**Act and Omission in Criminal Law: An Ethical Perspective**

This book discusses the critical distinction between an act and an omission in criminal law, one that serves as a defining thread in all categories of offenses. According to this distinction, when seeking to convict a defendant for committing an act that caused harm, any act that caused the prohibited outcome will suffice for the purposes of a conviction. In contrast, when seeking to convict a defendant for a failure to act – an omission – that caused the very same harm, the defendant will be convicted only if there was a duty to act, and the breach of said duty caused the proscribed harm.

The distinction between act and omission exists not only in the domain of criminal law; it also has deep roots in our moral thinking. Thus, the moral responsibility of a person who caused the death of another by purposefully committing an act is considered to be significantly greater than the moral responsibility of a person who “merely” took no steps to prevent the death. This distinction is, in the opinion of many, the moral basis for the difference between active euthanasia, which is forbidden in most countries, and passive euthanasia, which, under certain circumstances, is permitted in many countries.

This distinction between acts and omissions, which appears reasonable and intuitive from both a moral and a legal perspective, is not necessarily straightforward to substantiate. Indeed, since the early 1960s, a significant trend has emerged that opposes making this moral distinction, arguing that when the intent and outcome are identical in the case of an act or an omission, there is no moral difference between the two. This line of criticism represents a radically different moral approach, essentially challenging our basic intuition. It suggests that if the moral distinction between the acts and omissions is disputable, the legal distinction is also not self-evident, and our legal thinking should also change accordingly.

This book represents the first work to comprehensively and coherently link the philosophical-moral debate with the legal-criminal debate regarding acts and omissions. In this context, the book offers an important distinction between approaches that apply either a moral or a legal rationale to distinguish between acts and omissions.

After opening with a critical discussion of these prevailing rationales, the book presents a new rationale for distinguishing between acts of commission and of omission in criminal law. In the second part, the book discusses practical and important questions related to this proposed distinction, such as: What are the definitions of an act of commission and one of omission in criminal law? Is it appropriate to make distinctions in levels of punishment for these different categories of acts? What is the position taken by the courts in the United States regarding this distinction? And is the distinction between active euthanasia and passive euthanasia necessarily related to the distinction between an act and an omission in criminal law?

The Hebrew version of the book was published in 2015 by *Nevo*, considered one of the most reputable and influential publishers among jurists and legal professionals in Israel. The book was also quoted in numerous articles and books published in Israel, and formed the basis for a number of important Israeli Supreme Court rulings.

**I believe the book is highly suitable to Routledge’s Law, Ethics, and Economics series, presenting, as noted above, a new and comprehensive association between the two fields of criminal law and the philosophy of morality.**

**The Book’s Purpose**

This book explores one of the most important distinctions in our moral and legal thinking – between an act and an omission – in a comprehensive and detailed manner not before undertaken. Whereas articles written on the subject matter have separated the philosophical-moral debate from the criminal-legal one, this book offers a deep and enriching analysis that connects these two scholarly fields. In addition, the literature on this issue to date has focused on only particular aspects of the distinction; however, this book is concerned with the entirety of this distinction in all its legal and moral aspects.

The book is divided into Section One, covering theoretical issues and Section Two, exploring more practical questions. A primary aim of the book is to show that the practical issues clearly draw on the theoretical aspects, and it addresses the various rationales that distinguish between act and omission in criminal law.

The book begins by presenting the sceptical approaches that have challenged the distinction between act and omission from a moral perspective, and proceeds to critically discuss rationales that have sought to substantiate the distinction between act and omission in criminal law. In this context, the book proposes two types of rationales for distinguishing distinction between act and omission in criminal law: moral rationales and legal rationales. This novel division between moral and legal rationales directly affects a wide range of practical questions related to the distinction between act and omission in criminal law, which is discussed in Section Two. Identifying, analysing and differentiating between the different rationales can offer new and more complete insights into the distinction between an act and an omission in criminal law. Beyond this innovative division, the book proposes a new rationale for distinguishing act from omission in criminal law, focusing on the distinction between ‘killing’ and ‘letting die.’ The new rationale demonstrates that, contrary to intuition, the moral prohibition on killing protects broader values ​​than does the moral prohibition on letting die, and this is the basis for the distinction between killing and letting die in criminal law.

