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Chapter 9

ACTUS REUS

§ 9.01 *ACTUS REUS*: GENERAL PRINCIPLES[1]

[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,[2] 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;[3] (2) that causes; (3) social harm.[4] 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.[5]

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[1] See generally Michael Moore, Act and Crime (1993); Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?* in Action and Value in Criminal Law 187 (Stephen Shute, John Gardner, & Jeremy Horder eds., 1993); Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1965); Exchange, *The Actus Reus Requirement*, Crim. Just. Ethics, Winter/Spring 1991, at 11–26; A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403 (1998).

[2] Jerome Hall, General Principles of Criminal Law 222 (2nd ed. 1960).

[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 three people separately want the President dead: *A* idly wishes that the President were dead; *B* intends to kill the President and devises a meticulous plan to commit the offense; *C* actually kills the President. A society might 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 be punished for acting out his intentions. In Anglo-American criminal law, however, only *C* is punishable. "[t]he reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts."[6] Put differently, the legal requirement of conduct resulting in harm—the *actus reus* component of a crime—insures that *A* and *B*, although morally culpable, are not criminally responsible for their thoughts.

Reasons of pragmatism and principle justify the non-criminalization of mere thoughts. On a pragmatic level, the requirement of conduct is "[r]ooted in skepticism about the ability . . . to know what passes through the minds of men."[7] We often have difficulty accurately reconstructing our own thoughts, much less "reading" another person's mind.

But, suppose that we *could* read another's mind? Suppose that the government implanted an electrode in every infant's brain or used "precogs"[8] 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 terrible 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, a 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 daydream variety and fixed intentions that truly pose a real threat to society."[9]

[6] United States v. Muzii, 676 F.2d 919, 920 (2d Cir. 1982); see Proctor v. State, 176 P. 771, 772 (Okla. Crim. Ct. App. 1918) ("Guilty intention, unaccompanied with an overt act . . . [is not] the subject of punishment") (quoting Ex Parte Smith, 35 S.W. 628 (Mo. 1896)). The English Statute of 1351 punished "compassing [devising] the death of the King," but even this statute was interpreted to require an overt act. George Fletcher, Rethinking Criminal Law 207–13 (1978).

[7] Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405 (1959).

[8] See Philip K. Dick, *The Minority Report*, *in* The Minority Report and Other Classic Stories (2002); Minority Report (Dream Works 2002) (movie directed by Steven Spielberg based on the short story). For more on the criminal law implications of the world described by Dick, see Robert Batey, *Minority Report and the Law of Attempts*, 1 OHIO ST. J. CRIM. L. 689 (2004).

[9] 2 James Fitzjames Stephen, A History of the Criminal Law in England 78 (1883) ("If [the law] 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 . . . .").

[10] Powell v. Texas, 392 U.S. 514, 543 (1968) (Black & Harlan, JJ., concurring).

Second, in a society that values individual freedom, the use of the criminal law should be limited to situations in which harm is seriously threatened, and not simply "to punish thoughts and perfect character."[11] Respect for individual liberties, therefore, requires that the criminal law be exercised only to punish conduct.

Finally, and perhaps most basically, the *actus reus* requirement—the refusal to punish for thoughts alone—is premised on the retributive belief that it is morally wrong to punish people for unacted-upon intentions. Retributive theory justifies punishment of those who freely choose to harm others; the corollary of this is that society must give each person the breathing space, i.e., the opportunity, to choose to desist from wrongful activity. To a retributivist, voluntary conduct serves as a minimum precondition to the infliction of punishment.[12]

§ 9.02 VOLUNTARY ACT: GENERAL PRINCIPLES[13]

[A] General Rule

Subject to a few limited and controversial exceptions,[14] a person is not guilty of a crime unless her conduct includes a voluntary act. Few statutes defining criminal offenses expressly provide for this requirement. Nonetheless, the voluntary act requirement has common law support, modern courts usually treat it as an implicit element of criminal statutes,[15] and an increasing number of states now include a general statutory provision, cast in terms similar to the Model Penal Code, that sets out this rule.[16]

For analytical purposes the voluntary act rule may be separated into two components, the "act" and its "voluntary" nature.

