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OMISSIONS, CAUSATION AND LIABILITY

BY DOUGLAS N. HUSAK

Critics of Anglo-American law have lamented for some time that our legal system fails to go as far as others in imposing criminal (or civil) liability for failures to avert harm.¹ The duty not to harm is owed to all persons alike, but the duty to avert harm is owed only to a narrowly defined class of persons.² This asymmetry requires explanation, especially in the light of legal consequences which some commentators have described as "shocking in the extreme" and "revolting to any moral sense".³ A defendant rents a canoe to an intoxicated plaintiff, who overturns it. The defendant is an excellent swimmer, but sits passively on the dock, boat and rope at hand, smoking a cigarette and watching the plaintiff drown. In *Osterlind v. Hill*,⁴ the court found no liability. One would expect powerful arguments in support of such a disappointing legal result.⁵ In this paper I shall discuss *one* such argument that is especially pervasive in legal and philosophical literature, and shall conclude that it is unconvincing. But before this argument is reconstructed and attacked, it may be helpful to identify a factor that has contributed to some confusion on this topic.

Despite their implausibility, extremist positions on both sides of this controversy have attracted surprising support among commentators. Those who favour restricting liability for omissions to a few carefully limited circumstances sometimes dismiss apparent counter-examples with the tired

¹This lament is historically associated with Bentham. See Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Burns and Hart (London, 1970), p. 293. For surveys see Note, "The Failure to Rescue: A Comparative Survey", *Col. L.R.*, 52 (1952), p. 631; and Feldbrugge, "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue", *American Journal of Comparative Law*, 14 (1966), p. 631. See also Rudzinski, "The Duty to Rescue: A Comparative Analysis", in *The Good Samaritan and the Law*, ed. Ratcliffe (New York, 1966).

²*Jones v. U.S.*, 308 F.2d 307 (D.C. Cir., 1962), perhaps the leading case in this area, purports to follow *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907) in describing "four situations in which the failure to act may constitute breach of a legal duty": "First, where a statute imposes a duty of care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid". For interesting critical commentary on these conditions, see Fletcher, *Rethinking Criminal Law* (Boston, 1978), pp. 611-8.

³Prosser, *Law of Torts*, 4th ed. (St. Paul, 1971), pp. 340-1.

⁴263 Mass. 73, 160 N.E. 301 (1928).

⁵Criticism of such legal results is not directed primarily to the judiciary, which (insofar as criminal liability is concerned) cannot create new law without violating the maxim *nulla poena sine lege*. My remarks are addressed to the legislature, which did not recognize liability in the first place—and did not rectify the "oversight" subsequent to cases such as *Osterlind*.

apology that legal duty must occasionally fall short of moral obligation.⁶ Those who regard cases of failing to avert harm as *equally* blameworthy as cases of actively harming⁷ are embarrassed in their attempt to explain why no legal system has gone so far as to impose comparably severe punishments. The beginning of wisdom on this issue is to distinguish the question of whether liability should be imposed *at all* from the question of *how much* liability should be imposed. Unfortunately, even those commentators who seem on the verge of recognizing this distinction have not always remained attentive to it. George Fletcher observes that "we should keep in mind two questions: the first is determining that there is a duty and the second is pinpointing the scope of that duty".⁸ Yet his subsequent discussion apparently ignores the implications of this distinction by maintaining that "the duty to avert death is based on the moral assumption that in the particular situation, the failure to avert death is *equivalent* to killing".⁹ No reason is offered to explain why a duty to avert harm should be countenanced in only those circumstances in which the failure to avert harm is of blameworthiness *equal* to that of the act of causing harm. Why not impose a duty to assist in cases in which a breach of such duty would *not* be as dreadful as an act of harming? To a large extent, the fixation in contemporary philosophical literature on the question of whether liability should be *as great* for harmful omissions as for harmful actions distracts attention from the more fundamental issue of whether there should be liability for harmful omissions *at all*. If one is arguing against the claim that liability should not be enlarged in cases of failure to avert harm, one should not simultaneously draw inferences about the extent of such liability.¹⁰

