms. The tragedy a few years back of the small child run over by a delivery van in a market in China provides a ready example.[152] While the child lay dying in the street, surveillance video showed several passersby changing their courses so as to avoid her and craning their necks to look at her, but none of them bothered to summon assistance. Watching the video, and given the obvious extent of her injuries, it is impossible not to conclude that those who strolled along engaging in conduct other than calling for help did so with at least reckless disregard for the possibility that the child might die as a result.

The act-omission distinction seems to be a metaphysical step too far if it reflects general epistemic concern.[153] Although marking a forensic challenge, these concerns cannot support a general bar on punishing conduct conventionally described in negative terms. Rather, what they tell us is that we should punish harm-producing conduct, whether described in positive or negative terms, only where culpability can be shown, directly or with the assistance of reasonable inferences. Proving mens rea may be more difficult in cases of conduct conventionally described in negative terms, but the added forensic challenge cannot ground either a general act-omission distinction or a general prohibition against punishing acts conventionally described in negative terms. Sometimes the circumstances will show that the defendant knew there was an imminent risk of harm, knew that he could render effective assistance, and did something else instead. Sometimes they will not. As in cases of actions conventionally

151. FLETCHER, *supra* note 8, at 421 ("Conscious non-motion is a greater assertion of personality than casual acting.").

152. *See* Associated Press, *Toddler Hit-and-Run Sparks Outrage in China*, YOUTUBE (Oct. 18, 2011), https://bit.ly/3ltlNjp.

153. *See* FLETCHER, *supra* note 8, at 421; Hughes, *supra* note 5, at 592 (citing William Hawkins for early view that "willful" neglect to tie-up a dangerous animal can lead to homicide charges if the animal subsequently kills).

described in positive terms, the facts and circumstances of the case will drive the bus, which is as it should be.

If the foregoing is correct, then "omissions" present a mens rea problem rather than an actus reus problem. In many, if not most, cases of conduct conventionally described in negative terms, it is easy to identify harm-inflicting conduct but often quite hard to show a sufficient mental connection between a defendant and that harm. It is not impossible, however. In fact, the common law has long recognized one important way that mens rea can be proved in "omission" cases: by reference to special duties.

Special duties do not offer a way to make sense of omissions as acts. Quite to the contrary. As we have seen, these long-standing exceptions to the general rule against punishing conduct conventionally described in negative terms demonstrate the fictive nature of the act-omission distinction. The common law does not pretend that agents who fail to act in the face of a legal duty "act" by engaging in willful bodily movements or altering the natural arc of events. A duty to act does not magically convert an "omission" into an "act" or a cause.[154] We have just decided not to be too fussy about the act-omission distinction when faced with a parent who watches his child die of malnutrition over the course of weeks. This is not to suggest that duty, legal or otherwise, does not have an important role to play in cases involving conduct conventionally described in negative terms, however. Rather, if we follow the critique set forth here and abandon the act-omission distinction, then we start to see these special duties in a new light—as ways to establish culpability and tools for limiting the scope of responsibility for harm in cases involving conduct conventionally described in negative terms.

B. The Role of Epistemic Duties in Assessing Culpability

Despite endorsing the act-omission distinction, the common law has never held that all omissions are immune from prosecution. The common law has carved out exceptions in circumstances where defendants have special duties derived from statute, special status, contract, seclusion, or creation of a perilous situation.[155] We generally describe these exceptions as special duties to act. As we have seen, these exceptions by themselves signal some doubt about the act-omission distinction within the common law. The presence of a legal duty does not conjure a willed bodily movement or bend the arc of the universe. So, in the absence of a coherent act-omission distinction, it does not make much sense to justify these

154. *See* MOORE, CAUSE, *supra* note 100, at 141 ("Surely the bare fact of legal duty cannot transform an omission from a nothing that can cause nothing, to a nothing that can have 'consequences', [i.e.] that can cause something!").

155. *See* ALEXANDER & FERZAN, *supra* note 24, at 235.

exceptions on actus reus grounds.[156] There is, nevertheless, good reason to preserve the role of these exceptions in establishing liability for conduct conventionally described in negative terms, not because they ground duties to *do* something, but, rather, because they ground duties to *know* something. Recast in this way, these special duties to know can help to resolve the epistemic challenges faced by prosecutors in "omission" cases by supporting presumptions of intent, knowledge, or recklessness.

Before getting into the thick of things, it is worth a moment to clarify what must be proved in order to establish mens rea for any form of criminal conduct, whether it involves acts conventionally described in positive terms or in negative terms. The Model Penal Code provides useful guidance. Section 2.02 requires proof of purpose, knowledge, recklessness, or negligence, "as the law may require, with respect to each material element of the offense" including "nature of [the] conduct," "result," and "attendant circumstances."[157] So, for a murder by shooting—which requires either purpose or knowledge under Section 210.2(a)—a prosecutor would need to prove that the defendant knew he had a gun in his hand, knew it was loaded, knew it was pointed at a living person, knew that if he crooked his finger, then a bullet would be fired, knew the bullet would strike a person, had the conscious object or knew the person would die as a result, and then knowingly crooked his finger while knowing both that he had alternative courses of conduct and that he did not have a lawful privilege to kill. That's quite a lot, but in cases of conduct conventionally described in positive terms, much of this is condensed or presumed such that the problem of proof seldom seems too complicated or burdensome for overworked civil servants and somnolescent jurors.

