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## **Attempt by Omission**

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# Attempt by Omission

Michael T. Cahill\*

*ABSTRACT: In addition to requiring subjective culpability, criminal offenses typically involve two objective features: action and harm. In the paradigmatic case, both features are present, but criminal law also allows for liability where either of them is absent. Rules governing omission liability enable punishment where the offender performs no act, while rules defining inchoate crimes (such as attempt) impose liability where the offender causes no harm. In different ways, these two sets of rules establish the minimum threshold of objective conduct—to use the classic term, the minimum actus reus—required for criminal liability.*

*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.*

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## I. INTRODUCTION

In addition to requiring subjective culpability, crimes typically involve two objective features: action and harm.<sup>1</sup> In the paradigmatic case, both features are present, as where the act of firing a gun<sup>2</sup> leads to the harm of a person's death. Yet criminal law also has special rules enabling liability where either of these features is absent. Rules governing omission liability enable punishment where the offender performs no act.<sup>3</sup> Inchoate crimes, typified by attempt, impose liability where the offender causes no harm.<sup>4</sup> In different ways, these two sets of rules establish the minimum threshold of objective conduct—to use the classic term, the minimum “actus reus”—required for criminal liability.

The absolute floor for a criminal actus reus, then, should be defined by the intersection of these two sets of rules. Liability for what this Article alternatively calls “inchoate omissions” or, perhaps more to the point, “harmless inaction” would set the outer parameters of the state's criminalization authority, at least in terms of objective or conduct-related aspects (as opposed to culpability-related aspects) of crime.<sup>5</sup>

1. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01[A], at 85 (5th ed. 2009) (noting that the actus reus, or “physical or external portion of the crime[,] . . . generally includes three ingredients[,] . . . consist[ing] of (1) a voluntary act; (2) that causes; (3) social harm” (footnote omitted)); WAYNE R. LAFAVE, CRIMINAL LAW § 1.2(b), at 10 (4th ed. 2003) (noting that “basic premises” of criminal law include “the requirement of an act” and the sense that “only harmful conduct should be made criminal”).

2. Whether and when common descriptions such as “firing a gun” capture one or more individual acts, or differing species of acts, are matters of considerable philosophical debate. For a thorough discussion of the theory of action and its implications for criminal law, see generally MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993). Because the focus of this Article is on omission liability, this debate is largely irrelevant for present purposes. Rather, the significant distinction is between action and inaction.

3. See generally DRESSLER, *supra* note 1, §§ 9.06–.09, at 101–12 (discussing omissions and omission liability); 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 (1984).

4. DRESSLER, *supra* note 1, § 27.01, at 379–80. To be more precise, attempt liability applies to situations where the offender fails to cause the harm addressed or contemplated by some target offense. Attempts themselves may cause harm, as where they cause panic or fear in the would-be victims, but liability for attempt does not *require* any such harm to occur. See *id.* § 27.02, at 380–82. One might also consider the risk of harm itself to be an independent harm. See Part II.A (addressing this claim).

5. A similar but distinct category, also at the frontiers of criminal conduct, involves *complicity* by omission. In complicity cases, the requisite harm does occur, but the defendant is not its direct cause; instead, the harm-causing act of another person (the “principal”) is imputed to the defendant (the “accomplice”) based on the accomplice's assistance to the principal. In the complicity-by-omission case, the principal's act is imputed to the accomplice based on the accomplice's *failure* to act—usually, the failure to affirmatively stop the principal from performing the criminal conduct. For example, parents have been held liable as accomplices to the assault of their children where they knew another person was beating the

The law limits the potential to impose criminal liability based on an omission even where resulting harm occurs. A person may be punished for her failure to act only where a legal duty bound her to act in order to prevent the harm.<sup>6</sup> Classic examples of criminal omission involve legal caregivers or guardians: the parent who fails to care for a child;<sup>7</sup> the child who fails to care for an elderly, infirm parent;<sup>8</sup> or the healthcare worker who fails to provide needed care to a patient in her charge.<sup>9</sup> Where these caregivers' failures to satisfy their legal duties of care lead to harm, they may be subject to liability for neglect, battery, or even homicide.<sup>10</sup>

But what if a similar caregiver showed similar neglect toward the person in his charge, yet that person somehow managed to avoid harm—perhaps only because of heroic medical intervention unsought by, and beyond the control of, the neglectful caregiver? This caregiver would be bound by the same duty, possess the same culpability, and engage in the same inappropriate behavior as the one whose victim suffers harm. Only the outcome would differ, and that difference would arise from factors extraneous to the two caregivers' culpability, choices, and conduct. One might think that this second caregiver is also a suitable candidate for criminal punishment. Indeed, many criminal-law theorists seem to think

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child but did not intervene. *See, e.g., Lane v. Commonwealth*, 956 S.W.2d 874, 875–76 (Ky. 1997).

Insofar as it allows for imposition of liability on one who neither acted nor caused harm, the complicity-by-omission scenario has much in common with the inchoate-omission scenario that this Article discusses. (One might also envision exotic combinations of the two, such as the lawyer–accomplice who fails to prevent a client–principal from failing to report required information to the authorities.) For the sake of clarity and avoiding confusion, however, this Article focuses squarely on inchoate omissions rather than trying to address both categories.

6. LFAVE, *supra* note 1, § 6.2(a), at 311 (“For criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.”). A further requirement for liability is that the offender’s inaction must have a sufficient causal relationship to the harm. Of course, this rule is not peculiar to omissions; the causation requirement exists for affirmative acts as well. *See id.* § 6.2(d), at 319 (discussing the particular difficulty of establishing causation in omission cases); *id.* § 6.4, at 331–59 (discussing causation generally).

7. *See, e.g., State v. Williams*, 484 P.2d 1167, 1174 (Wash. Ct. App. 1971) (affirming a homicide conviction based on the parents’ failure to seek medical attention for their sick child).

8. *See, e.g., Davis v. Commonwealth*, 335 S.E.2d 375, 378–79 (Va. 1985) (affirming a conviction for involuntary manslaughter based on the breach of an implied agreement to care for a parent). For a discussion of “filial responsibility” laws requiring adult children to support their indigent parents, see generally Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL’y 709 (2001).

9. *See, e.g., Commonwealth v. Pestinikas*, 617 A.2d 1339, 1344–45 (Pa. Super. Ct. 1992) (affirming a homicide conviction based on the defendants’ failure to provide food and medical care as agreed).

10. *See supra* notes 7–9 (citing appellate decisions that affirmed homicide convictions based on failures to provide care).

so.<sup>11</sup> At the same time, the prospect of punishment in the absence of either action or harm might seem to set an unexpectedly, and perhaps disturbingly, low floor for criminal liability—particularly in situations like the typical case of harmless neglect, where not only are the usual objective requirements lacking, but the offender's mental state reflects the minimum degree of culpability (negligence) normally allowed to support criminal liability.

This Article asks whether criminal punishment for harmless inaction is ever legally possible, empirically observable, or normatively desirable—and, perhaps surprisingly, answers all three of these questions in the affirmative. In a remarkable legal sum, zero action plus zero harm can, and sometimes does, add up to a crime. Further, this Article maintains that such liability is not based on faulty math, but can be entirely appropriate, at least in some circumstances.

Part II addresses the preliminary issue of defining the boundaries of the inchoate-omission category. Parts III and IV explore the extent to which existing law allows punishment for inchoate omissions. Criminal codes often address inchoate conduct in two different ways.<sup>12</sup> First, a general attempt provision will broadly impose liability for unsuccessful efforts to commit some other target offense. Second, other particular offenses will define specific situations where conduct is criminal regardless of whether it causes harm. Part III explores attempt rules, and Part IV explores specific offenses whose elements require neither action nor harm. Each Part examines the existing law on the books and then investigates the enforcement of that law (where it exists) to see whether and when prosecutions are brought for offenses involving neither action nor harm. As it turns out, omission liability is widely available for both types of inchoate crime—attempts and specific offenses—but unevenly pursued as between those types: prosecution for omissions under those attempt statutes appears to be hen's-tooth rare, whereas prosecutions under more particular statutes, though hardly routine, do occur with some frequency.

Part V offers some observations about the broader legal and normative questions that inchoate-omission liability raises. Given that such liability defines the outer boundaries of criminalization authority vis-à-vis objective conduct, an initial issue is whether it should be allowed at all, and if so, whether and how its substantive scope should be restricted.

If such liability is ever appropriate, a related issue arises as to what form the criminal prohibition(s) should take—that is, whether it is desirable to address omission liability using attempt law, particularized offenses, or both.

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11. For a discussion of the position that the occurrence vel non of resulting harm should be irrelevant to criminal liability, see Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 883 n.6, 898–99 (2007).

12. See generally *id.* (surveying and exploring the dual and often overlapping use of general attempt provisions and specific offenses to impose criminal liability for inchoate conduct).

Criminalization via a single, capacious attempt provision reflects an effort to develop what I call a “dense” code, while adopting numerous, more specific offenses generates what I call a “sprawling” code. Part V discusses the relative advantages and drawbacks of pursuing density versus sprawl and considers the lessons of this Article’s investigation of inchoate omissions for the more general questions about how to structure criminal law.

## II. DEFINING THE CATEGORY

Before examining the situations in which criminal law imposes liability for inchoate omissions, it is necessary to specify more clearly what this category includes. If inchoate liability and omission liability each cover situations where some paradigmatic aspect of actus reus is missing, we must identify the usually required element that goes missing in those situations and understand why its absence might be troubling.

It is also important to recognize that the absence of either of these elements might *not* be troubling. Some skepticism has already been expressed about the relevance of harm<sup>13</sup> and action<sup>14</sup> to criminal liability. Even so, there has been little consideration of the implications of abandoning *both* harm and action as predicates to criminal liability, or of what objective requirements of criminality, if any, would remain if punishment could be imposed in the absence of both action and harm. Larry Alexander and Kimberly Ferzan have expressed their willingness to adopt an understanding of criminal liability based entirely on subjective culpability—demanding only culpable risk-creation and not any resulting harm or affirmative act<sup>15</sup>—but few of the other commentators who have

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13. Discussions of the irrelevance of harm to criminal liability often arise in the context of a claim that the *amount* of liability should not depend on the occurrence or nonoccurrence of harm—in other words, that completed crimes should not be punished more harshly than attempted crimes. *See id.* at 883 n.6, 898–99 & n.53 (discussing this claim and citing sources making the claim).

14. *See, e.g.,* STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 15 n.22 (2006) (citing sources that question the act requirement); Vincent Chiao, *Action and Agency in the Criminal Law*, 15 LEGAL THEORY 1, 2 (2009) (“[O]rthodox Anglo-American criminal theory . . . fails to explain adequately why criminal responsibility requires an act. . . . [W]hat is sound in the intuition underlying the so-called ‘act requirement’ is better explained by what I call the ‘practical agency condition’ . . . .”); Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1533 (1994) (“I will argue for these points: (1) There is no movement requirement in the criminal law; (2) There may, however, be a requirement of physical conduct which would include both movements and failures to move . . . .”); George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443 (1994) (arguing for a de-emphasis on bodily movements in defining the minimum requirements of criminal liability). *But see* GREEN, *supra*, at 15 (“[M]any criminal law theorists would argue that every crime commission requires a physical act.”); DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 84 (1987) (“[M]any theorists express skepticism about whether a person should *ever* be punished for a failure to act.”).

15. *See* Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 378, 380 (2008) (“Our theory of the criminal law thus places all of its

criticized the independent significance of action or harm seem willing to go this far or seem to have contemplated the consequences of allowing liability where neither action nor harm is present.<sup>16</sup> Moreover, neither Alexander and Ferzan nor the other critics have undertaken, as this Article does, a broader exploration of the extent to which inchoate-omission liability—whether seen as good or bad—is allowed and pursued under the existing law.<sup>17</sup> Before embarking on that exploration, however, let us clarify what we seek to examine.

#### A. WHAT IS AN “INCHOATE” CRIME?

It is possible to distinguish three types of objective conduct that may be subject to criminal sanction: harmful conduct, wrongful conduct, and conduct that threatens a harm or wrong.<sup>18</sup> First, and least controversially, criminal law may impose liability for conduct that causes harm.<sup>19</sup> Probably

emphasis on the actor's choice to release an unjustifiable risk of harm. . . . [O]missions, too, can count as culpable acts on our account.”). See generally LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009) (articulating their theory in more detail).

16. Cf. Jacobo Dopico Gómez-Aller, *Criminal Omissions: A European Perspective*, 11 NEW CRIM. L. REV. 419, 423 (2008) (noting the “perplexing questions raised by an examination of” omission liability, including whether “an *unconsummated* offense of omission [is] punishable as an attempt to commit an offense of harmful consequences”); Mark Perlman, *Punishing Acts and Counting Consequences*, 37 ARIZ. L. REV. 227, 233–35 (1995) (explaining the difficulty of defining omission crimes without reference to resulting harm).

British commentators are more openly supportive of inchoate-omission liability. See, e.g., DAVID ORMEROD, SMITH & HOGAN CRIMINAL LAW 414 (11th ed. 2005) (claiming that lack of omission liability is “an unfortunate gap in the law”). The United Kingdom's Law Commission recently recommended changing British attempt law to allow liability for omissions. See LAW COMM'N, CONSULTATION PAPER NO. 183, CONSPIRACY AND ATTEMPTS 20, 169, 189 (2007), available at [http://www.lawcom.gov.uk/docs/cp183\\_web.pdf](http://www.lawcom.gov.uk/docs/cp183_web.pdf) (noting that existing attempt law does not seem to apply to omissions, and proposing that it should); cf. *id.* at 189, 231 (speculating that liability for attempts by omission, if allowed, would be rare).

17. In addition to noting that British law does not allow liability for attempts by omission, see *supra* note 16, the United Kingdom's Law Commission has noted that the laws of Canada, New Zealand, and parts of Australia formally allow for such liability, but has not mentioned whether or how often it has been imposed in those places. See LAW COMM'N, *supra* note 16, at 269–70, 273, 275.

One article, focusing on American offenses that penalize the failure to report information to the government (typically information about criminal activity), has noted that such laws involve omission liability and do not require any resulting harm. See Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 6 (2002). However, the article does not explore the broader category of inchoate-omission offenses or its general implications for criminal law.

18. Other requirements, most prominently mens rea requirements, further limit the availability of criminal punishment for these types of objective conduct.

19. To be more precise, it is generally understood that the law may impose criminal liability for conduct that harms another person or an institution. See, e.g., 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 11 (1984) (“[T]he need to prevent harm (private or public) to parties other than the actor is always an appropriate *reason* for legal coercion.”). The



the most common understanding of the general limits of criminal law applies some version of the "harm principle," under which it is at least *prima facie* acceptable to criminalize conduct that causes harm.<sup>20</sup> Depending on the account offered, harm may or may not be a necessary or sufficient basis for criminalization, but it is generally understood that significantly harmful conduct and criminal conduct do and should overlap considerably.<sup>21</sup> Those who oppose the harm principle usually do not claim that criminal law cannot punish harmful conduct. Rather, they claim that criminal law can reach *beyond* harmful conduct to cover a second category: conduct that is harmless but nonetheless viewed as inherently morally wrongful or offensive.<sup>22</sup> Commonly proffered examples of harmless wrongdoing include breaking a gratuitous promise,<sup>23</sup> trespassing on property without damaging it,<sup>24</sup> and mutilating a corpse.<sup>25</sup> The suitability of criminal liability for harmless wrongdoing is a matter of debate.<sup>26</sup>

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claim that this principle, and *only* this principle, can support criminalization is frequently traced to John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

20. See, e.g., Dennis J. Baker, *The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation*, 33 AUSTL. J. LEGAL PHIL. 66, 67 (2008) (concluding that the harm principle is superior to Kant's deontological theory as a means of "ensuring that criminalisation decisions are fair, just and principled"); Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 156 (1995) ("Commentators have struggled to identify that subclass of wrongful conduct that is eligible for punishment. The *harm* requirement provides the most plausible solution to this problem." (footnote omitted)); cf. Meir Dan-Cohen, *Thinking Criminal Law*, 28 CARDOZO L. REV. 2419, 2420–21 (2007) (noting "the evolution of criminal law under the guidance of the harm principle," but criticizing this approach); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999) (noting the prevalence of reliance on the harm principle, but complaining that "[c]laims of harm have become so pervasive that the harm principle has become meaningless"). For an extended account exploring the relationship between the harm principle and the justification of criminalization, see generally 1–4 FEINBERG, *supra* note 19 (1984–1988).

