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Act and Omission in Criminal Law

Book Review on Roni Rosenberg, *Act and Omission in Criminal Law: Autonomy, Morality and Applications to Euthanasia (Routledge 2025)*

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Reading Roni Rosenberg's learned and thought-provoking book on act and omission in criminal law,[1] is a deeply rewarding intellectual experience. The distinction between act and omission strikes even those without expertise in criminal law or moral philosophy as intuitively sound and compelling. Yet at the analytical, philosophical, and normative level, the subject proves complex, subtle, and elusive. Rosenberg succeeds in rendering intricate issues accessible, guiding readers through the material with clarity and confidence. The book addresses the subject comprehensively from various angles, meticulously surveying the divergent approaches of legal scholars and moral philosophers while adding an original layer of fresh insights of his own and arguments.

This review cannot address all the fascinating discussions the book contains. I therefore focus on several of Rosenberg's central arguments and add some reflections, including perspectives from Jewish law, which is one of my research interests.

The book primarily examines the conventional legal approach in Western legal systems distinguishing between act and omission, drawing examples mainly from homicide law. Criminal codes provide that homicide consists in causing another person's death by act or by omission where there is a legal duty to act. Killing by act is always a serious criminal offense, whereas killing by omission requires a legal duty to act in order to convict the person of homicide.

For example, a mother has a duty to care for her infant, and if she fails to feed him, thereby causing his death from starvation (with the required mental element satisfied), she will be convicted of homicide by unlawful omission. Similarly, a lifeguard is obligated to save swimmers' lives, and therefore failure to rescue a drowning person results in conviction for homicide by unlawful omission. By contrast, beachgoers are not legally obligated to rescue drowning people. If George, sunbathing on the beach, sees an infant crawling into the sea toward its death yet does nothing—neither stopping the infant nor alerting its parents—he will be exempt from criminal liability, even if the omission was intentional (suppose George hates the infant's parents and wanted to cause them grief).

The question that arises is: what justifies the difference between act and omission? Or, as Rosenberg asks: "Why does the conviction of a person for an omission require identifying a duty to act, as opposed to an offense committed by act?".[2] Another way

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

[2] ibid 3. As to the question of whether, for instance, any contract may serve as a source of a duty to act, see: Roni Rosenberg, 'The Contract: Between Contract Law and Criminal Jurisprudence' (2014) 26 St. Thomas Law Review, 444.

to frame the question focuses on cases like George's where the law does not impose a duty to act. Why does the law sanction George if he kills the infant through active conduct (throwing it into the sea), but imposes no sanction if he stands by and does not save it? What is the normative basis for distinguishing between killing and letting die?

The matter is further complicated. We have said that when dealing with killing by omission, a source of duty is required. But the conventional legal approach holds that not every duty is sufficient to serve as a basis for criminal liability in cases of omission.[3] In Israeli law, for example, the statute "You shall not stand by the shedding of your fellow's blood" obligates any passerby to rescue any person in danger (=The Good Samaritan law). George, who saw the infant crawling into the sea, was therefore obligated to take rescue action. But nevertheless, if he failed to do so, he would be convicted only of the minor offense of failing to rescue, punishable by fine, not of homicide. This raises the question: why should the omission offense be less severe than an act offense, despite identical outcomes (a person's death)?

I. The Distinction Between Law and Morality and Mill's Harm Principle

The above examples address the legal sphere, but Rosenberg's book does not focus solely on this domain; it also dedicates extensive discussion to the moral dimension. In Chapter 1, Rosenberg comprehensively and critically surveys philosophers' arguments (James Rachels, Shelly Kagan, Jonathan Bennett and others) that from a moral standpoint there is no justification for distinguishing between killing by act and letting die. According to them, letting die is morally wrong in the same way as active killing. As Rosenberg notes: "This revolutionary position challenges our moral intuition and is likely to influence our legal thinking as well. If the moral distinction between an act and an omission is flawed, the legal distinction should also be questioned."[4]

Indeed, these philosophers might accordingly argue that within criminal law, anyone who kills by omission should be convicted, but this extension is not necessary, since one can distinguish between the moral domain and the criminal-legal domain in this context.

