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ORIGINAL PAPER

How Omissions Aren't Special

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1 Not-Doings and Omissions

The basic structure of the criminal law features what appears to be a stark asymmetry between the treatment of acts and omissions. Whereas we are prima facie accountable for harms that come about as a result of our positive acts, only in exceptional circumstances are we accountable for the harms which depend on our omissions. I may be liable for an omission if a distinct duty to act can be adduced, and if my failure to discharge that duty is culpable to the point of criminality (after all, positive moral obligations practically besiege us, and failing to discharge them is hardly ever seriously culpable). I have a duty to feed a child because I am her parent;[1] a duty to call the ambulance for a critically sick relative because he is in my house;[2] a duty to close a railway gate because I am the person employed to do it;[3] a duty to put out a fire, or call the fire brigade, because I am the one who started it.[4] Apart from where these exceptional duties arise, one's decision to allow a preventable harm to occur is no business of the criminal law, on the standard picture.

This default rule is one of the very first things students of the criminal law are made to learn. Omissions, we tell them, are special. The rule is all at once intuitive and curious. Intuitive, firstly, because it is unthinkable that failures to prevent harm *in general* should engage the attention of the criminal law. As Simester points out early on in his incisive reappraisal of the omissions problem in *Fundamentals of Criminal*

[1] *R v Gibbins and Proctor* (1918) 13 Cr App Rep 134.

[2] *R v Instan* [1893] 1 QB 450; *R v Stone & Dobinson* [1977] 1 QB 354.

[3] *R v Pittwood* (1902) 19 TLR 37.

[4] *R v Miller* [1983] 2 AC 161.

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Law, the category of 'not-doings' is boundless.[5] Consider how much hardship I fail to prevent merely by not sending more money to charity, by not volunteering in my local food bank, by choosing to be an ok legal academic rather than a spectacular nurse. So much activity to prevent harm is also mutually exclusive, of course: there is only so much one can do in the context of a single life, and putting one's efforts into harm prevention of some kinds (inasmuch as one ever does this), will necessarily come at the expense of other kinds.

These reflections show why the default rule is so natural: failure to prevent harm is an inescapable fact of life, so it cannot be a general basis for criminal answerability. But they also demonstrate the curiousness of approaching this state of affairs as a *rule* to be explained and defended. For what would it possibly look like for the criminal law to treat our not-doings *in general* on a par with our doings? It is not easy to get a handle on this proposal, so as to explain why we do not take it up. Simester sets himself the task of justifying a default rule according to which 'we are not accountable for failing to prevent something that it would be a crime to bring about through a positive act',[6] but only become accountable, in law, when a special duty to act can be scoped out. Why should the law not treat not-doings *tout court* just like it treats positive acts, he asks.[7] Completely aside, though, from questions of justice in accountability, it is not clear what it would mean to be held responsible for all the bad things I fail to prevent as if I had brought them about via a positive act. How would the law even begin to assign 'not-doings' under this definition, so as to apportion liability for them? The issue here is that when the focus of our investigations is the law's default rule around 'not-doings', understood as all the bad states of affairs I could improve but do not, it is difficult to see what alternatives there are to argue over. Surely, some principles must be fashioned from the outset to pick out from this limitless category of events those things that can be said to be *my* not-doings, as opposed to yet more things that happen in the world.

This is precisely where omissions come in. Omissions are more narrowly defined than the broader category of not-doings. An omission is the thing I didn't do which I clearly had a duty to do, which, in the ordinary course of things, I would do, and, or, which any decent person in my position would have done. These features of omissions are critical to our ability to detect them amidst the sprawling ether of events one's interventions could have affected. Omissions are, in this respect, like the hole in a donut, only hoving into view when viewed against the surrounding context which gives them their shape and defines their very existence. In this vein, Simester notes that omissions are a special subset of not-doings of a 'morally significant kind'.[8] To say 'You omitted to X' is invariably to say something in the accusatory mood.

This makes a certain kind of sense of Simester's decision to set his analytical sights on a default rule about not-doings rather than about omissions. Why treat *not-doings* differently from positive acts is the question to answer, he suggests. Are they, ceteris paribus, less culpable than our doings? Are they not causes of harm in the

[5] A. Simester, *Fundamentals of Criminal Law* (henceforth *FOCM*) (OUP, 2021), chapter 6, at 133.

