** This post is written with a view to being accessible to a wide range of readership. I've therefore avoided using footnotes and references. The ideas I discuss here are set out in much greater detail, with references, bibliography, index, and other bells and whistles in the following recent articles, copies of which are freely available:*

'Beyond acts and omissions: remark-able criminal conduct' (2021) 41(1) Legal Studies 1

'Against the act/omission distinction' (2022) 73 NILQ 103

Acts, Omissions, and Remark-able Criminal Conduct

Mark Dsouza

One of the first things a law student learns in their criminal law module is that, generally, the criminal law is interested in acts rather than omissions. Sure, *sometimes* the criminal law will also punish omissions, but that's the exception rather than the rule. As an empirical claim, that may be true in some (many?) jurisdictions. But are there good normative reasons to systematically prefer criminalising acts rather than omissions? I don't think so – I think the distinction we should really make is between conduct that belies a contextually salient expectation of how one ought to behave, and conduct that does not.

Things to be careful about

Let me start with a brief autobiographical aside. I realise that the act-omission distinction (AOD) is such a foundational concept in criminal law teaching that a rejection of it will seem to many, not just counter-intuitive, but almost heretical. When I first started teaching the AOD to students in a legal philosophy module, I thought so too. But then I noticed the sharp divide between the initial 'intuitive' reactions to bad Samaritan laws (that are taken to criminalise omissions to help) from students from common law jurisdictions (who immediately recoiled at the idea) and students from civilian law jurisdictions (who were invariably quite open to them). I began to wonder whether intuitions on this topic, mine included, were learned (and so only reliable if that learning was a distillation of good normative arguments), rather than innate. That possibility is why we must be very careful when making normative arguments about the AOD. We must be careful to consider all relevant matters, and equally importantly, we must be careful to exclude all extraneous matters.

True omissions and mere non-doings

For instance, we should only compare 'true' omissions (as opposed to mere non-doings) with acts. In ordinary language, it would be strange to say that I omit to see infra-red light, or to log into a WiFi network if I don't realise is available, or to do my morning meditation if I never start my day with

meditation. In fact, with a little work we can whittle down the set of 'true' omissions (in ordinary language) to a small subset of non-doings: those that

(a) are 'performed' by persons exercising their practical capacity for voluntary control, and
(b) belie a contextually salient expectation to do something

Obviously, a lot here turns on what I mean by a 'contextually salient' expectation. In short, that is a normative expectation (so not a mere prediction of what will happen, but rather something we *want* to happen, or should be able to rely on happening) stemming from societal morality, (conventions of behaviour, politeness, good manners, and so on) or even mere regularity and routine ('the post is *always* delivered to this postcode by 10:00 am', 'they always restock the supermarket on Sunday evenings', and so on). Even those that reject the AOD don't argue for liability for mere non-doings, and so we can't sensibly evaluate their arguments by comparing non-doings with acts when we consider appropriate targets for criminalisation. Instead, we must only compare true omissions with acts.

Conduct-tokens and the bigger picture

The next thing to keep in mind is the big picture of what we're interested in. We're concerned with the AOD in the context of the question of what should be criminalised, i.e., made a crime. In that context, the AOD is relevant only to the conduct element of the actus reus of a prima facie criminal offence. This is a tiny cog in a big machine that churns out criminal liability outcomes. Plenty of factors apart from our selection of a qualifying conduct token (be it an act, or an omission) will affect criminal liability: other parts of the actus reus, the mens rea, and defences, just to name a few. So, when comparing acts and omissions we must (1) be wary of drawing conclusions directly from criminal liability outcomes, and (2) exclude or neutralise from our test cases any matters relating to factors other than the offence's conduct element.

A default position on the AOD

If we look at how the various cogs of the machine that generates criminal liability outcomes fit together, we can see that the role of the conduct element of an offence is to pick out conduct that deviates from our baseline expectations about how people in the world will conduct themselves. Such deviations, if they occur in specified circumstances, or result in specified consequences, and if accompanied by specified mens rea states, without any defensive plea being applicable, will result in a criminal conviction.

Now, an act can clearly cause such a deviation. But, based on our brief discussion of how best to understand 'omissions', we can now see that an omission too involves a deviation from baseline

expectations. So unless we are given reason to think otherwise, we should treat omissions as being as capable as acts of satisfying the conduct element of any offence we want to create.

Evaluating arguments for distinguishing omissions from acts

Several theorists have tried to offer us reasons to think otherwise. Four such arguments still command some support. Consider these in turn.