In contrast to contemporary literature addressing the distinction between act and omission, the book is aimed at researchers, lawyers, and judges in the field of criminal law, and this book will undoubtedly assist them in acquiring a profound and comprehensive on the subject matter.

The book will also be of interest to scholars from the field of the philosophy of morality, as well as to bioethicists who grapple with the distinction between active and passive euthanasia.

**The Book’s Chapter Headings**

**Introduction**

The introduction presents a comprehensive overview of the book, explaining that the distinction between act and omission is ingrained in both criminal law and traditional morality. The latter focuses not only on the consequential aspect of conduct, but also on the manner in which it occurs, an approach which clearly reflects our intuitive thinking. Nevertheless, since the early 1960s, a significant trend has been emerging in philosophical literature criticising this distinction, to the point that it can be said that today that the philosophy of morality is divided on whether there is indeed a moral distinction between act and omission, or, alternatively, whether said distinction is devoid of real substance. Although the philosophy of morality has been sharply divided on the question of this distinction for some time, surprisingly, the controversy has never penetrated the realm of criminal law. However, one must ask whether, if the moral distinction is indeed itself in question, does that not lead to the legal distinction no longer being self-evident?

In view of this background, it should be emphasised that the purpose of the book is to answer several principal questions:

(1) What is the rationale that distinguishes act from omission in criminal law? In this context, we will clarify the reasons why a person will be convicted for an omission only if duty to act has been expressly identified, which differs from the case of an act. (2) What is the definition of an act and of an omission in criminal law, and what is the position of the courts in the United States on this issue? (3) Which duties satisfy the demand of an identified obligation to act in the event of an omission? Will every statute imposing a duty to act satisfy the requirement of an obligation, or will only specific duties suffice to meet this demand? (4) Should there be a difference in the level of punishment between an act that caused harm, and an omission that caused the same harm, even when a duty to act was violated? (5) Is the distinction between active and passive euthanasia related to the distinction between a criminal act and omission?

One of the aims of the book is to demonstrate the deep-rooted connection that exists between the question of rationale and the distinction between act and omission in criminal law as they relate to the practical questions presented above.

The introduction emphasises that analysing the legal and philosophical literature enables us to divide the rationales proposed for the distinction between act and omission in criminal law into two types: legal rationales and moral rationales. The legal rationale is that the need to establish a duty to act in the event of an omission, in contrast to the event of an act has several sources. First, it is a problem related to the principle of legality. It also reflects a motivation to solve a problem of coordination among citizens and to address the need to reduce the number of potential culprits. Each of these moral rationales separately emphasises a different vertex of the relevant triangle: the potential defendant, the causal link between the defendant’s behaviour and the prohibited harm, and the harm inflicted on the victim. Thus, the freedom rationale focuses on the “actor” vertex of the triangle, and, specifically, on the different infringements of the “actor’s” freedom in the event of a prohibition related to an act in contrast to a prohibition related to an omission. On the other hand, the causal rationale focuses on the vertex of the causal link between the defendant’s behaviour and the harm done to the victim. Finally, the third rationale emphasises the damage found at the third vertex of the triangle – the actual victim.

After concluding the review of the various rationales, the introduction briefly presents the theory I propose – that the distinction between act and omission in criminal law lies in the differing degrees of infringement of individual autonomy with respect to homicide by act, as compared to homicide by omission.

