Chapter 9

ACTUS REUS

§ 9.01 ACTUS REUS: GENERAL PRINCIPLES

[A] Definition

Generally speaking, crimes have two components: the “actus reus,” the physical or external portion of the crime; and the “mens rea,” the mental or internal feature. The concept of “actus reus” is the focus of this chapter.

The term “actus reus” reportedly was not generally used by scholars in criminal law treatises prior to the twentieth century, but it has found currency in modern Anglo-American jurisprudence. Unfortunately, there is no single accepted definition.

As used in this Text, the term “actus reus” generally includes three ingredients of a crime, which can be encapsulated in a single sentence: The actus reus of an offense consists of (1) a voluntary act; (2) that causes; (3) social harm. For example, if A picks up a knife and stabs B, killing B, the actus reus of a criminal homicide has occurred: A has performed a voluntary act (stabbing B) that caused B’s death (the social harm). As is developed in this chapter, “voluntary act” and “social harm” are legal terms of art that require special attention. The element of causation, which links the defendant’s voluntary act to the social harm, is discussed in Chapter 14.


3 In exceptional circumstances, failure to perform an act—an omission—may serve as the basis for criminal responsibility. See §§ 9.06-08, infra.

4 Eser, Note 1, supra, at 386.

5 Warning: Because “actus reus” has no universally accepted meaning, some courts and commentators use the term more narrowly than is suggested in the text, simply to describe the defendant’s conduct (in the example given, the voluntary acts of picking up the knife and stabbing B) or the result of that conduct (the social harm of B’s death), rather than a combination thereof.
B] Punishing Thoughts: Why Not?

Suppose that two people separately want the President dead: A idly wishes that the President were dead; B intends to kill the President and devises a method to commit the offense. If A actually kills the President, a society must plausibly punish all three persons. A would be punished for her morally wrongful thoughts; B would be punished for devising her plan; and C would not be punished for acting on those intentions. In Anglo-American criminal law, however, only C is punishable. The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts. But currently, the legal requirements of conduct resulting in harm — the actus reus component of a crime — insists that A and B, although morally blameworthy, are not criminally responsible for their thoughts.

Reasons of pragmatism and principle justify the noncriminalization of mere thoughts. On a pragmatic level, the requirement of conduct is “rooted in skepticism about the ability to know what goes on in the minds of men.” We often have difficulty accurately reconstructing our own thoughts, much less reading into another person’s mind.

But, suppose that we could read another’s mind? Suppose that the government implanted an electrode in our infant’s brain or used “precogs” to read our thoughts or see the future with clarity. Even if this were possible, punishment for thoughts alone would be objectionable to persons living in a free society. First, virtually all people, most of whom are entirely law-abiding, occasionally hope (like A) that some harm will befall another. A society that would invade mental privacy in this manner to punish for idle thoughts would be an intolerable place to live.

But, what about B? Many people have momentary antisocial thoughts, but few actually devise a plan of criminal action. On its face, the rule that allows B to escape punishment seems counter-utilitarian. For various reasons, however, B’s punishment would be unacceptable. First, practically speaking, there is no way to distinguish between desires of the disordered variety and fixed intentions that clearly pose a real threat to society.

6 United States v. Muzi, 676 F.2d 919, 920 (2d Cir. 1982); see Proctor v. State, 176 Ga. 771, 772 (Okla. Crim. Ct. App. 1913) (“Guilty intention, unaccompanied with an overt act . . . [is not] the subject of punishment”) (quoting Ex Parte Smith, 27 W. 628 (Mo. 1895)). The English Statute of 1561 punished “compassing” (desiring) the death of the King, but even this statute was interpreted to require an overt act. George Fletcher, Rethinking Criminal Law 207–208 (1978).


9 J. James Fitzjames Stephen, A History of the Criminal Law in England 78 (1888) (“[I]f the men were not so restricted it would be utterly intolerable; all mankind would be criminals, and most of their lives would be passed in trying and punishing each other . . .”).

[B] The “Act”

For purposes of the actus reus requirement, an “act” is, simply, a bodily movement, a muscular contraction.17 A person “acts” when she pulls the trigger of a gun, raises her arm, blinks her eyes, turns the ignition key in an automobile, or simply puts one leg in the front of the other to walk. Understand this way, an act involves physical, although not necessarily visible, behavior. For example, the muscular contractions involved in talking—the movements of the vocal cords and tongue—constitute “acts” for present purposes. However, the term “act” excludes the internal mental processes of thinking about, or of developing an intention to do, a physical act (e.g., “mental acts”).

Three aspects of the term “act” should be noted here. First, sometimes there can be bodily movement, but really no “act” at all by the person whose body has moved. For example, if A grabs B’s arm and swings it into C’s body, B has not acted (voluntarily or involuntarily), although her arm has moved. In this case, B’s arm was simply propelled, like a leaf blown by the wind, as the result of A’s act of grabbing her arm.

