
Volume 39
Issue 2 *Dickinson Law Review - Volume 39,*
1934-1935

1-1-1935

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Recommended Citation

W.H. Hitchler, *The Physical Element of Crime*, 39 DICK. L. REV. 95 (1935).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol39/iss2/3>

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THE PHYSICAL ELEMENT OF CRIME

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A crime is composed of two elements :

- (1) a particular physical condition.
- (2) a particular mental condition.¹

The former is a material and objective condition, and is usually called the *actus reus* or criminal act. The latter is a formal and subjective condition, and is usually, but inaccurately, called the criminal intent or *mens rea*.

The theory underlying this principle as to the composition of a crime is said to be that before punishing for a crime the law must be satisfied of two things :

- (1) That an act has been done which by reason of its harmful results or tendencies should be repressed by criminal punishment.
- (2) That the mental attitude of the actor was such as to render punishment deserved and effective.²

THE NECESSITY FOR AN ACT

The maxim *actus non facit reum, nisi mens sit rea* has been said to be "the fundamental maxim of the criminal law,"³ but it is just as true and just as important to say "*non est reus nisi corpus sit reum*," as it is to say "*non est reus nisi mens rea*."⁴

The principle that every crime includes a physical element seems always to have been recognized both in England and in the United States. "The imagination of the mind to do wrong without an act is not punishable in our law" is the pronouncement of the English court in a famous case;⁵ and in a

¹B.L., University of Virginia Law School, 1905; D.C.L., Dickinson College, 1932; LL.D., St. Francis College, 1932; Professor Dickinson School of Law, 1906—; Dean of Dickinson School of Law, 1930—.

¹"To put a party in the predicament of guilt there must be (a) some act, forbearance or omission referable to (b) the party's state of mind." Hibbert, *Jurisprudence*, p. 259. "In all crimes the definition consists of two parts,—the outward act and the state of mind which accompanies it." Mercier, *Criminal Responsibility*, p. 3. "To make a complete crime cognizable by human laws there must be both a will and an act." Blackstone, vol. 4, p. 20. See Cook, *Yale Law Journal*, vol. 26, p. 646; Kenny, *Criminal Law*, 11th ed., p. 37.

²Salmond, *Jurisprudence*, 7th ed., pp. 380, 290; Kenny, *Criminal Law*, 11th ed., p. 8; Sayre, *Harvard Law Review*, vol. 35, p. 976; Holmes, *Common Law*, p. 49.

³*Brown v. State*, 23 Del. 159. 25 L. R. A. (N. S.) 66.

⁴Stephen, *General View of Criminal Law*, p. 74.

⁵*Hales v. Petit*, Plow. 259.

comparatively recent American case the court declares, "With mere guilty intention unconnected with an overt act * * * the law has no concern."⁶

It has been asserted by various writers that in the early days of the common law, during the fourteenth and fifteenth centuries, criminal liability could be predicated upon mere intention. This doctrine, it is said, as expressed in the Year Books, was *voluntas pro facto reputabitur*.⁷ The authorities asserting this view, when traced to their sources, resolve themselves into mere memories of former cases recited in dicta, and furnish slender support for the doctrine for which they are cited. None of the cases proves that there ever was a time when criminal liability could be based on mere intention; there probably never was a time when it could be; and that it could not be was conclusively established in the sixteenth century.⁸

DIVINE LAW AND ETHICS

In requiring a physical act as a condition of liability the criminal law differs from the Divine Law. The Decalogue commands, "Thou shalt not covet,"⁹ as well as, "Thou shalt not steal;" and in the most famous of all sermons we are informed, "Whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart."¹⁰ It also differs from principles of ethics or moral philosophy, by which the mental element is sufficient to constitute guilt. Morality is internal. The moral law has to be expressed in the form, "Be this," and not in the form, "Do this."¹¹

Samuel Johnson, who had thought much upon the subject of acting, once said to Kemble, "Are you, Sir, one of those who believe yourself transformed

⁶Ex parte Smith, 135 Mo. 223. "It is contrary to the general principle of the common law that a mere intention to violate the law not followed by an actual violation should be a crime." *Sherman v. U. S.*, 10 Fed. (2d) 17. "An intent to commit a crime is not indictable." *Proctor v. State*, 15 Okla. 338, 176 Pac. 771; *Com. v. McGregor*, 6 Pa. D. R. 345; *Smith v. Blackley*, 188 Pa. 206; "The law takes no cognizance of an intent existing only in the mind." *Com. v. Randolph*, 146 Pa. 94.

⁷Coke, Third Institute, p. 99; Staunford, Pleas of the Crown, p. 27. See Potter, English Law, p. 307.

⁸Sayre, Harvard Law Review, vol. 41, p. 822; vol. 45, p. 991; Stephen, History of Criminal Law, vol. 2, p. 222; Holdsworth, History of English Law, vol. 8, p. 433. The doctrine, if it ever existed, was but a "momentary aberration." Pollock and Maitland, History of English Law, vol. 2, p. 477.

⁹A legislature might make covetousness criminal but the law would be inoperative unless an external test of covetousness were assigned by more or less arbitrary definition; and then the real subject matter of the law would be not the possession of covetousness but the behavior defined as evincing it. Pollock, Harvard Law Review, vol. 9, p. 303.

¹⁰"The men of old time had forbidden adultery; the new moral legislator forbids lust." Stephen, Science of Ethics, p. 148.