As we scale toward conduct conventionally described in negative terms, the picture begins to change. Graham Hughes does a nice job describing the general territory in his account of what would need to be shown in order to hold a pharmacist criminally responsible for failing in his statutory obligation to register the sale of poisonous substances.[158] On Hughes's telling, a prosecutor would need to prove that the pharmacist

156. Dan Markel, Jennifer Collins, and Ethan Leib have argued that special duties serve as signals to other potential rescuers that the bearer of the duty is on the case and that, therefore, those other possible saviors need not intervene. *See* MARKEL ET AL., *supra* note 4, at 86; *see also* Pope v. State, 284 Md. 309, 329 (1979) (noting that defendant charged with child abuse on a theory of omission was not guilty because "the mother was always present"). While a considerable improvement on the conventional view, it is an improvement rather than an alternative. That is, it assumes the act-omission distinction and also assumes a general prohibition against punishing omissions. As I will argue below, however, their insight does help us to understand important constraints on liability for conduct conventionally described in negative terms that assists in avoiding the Sally Struthers problem.

157. MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962).

158. *See* Hughes, *supra* note 5, at 601–03.

knew he was selling a poisonous substance, knew he had a statutory obligation to register the sale of all poisonous substances, and knew the substance was poisonous within the meaning of the statute, but nevertheless knowingly ate his orange knowing that his doing so was at the exclusion of registering the sale. As Hughes points out, the possibility of a non-culpable mistake at any one of these stages is far more likely and understandable than would be parallel claims of mistake in, say, a shooting homicide. Particularly noteworthy are the possibilities that the pharmacist may not have known that the substance he was selling was a "poison" for purposes of the statute or that he had a statutory obligation to register the sale of "poisons." Purely as a matter of intuition, his ignorance as to these facts seems far more plausible than parallel claims of ignorance by the perpetrator of a shooting crime that he did not know he had a gun in his hand. That intuition is instructive.

Regardless of whether his overall course of conduct is described in negative or positive terms, Hughes's pharmacist would qualify for an excuse if he made a mistake as to whether the substance he sold was a "poison" as defined by the statute. Students of the criminal law might ask for a moment's pause at this point. After all, this seems like mistake of law, not fact, and therefore ignorance or mistake should not provide any reason to question liability based on the long-established principle of *igorantia legis neminem excusat*.[159] With respect to the status of the substance as a poison under the statute, this concern is misplaced. Common law courts have long drawn a distinction between general ignorance of a legal prohibition and mistake as to the legal status of a thing, person, or act, where that legal status is a fact element of the crime.[160] Theft provides the classic example. Although ownership of a piece of property is a fact determined by law, it is a fact nevertheless.[161] Thus, a defendant who honestly and reasonably believes he has gained title to a piece of personal property will be excused if he takes that property and moves it with intent to deprive others of possession because he has made a mistake of fact.[162] Murder, which requires an "unlawful" killing, provides another example.[163] Whether or not a killer has legal justification

159. *See* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) ("[I]nnocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse.").

160. *See* Morissette v. United States, 342 U.S. 246, 271–73 (1952). This same point of law is recognized by the Model Penal Code. *See* MODEL PENAL CODE § 2.04(1) (AM. L. INST., Proposed Official Draft 1962) ("Ignorance or mistake as to a matter of fact *or law* is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.") (emphasis added).

161. *See Morissette*, 342 U.S. at 271–73.

162. *See Morissette*, 342 U.S. at 275–76.

163. *See* LAFAVE, *supra* note 3, at 725.

to kill, by virtue of self-defense, say, is determined in part by the law.[164] Nevertheless, a killer who makes an honest and reasonable mistake as to his need to use deadly force in self-defense cannot be convicted of murder.[165] In keeping with this rule governing mistakes of legal fact, Hughes's pharmacist would be excused if his conduct was predicated on a mistake about the legal status of the substance he sold.[166] A more general mistake regarding the legal obligation to record the sale of a poison presents a different circumstance, and would run afoul of the principle of *igorantia legis neminem excusat*. But does that mean that his ignorance of that legal duty is irrelevant to assessing his criminal liability? Not always.

There is a subtle but important distinction between being aware that one *could* act in a certain way and being aware that one *should* act in that way. The general rule that ignorance of the law cannot excuse covers the second circumstance, but not the first. If, by virtue of honest and reasonable ignorance, a defendant such as Hughes's pharmacist was not aware of a course of conduct alternative to the path he took, then his ignorance will provide grounds for excuse because he did not have the mens rea necessary for his act.[167] This is a rule that seldom gets much attention, but it plays an important role in a number of more frequently discussed doctrines. For example, a defendant who claims self-defense in a jurisdiction that imposes a duty to escape before resorting to deadly force can preserve his defense even if he had a safe avenue of egress if he honestly and reasonably was not aware of that opportunity.[168] Not surprisingly, this requirement also plays an important role in cases involving conduct conventionally described in negative terms. Consider, as an example, *Lambert v. California*.[169]

Lambert addressed the constitutionality of a municipal ordinance requiring that all felons staying in Los Angeles register with local authorities.[170] Lambert, who was a convicted felon, moved to Los Angeles, but did not register with local authorities.[171] Charged with failing to register, Lambert claimed that she was not aware that a registration regime existed, and therefore could not and did not know that she was not registering with authorities when she went about her life, engaging in a

164. *See id.* at 790–91.

165. *Id.* at 542–44. Of course, he may be guilty of manslaughter if he is reckless in forming his honestly held belief that deadly force is necessary. *See id.* at 790–91.

166. *See* Hughes, *supra* note 5, at 602.

167. *See id.* at 602 ("The maxim, 'ignorance of the law is no excuse,' ought to have no application in the field of criminal omissions, for the mind of the offender has no relationship to the prescribed conduct if he has no knowledge of the relevant regulations.").