1. Authorship/responsibility: *Some argue that when we author the stories of our lives by interacting with our environment and other people, we do so primarily through our acts, and only secondarily through our omissions. This, for them, justifies the primacy of act-based criminalisation.*

   There isn't much evidence for this claim. Sure, much of our vocabulary of causation is act-normative, but that isn't a reliable indicator of how we are hardwired to make sense of our interactions with the world. Even (generously) assuming that this isn't an English-specific phenomenon, language patters may reflect merely the relative frequency with which we interact with the world through acts and omissions. But frequency does not suggest primacy; if it did, we should be branding left-handed people as deviants or inferior. (Please don't!) We actually author both, our chosen doings, and our chosen non-doings. We can sensibly say 'I wish I'd called tails' or 'I saw that lottery ticket, but didn't buy it'. In this wide sense, authorship isn't very instructive. It supplies no reason to distinguish between doings and non-doings, let alone acts and omissions, in criminalisation contexts.
2. Causation: *Some claim that we cause things by our acts, whereas our omissions merely let things happen.*

   Perhaps that is true in physics. But in law (and ordinary speech), the attribution of causal responsibility is a normative as well as mechanical issue. So, we commonly use the language of causation to pick out the most salient ingredients in the occurrence of an event – even if they are omissive – as their causes. Thus it makes sense to say that D's failure to close the railway gate in the famous case of *Pittwood* caused V to be killed when a train crashed into his cart while it was crossing the tracks. Perhaps if we understood causation solely as a physicist would explain it, we could deny that D's failure had anything to do with the crash, and instead say that it was the train driver (who caused the train to move along the track) and the cart driver (who caused the cart to try and cross the track) that caused the crash. But the physicist's version of causation is not the law's version of causation. In law, causation has a distinctively normative flavour.
3. Wrongness/culpability: *Still others suggest that harming by act is either more wrongful, or more culpable, than harming by omission.*

These claims do not survive close examination. The wrongness argument is that harming by an act affects our 'security' interest in the stability of our world by changing things that we expect to remain constant, whereas harming by an omission only affects our interest in the expectation of improvement. The former is a more important interest, and so thwarting it is a more serious wrong. But this view rests on a failure to properly distinguish between non-doings and omissions. True omissions also adversely affect our security interest in the stability of the world. Our baseline world has both static elements (things that do not happen) and dynamic elements (things that regularly happen), and true omissions are that subset of non-doings that belie our expectations regarding these dynamic elements. In simpler words, my normal world is shaken up as much when a protest prevents my bus from continuing towards my office as when my regular bus simply does not show up. Both deviations harm my security interest. In truth, a non-doing that did not harm my security interest would not be a true omission at all.

The culpability argument too does not convince. This intuition-based argument suggests that because we tend to be more morally outraged by killers than by those who let someone die, and because we should regret killing more than letting someone else kill, killing by act is more culpable than killing by omission. But even assuming we share these intuitions, they do not support the conclusion for which they are marshalled. A killer may be more likely to 'do it again' than a person who lets someone die, if for no other reason than that we have many more opportunities to deliberately kill than we have to deliberately let someone die. So our moral outrage might reflect something other the agent's culpability; it might reflect our fear that the agent's conduct may be repeated. So we cannot reliably conclude on this basis that it is more culpable to cause any 'X' by act than by omission. As for regret, we regret plenty of things, whether or not we can rightly be blamed for them. I might regret not calling heads instead of tails on a coin toss. Regret is not a good indicator of culpability either.

4. Liberty: *Some argue that prohibiting an act leaves us more surviving options ('You can do anything but X') than prohibiting an omission ('You can do nothing but X'). So, to better protect liberty, we should prefer to prohibit acts rather than omissions.*

   This is true. But the liberty gap is smaller than one might initially think. If 'X' refers to a broad class of things, prohibiting it may destroy several options ('You cannot leave the prison cell'), and prohibiting its omission may be less restrictive than previously thought ('You must provide reasonable assistance to V', where a plethora of measures are considered 'reasonable assistance). Besides, we can multitask – if we are prohibited from omitting X, we can do X, *and* anything that is compatible with doing X. Moreover, we typically prohibit acts in perpetuity

('You should *never* kill a person'), but prohibit omissions ie, require acts, only for fleetingly ('Pull over, while this emergency vehicle crosses'). Finally, we can adjust variables other than the conduct element of an offence to achieve the desired balance between our interest in liberty and our interest in other values like security and solidarity. So, we can expect less of people ('Call the fire brigade!', rather than 'Run into a burning building to rescue someone!'), or link our expectations to the actor's role (laypersons need do less than fire-fighters), or adjust the threshold for a duty to act to arise (you must act if necessary to 'avert imminent serious bodily harm', not to 'minimise eventual minor property damage'), and so on. Since well drafted omissions-based criminal liability can adequately liberty-respecting, this argument too cannot support systematically distinguishing between acts and omissions in our criminalisation decisions.

