CABINING CRIMINAL OMISSION LIABILITY

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INTRODUCTION

Last year marked the first time that a student's parents were held criminally liable for a school shooting.[1] Neither pulled the trigger; rather, James and Jennifer Crumbley were convicted, at least in part, for what they *didn't* do.[2]

What they didn't do was egregious: they didn't seek professional help for their son despite appalling warning signs and his own pleas for medical attention; they didn't withdraw their son from school mere hours before the tragedy, ignoring the entreaties of his counselor; and they didn't bother to secure his gifted handgun.[3] Each detail is more devastating than the last.

The jury deemed the Crumbleys' failures so reprehensible as to be criminal. In doing so, the jury concluded that these failures causally contributed to the tragedy of the Oxford High School shooting.[4] This finding is both important and intriguing: important because expanding criminal liability for inaction extends the reach of criminal law; intriguing because, typically, one thinks of actions, rather than inactions, as causes of outcomes.

This article aims to elucidate questions, both legal and philosophical, concerning criminal liability for inaction, formally known as omission liability. In particular, this article aims to show that a person's omission liability for a victimizing outcome does arise, legally, and should arise, normatively, only as a consequence of that person's prior commissions, wherein those commissions are causes-in-fact of the victimizing outcome.

The first half of this article reviews the status of omission liability in criminal law. It aims to reveal the prevalence of this article's thesis in criminal law precedents. The second half of this article argues that the approach taken by courts is just and preferable to other standards of omission liability. In doing so, it aims to answer both doctrinal and normative challenges.

I. AN OVERVIEW OF CRIMINAL OMISSIONS

Before exploring the relevant doctrine and philosophical issues, a brief overview of the central concepts at play is in order.

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1. *Father of Michigan School Shooter Found Guilty of Involuntary Manslaughter*, THE GUARDIAN (Mar. 14, 2024, 9:00 p.m.), https://www.theguardian.com/us-news/2024/mar/14/father-of-michigan-school-shooter-found-guilty-of-involuntary-manslaughter.
2. *Id.*
3. People v. Crumbley, 11 N.W.3d 576, 579–88 (Mich. Ct. App. 2023).
4. *Id.* at 590–93.

A. Omissions Defined

An omission is a failure to act.[5] For instance, consider a law student who wakes up late and goes to class without getting a cup of coffee. One can say that the law student "did not get a cup of coffee," "failed to get a cup of coffee," or "omitted getting a cup of coffee." These statements are empirical claims about what did or did not happen: it is the case that the law student did not get a cup of coffee.

Only those with the capability to act intentionally can omit.[6] For instance, it would be absurd to say that a mountain failed to create an avalanche; mountains are not things that act and therefore cannot fail to do anything. While actors must have capabilities for intention and action, omissions can be intentional or unintentional. For instance, a lifeguard can fail to rescue a drowning beachgoer either intentionally, perhaps out of malevolence, or unintentionally, perhaps due to the distracting presence of a riveting volleyball game.

B. Omissions & Counterfactuals

While omissions do not require imagining anything beyond this reality, they suggest counterfactual worlds in which, instead of failing to act, an actor acted. Counterfactuals are events that did not happen but that, in theory, could have happened.[7] Put another way, a counterfactual is an imaginary or possible event which, had it occurred, would have precluded a corresponding outcome. Imagine if, instead of waking up late, the law student woke up early and got coffee; in that case, the law student did not fail to get coffee.

The counterfactual phrase "could have happened" is doing a lot of work here. There are many things that *could* have happened. The law limits itself to a narrow kind of counterfactual: an omitted act must be one of which the actor is "physically capable."[8] The legal notion of physical capability parallels the philosophical notion of ability, wherein an ability is a counterfactual dependence between choice and action.[9] To claim that an actor has an ability to perform an action is to claim that said action is counterfactually dependent upon the actor's choice. For example, the

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5. MODEL PENAL CODE § 1.13(4) (AM. L. INST. 1962).

6. George Wilson & Samuel Shpall, *Action*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 21, 2016), https://plato.stanford.edu/archives/win2016/entries/action/.

7. William Starr, *Counterfactuals*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 21, 2021), https://plato.stanford.edu/archives/sum2021/entries/counterfactuals/.

8. MODEL PENAL CODE § 2.01(1) (AM. L. INST. 1962).

9. John Maier, *Abilities*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sep. 21, 2022), https://plato.stanford.edu/archives/fall2022/entries/abilities/.

aforementioned law student has the ability to get coffee whereas the same law student does not have the ability to fly, no matter how vigorously he flaps his arms.

The law does not use the term "counterfactual dependent." Rather, when describing an event which is a counterfactual dependent of an outcome, the law says, "but for the event, the outcome would not have occurred." Such events, whether commissions or omissions, are referred to within the law as "but-for causes." A but-for cause is a type of cause-in-fact.[10]

C. Omissions as Breaches of Legal Duties to Act

Legally, an omission satisfies the *actus reus* element of a crime when it is both a but-for cause of the outcome and when it meets any additional causal requirements imposed by a law.[11] These "additional causal requirements imposed by law" are hugely important. Consider that each act is also many failures to act. For instance, every time that Tom Brady throws a touchdown pass, he fails to eat a sandwich, dance the Macarena, or advance the state of rocket science. The number of omissions that correspond to each act is unfathomably large.

Humorous omissions aside, each act also corresponds to a panoply of much weightier omissions. For instance, it is entirely plausible that an actor's failure to donate to the local soup kitchen is a but-for cause of an indigent's death by starvation. Thus, without "additional causal requirements imposed by law," every act could, and almost certainly would with the requisite mental state, result in a multitude of criminal liabilities because each realized act, a commission, necessarily omits every other possible act.

II. WHEN COURTS IMPOSE OMISSION LIABILITY

Practically, in the context of criminal omissions, "additional causal requirements imposed by law" means the imposition of some affirmative duty to act. A breach of such a duty, when actuated by the requisite mental state, constitutes a criminal omission. These duties include duties based upon contract, duties based upon relationships, duties based upon voluntary assumption of care, duties based upon creation of peril, duties of

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10. Michael Moore, *Causation in the Law* § 2.2, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 21, 2024), https://plato.stanford.edu/archives/spr2024/entries/causation-law/.

11. MODEL PENAL CODE § 2.03(1) (AM. L. INST. 1962).

landowners, duties to control conduct of others, and Good Samaritan duties.[12]

Metaphysically speaking, it would be strange if the mere imposition of an affirmative duty to act turned what was otherwise a non-cause into a cause.[13] Whether those duties are predicated upon "commonsense" or "foreseeable" notions of causation or upon some other basis, a duty does not a cause make.[14] In the abstract, legislatures, executives, and courts could impose an affirmative duty to act in any circumstance they so desire. In doing so, they have no legal obligation to follow a metaphysically coherent doctrine. Yet, the liabilities imposed by law follow a pattern, one according with this article's thesis: a person's omission liability for a victimizing outcome arises only as a consequence of that person's prior commissions, wherein those commissions are causes-in-fact of the victimizing outcome. Each scenario in which affirmative duties to act are imposed, and in which a breach results in omission liability, will be discussed in turn and its accordance with this article's thesis will be explored.

