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The Evil Waiter Case

LUIS E. CHIESA*

This essay discusses the “Evil Waiter Case,” a famous hypothetical fact pattern that has been the subject of much debate in the German, Spanish, and Latin American criminal law literature, but that unfortunately has not found its way into Anglo-American scholarly writings. The case presents us with a waiter who notices that the filet mignon she is taking to her assigned table is covered in a poisoned mushroom wine sauce. She nevertheless takes the dish to the table. The patron eats the poisoned filet mignon and dies several minutes later. Did the evil waiter kill the hungry patron or did she merely let him die? This essay argues that the evil waiter’s conduct shares morally relevant features of both actions and omissions, although it is neither purely active nor purely omissive conduct. It is, for lack of a better word, an “actmission” that is more blameworthy than a pure omission but less worthy of condemnation than purely active wrongdoing. Conduct counts as an actmission if it amounts to a failure to rescue (e.g. waiter fails to rescue patron) that is accomplished by engaging in a willed bodily movement (waiter places dish in front of patron). As a result of the hybrid nature of her conduct, the evil waiter should be punished more severely than if she had merely failed to rescue the patron, but less harshly than if she had actively killed the patron. More importantly, the Evil Waiter Case reveals that judges should not be forced to describe criminal conduct as either an act or an omission. Instead, American criminal law ought to recognize “actmissions” as a distinct category of conduct. Such actmissions should be punished more than pure omissions but less than entirely active conduct. Criminal law would thus be better served by replacing the act/omission distinction with the act/omission/actmission tris-tinction.

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I. INTRODUCTION

The chef at a restaurant rings the bell signaling to the wait staff that food is ready to be taken to a table. The waiter diligently walks to the kitchen and picks up the plate. It is an exquisitely prepared filet mignon with mushroom wine sauce. Alas, something is not quite right with the dish. The coloration of the mushroom sauce is off. Since the waiter is pursuing a doctoral degree in biology and chemistry, she quickly concludes that the mushrooms used for the sauce are poisonous toadstools capable of causing death if consumed by humans. Nevertheless, she decides to take the dish to the table. She reasons that it is not a waiter’s job to check food for poisonous substances. Upon reaching the table, she asks, “who ordered the filet mignon with mushroom wine sauce?” A hungry patron raises his hand while replying, “me, me!” The waiter gently places the plate in front of the hungry patron. With a “bon appétit, monsieur,” she leaves the area and goes back to the kitchen to pick up a dish for a different table. The hungry patron eats the filet mignon. He dies several minutes later from mushroom poisoning.¹

1. The Evil Waiter Case was first proposed by the renowned German criminal law scholar Günther Jakobs in his *DERECHO PENAL: PARTE GENERAL*. See GÜNTHER JAKOBS, *DERECHO PENAL: PARTE GENERAL, FUNDAMENTOS Y TEORÍAS DE LA IMPUTACIÓN* 250–53 (Joaquin Cuello Contreras & Jose Luis Serrano Gonzalez De Murillo, trans., Marcial Pons 2d ed. 1995) (2d ed. 1991). I ask the reader to assume that the chef is not at fault for using poisoned mushrooms for the wine sauce. This is not a necessary assumption, but it is helpful in order to avoid getting distracted with problems of complicity and allocating responsibility between the different actors possibly involved in the death of the hungry patron. The reader must also assume that the waiter

Did the waiter kill the patron or did she merely let him die? More specifically, is the waiter liable for murdering the patron or for failing to rescue him? If the correct answer is the former, she will likely be sentenced to a term of imprisonment that may range anywhere from ten years to life imprisonment depending on the jurisdiction.² If, however, the waiter merely failed to rescue the patron, she will not be punished at all in the vast majority of American jurisdictions.³

This essay argues that current legal rules inappropriately force us to choose between describing the conduct of the waiter as either an act that gives rise to murder liability or an omission that gives rise to liability for failing to rescue. The moral universe is more complicated than this. Some courses of conduct share morally relevant features of both acts and omissions. I call such courses of conduct “actmissions” and argue that their most salient feature is that they are more blameworthy than omissions but less blameworthy than actions.⁴ Building upon this theory, this essay suggests that the conduct of the evil waiter is best described as an “actmission” that is more blameworthy than a mere failure to rescue the patron, but less worthy of condemnation than actively killing him. As a result, the appropriate punishment that should be imposed on the waiter is less than the punishment authorized for murder, but more than what is authorized for failures to rescue. This, in turn, exposes an important shortcoming in American criminal law. Instead of artificially trying to force conduct into the “act” or “omission” categories, the interests of criminal law would be better served by acknowledging that there are courses of conduct that are partly active and partly omissive and, therefore, deserving of less punishment than purely active conduct but more punishment than entirely passive conduct.

The argument proceeds in two parts. Part II of this essay considers whether the conduct in the Evil Waiter Case is best described as an act or an omission. After finding that describing the evil waiter’s conduct as either an act or an omission is wanting, it is argued that the Evil Waiter Case presents a course of action that is both active and omissive in morally relevant ways. Therefore, it presents the signature structure of what this essay calls an “actmission.”

was able to notice that the mushrooms were poisoned only because he possesses special knowledge in light of his advanced studies. An average person or waiter would not have noticed anything wrong with the dish.

2. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2A1.1–.5 (2011) (outlining base offense levels for crimes of homicide).

3. See, e.g., Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 975 (2000).

4. I first made this claim in Luis E. Chiesa, *Actmissions*, 116 W. VA. L. REV. 583, 584 (2013).

Part III of this essay fleshes out the implications that the Evil Waiter Case has for American criminal law. More specifically, it explores whether it is best to replace the act/omission distinction with a sliding scale that allows decision makers to place conduct along a continuum that goes from fully active to purely passive conduct. Adoption of a sliding scale approach to human conduct would more accurately capture the moral complexity of the Evil Waiter Case and other fact patterns that share a similar structure. It would, for example, make better sense of so-called “double prevention” cases in which a person engages in an affirmative act that prevents another from preventing a particular harm.⁵ Like the Evil Waiter Case, double prevention cases share morally relevant features of both acts and omissions and thus resist classification as purely active or purely passive conduct. Furthermore, using Judith Jarvis Thomson’s famous violinist example,⁶ I will argue that abortion cases feature neither purely active nor entirely passive conduct. Rather, abortion presents a case in which a failure to provide sustenance is accomplished by way of an affirmative act. As such, abortion cases lie somewhere along the sliding scale between fully affirmative and completely passive conduct.

Although replacing the act/omission distinction with a sliding scale approach to human conduct would better describe the full import of conduct, such as the conduct presented in the Evil Waiter Case, double prevention cases, and abortions, it would do so at great cost. Adoption of a sliding scale of human conduct is ultimately unattractive because of the ill-defined nature of the sliding scale inquiry would make it difficult for the citizenry to know *ex ante* whether their conduct will be considered an act, an omission, or something in between. This may unconstitutionally deprive defendants of fair warning.⁷ While this provides a decisive argument against the criminal law’s adoption of a sliding scale approach to human conduct, it does not foreclose the possibility of recognizing actmissions as an autonomous category of human conduct alongside acts and omissions. Doing so would better account for cases like the Evil Waiter Case, double prevention cases, and abortions. Moreover, it would do so without depriving defendants of fair warning. American criminal law would thus be well served by replacing the rigid act/omission distinction with the richer act/omission/actmission trisdiction.

5. An example of a “double prevention” case would be that of an actor that physically restrains a person who is about to rescue a drowning child. By physically restraining the person, the actor has prevented the person from preventing the death of a child. Double prevention cases are discussed in more detail in Part III.A of this essay.

6. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971).

7. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); U.S. CONST. art. I, cl. 1 (“No State shall . . . pass any . . . ex post facto Law . . .”).

II. COMPETING FORMULATIONS: THE EVIL WAITER CASE AS ACTION, OMISSION, AND ACTMISSION

A. *The Evil Waiter Case as Action*

Scholars and philosophers frequently define action as a “willed bodily movement.”⁸ The few codes that define acts do so in similar fashion. The Model Penal Code, for example, defines an act as a bodily movement that is the “product of the effort or determination of the actor.”⁹ According to this definition, the waiter in the Evil Waiter Case engaged in an *act* that killed the hungry patron. After all, she engaged in a willed bodily movement—placing the dish in front of the hungry patron—that significantly contributed to the hungry patron’s death.¹⁰

There is much at stake in determining whether the waiter killed the hungry patron by engaging in harm-causing action. Most theorists agree that actions are more blameworthy than failures to act (omissions).¹¹ This essay argues that actions are more blameworthy than omissions because actions make the victim worse off than she was before. In contrast, omissions fail to make the victim better off.¹² It seems quite evident that we have a stronger claim against others that they abstain from making us worse off than we do to require them to make us better off.¹³

The difference between acts and omissions is not only of philosophical significance. It is difficult to make sense of many important features of our criminal laws without taking this distinction into account. Homicide laws best illustrate this. Killing a human being without justification or excuse is always punished quite severely.¹⁴ Nevertheless, letting a human being die is not generally punished in the United States.¹⁵ There are, of course, exceptions to this rule. Letting a person die is punished as severely as killing a person if there is a special legal duty to

8. See, e.g., MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 78 (1993) (quoting Oliver Wendell Holmes who said an act “‘is a willed muscular contraction, nothing more’”) (citation omitted).

