CRIMINAL OMISSIONS: SOME RELEVANT DISTINCTIONS

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The prevailing theory in continental European and Latin American legal literature distinguishes two kinds of punishable omissions: the simple (or "authentic," "genuine") omission and the "inauthentic" or "pseudo" omission (also known as commission by omission, comisión por omisión*). In this article a tripartite classification of crimes of omission is proposed. On the one hand, there are crimes of omission that are identical to cases of active commission (for which we should reserve the term of commission by omission). These are based on the idea of responsibility for one's own organization. On the other hand, there are simple crimes of omission in which we punish a breach of a duty of minimum solidarity toward our fellow citizens. Somewhere between these two categories lies a third type of aggravated crimes of omission that are based on liability for a breach of a duty of qualified solidarity (derived from specific institutions or relationships between people). Moreover, this threefold classification is based on the idea that differences between such omissions are a matter of degree.*

I. INTRODUCTION

According to the prevailing theory in continental European and Latin American legal literature, there are two kinds of punishable omissions: the simple (or "authentic," "genuine") omission and the "inauthentic" or "pseudo" omission (also known as commission by omission, *comisión por*

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omisión). A simple omission is a violation of the duty to aid others in an emergency or a breach of the general duty to either prevent or report an imminent crime. In continental penal codes, both of these types of omissions are commonly defined as specific crimes with relatively light punishment. In contrast, crimes of inauthentic omission take place when an individual who has not averted a criminal harm (e.g., the death of another) is charged for the harmful result as if he or she had caused it by affirmative conduct (e.g., homicide by omission). Although civil law courts and commentators accept that there are omissions that deserve the same punishment as offenses of active commission, the debate concerning the criteria that should be used to determine the equivalence of the omissive conduct to active conduct is as old as the problem itself.

In continental Europe, serious discussion regarding this issue began in Germany in the second half of the nineteenth century. This happened around the time when naturalist causalism became the leading theory regarding the concept of crime. According to this doctrine, the structure of all criminal offenses ought to lie in a corporal movement, which physically causes a change in the outside world. Based on this dubious premise, successive attempts were made to seek the same corporal movement featuring natural causation in the legal concept of omissions (or, at least, in those omissions that were thought to deserve the same punishment as criminal acts).[1] The result of these attempts placed the core of inauthentic omissions in the breach of a *specific duty to avoid the result* prohibited by the offense defined in the Special Part of the Code. As a result of this evolution, it was concluded that it made no sense to try to find a common structure among crimes of commission and those of inauthentic omission.[2] Offenses of commission were conceived as crimes in which the agent's control of the causal chain between the conduct and the result is essential. In contrast, offenses of omission (even those of inauthentic omission) were understood as crimes merely consisting of a "breach of duty."[3]

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1. On these attempts to find physical causation in cases of omission, as well as their failings, see Hans-Heinrich Jescheck & Heinz Gerd Goldmann, Die Behandlung der unechten Unterlassungsdelikte im deutschen und ausländischen Strafrecht, 77 ZStW 114, 114–15 (1965).

2. Deserving the same punishment as the physical causation of criminal harm. See Armin Kaufmann, Die Dogmatik der Unterlassungsdelikte 255 (1958).

3. The "duty to guarantee" (*Garantenpflicht*) entails that the person who is in a certain position of responsibility (*Garantenstellung*) guarantee that the result will not occur. See Johannes Nagler, Die Problematik der Begehung durch Unterlassen, 11 GS 1 (1938).

Inauthentic omissions were conceived as cases of omissions qualified by the intensity of duty,[4] and their equivalence with crimes of commission was shown as being fundamentally *axiological*. Thus, the concept of the inauthentic omission was based on the understanding that it comprised an authentic omission that was *qualified by a special intensity of a duty to act*. In other words, this doctrine considered crimes of inauthentic omission on the one hand an *aliud* (and on the other hand even a *minus*) with regard to crimes of commission, although they deserve the same punishment.

