BOOK REVIEW

Act and Omission in Criminal Law Autonomy, Morality and Applications to Euthanasia; Roni Rosenberg. Routledge Publication, 2025; ISBN : 978-1-032-46173-1

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The maxim *actus non facit reum nisi mens sit rea* translates superficially to the idea that an act cannot be guilty unless the mind is also blameworthy. A deeper examination of the maxim, however, uncovers several legal, moral and philosophical fault lines. For the element of *mens rea*, issues range from delineation and definition of standards such as intention, knowledge, negligence etc. (Morgan, 2016) to questions of strict liability which do away with the requirements of *mens rea* itself (Horder, 2016). The element of *actus reus* suffers from the problem of vagueness in terms of harmfulness and wrongfulness (Hirsch, 2014).

In terms of *actus reus*, much scholarly attention has also been paid to the issue of omissions vis-à-vis acts. At its most fundamental level, the criminalisation of an act prohibits the doing of the act. In contrast, the criminalisation of an omission pertains to the imposition of a legal obligation to perform an act. Akin to several major debates in criminal law and for reasons discussed in detail below, however, the discourse on act and omission falls squarely at the intersection of law and moral philosophy.

Driving home these moral philosophistic and legal perspectives, Roni Rosenberg's work titled "Act and Omission in Criminal Law: Autonomy, Morality and Applications to Euthanasia" is a rich addition to the growing body of literature on the topic (Roni Rosenberg, 2025). The book is divided into two parts with nine chapters. The first four chapters are devoted to understanding the rationales and theories for and against distinguishing acts and omissions in terms of criminalisation. Chapters five to seven enunciate judicial discourse, types of duties, and punishments for omission offences. Chapter eight differentiates between conduct- and result-based offences while chapter 9 creates a distinction between passive and active euthanasia based on the foregoing discussion.

There is much in the book that merits compliments. The book first consolidates and then builds upon the theoretical premises that underlie the debate on acts and omissions. The same, combined with the use of a discursive but simple writing style, makes the book a fantastic addition to any curriculum pertaining to advanced courses on the general principles of criminal law. Therefore, this book is recommended to anyone looking to explore the landscape of omissions-related liability in depth. The book has earned a well-deserved place at the National Law University Delhi, both in its library and its courses on criminal law.

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THE OR ETICAL DISTINCTIONS BETWEEN ACT AND OMISSION:

Rosenberg classifies the theoretical rationales underpinning the distinction between act and omissions under skeptical, moral, legal and autonomy. The skeptical theory argues that, *ceteris paribus*, harm caused by an act cannot be differentiated from a harm caused by an omission. The crucial requirement being that intention, motive, outcome and cost of harm prevention remain unchanged.

A commendable feature of Rosenberg's work is that his explanation of all the abovementioned theories is interspersed with thought experiments – some original, others inspired or replicated – to contextualise an in-depth analysis. To illustrate, the skeptical theory is instantiated in Rachel's (Rachels, 2006) thought experiment negating the distinction between killing and letting die. In this hypothetical scenario, Smith and Jones are both potential beneficiaries of a large fortune in the event of their respective nephew's demise. While Smith enters his nephew's bathroom and drowns him, Jones sees his nephew slipping and drowning in the bathtub but chooses not to save him. The motive, intention and outcome in both cases being the same, there is no distinction between the act in Smith's case from the omission in Jones' cases. Rosenberg then presents the critique and counterarguments to the experiment in an analytical attempt to dissect, deconstruct and construct the skeptical theories.

The moral theories too receive a similar treatment from Rosenberg. The moral rationales distinguish between an act and omission based upon the doer's (or the non-doer's in cases of omission) blameworthiness with respect to a harm premised upon a duty to prevent the same in cases of omission. The moral considerations are analysed by Rosenberg on grounds of liberty, causation, harm to victim and, dominance. Detailing and analysing Rosenberg's discussion of all themes within the confines of a book review is implausible. However, to exemplify the depth of Rosenberg's analysis, we may turn to his treatment of the liberty rationales.

One of the primary moral rationales for distinguishing between acts and omissions is the extensive intrusion on the agent's liberty by the latter. Rosenberg divides the liberty theory into two. First, a narrow theory of liberty that is concerned with restriction by an omission-based liability on an individual's liberty to the exclusion of any other act. For instance, if the law mandates us to save a drowning person, we are legally obligated to drop any activity we may be engaged in to save a drowning person. Rosenberg argues as against the same that such restrictions depend upon the definition of the offence and may not necessarily create such stringent restrictions. He exemplifies the same through the example of a ban on smoking which, although restricts a person from smoking, still allows the person to engage in other activities like singing and dancing. Even though the example does not quite fit within the theme, in as much as the ban on smoking is a prohibition of an act rather than a positive obligation, Rosenberg forwards the second liberty theory to check the extensive

intrusiveness argument against the narrow theory of liberty. This refers to the liberal understanding that extensive intrusiveness can be effectively checked through a legal requirement of a duty to act.

Rosenberg then develops the idea of a duty to act in the third chapter on legal rationales. This chapter highlights five core legal rationales for distinguishing between acts and omissions, three of which have been discussed in this review. Through the first rationale, Rosenberg proffers that even though the duty to act requirement may or may not emerge from a causation-based moralistic discourse, it finds a principled legal basis in the fair notice rationale underlying the principle of legality. The second rationale dictates that the duty act requirement emerges from a rule of lenity which requires statutes to be interpreted in a manner favourable to the accused. However, as correctly pointed out by Rosenberg, such rationale is primarily grounded in the moralistic framework discussed in the preceding paragraph.

