

**ACT, CIRCUMSTANCE, AND EVENT:
AUSTINIAN ACTION THEORY UNDER THE GRIFFITH CRIMINAL CODE**

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“Considerable confusion reigns, both in ordinary and in legal speech, on what is meant by an act, or a voluntary act. The most acceptable language is to say that an act means a willed bodily movement...”¹

ABSTRACT: Legal history and Sir Samuel Griffith’s *Criminal Code* do not always sit comfortably together. This is due in a substantial degree to accepted doctrine concerning the interpretation of the Griffith *Code* (the *Brennan-Vagliano* rule²), which deflects attention away from the *Code*’s historical antecedents, and instead concentrates focus upon the terms of the *Code* to the general exclusion of that history. Only in “exceptional circumstances” should the Court resort to pre-*Code* law in interpreting the provisions of the *Code*. It is arguable that this canon of interpretation somewhat over-simplifies what is in reality a substantially more complex question. This short paper does not, however, enter into the broader question of interpretation of the *Code* generally, but confines itself instead to one narrow issue: the significance of the words “act or omission”, an expression which appears in the *Code*, in that form, on numerous occasions, and which represents one of the foundation stones upon which the *Code* was erected. The expression, it is suggested, has a substantial historical pedigree, an appreciation of which can only assist to advance the modern articulation of criminal law theory under the *Code*. “Act” has long been recognised as an inherently ambiguous term³; but it is probable that, by the time Griffith came to write the *Code*, “act”, as a juristic concept, had taken on a recognised content based predominantly upon Austin’s simple action theory. The accurate determination of this original meaning takes on an added significance when, as is the case with the *Code*, the term in question underpins fundamental concepts of liability, in respect of which even a minor shift in meaning may substantially impact upon the daily application of basic tenets of criminal responsibility.

¹ Glanville Williams, *Textbook of Criminal Law* (1978) p 33.

² This expression is used as a convenient shorthand description of the rule (or set of rules) on the interpretation of “codes” laid down in *Brennan v R* (1936) 55 CLR 253, and *Bank of England v Vagliano Brothers* [1891] AC 107.

³ J W Salmond, *Jurisprudence* (1902) p 399; The Right Honourable Sir Harry Gibbs, “Queensland Criminal Code: From Italy to Zanzibar” (2003) 77 *ALJ* 232, 236.

In 1961, the High Court of Australia had occasion, for the first time, to carefully consider the General Part of Sir Samuel Griffith's *Criminal Code*. The case⁴ arose under section 13 of Tasmania's *Criminal Code*, a provision which, in concept, closely resembled Griffith's original section 23 of Queensland's *Code*⁵. Central to the Court's consideration was the word "act", in the context of the expression "act or omission" in section 13. The precise difficulty to be resolved was the content of the word "act". The case involved an unlawful wounding caused by the discharge of a projectile from an air rifle: was the "act" in question the discharging of the air rifle; or was it the wider transaction, inclusive of the wounding of the victim?

In the course of his judgment, Sir Owen Dixon CJ⁶ proffered an observation on the General Part of the Griffith *Code* which is familiar to all students of the *Code*⁷:

⁴ *Vallance v R* (1961) 108 CLR 56.

⁵ Gibbs J (as his Honour then was) in *Kaporonovski v R* (1973) 133 CLR 209 at 229, perceived no real difference between the sections such as might affect the interpretation of "act".

⁶ 108 CLR at 58. In his speech upon the occasion of his retirement as Chief Justice of Australia, Dixon CJ revisited his recollections of Griffith: "...he was a dominant legal mind. To my way of thinking, it was a legal mind of the Austinian age, representing the thoughts and learning of a period which had gone, but it was dominant and decisive. His mind was clearly of that caliber; he did not hesitate, he just felt that he knew; and that what he knew was right": 110 CLR v, xi (13/04/64); reprinted *Jesting Pilate* (1965) p 258. In *Timbu Kolian v R* (1968) 119 CLR 47 at 61, Windeyer J noted that s.23 of the Queensland *Code* (as applied to Papua New Guinea) used "the language of analytical jurisprudence". In *R v Kaporonovski* [1972] Qd R 465, 498G-499E, 503C, Justice Graham Hart considered that s.23 used Austinian concepts.