The acceptance of the breach of a specific duty to prevent harm as the decisive factor that determined the equivalence of certain omissions with active commissions generated a considerable extension of criminal liability for omissions. The breach of a *general* duty to provide aid in an emergency was considered an insufficient basis for criminal liability to attach for a result offense. However, as soon as the breach of a specifically qualified duty was established, the existence of a case of commission by omission of an offense of harmful consequences was established. This happened in a large number of cases, above all after the 1930s.[5] Two additional circumstances, while unrelated to the breach of duty theory, played an important role in extending criminal liability. On the one hand, the rise of the legal concept of the "Social State" (*Sozialstaat*) had the tangible consequence of expanding and intensifying the duties of solidarity amongst the citizenry whose breach might generate criminal responsibility. On the other hand, in the German case, the importance of "community" in the philosophy undergirding national socialism and its theoretical precursors generated a similar expansion of duties of solidarity that plagued scholarly approaches to the problem of commission by omission even during the 1950s and 1960s.[6]

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4. For a description quite similar to the one mentioned here, see Günther Jakobs, Die strafrechtliche Zurechnung von Tun und Unterlassen 15 (1996).

5. On this practice, see Bernd Schünemann, Die Unterlassungsdelikte und die strafrechtliche Verantwortlichkeit für Unterlassungen, 96 ZStW 293 (1984).

6. Regarding this, in 1965 Jescheck & Goldmann pointed out that "German law shows a particularly expansive tendency towards acknowledging legal duties where a breach is punished like a crime of commission." Jescheck & Goldmann supra note 1, at 133. This leads them to conclude that the best way to proceed was to achieve a maximum restriction of crimes of commission by omission. Id. at 148.

In light of the aforementioned considerations, a distinction between crimes of omission was generated that had little to do with the criterion that initially seemed to be the governing one—that of seeking similarities between crimes of omission and offenses of commission. Thus, the breach of a duty to act was accepted as the common element of punishable omissions. Among crimes of omission, some appeared to be omissions due to the breach of a qualified duty to act (also called a "duty to avoid resulting harm"). These were thought of as deserving the same punishment imposed in cases of crimes of commission.

II. IN SEARCH OF STRUCTURAL IDENTITY BETWEEN ACTS AND OMISSIONS

In Spain, the debate concerning crimes of omission has always been quite different from the German discussion. One traditional theory was even opposed to punishing omissions except in the very few cases where the legislators specifically provided for the criminalization of omissions, either together with offenses of commission[7] or independent of them. This coincided with a rare use of the doctrine of "commission by omission" by Spanish courts.[8] More recently, however, the legal concept that crimes of omission are punishable, based on legal definitions proscribing affirmative conduct, became the prevailing theory.[9] Furthermore, Spanish courts started to apply the doctrine of commission by omission more frequently, albeit always within a more restrictive paradigm,[10] at least when compared with the German approach to the doctrine.

It is worth noting that the main discussions amongst Spanish scholars regarding omissions had less to do with theoretical concerns about the

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7. See Juan Córdoba Roda, 2 Notas a la traducción de Maurach, Tratado de Derecho penal 296–97 (1962). Later, however, Córdoba Roda adopted a different opinion.

8. See, e.g., Juan Córdoba Roda, in 1 Comentarios al Código penal 7 (Juan Córdoba Roda & Gonzalo Rodríguez Mourullo dirs., 1972).

9. Córdoba Roda, 1 Comentarios, supra note 8, at 8.

10. Cf. María del Carmen Alastuey Dobon, Delitos de comisión por omisión en la Jurisprudencia del Tribunal Supremo, ADPCP 1019 (1992); Carlos Mir Puig, La posición de garante en la Jurisprudencia del Tribunal Supremo, en La comisión por omisión, 23 Cuadernos de Derecho Judicial 295–96 (1994). But see Huerta Tocildo, Principales novedades de los delitos de omisión en el Código penal de 1995 47 (1997) (holding the opposite position).

structure of criminal offenses than with the statutory language defining criminal infractions. In the 1970s and 1980s, there were three competing approaches to the problem of commission by omission in Spain:

(1) The first approach to the problem held that punishing commission by omission based on legal definitions of crime that *prima facie* prohibited causing particular results violated the principle of legality. In fact, some authors understood that those definitions referred to causal acts, not omissions. According to this position, punishing certain failures to avoid the resulting harm with the same punishment that would apply had the actor brought it about by way of an affirmative act would amount to holding someone liable for conduct that is not criminal under the Penal Code. Liability in these cases would thus be triggered by the commission of unwritten crimes that are somehow related to legally defined crimes. Therefore, some scholars argued in favor of identifying and criminalizing in the Special Part of the code a closed set (*numerus clausus*) of cases that would trigger liability for harmful results produced by way of commission by omission.[11]

(2) The defenders of the second approach to the problem shared the starting point of the first approach, for they generally considered that stating that the result offenses in the Special Part of the Penal Code could be committed by way of omissions was problematic. However, this group believed that the introduction of new specific definitions of crimes of commission by omission would not be feasible for pragmatic reasons. Therefore, they understood that it would be necessary to include a clause in the General Part recognizing the possibility of committing by omission offenses that are *prima facie* defined in terms of commission in the Special Part.[12]

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11. Huerta Tocildo, Las posiciones de garante en los delitos de comisión por omisión, in Problemas fundamentales de los delitos de omisión 19 (1987).