21. For principled defenses of this claim, see sources cited *supra* notes 19–20. For a discussion of empirical research indicating that common moral intuitions support, or at least overlap with, some version of the harm principle, see Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1860–65 (2007).

22. For one defense of the claim that liability for harmless wrongdoing is at least sometimes acceptable, see Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 195, 209–14 (1994).

23. See 1 FEINBERG, *supra* note 19, at 36.

24. See Hurd, *supra* note 22, at 213–14. But see 1 FEINBERG, *supra* note 19, at 34–35 (claiming that trespass creates harm independent of whether the land is left undamaged or even improved, because the trespass invades a recognized legal interest in exclusive possession).

25. See Hurd, *supra* note 22, at 213; cf. 1 FEINBERG, *supra* note 19, at 94–95 (discussing the general question of whether it is possible to "harm" or "wrong" a dead person).

26. For an extended discussion of whether criminalization of harmless wrongdoing is justifiable, see generally 4 FEINBERG, *supra* note 19 (1988). Because this Article focuses on the distinct category of inchoate liability, it need not take a position on the suitability of criminalizing harmless wrongdoing or on any other question related to the ultimate harms (or

In addition to harmful and wrongful conduct, there is a third possible object of criminalization: conduct that is neither harmful nor wrongful in itself, but that *threatens* some harm or wrong.<sup>27</sup> Such conduct may involve preliminary but as-yet-incomplete steps in the direction of the harm or wrong, such as a meeting to discuss a planned robbery; or it may involve acts that generate a risk of harm or wrong, such as speeding or firing a gun, though no actual harm ensues.

Crimes involving conduct in this third category—the subject of this Article—are variously described as “nonconsummate,” “inchoate,” or “anticipatory” crimes. The terms “inchoate” and “anticipatory” are often used to describe offenses involving preliminary conduct that is directed toward some other defined offense (sometimes called the “target” or “object” offense).<sup>28</sup> For example, the elements of attempt are set out as a function of efforts toward another offense. The terms are also sometimes used for freestanding offenses—such as possession offenses—whose elements exist independently and do not explicitly require the offender to be risking or planning some other offense.<sup>29</sup> This Article uses the term “inchoate” to describe any offense that neither requires harm nor involves behavior considered inherently wrongful or immoral.<sup>30</sup> Employing Douglas Husak’s formulation of the concept, an “offense is inchoate if it proscribes conduct that does *not* cause harm on each and every occasion in which it is performed.”<sup>31</sup>

One difficulty with inchoate liability lies in determining its exact object or scope: if such liability demands no harm or wrong, precisely what *does* it

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wrongs) that criminal law may address. As the text indicates, inchoate liability raises independent issues regarding how far criminal law may go in proscribing conduct that does not cause, but merely *risks*, such harms or wrongs, whatever they may be.

27. For further discussion of how and why this category is distinct from the first two, see Hurd, *supra* note 22, at 187–93. See also *id.* at 213 n.79 (“[T]here are good reasons to resist suggestions that attempts are either harms or wrongs . . .”).

28. See, e.g., Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989) (“‘Inchoate’ offenses allow punishment of an actor even though he has not consummated the crime that is the object of his efforts.”); *id.* at 3 n.5 (using the terms “object” or “target” to describe “an offense to which an inchoate or anticipatory crime relates,” and claiming that “[a]n inchoate crime must have another crime as its object”).

29. See, e.g., DRESSLER, *supra* note 1, § 9.03[C], at 96–97 (“Crimes of possession are ‘inchoate,’ or incomplete, offenses. That is, their real purpose is to provide the police with a basis for arresting those whom they suspect will later commit a socially injurious act . . .”); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 765–66 (1988) (giving numerous examples of specific offenses “defined in the inchoate mode”).

30. Of course, the conduct may be considered wrongful to the extent that it risks harm, but this is not the same as being *per se* wrongful.

31. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 160 (2008); see also Husak, *supra* note 20, at 158, 163–69 (offering a similar definition for “nonconsummate offense,” and further elaborating on the concept of a nonconsummate offense).

demand? Not much has been said about the nature of inchoate crimes as a category. Scholars typically define or categorize them only in the negative—as crimes that are *not* consummate—and even this distinction is unexplained.<sup>32</sup> The most thorough account of the nature and proper limits of inchoate liability comes from Husak, who characterizes inchoate offenses as demanding the creation of a sufficient *risk* of harm, even though harm itself need not occur.<sup>33</sup>

It seems the only other articulated position about the nature of inchoate liability is that inchoate crimes are characterized not by risk, but rather by the offender's *intent* to engage in harmful or wrongful conduct.<sup>34</sup> Under this view, a person's affirmative desire or purpose to bring about some criminal harm or wrong defines and supports inchoate liability.<sup>35</sup> Husak rejects this position on the ground that it makes the consummate-inchoate distinction "defendant-relative," so that a given crime's status as inchoate or complete depends on the individual offender's motivations rather than the nature or definition of the offense itself.<sup>36</sup> Like Husak, I reject the intent-based conception of inchoate offenses, though for slightly

32. See Husak, *supra* note 20, at 165–66 (“[F]ew theorists propose an explicit definition of nonconsummate offenses at all. Instead, most commentators simply list examples of such offenses, inviting the reader to formulate his own definition.” (footnote omitted)).

33. See *id.* at 164 (“The conduct proscribed by a nonconsummate offense creates a *risk* of harm—at least when such an offense is justified.”). In a more recent articulation that suggests a willingness to criminalize moral wrongs as well as harms, Husak says that inchoate offenses risk “harm or evil.” HUSAK, *supra* note 31, at 160.

34. See Husak, *supra* note 20, at 166 (“The most familiar answer to th[e] question [of what makes an offense inchoate] . . . invokes the mental state of the defendant. Typically, the relevant mental state is the aim, objective, end, or purpose of the defendant.”).

35. R.A. Duff draws a somewhat similar distinction between what he calls “attacks,” which involve an intentional effort to violate another person’s rights, and what he calls “endangerments,” which do not. See R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 942–52 (2005) (describing the distinction between attacks and endangerments). I discuss Duff’s formulation elsewhere. Cahill, *supra* note 11, at 903–05, 931–32. In any case, Duff’s distinction is not critical here, as he uses it not to define the boundary between consummate and inchoate crime, but rather to differentiate between two subcategories of inchoate crime.

36. See Husak, *supra* note 20, at 166–68. Husak states:

Two defendants might perform instances of the same crime with different ends or objectives; according to Dressler’s conception, the crime could be consummate relative to one defendant, but nonconsummate relative to another. Suppose, for example, that D<sub>1</sub> steals food with a different “end, objective, plan or purpose” than D<sub>2</sub>. Suppose that D<sub>1</sub> steals food in order to eat it; D<sub>2</sub> steals food in order to sell it. If D<sub>1</sub> is arrested after [s]he has eaten the food, but D<sub>2</sub> is arrested before he has sold it, D<sub>1</sub> but not D<sub>2</sub> has attained her end by her act of theft. Similarly, if D<sub>1</sub> is arrested before [s]he has eaten the food, but D<sub>2</sub> is arrested after he has sold it, D<sub>2</sub> but not D<sub>1</sub> has attained [his] end by [his] act of theft. A conception of a nonconsummate offense that invokes the perpetrator’s mental state entails that one person but not the other has committed a consummate offense, even though both have committed the same crime.

*Id.* at 167.

different reasons. Understanding inchoate crimes in terms of an offender's motivations or culpability, rather than the risks that his objective conduct creates, poorly suits the present task of specifying the nature and limits of the state's criminalization authority. Subjective intent, as opposed to objective risk, is both overinclusive and underinclusive as a criterion for criminalization.

Basing criminalization on intent is overinclusive in that it allows liability based solely on the offender's culpability, without requiring any showing of objective harm or wrong (or even risk of a harm or wrong). Such a criterion effectively bases the scope of criminalized activity entirely on individuals' subjective perceptions about the risks of their behavior. Such a focus is not without its adherents,<sup>37</sup> but it would entail outcomes that strike many as troubling, as it would allow liability for those whose conduct presents *no* actual danger or risk of harm—the so-called “inherently unlikely” attempt,<sup>38</sup> where a person seeks to cause harm but employs a means, such as voodoo,<sup>39</sup> that does not in fact make the harm more likely.

Basing criminalization on intent is also underinclusive because criminal liability can and should attach to nonintentional though culpable risk-taking. For example, conduct that recklessly creates a substantial risk of harm is a common, and proper, object of criminal sanction.<sup>40</sup> The intent-based approach to inchoate liability draws an arbitrary line between intent and other forms of culpability. A risk-based approach, on the other hand, can punish various degrees of culpable risk-creation while still retaining the ability to punish the vast majority of cases involving intent, since a person's intent to cause harm typically creates or reflects an actual risk of harm.<sup>41</sup> The only conduct that would be reached by an intent-based approach while simultaneously evading a risk-based approach would be conduct in the “inherently unlikely” category noted above—yet this category is extremely small and somewhat controversial as an object of criminal liability.<sup>42</sup>

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37. See generally, e.g., ALEXANDER & FERZAN, *supra* note 15 (advocating the use of subjective perception of risk, rather than objective risk-creation, as the basis for criminal liability).

38. MODEL PENAL CODE § 5.05(2) (1962).

39. See, e.g., PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 293–95 (2d ed. 2008) (discussing the case of John Henry Ivy, a convicted robber who tried to kill a sentencing judge using voodoo).

40. For references to existing offenses that punish various forms of reckless (or even negligent) endangerment, see Cahill, *supra* note 11, at 922–36. For a normative defense of liability for inchoate crimes of recklessness, see *id.* at 890–903.

41. See Husak, *supra* note 20, at 172.

42. See, e.g., Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244–51 (1995) (discussing issues surrounding “inherently unlikely” attempts, and proposing a slight reformulation of the Model Penal Code's treatment of them); Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 546–49 (2008) (proposing a test for impossible-attempt liability that would demand a genuine threat to protected interests).

Whether inchoate offenses are better understood as involving the intent to cause harm or, as I have argued, the objective risk of harm, one can understand the proper scope of inchoate liability only if one has a clear definition of what constitutes harm.<sup>43</sup> Though this Article does not seek to articulate a full-fledged theory of harm, it is necessary at this point to address two views of harm (or more accurately, views holding that specific things qualify as harms) that threaten to collapse the distinction between consummate and inchoate offenses entirely. First, some have argued that the risk of harm is itself a harm.<sup>44</sup> Obviously, if this view were accurate, the definition of inchoate offenses just articulated—which distinguishes them from consummate offenses on the ground that they do not cause, but only risk, harm—would be untenable, for it would fail to mark a relevant difference between inchoate and consummate offenses.

Others have convincingly rejected the position that risk is a harm.<sup>45</sup> Stated simply, it is either implausible or inaccurate to define “harm” such that a person can be harmed without knowing about it and without any identifiable setback to the person’s interests. Only the *ex ante prospect* of harm is relevant; after “suffering” the risk itself, the “victim” bears no trace of having “suffered” and differs in no detectable way from one who was not exposed to the risk. Accordingly, the amount a person would pay *ex post* to avoid exposure to a risk that is now known not to have resulted in any direct harm is zero—just as no property owner would pay to insure against past risks of fire or flood, though those risks may have existed. This being the case, it makes little sense to say that the person has been harmed by the risk itself. Of course, a person’s perception that he (or another person he cares about) will be, or has been, subjected to a risk may lead the person to experience distress or trauma, and that distress can easily be seen as a

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43. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 3.3, at 132–33 (1978). Fletcher notes:

Liability for an attempted offense is a paradigmatic instance of an inchoate offense. . . . In other contexts, however, it is more difficult to assess whether a defined offense is an “inchoate” or a “consummated” offense. . . . Absent a catalogue of harms that the law seeks to prevent, the distinction between inchoate and consummated offenses proves to be illusive.

*Id.*

44. See Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 998–1000 (2003) (arguing that risk is a harm).

45. See Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1444 (2003) (“My Article does not resolve the criminal or tort law status of risk imposition. Rather, it makes an important contribution to the debate about that status, by showing that one important argument in favor of liability—the argument that risking is itself a kind of consequential harming—must be abandoned.”); Stephen R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321, 330–39 (David G. Owen ed., 1995) (examining and rejecting the argument that risk is in itself a harm).

harm.<sup>46</sup> A criminal offense whose elements required the offender to cause actual psychological harm would therefore qualify as a consummate offense. Yet that intangible, psychological harm is distinct from the underlying exposure to an actual objective risk. The harm may arise even where there is no actual risk, and it may fail to arise in many cases where objective risk is present. The risk itself, then, is not a harm, and an offense that requires only creation of a risk but not proof of any resulting harm—physical or psychological—is an inchoate offense.

A second position complicating the harm-risk distinction is the view that efforts to cause a prohibited harm, even if they fail to cause that harm, generate some other social harm, perhaps by demonstrating a disregard for law and order.<sup>47</sup> This manifest lack of concern for social norms or values might undermine social cohesion or promote lawlessness among others.<sup>48</sup> Yet, as with the psychological harm that might attend a risk, the purported social harm may or may not occur as a result of any specific instance of risk-taking activity. If the public never learns about that activity, then no disruption of order or threat to social norms will occur. In fact, some risk-taking activity that would otherwise remain unknown (precisely because no actual harm ensues) might be revealed by the law-enforcement process of detecting and prosecuting that activity, thereby bringing it to light and making it public. But it would surely be odd to suggest that law enforcement is harmful because it might make the public aware of unlawful activity. Further, the social-harm position is problematic as an explanation of the justification for, and limits of, the state's ability to impose inchoate liability, for it seems circular. The source of the purported social harm is the fact of criminalization itself: the existence of the law is what makes the manifest "lawlessness" harmful. In that case, though, the identification of lawlessness as a harm is not doing any useful work in explaining the proper reach of

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46. See Adler, *supra* note 45, at 1440 ("To be sure, risk imposition construed in a different way—in actual, first-party terms—is harmful, at a minimum if the actual beliefs . . . are a component of fear, anxiety, or some other epistemic-affective hybrid. 'Emotional harm' is a genuine harm."); Perry, *supra* note 45, at 338–39 (distinguishing between risk exposure and psychological harm).

47. See Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 269 (1975). Robinson states:

I will contend . . . that the inchoate offenses do not punish bad intent evidenced by overt acts, but rather punish conduct which is harmful to society in a way apart from the harm which might have resulted had the actor's intent been fulfilled. The harm is intangible in character, and society is its object. Inchoate offenses not only create a risk of harm, they are harms in themselves.

*Id.* (footnote omitted).

48. See, e.g., FLETCHER, *supra* note 43, at 141–45 (expressing the view that attempts are properly criminalized based on a reflection of "manifest criminality" that generates public apprehension); cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468–78 (1997) (discussing the potential of lawlessness to promote further lawlessness).

criminalization authority; commission of any inchoate crime becomes harmful by virtue of the criminal prohibition itself.

For purposes of this Article, it is unnecessary to specify what qualifies as a harm and what harms are proper subjects of criminalization; this Article merely requires that harm, whatever it is, be meaningfully distinguished from the mere risk of harm. Inchoate offenses are those that do not require harm, but only risk. As the discussion in Part III demonstrates, nearly all offenses that qualify as inchoate under this formulation are easy to categorize as such and to distinguish from offenses that demand actual harm. Indeed, many such offenses are explicitly defined to require only a risk of some relevant harm rather than the harm itself. Others define the offense purely in terms of prohibited conduct—usually conduct that seems highly likely to correspond to some harm or risk of harm—without directly requiring the actual occurrence of harm or, in many cases, even a demonstrable risk of harm.

### B. WHAT IS A CRIME OF OMISSION?

Omission liability can be defined somewhat more easily than inchoate liability. An omission is simply a failure to act, and omission liability is liability that is imposed for a mere failure to act. One complication, though, is that many courses of conduct involve a mixture of actions and omissions and can be described either in terms of what a person has done (e.g., “you were off playing golf”) or in terms of what the person has failed to do (e.g., “you were neglecting your family”), or both. Understanding whether an alleged criminal offense rests on action or a failure to act is a matter of identifying the conduct for which the offender is culpable or blameworthy. In a case involving omission liability, the offender does not have the requisite culpability with respect to any affirmative acts, but rather is culpable with respect to his failure to act.<sup>49</sup>

One category of conduct that is controversial in terms of whether it constitutes an act or an omission is possession. Some characterize possession as an affirmative act, others as an omission. In one effort to finesse the issue, the Model Penal Code defined possession to be an act so long as the possessor has sufficient opportunity to divest himself of the item possessed.<sup>50</sup> If possession were seen not as an act, but as an omission—specifically, a failure to relinquish control over the property in question—then criminal offenses whose only objective requirement is possession<sup>51</sup> would constitute

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49. See Alexander & Ferzan, *supra* note 15, at 385–88 (arguing for omission liability based on the culpable choice not to abate an identifiable existing risk).