A. Duties Based upon Contract

The formation of a contract is a commission and not an omission. In order to demonstrate that omission liability arising from contracts accords with this article's thesis, the formation of a contract must be a but-for cause of those outcomes for which the law imposes omission liability.

In the civil context, it is universally accepted that formation of a contract coupled with a failure to perform can harm a counterparty: this is the basis of reliance damages. When a party relies on the expected fulfillment of a counterparty's contractual duties and, in doing so, "changes its position," that change of position generates reliance interests. Should the counterparty then fail to perform its contractual duties, the party is entitled to reliance

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12. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2(a)(1)–(5), 6.2(a)(7) (Oct. 2025 update) (Westlaw) (describing Good Samaritan duties as "dut[ies] to act to help another in distress").

13. MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 141 (2009) ("The crudest form of the mistake here is to think that the bare fact of legal duty can turn an omission from a non-cause into a cause."); J. Paul McCutcheon, *Omissions and Criminal Liability*, 28 IRISH JURIST 56, 75 (1993) ("This merger of duty and causation, although convenient is, to say the least, somewhat intellectually unsatisfactory . . . .").

14. Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 572 (1988) ("[T]he purpose of proximate cause analysis is to ensure that causal judgments, even in complex cases, reflect commonsense notions of cause and effect. To achieve this objective, the law necessarily relies on probabilistic and *normative* judgments to bridge the gap between the physical paradigm and nonphysical causal patterns in human conduct." (emphasis added)); People v. Crumbley, 11 N.W.3d 576, 591 (Mich. Ct. App. 2023) ("If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause."); Patricia Smith, *Legal Liability and Criminal Omissions*, 5 BUFF. CRIM. L. REV. 69, 79 (2001) ("[T]he idea that what constitutes proximate cause is a matter of legal policy and not a causal fact is the predominant view . . . .").

damages designed to restore the injured party to its pre-reliance economic position.[15] In other words, in accordance with this article's thesis, reliance damages are predicated upon non-performance of the contract, an omission, being subsequent to the formation of a contract, a commission. Even when criminal omission liability is imposed upon the breaching party for injuring a third party, this imposition parallels reliance damages for third-party beneficiaries in the civil context.[16]

B. Duties Based upon Relationships

The law imposes affirmative duties upon those in certain types of status relationships: parents have duties to their children, spouses have duties to each other, and ship captains have duties to their crews and passengers.[17] Some scholars note that masters have duties to their servants, but these precedents are found only in foreign jurisdictions.[18]

Relationships are regularly contractual in nature, formed by implicit or explicit terms, shared norms, and expectations. While only some relationships are legally recognized, many relationships involve confrontations amounting to "breaches of contract" where accusations are made and "damages," where appropriate, are paid. Sometimes these "lawsuits" can even result in the dissolution of relationship contracts. Each relationship has its own terms, norms, and expectations negotiated by the parties in question. Finally, relationships generate reliance interests, in general and in specific instances.

When seen in this light, omission liability imposed upon spouses and ship captains is analogous to omission liability imposed upon contractual parties. In both types of status relationships, independent parties have chosen to voluntarily embark on some joint venture: marriage, or employment, or leisure. However, duties based upon status relationships extend beyond those based upon contract: the law will impose omission liability based on duties outside the "contract" in question.[19]

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15. *Reliance Damages*, WEX, https://www.law.cornell.edu/wex/reliance_damages (last visited Mar. 4, 2023).

16. LAFAVE, *supra* note 12, § 6.2(a)(3); Paul H. 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, 115 (1984). *See also* State v. O'Brien, 32 N.J.L. 169 (N.J. 1867).

17. LAFAVE, *supra* note 12, § 6.2(a)(1); Robinson, *supra* note 16, at 112–13.

18. LAFAVE, *supra* note 12, § 6.2(a)(1); Robinson, *supra* note 16, at 113. *See also* Regina v. Smith (1837), 173 Eng. Rep. 438, 438–39 (Cent. Crim. Ct.); Rex v. Self (1776) 168 Eng. Rep. 170, 170–71.

19. *See, e.g.*, United States v. Knowles, 26 F. Cas. 800, 802 (N.D. Cal. 1864) ("[The commander] is bound, *both by law and by contract*, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard . . . ." (emphasis added)).

"Extra-contractual" status-relationship-based duties may be best understood as default rules written into the "contracts" in question. For marriage, "to have and to hold from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, until parted by death" sounds like it would include taking affirmative steps to ensure the welfare of one's spouse. In reliance terms, one might think twice before marrying a spouse who would fail to call for necessary medical aid![20] For seafaring, an oft-cited criminal case notes that omission liability arises from the contract between the ship captain and the passengers.[21]

Just as contracts can supersede default rules, exceptions to status-relationship-based omission liability support the notion that such duties are fundamentally contractual in nature: they can be changed by the express desire of one of the parties.[22] This final point suggests that, for example, a pre-nuptial agreement that explicitly spells out spousal duties may supersede default marriage rules. Another example: if a captain told the crew and passengers before embarking that anyone who fell into the sea would be left to drown, such notice may supersede the law's default rule placing affirmative duties to rescue on the captain.

Of course, the space of all status relationships encompasses much more than spouses and seafarers; however, the law is reluctant to impose omission liability on the bases of other "contractual" status relationships. These status relationships include those between friends, neighbors, acquaintances, and lovers. In one infamous case, a married man failed to procure help for his mistress, who had thrown herself into a morphine-induced stupor.[23] The court noted that the nature of the relationship was unlike that of spouses and more like that of friends:

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20. State v. Mally, 366 P.2d 868 (Mont. 1961); Territory v. Manton, 19 P. 387 (Mont. 1888).

21. *Knowles*, 26 F. Cas. at 802.

22. *See, e.g.*, Westrup v. Commonwealth, 93 S.W. 646, 647 (Ky. Ct. App. 1906) ("[A]ppellant's wife . . . declared her purpose to do without the services of [a physician] at the birth of her child . . . . In view of the foregoing facts, and the further fact[] . . . that in failing to earlier call in a physician [the appellant] acted in good faith *and at [his wife's] request*, though he doubtless erred in so doing, we fail to find any just or reasonable ground for the verdict of the jury . . . ."(emphasis added)); Commonwealth v. Konz, 450 A.2d 638, 641 (Pa. 1982) ("The marital relationship gives rise to an expectation of reliance between spouses, and to a belief that *one's spouse should be trusted to respect, rather than ignore, one's expressed preferences*. That expectation would be frustrated by imposition of a broad duty to seek aid, since one's spouse would then be forced to ignore the expectation that the preference to forego assistance will be honored." (emphasis added)).

23. People v. Beardsley, 113 N.W. 1128 (Mich. 1907).

> Had this been a case where two men under like circumstances had voluntarily gone on a debauch together, and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion. How can the fact that in this case one of the parties was a woman change the principle of law applicable to it?[24]

Unlike spousal relationships, which are both legally contractual and have culturally well-defined expectations, relationships between friends are far more varied. Whatever default rules exist for spouses do not exist for non-spouses; those norms are illegible to the law and are not enforced by it.