Rosenberg distinguishes between two categories of rationales for the act/omission distinction in criminal law.[5] **Moral rationales** ground the legal distinction in an underlying moral difference between acts and omissions—they presume that causing harm through action is morally more culpable than allowing harm through inaction, and that this justifies different legal responses. By contrast, **legal rationales** do not rest on any claim of moral difference. According to these accounts, acts and omissions may be morally equivalent—both equally condemnable—yet practical considerations unique to the legal sphere justify treating them differently.[6] This distinction reveals that even philosophers who reject the moral significance of the act/omission

[3] Rosenberg (n 1) 128-136 See also; Roni Rosenberg, '*Options for Convictions – Manslaughter by Omission*' (2014) *Alei Mishpat - the law review of the academic center of Law & Business 107.*
[4] Rosenberg (n 1) 3.
[5] (n1) 5-6.
[6] Rosenberg (n 1) at ch 2 ('moral rationales') and ch 3 ('legal rationales').

distinction can consistently endorse the legal distinction based on legal rationales, such as concerns about liberty, coordination problems, or administrative efficiency.

One approach to distinguishing between the moral and legal treatment of omissions is grounded in Mill's harm principle, which restricts the legitimate scope of criminal law to preventing harm to others while preserving individual liberty. Unlike active killing, which constitutes direct infliction of harm, failures to rescue or provide aid, though morally condemnable, do not directly cause harm—the victim's death would have occurred even if the potential rescuer had not been present at all. While both may be equally reprehensible morally, only active killing involves the direct causation of harm required by Mill's harm principle. Criminal law therefore limits omission liability to cases where a specific source of duty can be identified—whether arising from statute, contract or special relationship. In such cases, the existence of a duty transforms the omission into direct causation of harm that satisfies Mill's harm principle, for example by creating reliance that leads others to undertake risks they would otherwise avoid. This framework thus preserves the distinction between what morality demands and what the criminal law may legitimately enforce.

II. The Distinction Between Morality and Law Regarding Omissions in Jewish Law

Jewish law draws a similar distinction between the moral and criminal-legal domains with respect to omissions, taking a more categorical position than Western law: Jewish law does not criminalize omissions at all. A Talmudic principle states that "a transgression that does not involve an active deed is not punished (by lashes or death)"—even when there is a duty to act. On this view, Jewish law contains no legal duties to act; all such duties fall outside the domain of criminal law and remain purely moral obligations. Nevertheless, these norms effectively guide behavior by virtue of religious commitment, fear of social disapproval, and fear of divine punishment.

Let us consider the following example that relates to Rosenberg's discussion of the distinction between killing ang letting die. Biblical law in Leviticus 19:16 states: "You shall not stand by [the shedding of] your fellow's blood. I am the Lord". The Sages understood this law as imposing an obligation on passersby to save anyone who is in danger, as the Maimonides concludes:

> Whenever a person can save another person's life, but he fails to do so, he transgresses a negative commandment, as Leviticus 19:16 states: "Do not stand idly by while your brother's blood is at stake." Similarly, this commandment applies when a person sees his fellow drowning at sea or being attacked by robbers or a wild animal, and he can save him [...] And similarly, in all analogous instances, a person who fails to act transgresses the commandment: "Do not stand idly by while your brother's blood is at stake". [...]
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> Even though lashes are not given as punishment for the transgression of these prohibitions—because they do not involve committing a forbidden deed—they are nevertheless very severe. For whoever causes the loss of a Jewish soul is considered as if he destroyed the entire world, and whoever saves a Jewish soul is considered as if he saved the entire world.[7]

[7] Maimonides, *Code of Jewish Law*, *Laws concerning Murder and the Preservation of Life*, 1:14-16.

The final paragraph merits attention. The severity of punishment typically reflects the gravity of the offense: minor transgressions warrant lighter sanctions, while more serious violations call for harsher penalties. One might therefore conclude that the absence of punishment for failing to save another person indicates a relatively minor offense. Maimonides emphasizes that this conclusion would be mistaken. Although Jewish law imposes no legal sanction on omissions, from a moral standpoint one who fails to save another constitutes an exceedingly grave transgression.

Notice that Maimonides drew a sharp line between the duty to rescue and the offense of homicide. Someone who stands by while another person dies breaches the duty to save life—escaping punishment only because Jewish law imposes no sanctions for omissions. But Maimonides clearly does not classify this failure as killing, nor does he treat it as violation of 'You shall not murder'." We will return to this issue in the next section.