9. MODEL PENAL CODE § 2.01(2)(d) (1962).

10. This is what most civil law scholars conclude when they analyze this hypothetical. See, e.g., EUGENIO RAÚL ZAFFARONI ET AL., *DERECHO PENAL: PARTE GENERAL* 476 (Ediar 2d ed. 2002).

11. See, e.g., Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 *PHIL. REV.* 287, 298–300 (1989).

12. Some philosophers believe that omissions cannot cause harm. See, e.g., MOORE, *supra* note 8, at 88 (theorizing that Oliver Wendell Holmes would say that “‘omissions aren’t acts, so the failure of our theory to include them as acts is not a defect but a virtue’”) (citation omitted). Others, however, argue that omissions can be treated as causes of harms. See, e.g., H.L.A. HART & A. M. HONORÉ, *CAUSATION IN THE LAW* 35–36 (1959).

13. See, e.g., Quinn, *supra* note 11, at 289–90.

14. See, e.g., MODEL PENAL CODE § 210.2 (1962).

15. For a general overview of the failure of American jurisdictions to impose liability for failure to rescue, see Dressler, *supra* note 3, at 975–77.

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prevent that person's death.¹⁶ Absent this special duty, however, letting a person die is not punished at all in a majority of American jurisdictions.¹⁷ The few jurisdictions that do punish such omissions punish them much less severely than killing a person.¹⁸

It thus matters greatly whether the waiter in the Evil Waiter Case killed the hungry patron or merely let him die.¹⁹ A superficial analysis reveals that the waiter killed the patron because she engaged in a willed bodily movement that contributed to the patron's death. Upon closer inspection, however, matters are more complicated. Did the waiter's conduct leave the hungry patron worse off than he was before, or did it merely fail to make the patron better off? If it is the former, the waiter's conduct ought to be described as an act that deserves significant punishment. If it is the latter, the waiter's conduct is better described as an omission that deserves significantly less punishment.

Unfortunately for the hungry patron, his fate was mostly determined when the chef unwittingly poured the poisoned mushroom sauce on the filet mignon. Given the way in which restaurants typically operate, once a dish is ready to be taken to a given table, it is likely that the dish will eventually find its way to its intended recipient. If the evil waiter decided not to take the dish to the table, another waiter surely would have. Consequently, it seems that the hungry patron cannot really claim that the evil waiter's conduct made him worse off, for he surely would have died even had the evil waiter abstained from placing the dish in front of him. This is not to say that the waiter's conduct is not blameworthy. It surely is. However, her blameworthiness might be better explained by her failure to do something once she became aware that the mushroom sauce was poisoned. Note, however, that if the morally salient feature of the waiter's conduct is her failure to say or do something once she became aware of the danger, her conduct starts to look less like an act and more like an omission.

16. See MODEL PENAL CODE § 2.01(3)(b) (1962).

17. See, e.g., Dressler, *supra* note 3, at 975 ("The general rule is that a person is not criminally responsible for what he fails to do.")

18. This is the case, for example, in Vermont. VT. STAT. ANN. tit. 12, § 519 (2013) (providing for a duty to rescue, but willful violators are fined a maximum of \$100).

19. Whether the course of conduct in the Evil Waiter Case is described as an act or an omission matters greatly if it is assumed that acts are, *ceteris paribus*, more blameworthy than omissions. If, however, omissions are as blameworthy as actions, then whether the evil waiter's conduct is described as active or omissive will not make a significant difference. In this essay, I assume that acts are, *ceteris paribus*, more blameworthy than omissions and that, therefore, it matters whether we describe the evil waiter's conduct as an act or an omission. This is an assumption shared by many philosophers. See Quinn, *supra* note 11, at 287–89. Furthermore, this assumption lies at the heart of how acts and omissions are approached in the law. As I discuss in the text of this essay, *all* of the world's legal systems punish acts more than omissions, *unless* the failure to act is accompanied by a breach of a special duty to act.

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This is precisely what Günther Jakobs—the German scholar who came up with this hypothetical—argues.²⁰ For him, the waiter’s conduct has the structure of an omission, for what is truly blameworthy about the course of events is her failure to prevent harm to the patron while being in a position to do so.²¹ Thus, according to Jakobs, the fact that the waiter was performing a willed bodily movement at the time that the failure to act took place is a morally irrelevant feature of the conduct.²²

Describing the waiter’s conduct as an act is further cast into doubt by comparing it with a variation of the Evil Waiter Case that I will call the “Poisonous Waiter Case.”²³ In this case, the mushroom sauce is not poisoned when the waiter picks up the dish. However, the waiter poisons the mushroom sauce before she takes the dish to the hungry patron. The hungry patron eats the dish and dies several minutes later from food poisoning.

The waiter in the Poisonous Waiter Case clearly kills the hungry patron by engaging in an affirmative act, and there can be little doubt that the hungry patron is made worse off by the waiter’s conduct. Note, however, that the most salient feature of the Poisonous Waiter hypothetical is not the waiter’s decision to take the dish to the hungry patron’s table, but rather her decision to poison the mushrooms. This is not to suggest that the act of placing the dish on the table is immaterial to assessing the waiter’s blameworthiness in the Poisonous Waiter Case. Perhaps this act further increases her blameworthiness. It can plausibly be argued that the waiter who both poisons the dish and places it in front of the patron is more blameworthy than the waiter who merely poisons the dish but does not take it to the table. It would seem odd, however, to suggest that a waiter who does not poison the dish but takes it to the table knowing that it is poisoned is as blameworthy as a waiter who actually poisons the dish. Once again, it appears that—while not inconsequential—the act of placing the dish in front of the hungry patron is only a mildly relevant feature of the waiter’s conduct in both the Evil Waiter Case and the Poisonous Waiter Case.

It is also useful to compare the Evil Waiter Case with the case of a doctor who contributes to causing the death of a patient by flipping a switch that discontinues life support.²⁴ This case is interesting because—

20. JAKOBS, *supra* note 1, at 253.

21. *Id.*

22. *Id.* Most European criminal law scholars reject Jakobs’ conclusion. *See, e.g.,* ZAFFARONI ET AL., *supra* note 10, at 476.

23. Jakobs only discusses the Evil Waiter Case. Nevertheless, I devised the variations discussed in this essay to help better identify the moral intuitions triggered by the Evil Waiter Case.

24. In *Actmissions*, I argued in favor of describing termination of life support as an

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like in the Evil Waiter Case—a superficial analysis suggests that the doctor engaged in an act that resulted in the death of the patient. After all, flipping a switch is a clear-cut instance of a willed bodily movement. However, a more careful analysis reveals that it is unclear whether the doctor's conduct is best described as an act. Perhaps it is better to describe the doctor's conduct as a failure to continue providing life support. Interestingly, most courts and scholars agree that this is the best way of describing these life support cases.²⁵ As a result, doctors are generally allowed to discontinue life support if they obtain the consent of the patient or the patient's family.²⁶ This can only be justified under current law if flipping a switch that discontinues life support is viewed as an omission.²⁷ It would be unlawful to engage in such conduct if it were described as action, for it would then amount to an unjustified act of active euthanasia.²⁸ In other words, the law currently allows doctors to let their patients die if they obtain some form of consent, but it does not allow them to kill their patients regardless of whether they obtain consent to do so.²⁹ When the doctor's conduct is viewed as a failure to continue treatment, the act of flipping the switch fades to the background. Similarly, the evil waiter's act of bringing the plate to the table becomes a morally immaterial feature of the conduct if we zero in on the blameworthiness of failing to do something to prevent the hungry patron's death by food poisoning.

This analysis reveals that it is not at all obvious that the conduct of the waiter in the Evil Waiter Case is best described as an action. While it can be argued that the waiter killed the hungry patron by engaging in an affirmative act, it can also plausibly be argued that the act that the waiter performed—taking the dish to the table—only slightly explains the extent of the waiter's blameworthiness. In order to fully grasp the waiter's blameworthiness, it might be necessary to move beyond what he did and focus on what he failed to do. The waiter's act—like the doctor's flipping of the switch—is relevant only insofar as it is placed in the broader context of what the waiter and doctor omitted. Their blameworthiness can only be fully assessed once their conduct is understood not merely as “bringing the dish to the table” or “flipping the switch,”

“actmission” that is more blameworthy than refusing to provide medical treatment but less blameworthy than actively assisting the patient in suicide. *See* Chiesa, *supra* note 4, at 585–87.

25. *See, e.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 1016 (Cal. Ct. App. 1983) (“cessation of ‘heroic’ life support measures is not an affirmative act but rather a withdrawal or omission”).

26. *See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 285–88 (1990).

27. This is one of the lessons of the Barber case. *See* Barber, 147 Cal. App. 3d at 1017–18 (holding that there is no duty to continue life support “once it has proved to be ineffective”).

28. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 732–34 (1997).

29. *Id.* at 724–26 (discussing *Cruzan*, 497 U.S. 261).

but rather as “failing to do something to prevent the patron’s death” or “failing to continue life support.” This sounds more like an omission and less like an action.