**Section I**

**Chapter 1 – Comparative Sceptical Theory**

In this chapter, I discuss the sceptical theory, which holds that there is no moral distinction at all between an act and an omission in general, and between ‘killing’ and ‘letting die,’ in particular. According to this theory, when all circumstances are equal – the intentions, motives, consequences, and costs to prevent the harm – there is no difference between an act that caused the harm, and an omission that caused the very same harm. It should be noted that the various sceptical arguments criticizing the moral distinction between act and omission are not identical, and in this chapter, I present the distinctions between them. At the conclusion of each approach, I present potentials criticisms of it.

**1. Case Comparison Argument**

This section discusses the first position refuting the existence of a moral distinction between act and omission. The methodology of this position focuses on presenting two cases that are equal in every aspect, but in one case, the harm was caused as a result of an act, while in the other, the harm was caused as a result of an omission.

**2. The Argument Comparing the Reasons for the Prohibition**

In contrast to the first approach, which sought to negate the moral distinction by comparing two cases, the second approach, developed by James Rachels, focuses on analysing the rationale underlying the prohibitions against ‘killing’ and ‘letting die.’ This approach attempts to negate the moral distinction not on the strength of judicial intuition arising from a comparison of two cases, but on the basis of rational argument proving that there can be no moral distinction between the two instances at all.

**3. The Argument Attacking the Moral Rationale**

In contrast to the two previous approaches, which seek to posit positive arguments in favour of denying the moral distinction, this approach aims to deny any moral distinction by rejecting the various rationales proposed for the distinction between act and omission in the first place.

**4. The Argument Attacking the Definition**

The fourth and final approach refers to scholars who, having defined the concepts of ‘killing’ and ‘letting die,’ argue that in view of these definitions, there is no moral rationale for distinguishing an act from an omission in general, or ‘killing’ from ‘letting die,’ in particular.

**Chapter 2 – The Moral Rationales Distinguishing Act from Omission in Criminal Law**

In this chapter, I discuss the approaches that find a distinction between act and omission, and claim that this distinction rests on a moral rationale. According to these approaches, the reason a **legal** distinction must be drawn between act and omission, stems from the **moral** distinction between the two. In this regard, I note that when referring to moral rationales, I mean rationales that indicate a distinction related to the level of guilt attributed to the accused in the case of causing harm by an act, as opposed to guilt in the case of causing harm by omission. In presenting the rationales, I consider the definitions of act and omission arising from the relevant rationale. I critique each theory after presenting it to the reader.

1. **The Rationale of Causation**

This section presents one of the most morally intuitive rationales for distinguishing an act from an omission in criminal law. This rationale is based on a causal distinction between an act that caused harm, and an omission that resulted in the same harm. According to this distinction, homicide by act, for example, is more serious than failing to prevent a death, since in homicide by act, there is a causal link between the defendant’s actions and the victim’s death, whereas in the case of an omission, expressed as a failure to prevent a death, there is no causal link; at the very least, if there is a causal link between the accused’s conduct and the victim’s death, it is indirect. In this section, I examine a number of theories about causality that may support the position that there is a distinction between an act and an omission in general, and between ‘killing’ and ‘letting die,’ in particular.

1. **The Rationale of Liberty**

This section reviews one of the central accepted theories for distinguishing act from omission in criminal law, which focuses on the varied infringement of a citizen’s freedom of action. According to this approach, in the case of the prohibition against homicide by act, the harm to the citizen’s liberty is not very significant, as all that the citizen is required to do is to refrain from that particular act – in this case homicide – but this does not prevent the individual from performing an infinite number of other acts. On the other hand, a prohibition against omission permits the individual to do one deed, but prevents him or her from doing an infinite number of others. Thus, a prohibition against ‘killing’ prohibits the individual from taking specific action, but allows him or her to do an infinite number of other things. On the other hand, a general prohibition against ‘letting die,’ without a specific duty to act, would significantly impair the citizen’s freedom of action, since such a prohibition would oblige the individual to always perform rescue operations, because at any given moment, somewhere, there is a person in danger. Requiring the citizen to perform rescue operations at all times would deprive the individual of the opportunity to plan and manage their life in a reasonable manner.