The parent-child relationship, by contrast, cannot be conceived as contractual. However, the law's imposition of omission liability upon parents also accords with this article's thesis. When parents bring a child into their home, whether via conception, adoption, or some other means, they exert a massive causal influence over the course of that child's life. It is no exaggeration to say that every moment in a child's life is counterfactually dependent on the parents' choice of community, the parents' child-rearing practices, and, in most cases, the parents' genetics. Simply put, parents' commissions are but-for causes of every outcome in a child's life. Accordingly, parents uniquely take on omission liability for outcomes which might befall their children.[25]

Non-parents may also take on parental responsibility and its attendant omission liability but only with some affirmative, intentional step, a commission: "the key element is one of intent—whether the adult intended to assume parental duties."[26] Put another way, proxy parents voluntarily assume omission liability by assuming parental duties. Voluntary assumption of parental duties is only one species of the wider genus examined next.

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24. *Id.* at 212–15.

25. *See, e.g.*, Commonwealth v. Howard, 402 A.2d 674, 676 (Pa. Super. Ct. 1979) ("A parent has the legal duty to protect her child, and the discharge of this duty requires affirmative performance.").

26. State v. Sherman, 266 S.W.3d 395, 406 (Tenn. 2008) (reviewing the standard developed in other jurisdictions). *Cf.* Olp v. State, 738 P.2d 1117, 1118 (Alaska Ct. App. 1987) ("At common law, stepparents were not legally charged with the support of their children. The common law did, however, recognize a duty to support in someone who stood *in loco parentis* to the child. The doctrine of *in loco parentis* covers situations where a stepparent manifests an intent to acquire the status of parenthood without formal adoption. The stepparent's intention may be expressed by acts or declaration; *in loco parentis* status is normally a question of fact to be determined by a jury." (citations omitted)); Florio v. State, 784 S.W.2d 415, 417 (Tex. Crim. App. 1990) ("[T]hese facts . . . fall short of establishing the parent-child relationship that imposes statutory duties. Appellant's status as live-in boyfriend does not provide a basis for prosecution . . . ." (citations omitted)).

C. Duties Based upon Voluntary Assumption of Care

The law recognizes two ways by which a caretaker takes on omission liability by voluntarily assuming care of another. The first involves giving notice to others. In some instances, the notice can be contractual, as when care is transferred from a preceding caretaker to the caretaker who voluntarily assumes care.[27] Voluntary assumption of care can also arise when the caretaker gives notice to the community at large.[28]

Notice is a commission which, at the very least, *can* be a but-for cause of victimizing outcomes. As one leading treatise notes, "[p]erhaps [a rescuer] would be liable [for an omission] only if his conduct in starting to go to the other's rescue *induced other prospective rescuers to forego action*."[29] Another notes that "[s]ome courts have upheld convictions where the defendant voluntarily assumed the role of caretaker . . . the classic example is someone who starts to perform a rescue, *causing others to desist*, but then abandons the effort."[30] By contracting with a legal guardian or by sending notice to the community, a caretaker can influence others to refrain from acting in the interests of the child or helpless person in question. This commission is a plausible but-for cause of the outcome, as is the caretaker's subsequent omission.

Second, a caretaker takes on omission liability, without rendering notice, by voluntarily assuming care of another when the care tends to prevent others from providing it. For instance, a caretaker can take on omission liability by voluntarily assuming care while "seclud[ing] the helpless person as to prevent others from rendering aid."[31] A would-be nurse cannot move a heat stroke victim into a shady enclave only to abandon the person without

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27. *See, e.g.*, Pope v. State, 396 A.2d 1054, 1063 (Md. 1979) ("[W]e think it to be self-evident that responsibility for supervision of a minor child may be obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility."); Cornell v. State, 32 So. 2d 610, 611–12 (Fla. 1947) ("We are unable to find any evidence in the record to sustain a finding of guilt as to the mother of the child, Emily Dyer. It is true that at the time Emily Dyer delivered the child to her mother for safekeeping, both of the parties had had several drinks of intoxicating liquor, but there is no proof that either of the defendants were in such an intoxicated condition as not to be in full possession of their normal faculties, or to appreciate the full consequences of their acts. Neither is there anything in the record to show that when the mother left the child with the grandmother she, the mother, knew or had reasonable cause to apprehend that the life of the child might thus be endangered.").

28. *See, e.g.*, State v. Gargus, 462 S.W.3d 417, 427 (Mo. Ct. App. 2013) ("Defendant . . . voluntarily assumed the care of her mother . . . a person unable to meet her physical and medical needs, by . . . representing that she was the primary caregiver for [her mother]."); State v. Wilson, 987 P.2d 1060, 1069 (Kan. 1999) ("Absent a special relationship, one generally has no legal duty to aid or care for another person; once a person steps into the role of caregiver, *such that others are discouraged or precluded from filling that role*, that person has a duty to act reasonably in fulfilling the adopted role." (emphasis added)).

29. LAFAVE, *supra* note 12, § 6.2(a)(4) (emphasis added).

30. 1 FRANCIS WHARTON, WHARTON'S CRIMINAL LAW § 4:5 (16th ed. 2021) (emphasis added).

31. Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) (citations omitted).

water! In such situations, imposition of omission liability is analogous to liability for creating peril, where preventing others from rendering aid constitutes the peril.

If the law were to impose omission liability when a caretaker has voluntarily assumed care without preventing others from rendering aid, that imposition would not accord with this article's thesis. It does appear that there is some tension between this article's thesis and the law, with one leading treatise noting that:

> [A stranger] may have no duty to pick an unconscious person off the railroad tracks as a train is approaching around the bend, yet if he once lifts him off the track, he cannot thereafter lay him down again in his original position; if he should do so, and the train should kill him, he would be criminally liable for the homicide.[32]

In this example, perhaps the first commission, lifting the unconscious person off the track, does not generate liability, but the second commission, laying the unconscious person back down on the track, does generate liability as a but-for cause of the outcome. Alternatively, one could conceive of the entire action, lifting and laying, as a single commission; on this view, the commission is clearly not a but-for cause of the outcome, at odds with this article's thesis.

D. Duties Based upon Creation of Peril

Omission liability imposed due to an actor's creation of peril is an on-the-nose endorsement of this article's thesis.[33] In such instances, an actor creates peril by some commission and subsequently acquires an affirmative duty to prevent outcomes which would not result but-for the initial commission.

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32. LAFAVE, *supra* note 12, § 6.2(a)(4).

33. *See, e.g.*, United States v. Hatatley, 130 F.3d 1399, 1406 (10th Cir. 1997); State *ex rel*. Kuntz v. Montana Thirteenth Jud. Dist. Ct., 995 P.2d 951, 956 (Mont. 2000); People v. Kibbe, 321 N.E.2d 773, 776 (N.Y. 1974). *See also* J.C. Smith, *Liability for Omissions in the Criminal Law*, 4 LEGAL STUD. 88, 94–95 (1984) ("I venture, therefore, to suggest a general principle of which *Miller* is an example: whenever the defendant's act, though without his knowledge, imperils the person, liberty or property of another, or any other interest protected by the criminal law, and the defendant becomes aware of the events creating the peril, he has a duty to take reasonable steps to prevent the peril from resulting in the harm in question.").

