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ON THE MORAL IRRELEVANCE OF BODILY MOVEMENTS

GEORGE P. FLETCHER†

In the mess of confusions called Anglo-American criminal law, writers commonly refer to the “problem of punishing omissions.”¹ There is something untoward, they say, about imposing criminal liability on the bystander who could intervene to save a drowning child and fails to do so.² Punishing acts in violation of the law is all right, but there is some special difficulty, never completely understood and clarified, about imposing liability for omissions.

The confusion about omissions has suffered unnecessary compounding by the organization of one of the leading casebooks on criminal law. Apparently not quite sure where to locate their cases on omissions, Sanford Kadish and Stephen Schulhofer stuck

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¹ See, e.g., DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 83 (1987) (“Omissions, or failures to act, constitute one of the most puzzling tests of the actus reus requirement in both its descriptive and prescriptive formulations.”); LEO KATZ, *BAD ACTS AND GUILTY MINDS* 140 (1987) (“[A] disconcertingly large number of [omission] cases dumbfound one’s intuitions.”).

² See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 195 (2d ed. 1960).

them in among opinions on issues raised by requiring a voluntary act.³ The specious inference underlying this organization goes something like this: (1) we all agree that criminal liability presupposes human action, and (2) the law has an aversion to punishing omissions, and (3) therefore the latter aversion must be connected to the former requirement.

This sloppy thinking is drawn together by a play on the word "act." The act requirement speaks to the critical importance of human agency in our theory of moral and legal responsibility. But whatever the act/omission distinction is about, it is not about the problem of human agency. Agency is built into the standard example of the bystander who lets the child drown. The example would not even be interesting unless we assumed that the bystander chose to remain motionless and that she had an unrestrained option to intervene and rescue the child.

Moore has gone one step further than the organization thesis of the Kadish/Schulhofer casebook. He claims that punishing omissions is a problem precisely *because* we have the act requirement. "Omissions," he writes, "are the absence of any willed bodily movements."⁴ Actions are "willed bodily movements"⁵ and omissions are the opposite; they are "literally nothing at all."⁶ Well, Moore does not quite mean that. Someone who is asleep does not omit to rescue. Dead men who do "literally nothing at all" do not omit. To repeat the point made above, the only kind of omitting that is interesting is the kind in which human agency is expressed. When there is a solid challenge to agency in the context of "positive acts" (for example, hypnotism, somnambulism), the same grounds would undermine agency in omissions. What Moore must mean, therefore, is that omissions are the willed absence of bodily movements, or willed nonmotion.

At least, that is what it seems Moore means by omissions. He has another line of thought that defines omissions by reference to

³ See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 188-216 (5th ed. 1989) (dividing the section "Actus Reus—Culpable Conduct" into (a) positive actions and (b) omissions).

⁴ MICHAEL MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 28 (1993).

⁵ *Id.*

⁶ *Id.* A rather long and undifferentiated footnote claims that Moore's view is "the generic notion of an omission employed in the extensive philosophical literature on the topic." *Id.* at n.31. This strikes me as a reckless summary of a complicated literature.

particular acts. In the midst of the passages quoted above, he writes that "an omission to save *X* at some time *t* is just the absence of any instantiation of the type of action 'saving *X*.'" ⁷ Yet the dominant message is conveyed by Moore's conclusion that "there is no conceptual objection to be made to the movement/non-movement conceptualization of the act/omission distinction."⁸ Moore is not alone in thinking that the act/omission distinction parallels action and passivity. Prosser refers to the problem as "a distinction between action and inaction."⁹ And after reviewing the problem, Douglas Husak concludes that although the criterion of bodily movements "has been vigorously attacked, no satisfactory alternative has emerged to take its place."¹⁰

I mean to challenge this conventional view (which I will identify as Moore's view)¹¹ with the radical suggestion that bodily movements have no bearing on the act/omission distinction. Movement, as such, has no moral relevance. More precisely, I will defend the following propositions:

1. The problem of omissions, properly understood, poses no exception to the requirement of human action or agency in the criminal law.
2. The problem of omissions, properly understood, has nothing to do with the distinction between motion and nonmotion, bodily movements and the absence of bodily movements.
3. The distinction between motion and nonmotion has, at most, a debatable impact on the extent of our liberties.