[6] *FOCM* 131.

[7] *FCOM* 132.

[8] *FCOM* 133.

same way our positive acts are? Does liability for not-doings restrict our liberty in a special way? The question cannot be 'Why treat *omissions* differently?', is the thinking, because omissions are the subset of not-doings for which we are, almost by definition, answerable in some way. In their legal instantiation, omissions therefore constitute the exception to the default rule that we are not liable for our not-doings. The default rule pertains to the not-doings, not to the omissions.

But outside of the clutch of principles that define omissions, which bring them into view and give them their shape, there is no basis on which we can designate my not-doings and distinguish them from the not-doings of others. Outwith these principles, whatever they may be, there is no given set of not-doings yoked to each one us that present as candidate criminal offences. Defined as all the ills we fail to prevent, the category is far too vast, unruly, and full of internal tensions to provide such candidates. This is all to say, we can start only with omissions—with the things we fail to do that have normative salience, that stand in defiance of some expectation, moral or social (or both). The default rules worth exploring, I therefore maintain—the rules that present liability options the law could conceivably pursue—are those which concern the law's approach to responsibility for our omissions, for those failures to act which stand out as our very own not-doings.

2 Ascribing Responsibility through Acts and Omissions

Is there a special default rule that applies to *omissions*? I want to suggest that once we have the category omissions in our grasp, so to speak, it is far less clear that a special default rule exists with respect to it. A candidate default rule, transposing from Simester's description of the rule about not-doings, is that whereas we are generally answerable in law for our harmful positive acts, we are not, generally, answerable for our harmful omissions. To reiterate, I am defining omissions as those of our inactions that in some way defy normative expectations.

Thinking about not-doings, Simester suggests that a default no-liability rule can be justified by reference to a few principled considerations. Most prominent of these is what he calls 'the range-of-alternatives distinction'.[9] The core idea here is that when the law prohibits inaction, thus mandating *conduct*, it blocks us from engaging in our own projects and commitments while the positive duty is being fulfilled. This is not true when the law prohibits harmful positive acts. Each such prohibition knocks out only one option, but leaves the full range of other activities available. But this is not the only justification for the law's forbearance, Simester argues. He also claims that not-doings are also typically less culpable than are their counterpart positive acts, and that the law ought to reflect this through the default rule. Finally, he argues that a person is prima facie not accountable for her not-doings, whereas she is for her doings.

Tuning into these considerations explains why we are generally not liable for our failures to prevent harm, Simester suggests, and why, therefore, a distinct duty to act, rooted in some kind of connection to the harm, is needed to legitimate legal answerability. But I have said that failures to act in breach of some distinct duty—what

[9] *FCOM* chapter 6, *passim*.

we should call 'omissions'—are the only real candidates for any default rules about liability. To return to my own question, then, could considerations of the same kinds explain and justify the general no-liability rule which applies to omissions but not to positive acts? The main comment I wish to field in response to this question is that I am unconvinced there *is* a special 'no liability' rule that applies distinctly to omissions and not to positive acts.

We have already seen that any account of omissions requires us to carve out from the unlimited class of bad things I fail to prevent those which can credibly count as my non-deeds. Notice, however, that matters are very similar in respect of our deeds as well. We are not automatically accountable, even prima facie, for all of the ills that are causally connected to our movements in the world. What makes it the case, then, that X was something I *did*, was my harmful positive act, as opposed to one of the unlimited events which are causally dependent on my behaviour? In the words of Donald Davidson:

What events in the life of a person reveal agency; what are his deeds and doings in contrast to mere happenings in his history; what is the mark that distinguishes his actions?[10]

Out of the morass of 'mere happenings', the law is compelled to define the realm of our positive acts through principles of ascriptive responsibility that tie various happenings to our agency. It is only by reference to such principles that we are able to say, for instance, that wounding Jim is something the defendant *did*, rather than something that simply occurred after the defendant moved his body this way or that with a knife.