Before addressing the particular argument to be considered, it is appropriate briefly to place the issue of liability for omissions in a broader context. Recurrent in the literature are at least four reasons for opposing liability for omissions: (1) *actus reus* is a general requirement for criminal liability

⁶See, e.g., the statement of Judge Carpenter in *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 Atl. 809 (1897). See also Minor, "The Moral Obligation as a Basis of Liability", *Va.L.R.*, 9 (1923), p. 420. I describe such a rationale as a "tired apology" because, in the absence of further argument, it can be used to resist conforming *any* legal result with the conclusion of moral reasoning. It offers no *reason* for the disparity, when surely there is a *prima facie* case in favour of such a conformity.

⁷See, e.g., Rachels, "Active and Passive Euthanasia", *New England Journal of Medicine*, 292 (1975), p. 78.

⁸Fletcher, *supra* note 2, pp. 615-6.

⁹*Ib.*, p. 621 (my italics). Earlier Fletcher writes (p. 611): "The general theoretical basis for recognizing a duty to avert harm is that in the context of the relationship and under the particular circumstances, the failure to avert harm is as egregious a wrong as causing the particular harm".

¹⁰Those who are reluctant to recognize *any* liability before they are confident about *how much* liability to impose might profit from a study of the state of confusion among legal systems concerning how much to punish (1) persons who attempt crimes, and (2) persons who are accessories to criminal activity. No system exempts such persons from punishment altogether, though the issues of how to compare their liability with (1) those who complete crimes, and (2) perpetrators of criminal activity, are topics of considerable disagreement.

that is not satisfied by imposing liability for omissions, since omissions are not acts;¹¹ (2) liability for omissions is a greater deprivation of liberty than liability for positive acts, since agents who are prohibited from performing some act are allowed a greater number of permissible options than agents who are required to perform some positive act;¹² (3) no one has formulated an acceptable rule specifying precisely which omissions should give rise to liability that precludes a descent down the slippery slope to all sorts of absurd consequences;¹³ and (4) causation is a necessary condition of liability for harm, and one does not cause harm one merely fails to avert.¹⁴ A more comprehensive treatment than that provided here would address each of these arguments, preferably by sorting them into two kinds: those that attempt to demonstrate why it is objectionable to convert an acknowledged moral obligation into a legal duty, and those that allege that, intuitions notwithstanding, one is seldom under a moral obligation to avert harm.¹⁵ In the remainder of this paper, I shall focus on the last of the above arguments. Do the "facts" of causation provide any reason not to impose liability for harmful omissions to an extent greater than that currently recognized in most Anglo-American jurisdictions?

Expressed syllogistically, the argument to be discussed (henceforth called the *causal argument*) is as follows:

- (1) No one should be held liable for harm he has not caused.
- (2) A failure to avert harm is not a cause of harm.
- (3) Therefore no one should be held liable for harm he has failed to avert.

Premise (1) of this argument will be called the *causal assumption*, premise (2) will be called the *principle of causal efficacy*.

What is noteworthy in the relevant literature is that commentators who

¹¹This argument combines the *actus reus* requirement (see *Robinson v. California*, 370 U.S. 660 (1962)) with an analysis according to which omissions cannot be acts, since acts consist of bodily movements (see M.P.C. §1.14(2); Restatement (Second) of Torts §2; and Holmes, *The Common Law* (Boston, 1881), p. 54).

¹²See the discussions in Kleinig, "Good Samaritanism", *Philosophy and Public Affairs*, 5 (1976), p. 382; Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability", *U.Pa.L.R.*, 56 (1908), p. 217; Fletcher, *supra* note 2, pp. 602-6; and Rawls, *A Theory of Justice* (Cambridge, 1971), pp. 60 and 195-257.