B. *The Evil Waiter Case as Omission*

As the case of the doctor who discontinues life support demonstrates, the fact that a willed bodily movement takes place is not determinative of whether conduct ought to be described as an act or an omission. Some willed bodily movements are simply irrelevant (or only mildly material) to assessing the blameworthiness of the actor. We would not, for example, describe the offense committed by an actor who runs a red light by stepping on the gas as a crime of commission. Instead of focusing on the willed bodily movement of stepping on the gas, we should focus on the actor’s failure to stop his vehicle when he was required to do so.³⁰ As a result, the actor’s willed bodily movement fades to the background, and we consider what he failed to do to be the essence of his crime. In other words, his blameworthiness stems not from what he did (stepping on the gas), but from what he did not do (failing to stop at the red light). It is thus plausible to suggest that the doctor’s blameworthiness stems not from his act of flipping a switch, but rather from his failure to continue life support.³¹ Similarly, one may argue that the waiter’s blameworthiness in the Evil Waiter Case is not the product of her taking the dish to the table, but rather of her failure to do something to prevent harm to the hungry patron.

1. THE STRUCTURE OF PASSIVE WRONGDOING— THE OMISSIVE WAITER CASE

Unfortunately, describing the waiter’s conduct in the Evil Waiter Case as an omission raises its own set of problems. Setting aside for the moment the problem of ignoring that the waiter *did* engage in a willed bodily movement that resulted in the death of the patron, there is something about the case that makes it intuitively different from straightforward instances of omissive wrongdoing. This can best be grasped by comparing the Evil Waiter Case with a hypothetical that I will call the

30. See, e.g., FLA. STAT. § 316.0083(1)(a) (2014) (“A notice of violation and a traffic citation may not be issued for *failure to stop* at a red light if the driver is making a right-hand turn in a careful and prudent manner”) (emphasis added). Thus, omissions may be defined as the failure to perform a bodily movement required by law rather than as a failure to act *tout court*.

31. I argue in *Actmissions* that viewing these cases as pure omissions is mistaken. Properly understood, the conduct of discontinuing life support shares important features of both acts and omissions. I thus describe this course of conduct as an “actmission.” See Chiesa, *supra* note 4, at 583–87.

“Omissive Waiter Case.”³² In this variation of the fact pattern, the waiter who is taking the dish to the table is unaware that the mushroom sauce is poisoned. When she is about to place the plate in front of the hungry patron, the waiter working the table next to him—call him Waiter Two—notices that the mushrooms used for the sauce are poisonous. Like in the original hypothetical, Waiter Two is able to tell that the mushrooms are poisoned only because of the special knowledge he has acquired as a result of his advanced studies in science. Waiter Two has enough time to say something that would prevent the dish from being served to the hungry patron. Nevertheless, he says nothing. Consequently, the dish is placed on the table, and the hungry patron eats it. He dies several minutes later from mushroom poisoning.

It is obvious that the waiter in the Omissive Waiter Case is connected to the harm suffered by the hungry patron only by his failure to say or do something that would have prevented harm to the hungry patron. Since the waiter in the Omissive Waiter Case did not poison the mushroom sauce and was not carrying the poisoned dish to the table, he would only be at fault for what happened if his failure to do something to prevent harm to the patron is deemed worthy of condemnation. Most would likely believe that his omission is, in fact, blameworthy as long as he knew that the mushroom sauce was poisoned and he had sufficient time to do something about it.³³ The Omissive Waiter Case represents, therefore, the paradigmatic case of blameworthy omissive conduct.

2. PROBING THE DISTINCTION BETWEEN PASSIVE AND ACTIVE WRONGDOING—THE OMISSIVE WAITER AND POISONOUS WAITER CASES COMPARED

In order to assess the blameworthiness inherent in the Omissive Waiter Case, it is useful to compare it to the Poisonous Waiter Case, where the waiter acted to poison the dish. It can thus be said that the poisonous waiter killed the hungry patron. However, it cannot be argued that the omissive waiter killed the hungry patron when he failed to tell the patron or the person carrying the dish that the mushroom sauce was poisoned. What can be said is that the waiter allowed the hungry patron to die. While letting the patron die is surely worthy of blame, it is significantly less blameworthy than killing him. The difference between these cases is such that the waiter in the Poisonous Waiter Case would likely

32. Although Jakobs came up with the original Evil Waiter Case, I came up with the “Omissive Waiter” variation in order to highlight the differences between Jakobs’ original case and a case of pure omission.

33. Curiously, the waiter’s conduct in the Omissive Waiter Case is likely not punishable in the majority of American jurisdictions because mere failures to rescue do not generally give rise to criminal liability in our country. See Dressler, *supra* note 3, at 975–77.

be sentenced to a term of imprisonment in excess of ten years in the vast majority of American jurisdictions,³⁴ whereas the waiter in the Omissive Waiter Case would likely not be punished at all in most states.³⁵

Another way of looking at these cases is by assessing whether the victim was made worse off or merely not made better off by the conduct of the waiters. In the Poisonous Waiter Case, the hungry patron was clearly made worse off by the waiter's act of poisoning the mushroom sauce. The waiter in this case altered the expected course of events. The dish that was served to the patron was not poisoned, and it was only because the waiter poisoned the dish that the hungry patron ended up dead. On the other hand, the waiter in the Omissive Waiter Case did not make the patron worse off than he was before the failure to act took place. Note that the dish destined for the hungry patron's table was already poisoned before the waiter took notice of the danger. Given that the patron's life was already in the "zone of danger,"³⁶ the waiter's blame, if any, arises from his failure make the patron better off when he decided to abstain from saying or doing something that would have altered the expected course of events. In sum, the omission of the waiter in the Omissive Waiter Case had the effect of letting events run their course, whereas the act of the waiter in the Poisonous Waiter Case had the effect of changing the course of events in a way that was detrimental to the hungry patron's well-being.

3. LESSONS FROM COMPARING THE EVIL WAITER CASE WITH THE OMISSIVE AND POISONOUS WAITER CASES

Accurately assessing the blameworthiness of the waiter's conduct in the Evil Waiter Case requires that her failure to do or say something to prevent harm to the patron be taken into account. This sounds in the language of passive wrongdoing. Nevertheless, it seems wrong to suggest that the waiter's act of taking the dish to the table is immaterial to gauging the extent of her blame. By personally placing the poisoned dish in front of the patron, the waiter in the Evil Waiter Case seems to be more entangled with the fate of the hungry patron than the waiter in the Omissive Waiter Case who passively observes someone else take the dish to the patron. As a result, the conduct of the waiter in the Evil Waiter Case is not one of pure omission.³⁷

It may be useful to look at this from the viewpoint of the hungry

34. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2A1.1-.5 (2011) (outlining base offense levels for crimes of homicide).

35. Dressler, *supra* note 3, at 975-77.

36. *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928) (then-Judge Benjamin Cardozo described the "zone of danger" when discussing proximate cause).

37. See MODEL PENAL CODE § 2.01(2)(d) (1962) (indicating that a bodily movement is not a

patron and the claims he has against his servers. The patron's strongest claim would surely be against the waiter in the Poisonous Waiter Case. The claim in that case would be "do not poison my food!" This is as strong a claim as one can make. The patron's claim against the waiter in the Omissive Waiter Case would be significantly weaker. He could not, of course, tell the waiter "do not poison me," because the waiter simply played no role in the causal processes that led to the food being poisoned. Therefore, the patron could, at most, claim that the waiter should "do *something* to stop me from eating the poisoned mushroom sauce."

Note that the patron's claim in the Poisonous Waiter Case would not meaningfully interfere with the waiter's liberty. The waiter is not being told what to do. Instead, she is being told that she can do anything *except* the act that would significantly set back the patron's well-being. As a result, there are powerful reasons to allow the patron to make this claim. In contrast, the claim in the Omissive Waiter Case would interfere more significantly with the waiter's liberty. In this instance, the waiter is not merely being told that he has to abstain from doing something. He is being told that he *must* do something to advance the patron's welfare. This places a meaningful burden on the waiter's freedom, for, *ceteris paribus*, it is worse to be required to do something than to be told that one cannot do something.³⁸ Consequently, strong reasons militate against giving the patron a right to make this claim in the Omissive Waiter Case.

What kind of claim could the patron make in the Evil Waiter Case? Would his claim be stronger or weaker than the claims in the Omissive and Poisonous Waiter cases? The patron can coherently make two claims in the Evil Waiter Case. First, he could legitimately say to the waiter, "do not place the poisoned dish in front of me." This is similar to the claim in the Poisonous Waiter Case ("do not poison me"), for it merely requires the waiter to abstain from doing something. Second, the patron could claim that the waiter should "do or say something that would stop me from eating the poisonous mushroom sauce." This sounds more like the claim in the Omissive Waiter Case ("do something to stop me from being poisoned"), as it requires the waiter to do something that she was not planning to do.

There is another difference in the claims that can be made in the Evil Waiter and Poisonous Waiter Cases. While the waiter in the Poison-

voluntary act if it "is not a product of the effort or determination of the actor"); *see also* MOORE, *supra* note 8, at 78.