¹¹Stephen, The Science of Ethics, p. 148. "But no teacher of morality should tell men that it is just as bad to wish an evil thing as to do it." Hamilton, Studies in Moral Science, p. 76. Blackstone says, "In *foro conscientiae* a fixed design or will to do an unlawful act is almost as heinous as the commission of it." Vol. 4, p. 20.

into the very character you represent?" Kemble replied that he had never felt so strong a persuasion himself. "To be sure not," said Johnson, "The thing is impossible." And then, speaking as a moral philosopher, he added, "If Garrick really believed himself to be that monster, Richard the Third, he deserved to be hanged everytime he performed it."¹²

COMMON LAW CRIMES

The requirement of a physical condition as an essential element of criminal liability is applicable to all common law crimes. "The law will not take notice of an intent without an act,"¹³ correctly states the rule of the common law.¹⁴ It is sometimes stated that conspiracy is an exception to this rule,¹⁵ but this is incorrect.¹⁶ Conspiracy is not the mere concurrence of the intentions of two or more persons but the announcement and acceptance of such intentions. Bodily movement by word or gesture is necessary to effect it.¹⁷ "The very plot is an act in itself."¹⁸

STATUTORY CRIMES

The requirement is also applicable to statutory crimes. Here also, it is declared "that a person's intentions alone violate no law."¹⁹ In England, Parliament is omnipotent, and its power to define and punish crimes is absolute.²⁰ It would seem therefore that Parliament has the power to make a mere mental condition criminal. This power has apparently not been exercised, even if it exists. An exception appears to exist in that form of treason called "compassing the King's death." But this exception is only an apparent one, for the statute makes it essential to a conviction that some overt act should have been committed toward accomplishing the end contemplated.²¹

¹²Boswell's Johnson. The necessity for an act as an essential condition of criminality exists in other systems of criminal law. Ulpian says, "*Ne cogitationis poenam nemo patitur.*" Montesquieu says, "*Les lois ne se chargent de punir que les actions ex terreures.*" The requirement "must evidently be recognized unless where the worst form of tyranny prevails." Brooms, Legal Maxims, p. 311.

¹³Dugdale v. Reg., 1 E. & B. 445.

¹⁴Rex v. Higgins, 2 East 5; Rex v. Heath, Russ. & Ry. 184.

¹⁵State v. Crowley, 41 Wis. 271.

¹⁶State v. Buchanan, 5 Harr. & J. 317.

¹⁷Sayre, Harvard Law Review, vol. 5, p. 399.

¹⁸Aikins v. Wisconsin, 195 U. S. 194.

¹⁹People v. Martin, 102 Cal. 558, 36 Pac. 932.

²⁰12 C. J. 759.

²¹Kenny, Criminal Law, 11th ed., p. 38; Hibbard, Jurisprudence, p. 263. But it has been said that the crime is defined "as consisting in intention; so that even complete execution of the design is only evidence of the intention which constitutes the offense." Pollock, Jurisprudence, p. 161. In conspiracy, where an overt act is required by statute, it has been held that the crime consists of both the conspiracy and the act and not of the conspiracy alone. Hyde v. U. S., 225 U. S. 347. But see contra 12 C. J. 550.

In the United States, the power of the legislatures of the various states to define and punish crimes is limited by the state and federal constitutions;²² and it has been asserted that "a criminal intent not connected with any overt act may not be punished as a crime and any statute purporting to do so is unconstitutional."²³ Such a statute, it has held, "is condemned by the due process clause of the Constitution."²⁴ Applying this doctrine it has recently been held that a statute providing that persons reputed to be "habitual violators" of the law should be guilty of a crime was unconstitutional.²⁵

REASONS FOR REQUIRING AN ACT

Various reasons have been given for the requirement:

- (1) "The aim of the law is not to punish sins but to prevent certain external results,"²⁶ and it is our present belief that "no certain external results can be assigned to mere mental states."²⁷ "The state that complains in criminal cases does not suffer from the mere imaginings of men."²⁸
- (2) "It may perhaps be doubtful whether the mental condition is sufficiently under our control to justify legal results being based upon it."²⁹ It has been asserted that "the secret counsels and resolves of a man's mind are voluntary,"³⁰ but if they are not, the acts which result from them should not be punished.
- (3) "As no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than they are demonstrated by outward actions, it therefore cannot punish for what it cannot know."³¹ The judgment of the law must not only be but appear just and can only deal with that which is capable of proof.³²

²²16 C. J. p. 60.

²³Yale Law Journal, vol. 30, p. 762; Brill, Criminal Law, p. 13.

²⁴Proctor v. State, 15 Okla. 338, 176 Pac. 771.

²⁵People v. Belcastro, 356 Ill. 144, 190 N. E. 30; People v. Alterie 356 Ill. 307, 190 N. E. 305. See also Ex parte Smith, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606.

²⁶Com. v. Kennedy, 17 Mass. 18, 48 N. E. 770.

²⁷Pollock, Jurisprudence, p. 147.

²⁸Proctor v. State, 15 Okla. Cr. 338, 176 Pac. 771.

²⁹Keener, Selections on Jurisprudence, p. 169.

³⁰Pollock, Jurisprudence, p. 146.

³¹Proctor v. State, 15 Okla. Cr. 338, 176 Pac. 771, quoting Blackstone, vol. 4, p. 20. "For which reason in all temporal jurisdictions, an overt act or some open evidence of the intended crime is necessary before a man is liable to punishment." Blackstone, vol. 4, p. 20.

³²"The law cannot undertake to regulate the thoughts and intents of the heart. It seems unreasonable that the law should be required to detect and punish the criminal intent." Smith v. Com., 54 Pa. 209. "Human agencies are not yet arrived at such a degree of perfection as to be able without some act done to discern and to determine by what intent or purpose the human heart is actuated." Ex parte Smith, 135 Mo. 223.