Admittedly, Moore's position defies ready clarification. He could not possibly mean that only willed bodily movements could be the object of praise and blame. Tourists regularly pause and stare in wonderment at the motionless guards standing in front of Buckingham Palace. Standing without moving for a few minutes is a feat worthy of praise at least as much as doing a back flip off the diving board. And standing motionless on one's head is an even greater feat. Whatever else Moore might think, he surely is willing

⁷ *Id.* at 28.

⁸ *Id.* at 31. Further proof that this is the dominant message is Moore's effort to show that many punishable omissions are embedded in broader courses of action and therefore aspects of punishable complex actions. *See id.* at 32-33.

⁹ WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 338 (4th ed. 1971).

¹⁰ HUSAK, *supra* note 1, at 174.

¹¹ At the Symposium held at the University of Pennsylvania Law School on February 18, 1994, Moore disputed the interpretation I offer in the text. Alas, we must go by the printed page and not by the preferences of the author.

to praise those who deserve it, and remaining motionless under difficult conditions warrants praise. If nonmovements under certain conditions warrant praise, then surely nonmovements might also be the object of blame and condemnation.

Moore concedes as much by recognizing that there "should be an act requirement, although it is and should be subject to an exception in the case of certain omissions."¹² It is a pity that Moore pays no attention to the law and its complexities and fails, therefore, to give us a clue about which omissions pose an exception to his act requirement. He merely opines: we punish omissions "that violate our duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails."¹³ As he notes earlier, there is a special problem of infringing liberty when the state punishes omissions.¹⁴ I think that what he must mean by this claim is that prohibiting actions represents a lesser incursion in our liberty than requiring particular actions (that is, punishing their omission). As the argument goes, it is less intrusive to prohibit flag burning than it is to require children to pledge allegiance to the flag. The former only eliminates one of many ways of expressing contempt for the state; the latter requires people to submit their bodies to motions dictated by the state.

Moore comes to his curious conclusions about omissions after considering and rejecting three other approaches to the problem of the so-called distinction between acts and omissions.¹⁵ His definition appears to him to be the least problematic of the options. Yet in this entire discussion, Moore never even gets close to the problem in the case law that has gotten labeled in the literature as the problem of omissions. Let us take a closer look at the problem in context and assess whether the distinction between motion and nonmotion has or should have any relevance, either in law or morality.

The beginning of wisdom in this area is the recognition that there are two entirely distinct problems typically grouped under the same label "omissions." One problem is whether crimes defined by

¹² MOORE, *supra* note 4, at 59.

¹³ *Id.*

¹⁴ *See id.* at 48.

¹⁵ Moore rejects conceptualizations of omissions based on a grammatical test, a moral distinction, and a "baseline condition" test (where what makes the world morally worse relative to a particular baseline state of affairs is an action). *Id.* at 24-26.

action verbs such as killing, burning, maiming, assaulting, and raping can be committed by people who stand and let events run their course. Thus in the case of the bystander who lets the baby drown, the question is whether she can be held accountable for killing the child. There is not now and there never has been a separate crime of letting a person drown. The charge is murder or manslaughter and the verbs used to define this crime are always "killing" or "causing death." In the French literature, this problem is aptly called the problem of "*commission par omission*."¹⁶ We would have a better idea of what we were talking about if we used this simple label in English.

The second problem is punishing, by special statutory prohibition, various activities that can be described as failures to act. Consider the failure to register for the draft, or the failure to pay one's income tax. The most hotly disputed form of "failure" offense is the failure to render aid at the scene of an accident. Most European countries have first aid statutes of this sort; most American states do not.¹⁷ The important feature of these crimes is that the failure is the gist of the crime. There is no need for a further consequence. When an obligatory first aid statute does apply, it imposes a relatively small penalty on everyone at the scene who fails to give easily rendered aid before emergency assistance arrives.¹⁸ These statutes do not impose liability for homicide in the event that the victim of the accident dies.

There are different reasons for regarding these two sorts of omissions as problematic. Let us look at each category of them in turn.

I. COMMISSION BY OMISSION

In the case of commission by omission, the problem is statutory interpretation and the danger implicit in extending the verb "killing" to encompass cases of "letting die." That is a rather serious issue, but it has nothing to do with the question of motion versus nonmotion. There are many cases of motion that are not killing, and, I dare say, some cases of nonmotion that are. Suppose

¹⁶ HALL, *supra* note 2, at 198-99.