12. See the general reference made to several authors who shared this opinion in the description by Tomás Salvador Vives Antón, Javier Boix Reig & Juan Carlos Carbonell Matteu, in Relación de las V Jornadas de Profesores de Derecho penal, 6 RFDUC Monográfico 17 (1984); see also Carlos María Romeo Casabona, Los delitos de comisión por omisión: delimitación, insuficiencias y perspectiva político-criminal, in Política criminal y reforma penal. Homenaje al Prof. Del Rosal 936–37 (1993); Romeo Casabona, Límites de los delitos de comisión por omisión, in Omisión e imputación objetiva en Derecho penal 48–49 (Enrique Gimbernat, Bernd Schünemann, & Jürgen Wolter eds., 1994).

(3) The third position held that punishing commission by omission based on ordinary definitions of crimes in the Special Part of the Criminal Code was compatible with the legality principle. According to this viewpoint, neither specific definitions in the Special Part nor a general clause in the General Part of the Code were needed to address the problem of commission by omission, since either of these approaches could cause more inconveniences than advantages.[13] Although the majority of the legal community initially defended the second approach to the problem of commission by omission, it is worth noting that the third approach, which I have personally defended for over twenty years, has gone on to become widely accepted in Spain.[14]

As one can see, adopting either the first or the second approach to the problem inevitably leads to the conclusion that it would be illegitimate to punish cases of commission by omission unless the Criminal Code either specifically identifies the omissions that would lead to liability for result crimes in the Special Part (first approach) or contains a general clause establishing the equivalence of omissions to acts under certain circumstances (second approach). Both of these approaches are based on controversial premises. The first of these premises holds that the verbs found in criminal offenses in the Special Part must be understood as describing physical processes of causation, thus eliminating, in principle, the possibility of commissions by omission in which a bodily movement is missing. Thus, according to this argument, the express terms used to define result offenses would exclude the possibility of a criminal offense being committed by omission.

However, it could be countered that legal verbs, as well as those found in ordinary language, have an *ascriptive* rather than a *descriptive* meaning

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13. From this viewpoint, both active commission and commission by omission are understood to be the result of a "correct interpretation" of the legal terms and not of an analogy. Alexander Böhm, Methodische Probleme der Gleichstellung des Unterlassens mit der Begehung, JuS 178 (1961). See also Hartwig Meyer-Bahlburg, Beitrag zur Erörterung der Unterlassungsdelikte 150 (1962).

14. See Silva Sánchez, El delito de omisión. Concepto y sistema (2d ed. 2003); see also Estudios sobre los delitos de omisión (2004). The best analysis of the Spanish doctrine (Gimbernat Ordeig, Luzón Peña, Silva Sánchez, Gracia Martín, among others) is, without a doubt, the extraordinary work by Jacobo Dopico Gómez-Aller, Omisión e injerencia en Derecho penal 523 (2006).

(i.e., they take on a meaning of attributing liability, not describing causality). In terms of proof, the legal expression "Whoever kills a human being" requires much more than the expression "whoever causes the death of a human being" but at the same time requires less, or, perhaps, something different than that. Such an expression aims, above all, as is the case in ordinary language, to mean "whoever may be ascribed as his own a process of causing the death of another." For these reasons, factual causation is not only an insufficient condition (legal or proximate causation is necessary as well), but sometimes not even a necessary condition for the imposition of criminal liability.[15] To prove this, one need only be reminded of the classic case of the mother who lets her newborn child die of starvation by not breast-feeding him. It is difficult to see why this cannot be called "killing" without breaking the laws of semantics. If this is the case, it follows that the causalist approach to criminal theory does not provide us with an adequate understanding of criminal offenses. As a result of these considerations, most scholars now reject this approach to problems of commission by omission.[16]

One could still claim, however, that although there are no semantic objections to concluding that the elements of result offenses in the Special Part may be committed by omission, there are structural reasons derived from the radical ontological difference between active commission and omission that militate against equating cases where harm is produced by a failure to act with those in which it is brought about by an act. Thus, some authors who agree with the proposition that the definitions of criminal offenses can be interpreted to mean that they can be committed by way of omissions have grounded their objections on an examination of the diverse structure of the objective element of the offense in both commission and omission. This has led some to point out the difficulty of including within the scope of the same definition of a result offense cases of causation (acts) and those of lack of causation (omissions). Another objection that has been raised has to do with the difficulty of extracting from a single definition of an offense two distinct conduct rules—one consisting in

15. This obviously does not mean that there can be effects without causes. It simply aims to show that the effect can be attributed (the causal process can be attributed) to persons other than those causing them empirically.