So while it might be a fairly good idea to distinguish between acts and omissions as a rule of thumb, nothing in the foregoing arguments supports systematically distinguishing between them for the purpose of criminalisation decisions.

Commissions?

Now think back to the argument on how we distinguish true omissions from mere non-doings. The same arguments that suggest that not all non-doings are omissions, might also suggest that not all doings are 'acts'. Accordingly, if mere non-doings are not appropriate candidates for criminalisation, then perhaps neither are 'mere' doings. Let's consider that possibility (and to avoid confusion, let's refer to 'commissions' instead of 'true acts').

Here are some things I do: I age, I sweat, I breathe and blink at a regular pace, and I unthinkingly drum my fingers on the table as I read. Each morning, I wake up, I reach for my spectacles, and soon after, I brush my teeth, comb my hair, and have a cup of tea. Occasionally, I swear, or cut across my neighbour's lawn on my way to the shops. Suppose we tried to identify 'commissions' – the subset of doings of interest to the criminal law – in the same way as we identified omissions, which of these doings would make the cut? I lack the practical capacity to avoid aging, so that doing is non-voluntary, and clearly not of interest to the criminal law. To some extent, I can control how much I sweat, and how often I breathe and blink. I have even more control over my unthinking physical tics – I can avoid drumming my fingers on the table if I only thought to. But there's no relevant expectation that I not do these things. Therefore, they too should not count as commissions. And again, nothing in our experience suggests that the criminal law is interested in these doings as potential criminal conduct. I have still more control over the various doings that form part of my daily morning routine, but once more, since there is no relevant expectation that I desist from those doings, none of them qualifies as a

'commission' in the sense of that word that interests us. Certainly, the criminal law doesn't ordinarily consider criminalising these sorts of things. We could, of course, add facts to make these things of interest to the criminal law – perhaps my drumming my fingers triggers a switch that causes someone to suffer harm. But unless I realised this in advance, there is no reason to insist that *I* did something that might make the criminal law interested in holding *me* criminally liable – I would just be the victim of misfortune or some malicious electrician. By contrast, when I swear, I do belie a contextually salient expectation – one of politeness. The same is true when I trespass on my neighbour's lawn, only this time the explanation stems from my neighbour's legal rights. So here I do something of interest – these doings are commissions, and they are credible candidates for criminalisation (even if they are not, ultimately, criminalised). It seems plausible then, to think that only 'true' omissions and commissions can be plausible conduct tokens around which a criminal offence can be constructed. Let us refer to 'true' omissions and commissions collectively as conduct that is 'remark-able' (in the sense that, insofar as it belies an expectation, it is worthy of remark).

To be clear, there are a multitude of commissions and omissions. While each is a plausible candidate for criminalisation, there will be little appetite to criminalise most. Merely being a plausible candidate for criminalisation supplies no positive reason to criminalise. But where there is such appetite, the legislature can build a criminal offence around a commission or omission by identifying which, if any, other actus reus elements are required, stipulating the mens rea requirements, and specifying which, if any, defences apply.

Could parliament deliberately select a 'mere' doing (or for that matter, a 'mere' non-doing) as the conduct token for a criminal offence? Well, where parliament is sovereign, it could. It might even have good reasons to – perhaps existing societal normative expectations need to change, and the criminal law can drive that change. But without anything to suggest something like this, we'd expect such instances of criminalisation to be criticised trenchantly. Equally importantly, we might expect the judiciary to try to avoid imputing the intent to criminalise unremark-able behaviour (commissive or omissive) by, wherever possible, interpreting criminal offences so as to insist on some salient expectation-belying conduct.

We see this in the context of existing offences. In the relatively recent case of *Hughes* [2013] UKSC 56, D was charged with causing the death of another person by driving a motor vehicle on a road without insurance and without a licence, contrary to s.3ZB of the Road Traffic Act 1988. He was, in fact, driving without insurance and a valid licence when V, exhausted from an extended period of driving, and under the influence of heroin, swerved completely onto the wrong side of a single-carriageway and fatally crashed into D. However, the Supreme Court insisted that, in fact, parliament required not merely *the*

fact of D's driving, but some fault *in the manner of* D's driving to convict D under this provision, even though nothing in the words of the statute unambiguously supported that conclusion.

In combination, our findings on omissions and commissions suggests that rather than the AOD, we should structure our thinking about the conduct element of an offence around a requirement for remark-able conduct. Doing so wouldn't require us to jettison large chunks of the jurisprudence on the conduct element of a criminal offence; in fact, much of the caselaw that is presently taken to support the AOD is easily reconciled with the remark-able conduct requirement. Additionally, focusing on a remark-able conduct requirement gives us a principled basis for limiting the breadth of offences which appear to permit 'any conduct' to satisfy the conduct element of an offence.