50. MODEL PENAL CODE § 2.01(4) (1962) (“Possession is an act . . . if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.”).

51. Many such offenses have additional *culpability* requirements beyond the offender's culpability as to possession itself. For example, the offense may require that one possess illicit

inchoate-omission offenses under this Article's framework. Possession offenses are inchoate rather than consummate: possession itself is not harmful and typically not seen as wrongful, but merely as creating a risk of some other harm. Hence, if possession is an omission rather than an act, offenses criminalizing mere possession are inchoate-omission offenses. Obviously, inclusion of possession offenses within the category would greatly expand the extent to which existing criminal law defines and prosecutes crimes of inchoate omission. Possession offenses may be controversial precisely because they fit into this category: they differ from other offenses not only because they prohibit conduct whose status as action is dubious, or because they prohibit conduct that creates a mere likelihood of harm rather than actual harm, but because they combine both of these features.<sup>52</sup>

Indeed, possession offenses are especially extreme possible examples of inchoate-omission offenses because they extend the scope of omission liability beyond its usual boundaries—that is, beyond situations where the law imposes an affirmative duty to act. These offenses prohibit possession across the board, so that the prohibition applies to all people at all times rather than only specified people in particular situations. Of course, the offenses could simply be seen as defining a new legal duty not to possess contraband, and the law is presumably free to define such new duties, so long as they do not run afoul of the Constitution. Still, even possession offenses that raise no obvious constitutional issues will seem troubling because, and to the extent that, they involve only minimal or even nonexistent demands in terms of the objective action or harm required for liability. Indeed, many such offenses do not even explicitly require the offender to create a *risk* of any specified harm, but simply ban an entire range of (in)activity that seems generally to correlate with a risk of harm, though specific instances of it may well be completely harmless.<sup>53</sup>

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narcotics with the additional intention of selling them. But so long as possession is the only *objective* requirement, possession offenses involve inchoate omissions.

52. The same is true for so-called "status offenses," which criminalize a general trait or characteristic rather than any specific conduct. These offenses demand no overt action, and the traits they criminalize—such as drug addiction or gang membership—are not inherently wrongful or harmful but seem to correlate with some potential for harm. *See, e.g.,* LAFAVE, *supra* note 1, § 6.1(d), at 307 (describing crimes that punish status rather than acts or omissions). Pure status offenses, however, are typically held unconstitutional and thus do not demand additional independent discussion. *Id.*; *see also id.* § 3.3(d), at 149–50 (discussing the extent to which mental state and act are constitutionally required); *id.* § 3.5(f), at 180–82 (discussing the constitutional prohibition of cruel and unusual punishment as applied to a statute criminalizing narcotics addiction).

53. *See* Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 611–15 (1998) (discussing the overinclusiveness of drunk-driving and heroin-possession offenses).



## III. OMISSION AND ATTEMPT

## A. LAW

However conceptually unusual it may seem that one could attempt a crime by doing nothing, many American criminal codes allow for just such a possibility. For example, the Model Penal Code's attempt provision explicitly allows for omission liability: an attempt occurs when one "does *or omits to do* anything that . . . is an act *or omission* constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."<sup>54</sup> The criminal codes of seven states allow attempt liability for omissions in similarly explicit terms.<sup>55</sup> Another sixteen states are less direct but effectively reach the same result, as they define attempt in terms of a requisite amount of "conduct,"<sup>56</sup> and their codes elsewhere define "conduct" to include both acts and omissions.<sup>57</sup>

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54. MODEL PENAL CODE § 5.01(1)(c) (1962) (emphasis added); *see also id.* § 5.01(1)(b) (declaring that for a crime requiring a result, an attempt occurs when one "does *or omits to do* anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part" (emphasis added)).

The Model Penal Code's commentary says nothing about why or when attempt liability would arise for an omission, rather than an act or series of acts—itsself an interesting omission, particularly since the final version of the Model Penal Code strengthens the reference to omission liability relative to the initial circulated draft of the attempt provision. *See id.* § 5.01(1)(c) (Tentative Draft No. 10, 1960) (referring to one who "does or omits to do anything which . . . is a substantial step," i.e., including the final version's first reference to omission but lacking its second reference). The earlier draft's commentary also fails to elaborate on the basis or scope of omission liability for attempt.

55. ARIZ. REV. STAT. ANN. § 13-1001(A)(2) (2001); CONN. GEN. STAT. § 53a-49(a)(2) (2007); DEL. CODE ANN. tit. 11, § 531(2) (2007); KY. REV. STAT. ANN. § 506.010(1)(b) (West 2006); LA. REV. STAT. ANN. § 14:27(A) (2007); N.H. REV. STAT. ANN. § 629:1(1) (2007); N.J. STAT. ANN. § 2C:5-1(a)(2)–(3) (West 2005).

56. To be precise, only twelve of the sixteen states achieve this result by describing attempts in terms of "conduct"—typically, "conduct which [or that] constitutes a substantial step" toward the offense. ALASKA STAT. § 11.31.100(a) (2008); ARK. CODE ANN. § 5-3-201(a)(2), (b) (2006); COLO. REV. STAT. § 18-2-101(1) (2008); HAW. REV. STAT. § 705-500(1)(b) (1993); IND. CODE § 35-41-5-1(a) (1998); ME. REV. STAT. ANN. tit. 17-A, § 152(A) (2006) ("conduct that in fact constitutes a substantial step"); NEB. REV. STAT. § 28-201(1)(b) (2008); N.D. CENT. CODE § 12.1-06-01(1) (1997) ("conduct which, in fact, constitutes a substantial step"); OR. REV. STAT. § 161.405(1) (2007); UTAH CODE ANN. § 76-4-101(1) (2008); *see also* N.Y. PENAL LAW § 110.00 (McKinney 2004) ("conduct which tends to effect the commission of [a] crime"); OHIO REV. CODE ANN. § 2923.02(A) (LexisNexis 2006) ("conduct that, if successful, would constitute or result in the offense").

The Illinois, Michigan, and Montana codes appear to do the same thing as the twelve other codes, but in a somewhat unusual way. They define attempt to require an "act" toward the commission of an offense. 720 ILL. COMP. STAT. 5/8-4(a) (2006); MICH. COMP. LAWS ANN. § 750.92 (West 2004); MONT. CODE ANN. § 45-4-103(1) (2007). Yet they define "act" to include omissions. 720 ILL. COMP. STAT. 5/2-2 (2006); MICH. COMP. LAWS ANN. § 750.10 (West 2004); MONT. CODE ANN. § 45-2-101(1) (2007). Finally, Missouri's code has its own unique spin on that already unusual definitional turn, as it defines attempt to require an "act," MO. REV. STAT. § 564.011(1) (2000), yet it does not define the term "act"—it only defines the term "voluntary

For another ten American jurisdictions, it is less clear whether attempt liability based on an omission is possible under the law. Five codes—four state codes<sup>58</sup> and the federal criminal code—do not have a general attempt provision at all. Two of those five—the *Code of Iowa* and the *United States Code*—instead have provisions creating specific attempt offenses, such as attempted murder.<sup>59</sup> Iowa’s elaboration of attempt seems to allow for attempt by omission,<sup>60</sup> while the federal code is unclear.<sup>61</sup> The other three states with no general attempt provision have developed attempt doctrine exclusively through case law; in doing so, none appears to have dealt with the question of attempt by omission.<sup>62</sup> Another five codes have provisions simply prohibiting any “attempt” to commit an offense, without defining or

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act,” and defines that term to include omissions. *Id.* § 562.011(2). Accordingly, the status of attempt by omission may be more dubious under the Missouri code than under the other codes in this category.

57. ALASKA STAT. § 11.81.900(b)(7) (2008); ARK. CODE ANN. § 5-2-201(3) (2006); COLO. REV. STAT. § 18-1-501(2) (2008); HAW. REV. STAT. § 701-118(4) (1993); NEB. REV. STAT. § 28-109(5) (2008); N.Y. PENAL LAW § 15.00(4) (McKinney 2004); N.D. CENT. CODE § 12.1-02-01(1) (1997) (requiring as a basis for criminal liability “conduct, including an act, an omission, or possession”); OHIO REV. CODE ANN. § 2901.21(A)(1) (LexisNexis 2006) (requiring as a basis for criminal liability “conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing”); OR. REV. STAT. § 161.085(4) (2007); UTAH CODE ANN. § 76-1-601(4) (2008).

Indiana’s code does not define “conduct,” but it includes a provision requiring “conduct” as a basis for criminal liability and imposing supplementary rules for omissions, indicating that omissions are a subset of “conduct.” *See* IND. CODE § 35-41-2-1(a) (1998).

Maine’s code also does not define “conduct,” but it includes a defense for “involuntary conduct” that strongly suggests that both acts and omissions count as conduct. ME. REV. STAT. ANN. tit. 17-A, § 103-B (2006) (“It is a defense that, when a person causes a result or engages in forbidden conduct, the person’s act or omission to act is involuntary.”).

For the provisions of Illinois, Michigan, Missouri, and Montana, see *supra* note 56.

58. Iowa, Maryland, North Carolina, and Rhode Island.

59. *See* 18 U.S.C. § 1113 (2006) (punishing the specific offenses of attempted murder and attempted manslaughter); IOWA CODE § 707.11 (2009) (defining the specific offense of attempted murder).

60. As with the codes of Illinois, Michigan, and Montana, see *supra* note 56, Iowa’s code defines attempted murder to require an “act,” IOWA CODE § 707.11 (2009), but it defines “act” to include omissions. *See id.* § 702.2.

61. Like the five codes discussed next in the text, see *infra* note 63 and accompanying text, the *United States Code* uses but does not define the term “attempt.” *See* 18 U.S.C. § 1113 (2006).

62. Maryland and North Carolina have no general provision defining attempt, but they do have provisions addressing the *grading* of attempts for sentencing purposes. MD. CODE ANN., CRIM. LAW § 1-201 (LexisNexis 2002); N.C. GEN. STAT. § 14-2.5 (2007). Maryland also has specific provisions for “attempt to commit murder in the second degree” and “attempted poisoning,” which carry specified punishment ranges. MD. CODE ANN., CRIM. LAW §§ 2-206, 3-213 (LexisNexis 2002). To the extent the grading provisions imply a catchall, undefined category of punishable criminal attempts, these states would belong with the five jurisdictions mentioned next in the text. *See infra* note 63 and accompanying text. Rhode Island defines no attempt offenses whatsoever in its code.

otherwise clarifying that term.<sup>63</sup> Here again, case law supplies the actual content of the attempt rules, and here again, none of these jurisdictions seems to have addressed the issue of attempt by omission.

The remaining nineteen state criminal codes have attempt provisions whose terms appear to disallow liability based on an omission, as they require performance of an "act."<sup>64</sup> To summarize, twenty-four state criminal codes appear to permit imposition of criminal liability for attempts by omission—seven explicitly, and another seventeen (including Iowa) by referring to attempts as involving "conduct" or "acts" that can include omissions. An additional nine American codes, including the federal code and the District of Columbia code, are ambiguous in that they either do not discuss attempt at all or do not define the term. Depending on the status of attempt-by-omission liability in the ambiguous jurisdictions, roughly one-half to two-thirds of American jurisdictions *allow* prosecution for attempt by omission. But do such prosecutions ever occur? The next Section addresses that question.

### B. ENFORCEMENT

Notwithstanding the rather common legal availability of criminal punishment for attempt by omission, such punishment seems to be exceedingly rare. For the thirty-three jurisdictions whose codes do, or might,

63. D.C. CODE § 22-1803 (2001); IDAHO CODE ANN. § 18-306 (2004); S.C. CODE ANN. § 16-1-80 (2003) (referring to "the common law offense of attempt"); VA. CODE ANN. §§ 18.2-25 to -26 (2004); W. VA. CODE ANN. § 61-11-8 (LexisNexis 2005).

64. ALA. CODE § 13A-4-2(a) (LexisNexis 2005) ("overt act"); CAL. PENAL CODE § 21a (West 1999) ("direct but ineffectual act"); FLA. STAT. § 777.04(1) (2008); GA. CODE ANN. § 16-4-1 (2007); MASS. GEN. LAWS ch. 274, § 6 (2006); MINN. STAT. § 609.17 (2008); MISS. CODE ANN. § 97-1-7 (2006) ("overt act"); NEV. REV. STAT. § 193.330(1) (2007); N.M. STAT. § 30-28-1 (2004) ("overt act"); 18 PA. CONS. STAT. § 901(a) (2002); S.D. CODIFIED LAWS § 22-4-1 (2006); TENN. CODE ANN. § 39-12-101(a) (2006); TEX. PENAL CODE ANN. § 15.01(a) (Vernon 2003); VT. STAT. ANN. tit. 13, § 9(a) (1998); WASH. REV. CODE § 9A.28.020(1) (2008); WIS. STAT. § 939.32(3) (2007-2008); WYO. STAT. ANN. § 6-1-301(a)(i) (2007).

Two states present slightly unusual cases. First, Kansas—like Illinois, Iowa, Michigan, Montana, and (perhaps) Missouri, *see supra* notes 56, 60—defines "act" to include omissions. KAN. STAT. ANN. § 21-3110(1) (2007). Its attempt provision, however, requires an "overt act," *id.* § 21-3301(a) (emphasis added), which suggests that omission would not suffice. Second, Oklahoma's attempt provision sets out rules only for "completed" attempts—i.e., attempts for which the target offense's requisite result could have occurred without any further conduct by the attempter, but failed to occur in the case at hand (such as a "shoot and miss" scenario). *See OKLA. STAT.* tit. 21, § 44 (2001). The only suggestion that liability will lie for incomplete attempts appears in Oklahoma's *grading* provision for attempts, which refers to one who "attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails." *Id.* § 42. In any case, both the attempt provision (which applies only to one who "does" something) and the grading provision (which applies to one who "does any act") seem to require action and disallow omission liability.

Unlike the codes of Illinois, Iowa, Michigan, and Montana, *see supra* notes 56, 60, there is no indication that these codes (except Kansas, as just described) understand the term "act" to include omissions.

permit such punishment, a review of appellate decisions—an admittedly imperfect and incomplete method of searching for the full universe of prosecutions or convictions—reveals only *two* cases involving attempts by omission.

Both cases are from Louisiana, and both involved defendants who were charged with “cruelty” or neglect offenses but were convicted only of attempted cruelty. *State v. Cortez*, decided in 1996, reversed the attempted-juvenile-cruelty conviction of a mother who had allegedly failed to seek medical treatment for her six-month-old son’s leg injury.<sup>65</sup> *State v. Smith*, decided in 2004, affirmed a conviction for attempted “cruelty to the infirm” of a woman who had failed to bathe, move, or otherwise aid her elderly mother as she lay on a sofa for over a month.<sup>66</sup> Interestingly, though both of the appealed convictions were for attempt, which requires no resulting harm, the presence or absence of injury was relevant to the ultimate disposition of each case. The primary analysis in each related to whether the evidence was sufficient to support conviction for the completed, rather than the attempted, crime (in which case, the lesser conviction for attempt would stand).<sup>67</sup>

In another case not directly involving an attempt prosecution, the Tennessee Supreme Court suggested the potential for attempt-by-omission liability.<sup>68</sup> Paramedics who were summoned to treat the defendant’s wife entered the defendant’s home only to find filthy, foul-smelling conditions, with a baby half-buried in a pile of trash and two other children sleeping under a roach-infested blanket.<sup>69</sup> The defendant was charged with child neglect, convicted, and sentenced to forty months’ imprisonment.<sup>70</sup> The court of appeals reversed, and the Supreme Court of Tennessee affirmed the reversal, concluding that the statute in question required proof of an “actual, deleterious effect or harm” to the children’s health.<sup>71</sup> The court proceeded to conclude, however, that the defendant could be subject to

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65. *State v. Cortez*, 687 So. 2d 515, 516–17, 524 (La. Ct. App. 1996)

66. *State v. Smith*, 870 So. 2d 618, 619, 622–24 (La. Ct. App. 2004).