¹³Prosser, *supra* note 3, p. 341, discusses "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one". Others have offered similar criticism that an alleged duty of rescue would be *non-dischargeable*. See Trammel, "Saving Life and Taking Life", *Journal of Philosophy*, 62 (1975), p. 131.

¹⁴Fletcher, *supra* note 2, p. 423; Epstein, "A Theory of Strict Liability", *J. Leg. Studies*, 2 (1973), p. 151; and Weinryb, "Omissions and Responsibility", *Philosophical Quarterly*, 30 (1980), p. 1.

¹⁵Some commentators have blurred this distinction. Epstein, *supra* note 14, p. 201, seems to rest his critique of Good Samaritan legislation on the difficulty of translating moral obligations into legal duties: "It may well be that the conduct of individuals who do not aid fellow men is under some circumstances outrageous, but it does not follow that a legal system that does not enforce a duty to aid is outrageous as well". But elsewhere he claims to have moral reservations about an alleged duty to rescue: "The common law position on the Good Samaritan problem is in the end consistent with both moral and economic principles" (p. 200).

have been unconvinced by the causal argument have attacked the principle of causal efficacy much more frequently than the causal assumption. Many such critics have flooded the literature with analyses of causation according to which omissions as well as actions are capable of causing states of affairs.¹⁶ Nearly all of these accounts propose a counterfactual analysis of causation, according to which one condition that must be satisfied before an act or omission x can be said to cause event y is that y would not have occurred but for x . Such analyses purport to offer straightforward explanations of how omissions as well as acts can cause harm since, e.g., there is no reasonable doubt that the canoeist in *Osterlind* would not have drowned but for the failure of the defendant to try to rescue him. Cases of causal overdetermination, which have traditionally embarrassed counterfactual analyses of causation,¹⁷ are sometimes dismissed as of no "immediate concern".¹⁸

I shall here propose no criticisms of the principle of causal efficacy. Instead, let us consider the fact that the burden of formulating an analysis of causation that is incompatible with the principle of causal efficacy is borne only by those critics of the causal argument who subscribe to the causal assumption. If there is no compelling reason to retain the causal assumption, the truth of the principle of causal efficacy should not disturb those who favour an enlargement of liability for harmful omissions. It will not persuade proponents of the causal argument to abandon the causal assumption on the ground that well-established legal practices (e.g., strict liability, vicarious liability, etc.) seem to have dispensed with it already. For adherents of the causal assumption can be expected to employ it as the basis of an objection to these controversial forms of liability.

A more telling criticism of the causal assumption (when used in the context of the causal argument) is that it precludes the imposition of liability in even those few circumstances in which it is currently recognized in law. It is simply unacceptable to all parties to the controversy to permit a mother to sit passively by and allow her infant to bleed to death after he has accidentally injured himself. In the face of such examples, defenders of the causal assumption are less than convincing. In a disingenuous footnote, Richard Epstein, unshaken in his confidence in the causal argument, writes: "I put aside here all those cases in which there are special relationships between the plaintiff and the defendants: parent and child, invitor and invitee, and the like".¹⁹ It is best, after all, to "put aside" those objections to which one cannot respond.

An alternative strategy that at least acknowledges the importance of the

¹⁶See, e.g., D'Arcy, *Human Acts* (Oxford, 1963); Casey, ed., *Morality and Moral Reasoning* (London, 1971); and Harris, "The Marxist Conception of Violence", *Philosophy and Public Affairs*, 3 (1974), p. 192.

¹⁷See Bunzl, "Causal Overdetermination", *Journal of Philosophy*, 76 (1979), p. 134.

¹⁸Fletcher, *supra* note 2, p. 589, note 6.