168. *See* LAFAVE, *supra* note 3, at 547–49.

169. Lambert v. California, 355 U.S. 225 (1957).

170. *See id.* at 226–27.

171. *See id.*

host of activities that were not registering with authorities.[172] Note that this is not an argument based purely on ignorance of law. She instead focused on the role that ignorance of this particular law played in determining *mens rea*. She claimed that she did not know what she was not doing in the course of her daily doings. The government argued in response that the statute created a strict liability offense, negating Lambert's claims of ignorance.[173] Writing for the Court, Justice William Douglas acknowledged the authority of legislatures to create strict liability offenses,[174] but noted that the registration statute criminalized "conduct that is wholly passive."[175] Moreover, there was nothing in the nature of Lambert's actions—"mere presence in the city"[176]—"which might move one to inquire as to the necessity of registration."[177] Given these circumstances,[178] the Court held that Lambert could not be convicted because there was no direct evidence supporting a conclusion that she had "actual knowledge of the duty to register."[179] Neither was there "proof of the probability of such knowledge and subsequent failure to comply."[180]

As *Lambert* shows, concerns about a defendant's awareness of her opportunity to act are much more likely to play a role in cases involving criminal conduct conventionally described in negative terms.[181] In cases of conduct conventionally described in positive terms, common experience and the ratio of the size of the set of criminal or harm-causing conduct to the size of the set of benign conduct usually make it pretty easy for prosecutors to prove that a perpetrator knew what he was doing and

172. *See id.* at 227.

173. *See id.*

174. *See id.* at 228 ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.").

175. *Id.*

176. *Id.* at 229.

177. *Id.* at 228.

178. *See id.* at 230 ("[T]he evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.").

179. *Lambert*, 355 U.S. at 229–30. As the Court notes, the distinction between conduct that is *mala in se* and conduct that is *mala prohibita* marks a difference in terms of what juries may fairly infer about a defendant's mental state based on his conduct. *See id.* at 228 (citing Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910)).

180. *Id.* at 229.

181. *See id.* at 228 ("Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 [(1950)]; *Covey v. Town of Somers*, 351 U.S. 141 [(1956)]; *Walker v. City of Hutchinson*, 352 U.S. 112 [(1956)]. These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.").

knew that he had the option to engage in an alternative, non-criminal or harm producing, course of conduct. It is much more difficult for prosecutors in cases involving conduct conventionally described in negative terms. Ms. Lambert's case provides a good example. Because her "conduct [was] wholly passive—[a] mere failure to register" rather than "the commission of acts, or the failure to act under circumstances that should [have] alert[ed] [her] to the consequences of [her] deed,"[182] and the city of Los Angeles failed in its duty to provide fair warning to all felons that they had a duty to register their presence in the city,[183] the prosecution could not invite the jury to infer that, while going about her daily tasks, Ms. Lambert knew—or very well must have known—that she was not registering with authorities.[184] But, critical to our discussion here, the question was not whether "passive conduct" could constitute an "act." Instead, the question was whether Lambert knew that she was not registering with authorities when she instead went to the grocery store or the park. Absent some proof that she knew about this alternative course, the state could not meet its burden of proving mens rea for her alleged act of failing to register.

The same is true of Hughes's pharmacist. As he sits eating his orange after having sold a statutorily defined "poison," it is difficult to know whether he is knowingly not recording his sale as the law requires or, alternatively, has no clue whatsoever that recording the sale is even a contender for his time and attention. Although it is true that ignorance of a legal obligation to record the sale of poisons is not a stand-alone defense, ignorance of the law is nevertheless relevant to determining whether the pharmacist had the mens rea necessary to establish a culpable act. Just as in *Lambert*, absent some showing that the pharmacist knew that he did what he did to the exclusion of what he did not do, the prosecution cannot meet its burden of proving mens rea. But, again, this is a mens rea problem, not an actus reus problem.

Where the obligation to engage in one course of conduct to the exclusion of others is imposed by law, proving awareness of a legal duty is often helpful in meeting the more general requirement of proving mens rea. In a case against Hughes's pharmacist, the government might present evidence that the pharmacist took a licensing course during which he received lengthy instruction on maintaining records of poison sales. This

182. Lambert v. California, 355 U.S. 225, 228 (1957).

183. *See id.* at 229.

184. *See id.* at 229 ("Registration laws are common, and their range is wide. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking.") (internal citations omitted).

evidence would support an inference that his decision to eat an orange after making such a sale was to the knowing or reckless exclusion of properly recording the sale. The same is true in cases where the obligation to engage in one course of conduct to the exclusion of others is tied to more general obligations not to inflict harm. Take Dexter for example. A prosecutor would need to prove that Dexter knew Jimmy was in the water, knew Jimmy was drowning, knew there was a rescue buoy close at hand, and knew that he could either toss in the buoy, in which case Jimmy would live, or walk away, in which case Jimmy would die, and decided to walk away intending that Jimmy die, knowing that Jimmy would die, or with depraved indifference to the substantial risk that Jimmy would die. To fulfill this burden, a prosecutor would likely rely on Dexter's statements, his conduct, and circumstantial evidence. In some cases that may be enough. In others, not. And here is where special duties recognized by the common law as grounds for omission liability may come into play.

