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ESSAY

AN ESSAY ON CRIMINAL LIABILITY FOR DUTYLESS OMISSIONS THAT CAUSE RESULTS*

Daniel L. Rotenberg†

INTRODUCTION

Once upon a time, some courts and some analysts thought that an omission could not satisfy the causation requirement for a result crime. How can a person cause anything by doing nothing? Today, this fable has been put to rest. There remains, however, the view that act and omission are not the same, and that for omission to cause, there must be a "duty" to act legally imposed on the individual. I discuss in this essay a way that act and omission can be considered that would lay to rest, along with its mother fable, the requirement of duty.

CONDUCT

Before getting into causation, it may be helpful to equate act and omission as they co-exist under the principle of conduct. Criminal law doctrine posits that a crime requires that an offender engage in conduct. This can be done by either an act or an omission. These are comparable; and an equation can be made that gives to each, two elements that are almost identical. For act, there must be a "voluntary act." To avoid defining act by reference to act, I shall change act to "behavior." What is required are the two elements "voluntary" and "behavior." However voluntary is defined, and it is an elusive quality,

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it focuses on the offender's mental capacity to do something. Without the "will" or the "ability to control" the apparent doing is not the offender's "act." The second element must be satisfied as well. The offender must "behave." This is usually present, but if a person is physically handicapped and cannot move, then being moved by another person or a natural phenomenon would not constitute moving or doing or, to use the word of preference in this essay, behavior.

Now consider omission. Must there be the "voluntary" element? Clearly yes. Without mental capacity the inaction cannot be said to be the offender's. Packaging act and omission together, both require a mental ability to control behavior—otherwise the action, on the one hand, or the inaction, on the other, does not really attach to or emanate from the offender. They only appear to be connected.

The second element for omission, the "non-behavior," is what has presented the difficulty for analysts because obviously behavior and non-behavior are not identical. Two substitutes have been proposed: duty and physical capability. Concerning duty, the analysis states that there is no conduct by omission unless a duty to behave recognized by the criminal law has been violated. This duty may be created by the criminal law. Often, however, it is created by reference to civil law, contract, status, or even the omitter's prior behavior, and then it is given recognition by the criminal law. But duty as an equivalent to behavior seems to be a mismatch because the role of behavior under the principle of conduct is too modest to be equated with the role played by duty. An explanation may be helpful.

The principle of conduct is a basic concept that goes to the issue of whether the individual is functioning normally both mentally and physically. If she is, then the system may continue its inquiry to see if the individual is responsible for a crime. If not, the inquiry stops right there. Conduct is, thus, a dot—not a directional line. Duty enters the picture after the individual has been found to be normal—that the individual can both mentally and physically behave—and relates to the policy of whether the system wants to connect the individual to the crime. It is a directional line of significance. Physical capability, on the other hand, is a closer match. The physical capability to behave for omission can almost be equated with behavior of act. If behavior were treated as merely the manifes-

tation of physical capability, then a perfect equation would result: both act and omission would require the same two elements—mental capacity and physical capability. In effect, therefore, the principle of conduct would change into the principle of potentiality. Although this approach reduces the significance of act for "conduct" purposes, it does not automatically affect its importance for other purposes, especially its role in determining causation. This brings us to that subject.

CAUSATION

When the law concludes that a person has caused a certain result, it is not referring to mechanical causation. Rather, it is referring to policy. Is the individual responsible enough for the result that it is sensible to hold her criminally liable? Although the basic inquiry in act or omission concerns fact or "but for" causation, this is satisfied so readily that it is not a useful way to resolve causation. Consider this scenario. By pushing an elevator button in an office building, a person can blow up an adjoining building; at another elevator by not pushing a similar button, a person can blow up a different building. The usual analysis would have the pusher the cause of the explosion even though not aware of the consequence and the omitter not the cause, even though in both cases the "but for" requirement is satisfied. For the omitter to be the cause, she would need to have a duty and have it activated by the facts. That is, she would have to appreciate the situation. I contend that too little is required for the pusher and too much for the omitter. This point becomes clearer in the context of a strict liability crime where there is no mens rea as an essential aid in the analysis.

To hold the button pusher liable for the explosion based on an unknowing, innocuous push seems absurd. It ignores the prior contribution of those who set up the scheme as well as the laws of nature—such as physics and chemistry that combine with the push to achieve the result. A person is not an island, so to speak, when it comes to causing a result. At the other elevator it seems equally absurd to say that the omitter who has knowledge that by failing to push an elevator button a building will explode has not caused the result—unless a legal duty to behave can be imposed. Because act and omission can

be so close factually, it seems sensible to make them close legally. This can be done if we take an idea from omission and insert it into act analysis and, at the same time, take another idea from omission and delete it from omission analysis.

The concept that an omitter is not the cause of anything unless sufficiently aware of the facts to have a duty activated—a mother is not the cause of her son's drowning although only the abstract duty to prevent it exists until the mother knows that her son is in danger and the mother's duty, thus, comes alive—should also be applied to act. A pusher of an elevator button should not be the cause of an explosion unless she knows the facts that connect the pushing with the explosion. This change would alter the analysis under strict liability—for the better. It would not change mens rea analysis. At the same time duty should be eliminated as a requirement for omission causation. By doing away with it, each, the pusher and the non-pusher, is the cause of the explosion if each knew that the touching or non-touching would produce the harm. If this change is unsatisfactory it is the fault of strict liability and not causation.

In the final analysis, what clarifies and justifies the change is that, although both pusher and omitter are considered to be the cause of the explosions, they are not criminally liable unless they have the essential mens rea. There is even less reason to treat the actor and the omitter differently when it is appreciated that mens rea is, or should be, the basic fault ingredient. If, thus, the actor or the omitter each acts or omits with knowledge of the facts as well as the appropriate mens rea, and the proscribed result occurs, then each is liable.

Duty is no longer required. It is not needed either to identify which omitters should be held liable or which ones should not be. The other elements should be sufficient. Not so fast. If symmetry is important because lack of it suggests faulty analysis—which in this instance translates into weak comparable—why not keep duty and apply it to not only omissions but acts as well? A current and repetitive fact pattern has prompted some observers to make the equation in the life support context. A seriously injured person is in need of extraordinary life support assistance. In one instance, the physicians do not use the equipment and the patient dies; in the other, the physicians do use it but later pull the plug and the

patient dies. In the omission instance the doctors are not the cause of death unless a duty to act is found; in the act case the doctors are the cause. The argument is made that the law should require a duty for the act crime as well as the omission and thus find in both cases no causal connection. This brings to mind a modern business practice of promoting an incompetent manager instead of firing him. The better reason for exonerating the acting or omitting doctors is to recognize and validate what they have causally done. The law should acknowledge that they have caused the death—even with a mens rea of purpose or knowledge—but give them a defense based on the policy of justification. Better to openly admit the policy than obfuscate it under the shroud of duty.

CONCLUSION

With duty eliminated from omission analysis to satisfy either conduct or causation and rejected as an addition to act causation, there is nothing left but to lay duty to rest.