The criminal law doles out and delimits ascriptive responsibility for positive acts in large part through its doctrines of causation and remoteness, and, in particular, through the insufficiency of 'but for' causation for establishing legal causation. The law's doctrines of causation do not ask only whether the defendant's conduct was a sine qua non of the relevant harm. They insist, also, on a requisite degree of directness between conduct and harm, on the absence of 'intervening' causes, and, arguably, on some out of the ordinary, sub-optimal, or duty-breaching character of the behaviour which sets the harm in motion.[11]

In *R v Kennedy* (2007), the defendant filled a syringe with heroin and handed it over to the victim, who injected himself with the drug and consequently died of an overdose.[12] The pertinent legal question, on appeal, was whether the defendant had really caused the victim's death, so as to be guilty of unlawful act manslaughter. It was held on appeal that the victim's voluntary act of self-injecting was an intervening cause. *Killing* the victim was not something the defendant did, therefore, though his actions were a link in the causal chain leading to the victim's death. As in so many cases, we see, in *Kennedy*, the doctrines of legal causation being used to sift out our responsible deeds from the unlimited bad states of affairs that depend on what we do. Given the victim's intervention, killing the victim could not count as among the defendant's deeds, though it was a downstream effect of his actions.

[10] D. Davidson, *Essays on Actions and Events* (OUP, 2001) 43.

[11] See *R v Hughes* [2013] UKSC 56.

[12] *R v Kennedy (No 2)* [2007] UKHL 38.

It is instructive to consider *Kennedy* alongside *R v Evans*, another heroin overdose case.[13] There, the defendant witnessed her sister dying, over the course of a night, from an overdose of drugs that the defendant had supplied to her, failing to call the ambulance until it was too late. The court ruled that the defendant owed her sister a duty of care, having created the dangerous situation she watched unfold. The breach of this duty (through not calling the ambulance soon enough) established her guilt for gross negligence manslaughter. The omission made it the case that her sister's death was attributable to her.

From a certain point of view, *Kennedy* and *Evans* approached the same question from different sides. There is a baseline rule, let us say, that one is not responsible for the heroin-related deaths of others, in general, and even where they are causally dependent on something one does, such as supplying the heroin. Supplying is not sufficient for the death to be ascribed to one's agency, we might say. Exceptionally, things may stand otherwise. In the first place, they will stand otherwise if one's causal contribution is direct enough: if the defendant in *Kennedy* had literally injected the victim himself, said the court. In the second place, they will stand otherwise if, having supplied the heroin, the defendant breached a clear duty to help the victim, thereby omitting to save her. Both the 'act doctrine' and the 'omissions doctrine' are means of overturning the presumption that one does not bear ascriptive responsibility for other peoples' overdoses.

We are not, in general, criminally answerable for our non-deeds, the standard view says. But we are not, in general, criminally answerable for our deeds either, if these are understood to be all the harmed states that result from our bodily movements and presence in the world. Principles of ascriptive responsibility are equally needed to carve out one's own definable deeds from the heap of events connected to one's activities (was *killing* the victim something Kennedy did?). On this plane, there is no special rule applying to omissions that doesn't apply to acts. The criminal acts and omissions recognised by law are alternative routes to ascribing responsibility to agents for certain consequences and distinguishing those consequences from mere happenings and events. Both doctrines, we might say, fulfil the function of delimiting the states of affairs for which we are answerable, against the more basic master rule that we are not answerable in general for harms which depend, causally or counterfactually, on how we conduct ourselves.

Seen this way, there is no special default rule that I am not answerable for my omissions. I am not answerable *tout court* for bad happenings, but specifying an omission runs parallel to specifying an act as a means of connecting my agency to some of those happenings. In this fairly significant way, omissions are not all that special.

[13] *R v Evans* [2009] 2 Cr App R 10.

3 The Lesser Culpability Claim

I have suggested that the rules about omissions liability are not as distinctive and special as might first appear, once we see them as mirror principles of ascriptive responsibility that also apply to acts. But this still leaves us with plenty of interesting things to ask about the scope of criminal liability for omissions. Should the law still exercise special restraint when it comes to imposing criminal liability for our omissions, understood as our definable, duty-breaching, not-doings? Ought we to be punished less harshly for an omission than for its equivalent positive act? Should we be criminally liable for far fewer of our harmful omissions than of our harmful positive acts?

Simester surveys three possible justifications for treating omissions ('not-doings', in his rendering) and acts on a different footing. These are:

1. That culpable omissions are only non-interventions, or failures to improve matters, whereas positive acts worsen states of affairs;

2. That those guilty of omissions are, all other things being equal, less culpable than those guilty of harmful positive acts; and.

3. That there is, in general, a greater loss of liberty occasioned when proscribing omissions than when proscribing acts.