38. *See generally* Quinn, *supra* note 11, at 289–98 (discussing the differences between "doing" and "allowing").

ous Waiter Case is merely being told to abstain from doing something that he should not be doing in the first place (poisoning dishes), the waiter in the Evil Waiter Case is being told that she should not do what she signed up to do—serve dishes to the restaurant’s patrons. Telling a person to do something different than what she signed up to do in order to prevent harm to a third party may be more intrusive than to merely require her to abstain from doing something that she should not be doing to begin with.³⁹

There is at least one more morally relevant difference in the Omissive Waiter and Evil Waiter Cases. Requiring the waiter in the Omissive Waiter Case to prevent the death of the hungry patron is particularly intrusive because it would require him to come to the aid of someone he was not assigned to serve.⁴⁰ There is a sense in which requiring him to do something to help a patron who is being served by a different waiter would increase his responsibilities beyond what he presumably agreed to do in the first place. Waiters are assigned to work certain tables, and they could legitimately claim that they are not responsible for what happens to those at a table that has not been assigned to them. In contrast, requiring the waiter in the Evil Waiter Case to abstain from taking the dish to the hungry patron would require her to do something to prevent harm to a person she was assigned to serve.⁴¹ The claim would be that the waiter’s role of “serving” patrons also includes considering the well-being of patrons. It could plausibly be argued, therefore, that the waiter in the Evil Waiter Case has a special relationship with the hungry patron that is simply absent in the Omissive Waiter Case. The waiter in the Evil Waiter Case is responsible for the well-being of the patrons that she is assigned to serve. As a result, it seems less intrusive to ask her to do something to prevent harm to the hungry patron she is required to serve than to ask a different waiter to do something to help a patron that she is under no duty to aid.

4. PRELIMINARY CONCLUSION—THE EVIL WAITER’S CONDUCT IS NOT PURELY OMISSIVE

There are several reasons to oppose describing the conduct in the Evil Waiter Case as a mere omission. First, it seems intuitively wrong to claim that the waiter in the Evil Waiter Case merely lets the hungry patron die. Her act of taking the dish to the table and placing it in front of the hungry patron links the patron’s fate to the conduct of the waiter

39. This is an important feature of the Evil Waiter Case for Jakobs. See JAKOBS, *supra* note 1, at 252.

40. *Id.*

41. *Id.*

in a much more direct manner than what is typical of cases of pure omission. Second, in cases of true omissions—like the Omissive Waiter Case—the victim’s claim is that the actor should do something to come to his aid (e.g., say something that would prevent him from eating the dish). This, however, does not accurately describe the claim in the Evil Waiter Case. It is not merely a case of asking the waiter to come to the aid of the patron. The patron in this case can also legitimately ask the waiter to *abstain* from engaging in a course of conduct that would be harmful to the patron (taking the dish to the table). This resembles the sort of claims that victims have against actors in cases of active wrongdoing such as the Poisonous Waiter Case (“do not poison the dish!”). Finally, the victim in cases of pure omission generally asks the actor to do something that goes above and beyond what the actor is expected to do.⁴² This is why such omissions are typically not punished in American jurisdictions. While it is obviously legitimate to ask people to abstain from causing harm to others, it is not altogether clear that it is appropriate to ask people to heroically come to the aid of others.⁴³ Once again, the Omissive Waiter Case is illustrative. The waiter in that case is at fault for not coming to the aid of someone he was not expected to help or serve. Since he was assigned to a different table, the omissive waiter was not ultimately responsible for the hungry patron’s well-being. The waiter in the Evil Waiter Case is in a different position. She is being faulted for failing to prevent harm to a person she was expected to serve. As a result, requiring her to do something to prevent harm to the patron is less intrusive than requiring an uninvolved third party to come to the aid of the patron.

C. *The Evil Waiter Case as Commission by Omission*

The law singles out a special group of harm-causing omissions that may give rise to liability as if the actor had caused the harm by way of an affirmative act. Following George Fletcher’s terminology, I will call these cases instances of “commission by omission,”⁴⁴ given that the actor in these cases can be held liable for a crime of commission although the harm has been brought about by an omission. In order for an actor to be held liable for a crime of commission by omission, his conduct must meet three criteria. First, he must fail to perform an act.⁴⁵ Second, his failure to act must be the physical and proximate cause of a

42. This is not the case if there is a special duty to act. See *infra* Part II.C.

43. See, e.g., Quinn, *supra* note 11, at 307–08.

44. These cases are typically referred to as cases of “commission by omission” in continental jurisdictions. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 612 (1978).

45. See, e.g., MODEL PENAL CODE § 2.01(3)(a)–(b) (1962) (discussing the requirements of performing a voluntary act).

harm suffered by the victim.⁴⁶ Third, he must have a special duty to act that links him to the victim in a particular way.⁴⁷ The paradigmatic example of a crime of commission by omission is that of a parent who causes the death of her child by failing to provide the child with adequate medical care.⁴⁸ In such cases, the parent fails to perform an act (providing her child with adequate medical care), the child dies as a result of the failure of the parent to provide medical care (causation requirement), and the parent has a special duty to care for her child that links her to the child's well-being in a very stringent and particular way (special duty requirement). As a result, the parent's omission gives rise to liability for homicide as if she had killed her child by way of an affirmative act.⁴⁹

Perhaps the waiter's conduct in the Evil Waiter Case is best described as an instance of commission by omission. As was pointed out in the previous section, the conduct of the evil waiter can plausibly be described as failing to do something to prevent harm to the patron.⁵⁰ Furthermore, the waiter's failure to act may be causally linked to the death of the patron in at least two ways. First, had the waiter done something to let the patron know that the dish was poisoned, the patron likely would not have died. Therefore, the waiter's conduct may be considered the physical or the "but for" cause of the patron's death. Second, the death of the patron was a reasonably foreseeable consequence of the waiter's failure to tell the patron that the dish was poisoned. Consequently, the waiter's conduct may also be considered the proximate cause of the patron's death. Additionally, the waiter arguably had a special duty to act in furtherance of the well-being of the patron he was assigned to serve.

Viewing the Evil Waiter Case as an instance of commission by omission can adequately account for some of the differences between this case and the Omissive Waiter Case. It is more plausible to argue that the waiter in the Evil Waiter Case has a special duty to act in furtherance of the well-being of the patron than it is to contend that the waiter in the Omissive Waiter Case had a special duty to prevent harm to the patron. As the previous section points out, the waiter in the Evil Waiter Case was assigned to serve the hungry patron's table, whereas the waiter in

46. *See id.* § 2.03(1)(a) ("Conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred . . .").

47. *See id.* § 2.01(3)(b) ("Liability . . . may not be based on an omission unaccompanied by action unless . . . a duty to perform the omitted act is otherwise imposed by law.").

48. *See, e.g.,* *People v. Steinberg*, 595 N.E.2d 845, 846–47 (1992) (parent who failed to provide child with medical care was held liable for homicide by omission).

49. *See id.* at 847.

50. *See infra* Part II.B.3.

the Omissive Waiter Case was not assigned to that table.⁵¹ As a result, it is sensible to conclude that the waiter in the Evil Waiter Case is more closely linked to the hungry patron than the waiter in the Omissive Waiter Case. This could explain the different blameworthiness of the waiters in these two cases. The waiter in the Evil Waiter Case is more blameworthy than the waiter in the Omissive Waiter Case because the waiter's conduct in the former case breaches a special duty to act that is simply non-existent in the latter case.

Treating the Evil Waiter Case as one in which the death of the hungry patron is the product of commission by omission would lead to punishing the waiter in this case as severely as if he had killed the patron by way of an affirmative act.⁵² That is, it would lead to punishing the waiter in the Evil Waiter Case as much as the waiter who poisons the dish and then takes it to the hungry patron (the Poisonous Waiter Case). This approach does not calibrate the relative blameworthiness of the waiters in the different cases.

To understand why it does not seem right to punish the waiter in the Evil Waiter Case as severely as the waiter in the Poisonous Waiter Case, it is necessary to explain why it is usually the case that instances of commission by omission should be punished as harshly as cases of causing harm by way of an affirmative act.⁵³ As a general rule, actors who engage in harm-producing acts are more blameworthy than actors who produce harm by failing to act.⁵⁴ Why, then, do we sometimes punish harm-causing omissions as severely as harm-producing acts? Why do we punish the mother who causes the death of her child by failing to provide her with adequate medical care as severely as the mother who kills her child by poisoning her food?⁵⁵

The key to unlocking this puzzle is the additional blameworthiness that attaches for breaching the special duty to act that triggers liability for a crime of commission by omission. The actor's blame in cases of commission by omission is dependent on two factors. First, the actor is blameworthy for failing to prevent harm to the victim. This, however, is not enough to justify punishing the actor's failure to act as severely as if he had inflicted the harm by engaging in an act. In addition to this, the actor in cases of commission by omission is blameworthy for having breached a duty to act that made him responsible in a special kind of

51. See *infra* Part II.B.3.

52. See, for example, § 2.01(3)(b), which equates harm-causing omissions that breach a special legal duty to act with harm-causing actions.

53. See Dressler, *supra* note 3, at 975–77.

54. *Id.* at 975.