⁷ Dixon CJ's Austinian reference demonstrated his awareness of Austin's theories as they pertained to criminal law. Having recognised their potential influence, however, he chose to pursue it no further in his judgment. By mid-1961, when *Vallance* was decided, many of Austin's theories were generally taken to be outdated. His action theory was said by H L A Hart to be "an out-dated fiction – a piece of eighteenth-century psychology which has no real application to human conduct": "Acts of Will and Responsibility", in *Punishment and Responsibility* (1970) p 101. Hart's essay, in which he gave voice to this opinion, was first published in 1960, and at the time was described as "a frontal attack" upon Austin: Book Review (1961) 6 *JSP TL* 93 (J A Coutts). Whether Dixon CJ was aware of Hart's criticism of Austin at the time of *Vallance* is unknown, but Windeyer J, in the later case of *Timbu Kolian v R* (1968) 119 CLR 47, at 64-65, specifically referred to Hart's paper, and declined to apply Austin's conception of "act" to section 23. It has been cited more recently, again in reference to section 23, by Gummow and Hayne JJ in *Murray v R* (2002) 211 CLR 193, at 209. Hart rested his argument on two grounds: (i) that "act", in the sense of a muscular contraction, could not properly include an omission; and (ii) that Austin's narrow definition of an "act" was inconsistent with the common usage of the term. As to the first point, Austin did not maintain that an "act" included an omission: see *eg* R F Stalley, "Austin's Account of Action" (1980) 18 (4) *Jnl Hist Phil* 448, 449. In fact, Austin's Notes for a Criminal Code (discussed further below) used "act or omission" in the exculpatory provisions of its General Part. In respect of the second objection, the fact that most people, when thinking of an "act", do not think of it in terms of a muscular contraction (or even a bodily movement), is not really to the point (see also K W Saunders, "Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence

“The difficulty may lie in the use in the introductory part of the Code of wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do.”

If Dixon’s characterization was accurate, and if Griffith was indeed a “dedicated Austinian”⁸, an important question is posed as to the extent that his *Code* may have been drafted, at least in part, upon Austinian principles. That Austin’s influence upon 19th century criminal law may have outlasted his influence upon general jurisprudence has already been noticed⁹. At the very least, there is a case for exploring the possibility that some of Austin’s basic ideas about criminal law, and of his vision for criminal codification, made the transition from theory to reality through the medium of Sir James Fitzjames Stephen¹⁰.

The vehicle for this exploration is the expression “act or omission”. From occasional appearances in the early 19th century, “act or omission” became the choice of codifiers to denote the unit of liability in both positive and negative aspects: *positive* by denoting an “act or omission” as constituting an offence under circumstances defined in the Special Part; or *negative*, by exculpation from liability

of Volition” (1987-88) 49 *U Pitts LR* 443). Austin sought to analyse human conduct, to jurisprudential ends, by reference to its constituent parts. Where human conduct entails legal consequences, analysis of that conduct is unavoidable: common usage may refer to an “agreement”, rather than characterizing the conduct in terms of offer, and acceptance; or, in the case of a motor accident, a claim that one party was “in the wrong”, or “at fault”, does not excuse a court from examining the transaction by reference to the elements of duty, breach, causation, and damage. Depending upon the circumstances under consideration, and what is in dispute, the criminal law may similarly demand elemental analysis of a transaction. Austin identified the basic tools to undertake that task.

⁸ W L Morison, *John Austin* (1982) p 135.

⁹ J E Stannard, “A Tale of Four Codes: John Austin and the Criminal Law” (1990) 41 *NILQ* 293.