ELEMENTS OF AN ACT

An act is composed of three distinct factors or constituent parts :

- (1) Its origin in some bodily activity or passivity of the actor;
- (2) Its circumstances;
- (3) Its consequences.³³

For example, suppose A kills B by shooting him with a pistol. The factors or constituent parts of the act are :

- (1) Its origin—a series of muscular contractions by which A's arm is raised and his finger crooked.
- (2) Its circumstances—the fact that A has a pistol in his hand, that it is loaded, that B is in range and in the line of fire.
- (3) Its consequences—that the pistol is raised and pointed, in B's direction, that the trigger is pulled and the hammer falls, that the powder explodes, that the bullet is expelled and goes through the air and strikes and penetrates the body of B, that B's body undergoes physical changes which produce death. A similar analysis may be made of all acts for which a man may be held criminally responsible.³⁴

By some writers the term "act" is confined to that part of the act which we have described as its origin. According to these authorities the circumstances and consequences are not regarded as part of the act but as wholly external to it.³⁵ According to this theory the elements of a crime are : (1) The act; (2) Its circumstances; (3) Its consequences; (4) The mental element.³⁶ This view has not, however, been adopted in this article; and the term "act" is here used as a shorthand method of expression³⁷ which includes

³³Salmond, *Jurisprudence*, 7th ed., p. 382; *Yale Law Journal*, vol. 26, p. 647 per Cook.

³⁴Salmond, *Jurisprudence*, 7th ed., p. 383; *Yale Law Journal*, vol. 26, p. 647; Keeton, *Jurisprudence*, p. 155. Indeed, the act in question may be further analyzed. Between the pulling of the trigger and the falling of the hammer there is the releasing of the spring which brings down the hammer; between the releasing of the spring and its actual recoil intervene an infinite number of molecular movements in the body of the spring; and between the striking of the hammer and the ignition of the powder there is another series of molecular movements and chemical changes in the fulminating compound.

³⁵Austin, *Jurisprudence*, 5th ed., p. 415; Markley, *Elements of Law*, 6th ed., sec. 215; Holmes, *The Common Law*, p. 91; Hibbert, *Jurisprudence*, pp. 163, 167; Jenks, *New Jurisprudence*, p. 195; *Restatement of Torts*, vol. 1, sec. 2. Stroud exhibits some confusion of thought as to the meaning of the term act. *Mens Rea*, p. 2.

³⁶The actor's state of mind with reference to the circumstances and consequences. *Yale Law Journal*, vol. 26, p. 647.

³⁷"A harmless convenience of language and compendious thinking." Pollock, *Jurisprudence*, p. 158. "It seems convenient to group them under the term act." Hibbert, *Jurisprudence*, p. 163. For another and unusual meaning which has been given to the term act, see *Harvard Law Review*, vol. 9, p. 84; vol. 16, p. 493.

not only the origin of the act but also its circumstances and consequences. For this use there is abundant authority.³⁸

In ordinary speech we habitually include all material and relevant circumstances and consequences under the term act. The act of murder is the shooting and killing of the victim, and not merely the muscular contractions by which this result is effected;³⁹ and the necessity, in legal discussion, of including within the term "act" some of the consequences of bodily movement is demonstrated by the cases relative to the action of trespass. The direct damage sufficient to sustain an action of trespass by no means always follows directly upon a bodily movement. A number of clearly distinguishable consequences usually intervene, and it is only by including these consequences in the content of the term "act" that the damage can be said to be a direct consequence of the "act." Trespass could be maintained for the damage caused in the case set forth on page 99, but many consequences intervened between the bodily movement of the defendant and the ultimate damage.⁴⁰

VOLITION

Bodily activity or passivity constitutes the origin of an act only if it is voluntary, or willed. An act involves "a voluntary muscular contraction,"⁴¹—"a muscular movement that is willed."⁴² An act therefore has two elements—an internal determination and an external manifestation of it.⁴³ It "imparts intention in a certain sense." It is a muscular contraction and something more. The contraction must be willed. It is a willed, and therefore intended, muscular contraction.⁴⁴ But the intention necessarily imparted by an

³⁸Terry, *Anglo-American Law*, sec. 86; Salmond, *Jurisprudence*, 7th ed., p. 384; *Yale Law Journal*, vol. 26, p. 647; *Randal v. R. R.*, 169 Ala. 614, 53 So. 918. "The criminal act is clearly the whole crime, i. e., the movements as well as the consequences in the external world, which series of events all taken together are alleged to constitute a crime." *West Virginia Law Review*, vol. 2, p. 308.

³⁹Pollock, *Jurisprudence*, p. 148; Jenks, *New Jurisprudence*, p. 195.

⁴⁰Terry, *Anglo-American Law*, sec. 407. But in these cases the term "act" does not include all of the relevant and material consequences. See *Harvard Law Review*, vol. 9, p. 84. It is difficult to reconcile the meaning attached to the term act in popular speech with the maxim that a person is responsible for the natural consequences of his acts—"a maxim which shows that the law distinguishes between an act and its consequences." Hibbert, *Jurisprudence*, p. 167. Bentham calls the muscular movement an act, and an act plus its consequences, "action." *Principles*, Ch. 8, sec. 2. But in common usage the terms are synonymous.

⁴¹Holmes, *The Common Law*, p. 91.

⁴²*Yale Law Journal*, vol. 26, p. 647. "An act is a voluntary movement of the body." Stroud, *Mens Rea*, p. 1. "An act is always the result of a determination of the will which sets in motion the muscles in order to produce that motion as a consequence, even if no other consequence is desired." Keener, *Selections on Jurisprudence*, p. 165, quoting Markley.

⁴³Robinson, *Jurisprudence*, sec. 136; Terry, *Anglo-American Law*, sec. 77; Holland *Jurisprudence*, 9th ed., p. 100.

⁴⁴Holmes, *The Common Law*, p. 54; Holdsworth, *History of English Law*, vol. 8, p. 433; Keener, *Selections on Jurisprudence*, p. 165.