55. The law does not generally distinguish between different ways of killing, so it is irrelevant that the child dies as a result of food poisoning or of a failure to receive medical attention.

way for the victim's well-being. It is because of the combination of these two factors, failure to prevent harm and breach of a special duty to act, that the actor in cases of commission by omission is punished as severely as the actor who causes harm by performing an affirmative act.⁵⁶

An often-ignored problem inherent in cases of commission by omission is determining which duties give rise to liability for a crime of commission by omission. It is tempting to conclude that the breach of any duty to act might give rise to liability for a crime of commission by omission. A closer look reveals that this cannot be the case. For example, take an ordinance that imposes on property owners the duty to remove snow from the sidewalks directly in front of their property.⁵⁷ Is a property owner who fails to remove snow from the sidewalk liable for homicide if a person slips and falls on the slippery sidewalk and dies as a result of the fall? While a breach of this duty may give rise to tort liability for any injuries suffered by those who are injured as a result of the failure to remove snow,⁵⁸ it is unclear whether the breach could also give rise to criminal liability. There are other examples. Police officers obviously have a duty to prevent crime. But is a police officer who witnesses an assault and does not prevent it liable solely for failing to properly discharge his duties, a crime of pure omission, or is he also liable for complicity in the assault?⁵⁹ Once again, it is not clear that the latter is the right answer. A school janitor has a duty to remove a banana peel from the school hallway. He sees the banana peel but fails to remove it because he is busy reading the paper. A student slips and falls, hitting her head on the floor and dying as a result. Is the janitor liable for negligent homicide? Again, the answer is unclear.⁶⁰

56. The following table illustrates why and when I believe we are justified in punishing harm-causing omissions as severely as harm-inflicting actions:

Conduct	Blameworthiness	Total Blame
Killing (act)	100	100
Letting a Person Die (omission)	50	50
Breaching a Special Duty (i.e. parent's failure to provide child with medical care)	50	50
Letting a Person Die Who You Have a Special Duty to Protect (commission by omission)	50+50	100

57. See, e.g., MICH. COMP. LAWS ANN. § 67.9 (West 2014).

58. *But see* Gillen v. Martini, 188 N.W.2d 43, 44 (Mich. Ct. App. 1971) (“[A]n abutting property owner may not be held liable to pedestrians for injuries sustained by falling on sidewalks made hazardous by natural accumulations of ice and snow, and statutes and ordinances which impose a duty upon landowners to clean sidewalks create no private liability.”).

59. See, e.g., Pueblo v. Sustache Sustache, 2009 TSPR 119 (P.R. 2009).

60. Depending on the precise facts at hand, the janitor's employer may be subject to civil liability for the janitor's failure to act. See, e.g., Moore v. Winn-Dixie Stores, Inc., 173 So. 2d 603,

The correct solution to these cases is unclear because not every breach of a duty necessarily gives rise to liability for a crime of commission by omission. Commission by omission liability usually attaches when the actor had a special duty to protect a particular person or group of persons from harm or if the actor engaged in an affirmative act that created the peril that eventually harmed the victim.⁶¹ I will call the former type of obligations “duties to protect,” whereas I will call the latter obligations “duties that arise due to risk creation.” The duty to protect is special because it applies only when the actor has an obligation to look out for the well-being of a particular individual or group of individuals.⁶² It does not apply when the obligation that is imposed is for the well-being of the general citizenry.⁶³ Therefore, the few “duty to rescue” statutes that have been enacted in America do not create special duties that may trigger liability for a crime of commission by omission. The duty that is imposed by such statutes is a general duty to aid that does not focus on a particular individual or a particular group of people.⁶⁴ Obvious examples of duties to protect are the duties that parents have toward their children,⁶⁵ spouses have toward each other,⁶⁶ lifeguards have toward swimmers,⁶⁷ and bodyguards have toward the person they are contracted to protect. The paradigmatic example of a duty that arises due to risk creation is that of the driver who hits another car.⁶⁸ In such

608 (Miss. 1965) (holding that where a janitor did not remove a banana peel from the floor, a reasonable jury could find the janitor’s employer to be liable to a plaintiff who was injured when slipping on that banana peel). But, again, it is not clear whether criminal liability could arise from such an event.

61. Fletcher, *supra* note 44, at 611–24.

62. See, e.g., Peter Lopez, Comment, *Foreseeable Zone of Risk: An Analysis of Florida’s Off-Premises Liability Standard*, 55 U. MIAMI L. REV. 397, 404 (2001) (discussing when a landowner may have to duty to protect invitees even at points in time when those invitees are not on the landowner’s property).

63. See, e.g., *id.* at 413 n.118 (citing *Ferreira v. Strack*, 636 A.2d 682, 686 (R.I. 1994)) (“[T]here [is] no duty to protect an individual from injury by a third party on land which is not owned, possessed or controlled by the landowner.”).

64. This, of course, is the right solution, given that duty to rescue statutes are intended to impose liability in cases in which imposing commission by omission liability would be improper.

65. See, e.g., *People v. Steinberg*, 595 N.E.2d 845, 846–47 (1992).

66. This is perhaps a moral duty more so than it is a legal duty. See, e.g., *Guevara v. State*, 191 S.W.3d 203, 207 (Tex. App. 2005) (“[A]lthough spouses and family members may have a moral duty to exercise care toward one another, it does not follow that a legal duty to prevent harm necessarily arises from the familial relationship.” (emphasis added)).

67. See, e.g., *Gonzales v. City of San Diego*, 182 Cal. Rptr. 73, 76 (Cal. Ct. App. 1982) (holding that when a city voluntarily provides lifeguards, it voluntarily assumes a protective duty toward members of the public, and the city could then be held liable for negligent acts committed by its lifeguards).

68. Note that the creation of the risk must be the product of an act. The duty does not arise if the risk is created by “omission,” for there would be nothing in those cases to distinguish the omission that causes harm from the omission that causes risk. They would be one and the same.

cases, the driver must stop and help the occupants of the vehicle he hit.⁶⁹ Failure to do so would lead to liability for the injuries suffered by the occupants.⁷⁰

The above mentioned cases involving snow removal ordinances, police officers who fail to prevent crime, and careless janitors who do not keep the premises clean are problematic because, although the actors certainly breached a duty to act, it seems that the duty that they breached is not of the kind that typically gives rise to commission by omission liability. More specifically, in the case of snow removal statutes, property owners do not engage in an affirmative act that creates a risk of harm; rather, the risk of someone slipping on accumulated ice and snow is created by an omission to shovel the sidewalk.⁷¹ Furthermore, the property owner does not have a duty to protect a particular person or group of persons. Rather, the ordinance imposes a duty to protect the general citizenry.⁷² As such, it seems closer to the general duty to rescue statutes than to the laws that impose duties that give rise to liability for commission by omission. Similarly, police officers have a general duty to help the population at large, but they do not typically assume duties to aid a particular individual or group of persons.⁷³ Of course, there are some circumstances in which a police officer may assume the duty to protect a particular individual or group of individuals. The breach of this kind of duty may give rise to liability for a crime of commission by omission. Finally, although the school janitor may have a duty to keep the premises clean, he certainly does not have a duty to protect the students from physical harm. Furthermore, it seems that the janitor owes a duty to his employer, the school administration, instead of directly to the students. Therefore, it would be odd if the breach of his duty to keep the school premises clean could be enough to trigger liability for a crime of commission by omission.

Discussion of these cases highlights the problems inherent in

69. See, e.g., FLA. STAT. § 316.027(2)(a) (2014) (“The driver of a vehicle involved in a crash occurring on public or private property which results in injury to a person other than serious bodily injury shall immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and shall remain at the scene of the crash . . .”).

70. *State v. Mancuso*, 652 So. 2d 370, 371 (Fla. 1995) (holding that leaving the scene of an accident when the defendant should have known an injury occurred results in criminal liability).

71. See *Gillen v. Martini*, 188 N.W.2d 43, 44 (Mich. Ct. App. 1971) (finding no liability when the hazard created is due to the *natural* accumulation of ice and snow, but noting that a landowner that creates an *artificial* hazard on the sidewalk may be subject to liability).

72. See MICH. COMP. LAWS ANN. § 67.9 (West 2014).

73. Michael Pawlik, *El Funcionario Policial Como Garante de Impedir Delitos*, INDRET: REVISTA PARA EL ANÁLISIS DEL DERECHO, Jan. 2008, at 3–5, available at <http://www.raco.cat/index.php/InDret/article/viewFile/77888/101743> (concluding that the failure of a policeman in his duty is the same as commission of that crime because the State, as an “institution,” has a duty to protect its citizens).

describing the Evil Waiter Case as an instance of commission by omission. First, it is unclear whether the waiter in this case owes a duty to the patrons of the establishment. Perhaps it is best to assume that waiters—like school janitors—owe a duty to their employer (in this case, the restaurant). The waiter-patron connection is thus indirect. The waiter owes a duty to the restaurant, which, in turn, owes a duty to the patrons. Second, even if it is assumed that the waiter owes a duty directly to the patron, it is doubtful that the duty owed to the patron is a duty to rescue. If any, the duty owed by a waiter to a patron is to wait tables, but not to guarantee the patron's physical well-being.

The waiter-patron relationship is thus markedly different than the parent-child relationship. While parents have a duty to come to their child's aid if the need arises,⁷⁴ waiters have no such duty toward their patrons. A waiter is not, for example, required to perform the Heimlich maneuver on a patron who chokes on his food. It would, of course, be morally blameworthy for the waiter not to do something if his patron were choking, but it would not give rise to criminal liability. Even if it would give rise to some liability, it would certainly not give rise to commission by omission liability for homicide. The reason is intuitively obvious, even if not easily explained. Waiters who fail to come to the rescue of restaurant patrons are simply not as morally blameworthy as parents who fail to come to the rescue of their children or as lifeguards who fail to come to the rescue of drowning swimmers.