1. **The Rationale of Harm to the Victim**

This section examines the rationale that focuses not on the differing harm to the citizen’s freedom of action, or on the difference in the nature of the causal link between the defendant’s conduct and the prohibited harm, but on the differing harm to the actual victim. According to this approach, in all cases of ‘letting die,’ the victim ‘only’ loses a life he or she could have had if the defendant had provided assistance. In contrast, in the majority of instances of killing, the victim loses a life he or she could have had independent of the defendant’s act. Another approach focuses on the dissimilar harm to the victim, holding that in the case of ‘killing,’ the defendant makes the victim’s circumstances worse, whereas in the case of ‘letting die,’ it is true that the defendant brings the victim no benefit, but, the defendant also does not make the victim’s condition worse.

**Chapter 3 – The Legal Rationales that Distinguish an Act from an Omission in Criminal Law**

In this chapter, I present the approaches that posit that the distinction between an act and an omission in criminal law is not founded on a moral rationale, but on a legal one. I argue that according to this claim, even if there is no moral distinction between an act that caused harm and an omission that caused the same harm, it is still appropriate for criminal law to draw such a distinction for internal legal reasoning.

1. **The Rationale Based on the Principle of Legality**

This section reviews the position that the distinction between an act and an omission in criminal law lies in the principle of legality. According to this approach, since causality is rooted in deviating from the normal and the reasonable in any given situation, both an act and an omission can cause harm. An omission, like an act, may also constitute a deviation from the normal and reasonable in a given situation, and in such case, it will be the cause of the harm. However, although there is no substantial causal distinction between an act and an omission, there is still a need to identify a duty to act in the event of an omission in order for the citizen to know in a given situation that there is indeed a deviation from the normal and reasonable. Without defining a duty to act in the event of an omission, the citizen will not know whether the behaviour of omission was the cause of the harm or not. This distinction therefore does not derive from a moral distinction, but from a legal distinction based on the principle of legality.

1. **The Coordination Problem Rationale**

This section covers the position that the need to find a duty to act in the event of an omission, in contrast to the event of an act, stems from the need to solve the problem of coordination among citizens. That is, absent a need to identify a duty to act in the event of an omission, a tremendous waste of resources would result, as many citizens would have to help people in danger of harm, without any real need to do so. The specific duty to act solves this problem, since in any given instance, only specific people will have to provide aid, and the rest of society will be able go about its business.

1. **Reducing the Culprits Rationale**

This section reviews the position that the need to find a duty to act in the event of an omission stems from the difficulty of identifying the primary culprit in the event of an omission. The duty to act imposed on a specific type of person solves this problem.

**Chapter 4 – The Theory of Individual Autonomy Infringement**

This chapter is devoted to presenting and discussing the new rationale I am proposing for distinguishing an act from an omission, focusing on the distinction between ‘killing’ and ‘letting die.’ In this context, I would argue, the crucial element for the purposes of the distinction lies in understanding what interests the two prohibitions –on killing and on letting die – seek to protect. It appears that the starting point of all the previous theories suggested was that the two prohibitions seek to protect the same interests or values ​​– the victim’s life. In contrast to all these traditional approaches, in this chapter I argue that the interests underlying the prohibition on killing are wider and deeper than the interests underlying the prohibition on letting die. The proscription against killing establishes our personal autonomy, as individuals and as a society, in that it allows us to live a life of security, absent defensiveness or fear. On the other hand, the prohibition against letting die does not establish our autonomy; rather, in a mere small number of instances, it extends it.