"act" refers only to the origin of an act and does not extend to its circumstances or consequences.⁴⁵

The doctrine is expressed by saying that volition is an essential element of an act. An act is a bodily movement caused by a volition. A volition is a desire for a bodily movement which is immediately followed by that movement.⁴⁶ There are bodily movements which are not capable of being produced in accordance with a will to produce them, and therefore are not acts. The sphere of the operation of volitions is limited and not all bodily movements which are capable of being produced in accordance with a will to produce them are acts. The movements of the stomach in digesting or the beating of the heart cannot be produced or accelerated by mere volition, by directly willing them. If a person wishes to produce these effects, he can do so indirectly by putting food in his stomach or placing himself in an exciting situation. But the wish is not a volition, and the movements are not acts.⁴⁷

COMPULSION

A person's objective conduct, his bodily activity or passivity, may fail to be voluntary and to constitute an act because it is compelled by natural forces or by human agencies. A common form of compulsion by natural causes is accident or pure chance, where a person is a passive instrument of physical forces beyond his control. This may be illustrated by a hypothetical case given in the old books: "A whips a horse on which B is riding, whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A, but misadventure in B."⁴⁸ A acted and was therefore responsible. But B did not act and was therefore not responsible.

Bodily movements resulting from spasms or convulsions are not acts.⁴⁹ e. g., the convulsive movements of an epileptic.⁵⁰ "Suppose A is suffering from locomotor ataxia, and as a symptom of the disease his foot flies out and strikes C. This is not A's act. Suppose A while tossing in the delirium of typhoid fever, flings his arm against C. This is not A's act."⁵¹

The state of "automatism" which sometimes arises during sleep is an in-

⁴⁵Holmes, *The Common Law*, p. 131; *Harvard Law Review*, vol. 30, p. 546, per Keedy; Stephen, *History of Criminal Law*, vol. 2, p. 112.

⁴⁶*Harvard Law Review*, vol. 30, p. 546; Markley, *Jurisprudence*, 6th ed., sec. 215; Hibbert, *Jurisprudence*, p. 162. "An act is a motion of the body consequent upon volition." Jenk's, *New Jurisprudence*, p. 194. "There cannot be an act without volition." *Restatement of Torts*, vol. 1, sec. 2.

⁴⁷Terry, *Anglo-American Law*, sec. 78.

⁴⁸1 East P. C. 225; cf. *Hawkins P. C.* vol. 1, c. 29, sec. 3; *Hale P. C.*, vol. 1, p. 476. See *Gibbons v. Pepper*, 1 Ld. Raymond 38 for a similar case in which the rider was held not to be civilly liable because he had not acted.

⁴⁹Stroud, *Mens Rea*, p. 193; Holmes, *The Common Law*, p. 53.

⁵⁰*Restatement of Torts*, vol. 1, sec. 2.

⁵¹*Harvard Law Review*, vol. 30, p. 547.

stance of natural compulsion, and movements performed under its influence are not acts. "The movements of a man's limbs when he gesticulates in a troubled dream or walks in his sleep are not acts."⁵² "I do not think it has ever been suggested that a person who in his sleep sets fire to a house or caused the death of another would be guilty of arson or murder."⁵³

The greatest difficulty in the application of the principle that bodily movements irresistably compelled by natural causes are not "acts" has arisen in connection with the form of insanity called "irresistable impulse." The authorities are divided as to whether a person should be held criminally responsible for the "consequences" of bodily movements which are due to this form of insanity;⁵⁴ but the question whether such bodily movements are themselves really "acts" has not been frequently considered; and it may be argued that since such bodily movements are the result of a desire, although an insane and imperative desire, they are acts, because there is not an absence of volition, which exists only when the conduct does not depend upon the defendant's desire at all.

Compulsion by human agency, in order to render bodily movements involuntary and therefore not acts, must be so complete as to leave no room for choice. The bodily activity or passivity must not depend in any degree upon the wish or desire of the person charged with it. In these cases, as, in the cases of compulsion by natural causes, "inasmuch as the party is mentally passive it cannot be said that he acts."⁵⁵ "Suppose B takes A's hand and with it strikes C. This is clearly not A's act."⁵⁶

It has been contended that bodily activity or passivity under the complete control of hypnotic or post hypnotic suggestions are not acts, because the dominion of the hypnotist over the subject's mind is such as to deprive the latter of an independent choice of action. But if, as some modern authorities assert, the operation of hypnotic or post hypnotic suggestion lies merely in the impression upon the subject's mind of an urgent or imperative desire resulting in the commission of the suggested conduct, it cannot be denied that the conduct constitutes an act, whatever may be the rule as to the criminal responsibility for the consequences of such action.⁵⁷

It is generally agreed that one cannot be held criminally responsible for the consequences, whatever they may be, of involuntary activity or passiv-

⁵²Pollock, *Jurisprudence*, 5th ed., 146.

⁵³Stephen, *History of Criminal Law*, vol. 2, p. 100.

⁵⁴16 C. J. 102.

⁵⁵Austin, *Jurisprudence*, p. 1060.

⁵⁶Harvard Law Review, vol. 30, p. 546.

⁵⁷Stroud, *Mens Rea*, p. 257. Because of the exemption from liability which is accorded to infants in certain cases it has been suggested that the bodily movements by which they inflict harm on others are not acts. But infants have the power of volition and do act. Terry, *Anglo-American Law*, sec. 79.

ity.⁵⁸ But the question has not frequently arisen in actual cases.⁵⁹ There is a conflict of opinion as to whether "irresistible impulse" is a defense in criminal cases;⁶⁰ and hypnotic or post hypnotic suggestion has not yet been recognized as a defense.⁶¹ It has been specifically held, however, that one is not responsible for the consequences of his bodily movements resulting from "a paroxysm of somnolentia or somnambulism."⁶² In an English case the defendant was accused of shooting with intent to resist arrest. His defense was that the gun went off accidentally. The court charged the jury that a man must be taken to intend the natural consequences of his acts, and that it was for the prisoner to satisfy them that the gun went off accidentally. On appeal the conviction was reversed upon the ground that the direction might have been understood by the jury as laying down the incorrect proposition that a person must be taken to intend the consequences, not only of his intentional but also of his accidental acts.⁶³ Such an understanding could only be arrived at by a stupid jury, because there are not such things as "accidental acts." A movement of the body which is purely accidental is not an act at all.