E. Duties of Landowners

Inviting or permitting another to come onto a landowner's land is a commission. Subsequently, the landowner may acquire omission liability when, but-for the initial commission and but-for a subsequent omission, some harm befalls the visitor. Although jurisdictions disagree about which omissions implicate criminal liability, all predicate omission liability upon a prior but-for commission.[34] Crucially, landowners are not held criminally liable when an uninvited visitor trespasses onto the land; in such situations, the landowner commits no initial commission.

F. Duties to Control Conduct of Others

An actor can take on omission liability for failing to control conduct of others. Specifically, parents have a duty to control the conduct of their children and principals have a duty to control their common-law agents.

The *Crumbley* case aside, other jurisdictions criminalize parents' failure to control their children.[35] These laws accord with the principle that a "parent not only has a duty to act affirmatively to safeguard his children, but he also has a duty to safeguard third persons from his children."[36] While these laws likely reflect lawmakers' desire to reduce crime, they also accord with this article's thesis.[37] As discussed above, parents' commissions are but-for causes of every outcome in a child's life; this is the basis of parents' omission liability for harms befalling their children. On the flip side,

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34. *Compare* Commonwealth v. Welansky, 55 N.E.2d 902, 909 (Mass. 1944) ("[W]here as in the present case there is a duty of care for the safety of business visitors invited to premises which the defendant controls, wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences to them or of their right to care." (citations omitted)) *with* State v. White, 528 A.2d 811, 821 (Conn. 1987) ("[B]ecause the defendant had no duty to install smoke detectors in his building, he cannot be convicted of criminally negligent homicide for having failed to do so." (citations omitted)).

35. *See, e.g.*, CAL. PENAL CODE § 272(a)(1)–(2) (West 2006) ("Every person who commits any act *or omits* the performance of any duty, which act or omission causes or tends to cause . . . any person under the age of 18 years to [commit a crime] . . . is guilty of a misdemeanor . . . . For purposes of this subdivision, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child." (emphasis added)). *See generally* S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123 (1991); Monu Singh Bedi, *Expanding Homicide Liability for a Parent's Omission*, CARDOZO L. REV. 133, 134 (2024).

36. LAFAVE, *supra* note 12, § 6.2(a)(6).

37. Humm, *supra* note 35, at 1124 ("Frustrated with these seemingly intractable problems, lawmakers in many localities have begun to reevaluate the inadequacies of previous approaches to juvenile delinquency and child abuse. While most past efforts to curb juvenile violence have focused on providing positive reinforcement or punishment directly to the child, there is a growing trend toward holding parents criminally liable for failing to supervise their children adequately when they commit antisocial acts. Parents who fail to protect their children from violence similarly are facing harsher laws and sanctions from the courts." (citations omitted)).

parents' commissions are also but-for causes of each action taken by their children. Thus, parents also take on omission liability for the acts of their children.

Additionally, principals have a duty to control their common-law agents and take on attendant omission liability, where agency "is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[38] A common-law agency relationship is analogous to a contractual relationship, and the justification for principals' omission liability is similar: but-for the affirmative formation of the common-law agency relationship, the outcome would not have occurred and, because the agent "act[s] on the principal's behalf and subject to the principal's control," the principal voluntarily assumes liability for the acts of the common-law agent. Omission liability for the acts of common-law agents usually manifests in employment contexts.[39]

There is another way to think of common-law agency that precludes omission liability entirely. Historically, legal theorists thought of common-law agency as predicated upon the "oneness" of the personhood of the common-law agent and the principal.[40] In this sense, legally speaking, an agent's acts are a principal's acts. Thus, an omission by the principal could be conceived of as a commission by the common-law agent, which in turn implies that an omission by the principal is actually a commission by the principal! This theory precludes omission liability for principals entirely.

G. Good Samaritan Duties

In recent years, legislatures have imposed omission liability in a wider variety of circumstances. These "Good Samaritan" laws generally fall into one of three categories: laws that impose duties to aid strangers who are victims of "acts of God" or criminal acts, laws that impose duties to report in-progress victimizing crimes, and laws that impose duties to report

38. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

39. LAFAVE, *supra* note 12, § 6.2(a)(6). *See also* Moreland v. State, 139 S.E. 77, 78 (Ga. 1927) ("Where an injury is inflicted by the use or operation of a motor vehicle upon the public highways, the owner thereof is liable to respond in damages therefor, if the vehicle was being operated by such owner or was under his control, or was in the custody or control of his agent or servant acting within the scope of his employment and for the benefit of the owner. In all cases where the owner is present, he will be responsible for injuries sustained by third persons, unless the operator disobeys instructions as the owner is in law in control of the vehicle.")

40. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 232 (1881) ("[T]he characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal.").

specific types of crimes, usually murder and sexual assault.[41] These modern statutes often do not accord with this article's thesis. The earliest of these statutes passed in the 1970s, sparking a modern deviation from the notion that the law "has not traditionally imposed a general duty to rescue" outside of admiralty law.[42] The distinction between omission liability for failing to be a "Good Samaritan" as opposed to omission liability in accordance with this article's thesis is recognized in civil law contexts.[43]

III. WHEN COURTS *SHOULD* IMPOSE OMISSION LIABILITY

At the very least, the survey above illustrates a thread of jurisprudence that assigns criminal omission liability for reasons that accord with this article's thesis: omission liability arises for a guilty-minded actor when that actor's past commissions are but-for causes of a victimizing outcome that could have been prevented but-for the actor's subsequent omissions.

The argument for this article's thesis is not merely descriptive: it is also normative. Judges *should* impose omission liability only in those instances that accord with this article's thesis.[44] To understand why, various properties of commissions and omissions require unpacking. First, however, this article will examine what role causation generally plays in criminal liability.

A. Causation & Crime

For most crimes, there must be some *actus reus* that *causes* the victimizing outcome; a non-causal *actus reus*, regardless of the *mens rea*, is

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41. David C. Biggs, *"The Good Samaritan is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, With the Modern Desire to Possess Concealed Weapons*, 22 DAYTON L. REV. 225, 231 (1997). *See also* R.I. GEN. LAWS § 11-56-1 (1984); VT. STAT. ANN. tit. 12, § 519 (1968); WIS. STAT. ANN. § 940.34(2) (West 2025); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2025); OHIO REV. CODE ANN. § 2921.22(A) (West 2025); WASH. REV. CODE ANN. § 9.69.100 (West 2025); FLA. STAT. ANN. § 794.027 (West 2025); R.I. GEN. LAWS § 11-37-3.1 (1983).

42. LAFAVE, *supra* note 12, § 6.2(a); Robinson, *supra* note 16, at 117; Jeffrey Maltzman & Mona Ehrenreich, *The Seafarer's Ancient Duty to Rescue and Modern Attempts to Regulate and Criminalize the Good Samaritan*, 89 TUL. L. REV. 1267, 1268 (2015).

43. Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 NEW CRIM. L. REV. 452, 452–53 (2008) ("According to the prevailing theory in continental European and Latin American legal literature, there are two kinds of punishable omissions: the simple (or 'authentic,' 'genuine') omission and the 'inauthentic' or 'pseudo' omission (also known as commission by omission, *comisión por omisión*). A simple omission is a violation of the duty to aid others in an emergency or a breach of the general duty to either prevent or report an imminent crime . . . . In contrast, crimes of inauthentic omission take place when an individual who has not averted a criminal harm (e.g., the death of another) is charged for the harmful result as if he or she had caused it by affirmative conduct (e.g., homicide by omission).").

44. *Contra* Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993).

insufficient.[45] The obvious exceptions are the inchoate crimes, including attempt, conspiracy, incitement, and solicitation. None of the inchoate crimes cause any victimizing outcome, by definition, yet they still generate criminal liability. It is worth noting, as an aside, that liability for inchoate crimes may not be limited to circumstances in which the *actus reus* is a commission.[46]

Following the general truth that some *actus reus* causing some victimizing outcome is essential for criminal liability, this article takes for granted that some notion of cause is essential to what constitutes a crime. Commissions and omissions constitute the two flavors of cause, the dyad of causal primitives. Investigating the differences between commissions and omissions, and arguing why this article's thesis is normatively correct, requires multiple steps. First, this article will examine commissions and omissions in isolation: why, in isolation, should commissions yield criminal liability but omissions should not? For ease of reference, call this the "asymmetry problem." Second, this article will examine commissions and omissions in combination: why, subsequent to a commission but not in isolation, should an omission yield criminal liability? For ease of reference, call this the "combination problem."

B. The Asymmetry Problem

One more time now, the asymmetry problem: why, in isolation, should commissions yield criminal liability but omissions should not? This question gets to the heart of the differences between commissions and

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45. James Edwards, *Theories of Criminal Law* § 5.2, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sep. 21, 2021), https://plato.stanford.edu/archives/fall2021/entries/criminal-law/ ("Whether or not *mens rea* should be necessary for criminal responsibility, it is rarely claimed that it should be sufficient. The widespread belief that we should not countenance thought crimes, leads most writers to claim that there should be an *actus reus* element to each criminal offence. Paradigmatically, this element is satisfied only if *D* acts in a way that causes some outcome, such as death, or property damage, or fear of violence.").

46. Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1207 (2009) ("In addition to requiring subjective culpability, criminal offenses typically involve two objective features: action and harm . . . . The absolute floor for a criminal *actus reus*, then, would be defined by the intersection of these two sets of rules. The prospect of liability for 'inchoate omissions'—involving no act and no harm—exists at the frontier of the state's authority to criminalize conduct and, whether allowed or rejected, effectively determines the outer boundaries of that authority. Accordingly, inchoate-omission liability raises fundamental issues about the nature and proper scope of criminal law. This Article considers those issues, asking whether criminal punishment for harmless inaction is legally possible, empirically observable, or normatively desirable and, perhaps surprisingly, answering all three of these questions in the affirmative. However unlikely or dubious the legal math may seem, it turns out that zero action plus zero harm can, does, and sometimes should add up to a crime.").

omissions, differences which have bedeviled generations of legal scholars and practitioners.[47]

1. The Physical Causation Angle

The law speaks of but-for causes which, as discussed above, describe a relationship between events and outcomes in which events are but-for causes of outcomes when, but for the event, the outcome would not have occurred. In addition to but-for causation, there is another type of cause-in-fact: physical causation. Physical causation is, as the name implies, causation as studied in the physical sciences. An event is a physical cause of an outcome if the event involves the exertion of fundamental forces that explain the outcome in accordance with known scientific laws. Physical causes, unlike but-for causes, do not rely on counterfactuals. Physical causation is a purely empirical phenomenon which occurs in this reality and does not require reference to counterfactual worlds. Some leading scholars believe that physical causes and legal causes are one and the same.[48]

To illuminate the difference between physical causes and but-for causes, consider an example from criminal law: a violent assault including an attacker, a victim, and a bystander. Punching the victim, an act committed by the attacker, is a physical cause of the outcome, the victim's broken nose. Punching the victim is also a but-for cause of the victim's broken nose: but for punching the victim, the victim's nose would not be broken. Witnessing the violent assault, a commission by the bystander, is also an omission: the bystander failed to prevent the violent assault. While witnessing the violent assault, considered as a failure to prevent the violent assault, is a but-for cause of the victim's broken nose, witnessing the violent assault is not a physical cause of the victim's broken nose. Witnessing the violent assault did not exert fundamental forces in a way that affected the outcome and does not explain the victim's broken nose in accordance with known scientific laws. The example illustrates a general rule: both commissions and omissions can be but-for causes of outcomes but only commissions can be physical causes of outcomes.

In fact, in isolation, commissions are always physical causes of outcomes but are only sometimes but-for causes of outcomes. The imposition of criminal liability for commissions is not limited to those

47. Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 627 (1958) ("Even where a duty to act is clearly recognized by express provision of law, resulting liability for homicide through subsequent death is traditionally plagued by the question of causation. This was a topic which much troubled the German jurists of the nineteenth century.").

48. *See, e.g.*, MOORE, *supra* note 13, at vii ("The central idea . . . is that causation as a prerequisite to legal liability is intimately related to causation as a natural relation lying at the heart of scientific explanation.").

commissions which are both physical and but-for causes of victimizing outcomes; rather, criminal liability is regularly assigned when commissions are physical causes but not but-for causes.[49] Omissions, on the other hand, cannot be physical causes. By their nature, omissions do not exert fundamental forces.

There are compelling reasons for a criminal regime to impose liability on bases other than but-for causation. Consider one example of an "overdetermined" outcome: suppose that a debtor owes debts to multiple organized crime syndicates who have placed bounties on his head.[50] It may be the case that, even though one of the syndicates eventually finds and kills the debtor, the finding and killing is not a but-for cause of the debtor's demise. One can imagine that, had the first syndicate not found the debtor, the other syndicate would have done so. Thus, the murder of the debtor by the first syndicate is not a but-for cause of the debtor's death; rather, the first syndicate's actions are mere physical causes of the debtor's death. In such cases, it is easy to imagine a criminal regime, like ours, imposing liability upon the first syndicate despite its actions not being but-for causes of the outcome. In fact, courts have explicitly endorsed such reasoning.[51] If courts steadfastly refused to accept physical causes as causes-in-fact and only accepted but-for causes as causes-in-fact, then the first syndicate could only be charged with an inchoate crime, such as attempted murder, as the *actus reus* was not a but-for cause of the outcome. This would be absurd.

There may be other instances when an actor's commission is the physical cause of an outcome but not a but-for cause of the outcome for which a criminal regime does *not* want to assign liability. For example, suppose that during World War II a humanitarian took a job with the Gestapo, whose employees are regularly charged with torturing and murdering enemies of the Nazi state, for the purpose of minimizing the pain of the torture and the number of lives lost.[52] As the Nazi state would have hired some jackboot if the humanitarian had not taken the job, the humanitarian's actions are physical causes, not but-for causes, of whatever torture and murder is undertaken. Perhaps in such situations, the humanitarian can be rescued

49. *See, e.g.*, State *ex rel.* Attorney General v. Tally, 15 So. 722, 738–39 (Ala. 1894).

50. *See* MOORE, *supra* note 13, at 85–108 (summarizing the overdetermination problem and its variants).

