

THE OMISSION DILEMMA
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La responsabilité, fiction pratique

(Paul Valéry)

Omissions constitute a philosophical puzzle, not only for legal and moral theory but also from an ontological point of view. Omissions *per se* constitute an ontological problem. What kind of action or conduct is an omission? Can we claim that omitting to do something is a form of conduct? But an even harder problem is constituted by their causal role. Legal and moral claims do refer to omissions as having a causal role (think of medical activity and liability for the consequences of omissions)¹. Take for instance the Italian Penal Code, art. 40, par. 1: No one shall be punished if the harmful event is not a consequence of his action or omission. But the criteria for such legal and moral claims are not so clear. In what sense omissions occur and have a causal role? To put it differently, what are the truth-makers of statements about omissions? How could we ontologically account for the causal power of an omission, that is of a sort of negative entity?

We face a dilemma consisting in the *negative nature* of omissions on the one hand and in their *causal role* on the other. We may call it the Omission Dilemma (OD). It can be stated by the following three propositions:

- (1) Omissions are negative entities
- (2) Causation obtains only between positive entities
- (3) Omissions have a causal role.

If (1) and (2) are true, how could it be that (3) is also true? We have reasons for each of the propositions, but their conjunction cannot be true. It seems we are forced to abandon one of the three propositions; or at least we are forced to specify them in order to make them compatible. The first thing to be done is trying to specify (1). Are they mere absences? Or negative facts? Negative states of affairs? Negative events? Negative actions? Here we shall concentrate on the hypothesis that omissions are negative *actions*. The main reason for preferring this hypothesis is that omissions have a normative condition: there is no omission without a norm prescribing a certain action. So, OD shall be specified in OD' as follows:

- (1) Omissions are negative actions
- (2) Causation depends only on positive action
- (3) Omissions have a causal role.

Obviously the problem is not solved yet. How could it be that (3) is true if (1) and (2) are true? Now we have reasons for each of the three.

Concerning (3), it seems difficult to abandon it, given that our legal and moral claims do refer to omissions as having a causal role. Either such claims are senseless or there is a sense in which they have a causal role. Maybe (3) could be modified in order to account for the indirect or practical character of such a responsibility.

¹ “What is needed is a cogent defense of the ordinary recognition of omissions as efficacious conduct. That defense, in turn, will serve as philosophical ground for further theoretical refinement of our ordinary conception of responsible omissions.” (Sistare 1991: 302) Cf. e.g. Hart and Honoré 1985: 31, 38, 50-51, 59; Sistare 1989; Honoré 1999; Sartor 2005, § 16.3.

It seems very implausible to abandon (2), given that our intuitions about causation conceive of it as depending on positive entities having a causal power. How could it be that a consequence depends on something negative? *Ex nihilo, nihil fit* – the Latin maxim says.

It seems also implausible to abandon (1), given that our concept of omission refers to a ‘failing’ conduct². An omission could hardly be defined as a positive action, given that the failure to do something is the relevant character of it. Of the three propositions, the most difficult to abandon is (2). To solve OD, or at least OD, we should work on (1) and (3). A modification of (3) is a promising way to settle the dilemma, but from an ontological point of view something more shall be said about (1).

Let’s start from (1) then. As we said, it seems implausible to abandon this proposition, given that our concept of omission refers to an abstaining, or not-preventing, or ‘failing’, conduct. An omission could hardly be defined as a positive action, given that the failure to do something is the relevant character of it. But what does it mean to say that omissions are ‘negative entities’? It is plain they have a negative component, but it is not easy to specify it.

If omissions are negative actions, is such a negativity to be intended as logical or ontological? Do statements concerning omissions have truth-makers? Is it the case that there are in the world negative entities denoted by our concept of omission? Has this kind of negativity a purely logical nature or an ontological nature?

Three general hypotheses should be considered: (i) such a negativity is a purely logical construction; (ii) it is ontological consisting in the existence of negative entities; (iii) it is a logical construction but not a purely logical construction, being based on ontologically positive entities.

The third hypothesis is the most promising, since it permits the articulation of some logical, ontological and practical claims, avoiding the unpalatable consequences of the first and second hypotheses, namely that an omission is in the first case a purely logical construction comparable to purely fictional constructions and in the second that there exist negative entities as such.

If (iii) is true, then the ontologically positive entities on which an omission is constructed should be specified. An hypothesis to be considered is the one referring to an *intentional state*, namely the mental state consisting in the intention of not contrasting a developing causal chain that could be judged as probably leading to an event that the subject has the duty to contrast. There are problems concerning the standards of predictability and provability to be applied. But here our point is different: we try to throw some light on the ontological basis of an omissive conduct, and then on its causal role. Now the hypothesis to be judged refers to a mental state of the omitting subject. In this sense, omissions are *external* negative actions but *internal* positive actions. This means that they are not defined by a bodily action; rather, by an intentional state³. This meets, on the one hand, our concept of omission as failure to do something and, on the other, our intuitions concerning the responsibility for an omissive conduct. Omissions have a relevant negative nature but do not consist in negative entities, being such in virtue of an intentional state.