The exemption from criminal responsibility for the results of involuntary bodily movements which is, by most authorities, based upon the theory that without volition there is no act, is, by other authorities, based upon the theory that volition is a mental element which must accompany the act in order to constitute a crime.⁶⁴ Thus a recent writer states: "Confusion has been introduced into the subject by some writers who have sought to define act in terms of willed or voluntary muscular activity. Such definitions do not properly define the word * * * the defendant's mental condition constitutes intent or proves the existence of intent and is not in any sense a part of the act itself."⁶⁵

A person who, intentionally or negligently, surrendered his conscious volitional control over his bodily movements might be held responsible for results subsequently caused by such movements. But in a case where the defense claimed the defendant had killed the deceased in a paroxysm of somnambulism the court said, "If the person is and has been afflicted in the manner claimed, and knew, as he no doubt did, his propensity to do acts of

⁵⁸Stephen, *History of Criminal Law*, vol. 2, p. 100; Jenks, *Book of English Law*, p. 192. "Involuntary" used in connection with manslaughter characterizes the consequence of the bodily movement, death, and not the bodily movement itself. It does not mean that a volition was not present. *State v. McVay*, 47 R. I. 292, 132 A. 436.

⁵⁹Pollock, *Jurisprudence*, p. 147.

⁶⁰16 C. J. 102.

⁶¹Stroud, *Mens Rea*, p. 244.

⁶²Fain v. Com., 78 Ky. 183.

⁶³Rex v. Davies, 29 T. L. R. 350, (1913).

⁶⁴Harvard Law Review, vol. 30, p. 547.

⁶⁵Miller, *Criminal Law*, p. 94.

violence when aroused from his sleep, he was guilty of a grave breach of social duty in going to sleep in the public room of a hotel with a deadly weapon on his person, and merits, for that reckless disregard of the safety of others, some degree of punishment, but we know of no law under which he can be punished. Our law only punishes for overt acts done by responsible moral agents. If the prisoner was unconscious when he killed the deceased, he cannot be punished for that act, and as the mere fact that he had a weapon on his person and went to sleep with it there did no injury to any one, he cannot be punished for that."⁶⁶

INSTINCTIVE ACTS

Some psychologists assert that no hard and fast line can be drawn between voluntary movements of the body and what are called the reflex movements. Certainly there are some movements of the body as to which it is not easy to say how far they are the result of volition. For example, if a person, being suddenly struck at, dodges, as we say, "instinctively," ought the movement be considered his act?⁶⁷

A recent publication asserts that "a muscular reaction is always an act unless it is a purely reflexive action in which his mind and will have no share. Thus if A, finding himself about to fall, stretches out his hand to seize some object, whether a human being or a mere inanimate object, to save himself from falling, the stretching out of his hand and the grasping of the object is an act, since the defendant's mind has grasped the situation and has dictated a muscular contraction which his rapidly formed judgment leads him to believe to be helpful to prevent his fall. While the decision is formed instantaneously, none the less the movement of the hand is a response to the will exerted by a mind which has already determined upon a distinct course of action. The exigency in which the defendant is placed, the fact that the decision corresponds to a universal tendency of mankind, may be enough to relieve the defendant from liability, but it is not enough to prevent his grasping the object from being his act."⁶⁸

The question of criminal responsibility for the consequences of these so-called instinctive acts has not been frequently considered. There has been considerable discussion as to civil liability for such acts.⁶⁹ A person who wrongfully causes another to make these instinctive movements may be held responsible for the consequences resulting therefrom.⁷⁰

⁶⁶Fain v. Com., 78 Ky. 183.

⁶⁷Mercier, *Criminal Responsibility*, p. 44.

⁶⁸Restatement of Torts, vol. 1, sec. 2.

⁶⁹Harvard Law Review, vol. 7, p. 302; vol. 8, p. 225; vol. 13, p. 599; *Lardlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679.

⁷⁰Terry, *Anglo-American Law*, sec. 96.

SPONTANEOUS ACTION

Bodily movement, in order that it may constitute an act, need not be "spontaneous."⁷¹ It is not necessary that the actor's will should operate freely and without pressure from outside circumstances. The fact that the pressure is such that reasonable men cannot be expected to resist does not prevent its manifestation from being an act, although it may make the act excusable. The fact that a man is induced by some motive, powerful and terrible, to will a bodily movement does not render it involuntary and therefore not his act. The bodily movements of a criminal who is walking to his execution are just as much acts as if walking from his place of confinement to regain his liberty.⁷² And if B is induced by the blows of A to hit C, the hitting of C is B's act. This case differs from the case where A by force takes B's arm and therewith hits C. In the first case B was induced to "will" and the hitting was his act. In the second case B did not "will" and the hitting was not his act.⁷³

From the fact that a bodily movement has occurred, an intention that it should occur may be inferred in absence of evidence to the contrary. "It is a legal presumption that a person intended to do what he actually did."⁷⁴ The physical element of most crimes involves more than one bodily movement. Hardly any crime is committed by performing or omitting a single bodily movement.⁷⁵ And the same bodily movements may be followed by different groups of consequences and the question whether the actor may be held criminally responsible for more than one crime may arise.⁷⁶ A distinction is made in common speech between saying and doing—between word and act, but the speaking of words is an act and may constitute a crime, as, e. g., solicitation.⁷⁷

CONSEQUENCES

All acts are, in respect to their origins, alone indifferent. No bodily activity or passivity is itself criminal.⁷⁸ All the muscular contractions of a

⁷¹Keeton, *Jurisprudence*, p. 150.