16. Hartwig Meyer-Bahlburg, Zur gesetzlichen Regelung der unechten Unterlassungsdelikte, in MSchrKrim 250–51 (1965).

an obligation (duty to act in cases of omissions) and one consisting in a prohibition (abstaining from causing harm in cases of acts).

In my opinion, the aforementioned position can also be disputed. Active commission and commission by omission appear as two forms of commission of an offense that, although ontologically dissimilar, are, from a normative point of view, identical in their substantive structure as ways of exerting control over sources of risk of harm. With regard to the issue of whether an obligation and a prohibition can be extracted from only one definition of a criminal offense (i.e., in sum, under just one decision rule), there also seems to be an adequate response. The conduct rules underlying the definitions of criminal offenses found in the Special Part are generally rules that provide for a prohibition of behaviors that create certain risks of harm to the legal goods[17] of others. Therefore, such risky behaviors may acquire a double ontological configuration. While the creation of this risk might be the product of the mismanagement of efficient causality (bodily movement), it might also be a consequence of the breach of a voluntarily assumed commitment to act as a protective barrier against certain dangers that might threaten another person's legal interests.[18] In the description of the latter form of risk creation, one can easily grasp the complex character of the problem of commission by omission. On the one hand, it refers to an omission, insomuch as it generates responsibility for the breach of a voluntarily assumed commitment to act. On the other hand, these cases are instances of commission, insofar as the sum of the assumption of the commitment to act as a protective barrier and its breach implies a mismanagement of a source of a risk that is identical to the one that arises when one actively creates the risk.[19] In short, instances

17. The concept of "legal good," "legal value," or "legal interest" (*Rechtsgut*, bien jurídico) is the continental counterpart to the harm principle.

18. See, e.g., Silva Sánchez, El delito de omisión, supra note 14, at 359. Joachim Vogel has argued quite differently, from the perspectives of conduct and decision rules. See Joachim Vogel, Norm und Pflicht bei den unechten Unterlassungsdelikten (1993). In contrast, Kurt Seelmann comes closer. Kurt Seelmann, 1 Nomos Kommentar zum Strafgesetzbuch § 13 ¶ 16 (Ulfrid Neumann & Wolfgang Schild eds., 1995).

19. The idea of the existence in cases of commission by omission of "control" (*Herrschaft*) is key in Schünemann's thoughts. See Bernd Schünemann, Grund und Grenzen der unechten Unterlassungsdelikte (1971). See also Bernd Schünemann, Sobre el estado actual de la dogmática de los delitos de omisión en Alemania (Silvina Bacigalupo trans.), in Omisión e imputación, supra note 12, at 11.

of commission by omission are cases of omissions, since there is no causal creation of risk in a physical or scientific sense, but rather a lack of control over a source of danger. However, due to the context in which the omission takes place (breach of a specific commitment to control that special risk), it also becomes an instance of commission because it leads to an active interference in another person's legal sphere.[20]

In light of the aforementioned considerations, I believe that there is no problem with punishing instances of commission by omission in the same manner as cases in which the harm is brought about by way of an affirmative act, as long as they share the same structural identity. Thus, defenders of the theory of naturalist causalism were on the right track when they attempted to ascertain the instances in which this identity between acts and omissions could be said to exist. However, the conception of criminal conduct that undergirded their theory was flawed. As I have attempted to demonstrate, the distinguishing feature of result crimes committed by affirmative acts does not lie in the fact that it is only in these instances that one can say that conduct has caused a result in a physical or scientific sense, but rather in the fact that we disapprove of such an active interference with the legal sphere of third parties, we disapprove of conduct that actively creates risks that jeopardize the legal goods of others and harms the autonomy of someone. In contrast, crimes of omission generally express a disapproval of the actor's decision to not intervene in instances in which such intervention was necessary in order to safeguard a legal good of a third party. Thus, the distinguishing feature of omission crimes lies in the idea of ties of solidarity between the omitter and the victim. As a result of this, true instances of commission by omission have a dual nature, for they share certain features with cases of commission and other