III. Letting Die, Killing by Omission and the Question of Causation

Rosenberg critically surveys the various explanations offered by philosophers and legal scholars for the distinction between act and omission in criminal law. One explanation turns on causation. On this view, there is no factual causal connection between the omission and the result of death. The definition of factual causation (as well as legal causation) is a complex issue, yet Rosenberg presents the various approaches to causation tests in a comprehensive and clear manner.[8]

Without going into all details, it seems that even at an intuitive level, it might be said that one who did not save a person from drowning did indeed let him die but did not actually kill him. He did not prevent the death, but the death was caused by drowning in water. Indeed, causation explains most examples of killing by omission in Rosenberg's book, which follow precisely this pattern: failures to rescue someone from impending death. But the causal explanation extends beyond rescue cases to other instances of letting die that Rosenberg discusses—what he calls "removing a shield." These cases involve situations where someone possesses a shield that protects him against danger, and another person removes that shield, thereby exposing him to harm. Consider, for example, the following scenario: George has accidentally **s**wallowed poison but holds medication that can neutralize it and save his life. Robert removes the medication from George's hand, and George dies. Did Robert kill George? Philippa Foot argues that such cases constitute letting die rather than killing. Just as in drowning, the ultimate cause of death was the poison, not Robert's action. Robert removed the medication and thereby let George die, but he did not kill him—the poison did. On this analysis, there is no factual causal connection between the removal and death, since death resulted from the poisoning, not from the absence of medication.[9] Incidentally, Rosenberg offers an intriguing distinction here: if the medication

[8] Rosneberg, (n 1) at ch 2 s 3. For complex questions regarding causation, see also Roni Rosenberg, 'Drag Racing, Assumption of Risk, and Homicide' (2015) 51 *Criminal Law Bulletin* 283.

[9] Philippa Foot, 'The Problem of Abortion and the Doctrine of the Double Effect', in Bonnie Steinbock & Alastair Norcross (eds) *Killing and Letting Die* (1994) 266, 273. For a different approach see: Jeff McMahan, 'Killing, Letting Die, and Withdrawing Aid', in Bonnie Steinbock & Alastair Norcross (eds) *Killing and Letting Die* (1994) 266, 273.

belonged to Robert, he is permitted to reclaim it from George; but if it belonged to George, taking it amounts to killing.[10]

At this point, I want to introduce another example, not discussed in the book, that challenges the claim that omissions lack causal connection to death. The example draws on a hypothetical case debated by the Tosafists, Talmudic commentators in 12th-13th century Germany. Suppose someone accidentally pushes Robert while in a park, causing him to fall onto a baby lying on the grass. Robert's body weight will suffocate the baby within three minutes unless he moves. Robert can easily stand up and save the baby's life, but instead he remains lying on the infant to his death. Here, Robert has not merely let the baby die—he has killed the baby with his own body weight. He is plainly the cause of death. Yet Robert performed no act;[11] he killed by omission. In this case, the claim that there is no causal connection between Robert's remaining in place and the infant's death is harder to sustain. Indeed, the Tosafists distinguish between failure to rescue and this case, classifying only the latter as killing by omission. Yet as noted above, even this form of killing carries no criminal sanction in Jewish law, since it involves no active deed.

IV. Rosenberg's Autonomy-Based Theory

After critically surveying the traditional rationales for the act/omission distinction, Rosenberg proposes his original autonomy-based theory.[12] Importantly, the theory provides a legal rationale, not a moral one—Rosenberg does not claim that killing is morally worse than letting die. Rather, his argument concerns the broader social impact of these two sorts of behavior. Unlike previous theories, which assume that the prohibitions against killing and letting die protect the same interests, Rosenberg argues that the prohibition against killing protects broader and more fundamental interests. To demonstrate this, Rosenberg asks us to consider two thought experiments: What would a world without a prohibition against killing look like, and what would a world with only such a prohibition (but none against letting die) look like?

In a world without a prohibition against killing, Rosenberg argues—drawing on Hobbes's concept of the "state of nature"—human life would be characterized by constant fear and apprehension. As Hobbes famously wrote, life would be "solitary, poor, nasty, brutish, and short."[13] The problem is not merely the loss of life itself, but the severe impairment of human autonomy caused by living under the perpetual threat of violent death. Without basic security, individuals cannot reasonably plan their lives, pursue their aspirations, or become "the authors of their own lives."[14] This fear undermines not just individual autonomy but the very foundations of society—culture, creativity, and human development become impossible. By contrast, in a world with a

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[10] Rosenberg (n 1) 104-105; See also Roni Rosenberg, 'Between Killing and Letting Die in Criminal Jurisprudence' (2014), 34 Northern Illinois University Law Review 391, 424-425

[11] Classifying Robert as having performed no act rests on a definition that equates acts with bodily movements. But this test is contested. See chapter 5 of the book. See also: Michael S. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law (1993)* 28-29; Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (2009) 139-142; Roni Rosenberg, 'Two Models of "Absence of Movement" in Criminal Jurisprudence' [2014] *Ohio State Journal of Criminal Law* 195.