¹⁰ Stephen was an admirer of Austin: Morison *op cit* pp 148-151. Along with others, he was consulted by Sarah Austin with respect to the editing of her late husband’s unpublished manuscripts: L & J Hamburger, *Troubled Lives: John and Sarah Austin* (1985) p 195; “In his [Stephen’s] first principles he was an unhesitating disciple of Bentham and Austin”: Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) p 204. It is even possible to draw a direct line of descent from Austin to Griffith, *via* Starkie (and the Criminal Law Commissioners), and on to Sir James Fitzjames Stephen who, with his fellow Commissioners of 1879 (Blackburn LJ, and Barry and Lush JJ), referred back to the Reports of the Criminal Law Commissioners in preparing their Draft Code of 1879 (see *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences* (1879) p 6); in its turn, the Draft of 1879 provided the basis for the Bill of 1880, upon which Griffith drew so heavily in the course of preparing the Queensland *Code*.

where the “act or omission” fell within a justification or excuse contained in the General Part¹¹.

“act or omission” under the Griffith Code:

The most significant use of “act or omission” is to be found in the General Part of the *Code*. Of the forty-eight uses of “act or omission” throughout the *Code*, twenty-four occur within these first five chapters. The purpose of provisions in a General Part - to govern the operation of all offences – can only be achieved if a feature, common to every offence, can be identified. It is upon this common feature that the general provisions will operate. Griffith located this common foundation in the requirement that an offence be premised upon an “act” or an “omission”¹²:

“An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.

¹¹ This is not to suggest that the use of “act or omission” was confined to criminal codification. Sir Frederick Pollock used the expression to encompass the physical element in his *Draft of a Civil Wrongs Bill prepared for the Government of India* (completed *circa* 1886), and appended to *The Law of Torts* (1887) pp 517 *et seq.* see *eg* section 10, and compare with sections 6 and 9. Pollock also recognised, within his Bill, distinct “General” and “Special” Parts.

¹² *Code* section 2. Contrary to some views, this does not penalize an “act or omission” standing alone, but only where the circumstances or consequences of the “act or omission” are such as to engage an offence provision within the Special Part of the *Code*. If this section is read with section 36, the combined effect is that *all* offences *should* be premised upon an “act” or an “omission”, in order to receive the benefit of the exculpatory rules in Chapter 5. Under the criminal law of Queensland, there is no “act requirement” as it is popularly referred to. The expression “act or omission”, in section 2 and in other sections in the General Part, places “act” and “omission” on an apparently-equal footing insofar as their status as constituent elements of an offence is concerned, with no obvious preference that an “act” be present, rather than an “omission”. Further, it is open to the Queensland Parliament to create offences based upon *any* criteria, whether or not they include an act or an omission, and there is no fundamental or “constitutional” quality about section 2 of the *Code* which would prevent such offence creation. Implied departure from section 2’s principle may be evidenced simply by a later inconsistent statute. There is a stronger argument for asserting that Queensland law *does* recognize a “voluntariness” requirement, as laid down in the first limb of section 23 which, although still defeasible, will be held to apply in the absence of very clear indications to the contrary: *eg* *Hunt v Maloney* [1959] Qd R 164.

Although the Stephen draft codes did not include a counterpart to section 2 of the Griffith *Code*, it is clear that Stephen followed the same line of reasoning: “I suppose that in strict theory it would be impossible to define a crime otherwise than as an act or omission punished by law....: J F Stephen, “The Criminal Code (1879)” (1880) *The Nineteenth Century* (Jan) p 136 at p 145.

The critical role played by the “act or omission” requirement is clear if one has regard to the provisions in the General Part. By way of example are sections 23 and 16 (in their original form):

Intention: Motive.

- 23.** Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.
- Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Person not to be Twice Punished for Same Offence.

- 16.** A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

The potential application of these fundamental provisions is governed by the content to be accorded to “act or omission”, or more commonly, to “act”, a fact which underscores the primacy of clarity of meaning for “act or omission”. Far from clarifying the position, modern interpretations of “act” in section 23 caused one commentator to ask whether or not Griffith’s self-proclaimed satisfaction with Chapter 5¹³ had been wholly unfounded¹⁴. Section 16 has fared little better¹⁵.