I previously suggested that a significant difference between the Evil Waiter Case and the Omissive Waiter Case is that the waiter in the former case has a more stringent duty toward the hungry patron than the waiter in the latter case. This assumes that the waiter in the Evil Waiter Case was assigned to wait the hungry patron's table, whereas the waiter in the Omissive Waiter Case was not assigned to that table. This may have some bearing on the duties imposed on the two waiters. From the patron's point of view, he obviously will think that he can require more of the waiter assigned to his table than of other waiters. Nevertheless, as the cases discussed in this section reveal, waiters do not appear to have a duty to come to the aid of patrons. This holds regardless of whether the waiter is assigned to serve a particular table or not. Their duty simply does not extend to guaranteeing the patron's physical well-being. Therefore, whatever duty the waiters owe to the patron in these cases is not stringent enough to justify imposing liability for homicide on the basis of commission by omission.

Now consider a final variation of the Evil Waiter Case. Assume that the waiter assigned to the hungry patron's table is busy taking food

74. See, e.g., *People v. Steinberg*, 595 N.E.2d 845, 846–47 (1992).

to another table. In the interim, a different waiter decides to take the dish to the hungry patron. Although the waiter knows that he is not assigned to the hungry patron's table, he figures he might as well lend a helping hand to his fellow waiter who is supremely busy at the time. While this is happening, the waiter assigned to the hungry patron's table notices that the dish is being placed in front of the hungry patron. He also notices that the dish is poisoned. The waiter assigned to serve the hungry patron does nothing, and the hungry patron dies. Is the waiter assigned to serve the hungry patron liable for homicide? Once again, it seems that he is not. The fact that he was assigned to serve the hungry patron does not appear to make a difference, for what is ultimately determinative is the scope of the duty owed by the waiter to the patron. And it just seems that waiters do not have a duty to rescue patrons who are in need of help.⁷⁵ Therefore, there are good reasons to resist describing the Evil Waiter Case (and the rest of the evil waiter cases) as instances of commission by omission.

D. *The Evil Waiter Case as Actmission*

1. THE EVIL WAITER CASE DOES NOT PRESENT PURELY ACTIVE OR PASSIVE CONDUCT

The Evil Waiter Case is problematic. It is tempting to describe the conduct of the evil waiter as an action. After all, she takes the dish and places it in front of the hungry patron. This nominally satisfies the definition of an action, for it amounts to a willed bodily movement.⁷⁶ It is unclear, however, whether the act of taking the dish to the table is a legally and morally relevant feature of the conduct. It can be argued that what is truly blameworthy in this case is not the act of taking the dish to the table, but rather the waiter's failure to say or do something that would prevent the patron from eating the dish. If so, the waiter's conduct is better described as an omission. Her blame would then be the failure to do something that would have prevented the patron's death.

Describing the waiter's conduct in the Evil Waiter Case as an omission is also problematic. Wrongful omissions are less blameworthy than wrongful acts because omissions fail to make the victim better off, whereas actions make the victim worse off. The problem is that the waiter's conduct in the Evil Waiter Case does not merely fail to make

75. *Cf.* *Boller v. Robert W. Woodruff Arts Ctr., Inc.*, 716 S.E.2d 713, 716 (Ga. Ct. App. 2011) (holding that the venue owner did not have a duty to provide medical care to a concert patron who suffered a heart attack because the venue owner did not cause the plaintiff's heart attack); *Rasnick v. Krishna Hospitality, Inc.*, 690 S.E.2d 670, 673–75 (Ga. Ct. App. 2010) (holding that an innkeeper had no duty to rescue a guest suffering from a severe medical condition).

76. *See supra* note 37.

the patron better off. To be sure, the patron would have been better off had the waiter done something to prevent him from eating the dish. However, it may also be argued that the patron was made worse off by the waiter's decision to place the dish in front of him. The waiter's willed bodily movement is not wholly immaterial to assessing her blameworthiness for the patron's death.

2. THE EVIL WAITER'S CONDUCT AS AN "ACTMISSION" THAT IS BOTH ACTIVE AND PASSIVE IN MORALLY RELEVANT WAYS

A fresh start is clearly needed. If it is inappropriate to regard the Evil Waiter Case as an instance of action, and it is also problematic to consider it a case of omission, how should we proceed? It is submitted that the reason why assessing the waiter's blameworthiness in the Evil Waiter Case is difficult is because the waiter's conduct shares important features of *both* acts and omissions. On the one hand, the waiter engages in a willed bodily movement that is causally linked to the harm that is eventually suffered by the hungry patron. Taking the dish to the table and placing it in front of the table is clearly an act. And this act is not entirely devoid of moral relevance. Nevertheless, merely describing the evil waiter's conduct as action does not fully explain her blameworthiness. Her blameworthiness is also affected by her knowledge that the dish was poisoned and her failure to do something about it. This sounds in the language of omission. The full scope of the waiter's blameworthiness cannot be assessed until this failure to act is factored in.⁷⁷

As a result, a complete account of the evil waiter's blameworthiness requires making reference to both the act of placing the dish in front of the hungry patron and the waiter's omission in failing to say or do something to prevent the hungry patron from eating the poisoned mushroom sauce. The waiter's conduct is, in other words, both active and passive. Nevertheless, it is neither purely an act nor purely an omission. It is, for lack of a better word, an *actmission*.

Two practical consequences follow from labeling the waiter's conduct an actmission. First, the waiter's conduct should be viewed as more blameworthy than purely omissive conduct. Second, the waiter's conduct should be considered less blameworthy than purely active conduct.⁷⁸ In terms of criminal liability and punishment, the waiter should be punished more severely than someone who merely lets the victim die

77. See Chiesa, *supra* note 4, at 614 ("[T]he act/omission distinction is morally relevant because it is generally worse to engage in conduct that makes someone worse off than to engage in conduct that merely fails to make someone better off.")

78. See *id.* at 596 (discussing the blameworthiness of a doctor who discontinues life support in the context of actmissions).

by pure omission. She should, however, be punished less severely than someone who actively kills the victim by pure action.

Distinguishing between acts, omissions, and actmissions allows us to make better sense of the differences between the Evil Waiter Case and the Poisonous Waiter and Omissive Waiter cases. Most people find it intuitively obvious that the waiter in the Poisonous Waiter Case is more worthy of blame than the waiters in the Evil Waiter and Omissive Waiter cases.⁷⁹ The waiter who poisons the mushroom sauce is more deserving of blame than the one who becomes aware that the mushroom sauce is poisoned and nevertheless takes the dish to the hungry patron's table. The waiter who poisons the dish is also obviously more blameworthy than the waiter who merely lets another waiter take the poisoned dish to the patron's table. Most people also seem to believe that the waiter who is least deserving of blame is the one in the Omissive Waiter Case.⁸⁰ Witnessing another person take a poisoned dish to the patron's table and not doing anything seems intuitively less blameworthy than personally poisoning the dish. It also seems less blameworthy than not poisoning the dish but personally taking it to the table. Not surprisingly, it is more difficult to make sense of the Evil Waiter Case. Intuitions suggest that this case is more blameworthy than merely witnessing someone else place the dish in front of the patron (like the omissive waiter), but less blameworthy than poisoning the dish (like the poisonous waiter).

Intuitions may suggest that actmissions are more blameworthy than omissions but less blameworthy than actions—and those intuitions are probably justified. As was previously explained, acts are blameworthy because they make the victim worse off than she was before. In the Poisonous Waiter Case, for example, poisoning the dish made the prospects of the hungry patron worse off. In contrast, the waiter in the Omissive Waiter Case is blameworthy because he failed to make the patron better off when he did not come to his aid. But actmissions are blameworthy because—like omissions—they fail to make the victim better off and—like actions—they make the victim worse off. Actmissions do both.

Actmissions, like actions, leave the victim worse off than he was prior to the relevant harm-causing willed bodily movement.⁸¹ The patron is worse off when the waiter places the dish in front of him than when

79. I have discussed these three cases with numerous people. Some were law professors, others were school staff members, others were friends of diverse backgrounds. The vast majority believe that the most blameworthy conduct is that of poisoning the dish and taking it to the patron.

80. This conclusion is also nearly unanimous amongst those that I have informally surveyed.

81. See Chiesa, *supra* note 4, at 596 (arguing that actmissions are like actions in that they create a *new* risk “that did not exist immediately prior to the relevant harm causing willed bodily

the dish was lying on the kitchen counter. Nevertheless, there is a sense in which actmissions do not make the victim worse off, for they do not set in motion the course of events that is likely to cause harm to the victim.⁸² “This is what makes actmissions different from [pure] actions. Actions set in motion a course of events that will likely result in harm to the victim.”⁸³ Actmissions, in contrast, merely let harm-causing events run their course.