Any agent who is aware of a non-harm-producing course of conduct but nevertheless chooses to engage in harm-causing conduct may be criminally responsible for subsequent harm. As we have seen, proving that knowledge in cases of conduct conventionally described in negative terms often presents significant challenges.[185] These hurdles are easily overcome in cases where special status gives rise to epistemic duties. For example, if a child dies of neglect because his parents routinely watch television and play video games rather than feeding him, then they are guilty of manslaughter. That is not because his parents have a special duty to choose conduct that will preserve the child's life over conduct likely to result in his death. The duty not to engage in harm-causing conduct is general, and applies equally to conduct conventionally described in negative terms and to conduct conventionally described in positive terms. Rather, their special status marks a legal duty to know that their child is in need and to know that they have the opportunity to provide him succor.[186] That duty is informed and justified by background experiences, cultural expectations, social norms, and other existential conditions that together give rise to an epistemic duty so strong that it can even support a presumption of actual knowledge. We presume that parents very well must know about their

185. *See supra* notes 162–80 and accompanying text.

186. Here I diverge significantly from the account of omissions offered by Larry Alexander and Kim Ferzan. In their view, knowledge of a legal duty to act is a critical component of omissions liability, but the actual existence of that legal duty is of no moment whatever. *See* ALEXANDER & FERZAN, *supra* note 24, at 237–38. On my account, what matters is knowledge as to the opportunity to act, not knowledge of a legal duty to act. This puts the focus squarely on mens rea for the act without equivocating into thornier areas relating to knowledge or ignorance of the law. This does not mean that legal duties play no role, however. To the contrary, the existence of a legal duty can ground a presumption of knowledge as to the opportunity to act.

opportunities to feed their children and further presume that, if they do not feed their children, then they culpably chose a harm-producing course of conduct. That presumption is not absolute, of course. For example, a parent who honestly and reasonably believed that his baby was in the care of another person—visiting grandma and grandpa, say—when, in fact, the baby was dying of dehydration in a room upstairs, would not be guilty of child endangerment or manslaughter if the child dies. Why? Because he *did not know* that by making dinner, watching television, and falling asleep on the couch, he was choosing not to provide his child with life-sustaining care. It is not his act, but his mental state that matters.

To sum up a bit, the common law enforces a general prohibition on punishing conduct conventionally described in negative terms that is grounded in a hard distinction between acts and omissions. That general prohibition is subject to exceptions, such as where statutes, contracts, or special status relationships impose special duties. If, as I have argued here, the act-omission distinction reflects nothing more than a semantic preference, then it cannot bear the weight of justifying a general prohibition on punishing acts conventionally described in negative terms. That semantic preference does, however, mark a general problem with proving *mens rea* in cases of conduct conventionally described in negative terms.

Proving the *mens rea* for an act conventionally described in negative terms requires proof that the agent knew what he was not doing. This, in turn, requires proof of awareness of an opportunity to act in ways that would not, say, lead to the proximate death of another. On my account, this is what matters, not knowledge of a legal duty to act. The legal duty not to act in ways that lead to the death of another is general. This does not mean that legal duties do not have any role to play in assessing criminal liability for acts conventionally described in negative terms. To the contrary, the existence of a legal duty can provide useful context for grounding an inference of knowledge as to the opportunity to act. In circumstances where constellations of existential, cultural, social, and legal conditions give rise to special epistemic duties, juries can rightly be invited to presume knowledge with respect to the opportunity to act.

Although conceptually novel, this reconstruction largely preserves the core of common law doctrine governing omission offenses while allowing for the prosecution of all culpable conduct, whether it is conventionally described in positive or negative terms. As the next Section shows, it also exposes deep linkages between omission offenses and strict liability crimes.

C. *A Parallel Example: Epistemic Duties in Strict Liability*

The idea that circumstances, including legal status, can provide sufficient warrant for imposing epistemic duties and corollary presumptions of knowledge also plays an important role in the strict liability context. One conventional, but wrong, account of strict liability offenses is that they do not entail a mental connection between an offender and his act or a material element of the crime.[187] In fact, all strict liability does is remove from the prosecution the burden of *proving* mens rea with respect to one or more elements of a crime.[188] The distinction is fine, but critical, in the present context because it highlights the role played by factors that give rise to heightened epistemic duties, some of which may be sufficient to support presumptions of actual knowledge.

The only common law strict liability crime is statutory rape.[189] The conventional elements of statutory rape are sexual penetration by a male of a female,[190] not his wife, who is under the age of sixteen.[191] To make a prima facie case on these elements, a prosecutor must prove a voluntary act of intercourse and knowledge with respect to that act and the attendant facts that the perpetrator is a male, that his partner is a female, and that she is not his wife.[192] As a strict liability offense, however, the prosecutor need not prove mens rea with respect to the age of the child.[193] Furthermore, even credible claims of honest mistake by a man as to the age of the child will not provide an excuse.[194]

Given this exception to the general rule that prosecutors must prove some degree of mens rea with respect to each element of a crime,[195] it is tempting to think that the common law does not care whether men charged

187. *See* LAFAVE, *supra* note 3, at 288.

188. *See id.* at 295–96 ("The reasons for having statutes imposing criminal liability without fault are those of expediency: in some areas of conduct it is difficult to obtain convictions if the prosecution must prove fault, so enforcement requires strict liability.").

189. *See id.* at 288, 920–22.

190. As with much of the common law, the common law treatment of sexual assault crimes assumes a gender binary, limits itself to heterosexual engagements, and imagines men as perpetrators and women or girls as victims. We are fortunate to live in a time when these core assumptions are rendered suspect by expanding understandings of gender, sex, and sexuality, which raised consciousness makes one wince when investigating the common law and statutory law dealing with sexual offenses.

191. *See* LAFAVE, *supra* note 3, at 920–22. Jurisdictions now vary somewhat on how they structure their legislative treatment of statutory rape. *See id.*

192. *See id.* at 922–24 (discussing the so-called marital exemption).

193. *See id.* at 921–22.

194. *See id.* at 921–22.