For reasons of space, I will neglect point 1: whether the difference between worsening and not making better justifies the special treatment of omissions. I will confine myself instead to some remarks about points 2 and 3: the putative lesser culpability of omissions and what Simester calls 'the range-of-alternatives' distinction.

First, the lesser culpability claim. Are omissions, ceteris paribus, less culpable than positive acts? Doubtless, plenty of omissions are *more* culpable than plenty of positive acts. Watching a small child drown, a child whom you could easily save, but out of sheer indifference do not, is arguably more monstrous than the impassioned revenge killing of a loved one's abuser. Omitting to feed one's children, knowing they will starve, is leagues more culpable than minor assault (even of them). But these are not the right test cases for determining whether the act/omission distinction is morally neutral, because across these paired cases all things are far from equal: the degree of ultimate harm, and, in the first pair, the motives, are deeply asymmetrical.

A more promising pair of cases for testing the neutrality thesis (the thesis that, when all things are equal, it is *not* morally consequential whether one hurts through act or omission), as Simester indeed notes, is that of the parent who intentionally starves his child considered against the parent who outright poisons her.[14] Here, the act and omission strike us as equally murderous, never mind precisely *how* the parent brings about the child's death. That suggests the moral neutrality of the act/omission distinction reveals itself just as soon as we have the right cases to see it. But that conclusion is thrown into doubt when we consider a further pair of cases. The first features the aforementioned moral degenerate who refuses to rescue a drowning child who is unknown to him, when he could easily do so at practically no cost to himself. The other features a moral degenerate who actually *drowns* an unknown child.[15] In

[14] *FCOM* 132.

[15] See *FCOM* 148 for Simester's own reference to this comparison.

this pair of cases too, it seems we have kept everything equal—as equal as they can be—and yet it yields the contrary conclusion. When all that is left between the cases is the act/omission distinction, this does indeed seem to make a considerable moral difference. Even if the person who fails to save the child from drowning is culpable to the point of criminality, he is surely not as culpable as the person who does the drowning.

These pairs of cases point us in opposite directions vis-à-vis the neutrality thesis, generating something of a puzzle, as Simester points out. But we may wonder whether even these examples succeed in maintaining the ceteris paribus proviso. In order to serve as test cases for the neutrality thesis, the presumption across all four examples is, I think, that the agents (the negligent parent; the killer parent; the indifferent stranger; the killer stranger) act or fail to act with the same intention or motive: a desire or willingness for the victim to die. To achieve this, we might suppose, for instance, that the person who fails to rescue the child from the water *wishes* the child's death every bit as much as the person who positively drowns the child. This would be a very non-standard omission. But positing a symmetrical desire that the victim dies may not yet settle it that the *mens rea* is fixed across the cases. For, is the intent to end a person's life by one's own hand, by putting one's agency in the world to work to ensure that outcome, ever the same state of mind as that which is involved in the most determined refusal to save? The killer who drowns the child intends that the outcome be brought about by his own agency; he intends, himself, to be the agent of death; the omitter intends to do nothing, and so to allow death. Are these morally equal intentions?

If, as I suspect, they are not, one might take this to upend the ceteris paribus proviso in these cases, diminishing their usefulness for pronouncing on the neutrality thesis. Contrariwise, one might argue that the persistence of some moral difference, captured by a difference in intention, is what falsifies the neutrality thesis. Perhaps what we understand to be a difference in intent constitutes the moral difference between act and omission when all else is equal.

For Simester, the great difficulty in crafting ceteris paribus examples has pointed implications. Defenders of the neutrality thesis tend to make their examples quite extraordinary, he says, 'in order to achieve ceteris paribus terms'.[16] The hardship of achieving those terms alerts us to an important fact: 'virtually always', he says, omissions *will* be less culpable than positive acts, because things are so rarely all equal. The fact that ceteris paribus does 'not normally hold' hence works to justify the default rule that we are not accountable for our not-doings, but only become so where there is a distinct duty to act and a special connection to the harm.

Even if the neutrality thesis is right, then, the typical lesser culpability of not-doings gives the law a reason to 'exclude liability' for them as a baseline rule, Simester argues.[17] This said, the *correctness* of the moral neutrality thesis is attested to by the comparison of the parent who starves or poisons his child, he thinks, where it seems there really is no moral difference, as well as by numerous instances of inadvertent negligence. When D fails to take reasonable care, resulting in harm, it

[16] *FCOM* 144.