I would argue that on the methodological level, a different approach must be taken to proving the distinction between act and omission in general, and between killing and letting die in particular. Unlike other writers on the subject, I am not attempting to examine two discrete instances of killing and letting die and from that deduce why the prohibition on killing is graver. Quite the contrary. I am attempting to examine what underlies the prohibitions on killing and letting die. From this, I explore why the prohibition on killing is graver. Essentially, I argue that the severity of the prohibition should not be deduced from a particular case, but from the interests and values ​​that underlie the prohibitions.

To understand what underlies each prohibition, I argue that two main questions should be asked:

1. What would happen in the world if the ban on killing had not existed at all?

2. What would happen in the world had there been a ban on killing, but no ban on letting die?

My contention is that the answers to these two questions will provide insights into how the situation would be different without the relevant prohibitions. In other words, the two questions will clarify for us precisely what is protects by each of these prohibitions.

With regard to the first question, I demonstrate that without the prohibition against killing, there is a danger that we would fall into a life of defensiveness and fear of various injuries, including potentially fatal ones. Under such circumstances, even if people were able to protect their lives, they would still be living in constant fear of the threat of death. This fear would lead to a significant impairment of individual autonomy, since in such circumstances, it would be difficult for one to plan one’s life and realise one’s aspirations in a reasonable fashion. On the other hand, with regard to the second question, I demonstrate that had there been a ban on killing, but no ban on letting die, it is possible that we would not be living under optimal human conditions. However, we certainly would not deteriorate into Thomas Hobbes’ ‘natural state’ – of all-out war. In such a situation, although a person would fear dangerous situations, he or she would not be living in constant fear of being killed.

From this argument it follows that the prohibition on the act of killing seeks to protect the more fundamental interests of a person’s ability, and a society’s ability, to lead a reasonable life, than does the prohibition against letting die. I identify the differences between the theory I propose and the other rationales presented above, and demonstrate that my theory is consistent with a moral theory of utilitarianism in general, as well as with the social covenant moral theory of Hobbes and John Rawls.

To close this chapter, I show how the theory I propose affects the definition of killing and letting die, and how it resolves the criticisms levelled at the other theories mentioned in the previous chapters.

**Section II**

**Chapter 5 – Case Law Regarding the Definition of Act and Omission**

In this chapter, I present the position enunciated by case law throughout the United States regarding the definitions of act and omission. As I demonstrate, case law in the United States is not uniform; there are judgments that have applied the principle of physical movement to the definitions of act and omission, and there are other judgments that have not done this. According to the judgments that applied the principle of physical movement, an act is a physical movement, whereas an omission is the absence of a physical movement, and in any case involving a lack of physical movement (such as standing still), it must be found that there was a duty to act. In contrast, according to the judgments that did apply the principle of physical movement, there may be cases involving physical movement that would be classified as an omission, as well as cases that do not involve physical movement that would be classified as an act. At the end of the chapter, I explain the root of the dissension between the judgments with regard to the various rationales presented above.

**Chapter 6 – The Sources of a Duty to Act that Can Be Used as a Basis for Imposing Criminal Liability in Omission Offenses**

In this chapter, I discuss the question of what duties can provide the underlying infrastructure for imposing criminal liability in omission offenses. Can any lawful duty serve as a basis for a conviction in an omission offence, or may only specific and unique duties serve as such? Three approaches are explored to help answer these questions.

The **broader approach** posits that any duty at law, whether arising from criminal law or civil law, can serve as a basis for a conviction in an omission offense.

The **restrictive approach** posits that only certain duties can serve as the source of a duty for the purposes of a conviction in omission offenses. According to this position, the specific duties should arise from the relationship between defendant and victim, or from the relationship between the defendant and the source of the danger, or by virtue of a specific role or function of one of the parties.

The **intermediate approach** posits that only duties that have created a social expectation that they will be met can be considered duties to act relevant to reaching an omission offense conviction. Duties that do not create such social expectations cannot serve as the source of a duty to act for the purposes of a conviction in an omission offense.

After presenting the various approaches, I discuss the relationship between them and the rationales presented above.