¹³ “No part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction”: Letter of 29/10/1897, from Sir Samuel Griffith, Chief Justice, to the Attorney-General of Queensland.

¹⁴ I D Elliott, “Mistakes, Accident and the Will: The Australian Criminal Codes” (1972) 41 *ALJ* 255, 328.

¹⁵ See *R v Gordon ex parte Attorney-General* [1975] Qd R 301; *R v Tricklebank* [1994] 1 Qd R 330. It was probably the state of the decisions which caused Gaudron J to question whether section 16 had made *any* improvement over the common law: *Pearce v The Queen* [1997] HCA Trans 256 (15/08/1997) printed page 4.

Traditionally, resort to pre-*Code* sources is justified on the basis that “act”, in the context of the *Code*, is a term of uncertain import, or alternatively had acquired a technical or special meaning by the time the *Code* was enacted¹⁶. An attempt will accordingly be made to deduce, principally from the proto-legislative antecedents of the Griffith *Code*, a content for “act” which might facilitate a more logical development of the *Code* in its modern legal environment. These potential sources of information have been generally ignored in the consideration of the Griffith *Code*, yet it is clear from Griffith’s own notes that he used other codes, and in particular the Stephen-based *Criminal Code Bill 1880*, in compiling his own contribution to the closing years of the Victorian codification movement.

“act or omission” – the practical content:

The earliest use of “act or omission” in a practical and formulaic sense¹⁷ may be Thomas Starkie’s *Treatise on Criminal Pleading*¹⁸:

“The general rule has long been established, that no person can be indicted but for some specific act or omission, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record.”

In discussing the requirements of an indictment, Starkie undertook a basic elemental analysis¹⁹ of a criminal offence²⁰:

¹⁶ *Stuart v R* (1974) 134 CLR 426, 439 *per* Gibbs J.

¹⁷ There had been earlier occasional statutory usage: see *eg* 33 Geo III, c 75 (1793) s XIV (concerning the sewers and drains of London).

¹⁸ 1814, vol 1 at p 63 (2 vols). John Austin (1790-1859) and Thomas Starkie (1782-1849) were close contemporaries, but Starkie’s *Pleading* predated Austin’s writings. In 1814, Austin was still reading for the Bar. He was admitted in 1818, although his reading lists indicate interest in Bentham’s *Principles of Morals and Legislation* as early as 1816: Morison *op cit* pp 8-9. Both Starkie and Austin lectured at the University of London (Austin in Jurisprudence and the Law of Nations, and Starkie in Equity and Common Law) and both were destined to be appointed as Criminal Law Commissioners by Lord Brougham in 1833. Austin resigned in 1836, and was replaced by David Jardine. Starkie remained a Commissioner throughout the term of the original, as well as a later commission, until his death before the final report was submitted in 1849: R Cross, “The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853”, in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978) pp 5-21. Starkie and colleague Henry Bellenden Ker were the main drafters of the Commissioners’ Reports: M Lobban, “How Benthamic was the Criminal Law Commission?” (2000) 18 (2) *LHR* 427, 428. It is not possible to know whether or not Griffith had reference to the Commissioners’ Reports in drafting his *Code*, although Windeyer J on one occasion assumed that he had done so: *Timbu Kolian v R* (1968) 119 CLR 47, 61.

“Of the Averment of Circumstances collateral to the Act or Omission, which render that Act or Omission criminal

“...the criminal nature of the act must appear on the face of the indictment, and ... if the act or omission be not in itself illegal, it must be shewn to be so from the particular circumstances of the case, which cannot be supplied by any intendment whatsoever. ...

The criminality of an act, in itself innocent, may arise either from the *situation* or *knowledge*, of the defendant himself, or from that of *others*, or from *other particular circumstances* contained in the definition of the offence.”

In this analysis, the “act or omission” constitutes the primary, or basic, element of the offence. Attendant circumstances, and the accused’s mental state, which make the act or omission criminal in nature, are recognised as being distinct from the “act or omission” underpinning the offence²¹.