[11] United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc).

[12] But see Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437 (2007) (arguing for reconceptualizing the law in terms of a "control" requirement rather than an "act" or "conduct" requirement).

[13] See generally Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, SOC. PHIL. & POL'Y, Spring 1990, at 84; Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563 (1980); Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443 (1988).

[14] See §§ 9.06.–.07, *infra*.

[15] E.g., Martin v. State, 17 So.2d 427 (Ala. Ct. App. 1944) (*M* was charged with violation of an offense that provided that "[a]ny person who, while intoxicated or drunk, appears in any public place . . . and manifests a drunken condition [shall be convicted of an offense]"; the court interpreted the word "appears" to presuppose a voluntary appearance in public, which was not proven at *M*'s trial).

[16] Model Penal Code § 2.01. See § 9.05, infra.

[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. Understood this way, an act involves *physical*, although not necessarily *visible*, behavior. For example, the muscular contractions involved in talking—the movements of the vocal chords 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.

[17] Oliver Wendell Holmes, The Common Law 54 (1881).

[18] See § 9.10, *infra*.

[19] State v. Utter, 479 P.2d 946, 950 (Wash. Ct. App. 1971).

[20] See § 9.05, *infra*.

[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] or asleep.[27]

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[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 "automatism."

[27] See generally Rogers v. State, 105 S.W.3d 630, 636–38 (Tex. Crim. App. 2003); see also Fain v. Commonwealth, 78 Ky. 183 (1879) (sleepwalking); People v. Newton, 8 Cal. App. 3d 359 (Ct. App. 1970) (actions while unconscious); Fulcher v. State, 633 P.2d 142 (Wyo. 1981) (*id.*).

[28] Denno, Note 13, *supra*, at 326 ("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 do[illegible]ut of fear or shock, rather than malice.

How[illegible], does one go about [illegible]g causation in omission cases? As develo[illegible] in Chapter 14, a perso[illegible]ot responsible for an offe[illegible] unless she cau[illegible]the harm in question. S[illegible] philosophers argue that a[illegible]act is *never* t[illegible]ause of a consequence—[illegible]can nothing be the cause [illegible]nething?—but [illegible]n if this claim is false,[illegible]ore line-drawing problem[illegible]se. It is easy to determine that the victi[illegible] *Beardsley* "caused" her [illegible]death by ingesting poison; it is far more [illegible]lt to say that Beardsley'[illegible]ure to secure medical care for his paramo[illegible]used her death. She migh[illegible]ve died from the poison despite his best [illegible]ts. Similarly, even if on[illegible]Genovese's neighbors had called the polic[illegible]w can we know whether h[illegible]ould have come in time? For that matter,[illegible]ey *were* a cause of her d[illegible], isn't *everyone* in the world a cause, sinc[illegible]*body* helped her?

The l[illegible]drawing problems raise m[illegible]han purely pragmatic concerns. If it is diff[illegible]to determine a non-actor'[illegible]ntal state or degree of contrib[illegible]n to resu[illegible]g harm, there is an enhan[illegible]risk that a jury will *incorrec*[illegible]esolve th[illegible]ssues. That is, they migh[illegible]d an intent to cause harm w[illegible]one was [illegible]ent, or they may attach c[illegible]l responsibility where none [illegible]. Thus, the [illegible]k of punishing a legally i[illegible]ent person is substantially [illegible]iced.

A general rule that p[illegible]s are criminally responsib[illegible]r their omissions could also have an un[illegible]ded counter-utilitarian e[illegible]. People sometimes misconstrue what th[illegible]bserve: an apparent wron[illegible]r might really be an undercover police [illegible]r performing her lawful[illegible]es; the good samaritan intervenor may e[illegible]p frustrating a lawful ar[illegible]. Additionally, intervenors often cause inju[illegible]themselves or others b[illegible]r intervention. A bystander, helping out of[illegible] of criminal responsibili[illegible]she stands by, might provide poor medical[illegible]stance or fire a weapon[illegible]fely, causing more harm than[illegible] she had do[illegible]othing.