20. See Günther Jakobs, supra note 4, at 19–20 (where, resorting to Feuerbach's terminology, he points out that clearly "such obligations have nothing to do with solidarity, and therefore do not need any special legal basis, but are part of the citizen's "originary tie"). From a liberal standpoint, Feuerbach pointed out that the originary tie (*ursprüngliche Verbindlichkeit*) of the citizen with the state obliges him only to abstain from harming others, while positive duties would require a special legal basis (*besonderer Rechtsgrund*). In my opinion, every commission by omission is included in the "originary tie" (it is a matter of how one's own sphere of freedom is organized) and what lies outside of this is not commission by omission. Jakobs disagrees, admitting cases of "inauthentic" omission (within what he calls "*institutionelle Zuständigkeit*") beyond the originary tie, when someone breaches institutional duties to avoid harm.

features with cases of omission. What distinguishes instances of commission by omission from cases of active commission is the fact that there is no corporal movement resulting in a harmful physical causal chain. On the other hand, what distinguishes such cases from instances of simple omissions is that they bring about a complex situation where the perpetrator breaches a previously assumed obligation to function as a barrier against specific risks that threaten certain legal goods. The assumption of this obligation generates a sense of trust in the person who is potentially affected and in potential intervening third parties. If these requirements are met, the actor has control over a causal chain in a way that is substantively and structurally identical with the control that people have in cases of active commission. Thus, an actor who breaches such obligations by allowing behavior that poses a risk to the legal goods of the protected party to take place should be held liable for having caused the harm as if he had actively brought it about. Although such an actor does not actively cause the result, he exerts control over the relevant risks that endanger the party harmed in much the same way as the perpetrator of harm by way of active commission does.

It follows from the above-mentioned considerations that both cases of commission by omission and cases of active commission involve an interference with another's legal sphere. In fact, the perpetrator in cases of commission by omission first extends his sphere of organization to specific aspects of a third party's sphere of organization and then, when such aspects of the third party's life are considered (and they must be considered) to be part of "the affairs of the perpetrator," he does not adopt the necessary measures to protect the person harmed. Therefore, it is important to emphasize that punishment for crimes of commission by omission is not based on a violation of a duty of solidarity, but rather on a violation of the principle of autonomy. However, instances of commission by omission are similar to cases of simple omission to the extent that the offender does not bring about the causal chain leading to the result. The basis of control over a harmful course of events and over criminally relevant risks is not demonstrative of causation, but rather of a specific extension of one's sphere of organization over the legal sphere of organization of another being.

In sum, cases of *commissio per omissionem* are instances of true commission brought about by an omission (i.e., without actively causing the result). It can be said that these cases represent, *sit venia verbo*, authentic instances of commission (but not active) and inauthentic cases of omission. Once

the problem is conceived in this manner, the first task of theorists should be to distinguish between omissions that are substantively and structurally identical to cases of active commission (commission by omission) and those that are not. It is to this task that I now turn.

III. OMISSIONS NOT CLASSIFIED AS CRIMES OF COMMISSION

It is my contention that liability for a crime of commission by omission should only ensue if the omission is deemed to be structurally identical to an action. Thus, as far as the law is concerned, crimes of commission by omission should be understood as crimes of authentic commission. Furthermore, given that crimes of active commission require that the offender engage in conduct that demonstrates control over his sphere of organization, crimes of inauthentic omission similarly require conduct revealing control of the actor's own sphere of organization. This control over one's sphere of organization cannot be reduced to any special duty to act (or qualified duty of solidarity). If crimes of commission (either active commission or commission by omission) constitute cases in which criminal liability attaches as a result of the administration of one's sphere of organization (crimes of control), they cannot be turned into cases of criminal liability that attaches merely due to a breach of duty to act, regardless of the intensity of the duty.

Courts and criminal theorists have always accepted that there are some cases of omission that should be punished as if the actor had caused the result by active commission (e.g., the classic case of a mother who allows her newborn baby to die by not breast-feeding the child). However, the prevailing view stems from the notion that there are omissions to avert harm that deserve the same punishment as instances of active causation of the result, even if the omissive conduct is not structurally identical to an instance of active conduct. Before reaching that conclusion, however, one should first ask whether all cases of omission that result in harm as a consequence of a breach of a special duty to act should be punished just as if the harm had been brought about by an act. It is also worth asking whether these breaches of special duties to act that result in harm should be punished more severely than cases of simple omission consisting of a breach of a general duty to act (e.g., the general omission of the duty to