195. *See, e.g.*, Elonis v. United States, 575 U.S. 723, 734 (2015) ("Although there are exceptions, the general rule is that a guilty mind is a necessary element in the indictment and proof of every crime. We therefore generally interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.") (internal citations and quotation marks omitted).

with statutory rape are culpable with respect to the age of their sexual partners. The cases suggest the contrary, however.[196] *Regina v. Prince* remains the landmark.[197] There, the court was asked whether a statute prohibiting the taking of an unmarried girl under the age of sixteen from the home of her parents without their permission allowed a defense of reasonable mistake as to the age of the girl.[198] Writing for a majority of the court, Judge George Bramwell famously held that proof of culpability with respect to the other elements of the crime was sufficient to justify conviction because the act of knowingly taking any girl from the custody of her parents without lawful cause is an act "wrong in itself" and any agent who engages in this kind of conduct "does it at the risk of her turning out to be under the age of sixteen."[199] So, while Prince might well have pled reasonable mistake based on his belief that he had the permission of Annie's father to spirit her away,[200] he could not have pled mistake as to her age because he *knew* that he was engaging in risky behavior and *knew* that his conduct was subject to close social and legal regulation.[201] In Bramwell's view, that knowledge, in combination with the background social norms, provided grounds for the imposition of an absolute epistemic duty on Prince, which, in turn, was sufficient to ground a decisional rule under which his knowledge of Annie's age was presumed.[202] Put differently, Prince's culpability with respect to Annie's age was constructively proven by Prince's engaging in the morally fraught activity of eloping with young girls. Bramwell had no concerns about the fairness of this conclusive presumption because Prince had fair warning that he was embarking on a dangerous course of conduct, which was easy enough for him to avoid by simply abiding the prevailing rules of courtship and marriage.[203]

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196. *See* Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 743 (1960); *cf.* LAFAVE, *supra* note 3, at 289 (pointing out that "with many [strict liability] crimes the legislature is actually aiming at bad people").

197. Regina v. Prince, L.R. 2 C.C.R. 154 (1875).

198. *See id.* at 174 ("Whosever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any . . . person having the lawful care or charge of her, shall be guilty of a misdemeanour . . . Vict., c. 100 § 55.").

199. *Id.* at 174–75.

200. *See id.* at 175 ("If the taker believed he had the father's consent, though wrongly, he would have no mens rea. So if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the *act* forbidden by the statute . . . .").

201. *See id.* at 175.

202. *See id.* at 174–75. Dan Kahan has famously made parallel arguments in cases of mistake of fact and mistake of law. *See* Dan Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123 (1998); Dan Kahan, *Ignorance of Law Is an Excuse—But Only For the Virtuous*, 96 MICH. L. REV. 127 (1997).

203. *See Prince*, L.R. 2 C.C.R. at 174–75.

Although Bramwell's epistemic account of statutory rape offenses has been subject to critique, it has nevertheless found fertile home in the contemporary law of strict liability. For example, the United States Supreme Court in *United States v. Balint*[204] held that, in a prosecution for violating the Narcotics Act of 1914, the government need not prove that a defendant knew that, in fact, the drugs he sold were subject to regulation because the statute "require[d] every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute."[205] By the Court's lights, if you enter into the pharmaceutical trade, then you assume the burden of determining the legal status of that which you sell. In turn, that burden underwrites a presumption that you know you are selling a controlled substance when you sell a controlled substance. A few years later, the Court affirmed and refined its endorsement of epistemic duties as the foundation of strict liability in *United States v. Dotterweich*,[206] holding that Congress may impose absolute duties to discover material facts and conditions on those "who have at least the opportunity of informing themselves."[207] As in *Balint*, the Court in *Dotterweich* again emphasized notice, barriers of entry, and regulatory intervention as grounds for imposing epistemic duties sufficient to ground presumptions of knowledge.[208]

More recently, Justice Clarence Thomas consolidated the rules on epistemic burdens in strict liability offenses in *Staples v. United States*.[209] The question presented to the Court in *Staples* was whether a charge for violating 26 U.S.C. § 5861(d), which prohibits the possession of unregistered automatic weapons,[210] required the government to allege and prove that a defendant actually knew his unregistered firearm was an automatic weapon or whether, in the alternative, it would be sufficient if the government alleged and proved that he knew he possessed an unregistered firearm, and that his gun just happened to be capable of automatic fire.[211] The question was material because Staples admitted possessing an unregistered firearm, but claimed he did not know it had been modified for automatic fire.[212] Writing for the Court, Justice Thomas started with the general rule that prosecutors must prove some degree of

204. United States v. Balint, 258 U.S. 250 (1922).

205. *See id.* at 254. This, of course, is precisely the point at which Graham Hughes takes aim in his pharmacist hypothetical. *See supra* notes 157–64 and accompanying text.

206. United States v. Dotterweich, 320 U.S. 277 (1943).

207. *Id.* at 285.

208. *See id.* at 284–88.

209. Staples v. United States, 511 U.S. 600 (1994).

210. *See id.* at 603–05 ("[I]t shall be unlawful for any person . . . to receive or possess a [machinegun] which is not registered to him in the National Firearms Registration and Transfer Record.").

211. *See id.* at 603–04.