Second, the term “act” does not apply to the results of a person’s bodily movements. For example, suppose that D, intending to kill V, places dynamite around V’s house, where V is asleep, and then activates a detonator that causes an explosion, killing V. In a criminal homicide prosecution, the pertinent acts by D are the positioning of the dynamite around V’s house and her activation of the detonator. The term “act,” however, does not include the result of D’s conduct, i.e., V’s death. The latter constitutes the “social harm” element of the actus reus.18

Third, some courts and many scholars contend that, to be an “act”—or, more specifically, a human act—the muscular contraction must itself be voluntarily performed (as defined below). As one court put it, “[a]n [involuntary] ‘act’ . . . is in reality no act at all. It is merely a physical event . . . .”19 Most modern lawyers and the Model Penal Code,20 however, use the term “act” as it is defined in this subsection, as a bodily movement that can be voluntarily or involuntarily performed, as these terms are discussed immediately below.

[C] “Voluntary”

Unfortunately, the word “voluntary” is used by criminal lawyers in two different senses. The two usages of the term are often confused.

[1] Broad Meaning: In the Context of Defenses

The terms “voluntary” and “involuntary” are often used in discussing criminal law defenses to express the general conclusion that the defendant possessed or lacked sufficient free will to be blamed for her conduct.21 Thus, it is sometimes said that a person who acted under duress or as the result of a mental disorder acted “involuntarily.” This simply means that because the actor faced an extremely hard choice (duress) or was irrational (insane), she does not deserve to be punished for her actions. This is not how the term is used in the context of the actus reus requirement.

[2] Narrow Meaning: In the Context of the Actus Reus

The term “voluntary” has a much narrower meaning when used to determine whether the actus reus of an offense has occurred. Nineteenth century scholar John Austin defined a “voluntary act” in this sense as a “movement of the body which follows our volition.”22 Similarly, Holmes described it as a “willed” contraction of a muscle.23

What did Austin mean by “volition,” or Holmes by a “willed” act? Austin posited a view of human behavior, in which a person consciously decides to move a part of the body, and then that part of the body “invariably and immediately [follows] our wishes or desires for those same movements.”24 Applying this definition, nearly all human acts are voluntary,25 and thus it may be more useful to give examples of involuntary acts. Examples of these include reflexive actions, spasms, epileptic seizures, and bodily movements while the actor is unconscious.26

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17 Oliver Wendell Holmes, The Common Law 54 (1881).
18 See § 9.10, infra.
20 See § 9.66, infra.
21 Fletcher, Note 6, supra, at 803.
22 1 John Austin, Lectures on Jurisprudence 426 (3d ed. 1869).
23 Holmes, Note 17, supra, at 54.
24 Austin, Note 22, supra, at 426 (emphasis omitted).
25 Notice that if X points a gun at D and threatens to kill her unless she shoots V, D’s coerced act of pulling the trigger of a gun to shoot V is “voluntary” in the Austinian sense, although it is arguably “involuntary” in the broader sense described in subsection [1], supra.
26 The claim of unconsciousness is sometimes described as “automation.”

acts); State v. Commonwealth, 101 Ky. 415 (1902) (voluntary); State v. State, 896 P.2d 543 (Wyo. 1995) (id.).
28 Denno, Note 13, supra, at 926 (“Some of the most powerful research in neuroscience suggests that the unconscious may be in charge of how human beings make decisions about willed movements, such as choosing when to flex a wrist, bend a figure, or . . . even to fire a gun.”).
plausibly defendant of fear or shock, rather than malice.

How, then, does one go about imposing causation in omission cases? As developed in Chapter 14, a person is not responsible for an omission unless she causes the harm in question. Some philosophers argue that a *false* act is never the cause of a consequence—she can nothing be the cause of something—but even if this claim is false, line-drawing problems arise. It is easy to determine that the victim, Beardsley caused her death by ingesting poison; it is far more difficult to say that Beardsley’s failure to secure medical care for his paramedic caused her death. She might have died from the poison despite his best efforts. Similarly, even if one of Genovese’s neighbors had called the police, can we know whether he would have come in time? For that matter, were they a cause of her death isn’t everyone in the world a cause, since somebody helped her?

The line-drawing problems raise more than purely pragmatic concerns. It is difficult to determine a non-action’s state or degree of contribution to resulting harm, there is an enhanched risk that a jury will incorrectly resolve these issues. That is, they might find an intent to cause harm when none was present, or they may attach causal responsibility where none existed. Thus, the risk of punishing a legally innocent person is substantially increased.