51. *Tally*, 15 So. at 738–39 ("The assistance given, however, *need not contribute to the criminal result in the sense that but for it the result would not have ensued*. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it." (emphasis added)).

52. *See* Frances Howard-Snyder, *Doing vs. Allowing Harm*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 21, 2002), https://plato.stanford.edu/archives/sum2002/entries/doing-allowing (inspiring the present example).

from punishment not because the *actus reus* is causally insufficient, but rather because the humanitarian lacks the requisite *mens rea*: the harm was caused, reluctantly and in a minimized way, paradoxically, for the benefit of the harmed parties.

A parallel example for omissions, wherein an act is a physical cause but not a but-for cause, cannot be concocted. Omissions on their own can only be but-for causes of outcomes. It is worth noting, as an aside, that not *all* omissions are necessarily but-for causes.[53]

To summarize: commissions are always physical causes but are only sometimes but-for causes whereas omissions are sometimes but-for causes but are never physical causes. Visually, these differences can be schematized like so:[54]

Physical Causes		**Not Physical Causes**
Some Commissions	Some Commissions	Some Omissions
Not But-For Causes	**But-For Causes**	

If this article's thesis is justified, it may be because commissions, as physical causes, have some property that omissions do not have. One such candidate is that it is possible to identify committing actors as part of a

53. Yuval Abrams, *Omissive Overdetermination: Why the Act-Omission Distinction Makes a Difference for Causal Analysis*, 49 U.W. AUSTL. L. REV. 57, 58–59 (2022) ("Questions of omissive overdetermination have long bedeviled courts and commentators. They involve two omissions, each sufficient, and neither, independently, necessary for the harm. Similarly structured scenarios to Saunders, upon which the opening paragraph is based, are legion: a drug company or a manufacturer fails to properly warn of the risks of a drug or product while the doctor or installer fails to consult the poorly worded warning label on a drug or a product; a hospital performs a vaginal delivery on a patient, whose previous caesarean section puts the baby at risk, a fact which the first hospital failed to file in the medical records that the second hospital failed to request. In these cases, more than one party wrongfully omitted. In other cases, only one party wrongfully omitted, but, in order to determine whether the omission mattered, courts ask whether the second party, too, would have omitted nonetheless. For example, when a passenger drowned after falling overboard from a ship that was not equipped with a life preserver (would the preserver actually have been used?); when an inebriated victim was injured falling down an insufficiently lit staircase or slept through a fire alarm in a burning building with no fire-escape (would better lighting or a fire escape have made a difference?). In failure to warn cases, would the warning have been heeded? A straightforward application of the but-for test leads to the awkward conclusion that neither omitter caused the harm, since neither omission was necessary: in neither case is it true that the harm would have been prevented had the defendant done his duty." (citations omitted)).

54. *See also* MOORE, *supra* note 14, at 426–27 ("To probe this independent role of counterfactual dependence as a desert-determiner it will be helpful to distinguish four sorts of cases in which some actor D does or fails to do some act A, and some victim V suffers some harm H: 1. A causes H but H does not counterfactually depend on A. 2. H counterfactually depends on A but A does not cause H. 3. H does not counterfactually depend on A, and A does not cause H. 4. H counterfactually depends on A, and A causes H.") (using "cause" as this article uses "physical cause" and using "counterfactually depend on" as this article uses "but-for cause").

physical causal chain involving the exertion of fundamental forces whereas omitting actors cannot be so identified. For every outcome, a chain tracing the exertion of fundamental forces from the outcome to a causal event leads to some commission by a committing actor. The same cannot be said of any omissions by the actor: the traced chain would never lead to the omitting actor as there is no relation forged by the exertion of fundamental forces between the omitting actor and the outcome. Omitting actors are not part of the physical causal chain leading to the victimizing outcome and, further, their actions possess no explanatory power for the outcome in accordance with known scientific laws.

A second candidate distinguishing commissions from omissions concerns uncertainty intrinsic to imagined counterfactual worlds.[55] Imposing commission liability on an actor, when the commission at hand was a physical cause of an outcome, does not require the imagining of counterfactual worlds. By contrast, imposing commission liability or omission liability on an actor, when the act at hand was a but-for cause of an outcome, does require the imagining of counterfactual worlds. In some cases, it may be clear what the counterfactual world would have been, but in others, it may be very difficult to determine what the counterfactual world would have been. Thus, differences in causal determinability could provide a basis for considering commissions, rather than omissions, as those acts which generate criminal liability.[56] Alternatively, the mere fact that commissions, and not omissions, do not require the imagining of non-realities could serve as a sufficiently distinguishing property.

2. The But-For Causation Angle

Setting the notion of physical causation aside and leaning solely on but-for causation, there are still reasons to believe that criminal liability for omissions in isolation presents insurmountable problems. As discussed above, every commission carries with it an unfathomable multitude of omissions. Consider an earlier example: it is entirely plausible that an actor's failure to donate to the local soup kitchen is a but-for cause of an indigent's death by starvation. Consider further that failure to donate

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55. David Fair, *Causation and the Flow of Energy*, 14 ERKENNTNIS 219, 246 (1979) ("Omissions are non-occurrences. . . . [B]eing only possible, non-occurrences cannot be the sources or sinks of actual energy-momentum. To give a theory of causation between omissions, we need to consider possible alternatives to actual states of affairs.").

56. *See also* William Wilson, *Murder by Omission: Some Observations on a Mismatch between the General and Special Parts*, 13 NEW CRIM. L. REV. 1, 22 (2010) (arguing that an omission's "looser causal nexus" to an outcome should be offset by a "stricter fault element" in order to "generate[] a presumption that the omission was causally effective").

malaria nets to vulnerable populations may be a but-for cause of a child's early demise.

Accepting omission liability writ large severely constrains freedom. It is not clear whether broadening omission liability is workable without accepting a utilitarian moral calculus that considers actions as "net" good or bad. A utilitarian criminal law that treats omissions as causes could, for instance, impose criminal liability only for any deviation from optimally lifesaving or charitable activity. However, utilitarian moral commitments seem to cut against the law's treatment of persons as individuals rather than as mere repositories of utility, however defined. Without the saving balm of utilitarian commitments, even virtuous behavior, like saving a person's life, is suspect: saving one means failing to save another. In a world where omissions are treated as legal causes-in-fact, an actor can fulfill the *actus reus* for a multitude of heinous crimes even when the commission at hand is socially desirable. Perversely, said actor can further take on risk of criminal liability through the acquisition of knowledge about the world, such as knowledge about the cheap efficacy of malaria nets, which can supply the requisite *mens rea* for various crimes. With both *actus reus* and *mens rea* established, the crux of criminal liability is in place. While acquisition of knowledge can also make it easier for an actor to satisfy the requisite *mens rea* for crimes of commission, the scope of liability-inducing criminal commissions is small enough that any concerns over workability are relatively trivial; not so in the context of omissions.