67. *See id.* at 625 (“Because the record supports a finding of guilt to the offense charged, the jury did not err in finding the defendant guilty of the lesser offense of attempted cruelty to the infirm.”); *Cortez*, 687 So. 2d at 519–22 (addressing the sufficiency of the evidence to support conviction for the completed crime, and questioning whether the defendant’s failure to seek treatment worsened her child’s condition or otherwise caused the requisite “pain or suffering”); *see also id.* at 522–24 (addressing the sufficiency of the evidence to support the attempted crime).

68. *See State v. Mateyko*, 53 S.W.3d 666, 672–78 (Tenn. 2001) (discussing attempted child neglect). It may be worth noting that the facts and charges, summarized in the text, are similar to other cases charging neglect under more specific, non-attempt inchoate offenses, as discussed in Part IV.B.

69. *Id.* at 668.

70. *Id.*

71. *Id.* at 672.

liability for *attempted* child neglect, holding that such an attempt would require proof only of intent to engage in neglectful conduct and not of intent to cause harm.<sup>72</sup>

Why are there so few prosecutions for attempt by omission when almost half the states recognize liability for such attempts? The general lack of prosecutions for attempts based on omissions must involve some combination of three possible explanations: (1) there are simply few cases of attempt by omission out in the world; (2) there are cases, but they avoid detection; and/or (3) there are cases that are detected, but those cases do not get prosecuted.

As to the first explanation, cases that factually satisfy the elements of attempt by omission may be rare not only because of the lack of conduct, but also because of the lack of requisite culpability. Attempt typically requires intent, and many omissions are likely to reflect some lower degree of culpability.<sup>73</sup> One who affirmatively seeks to bring about some result or state of affairs is likely to *do* something to achieve it, so it seems reasonable that cases involving both intent and failure to act would be relatively unusual. On the other hand, lesser degrees of culpability, involving inattention to some risk of harm rather than a conscious effort to cause harm, seem more likely to accompany or underlie a person's failure to take action in a situation. Accordingly, cases of reckless endangerment by omission might arise even though cases of attempted murder by omission might be very rare. The *Cortez* decision suggests such a view in its skepticism about the applicability of attempt liability, with its "specific intent" requirement, to the state's child-neglect offense—a classic omission crime, and one that requires only "general intent," or criminal negligence.<sup>74</sup>

As to the second explanation, it makes sense that in the absence of the usual objective, observable hallmarks of criminal activity—action and harm—behavior that satisfies the technical legal requirements of attempt by omission would nonetheless be hard to spot. Dangerous activity is more

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72. See *id.* at 672–78. Note, however, that Tennessee's attempt provision requires an "act," see *supra* note 64, so with respect to omission-based liability, the *Maleyko* dictum might not bear scrutiny were a court to confront directly the question of punishing attempted neglect.

73. See, e.g., Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 600–07 (1958) (discussing mens rea in the context of omissions); Recent Case, *United States v. Golden*, 466 F.3d 612 (7th Cir. 2006), 120 HARV. L. REV. 2012, 2016 (2007) ("Traditionally, the criminal justice system has treated omissions with considerably less severity than affirmative misconduct, in part because it is more difficult to deduce pertinent intentionality from the former.").

74. See *State v. Cortez*, 687 So. 2d 515, 522–24 (La. Ct. App. 1996) (discussing the attempt provision's "specific intent" requirement and questioning the general suitability of attempt liability for the juvenile-cruelty offense); *id.* at 519–20 (discussing the cruelty offense's culpability requirements); cf. *infra* Part IV.A (discussing specific inchoate crimes of omission, including neglect offenses). As noted above, *Smith* was able to affirm an attempt conviction while avoiding the question of intent by considering and upholding the sufficiency of the evidence to support conviction for the *completed* crime, which did not require intent. See *supra* notes 66–67 and accompanying text (discussing *Smith*).

likely to be recognized than dangerous inactivity, and resulting harm can often be noticed after the fact, while an unrealized risk of harm cannot.

The second explanation ties into the third: even when the available information appears to indicate a case of attempt by omission, proving guilt beyond a reasonable doubt may be difficult. Again, *Cortez* and *Smith* seem to be exceptions that prove this rule: although the trials in those cases resulted in attempt convictions—apparently due to compromise verdicts—the underlying facts suggested some actual injury to the victims necessitating medical treatment, without which the cases would never have come to the attention of officials.

A final, yet fundamental, complication here is the difficulty of articulating a clear conceptual explanation of when an omission would ripen into an attempt. Defining the boundary between “mere preparation” and criminal attempt is notoriously difficult even when a person engages in affirmative acts pursuant to a criminal objective.<sup>75</sup> But determining whether and when a person’s *inaction* amounts to a “substantial step” in the direction of a crime seems a truly overwhelming task. When affirmative acts are involved, one can at the very least recognize when an attempt is “complete”—that is, when the person’s conduct would have caused the result in question but for some fortuitous circumstance. Yet in situations involving omission, even completed attempts prove elusive. At what point has someone performed enough of an omission—done enough of *nothing*—for the crime to occur? In the abstract, any amount of nothing should be as good as any other amount.

This conceptual puzzle is not just an abstruse head-scratcher, but may pose a significant difficulty for those criminal-law theorists—and there are a number of them—who think that resulting harm should be irrelevant to the criminal law.<sup>76</sup> Those theorists argue that there should be no legal distinction between attempts and completed crimes. Yet in cases of omission

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75. See Cahill, *supra* note 11, at 908–10 (discussing the difficulty of determining whether conduct constitutes an attempt).

76. See, e.g., Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 601 n.14 (2001) (citing various theorists, including herself, who take this position); see also Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1176 n.78 (1997) (noting the authors’ position that “results should never matter for criminal liability”); Ashworth, *supra* note 29, at 764 (“[R]esulting harm is not of central importance to the imposition or the grade of criminal liability.”); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 686 (1994) (“[P]unishing attempts and completed crimes differently makes no sense insofar as the goal of the criminal law is to identify and deal with dangerous offenders who threaten the public.”); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 390 (concluding after analysis that “results should play no role in desert or punishment”); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1607 (1974) (“[M]any problems associated with *mens rea* and the law of attempts have never been resolved satisfactorily, due to the absence of acceptable or coherent reasons for attributing significance to the harm caused . . .”).

liability, it seems unusually tricky, if not impossible, to determine whether an offender's inaction suffices to ground liability, except by reference to whether the prohibited harm has actually occurred and is causally attributable to the offender's failure to act. Accordingly, it appears that either this aspect of criminal law must take account of the presence or absence of resulting harm, or else the theorists who ignore resulting harm must abandon the possibility of omission liability, at least for crimes defined in terms of conduct seeking a particular result.<sup>77</sup>

One possible way to get around this problem would be to criminalize identifiable omissions that occur in particular contexts and create particular risks.<sup>78</sup> This might avoid the difficulty of determining when an omission

77. See Perlman, *supra* note 16, at 233–34. Perlman states:

One category for which the consequence-irrelevance theory fares particularly badly is crimes of omission. . . . If a mother puts her infant on a park bench in winter and leaves the infant there to die, she has in one sense not done anything to the child. . . . If consequences are not at all relevant to the specification of any crime, then what sort of crime is this so-called "crime of omission"? . . .

. . . [I]n many cases omissions are crimes only if harm occurs, and if no harm occurs there is no crime at all. Without appeal to the consequences, we either have to jail anyone who (intentionally or recklessly) omits the specified action, or punish no one, even if some of them allow innocent babies to die. Either way, it seems that somebody goes to jail who should not or somebody does not go to jail who should.

*Id.*; see also LAW COMM'N, *supra* note 16, at 181 (noting that an earlier Commission report suggested that "it is difficult to give any meaning" to the concept of an attempt by way of an omission to act"); *cf. id.* at 231 ("We acknowledge that there may be conceptual difficulties associated with identifying preparatory—and therefore more than merely preparatory—omissions. However, there can clearly be some situations where D's conduct is such that he or she is clearly 'on the job' even though there is no positive act . . .").

The theorists might respond that their theory allows for omission liability without making any accommodation for the occurrence of results, and that any limits on such liability where no result occurs would be evidentiary rather than substantive in nature. That is, the failure to establish liability for an omission would be due to the lack of convincing evidence about the sufficiency of the omission as a basis for liability, rather than a categorical bar against omission liability.

The difficulty seems deeper than that, though. After all, any "proof" that certain conduct could or would have caused a result that did not occur is necessarily counterfactual and relies on (justifiable) speculation rather than a conclusive evidentiary showing. The problem here is that such a counterfactual demonstration seems unusually tough, and perhaps impossible, where the basis of liability is inaction rather than action.

For a rare discussion that takes on these issues and seeks to elaborate an account of omission liability independent of any need to demonstrate resulting harm, see Alexander & Ferzan, *supra* note 15, at 385–90.

78. Alexander and Ferzan may achieve something similar by eliminating the possibility of liability for incomplete attempts. Alexander & Ferzan, *supra* note 15, at 379 ("[W]e would jettison incomplete attempts from the criminal law."). Indeed, since they view resulting harm as irrelevant, they presumably would not have a separate category of "attempts" toward some crime demanding a resulting harm, but would simply define the offense itself as the creation of a risk of that harm. In other words, they might define a set of particular inchoate offenses resembling

passes the threshold from being noncriminal to satisfying the generalized conduct test for an incomplete attempt toward some other target offense. Here, the omission itself would constitute the offense. This Article now turns to the possibility of punishing inchoate omission by using such offenses rather than by using a general attempt provision.

#### IV. SPECIFIC CRIMES INVOLVING HARMLESS INACTION

##### A. LAW

Attempt statutes are not the only means by which to punish inchoate omissions. Legislatures can and do enact other, specific offenses whose requirements allow for liability where an actor performs no act and causes no harm. Indeed, hundreds of such offenses exist. The following survey does not purport to be exhaustive, but is intended only to give a sense of how many such offenses exist and the types of conduct they tend to address. Generally, most of the offenses fall into one of two broad categories: omissions that generate or fail to ameliorate some risk of physical injury, or failures to comply with some specific obligation to provide required information to government authorities or others.

##### 1. Endangerment and Neglect

One common supplement to a general attempt provision, which typically demands intent to cause harm, is an endangerment offense enabling liability based on a showing of recklessness as to a risk of harm. Twenty-eight states have a general reckless-endangerment offense.<sup>79</sup> One of

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the offenses discussed in Part IV of this Article, rather than using a one-size-fits-all attempt provision with a generalized conduct rule.

79. For twenty-five of these states, the offense explicitly requires recklessness or its equivalent. *See* ALA. CODE § 13A-6-24 (LexisNexis 2005); ALASKA STAT. § 11.41.250 (2008); ARIZ. REV. STAT. ANN. § 13-1201 (2001); COLO. REV. STAT. § 18-3-208 (2008); CONN. GEN. STAT. § 53a-63 (2007) (first degree); *id.* § 53a-64 (second degree); DEL. CODE ANN. tit. 11, § 604 (2007) (first degree); *id.* § 603 (second degree); GA. CODE ANN. § 16-5-60(b) (2007); HAW. REV. STAT. § 707-713 (1993) (first degree); *id.* § 707-714 (second degree); 720 ILL. COMP. STAT. 5/12-5 (2006); IND. CODE ANN. § 35-42-2-2(b) (West Supp. 2008); KY. REV. STAT. ANN. § 508.060 (West 2006) (first-degree “wanton” endangerment); *id.* § 508.070 (second-degree “wanton” endangerment); *id.* § 501.020(3) (providing a definition of “wantonly” that is similar to the standard definition of “recklessness”); ME. REV. STAT. ANN. tit. 17-A, § 211 (2006); *id.* § 213 (aggravated version); MD. CODE ANN., CRIM. LAW § 3-204 (LexisNexis 2002); N.H. REV. STAT. ANN. § 631:3 (2007); N.Y. PENAL LAW § 120.25 (McKinney 2004) (first degree); *id.* § 120.20 (second degree); N.D. CENT. CODE § 12.1-17-03 (1997); OR. REV. STAT. § 163.195 (2007); 18 PA. CONS. STAT. § 2705 (2002); TENN. CODE ANN. § 39-13-103 (2006); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 2003); UTAH CODE ANN. § 76-5-112 (2008); VT. STAT. ANN. tit. 13, § 1025 (1998); WASH. REV. CODE § 9A.36.050 (2008); WIS. STAT. § 941.30 (2007–2008); WYO. STAT. ANN. § 6-2-504 (2007).

Three states have not adopted reckless endangerment only because they do not recognize “recklessness” as a distinct culpability level. *See* FLA. STAT. § 784.05(1) (2008) (defining an offense for “[w]hoever, through culpable negligence, exposes another person to



these states (Georgia) explicitly refers to omissions in defining the offense,<sup>80</sup> and another (Nevada) implicitly does so.<sup>81</sup> For eleven other states,<sup>82</sup> the offenses may apply to endangering omissions as well as endangering acts, as these states define their offenses to include reckless “conduct”<sup>83</sup> and separately define “conduct” to include omissions.<sup>84</sup> Some uncertainty remains, however, given that the typical provision requires conduct that “creates” a risk of injury or “places” another in danger, and it might be doubted that an omission can “create” such a risk or danger. A person’s inaction might constitute a failure to respond to a risk of injury that another person faces and might even be seen as a cause of any injury that occurs, but whether inaction itself can be said to *create* a risk is questionable.<sup>85</sup> Of the remaining provisions, most are unclear about whether an omission can

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personal injury”; code does not define “culpable negligence”); MONT. CODE ANN. § 45-5-208 (2007) (defining the offense of “negligently engag[ing] in conduct that creates a substantial risk of death or serious bodily injury”; Code defines negligence in section 45-2-101(43) to embrace usual concepts of recklessness and negligence together); *id.* § 45-5-207 (defining a similar offense for knowing endangerment); NEV. REV. STAT. § 202.595(1) (2007) (referring to “willful or wanton disregard”; code does not define “willful” or “wanton,” though “wanton” is likely similar to the modern formulation of recklessness).

80. See GA. CODE ANN. § 16-5-60(b) (2007) (defining the offense as “disregarding a . . . risk that [one’s] act or omission will cause harm”).

81. The provision imposes liability for “perform[ing] any act or neglect[ing] any duty imposed by law.” NEV. REV. STAT. § 202.595 (2007). The “neglect” basis of liability seems to expand on and contrast with the reference to liability for “any act,” apparently imposing omission liability (and doing so with the usual requirement, i.e., failure to satisfy a legal duty).

82. These states are Alabama, Alaska, Colorado, Hawaii, Montana, New Hampshire, New York, Oregon, Pennsylvania, Texas, and Utah.

83. See statutes cited *supra* note 79.

84. See ALA. CODE § 13A-2-3 (LexisNexis 2005); ALASKA STAT. § 11.81.900(b)(7) (2008); COLO. REV. STAT. § 18-1-501(2) (2008); HAW. REV. STAT. § 701-118(4) (1993); N.H. REV. STAT. ANN. § 625:11(I) (2007); N.Y. PENAL LAW § 15.00(4) (McKinney 2004); OR. REV. STAT. § 161.085(4) (2007); 18 PA. CONS. STAT. § 103 (2002); TEX. PENAL CODE ANN. § 1.07(a)(10) (Vernon 2003); UTAH CODE ANN. § 76-1-601(4) (2008).

Montana achieves this result by defining “conduct” to include “acts,” and then defining “act” to include omissions. See MONT. CODE ANN. § 45-5-208(1) (2007) (defining the endangerment offense in terms of “conduct”); *id.* § 45-2-101(1), (15) (defining “act” and “conduct”); see also *supra* note 56 (discussing states, including Montana, that define “act” to include omissions).

85. See, e.g., MOORE, *supra* note 2, at 267–78 (arguing against the claim that omissions can be causes); Michael S. Moore, Reply, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1784–85 (1994) (reiterating the claim that omissions are not causes, though noting that Anglo-American law sometimes treats them as if they are). For contrary views about the relationship between omission, causation, and criminal responsibility, see generally Marcelo Ferrante, *Causation in Criminal Responsibility*, 11 NEW CRIM. L. REV. 470 (2008); Gómez-Aller, *supra* note 16, at 429–43; Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 NEW CRIM. L. REV. 452, 457–61 (2008).

satisfy the offense.<sup>86</sup> Only one state, Indiana, seems to demand an affirmative act.<sup>87</sup>

In addition to the general endangerment offense, many states also have various specific endangerment offenses allowing for liability based on omissions that create risks but need not cause harm. These offenses can generally be grouped into four categories. First, thirty-eight states and the District of Columbia have particular offenses for endangering or neglecting the welfare of a child.<sup>88</sup> Some of these offenses apply only to the child's

86. Connecticut, Delaware, Kentucky, Maryland, Tennessee, Vermont, Washington, and Wyoming define the offense in terms of endangering "conduct," see statutes cited *supra* note 79, but do not define the term "conduct," so it is not clear whether an omission might qualify. Wyoming does define the phrase "course of conduct" for purposes of its stalking offense, and that definition requires a "series of acts," see WYO. STAT. ANN. § 6-2-506 (2007), so perhaps Wyoming is less likely than the others to treat an omission as conduct.