212. *See id.* at 603.

mens rea with respect to each element of a crime.[213] As he pointed out, Congress may create exceptions to this general rule, but courts are reluctant to find that a statute imposes strict liability absent a clear statement in the law, or where the statute "regulate[s] potentially harmful or injurious items," and the defendant is "alerted to the probability of strict regulation," perhaps because he "knows that he is dealing with a dangerous device of a character that places him in responsible relation to public danger."[214] Where there is a congruence of social need and fair notice, Congress may fairly impose on citizens the duty to determine material facts that frame their conduct.[215] Strict liability is a matter of assigning affirmative epistemic burdens such that a defendant can be held liable on a theory of culpable failure to know or on a theory of constructive knowledge, either of which would be sufficient to justify criminal liability. The *Staples* Court ultimately declined to find that 26 U.S.C. § 5861(d) imposes heightened epistemic burdens because gun ownership is common and widespread and because the process of buying a gun does not put citizens on notice of any particular duties they might have to determine whether their guns are capable of automatic fire.[216]

The United States Court of Appeals for the Second Circuit followed a similar course in *United States v. Rodriguez*.[217] There, the court was asked to decide what the government's burden of proof should be when prosecuting attempts by previously deported aliens to reenter the United States without permission of the Attorney General in violation of 8 U.S.C. § 1326(a).[218] Rodriguez was deported in 2000 and attempted to reenter the United States through John F. Kennedy International Airport in 2002 using a fake passport in another name. He was arrested by federal authorities at

213. *See id.* at 605–06.

214. *Id.* at 607 (quoting United States v. Dotterweich, 320 U.S. 277, 281 (1943) (internal quotation marks omitted)).

215. *See id.* at 608 (quoting United States v. Balint, 258 U.S. 250 (1922) (internal quotation marks and alteration marks omitted)).

216. *See id.* at 610, 613–14.

217. United States v. Rodriguez, 416 F.3d 123 (2d Cir. 2005), *cert. denied*, 546 U.S. 1140 (2006).

218. 8 U.S.C. § 1326(a) provides that:

> any alien who—
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
> (2) enters, attempts to enter, or is at any time found in, the United States, unless
> (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or
> (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
> shall be fined under title 18, or imprisoned not more than 2 years, or both.

an immigration checkpoint and subsequently was charged on an indictment alleging that, having once been deported, he "attempted to enter the United States, without the Attorney General of the United States having expressly consented to such alien's reapplying for admission."[219] Rodriguez's alert counsel moved to quash the indictment because it failed to allege scienter.[220] That motion was granted.[221] The government then filed a superseding indictment alleging that Rodriguez "knowingly and intentionally attempted to enter the United States without the Attorney General of the United States having expressly consented to such alien's reapplying for admission."[222] Rodriguez again objected, arguing that the indictment alleged scienter only with respect to the act of attempted reentry, and not with respect to want of permission from the Attorney General.[223] This motion was denied.[224] Rodriguez then entered a conditional plea of guilty in order to test his reading of the statute before the Second Circuit.[225]

Rodriguez had good reason to be hopeful. A few years before he was arrested, the Ninth Circuit held that Congress had effectively incorporated the common law of attempts into § 1326(a).[226] In that court's view, the government would need to allege and prove "specific intent" when charging attempts by previously deported aliens to reenter the United States without permission of the Attorney General.[227] Proving a knowing attempt to reenter the United States by a defendant who happened to have been previously deported and happened not to have received official permission to reenter from the Attorney General would not do.[228] Focusing on the unique history of persons subject to § 1326(a), the Second Circuit declined to follow the Ninth Circuit's lead.[229] Writing for the panel, Judge Chester Straub pointed out that those who are prosecuted for illegal attempted reentry have already been removed by force of law from the United States at least once.[230] Furthermore, as Judge Straub pointed out, during every removal procedure, deported aliens are informed orally and in writing that they may only reenter the United States with the expressed

219. *Rodriguez*, 416 F.3d. at 124.
220. *See id.*
221. *See id.*
222. *Id.* at 124–25.
223. *See id.* at 125.
224. *See id.*
225. *See id.*
226. *See* United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1193 (9th Cir. 2000) (en banc).
227. *See id.* at 1191–92.
228. *See id.* at 1196–97.
229. *See Rodriguez*, 416 F.3d at 126.
230. *See id.* at 127–28 (quoting United States v. Torres-Echavarria, 129 F.3d 692, 697–98 (2d Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998)).

prior permission of the Attorney General.[231] Given that the "INS is [not] a travel agency,"[232] the court determined that these "rather unique circumstances," describing the background of § 1326(a) defendants, "obviate the normative concerns that" drove the Ninth Circuit's view that excusing the requirement to prove scienter ran an unacceptable risk of convicting morally innocent defendants.[233] Based on these findings, the Second Circuit held that, by virtue of their special status and unique background experiences, § 1326(a) imposes epistemic duties on previously deported aliens that are so strict that they forgive prosecutors the burden of alleging mens rea as to the absence of permission of the Attorney General to reenter.[234]

Although these courts' analyses of strict liability are narrowly focused, the basic logic of these decisions has much broader application. Different activities carry with them different epistemic duties constructed on social and statistical grounds. The nature and extent of those duties provide different degrees of warrant for presuming knowledge from action. A person who points a loaded gun at a defenseless person and pulls the trigger five times bears rather strict epistemic burdens—so heavy, in fact, that prosecutors would all but be granted a conclusive presumption that the shooter knew the death of another would result from his actions. After all, how many people do such a thing without intending, or at least knowing, that death will result? The same is true where conditions sufficient to justify the imposition of strict liability exist. In a rough parallel to the common law presumption that agents intend the natural consequences of their actions, strict liability offenses allow for the imputation of knowledge in circumstances where an agent has crossed significant barriers of entry to engage in a dangerous, closely regulated, or morally fraught field of activity or otherwise has a unique history of experiences that is sufficient to give rise to heightened duties to know. That is why the Second Circuit felt comfortable concluding that Rodriguez knew he needed, but did not have, permission from the Attorney General to reenter the United States. But what does this tell us about criminal liability for conduct conventionally described in negative terms?