Under a view that accepts omissions as per se causes-in-fact, given the ease with which the *actus reus* and *mens rea* can be fulfilled for even the most serious crimes, the "additional causal requirements imposed by law" for omission liability are hugely important. These additional causal requirements are the only way to restrict the suddenly massive scope of actions that entail criminal liability. However, by imposing additional causal requirements by law, omissions become causes-in-law rather than causes-in-fact: omissions as causes become artificially limited, socially constructed, such that they do not reflect a metaphysical or empirical reality but merely reflect a social one![57] The Good Samaritan duties discussed above exemplify a social construction of causation.

Constraining omission liability in this manner, even for socially desirable reasons, goes against the nature of the cause-in-fact requirement of criminal liability. Either a plethora of seemingly innocuous actions, as omissions of other actions, can generate criminal liability or the *actus reus*

57. Charles E. Carpenter, *Proximate Cause*, 15 S. CAL. L. REV. 427, 428 (1942) ("[P]roximate cause is merely a delimitation of actual cause and can not exist without the latter.").

requirement should be limited to chains of causation set in motion by actors' commissions.

3. The Physical & But-For Causation Angle

There is an important unstated assumption in the prior discussion of but-for causation. This assumption involves the scope of the world in which but-for causes occur. In the organized crime syndicate example discussed above, the first syndicate's murder of the debtor was not a but-for cause of the debtor's death because the second syndicate was waiting in the wings to commit the same act. Yet, we could imagine a world smaller in scope than the entire world, consisting only of the first syndicate and the debtor while ignoring the rest of the world. In this new smaller world, the first syndicate's murder was a but-for cause of the debtor's death because the second syndicate was outside the smaller world entirely; it was as if the second syndicate did not exist.

One motivation for constricting the scope of the world accords with the purpose of the trial in an adversarial system: to reach the right answers. To achieve this goal, the rules of evidence limit the introduction of information, even truthful information, which may lead fact-finders astray.[58] Constricting the scope of the world considered may serve the same ends by the same means.

Another related motivation for constricting the scope of the world involves the uncertainty of how relevant actors behaved or would have behaved; as previously discussed, counterfactual worlds contain intrinsic uncertainty. In the organized crime syndicate example, it is hard to know whether the second syndicate would have attempted to go through with the murder and, even if it had, if it would have been successful. Constructing counterfactuals for the entire world is much, much harder than constructing counterfactuals for smaller worlds whose actors are readily identifiable and which contain fewer variables. At minimum, one could say that an actor whose actions constitute the physical cause of an outcome is at least responsible for the difference between the probability of the outcome given the actor's actions (100%) and the probability of the outcome if the actor had not caused the outcome (less than 100%). This difference serves as a

58. GEORGE FISHER, EVIDENCE 1 (4th ed. 2022) ("Why should we limit the information juries hear? Some reasons are clear enough . . . [but] [t]he great majority of evidence rules, however, serve a more elusive goal. That goal has something to do with achieving, at trial, the right result. We want juries to return the right verdict, and by that we may mean the truthful verdict, the one that accords with what happened.").

sort of probabilistic but-for cause. Variants of this idea have been endorsed by the courts, to greater and lesser effect.[59]

If one accepts that the scope of the world should be constricted when considering but-for causation, a question still remains: what should the constricted scope *be*? Consider again the violent assault with which this article introduced the distinction between physical causation and but-for causation. The smallest possible scope that still includes all necessaries of physical causation includes only the victim and the perpetrator, where the perpetrator's commission is both a physical cause and a but-for cause of the outcome. Another scope includes the victim, the perpetrator, and the bystander, where both the perpetrator's commission and the bystander's omission are but-for causes of the outcome. This second scope is analogous to a third scope including the victim, the perpetrator, the bystander, and some fourth party whose omission is also a but-for cause of the outcome. There is not an obvious *causal* reason why the scope should include the bystander but not this fourth party, even though the bystander obviously has other properties, like a knowledgeable mental state, that the fourth party lacks.

It does not seem that *any* possible scope can exclude the victim or the perpetrator and still capture the outcome that occurred. It also seems that there is no causal reason to include some omissions, which are but-for causes of the outcome, but not others within the scope of the world. Thus, by constricting the scope of the world in a causally principled way, physical causes and but-for causes become one and the same.

C. The Combination Problem

Whatever the angle, there are ample reasons, both metaphysical and practical, to, in isolation, impose criminal liability for commissions but not omissions. However, this conclusion does not address the combination problem: why, subsequent to an initial commission, but not in isolation, should omissions generate criminal liability?

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59. *See, e.g.*, Brackett v. Peters, 11 F.3d 78, 79 (7th Cir. 1993) ("So far as bears on this case, an act is a cause of an event if two conditions are satisfied: the event would not have occurred without the act; *the act made the event more likely*. The first condition is necessary to distinguish the attempted from the completed crime, the second to rule out cases in which, while the event in question would not have occurred but for the act, the act did not create the kind of dangerous condition that would make such events more likely to occur. Suppose, for example, that Mrs. Winslow had been killed by a fire at the nursing home. She would not have been in the nursing home (in all likelihood), so would not have been killed, but for Brackett's assault. But as there would have been no greater danger of fire in a nursing home than in her own home, in our hypothetical case the assault would not have placed her in a situation of danger and therefore would not be considered a cause of her death." (emphasis added) (citations omitted)).

Consider the situations discussed above in which courts impose omission liability. In most, though not all, instances, omission liability arises when an actor's prior commissions are causes-in-fact of a victimizing outcome. As also discussed above, in isolation, an omission is insufficient to serve as a cause-in-fact of the outcome. Now recall that criminal liability involves both an *actus reus* and a *mens rea*. At the time of the initial commission, prior to the subsequent omission, there is little reason to believe that an actor has the requisite *mens rea* to generate criminal liability. A sea captain contracting with seafarers likely wishes his voyagers safe passage. A concerned paramedic shepherding an injured person away from hubbub likely hopes to heal the person's wounds. Even an actor who creates peril for another may do so negligently rather than maliciously. In short, at the time of the initial commission, there is insufficient reason to believe that an actor has a criminal *mens rea*. Even if one suspected bad intent, proof would be hard to muster.

Perhaps omissions subsequent to an initial commission provide *post hoc* evidence of an actor's mental state during the initial commission. However, this approach to criminal liability conflicts with the doctrine of concurrence:

> [I]t is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur. Although it is sometimes assumed that there cannot be such concurrence unless the mental and physical aspects exist at precisely the same moment of time, the better view is that there is concurrence when the defendant's mental state actuates the physical conduct. That is, mere coincidence in point of time is not necessarily sufficient, while the lack of such unity is not necessarily a bar to conviction.[60]

Moreover:

> The easiest cases are those in which the bad state of mind follows the physical conduct, for here it is obvious that the subsequent mental state is in no sense legally related to the prior acts or omissions of the defendant.[61]

This fundamental doctrine poses a serious problem for this article's thesis: the temporal ordering of causal *actus reus*, the initial commission, and the culpable *mens rea*, which actuates the subsequent omission, is all

60. LAFAVE, *supra* note 12, § 6.3(a).
61. *Id.*

backwards. To put a point on it: "crimes committed by conduct in the form of omission to act . . . the state of mind must concur with the conduct."[62]

1. The Continuing Omission Angle

Recall that each commission corresponds to a multitude of omissions: every time that Tom Brady throws a touchdown pass, he fails to eat a sandwich, dance the Macarena, or advance the state of rocket science. It is also the case that each omission *can* correspond to a multitude of commissions but *actually* corresponds to exactly one commission. For instance, in the abstract, Tom Brady can fail to eat a sandwich in myriad ways: yes, he can throw a touchdown pass, but he can also film advertisements for Uggs or divorce his supermodel wife. Yet, in reality, Tom Brady failed to eat a sandwich by throwing a touchdown pass. The commission, throwing a touchdown pass, is the way in which Tom Brady failed to eat a sandwich. Collectively, then, each act is both an act of a single commission and an act of many omissions.