rescue punishable pursuant to Bad Samaritan legislation). Most commentators, and some legislatures, have attempted to resolve this problem by way of a combination of a relaxed concept of crimes of inauthentic omission (i.e., commission by omission) and a discretional mitigation of penalty. In my opinion, this is theoretically inconsistent and pragmatically problematic. It is theoretically inconsistent because it denies what it aims to maintain: that the omissions triggering liability in these cases are equivalent to instances of active commission.[21] From a pragmatic viewpoint it is problematic because it provides courts with an excuse to expand the scope of application of the doctrine of commission by omission beyond what seems to be adequate. The reason for this lies in the fact that the probability that courts will hold the defendant liable for a result offense in light of the doctrine of commission by omission increases as their discretion to mitigate punishment rises.[22]

The approach to cases of commission by omission that allows for a discretional mitigation of punishment conceives of crimes of inauthentic omission as breaches of a qualified (i.e., special) duty to act. The existence of a special (qualified) duty to act distinguishes these types of omissions from the traditional crimes of omission whose essence lies in the breach of a *general* duty to act. Under this framework, allowing the judge to discretionally mitigate punishment in cases of commission by omission makes sense, particularly when it is determined that the omissive conduct brought about the result in a way that is not structurally equivalent to a case of active commission.

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21. Wolfgang Schöne, Unterlassene Erfolgsabwendungen und Strafgesetz 339 (1974). The Project on the German Criminal Code of 1960 was already critical of affording a discretional mitigation of punishment in these cases because it was considered to be in contradiction to the clause of equivalence, since it entails that some crimes of inauthentic omission may be considered less serious than crimes of active commission. The Project on the German Criminal Code of 1960: Entwurf eines Strafgesetzbuches (StGB) E 1960 mit Begründung 119 (1960).

22. Schöne, supra note 21, at 341. See also Friedrich Stucke, Die Rechtswidrigkeit der Unterlassungsdelikte im nazionalsozialistischen Strafrecht 115 (Diss. iur. Kiel 1937): "If one gives to the judge the option of eventually avoiding the imposition of the most serious punishment, he will have far fewer objections to state that there was a legal duty to act [that generates liability for commission by omission] than if he were required to punish [such cases] in the same way as if they had been committed by way of an affirmative action . . . thus . . . it must be positively valued that the law provides for mitigation of punishment in cases of commission by omission."

This approach is in conflict with the conception of crimes of commission by omission defended here. If we start with a strict conception of crimes of commission by omission grounded on the existence of structural identity between the omissive conduct and a case of active omission, there is no reason to discretionally mitigate the punishment of the actor.

In a way, the approach to cases of commission by omission that allows for a discretional mitigation of punishment seems to confirm the fact that a bipartite system of punishable omissions that only distinguishes between cases of simple omissions and instances of commission by omission is not the most adequate. As a matter of fact, those that defend this approach do not deny that there are omissions that, although not structurally equivalent to cases of active commission, are more serious than the typical omission involving the breach of a general duty to act (such as in the general duty to provide aid in an emergency).[23] These types of omissions seem to be of intermediate gravity, for they are less serious than true cases of commission by omission and more serious than instances of simple omissions.

I believe that the best way to deal with the problem presented by these omissions of intermediate seriousness does not lie in allowing the judge to initially conclude that there is a "pseudo" equivalence between the actor's omissive conduct and cases of active commission and then permitting him to discretionally mitigate the punishment in light of the absence of total equivalence between the omission performed and instances of causation of harm by way of an affirmative act. This, as was stated above, seems to be an inconsistent position.

The best way to tackle these cases is by proposing the creation of an intermediate category of omissions that, being more serious than simple omissions, are not equivalent to cases of active commission. This intermediate category of omissions is not of sufficient seriousness to warrant charging the offender with the commission of a crime of harmful consequences as if he had caused the harm by way of affirmative conduct. In the

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23. See Claus Roxin, Política criminal y sistema del Derecho penal 45–47 (Francisco Muñoz Conde trans., 1972) (showing that there are several kinds of aggravated omissions and that commission by omission should be limited to cases of total equivalence between such cases and instances of active commission). See also Gunther Arzt, 1 Zur Garantenstellung beim unechten Unterlassungsdelikt JA 556 (1980) (acknowledging "stronger" and "weaker" positions of responsibility for guaranteeing the safety of a person (*Garantenstellungen*)).