It could be objected that there are omissions that do not require a specific intention on the part of the omitting subject. Having the intention of not doing *p* is different from not having the intention of doing *p*, but the latter can fall as well under the concept of omission. It is true strictly speaking, but usually such cases require the intention of doing something the omission is a consequence of.

There is another hypothesis concerning the positive entities an omission is based on: the actions performed by the subject instead of the action he should have performed. Those actions, it might be claimed, are truth-makers of the statements on omissions. Perhaps we might say that such

² Of course, there is a difference between the performance of a negative action and the non-performance of an action. But the latter seems to be a too weak criterion to define omissions. How could it be that the non-performance of an action has a causal role?

³ On prior intentions and intentions in action, or future-directed intentions and present-directed intentions, cf. Bratman 1987 and Searle 2001. On intentions in the law, see Naffine 2001.

statements have as truth-makers the inclusive disjunction of the relevant intentional state and the actions performed instead of the action required. But in our opinion the focus shall be put on the intentional state, given that an omission depends on there being a norm prescribing a certain action and that the liability for the consequences of the conduct depends on the intentionality of it. Take again the Italian Penal Code, art. 42, par. 1: No one shall be punished for an action or omission that wasn't performed with consciousness and will.

Such an account, however, does not answer the problem of their causal role. To say that an omission is an external negative action and internal positive action does not explain in what sense it has a causal role.

Let's talk about (2) then. It seems very implausible to abandon (2), given that our intuitions about causation conceive of it as depending on positive entities having a causal power⁴. How could it be that a consequence depends on something negative? One strategy to answer this question consists in adopting a conditionalist account of causation⁵. If a cause is just a set of conditions, there is room for positive and negative conditions. In this sense an omission is a negative condition of an event. The legal theory of the condition *sine qua non* is the legal version of the conditionalist account of causation. In these terms a counterfactual theory of omissions could be provided: an omission is a negative condition of an event if the obtaining of the correspondent positive condition would have impeded the event. The counterfactual judgment on the relation between omission and event is justified if it is based on a general rule of experience or a scientific law, universal or statistical. This strategy obviously depends on a deductive-nomological model of explanation.

Let's take an example from the Italian penal law. A recent decision of the *Sezioni Unite Penali* of the *Corte di Cassazione* (10/7-11/9/2002, n. 30328) concerns the medical liability for an omissive conduct. Such a decision was also the occasion for settling an interpretative contrast originated by different precedent decisions. The contrast was on the criteria and standards of proof required to determine a legal responsibility (liability) for an omissive conduct. For a first interpretation of the relevant legal principles, there is legal responsibility when it can be claimed that a positive medical action would have had 'serious and considerable probabilities of being successful'. For a second interpretation, there is responsibility when it can be proved that a positive medical action would have impeded the event 'with an high degree of probability, next to certainty'. Obviously both interpretations depend on a counterfactual judgment, but the second is stronger than the first.

The principles stated by the decision to settle the contrast are the following:

- a) the counterfactual judgment on the causal relation between omission and event is justified 'on the basis of a general rule of experience or a scientific law – universal or statistical';
- b) from the coefficient of probability stated by a statistical law it is not permitted to 'automatically deduce' the confirmation of the hypothesis about the causal relation, since the judge has to verify it 'in the concrete case, on the basis of the factual circumstances and the evidence';
- c) the hypothesis shall be rejected if the evidence is insufficient, contradictory or uncertain.

Now, the third principle is obviously correct but there is a strong tension between the first and the second, despite the fact that the decision presents them as perfectly compatible. The epistemological difficulty is the following: how could we verify a counterfactual hypothesis about a concrete case? By definition, consisting in a supposition about a fact that did not occur, we cannot verify it.

In order to determine the relevant counterfactual judgment, the decision we are examining refers to the criterion called of the 'double formula': 1) human conduct is a necessary condition of the event if 'once it is mentally eliminated from the set of the facts that did occur, the event would

⁴ Notice however that some philosophers talk about causation by omission. See Lewis 1986: 159-213, 241-69. Cf. Menzies 1996, Dowe 2001, Thomson 2003.

⁵ See the well-known Mackie 1974.