Just as in cases of crimes involving conduct conventionally described in positive terms, some cases involving conduct conventionally described in negative terms will provide firm grounds for inferring that defendants knew about their opportunity to act. Dexter's is a good example. In other cases, a defendant's experiences, status, or legal duties may ground a

231. *See id.* at 128 (quoting United States v. Morales-Palacios, 369 F.3d 442, 448 (5th Cir. 2004), *cert. denied*, 543 U.S. 825 (2004)).

232. *Id.* (quoting *Torres-Echavarria*, 129 F.3d at 697–98).

233. *Id.* at 126.

234. *See id.* at 128.

presumption. For example, because parents have a special status with respect to their children, we might presume that a father who stands idly by on a boardwalk eating an orange while his child drowns in the water below knew that he had the opportunity to save his child, but culpably chose not to make the effort.[235] Charging a random passerby presents more challenges, however, because the epistemic burdens of those walking on boardwalks are not particularly stringent. Again, anyone on the boardwalk who actually knew there was a child drowning in the water, knew the child could be saved by throwing in a life buoy, knew that such a buoy was ready at hand, and chose to eat an orange instead, would be guilty of homicide if the child died. The problem with respect to most passersby in this kind of situation is proving that knowledge. That is a problem of proof, but is in no way insurmountable. Prosecutors will need to rely on circumstantial evidence, common sense, and reasonable inferences to prove that eating an orange constituted a culpable act of homicide. In some cases, the evidence available will be enough to establish mens rea. In other cases, it will not. But that is no different than the mine run of cases involving conduct conventionally described in positive terms, in which juries must infer mens rea from a defendant's conduct and the circumstances surrounding that conduct.[236]

IV. AVOIDING SALLY STRUTHERS PROBLEMS

I have argued here that anyone who *knows* there is a need to provide lifesaving assistance, *knows* that he has the opportunity to provide it, and *knows* that any other course of conduct will cause a death, has a legally enforceable duty not to engage in conduct likely to result in harm. If "you *know* you've gotta help me out," then you've gotta not engage in conduct that is not helping me out. One of the principal advantages of this view is that it would allow us to punish the lucky hit man. A significant concern is that it might also put us on the hook for homicide if we go about our daily lives instead of answering Sally Struthers's call or providing lifesaving assistance to the thousands of innocent but unlucky people who die each day. As this closing part argues, most of these concerns are fairly

235. In a horrific real-life example of this, consider the case of Justin Ross Harris, who was found guilty of murdering his child by failing to remove him from a car seat and leaving the child in a hot car to die of hyperthermia and dehydration. *See* Daniella Silva, *Georgia Dad Justin Ross Harris Sentenced to Life in Son's Hot Car Death*, NBC NEWS (Dec. 5, 2016, 5:42 PM), https://nbcnews.to/3CcErmk. To the point made here, Judge Mary Staley Clark, at the sentencing hearing, noted that this "factually was a horrendous horrific experience for this 22-month-old child who had been placed in the trust of his father and in violation and dereliction of duty to that child, if not love of that child, callously walked away and left that child in a hot car in June in Georgia in the summer to swelter and die . . . ." *Id.*

236. *See supra* notes 147–50 and accompanying text.

easy to dispose of by returning to the basic common law requirements for culpability and cause, which apply equally whether the act in question is conventionally described in negative or positive terms.

Although I have a general sense that there is an overwhelming amount of need in the world, I do not at this moment have any particular knowledge of any specific person's specific needs. Absent that knowledge, typing this sentence is not a homicidal act even if, as a matter of fact, my typing is to the exclusion of other conduct which would prevent harm. Without some special duty to know about both the particulars of an imminent death and my opportunities to intervene, my ignorance and actions are non-culpable, at least from a legal point of view.

Considerations of actual and proximate cause also bar broad criminal liability for those who do not answer Sally Struthers's call. Given the diffuse nature of risks and opportunities to intervene in cases such as these, it would be impossible to say that, but for my changing the channel or going back to bed, any particular person would have survived. Even if that case could be made, the same diffusion would make it impossible to justify finding the sort of objective unreasonableness that is necessary for proximate cause. These general concerns aside, there is good reason to doubt that giving money to Sally would, in fact, save anyone. There are hundreds of these organizations and they vary widely in their integrity and capacity to render meaningful assistance.[237] The reasonable doubts one holds when solicited by one of these outfits further compromises attempts to prove culpability, cause in fact, and proximate cause.

Although these concerns together probably make us immune from criminal liability for failing to answer Sally Struthers's pleas, it remains the case that, if I am walking alone down a deserted street, see a severely injured person lying on the sidewalk, but do absolutely nothing to provide or summon assistance, then I can and should be charged with homicide if this hapless fellow dies as a consequence of my walking away. But what do we say if I am not alone on that street but, instead, am one of five, ten, or several dozen onlookers, each of whom chooses to do something other than summon help? Here again, mens rea, cause in fact, and proximate cause present significant barriers against successful prosecution. Consider again the parable version of the Kitty Genovese case.[238] On that telling, dozens of people in Ms. Genovese's building knew she was in mortal danger, knew they could call the police, and knew that calling the police would at least have a good chance of saving her life. It is quite reasonable, however, to believe that none of them knew that their individual decisions

237. There are, of course, ways to moot these concerns by dint of due diligence or reliance on organizations like Global Giving, which vets thousands of charitable projects. *See, e.g.*, GLOBAL GIVING, https://www.globalgiving.org/ (last visited Oct. 2, 2021).