[12] Rosenberg (n 1) ch 4.

[13] Thomas Hobbes, *Leviathan* ch 13 (1651).

[14] Ibid.

prohibition against killing but not against letting die, individuals could still lead reasonable lives with personal autonomy and a basic sense of security. While not ideal, such a world would not descend into Hobbes's war of all against all. People would need to exercise caution, but their exposure to risks would generally depend on their own prudent choices.

Rosenberg concludes that "the prohibition against killing seeks to protect much more fundamental interests and values… than does the prohibition against letting die. It upholds individual autonomy and ensures a life free from persistent fear."[15] While prohibiting letting die may enhance individual autonomy in specific instances—by rescuing someone from danger—it does not protect autonomy as fundamentally as does the prohibition against killing.

To be sure, Rosenberg persuasively demonstrates that killing by act poses a greater threat to society's collective sense of security than does killing by omission. Yet killing by omission still results in the victim's death. Why does this not warrant criminalizing all instances of killing by omission, even where no specific duty to act exists?

Rosenberg anticipates this objection. He acknowledges that the prohibition against letting die does aim to protect individuals' physical lives, raising the question: "why not convict of homicide every person who could have prevented death but failed to do so?".[16] His response is that the autonomy-based theory must be integrated with the liberty rationale.[17] Society, he argues, must strike a balance between two competing considerations: on one hand, we want individuals to live without fear; on the other, we want them to live their lives without constantly having to rescue others. When a prohibition serves to enable life without fear—as the prohibition against killing does—liberty concerns carry less weight, and the prohibition can be applied categorically even if it restricts some freedom. By contrast, when a prohibition does not serve to protect life without fear—as with the prohibition against letting die—liberty considerations become paramount. Since individuals can still live reasonable lives with basic security even without a comprehensive prohibition against letting die, imposing a universal rescue obligation would constitute too severe an infringement on liberty relative to the interests it protects.

Rosenberg's argument can be understood as a sophisticated development of Mill's harm principle. Mill famously argued that the legitimate scope of criminal law is restricted to preventing harm to others while preserving individual liberty. Rosenberg's insight lies in recognizing that applying the harm principle requires a two-sided balancing test: we must weigh not only the severity of the harm caused by the prohibited conduct, but also the degree to which the criminal prohibition itself restricts individual liberty.

In the case of active killing, this balance strongly favors criminalization. The harm is severe—it destroys not only the victim's life but also undermines the general public's sense of security and autonomy, creating the fear and instability that Hobbes described. Yet the restriction on liberty is relatively minimal: refraining from killing does not significantly burden citizens in their daily lives or prevent them from

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[15] *ibid* 95; See also: Roni Rosenberg, 'Two Concepts of Freedom in Criminal Jurisprudence' [2017], *6 British Journal of American Legal Studies*, 279.

[16] Rosenberg (n 1) 111.

[17] ibid at 111-112.

pursuing their goals and aspirations. The balance thus clearly justifies categorical criminal prohibition.

By contrast, in the case of killing by omission, the calculus shifts dramatically. While the harm to the victim is equally grave (death), the broader social harm is less severe—society's foundational sense of security and autonomy is not systematically undermined when people fail to rescue others. At the same time, the restriction on liberty is far more substantial: imposing a universal duty to rescue would require citizens to constantly interrupt their lives and activities, significantly curtailing their freedom to pursue their own projects and plans. In this balance, the more limited harm does not justify the severe restriction on liberty—except in those specific cases where a particular duty to act can be identified.

One further application of Rosenberg's theory merits mention. In an earlier paper,[18] Rosenberg used the insight that murder threatens society's collective sense of security to provide a fresh perspective on the provocation defense in homicide law. Various legal systems provide some mitigation in cases of murder committed following provocation. Legal scholars have offered several rationales for this mitigation. Rosenberg adds that murder committed following provocation inflicts less harm on the public's sense of autonomy and security. Citizens can reassure themselves that such killings occur only when victims provoke their killers: by refraining from provocation, they can remain safe. Provocation-based killings thus appear conditional and avoidable and therefore do not threaten the public's foundational sense of security in the way that unprovoked killings do.

V. The Act/Omission Distinction in Life-Against-Life Conflicts

I wish to highlight new rationale for the act/omission distinction in certain cases that can shed light on some of the examples and dilemmas it presents. This rationale derives from an argument by the Tosafists, which relate to cases of life-against-life conflicts. Suppose George is threatened: kill Dana or we will kill you. May George kill Dana to save his own life? The answer is clearly negative, as the Talmud explains through a rhetorical question we might pose to George: "Who says your blood is redder? Perhaps Dana's blood is redder!" In other words, George has no justification to take active measures to kill Dana in order to save his own life, since his life is not more valuable than hers.