past, I have called these types of omissions *qualified or aggravated omissions*, *omissions of intermediate seriousness*, or *crimes of omission of a guarantor's duty*. The need to identify this third category of omissions arises from a deeply felt, though undertheorized, intuition about the relative seriousness of different types of omissions.[24] Specifically regulating this type of intermediate omission in criminal codes would halt any possible trend towards expanding liability in borderline cases of commission by omission. At the same time, it would lead to acknowledging the undeniable fact that there are omissions for which the punishment of crimes of omission of a general duty to rescue is insufficient, whereas punishing them as full-fledged instances of commission by omission is disproportionate and lacks theoretical basis. Criminalizing omissions of intermediate seriousness as a qualified type of simple omission would allow us to bridge the gap between instances of simple omissions and cases of commission by omission. In my opinion, this is an important and necessary step that must be taken if we are to approach the problem of criminal omissions in a coherent and fair manner.[25]

Omissions of intermediate seriousness do not actively cause harm to a third party's autonomy, for the perpetrator does not have the same control over a potential source of danger as an actor in a case of active commission would have. Thus, these are ultimately cases that involve a breach of a qualified (special) duty of solidarity by a person who is particularly obligated to act in light of this duty. This is the case, for example, of omissions to rescue a spouse who is in danger, of helping a family member who is in need of aid, or of a public officer's failure to help someone in need, *as long as these actors have not extended the scope of their own sphere of organization to encompass*

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24. See Claus Roxin, Unterlassung, Vorsatz und Fahrlässigkeit, Versuch und Teilnahme im neuen Strafgesetzbuch, JuS 200 (1973). For Roxin, cases of omission that are more serious than simple ones, but not equivalent to instances of active commission, should be treated as aggravated violations of the omission to render aid when one has a duty to do so. However, given that this was not the path taken by the German legislators, he believes that the same consequences can be achieved by making use of the clause of discretional mitigation. More recently, see Seelmann, supra note 18, § 13, ¶¶ 17 & 116.

25. Those that I have called omissions of intermediate seriousness—and only those—are based on the idea of qualified "solidarity." That is why I believe the cases that *Jakobs* calls cases of "institutional liability" should not be included within the instances that trigger liability for commission by omission. Cf. Jakobs, supra note 4, at 30; see also Javier Sánchez-Vera, Delito de infracción de deber y participación delictiva (2002).

some specific risks that endanger the legal sphere of their spouse, relatives, etc. These situations are, on the one hand, different from those in which there is a real link between omission and active commission and, on the other, much more serious than those of a general omission of duty to rescue.

To summarize, I propose a tripartite classification of crimes of omission. On the one hand, there are crimes of omission that are identical to cases of active commission (for which we should reserve the term of commission by omission). These are based on the idea of responsibility for one's own organization or, in other words, on our responsibility for the way in which we control sources of risk. On the other hand, there are instances of simple crimes of omission in which we punish a breach of a duty of minimum solidarity toward our fellow citizens. Somewhere between these two categories lies a third type of aggravated crimes of omission that are based on liability for a breach of a duty of qualified solidarity (derived from specific institutions or relationships between people). However, it should be noted that this is not a rigid classificatory scheme in the mold of the classic bipartite approach to omissions. Rather, my threefold classification is based on the idea that differences between such omissions are a matter of degree. Thus, the difference between crimes of omission that imply a breach of a duty of minimum solidarity (simple omissions) and those that imply a breach of duty of qualified solidarity (omissions of intermediate seriousness) lies in the intensity of the institutional tie that binds offender and victim. The difference between the class of omissions identical to cases of active commission and the class of omissions of intermediate seriousness is one of degree as well. In the latter cases the perpetrator does not have the same control over the source of danger as an actor in a case of active commission would have. However, he does stand in a certain special relationship to either the source of danger or the endangered person. This relationship is also a matter of degree, for the seriousness of the omission is dependent on whether the conduct is seen as more or less similar to cases in which the actor has control over the source of the danger.

IV. THE AREA OF SOLIDARITY

When an actor engages in a crime of commission by omission in the strict manner in which it has been defined here, he has breached the *neminem laedere* principle. By virtue of the *neminem laedere* principle, each and

every one of us must organize our own legal sphere so that there is no resulting harm to others that can be attributed to the way in which we exercised control over our sphere of organization.[26] Beyond the aforementioned principle, one will only find the principle of *casum sentit dominus*,[27] which closes the gap between the liberal ideal of individuals that are fully in charge of their separate legal spheres (subject, of course, to their respect for the *neminem laedere* principle). By virtue of the principle of *casum sentit dominus*, we are all required to tolerate the harmful consequences of processes that injure us that are not objectively attributable to the acts of harmful organization of third parties.