not have occurred'; 2) human conduct is not a necessary condition of the event if 'once it is mentally eliminated with the same procedure, the event would have occurred all the same'. Now, if the criterion for 'verifying' a counterfactual hypothesis is such a one, it should be judged as completely unsatisfactory. In the first place, the psychological criterion of the 'mental elimination' has a little of reliability and empirical relevancy. In fact the decision specifies that the fact should be an instance of a scientific law, universal or statistical (according to principle a) above). This condition has undoubtedly a stronger empirical relevancy and a higher epistemic reliability. The decision claims that the 'conditionalistic scheme' of the double formula integrated with the criterion of the instantiation of a scientific law is utterly satisfying. This could be admitted (passing over the psychological interpretation of the 'conditionalistic scheme') but then it faces another problem: the problem of proving that *in the concrete case* the omission was causally responsible (as principle b) above requires). In particular, the decision we refer to provides a detailed description of the case in hand, claiming that the evidential basis justifies an ascription of responsibility to the omissive conduct. This sounds plausible, but the epistemological problem is left untouched: even providing a very detailed description, could we provide a proof of the omissive conduct's being responsible for the *concrete case*? How could we verify a negative action and moreover verify that it caused a positive event? We could suspect that the understandable intention of the court (to restrict the first interpretation above) determines in the end a set of conditions which is too strict and epistemologically unrealistic. Of the three principles stated by the court, the first and the third are undoubtedly acceptable but the second is not insofar as it requires to verify something that did not occur. We can and we ought justify our counterfactual judgments on the basis of scientific laws and high coefficients of probability, but literally we cannot verify something which is contrary to facts.

Perhaps we can distinguish two interpretations of principle b) stated by the court: a strict one requiring that it shall be verified that the omission is causally responsible of the event, and a less strict one requiring that it shall be verified that the case in hand is covered by a scientific law justifying a counterfactual judgment. The strict interpretation demands too much. The less strict runs the risk of dissolving the pretended purport of the principle.

Moreover, a conditionalist account of causation does not go without objections. There are cases in which a condition *sine qua non* is not a causally relevant factor and cases where a causally relevant factor is not a condition *sine qua non*. Plainly, to be a condition *sine qua non* of some event on some given occasion and to be causally connected with it are not the same thing.

Thus, a more ontologically-oriented account of causation seems to be needed; but such an account makes difficult to understand how an omission could have a causal role. To resume: a solution to the dilemma is that of extending the causal language, extending our causal concepts⁶; extending the criteria for (2), in order to accept (3). In this sense, a conditionalist scheme plus a nomological criterion seems to modify (2) so as to make (3) acceptable, but such a modification implies some epistemological problems and goes not without objections from the point of view of a theory of causation. We have no theory of causation to put forward to solve the dilemma. Our claim is that an ontologically-oriented theory of causation seems to be needed, but we shall leave proposition (2) unspecified, believing that its vagueness is compatible with any theory of causation capable of avoiding the drawbacks of a conditionalist one.

Let's talk about (3) now. How could it be that a negative entity (an omission) has a causal role? In fact, our legal doctrine is in general very prudent about the ontological status of omissions

⁶ "On the one hand it is perfectly common and intelligible in ordinary life to speak of static conditions or negative events as causes: there is no convenient substitute for statements that the lack of rain was the cause of the failure of the corn crop, the icy condition of the road was the cause of the accident, the failure of the signalman to pull the lever was the cause of the train smash. On the other hand the theorist, when he attempts to analyse the notion of cause, is haunted by the sense that since these ways of speaking diverge from the paradigm where a cause is an event or force, they must be somehow improper. The corrective is to see that in spite of differences between these cases and the simple paradigms, the very real analogies are enough to justify the extension of causal language to them." (Hart and Honoré 1985: 31)

and their causal role; it is generally preferred to claim they constitute a form of 'normative causality'.

We said that omissions may be conceived of as external negative actions but internal positive actions. Remember that once we have answered the problem of their ontological status, the OD is not solved, because we have to answer the problem of their causal role: are they mere abstentions from interfering with an independent causal chain or genuine causal factors of the relevant chain? The first answer leads to the idea that their causal role consists in an indirect or merely normative role. The second to the stronger idea that they have a direct role in the producing of the event. Our account of their ontological status and our intuitions about causation (proposition (2) of the dilemma) tend to endorse the first answer. So, it seems difficult to abandon (3), but (3) could be modified in order to account for the indirect, or normative, character of such a responsibility.

It seems true it is a sort of *indirect* causal responsibility. For someone not positively acting (when he has a duty to act) is not held responsible for the consequences of his conduct in a strict sense but for the consequences of another causal chain he had the possibility to contrast.

Moreover it could be claimed it is just a sort of *normative* responsibility, without a corresponding ontological role. This is a widely shared opinion among legal theorists. Now it is absolutely true that an omission has a normative condition or component: there is no omission without a corresponding legal or moral norm prescribing a certain action. But it is one thing to recognize this component and another to claim that the ontological component of an omission can be reduced to its normative component. If such a reduction would be made, it would be impossible to explain the difference between the case in which the subject had the possibility to contrast the causal chain and the case in which he hadn't. Our intuition is the following: there should be a relevant ontological base justifying a norm an omission depends on. The reduction of the ontological component of an omission to its normative component forbids a justification of the norm. In this sense, the idea of an indirect responsibility is a better explanation of their causal responsibility than the idea of a mere normative responsibility.

Thus, a tentative solution of the omission dilemma could be the following:

- (1) Omissions are external negative actions but internal positive actions
- (2) Causation depends on positive action
- (3) Omissions have an indirect causal role.

This is a tentative answer, needing a richer discussion of the many problems involved in the three propositions.

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