[17] ibid.

seems to matter precious little whether her negligence takes the form of an act or omission—whether a factory safety technician negligently fails to flip a safety switch needed to prevent accidents, or *flicks off* the safety switch, mistakenly thinking she was turning it on.[18]

Let me venture just a few comments about these suggestions. First, the case of the parent who starves his child, along with so many examples of negligence, is indeed where the moral neutrality thesis looks at its strongest. Yet these are also the failures to prevent harm which most lend themselves to re-description as a form of conduct, or, rather, of misconduct. The parent who starves his child is not doing nothing; he is engaged in an activity, the activity of negligent child-rearing. Manifold negligent 'omissions' can be just as well understood in similar terms—as, rather, illicit ways of carrying on. The 'omission' by an anaesthetist to notice and respond to a patient's disconnected oxygen pipe is also, and every bit as much, the activity of medical malpractice.[19] Where omissions seem the most morally equivalent to acts, then, is also where they least resemble mere inaction and are akin to the act of doing something badly, like a misreading or a misdirecting.

Does this feature of negligence cases reinforce their bearing out of the neutrality thesis, or does it instead suggest they are not the right examples with which to test it? I find it difficult to say. The characteristics that place these so-called omissions on a par with acts culpability-wise are the same characteristics which undercut their description as being, strictly speaking, omissions. The fact that omissions liability is most straightforward where omissions are at their most act-like—when they are, seen from the other end, badly performed activities[20]—also bolsters the thought that the omissions rules are, to begin with, not all that special. So much of what we might think of as liability for negligent 'omissions' fits neatly within a principle of prima facie accountability for one's harmful conduct, which Simester's remarks about inadvertent negligence helpfully illuminate. To be sure, the lazy bystander case, wherein the wrongdoer does wrong by *really* doing nothing (watching the saveable child drown, for instance), stands out in sharp contradistinction to these negligent performance cases, and it is no coincidence that it generates more consternation regarding criminal liability.

Second, let us return to Simester's proposal that the typical lesser culpability of omissions part grounds the default rule that we are not legally accountable for them. Though it may be true that omissions are equally culpable when all things really are equal, this is so rarely the case that we ought not to be accountable for our failures to prevent harm unless a distinct duty to act is apparent, the suggestion goes. I have suggested that we can only get hold of our omissions, to begin with, in the light of distinct and specific duties to act. Let us assume, then, that one can almost never find positive act counterparts for these omissions, because things are almost never (if ever?) equal between omission and act. Does that sponsor the conclusion that omissions are 'typically' less culpable than acts? But which omissions have been

[18] *FCOM 145.*

[19] *R v Adomako* [1994] 3 WLR 288.

[20] 'Badly' here is intended to mean ethically inadequate, not to denote only practical incompetence in the field of activity.

adjudged less culpable than which acts, so as to reach the conclusion about typicality? Omissions *in general* cannot be said to be less culpable than acts *in general*; it all depends which omissions and acts one has in mind, as I have said. (Refusing to call an ambulance for your critically ill mother isn't less culpable than stealing money from your sister.) So the claim that omissions are typically 'less culpable' can only mean that they are typically less culpable *than their counterpart positive acts*. But if the ceteris paribus proviso almost never holds, we lack sufficient comparisons with direct counterparts to yield the conclusion about typically lesser culpability. To be able to say that, we actually do need to have a spread of cases where we are confident enough that all things are equal, and where it is clear the omissions are standardly less culpable. The fact that it is fiendishly difficult to find a pair of cases where all things are equal does not mean, then, that omissions are typically less culpable than positive acts.

If it turns out that in the only ceteris paribus examples we can manage to think up the omission *is* less culpable, this will indeed be bad news for the neutrality thesis. But disproving the neutrality thesis would not, in any case, entail that harmful omissions are typically or generally less culpable than harmful positive acts, only that every omission is less culpable than its exact positive act equivalent.