“act or omission” – the Austinian view:

¹⁹ He appears to have been well-qualified for the task, assisted by a keen mathematical bent. Having been Senior Wrangler and Smith’s prizeman at Cambridge, he was elected a Fellow of St Catharine’s College in 1803. He was called to the bar in May 1810, after having been pupilled to the prolific legal author Joseph Chitty Snr. His *Criminal Pleading* was accordingly written early in his professional career, predating the multi-volume treatise on criminal law authored by his pupilmaster by some two years. He produced his well-known *Practical Treatise on the Law of Evidence* in 1824, and was the second Downing Professor, from 1823-1849: DNB Starkie, Thomas (1782-1849); “Mr Starkie” (1849) 10 *Law Review* 201-204. As Professor Smith has noted, Starkie was “clearly no intellectual slouch”: K J M Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (1998) p 127.

²⁰ *Supra* vol 1 at p 149. Bentham had considered act and omission in his *Introduction to the Principles of Morals and Legislation* (Harrison Ed, 1967) pp 190-191, but rather than “act or omission”, he used “act” to denote both, and then delineated the concepts of “positive acts” (such as consist in motion or exertion), and “negative acts” (such as consist in keeping at rest; that is, in forbearing to move or exert oneself). Any direct influence upon Starkie’s use of “act or omission” was more likely to have come from his master, Joseph Chitty, who had used “act or omission” in his *Treatise on Pleading*, in the context of actions *contra formam statuti*, some five years earlier: 1 *A Practical Treatise on Pleading and on the Parties to an Action* (1809) p 358.

²¹ Compare one of the very few judicial excursions into offence analysis by Lord Mansfield in *R v Scofield* (1784) Caldecott 397, 403, in the context of “attempt”: “So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.”

A consideration of Austin's theory should be prefaced with a brief reference to Bentham's contribution. Bentham treated action in terms of "act", "circumstances" and "consequences". In *The Principles of Morals and Legislation*, Bentham discussed "Human Actions in General". Within a criminal transaction, he isolated four "articles"²²:

"In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered: 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, or unconsciousness, or false consciousness, that may have accompanied it."

He presented here two physical elements ("act" and "circumstances"), and two mental elements ("intention" and "voluntariness"). After discussing "acts", he moved to "circumstances":

"So much with regard to acts considered in themselves: we now come to speak of the circumstances with which they may have been accompanied. These must necessarily be taken into the account before anything can be determined relative to the consequences. What the consequences of an act may be upon the whole can never otherwise be ascertained: it can never be known whether it is beneficial, or indifferent, or mischievous. In some circumstances even to kill a man may be a beneficial act: in others, to set food before him may be a pernicious one."

Thus were consequences to follow upon acts and circumstances. Bentham observed, in respect of consequences, that "the consequences of an act are events", and his use of "event" in this context brings to mind Stephen's use of "event" in his Draft Code, and Griffith's use of the same term in his own *Code* (eg sections 12 and 23). This usage is consistent with the meanings attributed to "event" during the relevant period²³. Bentham wrote, in summary²⁴:

"An act of some sort or other is necessarily included in the notion of every offence. Together with this act, under the notion of the same offence, are included certain circumstances: which circumstances enter into the essence of the offence, contribute by their conjunct influence to the production of

²² (Harrison Ed, 1967) Ch VII, p 190 *et seq.*

²³ See *eg Dr Johnson's Dictionary* (Todd Ed, 1836): "an end, issue, consequence; incident".

²⁴ At p 198.

its consequences, and in conjunction with the act are brought into view by the name by which it stands distinguished. These we shall have occasion to distinguish hereafter by the name of *criminative* circumstances.”