238. *See supra* notes 46–51 and accompanying text.

to eat dinner or watch television would result in her death. That is due to well-documented cognitive biases that we all have when we are part of a crowd.[239]

Particularly when we are in a group of strangers, we tend to think that someone else has or will act, so there is no need for us to act.[240] As Jennifer Collins, Ethan Leib, and Dan Markel have argued, this psychological phenomenon has a normative dimension where we have reason to believe that others who are present have a socially or legally significant relationship with the victim.[241] That is because their presence signals to us that there is someone on the scene who is better situated to know the nature and dimension of need, to know the sort of assistance that is necessary or proper, and to provide that assistance.[242] Because these mens rea concerns are general, they also make it difficult to reach the objective findings necessary to prove proximate cause in cases like *Pope*, where a parent is present on the scene when a child apparently needs assistance.[243] Of course, that might change if the parent is the source of the threat. Finally, depending on how many people are on the scene, factual cause may be so diffuse that it becomes impossible to say with any certainty that the conduct of any particular person caused the death. That is certainly true in the Sally Struthers case where the actions of millions or even billions of persons have equal claim to going about their business rather than donating to the cause. In a phrase, everyone is responsible, so nobody is responsible.

Importantly, none of this imposes an absolute bar on prosecuting people for their individual decisions to engage in conduct to the exclusion of summoning or providing aid for someone in need, but it does highlight the factors that are likely to be most relevant when making those assessments, including: severity of the risk, number of others on the scene, indications that help has already been summoned, the presence of anyone who has a special relationship or responsibility for the victim, and whether it is reasonable to assume that, if present, the person responsible will actually provide proper assistance. The facts will govern, of course, but, again, it is likely that in circumstances like *Pope* the inaction of a specific person with unique opportunities to intervene would and should result in a homicide conviction. It was painfully clear in that case that Demiko's mother was neither capable nor worthy of the responsibilities attendant to

239. *See, e.g.*, Melissa Burkley, *Why Do We Help Less When There Is a Crowd?*, PSYCH. TODAY (Nov. 4, 2009), https://bit.ly/3hB4V9m (discussing pluralistic ignorance and diffusion of responsibility).

240. This phenomenon is sometimes referred to as "diffusion of responsibility." *See id.*

241. *See* MARKEL ET AL., *supra* note 4, at 86.

242. *See id.*

243. *See* Pope v. State, 284 Md. 309, 329 (1979).

her maternal status, and Ms. Pope was the only other person in a position to determine Demiko's fate by her choice of action.

Another important set of questions goes to how much we can fairly be asked to sacrifice by selecting against our preferred course of conduct if doing so will result in harm accruing to another. This is the substance of the general libertarian objections to omissions liability and the point that Thomas Macaulay made when he argued that we cannot prosecute a surgeon who refuses to travel out of his way to perform a necessary life-saving operation even if he is the only one who can do it.[244] Here, we have no mens rea problems or difficulties in showing cause if the surgeon goes to dinner and a play resulting in the patient's death. So, is he guilty of homicide? This question really comes down to whether a familiar limit on omissions liability—that the provision of aid must not be too dangerous or burdensome[245]—should continue to carry weight if we no longer have an act-omission distinction or a general prohibition against punishing omissions.

Though it may require some modifications to some existing doctrine, it seems clear that these considerations should not continue to matter under the well-established common law principles we have been discussing. After all, the general idea of assessing risks and rewards is already a component of recklessness as a standard of culpability for primary offenses and of necessity as an affirmative defense. In a case like Macaulay's surgeon, it would be left to the jury to decide whether his going to dinner and a play posed a substantial and unjustifiable risk of death or whether, on balance, his decision to go to dinner and a play prevented a harm that is substantially worse than the death of the patient. It is hard to say with any certainty what the results might be, particularly with respect to the recklessness inquiry, but there is much to learn from the law on socio-economic rights, which necessarily takes practicality into account when determining the contours of norms and obligations.[246] At any rate, this puts the focus of the conversation where it should be—on whether a defendant's conduct posed an unreasonable risk of harm to another, he knew it, and he did it anyway.

CONCLUSION

The possibility of criminal punishment is, by design, anxiety inducing. We all look for reassurance that we will not end up on the wrong

244. *See* MOORE, *supra* note 22, at 55 (quoting Thomas Macaulay, *Notes on the Indian Penal Code, 1837*, *in* WORKS, VII, 494 (1897)).

245. *See* LAFAVE, *supra* note 3, at 337–38; MARKEL ET AL., *supra* note 4, at 64.

246. *See, e.g.*, Mazibuko v. City of Johannesburg 2009 (3) BCLR 239 (CC) (S. Afr.) (determining the scope of constitutional right to water, in part, based on government's capacity to provide water).

side of the law by accident or misstep. The substantive criminal law therefore includes a lot of safety measures. The act-omission distinction might be regarded as one of these. It serves as a shield against less fanciful versions of the Sally Struthers problem, guaranteeing that we are not our brothers' keepers. It is not at all clear that this is a conceptually coherent or wholly desirable result, however. In fact, the act-omission distinction seems to reduce to little more than an idiosyncratic semantic preference. Absent a more robust defense, we should abandon the act-omission distinction altogether. That does not mean that we are stuck with a criminal law that only Jean-Paul Sartre could love. Instead, the result is to rest more weight on assessments of culpability. By operation of law, the act-omission distinction prevents many cases of culpable wrongdoing from going to trial. The primary consequence of the views advanced here is that more of these cases would be subject to threats of punishment, thereby increasing motives for each of us to choose courses of action that prevent harm to others over those that cause harm to others. From my point of view, that is not such a bad result.