Defen[illegible] of the general rule also[illegible]ct the moral claim that omissi[illegible]and acts ar[illegible]orally symmetrical. Ca[illegible] harm and allowing it to occ[illegible]re not moral[illegible]milar. "[A] doctrine of[illegible]ral liability for not-doings w[illegible]result in a s[illegible]n that is largely inse[illegible]ve to ideas of individual res[illegible]ibility and at[illegible]ship."[99] The man who[illegible]bed Kitty Genovese is the pe[illegible]who harmed her. Those who figurativ[illegible]stood by and did nothing[illegible] not hurt her. "[W]ithout an act/omissi[illegible]doctrine like the one our l[illegible]system presently recognizes, this truth would be valueless."[100]

cies, 10 J. PERSONALITY & SOC. PSYCH. 215, 215 (1968) ("We have found that the mere perception that other people are also witnessing the event will markedly decrease the likelihood that an individual will intervene in an emergency."); Katz, Note 35 *supra*, at 150 ("For Kitty Genovese, then, there was no safety in numbers.").

[98] There is rich debate on the subject of causation-for-omissions. For example, see John Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192 (1975); Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980); see also H.L.A. Hart & Tony Honoré, Causation in the Law 48 (2d ed. 1985) (concluding that some non-actions are causes because they represent an unexpected "deviation from a system or routine").

[99] Simester, Note 88, *supra*, at 329.

[100] *Id.*

Or, consider t[illegible]owning child hypothetical involving [illegible] the Olympic swimmer. Supp[illegible]at we learned that *X* pushed the child [illegible]e pool. Even assuming tha[illegible]btained sadistic pleasure from watchi[illegible]e child die, would we say tha[illegible]act and *S*'s omission are morally equi[illegible]t? *X caused* the child to die; *S*[illegible]ely *permitted* it. *X* changed the state[illegible]airs by putting the chil[illegible] in jeo[illegible]y; *S* merely failed to put things rig[illegible] killed the child; *S* wit[illegible] a h[illegible]t. Advocates of the no-liability-fo[illegible]issions rule contend [illegible]the p[illegible]ve duty not to make the world wor[illegible] morally speaking, m[illegible]ingent t[illegible]n the duty to make it better.[101]

The latter point leads to a fina[illegible]ification for the ge[illegible]o-liability rule, which is that the omission[illegible]ine is consistent[illegible] the principle of autonomy. In a society su[illegible]s ours, which valu[illegible]ividual freedom and limited governmental p[illegible], the criminal ju[illegible]system should be used discriminately. Even i[illegible]person is *morally*[illegible]ated to come to the aid [illegible] others, not every[illegible]ation of a mor[illegible]ty should result in cri[illegible] punishment. It i[illegible] role of religion[illegible]other moral institutions t[illegible]perfect human chara[illegible]the purpose of t[illegible]iminal law is limited to deterring or punishing persons for causing h[illegible]If it were otherwise, the criminal justice system would intrude too deeply into peoples' lives.

§ 9.07 OMISSIONS: EXCEPTIONS TO THE NO-LIABILITY RULE

[A] Common Law Duty to Act: "Commission by Omission"

[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"[102] 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 omitter caused[103] 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.[104] 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

[101] Kamm, Note 88, *supra*, at 1493.

[102] Fletcher, Note 88, *supra*, at 1447.

[103] But see the text to Note 98, *supra*.

[104] *E.g.*, People v. Oliver, 210 Cal. App. 3d 138 (Ct. App. 1989).

death.[105] 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 scholars[107] 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

[105] Commonwealth v. Levesque, 766 N.E.2d 50 (Mass. 2002).

[106] Degren v. State, 722 A.2d 887 (Md. 1999) (sexual abuse); Pope v. State, 396 A.2d 1054 (Md. Ct. App. 1975) (child abuse).

[107] E.g., Fletcher, Note 88, *supra*, at 1448–49.

[108] Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962).

[109] State v. Smith, 65 Me. 257 (1876); see also State *ex. rel.* Kuntz v. Thirteenth Judicial District, 995 P.2d 951 (Mont. 2000) (unmarried couple who lived together for approximately six years owed each other the same protective duty as exists between spouses).