Third, and last, what sort of default rules do these reflections sponsor? Simester is quite aware of the points raised here, I believe. Given this, I propose we can faithfully restate his core claim as follows: to the extent we ever *can* specify a positive act that is the mirror opposite of some culpable omission, the omission will reveal itself to be less wrongful. This suggests that *qua* omission, there is what we might call a 'culpability deduction'. If that were right, should the law exhibit any special reticence to criminalise omissions on this count?[21] I do not see why. Plenty of omissions are culpable enough for criminalisation even if they are not culpable on a par with their counterpart positive act, assuming we can specify one. And many omissions are much *more* culpable than numerous, harmful positive acts that are apt for criminalisation. Formulated this way, then, the lesser culpability claim does not endorse a principle of special legal restraint with regard to omissions *qua* omissions.

4 The Range-of-Alternatives Distinction

Let me now turn to the 'range-of-alternatives distinction'.[22] Summarised above, this is the idea that prohibitions on not-doings are more onerous, in their very nature, than prohibitions on doings. In proscribing a doing, the law rules out for us only

[21] To recapitulate, I acknowledge that this is to subvert Simester's own question, which is whether the law ought to adopt the default rule that we are not accountable for our 'not-doings', understood as any failure to prevent harm, with or without a duty to act. As I have explained above, though, I am not convinced there is a default rule of this kind that applies to not-doings but not to deeds. We are not, and cannot conceivably be, answerable in general for the bad consequences that depend on our actions and inactions. Principles of ascriptive responsibility are called upon, in both cases, to connect bad states of affairs to our agency, via the identification of a specific act or omission. Since that is so, the only default rules I consider ripe for discussion are rules pertaining to the scope of criminal omissions.

[22] *FCOM* 136-137; 141-143; 150-152.

one option, whereas when mandating positive action it rules out everything else, for as long as the positive duty lives. A key plank here is the thought that we may legitimately demonstrate partiality towards our own projects, goals, and attachments as we go about our lives. Sweeping liability for failures to prevent harms to which we are not personally, uniquely connected would threaten this freedom to pursue our own ends, by demanding that we subordinate our own projects to the impersonal goal of harm prevention wherever doing so would yield results. This opportunity costs dimension is a foremost justification, as Simester sees it, for the rule that, absent a distinct duty to act, we are not accountable for not-doings.

To reiterate, I find it very difficult to conceive of a general ground of liability for not-doings prior to some principles of ascriptive responsibility that scope out what properly *counts* as my not-doings (as opposed to mere happenings), principles that will surely cite personal connection to particular harms, and clear and distinct duties to act. I am in full agreement with Simester that a regulatory scheme of general liability for preventable harms would seriously imperil the ability to pursue one's own life projects. But I also find all thought of such a regulatory scheme confounding, insofar as it posits a definable category of 'not-doings' that does not depend on the distinct, individualised, duties to act which give omissions their shape. In a similar train to the above, then, I would rather ask whether the opportunity costs worry tends toward special restraint when it comes to criminalising *omissions*—the things one does not do in breach of some obvious normative expectation.

Clearly, prohibitions on positive acts *can* be more onerous and liberty-restricting than prohibitions on omissions. In making the 'range of alternatives' point, Simester asks us to 'compare being prohibited from drowning the other swimmers at a beach to being mandated to save—or indeed, drown—them' (142).[23] In this comparison, the duty to act is far more liberty-restricting than the duty to abstain. But compare, instead, being mandated to share one's sun screen whilst on the beach and being prohibited from setting foot on the beach altogether. Here, the act liability (you are banned from going on the beach) is far greater an imposition than the omissions liability (you are banned from not sharing your sun screen, when on the beach). So there is an 'all other things being equal' element to the range-of-alternatives distinction, too. The idea is not that omissions liability is more liberty-reducing across the board, but that any instance of omissions liability sports a feature that positive act liability does not: that for whatever time the corresponding duty to act applies, all other options are foreclosed. If I must rescue a wounded hiker I happen upon on a mountain pass, I am not free to do anything else in the meantime.

Looping back to the previous discussion, there is one order of omissions liability it seems inapt to view as liberty-restricting in this special way. These are the sorts of cases where the omission is in fact just a mode of negligently engaging in some activity. The opportunity costs element is not germane here, it could be argued, once the duty to act is more accurately understood as a duty to perform an activity responsibly, given your choice to perform it. You cannot assume the social role of parenthood without feeding your children. You cannot be an air traffic controller without telling pilots when they are too close to other aircrafts. Liability pegged to failures like

[23] *FCOM* 142.

these does not exactly amount to coercing people into conduct, to the exclusion of all other options. It is, rather, the legal conditioning of all manner of options: one cannot choose to do *that thing in this way.* That is indeed a restriction on liberty—being an inattentive air traffic controller is an excluded choice. But it is not a liberty restriction of a wholly different character to the coercive removal of my choice to punch someone, or to smash up some property.