¹⁷ See Meier Dan-Cohen, *Actus Reus*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 20-21 (Sanford H. Kadish ed., 1983).

¹⁸ See, e.g., VT. STAT. ANN. tit. 12, § 519 (1973) (imposing up to a \$100 fine on an individual who fails to rescue a person in physical danger where there is no peril to herself).

that one of the guards at Buckingham Palace enters into a conspiracy with outsiders to kill the Queen. His signal to them about when they should bomb a certain portion of the palace is his remaining motionless an extra five seconds after the other guards begin to change their posture. This would be enough to render him a conspirator and thus complicitous in the death of the Queen, if the plot succeeds. He contributes to her death by signaling that the bombing should proceed.

Moore might reply: yes, but he cannot do it alone. Nonmotion cannot cause anything in and of itself—and least of all death. But surely, unexpected nonmotion could be the cause of death. A car refuses to move from the path of the motorcade. A pilot becomes motionless and refuses to handle the controls of the plane, thus causing it to crash. There are numerous examples of this sort that trade on the unexpected nonmotion of one thing relative to other things in motion. Moore says that he has an argument against omissions as causes,¹⁹ but I find no case against the plausible position of Hart and Honoré that failing to water the plant, when one reasonably expects the contrary, causes it to die.²⁰

There might be many cases, then, in which the omissive failures to care cause death. A mother's failure to feed her child is readily treated as the affirmative act of neglect or starvation, and thus virtually every Western legal system would include this case within the ambit of criminal homicide. Whether the mother remains motionless as the baby dies is totally irrelevant.

The more difficult cases are those that we would call letting die rather than killing. A woman falls sick and her lover fails to call for medical help. He lets her die when he could have intervened and staved off death. Whether he is liable depends, in the common view of the courts, on whether he has a duty to aid her.²¹ Moore has the mistaken view that the question whether these duties obtain or not is somehow regulated by statute.²² This is false. There is no common law legal system that determines by statute which relationships are sufficiently close to generate the kind of duty that will, in breach, support a conviction for criminal homicide. The Model

¹⁹ See MOORE, *supra* note 4, at 277-78.

²⁰ See H.L.A. HART & A.M. HONORÉ, *CAUSATION AND THE LAW* 38 (2d ed. 1985).

²¹ See, e.g., *People v. Beardsley*, 113 N.W. 1128, 1129 (Mich. 1907).

²² See MOORE, *supra* note 4, at 56-57 (arguing that Anglo-American criminal codes distinguish between such omissions as those associated with parental duties to care for their children and omissions associated with the duties of strangers to assist others).

Penal Code provides that “[l]iability for the commission of an offense may not be based on an omission . . . unless . . . a duty to perform the omitted act is otherwise imposed by law.”²³ “Law” in this context means case law, law as principle, not law as statutory enactment. Therefore, the punishment of commission by omission raises serious problems under the principle *nulla poena sine lege*.

One would think that commentators would be shocked by the wholesale breach of legality in the judicial development of duties that supplement the law of homicide. My sense of the literature is that most observers are concerned about condemning the injustice of not punishing immoral omissions.²⁴ There is little concern about the issue of legality in letting courts roam freely about our moral sentiments. Moore’s own view ignores the issue of legality and stresses only the problem of protecting our liberty.²⁵ Later I turn to the question whether this concern about liberty or autonomy is well taken.²⁶

II. OFFENSES OF FAILING TO ACT

When a statute requires action of a particular sort, it poses no problem of legality,²⁷ but for some it might raise a problem of intruding too much in the sphere of our privacy or liberty. We do not hear this objection too often about the statutory duty to file an income tax return or the duty to report for jury service. The only area of controversy seems to be the duty to render first aid at the scene of an accident. Most people, in my impression, stop and render aid. Even in a callous city like New York, passersby will stop and give assistance when their safety is assured. There might be a case for expressing the communitarian judgment that rendering aid is the right thing to do. In view of the lack of legal sophistication

²³ MODEL PENAL CODE § 2.01(3)(b) (Proposed Official Draft 1962).

²⁴ See, e.g., HUSAK, *supra* note 1, at 156-60 (discussing the “apparent injustice” of omissions and noting that “the sentiment has favored enlarging rather than narrowing the scope of criminal liability for omissions”); Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PA. L. REV. 1455, 1483-92 (1994) (arguing for criminalization of certain omissions based on social contract theory).