Maine and North Dakota define the offense to apply when one "creates a substantial risk," see statutes cited *supra* note 79, and both states broadly define the concept of "acting" to include omissions. See ME. REV. STAT. ANN. tit. 17-A, § 2(2) (Supp. 2008); N.D. CENT. CODE § 12.1-01-04(2) (Supp. 2007). Accordingly, these statutes presumably cover omissions as well as affirmative acts—assuming, as noted in the text, that omissions can create a risk.

Arizona's provision refers to "endangering another person," ARIZ. REV. STAT. ANN. § 13-1201(A) (2001), and Wisconsin's refers to one who "endangers another's safety," WIS. STAT. § 941.30 (2007–2008). These statutes might apply to omissions and might even do so more readily than the statutes that require risk creation; one's omission might endanger another in a context where some outside force or event creates the initial threat of injury to that person.

Similarly, Illinois refers to one who "endangers [another's] bodily safety." 720 ILL. COMP. STAT. 5/12-5(a) (2006). The provision's later reference to "perform[ing] . . . acts that . . . endanger safety," *id.*, might suggest that the statute excludes omissions, but Illinois defines "act" to include omissions. See *id.* § 2-2.

Finally, Florida's provision refers to one who "exposes another person to personal injury." FLA. STAT. § 784.05(1) (2008). It seems possible that inaction in the face of a risk or threat could count as "exposing" another to injury.

87. IND. CODE ANN. § 35-42-2-2(b) (West Supp. 2008) (defining the offense to require that one "perform[] . . . an act"). Indiana's code does not define "act," but its provision discussing the minimum conduct requirement for liability refers to "a person who omits to perform an act," IND. CODE § 35-41-2-1(a) (1998), implying that "performing an act" involves some affirmative act.

88. See ALA. CODE § 13A-13-6 (LexisNexis 2005); ALASKA STAT. § 11.51.110 (2008); ARIZ. REV. STAT. ANN. § 13-3619 (2001); ARK. CODE ANN. § 5-27-207 (2006); CAL. PENAL CODE § 273a (West 2008); CONN. GEN. STAT. § 53-21(a)(1) (2007); DEL. CODE ANN. tit. 11, §§ 1102(a)(1), (4), 1107 (2007); D.C. CODE § 22-1102 (2001); FLA. STAT. § 827.03(3) (2008); GA. CODE ANN. §§ 16-5-70(a), -12-1 (2007); HAW. REV. STAT. § 709-903.5 (1993 & Supp. 2007); 720 ILL. COMP. STAT. 5/12-21.6, 130/2 (2006); IOWA CODE §§ 726.3, .6 (2009); KAN. STAT. ANN. §§ 21-3608, -3608a (2007); KY. REV. STAT. ANN. § 530.060 (West 2006); LA. REV. STAT. ANN. § 14:93.2.1 (2004); ME. REV. STAT. ANN. tit. 17-A, § 554 (2006); MASS. GEN. LAWS ch. 265, § 13L (2006); MINN. STAT. § 609.378 (2008); MISS. CODE ANN. § 97-5-39 (2006); MO. REV. STAT. §§ 568.045, .050 (Supp. 2008); MONT. CODE ANN. § 45-5-622 (2007); NEV. REV. STAT. §§ 200.508(2), 201.110 (2007); N.H. REV. STAT. ANN. § 639:3 (2007); N.J. STAT. ANN. § 2C:24-4 (West 2005); N.M. STAT. § 30-6-1 (Supp. 2008); N.Y. PENAL LAW § 260.10(2) (McKinney 2008); N.C. GEN. STAT. § 14-318.2 (Supp. 2008); OHIO REV. CODE ANN. § 2919.22 (LexisNexis Supp. 2008); OKLA. STAT. tit. 21, § 852.1 (2001); OR. REV. STAT. §§ 163.545–.547 (2007); 18 PA. CONS. STAT. § 4304 (Supp.

parent<sup>89</sup> or legal guardian, but others apply to any adult who places a child in danger.<sup>90</sup> A related, though slightly distinct, group of provisions imposes liability for failure to provide support (such as food, clothing, or shelter) for one's child or, under some statutes, one's spouse or parent.<sup>91</sup> Typically,

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2007); TENN. CODE ANN. § 39-15-401 (Supp. 2008); TEX. PENAL CODE ANN. § 22.041 (Vernon Supp. 2008); UTAH CODE ANN. § 76-5-112.5(2) (2008); VA. CODE ANN. § 18.2-314 (2004); W. VA. CODE ANN. §§ 61-8D-3, -4 (LexisNexis 2005); WIS. STAT. § 948.21 (2007-2008); WYO. STAT. ANN. § 6-4-403(a) (ii) (2007).

89. For a thorough survey and analysis of the various obligations that criminal law imposes based on familial relationships, including the duties of parents toward their children, see generally Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327 (2008). For an argument that the law's impositions on parents should be more relaxed than its impositions on other custodians of children, see Roderick M. Hills, Jr., Reply, *Do Families Need Special Rules of Criminal Law?: A Reply to Professors Collins, Leib, and Markel*, 88 B.U. L. REV. 1425, 1433-35 (2008).

90. Some states have distinct subsections, or multiple sections, to address each category separately. See ALA. CODE § 13A-13-6(a) (LexisNexis 2005); FLA. STAT. § 827.03(3) (2008); GA. CODE ANN. § 16-5-70 (2007); 720 ILL. COMP. STAT. 5/12-21.6, 130/2 (2006); IOWA CODE § 726.3 (2009) (applying to parents and persons having custody of a child); *id.* § 726.6 (applying not only to parents and persons having custody of a child, but also to guardians and those having "control" over a child—where "control" is defined as "supervision," temporary supervision without parental consent, or driving a car with the minor in it); NEV. REV. STAT. §§ 200.508, 201.110 (2007); N.M. STAT. § 30-6-1 (Supp. 2008); N.Y. PENAL LAW § 260.10(2) (McKinney 2008); OHIO REV. CODE ANN. § 2919.22(A)-(B) (LexisNexis Supp. 2008); TEX. PENAL CODE ANN. § 22.041(b)-(c) (Vernon Supp. 2008); W. VA. CODE ANN. §§ 61-8D-3, -4 (LexisNexis 2005); WYO. STAT. ANN. § 6-4-403 (2007). In a slight variation, some statutes are drafted to apply generally to any adult but *also* specify in particular adults with legal custody of any child. See CAL. PENAL CODE § 273a (West 2008); ME. REV. STAT. ANN. tit. 17-A, § 554 (2006); MISS. CODE ANN. § 97-5-39 (2006); MO. REV. STAT. §§ 568.045, .050 (Supp. 2008); MONT. CODE ANN. § 45-5-622 (2007). A statute in Delaware applies to legal guardians but also to any adult who commits certain crimes while knowing that the crime is being witnessed by a child of that adult's family or the victim's family. See DEL. CODE ANN. tit. 11, § 1102(a)(4) (2007). Separately, Delaware also imposes liability for any adult leaving certain items unattended that might endanger children. *Id.* § 1107.

Other states have provisions whose terms simply apply generally to any adult (some say "person"). See ALASKA STAT. § 11.51.110(a) (2008); ARK. CODE ANN. § 5-27-207(a)(1) (2006); CONN. GEN. STAT. § 53-21(a)(1) (2007); KAN. STAT. ANN. §§ 21-3608, -3608a (2007); MASS. GEN. LAWS ch. 265, § 13L (2006); N.H. REV. STAT. ANN. § 639:3 (2007); TENN. CODE ANN. § 39-15-401 (Supp. 2008); UTAH CODE ANN. § 76-5-112.5(2) (2008).

Still other states have statutes that are limited to adults with legal custody of a minor or similarly recognized legal obligations. See ARIZ. REV. STAT. ANN. § 13-3619 (2001); D.C. CODE § 22-1102 (2001); HAW. REV. STAT. § 709-903.5 (1993 & Supp. 2007); KY. REV. STAT. ANN. § 530.060(1) (West 2006); LA. REV. STAT. ANN. § 14:93.2.1(A) (2004); N.J. STAT. ANN. § 2C:24-4(a) (West 2005); N.C. GEN. STAT. § 14-318.2 (Supp. 2008); OKLA. STAT. tit. 21, § 852.1(A) (2001); OR. REV. STAT. §§ 163.545-547 (2007); 18 PA. CONS. STAT. § 4304 (Supp. 2007); VA. CODE ANN. § 18.2-314 (2004); WIS. STAT. § 948.21 (2007-2008). A Minnesota statute applies mainly to legal guardians but has a subsection that applies to any adult who endangers a child by giving them access to firearms. MINN. STAT. § 609.378(1)(c) (2008).

91. See ALASKA STAT. § 11.51.120 (2008) (child); ARIZ. REV. STAT. ANN. § 13-3611 (Supp. 2008) (spouse); ARK. CODE ANN. § 5-26-401 (Supp. 2007) (child or spouse); CAL. PENAL CODE §§ 270, 270a (West 2008) (child or spouse); CONN. GEN. STAT. § 53-304 (2007) (child, spouse, or parent); FLA. STAT. § 827.06 (2008) (child or spouse); IDAHO CODE ANN. § 18-401 (2004) (child or spouse); IND. CODE §§ 35-46-1-5 to -7 (1998 & Supp. 2001) (child, spouse, or parent);

these statutes do not directly require any resulting harm to the child or spouse, though many are defined in terms of failing to provide “necessary” support, and proof that the support was necessary might demand proof that the absence of support caused some injury or harm.<sup>92</sup>

Second, twenty-three states have offenses for endangering elderly, incompetent, or otherwise vulnerable adults.<sup>93</sup> As with child-endangerment offenses, these offenses sometimes are of general applicability and sometimes impose a duty only on the person’s guardian or caretaker. Of course, these endangerment statutes also cover situations where the neglect does in fact ripen into harm, often aggravating the offense grade based on the resulting harm.

Third, using a sometimes-less-direct means of addressing what amounts to endangerment, various offenses criminalize the failure of an official, or other person bound by some public trust, to discharge his or her duty—typically, a duty to protect others or ensure their safety. A couple of these offenses apply broadly to any official who fails to perform his or her duty.<sup>94</sup> Others apply to specific actors, such as road overseers,<sup>95</sup> persons having

KAN. STAT. ANN. § 21-3605 (2007) (child or spouse); MINN. STAT. § 609.378(1)(a)(1) (2008) (child). For a general discussion and evaluation of these statutes, see Collins et al., *supra* note 89, at 1347–49, 1416–22.

92. Not all statutes have such a “necessity” requirement, and at least one state’s provision suggests that failures to provide “necessary” support need not cause harm in order to be punishable. Minnesota’s provision applies to one who “willfully deprives a child of *necessary* food, clothing, shelter, health care, or supervision” where “the deprivation harms *or is likely to substantially harm* the child’s physical, mental, or emotional health.” MINN. STAT. § 609.378(1)(a)(1) (2008) (emphases added). Accordingly, it seems at least possible that a violation of these statutes could occur even absent any resulting harm.

93. See ARK. CODE ANN. § 5-27-203 (2006) (incompetent); *id.* § 5-28-103(c) (“endangered” or “impaired” person); DEL. CODE ANN. tit. 11, § 1105 (2007) (incompetent); FLA. STAT. § 825.102(3)(a)(2) (2008) (elderly or disabled); HAW. REV. STAT. § 709-905 (1993) (incompetent); IDAHO CODE ANN. § 18-1505 (Supp. 2008) (“vulnerable adult”); 720 ILL. COMP. STAT. 5/12-21(a)(2) (2006) (elderly or disabled); IOWA CODE § 726.3 (2009) (“dependent person”); *id.* § 726.7 (resident of a healthcare facility); *id.* § 726.8 (“dependent adult”); KAN. STAT. ANN. § 21-3425 (2007) (“confined person,” including a prisoner or a disabled, mentally ill, mentally retarded, or involuntarily confined person); *id.* § 21-3437(a)(3) (“dependent adult”); ME. REV. STAT. ANN. tit. 17-A, § 555(1) (2006) (“dependent person”); MD. CODE ANN., CRIM. LAW § 3-605 (LexisNexis 2002) (“vulnerable adult”); MINN. STAT. § 609.233 (2008) (“vulnerable adult”); MO. REV. STAT. § 565.184(1)(4) (2000) (elderly); N.H. REV. STAT. ANN. § 639:3 (2007) (incompetent); N.J. STAT. ANN. § 2C:24-7 (West 2005) (incompetent); N.Y. PENAL LAW § 260.25 (McKinney 2008) (incompetent or physically disabled); N.D. CENT. CODE § 12.1-31-07(2) (Supp. 2007) (“vulnerable adult”); OHIO REV. CODE ANN. § 2903.34 (LexisNexis 2006) (patient of care facility); *id.* § 2903.341 (mentally retarded or developmentally disabled); OKLA. STAT. tit. 21, § 843.3 (Supp. 2008) (“vulnerable adult”); S.D. CODIFIED LAWS § 22-46-2 (2006) (disabled); UTAH CODE ANN. § 76-5-112.5(2) (2008) (elderly); VT. STAT. ANN. tit. 13, § 1378(a) (Supp. 2008) (“vulnerable adult”); VA. CODE ANN. § 18.2-369(A) (2004) (“incapacitated adult”); WYO. STAT. ANN. § 6-2-507 (2007) (“vulnerable adult”).

94. See MISS. CODE ANN. § 97-11-37 (2006); OKLA. STAT. tit. 21, § 580 (2001); VT. STAT. ANN. tit. 13, § 3006 (1998).

95. See MISS. CODE ANN. § 97-15-47 (2006).

control of a public conveyance<sup>96</sup> (including specific offenses for a rail conductor's failure to ring a bell or whistle before a crossing<sup>97</sup>), seamen,<sup>98</sup> and owners of "dangerous animal[s]."<sup>99</sup> Still others penalize specific failures to perform a required act or take steps to prevent an identified threat, such as neglecting to suppress a riot,<sup>100</sup> pursue or confine an offender or convict,<sup>101</sup> investigate a fire,<sup>102</sup> or prevent a catastrophe.<sup>103</sup> Some offenses extend a duty to common citizens to assist in the performance of some public service. For example, some offenses punish persons who disobey a peace officer's demand for assistance in effectuating an arrest (or otherwise enforcing the law),<sup>104</sup> responding to a riot,<sup>105</sup> or fighting a fire.<sup>106</sup> All these crimes are inchoate, as they require no resulting harm. The citizen's inaction can lead to liability even when it does not actually impede the official's ability to fulfill his or her duties, such as when the arrest is successfully made anyway. Some of these offenses may contemplate dereliction of the relevant public duty as risking, or even being, a harm other than a threat to safety, but the nature of such a harm, if any, is not specified and defies easy articulation. Most such offenses are more easily seen as being concerned with inaction that jeopardizes others' personal safety.

96. See 720 ILL. COMP. STAT. 5/12-5.5 (2006); MASS. GEN. LAWS ch. 265, § 30 (2006); *see also* OKLA. STAT. tit. 21, § 1255 (2001) (specific offense for railroad workers).

97. See IDAHO CODE ANN. § 18-6002 (2004); OKLA. STAT. tit. 21, § 1253 (2001).

98. See 18 U.S.C. § 2196 (2006).

99. See KAN. STAT. ANN. § 21-3418 (2007).

100. See CAL. PENAL CODE § 410 (West 1999); MASS. GEN. LAWS ch. 269, § 3 (2006).

101. See FLA. STAT. § 843.10 (2008) (criminalizing the act of negligently allowing a prisoner in custody to escape); MISS. CODE ANN. § 97-9-39 (2006) (criminalizing the act of "willfully and corruptly refus[ing] to execute any lawful process . . . requiring the apprehension or confinement of any person charged with a criminal offense"); *id.* § 97-11-35 (criminalizing the act of "willfully neglect[ing] or refus[ing] to return any person committing any offense against the laws").