¹⁹Epstein, *supra* note 14, p. 189, note 91. Fletcher also favours "leaving aside" such cases (p. 601).

difficulty attempts to analyse cases such as that of the bleeding infant as instances of an act of killing rather than as instances of an omission of letting die.²⁰ This tactic should quickly convince you that you no longer understand the distinction between acts and omissions. It will not do to re-characterize any apparent omission in which it seems clear that liability is properly imposed as an instance of acting. One might as well dissolve the problem by claiming that *Osterlind* involves positive action. What are sorely needed at this point are theoretical analyses of the concepts of acting and omitting.²¹ However this elusive distinction is ultimately drawn, it would be surprising if it coincided with considered opinions about when behaviour should or should not give rise to liability. If such a coincidence obtained, there would be adequate grounds for suspecting that normative considerations had been smuggled into the respective analyses of acting and omitting. But if such normative considerations were indeed part of the analyses, the claim that omissions should not give rise to liability is in danger of becoming a tautology.²² One might hope for a non-normative criterion to distinguish acts from omissions. Such a criterion could then be employed to test the substantive hypothesis that behaviour categorized as action rather than as omission gives rise to greater obligations. The claim that behaviour involves an omission rather than a positive act is typically put forward as a reason for exempting the agent from liability. If omissions are (in part) defined as behaviour involving fewer obligations than positive acts, the categorization of behaviour²³ cannot serve as such a (non-circular) reason, since the categorization already incorporates the normative conclusion. On this account, the conclusion of the causal argument is trivial and uninteresting. The fact that arguments (e.g., the causal argument) are constructed to support this conclusion is evidence that its defenders do not regard it as a logical truth.

It seems plausible to suppose that strong utilitarian arguments can be marshalled against the causal assumption. If the enforcement of sanctions for violations of law exerts any influence on human behaviour, the imposition of liability for failure to avert harm that one has not caused can be expected to result in a net reduction of harm. But this claim cannot be adequately defended here. Instead, it is profitable to examine what might be said on behalf of the causal assumption. This project requires a willingness to construct arguments for one's adversaries, for those who adopt the causal assumption generally exhibit a curious reluctance to argue for it. In the

²⁰Foot has maintained that some cases of "letting die" can be described as instances of causing death. See her "Euthanasia", *Philosophy and Public Affairs*, 6 (1977), p. 85.

²¹See references in note 16; and Brand, "The Language of Not Doing", *American Philosophical Quarterly*, 8 (1971), p. 49; Chisholm, *Person and Object* (La Salle, 1976); Thomson, *Acts and Other Events* (Ithaca, 1977); and Davis, *Theory of Action* (New Jersey, 1979).

²²See my "Killing, Letting Die and Euthanasia", *Journal of Medical Ethics*, 5 (1979), p. 200.

²³Here and elsewhere I use 'behaviour' as a generic term including both acts and omissions. I prefer this to the term 'conduct' employed, e.g., in M.P.C. §1.13(5).

light of the fact that the causal assumption has gone virtually unchallenged in the long history of legal theory,²⁴ the results of this inquiry are disappointing. I shall assess three arguments.

(1) One clue to the appeal of the causal assumption is contained in the various labels under which causation is described by legal theorists. The counterfactual sense of causation typically said to constitute a necessary (though not a sufficient) condition for liability is characterized alternatively in the literature as "cause in fact", "scientific cause", or "cause in the philosophical sense".²⁵ Legal theorists who employ these labels seem undisturbed by the nearly universal resistance to this analysis of causation among both scientists and philosophers. But there is little difficulty in accounting for the attraction of allegedly "scientific", "objective", or "factual" principles which establish limits on the scope of behaviour for which one can be held liable. One can thereby suppose that judgements of liability are not *entirely* normative. Both legal and non-legal minds continue to be influenced by a "positivistic" bias that maintains that normative questions are inherently insoluble. It is reasonable to suspect that the causal assumption will be found appealing to the extent that one holds such a bias.