The third legal rationale is the coordination problem which highlights issues of efficiency in coordination and justice. Rosenberg's treatment of the rationale, relying on Feinberg, is primarily focussed upon rescue offences. The coordination problem, for instance, justifies imposing the duty to rescue on specific individuals who can perform the rescue most efficiently and effectively. A parent is best situated to rescue a child, and a firefighter is best equipped to deal with a fire. According to this rationale, the law prioritises the duty to rescue on such a basis rather than creating a general duty to rescue. It is unclear, however, as to how the rationale would apply to the duty in cases of easy rescue. It is also apparent that the rationale focusses more on institutional arrangements i.e. searching for the most efficient path to reduce/prevent harm, rather than a deontological enquiry aimed at determining the scope and extent of a legal duty owed by all individuals.

THE AUTONOMY RATIONALE: DISTINGUISHING BETWEEN KILLING AND LETTING DIE

The fourth rationale is Rosenberg's original contribution to the distinction between act and omission. Viewing the fourth rationale, which he terms the Autonomy Rationale, from the vantage point of the debate on the prohibitions relating to killing versus prohibitions on letting die, Rosenberg proffers that there is a distinction between the values that underlie both. He argues that:

> "*The prohibition against killing encompasses broader and more significant values, particularly safeguards human life, constitutes our personal autonomy as individuals and as a society and enabling us to lead secure lives free from fear. By contrast, the prohibition against letting die does not guarantee our person autonomy, although in certain instances, it may expand it.*"

Can this distinction be so simplistic? As the discussion on the principle by Rosenberg goes on to show, it is not. Rosenberg argues that the autonomy rationale differs from other rationales in that it does not focus on a causal distinction between acts and omissions, as both lead to harm. This may not be a strength of the principle but rather a critique. The autonomy rationale, through a singular and unidirectional focus on the extent of violation of autonomy by an act, loses sight of the intention and context of the act which other rationales consider. For instance, a withdrawal of life support may be reflective of respect for autonomy and dignity in certain instances of letting die more than the value of preservation of life through a prohibition on killing. The same was a basis of the legalisation of passive euthanasia in the Indian jurisdiction wherein J. Dipak Misra (Common Cause v. Union of India) opined that:

> "*But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently, should he/she be —guinea pig for some kind of experiment? The answer has to be an emphatic — No! because such futile waiting mars the pristine concept of life, corrodes the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy.*"

However, it must be clarified that the decision cited above is not contrary to Rosenberg's analysis with respect to the ownership of the shield. Rosenberg proffers that the distinction between killing and letting die relates to the idea that if a person's death results from an intrusion of a safe space (a shield) the same is classified as a killing whereas if the person dies not as a consequence of such intrusion, the case would one of letting die. The shield in *the Common Cause* is the requirement of an advanced directive or a living will requiring the person to consent to the withdrawal of life support at a point in time prior to such withdrawal.

ACTIVE AND PASSIVE EUTHANASIA:

Rosenberg hypothesises that "*majority of rationales proposed for distinguishing between acts and omissions are not applicable to the distinction between active and passive euthanasia.*" Rosenberg's analysis of the liberty, moral, legal and autonomy-based rationales in the context of active and passive euthanasia is agreeable in principle. For instance, Rosenberg is correct in stating that the liberty rationale in both its narrow and liberal conceptions cannot be applied because a physician cannot argue that their liberty to go about their profession is being restricted by their duty to rescue the terminally ill patient.

However, several nuances require deeper examination. The argument that passive euthanasia may be premised on considerations such as individual autonomy to choose how to die can be questioned. Rosenberg argues that such autonomy emerges from "*the right to decide how to live and die as long as it does not harm others*." The same is premised on the conception of the harm principle propounded by J.S. Mill (Mill, 2008) and furthered by Joel Feinberg (Feinberg, 1984). The rationale underlying the criminalisation of suicide, however, does not necessarily emerge from the harm principle but rather from legal paternalism, wherein the state, as *parens patriae,* decides what is and what is not prohibited. Further, the claim that "*state should not protect the right to life when the individual to whom this right applies does not seek such protection*" may not apply in all jurisdictions, in as much as waiver of fundamental rights such as the right to be life may be constitutionally impermissible (Basheshar Nath v. Commissioner of Income Tax).

CONCLUSION:

Roni Rosenberg's work on act and omission in the context of euthanasia cannot be termed as anything but seminal in furthering the academic discourse. The author must be applauded not only for their contribution to the criminal law academy in substantive terms, but also for the work's exemplariness of how an analysis combining moral philosophy and legal discourse should be conducted. The book succeeds in presenting a systemic and insightful account of the various rationales underlying the distinction between acts and omissions as well as their (in)applicability to the distinctions between passive and active euthanasia while treading complicated themes such as autonomy and morality.

REFERENCES

Basheshar Nath v. Commissioner of Income Tax, AIR 1959 SC 149.

Common Cause v. Union of India, (2018) 5 SCC 1.

Feinberg, J. (1984). Harm to Others: The Moral Limits of the Criminal Law. Oxford University Press.

Hirsch, A. v. (2014). Harm and Wrongdoing in Criminalisation Theory. Criminal Law and Philosophy, 245-256.

Horder, J. (2016). Ashworths Principles of Criminal Law. Oxford University Press.

Mill, J. S. (2008). On Liberty and Utilitarianism. Bantam Classics.Morgan, N. (2016)). Fault Element of Offences. In Barry Wright and Stanley Yeo (eds.), Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform, (pp. 59-86). New York: Routledge.

Rachels, J. (2006). Active and Passive Euthanasia. In B. S. (eds.), Killing and Letting Die (p. 112). Fordham University Press.

Roni Rosenberg. (2025). Act and Omission in Criminal Law: Autonomy, Morality and Applications to Euthanasia. Routledge.