The Florida statute may be seen as involving a resulting harm, since an offender's escape is itself an injury to social interests. The corresponding Mississippi statute, however, makes clear that liability for allowing a possible escape shall arise "whether such escape be attempted or effected or not." MISS. CODE ANN. § 97-9-39 (2006).

102. See N.C. GEN. STAT. § 14-69 (2007).

103. See N.J. STAT. ANN. § 2C:17-2(d) (West 2005); 18 PA. CONS. STAT. § 3303 (2002).

104. See FLA. STAT. § 843.06 (2008); HAW. REV. STAT. § 710-1011 (1993 & Supp. 2007); 720 ILL. COMP. STAT. 5/31-8 (2006); IOWA CODE § 719.2 (2009); MASS. GEN. LAWS ch. 268, §§ 24-25 (2006); MICH. COMP. LAWS ANN. § 750.483 (West 2004); NEB. REV. STAT. § 28-903 (2008); NEV. REV. STAT. § 199.270 (2007); OKLA. STAT. tit. 21, §§ 537-538 (2001); OR. REV. STAT. § 162.245 (2007); UTAH CODE ANN. § 76-8-307 (2008); VA. CODE ANN. §§ 18.2-463 to -464 (2004); W. VA. CODE ANN. § 61-5-14 (LexisNexis 2005); WIS. STAT. § 946.40 (2007-2008).

105. See MASS. GEN. LAWS ch. 269, § 2 (2006); MICH. COMP. LAWS ANN. § 750.523 (West 2004); MO. REV. STAT. § 574.060 (2000). Michigan also has a provision imposing a duty on officials themselves to respond to a riot. *See* MICH. COMP. LAWS ANN. § 750.524 (West 2004).

106. See OR. REV. STAT. § 162.255 (2007).

Finally, about a dozen states expand liability beyond endangerment of humans, criminalizing omissions that endanger animals as well. Some of these offenses target the animal's owner,<sup>107</sup> while others apply to any person who "confines" an animal and then fails to give it proper nourishment or care.<sup>108</sup> At least one such provision is even broader, applying not only to owners or guardians but to anyone whose omission threatens the health of an animal in certain ways or in certain contexts.<sup>109</sup>

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107. See CONN. GEN. STAT. § 53-247(a) (2007) (imposing liability on any person who, "having charge or custody of any animal, . . . fails to provide it with proper food, drink or protection from the weather or abandons it"); D.C. CODE § 22-1011 (2001) (criminalizing the failure of an "owner or person in charge" to provide proper food or shelter "for more than 5 consecutive hours"); IND. CODE ANN. § 35-46-3-7(a) (West Supp. 2008) (criminalizing the behavior of a person who "owns a vertebrate animal" and who "abandons or neglects" that animal); KAN. STAT. ANN. § 21-4310(a)(3) (2007) (making it a crime for a person "having physical custody of any animal [to] intentionally fail[] to provide such food, potable water, protection from the elements, opportunity for exercise and other care as is needed for the health or well-being of such kind of animal"); KY. REV. STAT. ANN. § 525.130(1)(b) (West 2006) (making it a crime for a person to "[s]ubject[] any animal in his custody to cruel neglect"); MISS. CODE ANN. § 97-41-9 (2006) (requiring that the owner or person with custody provide "necessary sustenance, food, [and] drink"); N.H. REV. STAT. ANN. § 644:8(I), (III)(f) (2007); OR. REV. STAT. § 167.325 (2007) (making it a crime for a person with custody or control to "fail[] to provide minimum care for an animal").

108. See CONN. GEN. STAT. § 53-247(a) (2007) (imposing liability on any person who, "having impounded or confined any animal, fails to give such animal proper care or . . . fails to supply any such animal with wholesome air, food and water"); FLA. STAT. § 828.13(2)(a) (2008); IOWA CODE § 717B.3(1) (2009) (requiring that a person who "impounds or confines . . . an animal" provide sufficient food and water and, if the animal is a cat or dog, adequate shelter).

Note that these offenses impose omission liability, for it is not the confinement but the subsequent neglect or failure to act (along with one's culpability as to the risks that such neglect creates) that generates liability. The earlier act of confinement does not itself lead to criminal liability, though it does give rise to the duty that grounds the potential for omission liability based on the subsequent failure to act.

109. See W. VA. CODE ANN. § 61-8-19(a)(1) (LexisNexis Supp. 2008). This provision reads:

It is unlawful for any person to intentionally, knowingly or recklessly,

...

(B) abandon an animal;

(C) withhold,

(i) proper sustenance, including food or water;

(ii) shelter that protects from the elements of weather; or

(iii) medical treatment, necessary to sustain normal health and fitness or to end the suffering of any animal; [or]

...

(E) leave an animal unattended and confined in a motor vehicle when physical injury to or death of the animal is likely to result . . . .

## 2. Failure to Disclose or Report

A second group of inchoate-omission offenses imposes liability for failure to provide information where the law requires its provision.<sup>110</sup> Many offenses penalize failures to report required information to public authorities, such as law-enforcement officials. For example, numerous offenses criminalize various parties' failure to report known or likely criminal activity—regardless of whether such failure actually impedes any criminal investigation. The duty to report may cover various offenses,<sup>111</sup> including money laundering or other financial misconduct,<sup>112</sup> environmental violations,<sup>113</sup> treason,<sup>114</sup> sexual assault,<sup>115</sup> domestic violence,<sup>116</sup> child pornography,<sup>117</sup> child abuse,<sup>118</sup> elder abuse,<sup>119</sup> animal neglect,<sup>120</sup> crimes involving gunshot wounds,<sup>121</sup> and corruption in sporting events.<sup>122</sup> Other offenses require provision of information necessary for governmental recordkeeping or administration of services, such as information affecting eligibility for government assistance<sup>123</sup> or information regarding the ownership or sale of regulated tranquilizer guns.<sup>124</sup> Finally, a

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110. For a more comprehensive survey of such offenses, see generally Thompson, *supra* note 17.

111. See MASS. GEN. LAWS ch. 268, § 40 (2006) (homicide, sexual assault, or armed robbery); TEX. PENAL CODE ANN. § 38.171 (Vernon Supp. 2008) (felony “in which serious bodily injury or death may have resulted”); WIS. STAT. § 940.34(2)(b) (2007–2008) (creating a reporting duty for a private detective “who has reasonable grounds to believe that a crime is being committed or has been committed”).

112. See Thompson, *supra* note 17, at 3–5, 24–31 (citing and discussing various such offenses).

113. See *id.* at 31–35.

114. See W. VA. CODE ANN. § 61-1-3 (LexisNexis 2005).

115. See ME. REV. STAT. ANN. tit. 17-A, § 760 (Supp. 2008).

116. See Thompson, *supra* note 17, at 10 & n.31 (summarizing statutes and citing other sources).

117. See OR. REV. STAT. § 163.693 (2007); S.D. CODIFIED LAWS §§ 22-24A-16 to -18 (2006).

118. See 18 U.S.C. §§ 1169, 2258 (2006); ALASKA STAT. § 11.56.765 (2008); ARIZ. REV. STAT. ANN. § 13-3620 (Supp. 2008); TEX. PENAL CODE ANN. § 38.17 (Vernon Supp. 2008).

119. See MINN. STAT. § 609.234 (2008); NEV. REV. STAT. § 200.5093 (2007); N.M. STAT. § 30-47-9 (2004); S.C. CODE ANN. § 16-3-1050(A) (2003).

120. See NEB. REV. STAT. § 28-1017 (2008).

121. See KAN. STAT. ANN. § 21-4213 (2007) (gunshot wound or other serious wound “apparently inflicted by a knife, ice pick, or other sharp or pointed instrument”); ME. REV. STAT. ANN. tit. 17-A, § 512 (2006); MO. REV. STAT. § 578.350 (2000); NEB. REV. STAT. § 28-902 (2008) (“wound or injury of violence”); N.H. REV. STAT. ANN. § 631:6 (2007); 18 PA. CONS. STAT. § 5106 (2002); R.I. GEN. LAWS § 11-47-48 (2002).

122. See 720 ILL. COMP. STAT. 5/29-3 (2006); R.I. GEN. LAWS § 11-7-12 (2002).

123. See S.D. CODIFIED LAWS § 22-29-12 (2006).

124. See NEB. REV. STAT. §§ 28-1209 to -1210 (2008).

handful of offenses reverse the flow of required information, penalizing public servants who fail to disclose conflicts of interest.<sup>125</sup>

Probably the most common and well-known examples of criminal provisions within this category are the offenses—some version of which has been enacted in every state—that penalize convicted sex offenders' failure to satisfy registration or notification requirements.<sup>126</sup> These and other felon-registration offenses are somewhat *sui generis*, however, because the affirmative obligations they impose might be seen as part of the punishment for the offender's earlier crime(s).

### B. ENFORCEMENT

Some of the factors that might curb prosecutions for attempt by omission seem likely to have similar force in the context of particular crimes of inchoate omission, yet others do not. Unlike attempt, specific crimes can and, as the examples indicate, often do demand only a reduced level of culpability, such as recklessness or negligence, as a basis for liability. Also, while prosecutors may struggle to conceptualize, much less explain to a jury, the notion of inaction as a "substantial step" in the direction of a crime, in these situations the inaction itself is squarely defined to fit within the parameters of an offense.

And indeed, these offenses—particularly the endangerment offenses—generate prosecutions for omissions more frequently than is the case under the attempt statutes. A search of publicly available court opinions—which reflect only a small fraction of all prosecutions—turns up a number of cases involving situations where a defendant's inaction generates criminal liability even though the inaction does not lead to any injury.<sup>127</sup> Some scenarios recur, such as situations where an adult leaves an infant in a car for an extended period of time on a very hot or cold day;<sup>128</sup> where an adult leaves

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125. See ALA. CODE § 13A-10-62 (LexisNexis 2005); COLO. REV. STAT. § 18-8-308 (2008); UTAH CODE ANN. § 76-8-109(4) (2008).

126. See generally Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172–78 (1999) (discussing these requirements).

127. For this project, searches were conducted in each relevant jurisdiction's case-opinion databases on Lexis and/or Westlaw, using as search terms any of the jurisdiction's statutory provisions whose elements allowed for inchoate-omission liability. Many of those provisions are written so as to allow liability when harm occurs or when there is an affirmative act, so the vast majority of retrieved cases involved fact patterns in which action, harm, or both were actually present. Those cases were ignored. Many, though not all, of the remaining cases (i.e., the ones that involved prosecution for an inchoate omission) are discussed in the text and footnotes in this Section.

128. See *People v. Jordan*, 843 N.E.2d 870, 879–81 (Ill. 2006) (reviewing a child-endangerment conviction of a father who left an infant in a car for up to forty minutes on a twenty-degree day); *State v. Todd*, 183 S.W.3d 273, 275–76, 280 (Mo. Ct. App. 2005) (affirming a child-endangerment conviction of a mother who left a nine-year-old in a car on a ninety-four-degree day while she gambled in a casino); *State v. Warner*, No. DC 03-55, 2003 Mont. Dist.



drugs or other dangerous objects lying around the house in the immediate presence of unsupervised children;<sup>129</sup> where officers enter a home to find children in a state of apparent extended neglect (lying in excrement, clearly underfed, etc.), though suffering no specific injuries and ultimately recovering once given medical treatment;<sup>130</sup> or where an adult fails to pursue immediate medical treatment for a sick or injured child, but later treatment leads to a full recovery.<sup>131</sup> In one extreme example, a father,

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LEXIS 3162, at \*1, \*4 (Mont. Dist. Ct. Aug. 14, 2003) (affirming a child-endangerment conviction of a mother who left her infant in a car on a thirty-five-degree day); *State v. Obeidi*, 155 P.3d 80, 81 & n.1, 84 (Or. Ct. App. 2007) (affirming a child-neglect conviction of a mother who left a three-year-old and a one-year-old in a car for twenty to thirty minutes, even though the weather created no specific safety concern); *Cochener v. State*, No. C14-91-00153-CR, 1992 Tex. App. LEXIS 1370, at \*1-2, \*8 (Tex. App. May 21, 1992) (affirming a child-abandonment conviction of a mother who left a four-year-old in a car while shopping, at which point the child left the car, walked across a parking lot, and was found crying by a store window).

At least one state has a specific criminal offense addressing this scenario and requiring no resulting harm, thus defining an inchoate-omission crime. See TEX. PENAL CODE ANN. § 22.10 (Vernon 2003). There have been a number of recent cases involving similar abandonment but resulting in the baby's death. See Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 820-32 (2006) (reporting on an empirical study of 130 hyperthermia cases involving children left in cars between 1998 and 2003).

129. See *State v. Smith*, 869 A.2d 171, 173, 178-79 (Conn. 2005) (affirming a child-endangerment conviction where authorities found a one-year-old on the defendant's bed with a packet of crack cocaine, though not mentioning whether the defendant was the child's parent or guardian); *State v. Fagan*, 883 A.2d 8, 11, 15 n.7, 18 (Conn. App. Ct. 2005) (affirming a child-endangerment conviction where authorities found toddlers in the defendant's bedroom with razors and crack, notwithstanding the fact that the defendant claimed not to be the children's legal guardian); *State v. Sage*, 977 S.W.2d 65, 67-68, 71-72 (Mo. Ct. App. 1998) (affirming a child-endangerment conviction of a mother who left her child in a house full of chemicals and sharp objects); *State v. Graham*, 109 P.3d 285, 287, 291 (N.M. 2005) (affirming a child-abuse conviction where officers executing a search warrant found two infants in an untidy house with drugs throughout, including a marijuana bud in a crib); *State v. Damofle*, 750 P.2d 518, 519, 521 (Or. Ct. App. 1988) (affirming a "criminal mistreatment" conviction of parents whose three children—aged five years, one-and-one-half years, and five months—lived in unsanitary conditions and within easy reach of matches and gasoline, and holding that the statute required no proof of injury to the children).

130. See *People v. Harris*, 48 Cal. Rptr. 677, 678-79, 682 (Dist. Ct. App. 1966) (affirming a mother's child-endangerment conviction after authorities found her children—one of whom had a dried bed sheet stuck to his skin—in a house with old food, excrement, and "[c]ockroaches of all sizes . . . in every room"); *Knight v. State*, 505 S.E.2d 796, 798 (Ga. Ct. App. 1998) (affirming a child-cruelty conviction of the father of a malnourished child); *State v. Bachelder*, 565 A.2d 96, 97 (Me. 1989) (affirming a child-endangerment conviction of a mother who failed to feed, bathe, or clothe her children and who let them wander in the streets); *Commonwealth v. Wallace*, 817 A.2d 485, 491-94 (Pa. Super. Ct. 2002) (affirming a father's child-endangerment conviction for raising his children in a filthy, foul-smelling home with mice, maggots, structural damage, and no working furnace, and holding that the statute did not require proof of actual injury).

131. See *Withrow v. State*, 619 S.E.2d 714, 715-17 (Ga. Ct. App. 2005) (affirming a child-cruelty conviction of a mother who failed to get treatment for three days after her boyfriend abused her child); *Wolf v. State*, 540 S.E.2d 707, 708-09 (Ga. Ct. App. 2000) (affirming a child-

apparently intoxicated, stared for minutes at his burning car while his five-year-old and two-year-old children were trapped inside, neither seeking to rescue them nor responding to others who asked if anyone was inside; ultimately, he stated that the children were inside, and another man rescued them from the car.<sup>132</sup>

Some cases involve children who have simply been left unattended; typically, the children are later found by someone else, sometimes in a public area.<sup>133</sup> In an Indiana case, the defendant was supposed to be watching his girlfriend's five-year-old, but he instead left to help someone move furniture a few blocks away; the child was later found "wandering the street."<sup>134</sup> Similarly, in an Ohio case, a police officer found a two-year-old about to step from the curb onto a street; upon the child's return to his house, some 100 yards away, his mother said he had been gone for just five or ten minutes.<sup>135</sup> Another Ohio case involved a bus driver who found an unattended two-year-old wandering around a parking lot in the rain wearing only a diaper.<sup>136</sup> In New Jersey, a mother was sentenced to eight years' imprisonment for leaving her three children alone at home on a 100-degree day with the windows closed and blinds drawn, where her brother found them before they suffered any injury.<sup>137</sup> In one New York case, the defendant left a child alone for over two hours; the court, questionably, concluded that "leaving a child alone" is an act rather than an omission, so the defendant could be found liable in spite of the lack of any legal duty toward the child.<sup>138</sup>

As for the other broad category of harmless-inaction crimes—the failure-to-report offenses—Sandra Guerra Thompson has conducted

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cruelty conviction of a mother who failed to pursue treatment for her child, or authorize treatment by others, after the child suffered a severe burn).