⁷²Stephen, *History of Criminal Law*, vol. 2, p. 102.

⁷³"Herein lies the difference between physical compulsion and duress." Hibbert, *Jurisprudence*, p. 165. "If the movement is caused by physical compulsion, as when the hand of a person is forcibly guided, there is no act since 'will' is absent. But the will itself being amenable to motives, may be coerced by threats, etc. Here there is an act." Holland, *Jurisprudence*, 9th ed., p. 101. Keeton, *Jurisprudence*, p. 151, "In the second case there was no appeal to conflicting desires." Hibbert, *Jurisprudence*, p. 169. "In the first case having before him the choice of two things he chose the least disagreeable alternative." Keener, *Jurisprudence*, p. 176.

⁷⁴*McElvey v. State*, 9 Neb. 157, 2 N. W. 378.

⁷⁵Terry, *Anglo-American Law*, sec. 82, 568. To commit larceny one must *take and carry away*. To commit burglary one must break and enter.

⁷⁶Terry, *Anglo-American Law*, sec. 569; *Com. v. Erneste*, 89 Pa. Super. Ct. 102.

⁷⁷Terry, *Anglo-American Law*, sec. 81.

⁷⁸Holmes, *The Common Law*, p. 54; Salmond, *Jurisprudence*, 7th ed., p. 383.

man who shoots another with a pistol, the motions of his arm and hand by which the pistol is aimed and discharged, would be perfectly lawful if the actor had not a pistol in his hand, or if no one stood in front of him, or even, according to some cases, if the pistol was not loaded.⁸⁰

Acts are made criminal because of their consequences and these consequences are determined by the circumstances. "An act which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it is done."⁸¹ The consequences of an act because of which it is made criminal may be either actual or anticipated. Acts may be criminal because of their "tendencies or their actual results."⁸²

Crimes may therefore be divided into two classes :

- (1) Those in which an act is made criminal by reason of the actual harm which in fact ensues from it.
- (2) Those in which an act is made criminal by reason of its mischievous tendencies, irrespective of the actual results.⁸³

"Criminal liability," it is said, "is usually sufficiently established by proof of some act which the law deems dangerous in its tendencies, even though the issue is in fact harmless."⁸⁴ "Generally speaking in criminal law acts are wrongful on account of their tendencies."⁸⁵ Since the tendencies of an act are determined by its circumstances, it is sometimes said that acts of the second class are made criminal because of their circumstances, and the distinction is made between acts which are criminal because of their consequences and those which are made criminal because of their circumstances,⁸⁶ but this distinction overlooks the fact that in all cases the consequences of an act, actual or anticipated, are determined by its circumstances.⁸⁷

Bodily activity may be attended by an infinite variety of circumstances and an endless chain of consequences.⁸⁸ An act has no natural boundaries. Its limits must be artificially defined for the purpose at hand for the time being. Out of the array and chain the law therefore selects some, and declares that bodily activity or passivity, or certain forms thereof, attended by these is criminal. It is the law which selects the bodily activities and passivities and the circumstances and consequences with which they must be attended to constitute crimes. "It is for the law at its own good pleasure to select and de-

⁸⁰Terry, *Anglo-American Law*, sec. 110; Abraham Tucker, *Light of Nature*, ch. 11.

⁸¹*Aikens v. Wisconsin*, 195 U. S. 194; Amos, *Science of Law*, p. 103.

⁸²Keeton, *Jurisprudence*, p. 156.

⁸³Salmond, *Jurisprudence*, p. 156.

⁸⁴Salmond, *Jurisprudence*, 7th ed., p. 385.

⁸⁵Keeton, *Jurisprudence*, p. 156.

⁸⁶*Harvard Law Review*, vol. 41, p. 838; Jenks, *New Jurisprudence*, p. 195.

⁸⁷*Yale Law Journal*, vol. 40, p. 53.

⁸⁸Keeton, *Jurisprudence*, p. 156.

fine the relevant and material facts of each species of crime."⁸⁹ The circumstances and consequences so selected and defined are the constituent parts of the criminal act. All others are irrelevant and without legal significance. Thus in larceny the hour of the day is irrelevant, but in burglary it is material.⁹⁰

OMISSIONS

The criminal act may be either positive or negative—an act of commission or acts of omission.⁹¹ Acts of omission, being purely negative, can only be described by describing the acts of commission which are omitted.⁹² By some authorities the term act is used in a narrow sense to include only positive acts, and then it is opposed to omissions and does not include them.⁹³ This restriction is inconvenient. Adopting the generic sense, acts can be described as positive or negative, but if the term is restricted to acts of commission, there is no name for the genus and an enumeration of species is necessary.⁹⁴

Acts of omission are sometimes called negligence.⁹⁵ But this is incorrect. Negligence relates to the mental part of crime. Omission, on the contrary, concerns the physical part of crime. An omission may be either intentional or negligent, just as a positive act, or act of commission, may be either intentional or negligent.⁹⁶ An omission may be due to passivity or to acts inconsistent with the act omitted.⁹⁷ In the latter case, the inconsistent act may be committed prior to or coincident with the omission. These distinctions may be of importance in considering the mental element of crime.⁹⁸

The term omission is sometimes confined to unintentional negative acts.

⁸⁹Salmond, *Jurisprudence*, 7th ed., p. 383.

⁹⁰Keeton, *Jurisprudence*, p. 156. "The outward act which enters into the composition of crime is the subject of innumerable statutes and innumerable judicial decisions. Criminal acts have been classified and considered with the utmost minuteness and most discriminating subtlety, as to their kinds, their effects, their stages, their circumstances, and I know not what besides. The other ingredient of crime—the state of mind which accompanies the outward act—is much more obscure; and, though it has received much attention at the hands of very eminent men, it has not reached a stage of such settled determination as has the first ingredient." Mercier, *Criminal Responsibility*, p. 3.