²⁵ See MOORE, *supra* note 4, at 48.

²⁶ See *infra* note 30 and accompanying text.

²⁷ Note the Model Penal Code recognizes that “[l]iability for commission of an offense” by an offense is acceptable if “the omission is expressly made sufficient by the law defining the offense.” MODEL PENAL CODE § 2.01(3)(a). That the Code wastes words on this redundant provision (it is all right to punish omissions if a statute says so) testifies to our confusion about the area.

in this area, however, I am afraid that a statute of this sort would be understood as imposing the kind of duty that would support liability for homicide. German courts are very clear that violating the duty to aid provision is insufficient for homicide.²⁸ In view of our casual attitudes toward the principle of legality, however, a duty to aid statute would be a loose, duty-generating canon.

I wish to turn, then, to the widespread view that there is something untoward about statutes that prohibit failings.²⁹ These are statutes that demand beneficial actions rather than prohibit harmful ones. This demand on us supposedly intrudes upon our autonomy or liberty.³⁰ I confess that I do not get the objection. Whether a demand or prohibition is more noxious depends on the content of that which is demanded or prohibited. It depends, in short, on the substance rather than the form (active or passive) of the duty. Regulations that prohibit smoking in university buildings are very intrusive upon the liberties of smokers; the newly evolved custom requiring smokers to ask permission before they light up is not so intrusive. Laws prohibiting homosexual sodomy are rather intrusive (if enforced); promoting a culture of safe sex (an affirmative duty to use condoms) is less intrusive. These examples should be enough to call into question the assumption that demanding action somehow offends liberty in a way in which prohibiting action does not.

We should recall Moore's definition of omissions as the absence of bodily movement. His claim is that requiring movement is more intrusive than prohibiting it.³¹ This seems odd—as a wholesale claim. Think about two orders: (1) don't sit, and (2) stand! The question is whether the second, because it requires an act, is more intrusive than the first, which prohibits an act. The argument might be that it is, for there could be a half dozen postures one might assume: (1) lying down, (2) kneeling, (3) kneeling on all fours, (4) sitting, (5) standing on two legs, or (6) standing on one leg. The first order eliminates (4) and implicitly permits the remaining five options. The second order permits only two options, (5) and (6). Because the first permits five options and the second only two, it

²⁸ See ADOLF SCHÖNKE, HORST SCHRÖDER, & THEODOR LENCKNER, STRAFGESETZBUCH: KOMMENTAR § 323c cmts. 34-35 (23d ed. 1988).

²⁹ See HUSAK, *supra* note 1, at 84 ("Nonetheless, many theorists express skepticism about whether a person should *ever* be punished for a failure to act.").

³⁰ See *id.* at 159; MOORE, *supra* note 4, at 48.

³¹ See *supra* notes 12-14 and accompanying text.

looks as though the second order, the affirmative demand, encroaches more on liberty. This is the case one might make for Moore's position.

But look again. The argument turns on options (1), (2), and (3) having value to the actor. If they have no value, the actor loses nothing by having his range of options limited to standing on one leg or two. There is nothing in the nature of the affirmative order that makes it more intrusive than the negative order.

Moore's claim is more plausible when limited to bringing about or failing to avoid some specific harm, such as death or bodily injury. It is supposedly less intrusive to require people to abstain from killing than it is to require them to avoid the occurrence of a natural death. But this increased difficulty has nothing to do with the distinction between motion and nonmotion. The problem with affirmative duties is that they fall due at a time and place over which we have no control. All of a sudden you find yourself next to the pond with the proverbial drowning child. You must act now. It matters not that you are not in the mood to be a hero or that you have something better to do. There is nothing quite so unpredictable and insistent as having the circumstances determine when and how we must act.

For all their similarity with other statutory offenses, crimes of failing do display some special features. As compared to the cases of commission by omission, no harm follows from failing to do acts that contribute to the common good. A public good may follow from widespread compliance, but a particular breach is, at most, a wrong of freeriding on those who do comply. Because there is no obvious wrong in violating a statute of this sort, the courts are more likely to recognize mistake of law as a defense to crimes of failing. A good example is the Supreme Court decision in *Lambert v. California*,³² where the defendant violated a duty to register as a convicted felon. The Court reversed the conviction on the ground that, as a matter of due process, actual knowledge or probability of knowledge should be required as a condition of liability.³³ Other courts reach this result by interpreting the element of "willful failure" to include knowledge of the legal prohibition.³⁴

³² 335 U.S. 225 (1957).