132. *Steinecke v. State*, No. 01-05-00813-CR, 2007 Tex. App. LEXIS 2898, at \*2-4 (Tex. App. Apr. 12, 2007).

133. *See, e.g., State v. Branham*, 743 A.2d 635, 637, 640 (Conn. App. Ct. 2000) (affirming a child-endangerment conviction where a father left three children, all under the age of four, alone in an apartment for about one hour, at which point the mother returned to find the children home alone); *Castillo v. State*, No. 08-04-00377-CR, 2006 Tex. App. LEXIS 5342, at \*1-3, \*24 (Tex. App. June 22, 2006) (affirming a child-abandonment conviction of a mother who left her children alone overnight, giving responsibility to the eleven-year-old eldest child, who in turn left the siblings alone and went to school the next morning); *cf. Morris v. Commonwealth*, 636 S.E.2d 436, 437-41 (Va. 2006) (reversing, by a 4-3 vote, a child-neglect conviction of a mother whose children, ages five and two, were found playing in the woods near the defendant's trailer while the defendant was inside sleeping).

134. *Thames v. State*, 653 N.E.2d 517, 517 (Ind. Ct. App. 1995).

135. *State v. Schaffer*, 713 N.E.2d 450, 450-52 (Ohio Ct. App. 1998).

136. *State v. Melvin*, No. 21135, 2003 WL 1524567, at \*2 (Ohio Ct. App. Mar. 26, 2003).

137. *State v. D.V.*, 791 A.2d 304, 305 (N.J. Super. Ct. App. Div. 2002).

138. *People v. Watson*, 700 N.Y.S.2d 651, 654 (Crim. Ct. 1999).

research into their enforcement.<sup>139</sup> Prosecutions for these crimes are rare,<sup>140</sup> and those that do occur bear some factual resemblance to the child-endangerment cases. For example, Thompson discusses a handful of prosecutions in Texas against mothers who failed to report abuse or molestation of their children by others.<sup>141</sup> The general rarity of prosecution is not especially surprising, as the offenses likely exist mainly to give police and prosecutors investigative leverage, enabling them to use the *threat* of prosecution to obtain information for pursuing some other crime.<sup>142</sup> Interestingly, though, such laws can still have a significant impact, since the legal duty they impose is sometimes used as the basis for bringing a civil claim against a non-reporter for the failure to report.<sup>143</sup>

In sum, it is clear that numerous inchoate-omission offenses are on the books. Even a limited investigation indicates that authorities enforce such offenses, generating convictions and punishment—perhaps not as an everyday matter but not as an exceedingly rare matter either. Should we find these laws, and their enforcement, disturbing, or are they an appropriate exercise of authority? The next Part of this Article takes up that question.

## V. EVALUATING CRIMES OF HARMLESS INACTION

Thus far, this Article has described the category of inchoate-omission crimes and has shown that such crimes do exist. But should they exist? And if so, in what form? This Part takes up those questions. Part V.A addresses the normative question of whether such crimes can be justified or desirable, and it answers that question in the affirmative.

There remains the second, formal question, which Part V.B addresses. Parts III and IV explored, in the particular context of inchoate omissions, two formally distinct ways of criminalizing behavior. One option is to write a single provision with terms designed to have sufficient breadth to capture all of the relevant behavior. The other is to write numerous specific provisions, each of which captures a subset of the relevant behavior. The discussion in

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139. See Thompson, *supra* note 17, at 15–16, 20–23, 33–34 (surveying various failure-to-report cases).

140. See *id.* at 16 (“[P]rosecutors in most states do not invoke their reporting laws against non-reporters, especially not non-reporters who are not professionals within certain categories of mandatory reporters.”); *cf. id.* at 33 (“The CERCLA reporting statute has generated relatively few published cases.”).

141. See *id.* at 15–16.

142. *Cf. id.* at 33 (noting that the pattern of enforcement of environmental reporting statutes, which require offenders to report *their own* underlying violations, “suggests that prosecutors use the reporting charge as a bargaining chip in less serious dumping offenses as a means of extracting guilty pleas”).

143. See *id.* at 7 (“Of special concern in drafting reporting statutes is the fact that, in some areas of law, their primary use will be to create civil liability for non-reporters by creating a legal duty under criminal law. Non-reporters of child abuse, for example, are rarely prosecuted, but often are sued.”).

this Part takes a step back to explore and evaluate these two methods of designing criminal-law doctrine, considering any lessons that the inchoate-omission category teaches about these general issues.

#### A. THE SCOPE OF CRIMINAL LIABILITY

In the abstract, imposing criminal liability on a person who does not act, and whose inaction causes no tangible harm, seems troubling. Such liability raises the specter of thought crimes requiring the government to prove hardly anything with respect to the defendant's actual behavior in the world: neither any observable conduct nor any demonstrable change in a preexisting state of affairs.<sup>144</sup> Given these concerns, the frequent criticism of such inchoate-omission crimes as possession offenses is hardly surprising.<sup>145</sup>

Further, many of the particular inchoate-omission crimes that exist on the books threaten to expand the scope of criminal law into areas where it might seem unsuitable or unsettling. For example, the various child-neglect or elder-neglect offenses, if enforced overzealously, might lead to an intrusion on intimate familial life, which seems best left to civil law or beyond the scope of law altogether. Modern criminal law has increasingly intervened in domestic life, sometimes laudably so, as with the increased criminalization and prosecution of domestic abuse.<sup>146</sup> Yet even these seemingly uncontroversial interventions can have a powerful, perhaps negative, ancillary impact on family relationships, as Jeannie Suk has recently described.<sup>147</sup>

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144. See Perlman, *supra* note 16, at 234–35. As Perlman explains:

[I]n a crime of omission, one is guilty of a lack of action, and the crime will be simply having the intent to allow (through omission) something bad to occur. Murderous child abandoning will be failing to act as you should while having the intention (knowing or having it as your purpose) to have a harmful event occur as a result of your inaction. What are we punishing in a case like this? We are not punishing the harm, but only the intention to do the harm coupled with lack of action to prevent it. . . . [N]ow it begins to look like the consequence-irrelevance theory will punish people's intentions, rather than their actions. This is quite a frightening prospect, for it begins to look like we are punishing Orwellian "thought-crimes," and such punishment seems obviously unacceptable and immoral. When consequences matter in crimes of omission, we do not punish for intention alone, but rather intention *plus* harm caused by the intentional lack of action. If consequences are irrelevant, we would punish intentions alone in cases of omissions, and this is a good reason to reject the thesis of consequence-irrelevance.

*Id.*; see also Gómez-Aller, *supra* note 16, at 423 (noting that punishing unconsummated omissions "[p]erhaps . . . would be tantamount to punishing mere ideas or thoughts").

145. See *supra* notes 50–53 and accompanying text (discussing possession offenses).

146. See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 11–13 (2006) (describing the development of the criminal law's role in addressing domestic violence).

147. See *id.* at 53–63 (arguing that domestic-violence protection orders result in "de facto divorce" and strained relationships).

More generally, using criminal law to punish mere negligence, especially when the law does not even require overt action, runs the risk of blurring the tort–crime distinction and reducing the moral authority of criminal law as its domain expands to include not only serious transgressions, but also low-grade—they are harmless, after all—instances of neglect. Indeed, since inchoate-omission crimes by definition require no resulting harm, they potentially expand liability even beyond what would be available under tort law, where damages would be required.

The above concerns notwithstanding, it may still seem sensible, and even desirable, to punish some culpable omissions that fail to cause harm. In general, requiring harm for criminal liability introduces the potential for “moral luck”—that is, a judgment of blame that depends on factors outside the control of the person being blamed.<sup>148</sup> Numerous commentators who oppose such judgments criticize criminal-law rules that base liability on, or enhance liability because of, the occurrence of resulting harm. They claim that the results of a person’s conduct are irrelevant to a moral assessment of the conduct, as those results are beyond the person’s capacity for choice and control.<sup>149</sup> Similarly, focusing on the distinction between action and omission obscures a more proper consideration of whether the risks or dangers a person created were a matter of her exercise of choice and her capacity for control.<sup>150</sup> A person who culpably risks a prohibited harm merits moral condemnation in equal measure whether the risk arises through an affirmative act or a deliberate failure to act.<sup>151</sup>

Allowing liability for harmless inaction, at least in some cases, may also promote the utilitarian crime-control goals of the criminal law. Deterrence

148. The two pioneering articles on the subject, both entitled *Moral Luck*, were written by Thomas Nagel and Bernard Williams and were reprinted in a later book with the same title. See Thomas Nagel, *Moral Luck*, in MORAL LUCK 57 (Daniel Statman ed., 1993); Bernard Williams, *Moral Luck*, in MORAL LUCK, *supra*, at 35; see also Dana K. Nelkin, *Moral Luck*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2009), <http://plato.stanford.edu/archives/spr2009/entries/moral-luck/>.

149. See *supra* note 11 (noting the claim that the occurrence or nonoccurrence of resulting harm should be irrelevant to the amount of criminal liability).

150. See Douglas Husak, *Does Criminal Liability Require an Act?*, in PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 60, 60 (Antony Duff ed., 1998) (arguing that criminal law’s act requirement is better seen as a control requirement); cf. Chiao, *supra* note 14, at 14–22 (arguing that the act requirement should be replaced by the “practical agency condition,” and contrasting this approach with Husak’s control requirement).

151. See, e.g., Alexander & Ferzan, *supra* note 15, at 386 (“Omissions should be treated as on par with volitions, not as equivalent to mere choosings (or future intentions) to risk.”); *id.* at 388 (“Culpability for omissions mirrors culpability for risk-impositions, the only difference being the complexity of the risk analysis.”); Husak, *supra* note 150, at 77 (“Theorists who . . . defend the act requirement must struggle to explain why the criminal law should impose liability only for acts—because persons may be morally responsible for a great many states of affairs other than their acts.”); *id.* at 82 (“Omissions provide the clearest example of a state of affairs other than action over which persons can exercise a sufficient degree of control to be responsible.”).

and incapacitation are ill-served by making a fetish of the distinction between action and omission. If a person's unwillingness to act or clear disregard for others' interests creates an obvious danger, there is no reason for the criminal law to wait until such danger translates into actual harm before intervening. For crime-control purposes, the central consideration is whether sufficient data exist to warrant a conclusion that punishment would prevent this person or others from engaging in future conduct, either affirmative acts or failures to act, that jeopardizes the interests the law seeks to protect.

Further, practical constraints likely limit the potential for abuse or other concerns with such crimes. First, the very possibility that harmless-inaction cases will seem dubious or trivial makes it highly likely that prosecutors will pursue only exceptional cases. Also, police departments are unlikely to dedicate scarce investigative resources to the pursuit of these offenses. Moreover, the difficulties of proof that attend omission cases—demonstrating culpability where no overt act is undertaken in furtherance of that culpability and demonstrating the person's awareness of the situation and opportunity to act—should limit the application of liability, especially when coupled with jurors' probable skepticism about a prosecution for doing nothing and causing no harm.

In fact, a review of the actual cases involving prosecution of inchoate omissions seems to confirm that these crimes are enforced narrowly, rarely, and only where enforcement has some intuitive appeal. For example, although the scope of the offenses as written may seem to threaten an undue intrusion of law enforcement into domestic affairs, it seems that these crimes are not, and are unlikely to be, investigated directly. Rather, in the actual cases, only "public" displays of negligence—such as children who are found alone in cars or playing in traffic—seem to attract the attention of law enforcement.<sup>152</sup> Of course, this feature of inchoate-omission prosecutions might suggest a subtler but still troubling tendency toward selection bias or discrimination if poor people or minorities are more likely to be the subject of intrusive searches or to otherwise lead their lives in public (or observed) spaces,<sup>153</sup> while those with greater means can, to put it crudely, afford the privacy to neglect their children without fear of prosecution. Yet such concerns, if accurate, transcend the category of inchoate-omission liability and raise broader issues—about not only law enforcement but housing policy, race relations, the distribution of wealth, and so on—that are beyond the scope of this Article.

It is difficult to come to any firm conclusion about the propriety of inchoate-omission liability without additional data about the full extent of

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152. See *supra* Part IV.B (describing factual settings giving rise to prosecutions for inchoate-omission crimes).

153. I am indebted to Michael O'Hear for this observation.

prosecutions for such crimes as well as equally significant, yet harder-to-glean, data about how often law enforcers who are presented with violations of these crimes *decline* to prosecute. Absent such data, it is unclear whether the possibility of selective or biased enforcement of these offenses should be troubling—or, to be more precise, whether these crimes create more, less, or about the same amount of concern as any other category of criminal offense.

Still, one important and perhaps surprising observation worth noting here is the extent to which the issues surrounding harmless-inaction offenses are empirical issues of this kind rather than more fundamental normative issues. Looking at the underlying facts of the endangerment-by-omission prosecutions that have occurred, a compelling case can be made that some cases of harmless inaction are genuinely blameworthy and properly within the reach of the criminal law. Similarly, failure-to-report situations have generated significant outrage in cases where the law did *not* penalize the failure of witnesses of serious crime to come forward, as in the notorious Massachusetts barroom gang rape where no onlookers notified the police,<sup>154</sup> or when Kevin Cash watched a friend rape and murder a seven-year-old girl and neither intervened nor reported the crime later.<sup>155</sup> Examination of the inchoate-omission category as it plays out in reality, rather than on some conceptual level removed from the particulars of human behavior and law-enforcement practice, reveals a possible role for such offenses and also suggests possible practical limitations that curb the potential for abuse.

One might even say that the reality poses problems for the theory, rather than the other way around. Some of the more extreme cases of child neglect that have been prosecuted under inchoate-omission statutes seem to call out for moral blame and public condemnation, the lack of concrete injury notwithstanding.<sup>156</sup> Imposing criminal liability in these cases poses a challenge in terms of the classical objective requirements of criminal law, because such cases involve neither harm nor any clear manifestation of culpability in the form of action. Moreover, imposition of inchoate-omission liability also challenges *subjectivist* visions that are willing to dispense with objective requirements in favor of a focus on personal culpability. This is because in child-neglect cases, the relevant offenses generally do not require a conscious, subjective disregard for another's welfare (i.e., recklessness), but only failure to satisfy some objective standard of proper diligence or attention (i.e., negligence). Whether the facts of the prosecuted cases suggest recklessness or merely negligence might be debatable, but in any event, these cases seem to test the boundaries of most standard accounts of

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154. See Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571, 571 (2000) (discussing this case).

155. See ROBINSON, *supra* note 39, at 399–407 (providing the facts of the Cash case).

156. See *supra* Part IV.B (describing these cases).

criminal liability, which demand some level of objective manifestation of criminality, some degree of subjective culpability, or both. Liability in these cases might accord best with a character-based or virtue–ethics account of criminal liability, according to which a person is properly subject to punishment based on the failure to recognize his obligations or to arrange his priorities or preferences in such a way that his attention is on the proper things.<sup>157</sup> To the extent that liability for harmless inaction seems to have intuitive appeal, perhaps the virtue–ethics understanding also has some appeal, at least as an explanatory account, if not as a normative justification.

Whatever theoretical justification, if any, supports the intuition that these cases may warrant punishment, that intuition itself, if shared sufficiently widely and deeply, may provide a reason to enable liability for such cases. Criminal law may be most effective in promoting compliance when its prohibitions track the community’s shared sense of moral conduct, and the criminal law’s refusal to punish conduct that the community views as blameworthy may undermine the law’s moral standing and concomitant ability to promote respect and adherence.<sup>158</sup>

At any rate, it seems quite hasty to reject out of hand the possibility of ever imposing liability for inchoate omissions. Indeed, instead of viewing the issue as demanding a yes-or-no vote on the appropriateness of the category, it might be wise to ask more focused, tactical questions about how the law

157. See, e.g., Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability judgments*, in CRIME, CULPABILITY, AND REMEDY 59, 61 (Ellen Frankel Paul et al. eds., 1990) (“Only a character-based conception of a moral agent’s necessary attributes can explain how th[e] capacity for moral responsiveness is developed and why it is sometimes fair to blame actors who fail to exercise this capacity.”); *id.* at 81 (“The ultimate basis for our culpability may lie in our failure to do something about those aspects of our character that make it so difficult for us to avoid engaging in morally objectionable conduct.”); Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 457 (1998) (“We punish negligent actors, intoxicated and reckless actors, and those who make unreasonable mistakes regarding elements of a crime because they exhibit in their acts a failure of practical judgment.”); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1479 (1995) (“[O]ne might be held liable for an omission not because it is a failure to act where action is required, but because the failure itself evinces a lack of judgment, an absence of virtue.”); Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 151 (1996). Professor Pillsbury asserts:

Motivations to perceive, or not perceive, . . . should be considered part of the individual’s base responsibility. Like urges to hurt or to help, perception priorities help define the person. . . .