It hardly needs to be pointed out that this first basis for believing the causal assumption is without merit. The defects of this argument can be identified without defending a controversial theory according to which normative questions are as susceptible to rational solution as non-normative issues. A more direct response is as follows. Even if the counterfactual analysis of causation employed in Anglo-American law were "scientifically" accurate, the decision to *use* such an analysis to establish the limits of personal liability would remain a normative one. Surely no non-normative *fact* of the matter tells us it is unjust to hold persons liable for harm they have not caused. Questions of liability *are* normative, despite the unfortunate tendency to pretend otherwise.

(2) A second possible basis for retaining the causal assumption is derived from the resistance of our legal system to apportion blame and liability. Many of the situations in which it is tempting to hold agent *A* liable for harm he has not caused are cases in which some agent *B* has unquestionably acted to cause the harm. Fletcher's treatment hazards the "experimental thesis" that (analogous to the law of accessories) liability for omissions is a branch of *derivative* liability.²⁶ Liability is said to be derivative when there exists some other, primary offence from which liability can be derived. It is no doubt true that a convincing argument that *B* has acted to cause a harm often makes us less inclined to hold *A* liable. But why? Perhaps there is a tendency to suppose that if *B* is held liable to the fullest extent

²⁴Nearly every treatise on criminal law or torts includes causation as one of the necessary conditions of liability.

²⁵Some of these labels are discussed in LaFave and Scott, *Criminal Law* (St. Paul, 1972), §35.

²⁶Fletcher, *supra* note 2, pp. 581 ff.

of the law for the harm that is caused when *C* is pushed in a lake and drowned, we had better attribute no liability for the death to *A*, who merely watched the act. If the reluctance of our legal system to apportion liability requires that either *A* or *B* be held totally responsible for the death (in the absence of complicity), the relevant question becomes this: who is *more* liable for the harm—*A* or *B*? Surely greater liability attaches to *B*, hence it might be thought that there is none left over for *A*.

One version of this strategy has recently been advanced by Elazar Weinryb. He invokes the causal assumption to “shed grave doubts on the appropriateness of holding someone responsible for the harm he omits to prevent”.²⁷ His defence of the principle of causal efficacy is detailed and plausible, but, characteristically, the causal assumption is supported almost as an afterthought. The reasoning in favour of the causal assumption is that “our idea of responsibility requires that it should be uniquely ascribed”, and “in many situations causation is the only means by which we can satisfy the uniqueness requirement”.²⁸

This basis for retaining the causal assumption can be rejected without addressing the complex issues involved in apportionments of blame. In the first place, many of the cases in which it seems appropriate to impose liability for omissions are situations in which no other agent has acted to cause the harm. Hence Fletcher’s “experiment” of treating liability for omissions as a kind of derivative liability is of limited application at best. It would not, for example, alter the legal result in *Osterlind*. More to the point, the failure to avert harm is easily conceptualized as an offence distinct from the act of causing harm. Hence questions about how blame might be apportioned for a *single* offence need not even arise.²⁹ Thus even if Weinryb is correct that “our idea of responsibility” necessitates that it be “uniquely ascribed”—a very debatable contention—there is no barrier to holding persons who fail to avert harm liable for offences distinct from that of actively causing harm.

(3) Finally, the causal assumption might be indirectly defended by the familiar process of criticizing alternative proposals to limit liability. Surely *some* general principles must limit the scope of events for which one may be held liable, and one should not be too quick to reject a plausible candidate for this role until a more suitable replacement can be found.

A radical response to this defence might question the *a priori* conviction that general principles to limit liability *must* exist. But the above challenge is better met by defending an alternative to causation. Clearly this project cannot be undertaken in detail here. But a tentative hypothesis is that our

²⁷Weinryb, *supra* note 14, p. 3.

²⁸*Op. cit.*, p. 9.