The more straightforward example of the 'pure omission'—the bystander who elects not to save the drowning child—better lends itself to the analysis according to which a legal duty to act is especially liberty-restricting in blocking all other options. In many cases, Simester rightly says, this liberty consideration is simply outweighed, for instance, where the liberty infringement is minimal, fleeting, and the costs of not acting are severe.[24] In her widely-read essay about abortion ethics, Judith Thomson imagines that she is on the brink of death, and that the actor Henry Fonda only has to cross a room and place his cool hand on her fevered brow to revive her—the easiest rescue case there is.[25] Thomson believes Fonda's refusal would be monstrous, but that his performance is not morally required, a pair of propositions I have always found difficult. What is clear enough, though, is that Fonda's freedom to pursue other options and to not cross the room—when he is already in the room!—holds hardly any weight against the value of Thomson's life.

Simester claims that the liberty concern of having all but one option forbidden to us is outweighed in all cases where there is a distinct duty to act. Putting things slightly differently, I might say that the fact it is so grossly outweighed is what explains, in such cases, *why* there is a duty to act which it would be wrong to shirk. Were things not set up in such a way as to make it horribly unjust for Fonda to refuse, even taking into account his need to live his own life, we would not be looking at such a clear case of a culpable omission.

Can the range-of-alternatives distinction provide the basis for any default rule regarding omissions? It might be thought that the opportunity costs dimension of duties to act favours an especially limited scope of pure omissions liability. For any isolated duty to act, the loss of liberty to the obliged person may well be trivial. (What is it to Henry Fonda if, once in his lifetime, he is obliged to cross a room to save a person?) As Simester remarks, though, a general and recurrent legal duty to act is far more onerous.[26] It is not easy to specify the exact quota of easy rescues the law can require of one person before it is too demanding, but a general duty to forestall preventable harm whenever it is within one's power to do so would certainly ask too much. However, a duty to act which is that capacious would not amount to the legal enforcement of our positive moral obligations, for we are *not* morally obliged to intervene against all the harms we can thwart or lessen. Simester is entirely correct to point out that not all ills can be equally everyone's business, or we'd never be able to do anything. Moreover, he rightly says, a responsibility system like that—wherein everyone capable of making a difference bears ascriptive responsibility for a bad consequence in equal measure—sit uneasily with our sense of our own agency in the

[24] *FCOM* 143.

[25] J. Thomson, 'A Defense of Abortion', *Philosophy & Public Affairs*, 1 (1):47-66 (1971).

[26] *FCOM* 150.

world and of the separateness of persons.[27] To assimilate everyone who doesn't pick up some litter with the original litterer, he writes, would 'weaken the sense of what the original litterer *does*'.[28] I think this right, and also that it is as true of a system of moral responsibility as it is of a system of legal responsibility.

I am in total accord with Simester, then, that some personal connection to or involvement with preventable harm ought to be a condition of omissions liability. But this is, in any case, what is required to identify the breach of a particular duty to act and, hence, any omission that is a candidate for criminalisation. Not all our harmful omissions should trigger the interest of the criminal law, just as not all our harmful acts should. Where, however, the personal duty to act is clear, the refusal iniquitous, and the harmful consequence the law's business, there is no special reason for regulatory restraint attaching to the fact that it is a culpable *omission* we are looking at. There is nothing too recurrent or general about obligations meeting this description; any incident meeting the criteria is already atypical, and far from a standing feature of life. So there is no great worry, I think, concerning the burdensomeness of the law's treating acts and omissions alike, the range-of-alternatives point notwithstanding. It must be remembered, moreover, that the more intrusive and ubiquitous a putative duty to act *is*, the more footing one has to argue that it does not reflect our actual moral duties.