This raises a further question. If actmissions—like omissions—do not create the risk that leads to harming the victim, what makes them more blameworthy than failures to act?⁸⁴ Actmissions are different because—unlike omissions—they *accelerate* the culmination of a harmful course of events that was already in motion when the actmission took place. This is what happens in the Evil Waiter Case. The patron was likely going to die of food poisoning regardless of the evil waiter’s conduct. Had the evil waiter not placed the dish in front of the hungry patron, a different waiter would have probably done so. Since the course of events that was meant to harm the victim—poisoning the dish and placing it where a waiter would pick it up—was already set in motion prior to the evil waiter’s conduct, there is a sense that what the waiter does is merely allow the events to unfold. However, the waiter’s actmission does something more than merely let events run their course. It *accelerates* the occurrence of the harm that was likely to take place anyway. And this is more blameworthy than merely letting the harm happen in due course.⁸⁵

This is the special kind of harm that is brought about by the evil waiter’s actmission. Given that the evil waiter’s actmission (taking the dish to the table) hastened the occurrence of harm to the patron, she

movement. . . . Nevertheless, actmissions . . . do not create a risk that is different from the risk that jeopardized the victim’s wellbeing in the first place”).

82. *See id.* (For example, “discontinuing life support merely subjects the victim to the same risk that she was subjected to prior to receiving medical treatment.” That is to say, “the patient’s life is jeopardized by h[er] ailment, not by the withholding of further treatment.”).

83. *Id.*

84. I have asked, and answered, this very question in my past work, *Actmissions*. *See id.* at 597.

85. In *Actmissions*, I also argued that some actmissions are blameworthy because they hasten the occurrence of harm that would likely materialize anyway, while other actmissions are blameworthy because they return the victim to a zone of danger that she was previously shielded against. *Id.* This is what happens when a doctor discontinues life support. By discontinuing life support, the doctor is returning the victim to a condition in which her life will once again be in jeopardy. Moreover, the doctor is returning the victim to the same dangerous condition that she was in before the decision to begin life support was made. This kind of actmission presents a course of conduct that can thus be described as an abandoned rescue. The victim is temporarily safer because she is protected by the actor, who then decides to do something that results in an abandoned rescue. In so doing, the actor once again places the victim at risk of suffering the kind of harm that it seemed the actor was protecting her against. *Id.*

should be punished more than the actor in the Omissive Waiter Case who merely allowed the patron to be harmed. In contrast, since the evil waiter’s actmission did not set in motion the course of events that was likely to harm the patron, she should be punished less than the waiter in the Poisonous Waiter Case who was responsible for creating the risk of harm to the victim.

The following table summarizes the defining features of actmissions and explains why the Evil Waiter Case displays the signature structure of what I call an “actmission”:

TABLE 1: ACTMISSIONS⁸⁶

Requirement	Comments	Illustration
1. “[A] harm causing event must be set in motion by someone or something other than the actor.”	Actor does not create danger that threatens the victim	The dish is poisoned before the waiter touches it
2. “[T]he actor must find himself in a position in which he can do something to prevent the event from transpiring and causing harm to the victim.”	Triggering condition for duty to rescue	Waiter can prevent harm to patron by not placing dish in front of him
3. “[T]he actor fails to do something to prevent harm to the actor.”	Failure to rescue	Waiter fails to save patron when he places dish in front of him (similar to omission)
4. “[T]he actor’s failure to do something to prevent harm to the actor must consist of a willed bodily movement.”	Action that fails to make victim better off rather than making victim worse off	Placing dish in front of patron is willed bodily movement (similar to action)
5. “[T]he willed bodily movement either accelerates the occurrence of a harm that would have likely taken place anyway or returns the victim to a zone of danger that the actor had shielded her against.”	Distinct actmissions harm that is less wrongful than harmful actions but more wrongful than harmful omissions	Placing dish in front of patron accelerates occurrence of patron’s likely death (actmission)

III. LESSONS FROM THE EVIL WAITER CASE: THE ACT/OMISSION DISTINCTION IS IN NEED OF AN OVERHAUL

A. *Should the Act/Omission Distinction be Replaced with a Sliding Scale of Human Conduct?*

An analysis of the Evil Waiter Case reveals that there are some courses of conduct that share morally relevant features of both acts and omissions. Is the Evil Waiter Case simply an anomaly, or does it reveal

86. Table 1 is meant as an illustrative tool and was created by the author using his past work, *Actmissions*. See *id.* at 598.

a more pervasive problem that criminal law ought to address? I believe it is the latter. The existence of actmissions forces us to seriously consider whether the act/omission distinction should be replaced with a sliding scale that admits a myriad of different courses of conduct that lie somewhere between pure actions and pure omissions.

American criminal law currently approaches human conduct in an all-or-nothing fashion. Harm that is relevant to the criminal law (e.g., the death of a person) can either be produced by an action (stabbing a person) or an omission (failing to rescue a drowning person). If harm is caused by action, the defendant is liable regardless of whether he owed a special duty to the victim.⁸⁷ The presence of harm-causing action thus obviates the duty inquiry. In contrast, if harm is brought about by omission, there is liability only if the defendant owed the victim a special duty to act.⁸⁸ Omissions thus raise duty inquiries that are non-existent when harm is caused actively. Acts and omissions function in an all-or-nothing fashion because harm is either brought about actively or passively and, together, these two possibilities exhaust the forms of commission of criminal offenses.⁸⁹

The existence of “actmissions” that share morally relevant features of both acts and omissions calls into question the all-or-nothing nature of the act/omission distinction. If there are courses of conduct that are neither active nor omissive, then the act/omission distinction fails to exhaust the different ways of committing criminal offenses. Acknowledging the existence of courses of action that lie somewhere between active and passive conduct opens the door to arguing that the rigid act/omission dichotomy ought to be replaced with a sliding scale of conduct that goes from fully passive to fully active. According to this approach, the decision maker should not be forced to decide whether conduct is *only* either an act or an omission. Rather, the adjudicator should take into account a series of factors that give her discretion to decide where the conduct falls between the two extremes of fully active and fully passive conduct. The factors that the decision maker could take into account

87. See, e.g., MODEL PENAL CODE § 2.01(1) (1962).

88. See, e.g., *id.* § 2.01(3)(b).

89. See, e.g., *id.* § 2.01(1) (no offense can be committed unless it “is based on conduct that includes a voluntary act or the omission to perform an act”). In a sense, the norms that the criminal law currently adopts to classify human conduct function like “rules.” A rule is a norm that applies in an all-or-nothing fashion. See generally Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967). When a rule applies, it is outcome determinative. *Id.* The criminal law’s norms relating to human conduct function mostly like rules because conduct has to be classified as *either* an act or an omission, and whether the conduct is described as one or the other will typically be dispositive of whether the prosecution needs to show that the defendant had a legal duty to act. As a result, describing conduct as an act or omission is quite frequently outcome determinative.

might include whether the actor performed a willed bodily movement, whether the conduct created a new risk of harm or merely allowed an already existing risk to materialize, whether the conduct accelerated the occurrence of a harm that would likely take place anyway, and the strength of the causal connection between the actor's conduct and the victim's harm. After balancing these factors, the judge would have the discretion to determine where the conduct falls in the sliding scale of active and passive wrongdoing.⁹⁰

This sliding scale approach better captures the complexity of our moral universe. Take, for example, instances of conduct that the philosopher Michael Moore has called "double preventions."⁹¹ Double preventions consist of courses of conduct in which a person engages in an act that prevents someone else from preventing harm to another person.⁹² Suppose that Juan uses physical force to restrain María, who was about to save a drowning child.⁹³ No one saves the drowning child and the child dies. In this case, Juan engages in an act (physically restraining María) that prevented María from preventing the death of the drowning child. Did Juan kill the drowning child or did he merely let the child die? On the one hand, Juan engaged in a willed bodily movement (restraining María) that is relevant to explaining why the child drowned. This sounds in the language of action and, therefore, supports a finding that Juan "killed" the child. On the other hand, Juan's act merely allowed the child to drown. This sounds like an omission and, consequently, counsels in favor of concluding that Juan merely let the child die.

I submit that most people's intuitions are that producing harm by a double prevention is less blameworthy than actively causing it, but is more worthy of condemnation than passively letting it happen. That is, Juan is more deserving of blame for preventing María from preventing the child's drowning (double prevention) than if Juan had merely let the child drown without preventing someone else from saving it (omission). However, Juan is less deserving of blame for preventing María from saving the drowning child (double prevention) than if Juan had drowned

90. The norms that are created to implement a sliding scale approach to human conduct would more closely resemble "standards" than "rules." A standard is a norm that does not apply in an all-or-nothing fashion. Standards give the decision maker discretion to decide a case on the basis of a number of factors that must be balanced. The way in which the balance is struck may differ from decision maker to decision maker and, therefore, application of the standard is not outcome determinative in the same way as application of a rule is. See generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383-90 (1985).