An *actus reus* should be thought of in this way, as both commission and omission. In fact, a single *actus reus* can yield both commission liability and omission liability. Imagine a situation in which, on a bustling city street, an actor trips and knocks a bystander into traffic. The actor, falsely believing that he has been pushed, ignores the bystander and physically retaliates against an innocent passerby. The *actus reus* yields both commission liability, for physically retaliating against the innocent passerby, and omission liability, for failing to rescue the bystander. Thus, while only certain facets of an *actus reus* may generate liability, the *actus reus* as a whole is multi-faceted.

Building upon the example above, consider creation of peril in the abstract. When an actor creates peril for a victim, there is at least one moment in time in which the actor both creates peril for the victim and simultaneously fails to rescue the victim. This moment's existence can be attributed to the fact that creating peril is a temporally extended action which, at least in theory, the actor could have terminated a moment sooner in order to commence a rescue. This compound act, in which a commission creates the peril and an omission fails to rescue, is the *actus reus*. At some later moment, while still failing to rescue the victim, the actor evinces the requisite *mens rea* to generate omission liability. An ongoing omission, failing to rescue the victim, stretches through time from the moment of the *actus reus* to the moment of the *mens rea* like a sort of intertemporal metaphysical glue connecting the two. Similar explanations exist for the

62. *Id.*

other situations in which the law imposes omission liability, excluding the imposition of Good Samaritan duties.

The "intertemporal metaphysical glue" of an ongoing omission evokes the doctrine of continuation: criminal liability can be imposed when "physical conduct . . . begin[s] first but continue[s] until the requisite state of mind occurs."[63] Typically, this doctrine deals with ongoing commissions. Consider, for example, a car driver who starts his morning commute without noticing that the neighbor's dog has been leashed to the rear fender. The driver would not be criminally liable for animal abuse if he is unaware that the dog is affixed to his vehicle; yet, as soon as he becomes cognizant of this fact, any continued driving he undertakes is doubtlessly criminal.

A parallel doctrine for omissions would account for the unique way in which a causal *actus reus* necessarily precedes a guilty *mens rea*. Under this hypothetical parallel doctrine, the "physical conduct" begins with the *actus reus*, an act which, simultaneously, causes the outcome and fails to prevent the outcome. The failure to prevent the outcome is an ongoing omission which continues from the moment of the *actus reus* at least until the moment of the *mens rea*. In other words, the *actus reus* "continues" through an omission instead of through a commission. When the *mens rea* occurs, criminal liability arises. Voila: a doctrine of continuation for omissions.

2. The Continuing Commission Angle

Alternatively, one can imagine that, instead of ongoing omissions, ongoing commissions connect the *actus reus* to the *mens rea*; this is the vanilla version of the doctrine of continuation. For contracts, the act "insufficient performance of the contract" continues from the initial commission, the signing of the contract, through the culpable *mens rea*. For non-contractual relationships like those between parent and child, the act "harming the child" continues from the initial commission, procreation. For voluntary assumption of care, the act "preventing a victim from receiving care" continues from the initial commission, notice to the community or seclusion of the victim. For landowners, the act "ill-advised permission to trespass" continues from the initial commission, granting permission. For controlling conduct of others, the act "empowering another to cause harm" continues from the initial commission, either the procreation of a child or the formation of an agency relationship.

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63. *Id.* § 6.3(a) n.5. *See also* Smith, *supra* note 33, at 100 ("Where we have a true continuing act, it should obviously be sufficient that the defendant forms the *mens rea* at any time during the continuance of the act.").

These broad acts are meant to be construed as stretching through time from the initial causal commission through the manifestation of the requisite *mens rea*. Once the *mens rea* is reached, if the actor has continued to perform, then criminal liability arises. Note that this approach formally eliminates omission liability entirely.

Two categories of omission liability would be lost entirely under this approach. Good Samaritan duties are out-of-step with this article's thesis anyway, but it is also hard to imagine that, under this approach, liability for creation of peril would survive in the criminal context. Often, peril is created via some initial act without requisite *mens rea*, like accidentally knocking someone into a swimming pool. Under today's doctrine, when the actor fails to rescue the victim, liability is imposed. It does not appear that any continuing commission connects the initial act to the subsequent *mens rea*; it is not as though the actor is *continuing* to create the peril. Such cases would, under this approach, become the exclusive province of torts.

There is some sense in channeling creation of peril into the realm of torts precisely because the initial commission lacks the *mens rea* to constitute criminal activity. As the law currently stands, setting aside Good Samaritan duties, creation of the peril is the *only* circumstance for which courts impose omission liability and for which the court is agnostic about the mental state actuating the initial commission.

3. The Inchoate Crime Angle

If there is no way to connect the *actus reus* with the *mens rea*, then there is still one tool available to preserve criminal liability for omissions: the existence of inchoate crimes. Courts could recognize that omissions should not be treated as causes-in-fact while still imposing criminal liability in those situations that accord with this article's thesis. This approach is not particularly satisfying but preserves this article's thesis while holding actors liable for serious breaches of affirmative duties.

CONCLUSION

This article laid out the following thesis: an actor's omission liability for an outcome does arise, legally, and should arise, normatively, as a consequence of the actor's prior commissions, wherein those commissions are causes-in-fact of the outcome. This thesis accords with the vast majority of existing impositions of criminal omission liability by courts. Moreover, there are inescapable metaphysical and normative problems that result when omissions, in isolation, are treated as causes-in-fact. While the treatment of omissions as non-causes poses some problems for situations in which

omission liability is currently imposed, various doctrinally informed approaches could still preserve liability.

To conclude, a final word on the Crumbleys: as the court rightly noted, "but for defendants' . . . failure to properly secure the gun . . . these murders would not have occurred that day."[64] This omission alone, however, is not enough: the antecedent commission, the Crumbleys' "decision to purchase their mentally disturbed son a handgun," is what makes the omission criminal.[65]

Without further data, one can only speculate whether the *Crumbley* case's seeming expansion of criminal omission liability will be for good or for ill. Setting these to-be-determined empirical questions aside, this article aims to offer a coherent theory of criminal omission liability which, while concurring with the causal judgment in *Crumbley*, sets strict limits on how far omission liability can extend. "[I]t is better that ten guilty persons escape, than that one innocent suffer."[66] Imposing omission liability only when a prior commission causes a victimizing outcome may thread this needle; after all, it is already the principle that our law practices.

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64. People v. Crumbley, 11 N.W.3d 576, 591–92 (Mich. Ct. App. 2023).
65. *Id.* at 591.
66. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *352 (1769).