The expression “act or omission” finds repeated use, in the context of a criminal offence, in John Austin’s notes for a criminal code²⁵. Austin divided his Draft Code into (i) The General Part²⁶, and (ii) The Particular (or Special) Part. Within the General Part, he included such concepts as would have general application across the spectrum of criminal offences, as follows:

Part I - The General Part

Chapter 1	Chapter 2	Chapter 3	Chapter 4	Chapter 5	Chapter 6
Definition of crime, Divisions of crime	Terr. Jurisdiction, Jurisdiction based on punishment/procedure	Essentials of crime, Conditions which render an act or omission a crime, “grounds of imputation”	Consummated crimes, Attempts	Principals and Accessories	Punishments

²⁵ J Austin, 2 *Lectures on Jurisprudence* (5th Ed, 1911), “Fragments of a Scheme of a Criminal Code”, pp 1051 *et seq*, containing edited notes. These notes, in and of themselves, are but memoranda of Austin’s thoughts on criminal law, and codification. With respect to their direct influence, the most that can be said is that they were available (along with many other potential sources on codification) to any diligent codifier of the early 1890’s. The difficulty in developing any theory of potential influence is compounded by the uncertainty of the date of preparation of the subject memoranda. They may have been prepared while Austin was still a member of the Criminal Law Commission (a possibility suggested by Sarah Austin), or following his departure from the Commission, when he began work alone, suggesting he might “write a complete draft of a criminal code”: Hamburger *op cit* pp 51, 215 n70. This time frame would put the origin of the Notes *circa* 1833-1836. A little later, Austin used the “act or omission” formula in what may be the only “proto-legislation” which has come down to us of which we can say that it was “pure Austin”, namely, his draft legislation on censorship and libel for the Island of Malta, submitted in late 1838. Austin, along with his former student, and friend, (later Sir) George Cornwall Lewis, were appointed in 1836 as Commissioners to investigate and report upon matters affecting the government of Malta. The draft censorship Bill was one of the issues addressed by the Commissioners: *Draft of an Ordinance for Abolishing the Censorship, and for providing against Abuses of the consequent Liberty of Publishing*, in *Sessional Papers of the House of Lords*, vol VII, 1839.

²⁶ This might be the first English use of the term in this context.

Austin’s General Part typified the approach adopted in most criminal codification undertakings of the Victorian period²⁷. Chapter 3 contained several principles which were erected upon the basic element of an “act or omission”²⁸:

1	An <i>act or omission</i> is not a crime (or is not imputable to the party), unless the party knew, or, with due attention, might have known, that, under the circumstances of the fact, it was a crime [or, an <i>act or omission</i> is not a crime (or is not imputable to the party) unless the party subsumed the fact, or, with due attention, might have subsumed the fact, under the law]
2	An <i>act or omission</i> is not a crime, if it be purely <i>involuntary</i> ; <i>ie</i> if the not doing the act done, or the doing the act omitted, did not depend anywise on the wishes (or will) of the party.
3	Generally, an <i>act or omission</i> is not a crime, or is more or less excusable, if it proceeded from an instant and well-grounded fear stronger than the fear naturally inspired by the law.
4	An <i>act or omission</i> pursuant to a legal duty is not a crime
5	An <i>act or omission</i> pursuant to a legal right, or to a permission or licence granted or authorised by the law, is not a crime.
6	An <i>overt</i> act (or such an act, other than a confession of the party, as indicates his criminal knowledge) is of the essence of a crime by commission; also of a crime by omission accompanied with criminal knowledge.

Underpinning “act or omission” was Austin’s idea of what constituted an “act”. This was inextricably tied to his perceptions of the mental phenomena he designated as “volition” and “will”²⁹:

²⁷ Edward Livingston’s Draft Code for Louisiana: Book I (General Provisions): c.I (General Provisions relating to the Operation of the Penal Laws); c.II (General provisions relating to Prosecutions and Trials); c.III (Persons amenable to the Code, and Matters of Justification and Excuse); c.IV (Repetition of Offences); c.V (Complicity): 2 *The Complete Works of Edward Livingston on Criminal Jurisprudence* (1873); Macaulay’s *Indian Penal Code*: c.I (General Explanations, incl Definitions); c.II (Punishments); c.III (General Exceptions, Excuse *etc*); c.IV (Complicity): *A Penal Code prepared by the Indian Law Commissioners* (1838); R S Wright’s Draft Criminal Code for Jamaica: Part I (General provisions): Title I (Preliminary matters); Title II (General Explanations, incl Definitions); Title III (Punishments); Title IV (Attempts); Title V (Complicity & Conspiracy); Title VI (General Exemptions, incl Excuse); Title VII (Justifiable Force and Harm): *Criminal Code and Code of Criminal Procedure for the Island of Jamaica* (1877).