²⁹Treating the failure to rescue as an offence distinct from an act of causing harm helps make sense of cases such as *Jones v. State*, 220 Ind. 384, 43 N.E. 2d 1017 (1942), in which the defendant was held guilty of murder after he failed to rescue a woman who had fallen into a creek after he had raped her.

feelings about liability are better accommodated by supposing that agents should be held liable for only those states of affairs over which they have *control*. I shall not develop this suggestion³⁰ beyond pointing out that, whatever 'control' means, it seems reasonable to believe that the defendant in *Osterlind* had control over the fate of the canoeist—hence his failure to *cause* the drowning creates no obstacle to liability.

Thus no compelling arguments in favour of the causal assumption can be reconstructed from legal or philosophical literature. Considering the counter-intuitive implications of that premise, I suggest that it should be abandoned. Against this background, it is fair to point out that not all legal theorists have accepted it. Hart and Honoré, in perhaps the most comprehensive examination of the connection between causation and liability, explicitly reject the causal assumption. They write:

So causing harm of a legally recognized sort or being connected with such harm in any of the ways that justify moral blame, though vitally important and perhaps basic in a legal system, is not and should not be either always necessary or always sufficient for legal responsibility.³¹

Given this repudiation, why write an entire book on the connection between causation and legal responsibility? The answer, according to Hart and Honoré, consists in what I shall call the *causal relevance principle*, which they express as follows: "We shall provisionally . . . treat statements that a person caused harm as one sort of non-tautologous ground or reason for saying that he is responsible".³²

Is the causal relevance principle true? Whether proposition *p* is a reason for believing proposition *q* is notoriously difficult to assess. One way to defend this principle would consist in providing an example in which the substantive issue is whether agent *A* or *B* is more appropriately held liable for some harm *x*. Suppose that a person felt relatively confident that *A* was a better candidate for liability than *B*, but was unclear about whether the action of *A* caused *x*. Suppose at some later time he became convinced (on independent grounds) of an analysis of causation that identified the action of *B* as the cause of *x*. Should this new conviction provide him with a reason to re-examine his earlier belief that *A* was a better candidate for liability than *B*? It is not clear why it would. If his original basis for holding *A* liable did not depend on a belief that *A*'s action was the cause of *x*, it is not obvious why this conclusion should be undermined by an argument showing that *A*'s action was *not* the cause of *x*. It is unclear whether any example corresponds to this description. The description merely suggests a test by which the truth of the causal relevance principle might be assessed.

³⁰The notion of control plays a central role in Hart's rejection of the doctrine of the double effect in criminal law. See "Intention and Punishment", in his *Punishment and Responsibility* (Oxford, 1968), p. 113.

³¹Hart and Honoré, *Causation in the Law* (London, 1959), p. 63.

³²*Op. cit.*, p. 62.

Nonetheless, one cannot fail to be impressed by the strong positive correlation between cases in which the action of *A* causes harm *x* and cases in which *A* is properly held liable for *x*. Does this correlation establish the causal relevance principle? However this question might be answered, the proposition 'A's action caused harm *x*' (*p*) is not the *best* reason for believing the proposition 'A is responsible for harm *x*' (*q*). *p* fails to be the best reason for believing *q* when there is some other proposition *r* that correlates more strongly with *q* in the sense that (1) *q* is true when *r* is true but *p* is false; and (2) *q* is false when *r* is false but *p* is true. The proposition 'A has control over whether or not harm *x* occurs' satisfies these conditions when substituted for '*r*'. Perhaps the plausibility of the causal relevance principle can be explained by the fortunate fact that we have control over most of the harm we cause and no control over most of the harm we do not cause. But in those cases in which we have *no* control over the harm we *cause* (e.g., we injure someone while experiencing an epileptic seizure), we certainly are exempt from liability. It would seem that such an exemption is out of the question in the opposite case in which we *have* control over the harm we do *not* cause. Any example to support this contention is question-begging, but cases such as *Osterlind* seem to provide perfectly good illustrations.³³

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³³I wish to thank Micheal Zimmerman for a number of helpful suggestions about how this paper might be improved.