5 The Bad Samaritan and the Easy Rescue

The lazy bystander who malignly declines an easy rescue has already made several appearances in this discussion. He also tends to be a central figure in the first lesson of my own criminal law undergraduate course, where much of the debate concerns whether the law of England and Wales should recognise the criminal responsibility of the 'Bad Samaritan'. As Joel Feinberg defines him, the Bad Samaritan is:

(a) a stranger standing in no 'special relationship' to the endangered party,

(b) who omits to do something—warn of unperceived peril, undertake rescue, seek aid, notify police, protect against further injury—for the endangered party,

(c) which he could have done without unreasonable cost or risk to himself or others,

(d) as a result of which the other party suffers harm, or an increased degree of harm,

(e) and for these reasons the omitter is 'bad' (morally blameworthy).[29]

The refusing Henry Fonda would certainly fit this description of the Bad Samaritan, as would the apocryphal villain who sits reclined, sipping his cocktail, declining to move a muscle, while a toddler in the pool in front of him drowns in two feet of water. It is always perplexing to me just how zealously students work, almost without exception, to rebut the arguments in favour of criminal responsibility for failures of

[27] *FCOM* 147.

[28] ibid.

[29] J. Feinberg, 'The Moral and Legal Responsibility of the Bad Samaritan' in *Freedom & Fulfillment* (Princeton University Press, 1992) at 175.

easy rescue of this and less farfetched kinds (as well as how instinctively they identify with the would-be rescuer instead of the imperilled party). Arguments featuring heavily in these discussions include problems of knowledge on the part of the omitter (perhaps it is not obvious that the victim is in such peril, and that he can help, and without unreasonable cost?); the liberty restriction in mandated action; the view that easy rescue liability mandates supererogatory acts; and worries about unbounded categories of duty-breachers and too many Bad Samaritans—i.e. what if you are just one of many people who could have acted but didn't?

Many of these counter-arguments end up deflating as soon as one builds in the indispensable conditions of a legal duty of easy rescue, for instance, that it is obvious to the omitter what will likely happen if he fails to intervene, obvious that the cost of intervening is reasonable, and that he is singly and especially marked out as able to help. I agree with Simester that we cannot countenance a legal duty to aid that condemns everyone on a packed beach who failed to assist a swimmer in trouble.[30] In such cases, though, the surplus of potential rescuers undercuts the clear and distinct duty on each would-be rescuer to intervene. The less clear it is to a would-be rescuer that it falls to *her* to do something (as it would if she were the only one around, or if *she* were the lifeguard), the weaker the argument that she omitted to help. Too many bystanders can crowd out a clear duty of aid, and with it, ascriptive responsibility for the harm.

None of this tells us why the law ought not to impose a duty to rescue where there is no problem of too many bystanders, and where it is abundantly clear to the duty-bearer that it rests with her to act, as it is if I happen across the wounded hiker on the mountain pass, with no one else around. Furthermore, as Feinberg underscores, the refusal to act in a quintessential easy rescue case is *not* the refusal to engage in supererogation.[31] Where the rescue is easy enough, and the costs reasonable, refusing to rescue is not the refusal to go beyond the call of duty, but a refusal to do exactly what duty, what morality, requires. When specified properly, then, a legal duty of easy rescue is not the enforcement of gratuitous benevolence, not the legal requirement to be a Good Samaritan (a figure synonymous with supererogation) at all, but only to do the absolute minimum that morality demands.[32]

There are ample ways of being personally connected to some bad state of affairs one fails to prevent. Being responsible for bringing about that bad state of affairs, or volunteering to ensure against it, are some ways. Being in a unique position of easy rescue is another. Simester is explicit about the fact that nothing in his analysis rules out a legal duty of this kind.[33] It is only, he says, that the lack of 'prima facie connection' to the harm in easy rescue cases—and the general right, we might say, to go about one's own business without becoming implicated in any preventable harm—underwrites the initial right to not intervene, which must then be overridden by other considerations, such as the negligible costs of acting and what is at stake in

[30] *FCOM* 147.

[31] Feinberg (above) at 189.

[32] Thomson had this latter standard in mind when she wrote of 'Minimally Decent Samaritans'.

[33] *FCOM* 132.

not acting.[34] Again, I would venture a slightly different analysis: a personal connection to the harm can be established by the fact that one is singled out, by fate, as the only person capable of assisting, when it is evidently easy to do so, when the costs of not helping are grave, and so on. Easy rescue cases, defined thusly, pass the personal connection test quite plainly.

It is a sound basic rule that we are not legally on the hook for preventable harms that have nothing specifically to do with us. A duty of easy rescue is not an exception to this rule, though; it is an instantiation of it.

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[34] *FCOM* 150.