91. See MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 459-60 (2009).

92. *Id.*

93. Moore discusses "double preventions" generally. I came up with this hypothetical in order to explain the concept.

the child (action). If this were correct, the sliding scale of blameworthiness in these cases would look like this:

Most Blameworthy: Juan drowns the child (action)

Intermediate Blameworthiness: Juan prevents María from preventing death of drowning child (double prevention)

Least Blameworthy: Juan lets the child drown but does not prevent anyone else from trying to save the child (omission)

The criminal law's all-or-nothing approach to human conduct is also undermined by cases that share the structure of Judith Jarvis Thomson's famous violinist example. As Jarvis Thomson describes the case,

[y]ou wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. . . . To unplug you would be to kill him. . . . [But, in nine months] he will have recovered from his ailment, and can safely be unplugged from you.⁹⁴

While Jarvis Thomson invokes the violinist thought experiment to ask whether it is morally permissible for the person to unplug herself from the violinist,⁹⁵ I believe the case raises a distinct—although interrelated—question. If the person unplugs herself from the violinist, has she killed the violinist or merely let him die? On the one hand, the person has engaged in a willed bodily movement that causally contributes to the violinist's death (unplugging herself from his body). This description of the facts sounds like an action and, consequently, like "killing" the violinist. On the other hand, by unplugging herself, the person has allowed the violinist to die as a result of his ailment and, therefore, has let the violinist die. This sounds more like passive conduct.

Once again, I submit that unplugging yourself from the violinist is more worthy of condemnation than merely refusing to plug yourself to the violinist in the first place. In contrast, I argue that unplugging from the violinist is less blameworthy than actively killing the violinist by, for example, injecting him with poison. Moreover, I posit that it is odd to describe the conduct in this thought experiment as purely active or purely omissive. In order to fully capture the moral complexity of the fact-pattern, it is necessary to take into account both the act of unplugging *and* how the act may be construed as a failure to provide suste-

94. Thomson, *supra* note 6, at 48–49.

95. Jarvis Thomson believes that it *is* permissible to unplug yourself from the violinist. *Id.* at 61–62.

nance. Once both the active and passive features of the conduct are given their due, the full blameworthiness of the conduct comes into full view:

Most Blameworthy: You inject violinist with poison (action)

Intermediate Blameworthiness: You unplug yourself from the violinist (both action and omission)

Least Blameworthy: You refuse to plug yourself to the violinist (omission)

While the violinist case is concededly an extravagant example, it is—as Jarvis Thomson argues—similar to other cases that are of significant practical import. According to Jarvis Thomson, unplugging yourself from the violinist is similar to aborting a fetus.⁹⁶ While not identical, the cases are similar, for abortion entails engaging in active conduct that may be construed as a failure to continue providing sustenance to the fetus.⁹⁷ Looking at abortion as a course of conduct that shares morally relevant features of both acts and omissions may explain why killing a fetus is less blameworthy than killing a born child, even if one assumes that the fetus is as much of a person as the born child is.⁹⁸ Aborting the fetus is less blameworthy than killing a child because the former is plausibly construed as a failure to continue providing sustenance, whereas the latter cannot be. While both aborting a fetus and killing a child entail engaging in active conduct, the full meaning of an abortion can only be grasped when it is placed within the broader context of omission. The fetus dies because the mother no longer wishes to sustain it. This failure to provide sustenance is an omission.

With few exceptions, most scholars have failed to grasp the (partially) omissive nature of abortions. This infelicitous failure reflects the pervasiveness of the all-or-nothing approach to human conduct. The standard approach goes something like this: Either the mother killed the fetus or she let it die. Given that abortion may only be accomplished by engaging in a willed bodily movement, aborting a fetus is the same as actively killing the fetus. But there is no need to pigeonhole the mother's

96. *Id.* at 48–49.

97. See, e.g., SHERRY F. COLB, MIND IF I ORDER THE CHEESEBURGER? AND OTHER QUESTIONS PEOPLE ASK VEGANS 87–91 (2013) (posing a hypothetical scenario where a developing embryo and fetus can be housed in an incubator up until the twenty-fourth week of pregnancy, and contemplating the moral choices this would present at the end of the twenty-fourth week).

98. I take no position here regarding whether a fetus ought to be considered a “person.” Even assuming that the fetus is a person, I argue that killing a fetus is not a case of purely active wrongdoing, but rather an “actmission” that consists of engaging in a willed bodily movement that amounts to a failure to continue providing sustenance. As such, an abortion shares morally relevant features of both acts and omissions. This alone is enough to conclude that the abortion of a fetus is, *ceteris paribus*, less blameworthy than the killing of a born child.

conduct as either wholly active and therefore highly blameworthy, or wholly passive and not particularly worthy of blame. If the current all-or-nothing approach to human conduct were replaced with a more flexible sliding scale approach, one might simply conclude that aborting a fetus is not as blameworthy as killing a person, but more blameworthy than failing to save a person. This reframing of the intractable abortion issue is worthy of discussion.

While a sliding-scale approach to human conduct describes in richer and more accurate detail our moral intuitions regarding a broad array of conduct, it is difficult to implement as law. Adoption of the sliding scale approach is impractical, for judges are not well equipped to decide where a particular case falls within the continuum that occupies the space between fully active and fully omissive conduct. Furthermore, even if decision makers are equipped to make such determinations, replacing the neat act/omission distinction with a concededly more nebulous sliding scale of human conduct may generate more problems than it solves. It may lead, for example, to similar cases being treated differently solely based on how different judges balance the competing factors. Additionally, adopting a sliding scale of human conduct may run afoul of the fair warning requirement, for a person could plausibly argue that the laundry list of factors that judges would take into account when determining how to classify the conduct do not provide individuals with *ex ante* fair notice regarding how their conduct will be treated by the courts.⁹⁹

B. *A More Modest Proposal: Towards the Act/Omission/Actmission Tristinction*

Although the sliding scale approach to human conduct provides a better framework for fully grasping the moral complexity of the Evil Waiter Case, the violinist example, and instances of double prevention, there are good pragmatic reasons against replacing the act/omission distinction with the more ill-defined sliding scale approach. Considerations of fair warning counsel in favor of more precision in defining the human conduct requirement than what is provided by the sliding scale approach. Furthermore, judges likely need more guidance than what the sliding scale approach affords. In spite of this, there are still good reasons to abandon the act/omission distinction. As the Evil Waiter Case

99. See *supra* note 7. See also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (citing *United States v. Harriss*, 347 U.S. 612 (1954)) (stating that a law does not satisfy constitutional fair warning requirements and is void for vagueness when it “‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ and because it encourages arbitrary and erratic arrests and convictions”).

and the rest of the cases discussed in Part II of this essay reveal, the act/omission distinction simply fails to fully explain the blameworthiness inherent in a non-negligible number of scenarios.

But if the sliding scale approach is too ill-defined to warrant adoption and the act/omission dichotomy is overly simplistic, is there an attractive compromise? I believe there is. The act/omission distinction ought to be replaced with an act/omission/actmission tris-tinction. Recognizing actmissions as a distinct course of conduct in addition to acts and omissions better accounts for cases like the violinist example, the Evil Waiter Case, and double preventions, without sacrificing too much precision in the manner that adoption of the sliding scale approach would require. As I explained in Part I, a course of conduct counts as an actmission when a willed bodily movement results in a failure to rescue. This is what happens in the Evil Waiter Case, for she engages in a willed bodily movement (placing dish in front of patron) that results in a failure to rescue the patron. Double prevention cases present a similar structure. When Juan restrains María, he engages in a willed bodily movement that results in the failure to rescue the drowning child. Finally, abortion amounts to a failure to continue providing sustenance to the fetus that is accomplished by a willed bodily movement.

As I have argued before, these actmissions are more blameworthy than pure omissions but less worthy of condemnation than pure actions.¹⁰⁰ Placing the dish in front of the patron is more blameworthy than simply failing to rescue the patron but less wrongful than poisoning the patron. Juan's restraining of María is more deserving of blame than merely failing to do something to save the drowning child, but less blameworthy than actively drowning the child. Finally, aborting a fetus is less worthy of condemnation than killing a born child, while more worthy of condemnation than merely failing to rescue a child. Describing these courses of conduct as actmissions calibrates the blameworthiness that ought to attach in each of these cases more accurately than describing these fact patterns as either acts or omissions. Furthermore, the definition of actmissions provided in this article is sufficiently specific to satisfy constitutional fair warning requirements.¹⁰¹ This, in turn, provides us with compelling reasons for replacing the act/omission distinction with an act/omission/actmission tris-tinction.

100. See *supra* notes 77–85 and accompanying text; see also Chiesa, *supra* note 4, at 606 (“Recall that actmissions are more blameworthy than pure omissions but less worthy of condemnation than full-fledged affirmative actions.”).

101. See *supra* notes 7, 99.

IV. CONCLUSION

The Evil Waiter Case and other cases that share a similar structure expose an important shortcoming in American criminal law: the act/omission distinction cannot fully account for the blameworthiness of these scenarios. In order to fully grasp their moral complexity, it is necessary to acknowledge that they present courses of conduct that share relevant features of both acts and omissions. If these cases feature neither active nor omissive conduct, it would be tempting to move from the rigid act/omission distinction to a more flexible sliding scale of human conduct. Such a radical revision of criminal law is nevertheless ill-advised. Replacing the act/omission distinction with a nebulous sliding scale that allows the decision maker to place courses of conduct somewhere along a spectrum that goes from full-fledged action to pure omission would likely fail to provide the specificity that fair warning requires. This does not mean, however, that the criminal law ought to maintain the act/omission distinction. There is a more attractive intermediate position that better accounts for cases like the Evil Waiter Case without running afoul of the fair warning requirement. American criminal law ought to recognize “actmissions” as a distinct category of conduct. Such actmissions should be punished more than pure omissions but less than purely active conduct.