³³ See *id.* at 229-30.

³⁴ See *United States v. Murdock*, 290 U.S. 389, 396 (1933) (finding that "willfully" in federal tax statutes implies that "a bona fide misunderstanding" about duty to pay tax should be a complete defense). *But cf.* *Check v. United States*, 498 U.S. 192, 206

Crimes of failing to act also strike a sensitive taboo in criminal justice. Everyone seems to agree that it would be a perversion of the institution of punishment to convict for thoughts alone. The question is whether punishing omissions poses this problem. It seems as though it might, for if an omission is the absence of action, as Moore claims, there is nothing there to punish but the thought of doing nothing. Several decades ago Herbert Morris resolved this problem with regard to instances of commission by omission.³⁵ In these cases, we do not punish for passivity alone, for the omission permits the realization of a harmful consequence, typically the death of someone in distress. The crime of the omission expresses itself, therefore, in an untoward event in the external world. But this is the case with regard to crimes of failing to act, and therefore the problem remains.

Suppose we had a statutory requirement to vote, as do many countries. If I were punished for not voting, would I be punished for thoughts alone? It is not the thought of not voting that triggers liability, but actually not voting. But not voting, it is said, is nothing, and therefore, all there is to punish is the thought that accompanies the not voting. But if not voting were "nothing," why would anyone think of sanctioning it? Like other punishable failures, not voting occurs in the context of others' compliance with the demand. It is the wrong of freeriding on those who maintain the democratic system. And not voting is hardly the absence of bodily movement. One could be engaged in an infinite variety of activities in the time one should be voting.

Concerns about punishing for thoughts in this context seem to be misplaced. Thoughts prove to be tempting as the basis for punishment when they are treated as an index of likely harm. If we push back the threshold of attempt liability as far as we can, we end up with a bare bones intention to harm. Everyone agrees that taking these intentions to harm as the focal point of liability goes too far in intruding upon individual privacy and liberty. The thoughts or intentions that are not permissibly subject to punishment are those that are unrealized, namely an intention to cause harm in the future. This is not the nature of intentions accompanying statutory omissions, such as a failure to pay taxes or to vote.

(1991) (holding that good faith belief that tax law is unconstitutional does not negate liability for "willfully" failing to file a tax return).

³⁵ See Herbert Morris, *Punishment for Thoughts*, 49 *MONIST* 342, 346-48 (1965) (discussing omissions as "external conduct").

These are completed acts; there is no unrealized intention. And therefore, in this context, there is no particular problem of punishing the knowledge or intention accompanying the omission that Moore calls "literally nothing at all."³⁶

Why does Moore go wrong in his analysis of omissions? It may be that he places too much emphasis on action as "willed bodily movement."³⁷ Action is analyzed in isolation. Willed bodily movement happens, whether it is directed toward or understood as action by others. Moore examines action in abstraction from the way we act in relationships with other people. Whether this generates mistakes in the theory of action, I am not sure; but it is obvious that applying the same method in thinking about omissions produces more mistakes than one can comfortably tolerate. It leads Moore to define omissions as the absence of bodily movements. It prompts him to recognize a vague exception to the act requirement in the criminal law. But his most interesting mistake is thinking that either moving or not moving is a question of liberty.

It turns out that whether one moves or does not move has nothing to do with the two problem areas posed by omissions in the criminal law. The act requirement remains intact, without exception, even though we sometimes punish commission by omission and statutory offenses of failing to act. Bodily movements or their absence have in themselves no moral relevance. Compelling certain motions is sometimes more intrusive, sometimes less intrusive than prohibiting other motions. The only question of liberty is posed by the demand that one act at a particular moment of time to save another, who for reasons beyond one's control, finds himself in need. The duty to intervene poses a question of liberty not because it requires bodily movement, but because the duty is triggered by an unpredictable event at an unpredictable time and place.

³⁶ MOORE, *supra* note 4, at 28.

³⁷ *Id.*; see also *supra* notes 4-6 and accompanying text.