A general rule that persons are criminally responsible for their omissions could also have an undesired counter-utilitarian effect. People sometimes misconstrue what to observe: an apparent wrongdoer might really be an undercover police officer performing her lawful duties; the good samaritan intervener may only be frustrating a lawful arrest. Additionally, intervenors often cause injuries to themselves or others by their intervention. A bystander, helping out of a sense of criminal responsibility, the stand by, might provide poor medical assistance or fire a weapon carelessly, causing more harm than she had done originally.

Defenders of the general rule also reject the moral claim that omissions and acts are morally symmetrical. Causing harm and allowing it to occur are not morally similar. “[A] doctrine of general liability for not-doings would result in a system that is largely insensitive to ideas of individual responsibility and accountability.” The man who witnessed Kitty Genovese is the person who harmed her. Those who figuratively stood by and did nothing did not her. “[Without an act/omission doctrine like the one our law system presently recognizes, this truth would be valueless.”

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§ 9.07 OMISSIONS: EXCEPTIONS TO THE NO-LIABILITY RULE


[1] Overview

In the limited circumstances set out in subsection [2] below, liability for a criminal offense may be predicated on an omission, rather than on a voluntary act. Such cases involve what may be termed “commission by omission” liability. Put more fully, a defendant’s omission of a common law duty to act, assuming that she was physically capable of performing the act, serves as a legal substitute for a voluntary act. If the remaining elements of the charged offense are proven (that is, the omission caused the social harm of the offense with the requisite *mens rea*), the defendant may be convicted of the crime. Thus, for example, courts have upheld criminal homicide convictions based on omissions. A person with a legal duty to act who negligently fails to provide needed care to someone in great medical distress may be guilty of manslaughter if the person dies as a result of the omission. A person who has a legal duty to report a fire may be convicted of some form of criminal homicide if her failure to report the fire recklessly or negligently results in
A parent who has a duty to act may be convicted of child or sexual abuse if she fails to prevent such harm from being committed by another person.106

Punishment for “commission by omission,” even if otherwise defensible, has been criticized by a few scholars107 as violative of the legality principle. That is, the definitions of most criminal offenses contain verbs such as “kill,” “burn,” or “break and enter.” It is questionable whether, for example, a person who stands by passively while another dies, even if she has a duty to intervene, can be said to have “killed” the other person, as distinguished from “permitting” such a death to occur. Nonetheless, courts rarely bar convictions on legality or statutory construction grounds.

We turn now to those uncommon circumstances in which a person does have a common law duty to act.

[2] When There Is a Duty to Act

[a] Status Relationship

A person may have a common law duty to act to prevent harm to another if she stands in a special status relationship to the person in peril. Such a relationship is usually founded on the dependence of one party on the other, or on their interdependence. Such status relationships include: parents to their minor children;108 married couples to one another;109 and masters to their servants.110 For example, a mother who allows her children to remain with their father, whom she knows is abusing them, is herself guilty of child abuse by her omission;111 and, a parent’s failure to seek medical attention for her seriously ill child, which omission results in the child’s death, will support a conviction for criminal homicide, assuming that the parent acted with the requisite mens rea.112

[b] Contractual Obligation

A duty to act may be created by implied or express contract. For example, one who breaches an agreement to house, feed, and provide medical care to an infirm stranger,113 or to care for one’s mentally and physically disabled parent,114 may be held criminally responsible for an ensuing death. Similarly, a babysitter owes an implied contractual duty to protect her ward, and a doctor has a duty to provide ordinary medical care for her patient.

[c] Omissions Following an Act

In some circumstances an act, followed by an omission, will result in criminal responsibility for the omission, even when there is no liability for the original act.

[i] Creation of a Risk

A person who wrongfully harms another or another’s property, or who wrongfully places a person or her property in jeopardy of harm, has a common law duty to aid the injured or endangered party. If she breaches her duty in this regard, she may be held criminally responsible for the harm arising from the omission. For example, if D negligently injures V, D has a common law duty to render aid to V. If D fails to do so, and V dies as the result of the omission, D may be held criminally responsible for V’s death, even if she is not guilty of any offense regarding the initial injuries.115

Although there is considerably less case law in this regard, a duty to act could arise from non-culpable risk-creation. For example, a few courts have held that one who accidentally starts a house fire, and who, therefore, is free of liability for the initial blaze, may be convicted of arson if (with the requisite wrongful state of mind) she fails to act to extinguish the fire or prevent damage to property therein.116 There is a split of authority regarding whether one who justifiably shoots an aggressor in self-defense, seriously wounding the latter, has any subsequent duty to obtain medical aid for the wounded aggressor.117

[ii] Voluntary Assistance

One who voluntarily commences assistance to another in jeopardy has a duty to continue to provide aid, at least if a subsequent omission would put the victim in a worse position than if the actor had not initiated help. This rule applies even if the omitter had no initial responsibility to rescue the victim.