⁹¹Holland, *Jurisprudence*; *State v. O'Brien*, 32 N. J. L. 169.

⁹²Terry, *Anglo-American Law*, sec. 110.

⁹³Stroud, *Mens Rea*, p. 4; *Randle v. Birmingham*, 169 Ala. 614, 53 So. 918; Keeton, *Jurisprudence*, p. 151.

⁹⁴Salmond, *Jurisprudence*, 7th ed., p. 381.

⁹⁵The word negligence is derived from shirking one's duty in the harvest field.

⁹⁶*California Law Review*, vol. 7, p. 431; Salmond *Jurisprudence*, 7th ed., pp. 382, 421.

⁹⁷"When a party omits he may have taken either one of two courses—i. e., he may do nothing at all or he may do something different from the act he is omitting to do." Hibbert, *Jurisprudence*, p. 165.

⁹⁸Stroud, *Mens Rea*, p. 5.

It is then opposed to forbearances which are intentional negative acts.⁹⁹ A forbearance, it is said, is the determination of the will not to act. It is omission together with advertence to the act which is not done and a determination not to do it.¹⁰⁰ It is a conscious advertence to a particular course of action and a conscious refusal to adopt it; and an omission implies inadvertence with regard to a given course of action and a consequent, but unconscious, failure to adopt it.¹⁰¹

The theory upon which forbearances are made criminal is obvious. Forbearances are intentional omissions. Intention is the result of deliberation on motives, and the threats of the criminal law furnish potential forbearers a powerful motive to do rather than to refrain from doing the proper thing. Omissions are made criminal upon the theory that the threats of the law stimulate the mind to greater alertness or the memory to greater activity, than it would otherwise display, and thus reduces the number of omissions. It must be left to the psychologists to decide whether this is true or not.

Inaction due to physical compulsion is not an act of omission.¹⁰² Thus if A is locked in a room so that he cannot get out he does not "omit" to come out. But if the door is open and he refrains from coming out because he is threatened with harm if he does come out, his not coming out is an act of omission. The ordinary doctrines relative to the mental element of crimes apply to crimes by omission according to the character of the crime in question and the circumstances of each case.¹⁰³ The consequences of an omission may be intended or unintended, expected or unexpected, and the circumstances of the omission may be known or unknown, and the criminal responsibility in the particular case may, as in the case of acts of commission, depend upon these facts.¹⁰⁴

CRIMES OF OMISSION

When it is said that the criminal act may be positive or negative, it is not meant that every crime may consist of either a positive or negative act. The

⁹⁹Salmond, *Jurisprudence*, 7th ed., p. 382; Keeton, *Jurisprudence*, p. 150; Hibbert, *Jurisprudence*, p. 160.

¹⁰⁰Keener, *Jurisprudence*, p. 169; Terry, *Anglo-American Law*, sec. 83; Keeton, *Jurisprudence*, p. 150. A forbearance is sometimes called a wilful neglect which is a contradiction in terms, for in case of neglect there is no intention. Hibbert, *Jurisprudence*, p. 181.

¹⁰¹Jenks, *New Jurisprudence*, p. 206; Robinson, *Jurisprudence*, sec. 136. It is not clear whether the intention necessarily involved in a forbearance relates to the bodily inaction or to the consequences thereof. "The consequences of a forbearance may be desired or not desired, expected or not expected, adverted to or not adverted to." Keener, *Jurisprudence*, p. 169. "If I fail to keep an appointment through forgetfulness my act is unintentional and negative; that is to say, an omission. But, if I remember the appointment and resolve not to keep it, my act is intentional and negative; that is to say, a forbearance." Salmond, *Jurisprudence*, 7th ed., p. 382.

¹⁰²Hibbert, *Jurisprudence*, p. 166.

¹⁰³Stroud, *Mens Rea*, p. 156.

¹⁰⁴Keener, *Jurisprudence*, p. 169; Terry, *Anglo-American Law*, sec. 83.

perpetration of some crimes requires a positive act; the perpetration of others requires a negative act; and some crimes may be perpetrated by either positive or negative acts.

The great majority of crimes require acts of commission.¹⁰⁵ Although the number of crimes by omission has increased greatly in recent years, they are still comparatively few in number.¹⁰⁶ The law does not require active benevolence between man and man. It is left to one's conscience whether he shall be a good Samaritan or not.¹⁰⁷ "Thus, not to remove your neighbor's baby from the railroad track in front of an on-rushing train, although it would cause you very little trouble to do so, is no crime even if the child's life is lost as a result of your neglect. You can let your mother-in-law choke to death without sending for a doctor, or permit a ruffian half your size to kill an old and helpless man, or allow your neighbor's house to burn down, he and his family sleeping peacefully in it, while you play the pianola and refuse to call up the fire department, and never have to suffer for it—in this world."¹⁰⁸

It is chiefly by reason of its failure to impose affirmative duties and to make the failure to perform these duties crimes, that the criminal law differs from morality; and it is perhaps debatable whether inaction in the face of manifest danger to another should not be made criminal.

It seems, however, that the law in strictly limiting affirmative duties, and consequently crimes of omission, has adopted a prudent course. If every one were bound to act when another was exposed to danger, the consequences resulting from officious and mistaken inference would probably be worse than those which result from the operation of the present law. The practical difficulty in framing laws to impose affirmative duties to be benevolent would also be very great. The difficulty would be in drawing the line. A possible working rule might be that one who fails to interfere to save another from impending death or great bodily harm when he might do so with little or no inconvenience to himself, and death or great bodily harm follows as a consequence of this inaction, shall be guilty of a crime.¹⁰⁹ Bentham contended that every man is bound to assist those who have need of assistance if it can be done without exposing himself to sensible inconvenience and that this obligation was stronger in proportion as the danger is greater for the one and

¹⁰⁵Geldart, *Elements of English Law*, p. 193; Jenks, *Book of English Law*, p. 193.