The Tosafists extend this principle to cases of omission, drawing an intriguing inference. Suppose now that George is threatened with death unless he fails to rescue Dana. Here the Tosafists hold that George is not obligated to sacrifice his life, and may remain passive and save his life, even though this causes Dana's death by omission. To illustrate further, let us return to the case mentioned above where Robert was accidentally pushed in the park and fell onto a baby lying on the grass. As noted above, Robert must get up to save the baby, and if he does not do so, he will be considered to have committed manslaughter by omission. But suppose that malicious terrorists enter the park and threaten Robert, who is lying on the baby: "If you get up (thereby saving the baby), we will kill you." Must Robert rise to save the baby at the cost of his

[18] Roni Rosenberg, 'A New Rationale for the Doctrine of Provocation: Applications to Cases of Killing an Unfaithful Spouse' *[2019] 37 Columbia Journal of Gender and Law* 220; Roni Rosenberg, 'Human Dignity and the Doctrine of Provocation' [2020] *Notre Dame Journal of Law, Ethics & Public Policy* 281.

own life? According to the Tosafists, the answer is no. In this case, Robert may invoke the same principle in his favor: "Who says the baby's blood is redder than mine?" Robert has no obligation to take active measures to save the baby's life at the expense of his own.

This principle offers a distinct normative rationale for the act/omission distinction in a particular category of cases: conflicts between equivalent lives. Where A's life is balanced against B's life, there is no justification for imposing a legal duty to take active measures favoring one over the other. A person may therefore remain passive to save his own life, even though his passivity causes another's death by omission. In such cases, the act/omission distinction reflects not considerations of causation, autonomy, or liberty, but rather the absence of justification for requiring affirmative action when competing interests are evenly matched.

VI. The Act/Omission Distinction in the Context of Euthanasia

In the book's final chapter, Rosenberg examines the act/omission distinction in the context of euthanasia. Many legal systems, including Jewish law, distinguish between active and passive euthanasia: while actively killing a terminally ill patient is prohibited, allowing such a patient to die is often permitted and even recommended. Physicians are not obligated to prolong the life of a terminally ill patient suffering severe pain, and many systems permit withdrawing life support even when this hastens death.

Rosenberg considers whether the various rationales surveyed in the book for the act/omission distinction—including his own autonomy-based theory—provide adequate justification for this distinction in euthanasia cases. His persuasive argument is that most rationales fail in this context. Consider, for example, the liberty-based rationale: the claim that imposing universal rescue duties would excessively burden potential rescuers' freedom has no application to the physician who wishes to terminate the life of his suffering patient by action or by omission. According to this analysis, there is no compelling basis for distinguishing between acts and omissions in euthanasia cases. A coherent approach would thus either prohibit or permit all forms of euthanasia, whether active or passive.[19]

Euthanasia represents an exceptional situation in which we suspend duties that normally apply. A physician is ordinarily obligated to save a patient from death, yet when the patient suffers unbearable pain, the physician may—and perhaps should—let him die by omission. This is also the position of Jewish law. The prevailing view holds that from a consequentialist perspective death is preferable to a life of terminal suffering. Therefore, it is permissible and even appropriate to pray for such a patient's death, and likewise permissible and even recommended to cause death by omission. Yet why is it forbidden to cause the suffering patient's death through active intervention? The answer likely lies in a concern for the moral integrity of the agent: actively killing corrupts the soul of the physician who performs the act, even when the result—the patient's death—is desirable. This agent-centered rationale provides a

[19] See also Roni Rosenberg, 'Moral and Practical Considerations in the Debate on Physician-Assisted Suicide – The Terminally Ill Adults (End of Life) Bill in the UK (Commentary – Bioethics Today ,January 2025; Roni Rosenberg ,*Active and Passive Euthanasia vs. Act and Omission in Criminal Law – Moral and Legal Perspectives* ,Social Legal Studies Association (2025).

distinct justification for the act/omission distinction in euthanasia cases, one that focuses not on consequences or liberty concerns, but on the moral character and psychological welfare of those who would bring about death.

This review has engaged with only a small portion of Rosenberg's rich and illuminating study. The book offers a sophisticated analysis that advances our understanding of fundamental questions in criminal law theory. Rosenberg's work will reward careful study by anyone interested in the philosophical foundations of criminal responsibility, and it deserves a prominent place in ongoing debates about the act/omission distinction.