For example, a well-meaning individual who takes a sick person into her home, but then fails to provide critical care, may be held responsible for a death arising from this failure. By letting the victim rely on her for care, and by abandoning the victim so that others are unaware of her deteriorating condition, the defendant has made matters worse than if she had never become involved.118

108 E.g., Fletcher, Note, supra, at 1448-49.
109 Jones v. United States, 305 F.2d 397 (D.C. Cir. 1962).
110 State v. Smith, 65 Me. 347 (1876); see also State ex rel. Kuntz v. Thirteenth Judicial District, 966 P.2d 853 (Mont. 2000) (unmarried couple who lived together for approximately six years owed each other the same protective duty as exists between spouses).
114 Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985).
115 See also Jones v. State, 42 N.E.2d 1017 (Ind. 1942) (D raped V; emotionally distraught, V jumped or fell into a creek; D did not attempt to rescue V, although he was aware of her peril; D was convicted of murder for V’s death resulting from his omission).
118 E.g., People v. Oliver, 210 Cal. App. 3d 135 (Ct. App. 1989) (O permitted V, who was
Statutory Duty (Including “Bad Samaritan” Laws)\textsuperscript{119}

Independent of any existing common law duty to act, a duty to act may statutorily be imposed. Examples of such statutes are those that require: a person to pay taxes on earned income;\textsuperscript{120} a driver of a motor vehicle involved in an accident to stop her car at the scene;\textsuperscript{121} and parents to provide food and shelter to their minor children.\textsuperscript{122} Failure to satisfy a statutory duty (assuming, again, that the actor had the capacity to perform the duty and failed to do so with the requisite \textit{mens rea}) constitutes a violation of a statutory “duty to act” offense.

Especially controversial in this regard are “Bad Samaritan” laws, which have been adopted in a few states. These statutes make it an offense, usually a misdemeanor, for a person not to come to the aid of a stranger in peril under specified circumstances. For example, a Vermont statute provides that it is an offense for a bystander to fail to give “reasonable assistance” to another person whom she “knows . . . is exposed to grave physical harm,” if such aid “can be rendered without danger or peril” to the bystander, “unless that assistance or care is being provided by others.”\textsuperscript{123}

Even if such offenses are otherwise desirable, they are difficult to enforce fairly. It is unclear, for example, who (if anyone) would have been guilty of such an offense in the Kitty Genovese tragedy.\textsuperscript{124} How many of the persons awakened by the cries for help “knew” the nature of her plight? What would have constituted “reasonable assistance”? Suppose a young woman, awakened by the cries, lacked a telephone to call the police: Would she have been obligated to do anything, such as scream out the window to the assailer to stop? Is there a risk in this action, i.e., that the attacker might come to her premises and attack her? And, would any of the thirty-eight neighbors have known, as statutorily required, that assistance (e.g., a phone call to the police) had not already been provided?

Critics of Bad Samaritan laws assert that either nobody can fairly be prosecuted under them (thus rendering them of no practical benefit) or a prosecutor might arbitrarily single out one person for prosecution as an object lesson, even though that individual was not more culpable than the other bystanders not prosecuted. There is also the risk that juries, inflamed by the facts, will convict a bystander even though her guilt is legally doubtful.

\textbf{\textsection 9.09 MEDICAL “OMISSIONS”: A SPECIAL PROBLEM}

Consider this novel. Patient, $P$, is in an irreversible coma, kept alive by use of a respirator. $P$'s doctor, concludes that $P$'s medical treatment would be useless and thus turns off the respirator, reasoning that the effect will be to cause $P$'s imminent death, which occurs.

\textbf{[A] Act or Omission?}

A way to analyze the scenario presented above is as follows: $D$ committed a voluntary act by turning off the respirator; this conduct caused $P$'s death, thereby creating a death, which occurs. As there is no recognized legal defense for euthanasia, $D$ is guilty of murder.

Is it self-evident, however, that $D$ is performing an act, rather than omitting conduct, when she turns off a respirator on a comatose patient? Literally, of course, $D$'s action does include the voluntary act of turning the plug or turning off the switch on the respirator. But, does this scenario differ significantly from one in which $D$ fails to turn the respirator on in the first

\textsuperscript{121} E.g., Cal. Vehicle Code § 20001 (Deering 2008).
\textsuperscript{122} E.g., Cal. Penal Code § 270 (Deering 2008).
\textsuperscript{124} See § 9.06[A], supra.
\textsuperscript{125} Model Penal Code § 2.01(1).
\textsuperscript{126} E.g., Model Penal Code § 220.1(3) (failure to control or report a dangerous fire).
\textsuperscript{127} Model Penal Code § 2.01(3)(b).
\textsuperscript{128} American Law Institute, Comment to § 2.01, at 222-23.