¹⁰⁶Ogders, *Common Law of England*, p. 106; *West Virginia Law Review*, vol. 40, p. 387; *Com. v. Cali.*, 247 Mass. 20, 141 N. E. 510. See Stroud, *Mens Rea*, p. 155.

¹⁰⁷Ames, *Essay on Legal History*, p. 451.

¹⁰⁸Train, *The Prisoner at the Bar*, p. 450. "Omissions were probably punished in early times by the primitive tribunals of the village, guild, or manor. But until recent times it was rare for the state to punish directly the offense of mere omission." Jenks, *New Jurisprudence*, p. 207. "For many centuries, English law, like all primitive systems concerns itself mainly, if not exclusively, with acts of commission." Jenks, *Book of English Law*, p. 193. Holdsworth, *History of English Law*, vol. 2, p. 51.

¹⁰⁹Ames, *Essays on Legal History*, p. 451.

the trouble of preserving him the less for the other.¹¹⁰ The Dutch Penal Code provides: One who witnessing the death with which another is threatened neglects to give or furnish him such assistance as he can give or procure without reasonable fear of danger to himself or others if the death of the person in distress follows,¹¹¹ shall be responsible.

A distinction must be made between mere acts of omission and omissions in the course of or preceded by affirmative action.¹¹² The immediate cause of an injury may have been an act of omission but if it is connected with active conduct in this way, the whole course of conduct may be considered as having caused the injury.¹¹³ The distinction between a mere omission and an omission in the course of affirmative action is "most pregnant." "If a surgeon from benevolence cuts the umbilical cord of a new born child he cannot stop there and watch the patient bleed to death. It would be murder wilfully to allow death to come to pass in that way."¹¹⁴ A person who fails to look for pedestrians while driving an automobile and as a result hits and kills one commits manslaughter by affirmative action.¹¹⁵ The tendency to consider omissions as active misfeasance has been carried to extremes.¹¹⁶ Thus a recent writer says: "On the whole, it may be said that duties to take positive action for the benefit and protection of others attach only to certain relations, and are imposed only when necessary to afford protection. Even in case of family relationship, there is present the will of the citizen to become a husband and father, so that even here the relation is, in the last analysis, a creature of *voluntary action* on his part."¹¹⁷

Acts of omission have sometimes been held sufficient to render a person guilty of a crime although the law defining the crime seemed to require an act of commission. Thus an owner of an automobile who knew that his car, in which he was riding but not driving, had struck a dog, and who made no effort to have his car stopped to give aid to the suffering animal is guilty of the offense defined in a statute which provides that, "any one who shall wantonly or cruelly ill treat or otherwise abuse any animal shall be subject to fine or imprisonment." The court said that "such a person certainly wantonly and cruelly abuses an animal in a common sense and humane interpretation of the statute. Ill treatment and abuse does not need to be active; it may

¹¹⁰Works, vol. 1, p. 164. See also Livingston, Works on Criminal Jurisprudence, vol. 2, p. 126.

¹¹¹Article 450.

¹¹²West Virginia Law Review, vol. 40, p. 388.

¹¹³Stroud, Mens Rea, pp. 163, 165.

¹¹⁴Holmes, The Common Law, p. 278.

¹¹⁵Jenks, Book of English Law, p. 195.

¹¹⁶West Virginia Law Review, vol. 40, p. 388.

¹¹⁷Bohlen, Studies in the Law of Torts, p. 318.

be passive. It does not need to be the commission of an act; it may be an omission to do what the circumstances require."¹¹⁸

ACTS CONSTITUTING SEVERAL CRIMES

Acts which are similar in some respects may constitute different crimes because :

- (1) They are different in other respects.
- (2) They are accompanied by a different mental element.
- (3) They are prohibited by different systems of law.

Acts which are similar in their origins may constitute different crimes because their consequences or tendencies are different. Thus an unlawful blow struck at another may fail to reach him and constitute an assault; or reach and constitute a battery; or destroy a limb and constitute mayhem; or cause death and constitute homicide. And shooting at a person in a private room is an assault; in a public place, a breach of peace; in the presence of the court, a contempt.¹¹⁹

Acts which are in all respects similar may constitute different crimes because of difference in the mental element with which they are accompanied. This difference may be either in the intent or in the motive. Every act may give rise to two questions with respect to the mental attitude of the actor. The first is : How did he do the act, intentionally or not? The second is : If he did it intentionally, why did he do it? The purpose of the actor to do an act is the intent and his purpose in doing it is his motive.

The act of hitting one on the head with an axe and killing him is murder in the first degree if the actor intended to kill, but is only murder in the second degree if the actor intended merely to inflict great bodily harm. The difference in the intent renders the acts different crimes. The act of breaking and entering a dwelling house in the night time is burglary if the reason for doing it was the desire to commit a felony, but is at most a misdemeanor if the reason was something else. The difference in the motives renders the acts different crimes.

Acts which are similar may constitute different crimes because they are prohibited by different systems of law. In the United States an act may be prohibited by : (1) federal law, (2) state law, and (3) municipal ordinance and be punished as a crime by the nation, the state, and the municipality, and an act so prohibited constitutes different crimes even though all three laws designate it by the same name.¹²⁰

¹¹⁸Com. v. Putch, 18 D. & C. 680. This was a case of omission preceded by an affirmative act. But see Com. v. Cali., 247 Mass. 20, 141 N. E. 510.

¹¹⁹The difference here is in the anticipated consequences, or tendencies, but these depend upon the circumstances.

¹²⁰16 C. J. 62.