We may blame persons for failing to perceive risks to others when we can trace their lack of awareness to bad perception priorities. In such a case, we judge the person guilty of a bad choice. In setting his or her perception priorities, the individual assigned too low a priority to the value of other human beings.

Pillsbury, *supra*, at 151.

158. See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE* 21–23, 183–85 (2006).



might facilitate prosecution in suitable cases while minimizing the risks of over-enforcement. Accordingly, let us now turn to a brief consideration of these questions of design.

### B. THE SHAPE OF CRIMINAL LIABILITY

Codes can and do criminalize inchoate omissions by using a general attempt provision, creating specific offenses, or employing a combination of the two. Accordingly, the inchoate-omission situation presents important questions about not only what to criminalize, but how to criminalize. One key question about how to criminalize asks: Is it preferable to have a code with few, relatively broad offenses (such as attempt), or numerous, particular offenses (such as child neglect, elder neglect, failure to report, dereliction of official duty, etc.)? I have referred to this basic distinction as presenting the choice between a “thin” code, with fewer but broader provisions, and a “thick” one, with many more precise provisions.<sup>159</sup> This terminology gives some sense of what the codes might look like as a whole, but it does not convey the equally important distinction with respect to the features of each individual provision within each code. For the sum total of a code to be thin, many specific portions of that code must be descriptively thick, capturing a great deal of meaning in the space of a single concept or term. For example, a code might make itself thinner by using a single attempt provision in lieu of many varied inchoate offenses, but the single attempt provision can do its work only if it uses terms that are capacious, complex, and flexible—that is, subject to some indeterminacy and ambiguity. Individual, precise provisions within a thick code, on the other hand, may admit of thinner description.

Accordingly, a more apt metaphor for the comparison might describe the differing codes not in terms of thickness but in terms of density. Assuming that the content of the two codes is meant to be similar even though the form differs, the more dense code (what I previously described as a “thin” code) would need to contain as much weight as the less dense one, but with less volume.

Geographic imagery might best convey a sense of the possible geography of criminal law.<sup>160</sup> A “dense” code resembles a dense city (think Manhattan): without a lot of total space, each piece of real estate (here, a provision or offense) becomes important, so that small sections of the code—even individual words—must support vast skyscrapers of interpretive meaning. On the other hand, a code whose provisions take up a much larger total amount of space—what we might call a “sprawling” code (think

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159. See Cahill, *supra* note 11, at 887–89, 938–55 (detailing the use of “thick” and “thin” codes).

160. Such are the analogies that strike someone who teaches both criminal law and property. Nothing that follows should suggest, however, that my attitudes toward density versus sprawl with respect to criminal codes track my sensibilities about good urban planning.

Phoenix)—need not demand as much from each provision standing alone. Neither layout is inherently superior; rather, each makes its own demands. Dense codes require careful attention to the architecture and engineering of each provision. Sprawling codes require more attention to the overall plan, so that one can see how different parts of the map relate to each other.

What are the general advantages and drawbacks of adopting a dense versus a sprawling code? In earlier work, I have explored criteria by which to judge the quality and effectiveness of a criminal code.<sup>161</sup> Those criteria reflect the importance of three general considerations. First, the code should provide fair notice, which requires conduct rules (i.e., rules describing *ex ante* what conduct is prohibited) that are both comprehensive and clear.<sup>162</sup> Second, the code should promote ease of application, for the sake of reducing both the cost of the system and the likelihood of improper disparities across cases based on the discretion of individual enforcers. Ease of application requires adjudicative rules (i.e., rules for determining *ex post* which conduct violations will lead to liability)<sup>163</sup> that are similarly comprehensive and clear.<sup>164</sup> Third, the code should promote fair and accurate outcomes, which requires rules that are substantively just and appropriate—or at a minimum, not internally inconsistent—with respect to both determining liability *vel non* and establishing the amount of liability (i.e., the sentence).<sup>165</sup> An assessment of the merits of dense and sprawling codes, then, should consider their strengths and weaknesses in advancing these three goals.

With respect to notice, a dense code may be preferable to the extent that its brevity makes it more accessible and enables a reader to obtain and retain a clear grasp of the rules in their entirety. But dense codes' reliance on broad terms and concepts might make their provisions so vague and indeterminate as to provide little reliable guidance *ex ante*. Contrast, for example, a sprawling set of justification provisions—detailing precisely whether and what level of force may be used in particular contexts—with a single dense provision defining justifiable force in terms of “reasonableness.” As is generally the case with legal formulations that employ standards rather than rules—a distinction that the density-versus-sprawl distinction roughly tracks<sup>166</sup>—the flexibility that gives a dense code the ability to achieve fair

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161. See generally Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000) (establishing and applying a system of evaluation for criminal codes).

162. See *id.* at 6–11.

163. For more on the distinction between conduct rules and adjudication rules, see *id.* at 3–4.

164. See *id.* at 12–14.

165. See *id.* at 14–20.

166. Cf. Cahill, *supra* note 11, at 943 (comparing the thick–thin distinction to the rule–standard distinction).

case-by-case resolutions *ex post* also limits the code's transparency and predictability.

Inchoate-omission crimes are a case in point. A general reference to a failure to act or to an omission "constituting a substantial step"<sup>167</sup> toward a crime provides little guidance as to the situations in which one is bound to affirmatively act or else risk criminal liability. Lest the scope of criminal liability range too far, it seems far better to specify with some precision the particular contexts, relationships, and situations that will trigger an obligation to act. This is especially true where, as with many inchoate-omission offenses, liability is based not only on an omission but on a reduced, and rather vague, culpability standard such as negligence. An unspecific reasonableness standard offers little direction regarding the situations generating an affirmative obligation to help or protect others. Clarity is crucial not only in describing the contours of omission liability, but also in explaining the basis and scope of inchoate liability. Inchoate liability, no less than omission liability, expands the reach of criminal law, for it penalizes conduct that sometimes is entirely innocuous. Accordingly, it should be incumbent on the law to specify the nature of the target harms grounding the exercise of criminalization authority and the levels of risk, short of actual harm, that suffice to support punishment.<sup>168</sup>

One must bear in mind, however, that sprawling codes may give rise to notice problems of their own.<sup>169</sup> Although specific offenses may be designed to offer clearer notice about the scope of the criminal law, there is also the contrary risk that overlong criminal codes make it more difficult for the average citizen to understand what the criminal code commands. Rather than promoting the principle of notice, today's criminal law creates an impregnable network of prohibitions that no one but a criminal-law expert can decipher.

The notice problem is further exacerbated by the increasing level of criminalization, which is nowhere more problematic than with respect to the creation of liability for inaction. As William Stuntz has put it, we are moving "ever closer to a world in which the law on the books makes everyone a felon."<sup>170</sup> Whereas a proposed bill that would generate blanket liability for all manner of failures to act might raise questions about the proper boundaries of criminalization, a legislature might not feel similar qualms

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167. MODEL PENAL CODE § 5.01(1)(c) (1962).

168. See Michael T. Cahill, *Grading Arson*, 3 CRIM. L. & PHIL. 79, 88–91 (2009) (discussing concerns that arise when offenses such as arson address multiple harms or risks at once or fail to specify the harms or risks that they are meant to address).

169. The balance of this Section's discussion draws on Cahill, *supra* note 11, at 936–38, 949–55, and Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 638–40 (2005).

170. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

about adopting a relatively narrow affirmative duty to act. Indeed, the number of existing inchoate-omission offenses indicates that legislatures feel quite comfortable enacting such crimes. Yet serial enactment of many “small” crimes may have the cumulative effect of extending the scope of criminal law as much as, or more than, a single broad provision would, while avoiding the scrutiny that would attend enactment of the broad provision. Accordingly, while the sprawling-code model seems more workable here, vigilance is necessary to ensure that sprawl does not grow out of hand. One way to curb undesirable sprawl may be to put a virtual wall around the criminal code’s borders, enacting general *ex ante* parameters or limitations—whether substantive or procedural—to restrain the growth of subsequent, more particular enactments. This Article discusses possible methods for implementing such a strategy below.

With respect to application of the code, as noted earlier, a sprawling code might facilitate easier implementation of any single provision, since individual provisions should be more focused and use more precise language, creating fewer interpretive difficulties. Again, the inchoate-omission case study seems to support the sprawling-code model as the preferable form for facilitating practical ease and normative appropriateness in applying the law. Where the law imposes affirmative obligations to act, the personal liberty interests of the populace are too strong,<sup>171</sup> and the limitations on discretion and potential abuse too few, to rely on rules whose content is unclear *ex ante* and is fleshed out only in the rules’ subsequent application.

Moreover, broad or ambiguous provisions run the risk of not only extending liability too far, but also preventing liability from reaching far enough. Especially in the context of omissions, where both the law and lay sensibilities hesitate to impose affirmative duties to act, prosecutors or juries may be reluctant to pursue or impose punishment if the broadly worded text of a dense code does not state emphatically enough that failure to act may lead to liability in the relevant situation.

The possible difficulty with applying sprawling codes involves the relationship between their individual provisions. Adopting a vast array of offenses might lead to interpretive and grading inconsistencies and problems as enforcers attempt to determine how specific provisions relate to one another and to broader general provisions, if any such provisions are also adopted.<sup>172</sup> The relationship between multiple overlapping offenses is often unclear on its face, and there is typically little guidance from other

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171. See Thompson, *supra* note 17, at 53–57 (explaining how Good Samaritan and public-welfare offenses may infringe on personal liberty).

172. See Robinson & Cahill, *supra* note 169, at 643–44 (offering examples from Illinois law of specific endangerment offenses whose grading is inconsistent with the general endangerment offense).

sources as to how the legislature wanted or expected various provisions to relate to one another.

These application issues tie into the third set of considerations—the desire to achieve fair and accurate gradations of punishment. As a code includes a greater number of increasingly refined distinctions in its offense definitions, it becomes harder to make those distinctions meaningful by placing the different offenses into different punishment categories, without in turn adopting an unwieldy number of categories. To put it differently, it may be easy to specify offense conduct with precision, but one will not necessarily be able to specify the proper offense punishment with analogous precision, because a narrowly defined form of conduct may merit very different punishments in different circumstances.

Of course, a dense code may give rise to the opposite problem: rather than making too many fine-grained distinctions whose ramifications are unexplained or unclear, dense codes may engage in crude oversimplifications that treat distinguishable situations alike. Examples include a one-size-fits-all definition of attempt joined to a blanket rule punishing all attempts as one offense grade lower than the completed crime, or (perhaps worse) a single complicity provision creating a rule under which any level of aid generates liability equivalent to performance of the offense itself—a particularly dubious rule if an omission can also suffice to ground complicity liability.<sup>173</sup>

The inchoate-omission case study suggests that when dealing with offenses that push the outer boundaries of criminalization authority, precision rather than flexibility is crucial. Otherwise, neither law-enforcement authorities nor citizens will have notice of how the law expects them to behave. Thus, it is hardly surprising that in many jurisdictions, numerous sprawling inchoate-omission offenses supplement a denser attempt provision, even where the attempt provision seems to allow for omission liability.<sup>174</sup> And it is those sprawling offenses rather than the attempt provision that seem to generate actual prosecutions.<sup>175</sup>

To be clear, then, density and sprawl are not discrete categories but represent a range of approaches that can augment or complement, as well as undercut or contradict, one another. The best way to maximize the relative strengths of each type of code, while minimizing the weaknesses of each,

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173. See *supra* note 5 (discussing liability for complicity by omission).

174. As noted in Part III.A, twenty-four states have attempt rules allowing for omission liability. See *supra* notes 55–57, 60 and accompanying text. The discussion of more specific inchoate-omission offenses in Part IV.A cites at least one such offense for each of those states. See *supra* notes 82–86 and accompanying text (discussing twelve states whose general endangerment offenses allow for omission liability); *supra* notes 88–126 and accompanying text (describing and citing more specific inchoate-omission crimes).

175. Compare *supra* Part III.B (discussing the frequency of inchoate-omission prosecutions under attempt statutes), with *supra* Part IV.B (discussing the frequency of inchoate-omission prosecutions under other statutes).

might be to adopt a hybrid or compromise approach. Though perhaps the worst way to draft a code is to indiscriminately mix density and sprawl,<sup>176</sup> much may be gained from deliberately using different drafting methods for different types of rules, with a conscious awareness of how they will relate to each other.

One option is to adopt a dense code but to supplement its broad rules with precise, narrow evidentiary rules. The Model Penal Code (the “Code”) employs such a method with its conduct rule for attempt and its felony-murder formulation.<sup>177</sup> As a general matter, having a general attempt provision whose terms can apply to efforts toward a wide range of possible target offenses reflects a dense approach to code drafting.<sup>178</sup> Accordingly, the Code’s attempt provision, like any general attempt provision, employs a vague standard to define the amount of conduct necessary for an attempt: one must engage in a “substantial step” toward the offense.<sup>179</sup> The Code provides additional guidance, however, by specifying numerous types of particular conduct that, if shown, will satisfy the prosecution’s burden of production as to the “substantial step” element.<sup>180</sup> The Code defines murder in terms of the somewhat fuzzy mental state of “extreme indifference to the value of human life,” but adds some clarity by providing a rebuttable presumption of such indifference where the offender causes death in the course of certain felonies.<sup>181</sup> Similar rules might be crafted in other contexts. For example, an inchoate offense that requires the offender to create a “substantial risk” of harm might be supplemented with rules that allow the factfinder to infer such risk from specified acts or omissions. Such rules enable consistency, provide clearer guidance, and facilitate prosecution without imposing an irrebuttable presumption that the conduct created a prohibited risk—as some current provisions effectively do by defining offenses solely in terms of conduct and not explicitly demanding the creation of an actual risk of harm.

Another option would be for the legislature to adopt a dense criminal code while simultaneously adopting a more sprawling official commentary to the code—again, perhaps following the Model Penal Code in form, even if not in substance—and giving that commentary legal force.<sup>182</sup> The commentary could offer clear and precise illustrations of how the code should apply to predictable and recurring situations, while the code itself

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176. See Cahill, *supra* note 11, at 888–89, 952–55 (discussing the dangers of mixing “thick” and “thin” codes).

177. MODEL PENAL CODE § 210.2(1)(b) (1962) (felony-murder provision).

178. See Cahill, *supra* note 11, at 887 (noting that the use of broad attempt provisions represents a “thin” approach to code drafting).

179. MODEL PENAL CODE § 5.01(1)(c) (1962).

180. *Id.* § 5.01(2).

181. *Id.* § 210.2(1)(b).

182. See Robinson & Cahill, *supra* note 169, at 654–55 (discussing this technique).

would retain the flexibility to accommodate unforeseen cases. If the legislature wanted to clarify that specific conduct fell within the terms of an existing offense, it could add an illustration to the commentary to this effect instead of creating an entirely new offense with elements that would almost entirely replicate the already-existing offense and might fail to make explicit reference to the relevant underlying harms it addresses. In this way, the code itself could be consistent, concise, and direct in specifying the general harms of concern to the criminal law, with fewer new offenses being added and less overlap, confusion, and contradiction being created.

## VI. CONCLUSION

Zero act plus zero harm adding up to one crime is, surprisingly, not faulty math. The accuracy of this legal sum is empirically observable and normatively defensible. Moreover, here, as elsewhere, empirical observation and normative analysis can fruitfully interact. Too often, theorists and other legal commentators address issues such as the proper scope of criminal liability at a purely conceptual level, paying little regard either to how the theoretical resolution of these issues might best be cemented into workable doctrine or to how real-world legal institutions are already confronting, and finding practical ways to address, the issues in question. At the same time, critical examination, rather than unquestioning acceptance of existing practices, is obviously essential. This Article has sought to pursue such a reflective equilibrium in considering the problem of criminal liability for harmless inaction, as the resolution of that problem has serious ramifications for the scope and content of criminal law both in principle and in practice.