**Chapter 7 – Sentencing Differences between Act and Omission**

In this chapter, I explore the question of whether there should be a distinction at the level of punishment between a case in which an act caused harm and the case in which an omission caused the same harm as a result of a breach of duty to act? Should a case in which a lifeguard refrains from assisting a drowning person be punished in the same way as ‘A,’ who drowned ‘B’ by an affirmative act? Or should the lifeguard’s punishment be more lenient, because the behaviour was manifested in an omission, and not in an act. In this context, I present a number of approaches to the question of punishment, and link them to the division between moral rationales and legal rationales.

**Chapter 8 – The Distinction between Active and Passive Euthanasia and its Connection to the Distinction Between Act and Omission in Criminal Law**

This chapter examines various positions on the question of whether a moral and legal distinction should be drawn between active and passive euthanasia. In this context, I suggest a somewhat complex position, according to which, even if we accept the moral and legal distinction between an act that caused harm and an omission that caused the same harm, there is still no distinction between active and passive euthanasia. In fact, if passive euthanasia is permitted, active euthanasia should also be permissible.

**Length & Schedule**

The estimated length of the book is about 120,000 words. I believe that once the proposal is approved, the translation of the book will be completed in approximately nine months.

**Market**

As a legal monograph regarding the distinction between an act and an omission in criminal law, the book is of particular interest to researchers in the field of criminal law, as well as to judges and lawyers. Moreover, the issue of the distinction between act and omission is taught in all law schools as part of the introductory course to criminal law; therefore, the book can act as an aid to lecturers presenting this course.

Combining two fields of study – the philosophy of morality and criminal law – this book is relevant to scholars in the field of the philosophy of morality, as well as to bioethicists concerned with the issue of euthanasia and to educated readers interested in these issues.

**MARKET SURVEY**

KILLING AND LETTING DIE (SECOND EDITION) EDITED BY BONNIE STEINBOCK AND ALASTAIR NORCROSS (1994). This book includes articles written by various scholars on the moral distinction between killing and letting die. In contrast, my book deals entirely with the distinction between act and omission in criminal law, drawing links between discussions from the fields of the philosophy of morality and criminal law. My book also examines practical issues occupying the courts on a daily basis involving this issue.

MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993). This book discusses the philosophy of the act, and its implications for criminal law. In this regard, only one part of the book discusses the distinction between act and omission in criminal law, primarily from the perspective of a causal distinction between an act and an omission.

Moreover, many articles have been written, both in criminal law and in the philosophy of morality, about the distinction between an act and an omission; Additionally, every criminal law textbook contains a chapter on omissions in criminal law. Yet no book has ever been written that focuses entirely on this distinction, comprehensively presenting both the sceptical approaches that dispute the distinction between act and omission, and the legal and moral rationales for the distinction, while tying them to the resulting practical questions.

**Biographical Summary**

Dr. Roni Rosenberg is a lecturer and researcher in the fields of substantive criminal law and in the jurisprudence of criminal law. He holds a Ph.D. from the Bar-Ilan University (2010) and was a researcher at the Taubenschlag Institute of Criminal Law at the Tel Aviv University Faculty of Law from 2017 – 2019. He has published more than 20 articles in leading journals in Israel and around the world in the field of criminal law. His articles have been cited in judgments rendered by Israeli courts, including important Supreme Court rulings.

Dr. Rosenberg was the editor-in-chief of the journal *Legal Research* [Hebrew – *Mekhkarei Mishpat*], which is the leading journal of the Bar-Ilan University Faculty of Law (2008 – 2010).

Dr. Rosenberg served as an advisor to the *Knesset* Committee for the Advancement of Women on the issue of the amendment of the Prevention of Sexual Harassment Act, and participated in discussions at the Knesset’s Constitution, Law and Justice Committee on regarding the reform of the statute governing homicide offences enacted in Israel in 2019.