The validity of the principle *casum sentit dominus* as a way of bridging some gaps in the liberal model of relationships between citizens has its exceptions. These exceptions arise from the existence of crimes of omission of the duty to rescue or to provide assistance[28] (requiring us to help someone in need even though we did not cause the dangerous situation), as well as from the existence of situations involving cases of justifiable aggressive necessity justification (requiring us to tolerate the harmful acts of third parties even if we played no part in creating the situation that led to their justifiable response). Thus, there are *duties of active solidarity* (obligations to help) *and also duties of passive solidarity* (obligations to sacrifice), which significantly alter the model derived from combining the principles of *neminem laedere* and *casum sentit dominus*.[29] In fact, by virtue of those duties, the person threatened by a dangerous causal chain must be rescued, as long as certain conditions are met, by third parties whose only link to the person in danger, in the most extreme of cases, would be the common condition of being human. In addition to this, in some cases a person is entitled to aggressively divert the causal chain that threatens him by endangering the interests of innocent third parties, who, if certain conditions are met, are required to tolerate this dangerous diversion of the causal chain. A breach of such duties of (active and

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26. Cf. Michael Pawlik, Unterlassene Hilfeleistung: Zuständigkeitsbegründung und systematische Struktur GA 360 (1995).

27. The most important Spanish text on these issues and their relationship with the idea of solidarity is that of Francisco Baldó Lavilla, Estado de necesidad y legítima defensa 43 (1994).

28. This duty can be qualified, as has already been pointed out.

29. But see Pawlik, supra note 26, at 363. For Pawlik, solidarity appears to be an individual psychological phenomenon and is not a source of legal-criminal duties.

passive)[30] solidarity gives rise to criminal liability. What is more, it is the only (and still quite unexplored) basis for criminal liability different from the organization of one's own legal sphere of liberty (active commission and commission by omission in their strictest sense).[31]

As mentioned above, solidarity as a basis for criminal liability admits degrees, which we have divided into two groups of crimes of omission, one involving a minimum degree of interpersonal solidarity and the other involving a special or qualified duty of solidarity. The latter arises when people are linked by special ties of greater intensity than the general ties that unite the citizenry. We might call these particularly intense links of solidarity "institutional ties." Since the intensity of these links is variable (ranging from cases that are close to instances of minimum solidarity among human beings to instances of maximum solidarity that verge on cases of responsibility for one's own organization), it must be made clear that the proposed tripartite classification is flexible and not etched in stone.

Finally, it is extremely important to highlight the dual nature of these duties of solidarity. Not only do they restrict the freedom of the person under obligation, but they also expand the freedom of the person rescued, for they free him of falling prey to certain dangerous causal chains. Since both positions are interchangeable, the punishment of the breach of duties of solidarity is compatible with a consensual conception of the criminal law based upon decisions made behind the veil of ignorance.[32] In light of this conception, the possibility of attaching legal significance to duties of solidarity within the criminal law seems to be currently accepted by the vast majority of continental scholars, even those who adopt Kantian perspectives.[33] This is the

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30. In fact, the duty of solidarity is breached both by not providing active rescue and by not tolerating the acts of self-help of the person affected by the situation of danger, subject to certain legally established limits (an important limit stems from the idea that self-sacrifice can't be required by the law).

31. See also Henrike Morgenstern, Unterlassene Hilfeleistung. Solidarität und Recht 136–37 (1997); Wolfgang Wohlers, Einschränkung des Notwehrrechts innerhalb sozialer Näheverhältnisse, in JZ 441 (1999).

32. See Morgenstern, supra note 31, at 81 (reaching this same conclusion when analysing Rawls's viewpoint); Wohlers, supra note 31, at 441 (same).

33. On their compatibility with the "harm principle," cf. Joel Feinberg, 1 The Moral Limits of the Criminal Law: Harm to Others 128 (1984): "My own intuition is that bad samaritan statutes are morally legitimate in principle, though there may be some practical difficulties in their implementation."

case, for example, of *Kühl*,[34] who, although noting the difficulty in maintaining the existence of a duty to rescue other persons in danger, concludes that even though for us solidarity is not a principle with clear legal consequences, it seems possible to consider that some duties of solidarity should be elevated to the category of legal duties without ignoring Kant's objections.

34. Kristian Kühl, Naturrechtliche Grenzen strafwürdigen Verhaltens, in Festschrift für G. Spendel zum 70. Geburtstag 92 (1992).