[110] Rex v. Smith, 2 Car. & P. 449, 172 Eng. Rep. 203 (1826).

[111] State v. Williquette, 385 N.W.2d 145 (Wis. 1986).

[112] State v. Williams, 484 P.2d 1167 (Wash. Ct. App. 1971).

[113] Commonwealth v. Pestinikas, 617 A.2d 1339 (Pa. Super. Ct. 1992).

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 secluding 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]

[114] Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985).

[115] See also Jones v. State, 43 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).

[116] Regina v. Miller, [1983] 1 All ER 978 (House of Lords); see Commonwealth v. Cali, 141 N.E. 510 (Mass. 1923).

[117] State ex rel. Kuntz v. Thirteenth Judicial District, 995 P.2d 951 (Mont. 2000) (duty owed); King v. Commonwealth, 148 S.W.2d 1044 (Ky. 1941) (no duty owed).

[118] E.g., People v. Oliver, 210 Cal. App. 3d 138 (Ct. App. 1989) (*O* permitted *V*, who was

[B] Statutory Duty (Including "Bad Samaritan" Laws)[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;[120] a driver of a motor vehicle involved in an accident to stop her car at the scene;[121] and parents to provide food and shelter to their minor children.[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 *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."[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.[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 for the assaulter 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?

extremely intoxicated, to come to her home, and then allowed *V* to use her bathroom, where *V* injected himself with narcotics; when *V* collapsed, *O* did not summon aid; held: *O* was guilty of manslaughter because "she took [*V*] from a public place where others might have taken care to prevent him from injuring himself, to a private place—her home—where she alone could provide such care"); Regina v. Instan, 17 Cox Crim. Cas. 602 (1893) (*I*, who lived alone with *V*, her elderly and sick aunt, in *V*'s house, failed to obtain needed food and medical care for *V*, who died as a result; held: *I* was properly convicted of manslaughter).

[119] See generally Dressler, Note 88, *supra*; Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 PHIL. & PUB. AFF. 157 (1994); Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3 (2002); Woozley, Note 88, *supra*; Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993).

[120] 26 U.S.C. § 7203 (2008).

[121] E.g., Cal. Vehicle Code § 20001 (Deering 2008).

[122] E.g., Cal. Penal Code § 270 (Deering 2008).

[123] Vt. Stat. Ann. tit. 12, § 519(a) (2007).

[124] See § 9.06[A], *supra*.

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.

§ 9.08 OMISSIONS: MODEL PENAL CODE

The Model Penal Code does not differ significantly from the common law regarding omissions. A person is not guilty of any offense unless his conduct "includes a voluntary act or the omission to perform an act of which he is physically capable."[125]

Liability based on an omission is permitted in two circumstances: (1) if the law defining the offense provides for it;[126] or (2) if the duty to act is "otherwise imposed by law."[127] The latter category incorporates duties arising under civil law, such as torts or contract law.[128]

§ 9.09 MEDICAL "OMISSIONS": A SPECIAL PROBLEM

Consider this problem. Patient, *P*, is in an irreversible coma, kept alive by use of a respirator. *D*, *P*'s doctor, concludes that further medical treatment would be useless. She turns off the respirator, knowing that the effect will be to cause *P*'s imminent death, which occurs.

[A] Act or Omission?

One 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, the actus reus of murder; *D* caused *P*'s death knowingly, the *mens rea* of murder; therefore, the elements of common law murder have been proven. 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 conduct *does* include the voluntary act of unplugging 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

[125] Model Penal Code § 2.01(1).

[126] E.g., Model Penal Code § 220.1(3) (failure to control or report a dangerous fire).

[127] Model Penal Code § 2.01(3)(b).

[128] American Law Institute, Comment to § 2.01, at 222–23.

[129] See generally George P. Fletcher, *Prolonging Life*, 42 WASH. L. REV. 999 (1967); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857 (1992); Arthur Leavens, Note 88, *supra*; H.M. Malm, *Killing, Letting Die, and Simple Conflicts*, 18 PHIL. & PUB. AFF. 238 (1989); Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 Ethics 497 (1999).