²⁸ “These six principles, which are in the nature of axioms, appear to cover all exemptions from criminal liability allowed in respect of conduct amounting outwardly to an infraction of the law”: D A Stroud, *Mens Rea, or Imputability under the Law of England* (1914) p 23. Professor Kenny described Dr Stroud as a “follower of Austin”: Book Review (1915) 31 *LQR* 451.

“Certain movements of our bodies follow invariably and *immediately* our wishes or desires for those *same* movements: Provided, that is, that the bodily organ be sane, and the desired movement be not prevented by an outward obstacle or hindrance. If my arm be free from disease, and from chains or other hindrances, my arm rises, as soon as I wish that it should. But if my arm be palsied, or fastened down to my side, my arm will not move, although I desire to move it. These antecedent wishes and these consequent movements, are human *volitions* and *acts* (strictly and properly so called). They are the only objects to which those terms will strictly and properly apply.”

After some elaboration, he continued³⁰:

“And as these are the only *volitions*; so are the bodily movements, by which they are immediately followed, the only *acts* or *actions* (properly so called). It will be admitted on the mere statement, that the only objects which can be called acts, are consequences of Volitions. A voluntary movement of my body, or a movement which follows a volition, is an *act*.

The *involuntary* movements which are the consequences of certain diseases, are *not* acts. But as the bodily movements which immediately follow volitions, are the only *ends* of volition, it follows that those bodily movements are the only objects to which the term ‘acts’ can be applied with perfect precision and propriety.”³¹

Austin himself acknowledged that this conception of “act” did not necessarily accord with what could be called common usage³²:

“The only difficulty with which the subject is beset³³, arises from the concise or abridged manner in which (generally speaking) we express the objects of our discourse.

²⁹ John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* (5th Ed, 1911 printing) (hereafter referred to as *LJ*) pp 411-412. All subsequent references are to the pagination in this edition.

³⁰ *LJ* pp 414-415.

³¹ This is particularly important, and indicates that Griffith did not apply Austin’s theory in any pedantic manner. In Austin’s view, an involuntary bodily movement was *not* an “act”; the word “act” necessarily included the idea of voluntariness. Thus, to speak of a “voluntary act”, to Austin, would present a tautology. Griffith’s use of “act”, however, refers to only the bodily movement. This is a neater formulation, which then permits of treatment of “act” from both “willed” and “unwilled” perspectives.

³² *LJ* p 415.

Most of the names which seem to be names of acts, are names of acts, *coupled with certain of their consequences*. For example, If I kill you with a gun or pistol, I *shoot* you: and the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an *act*, perpetrated by me. In truth, the only part of the train which are my act or acts, are the muscular motions by which I raise the weapon; point it at your head *or* body, and pull the trigger. These I *will*. The contact of the flint and steel; the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will*. I *will* not those consequences, although I may *intend* them.”

As if to emphasize the importance of his classification, Austin repeatedly returned to the same theme³⁴:

“The bodily movements which immediately follow our desires of them, are the only human *acts*, strictly and properly so called. For events which are not *willed* are not *acts*; and the bodily movements in question are the only events which we *will*. They are the only objects which follow our desires, without the intervention of means. . . .”

“The bodily movements which immediately follow our desires of them are *acts* (properly so called).

But every act is followed by *consequences*; and is also attended by *concomitants*, which are styled its *circumstances*.

To desire the *act* is to *will* it. To *expect* any of its *consequences*, is to *intend* those consequences.

The act itself is *intended* as well as *willed*. For every volition is accompanied by an expectation or belief, that the bodily movement wished will immediately follow the wish.

A consequence of the act is never *willed*. For none but acts themselves are the appropriate objects of volition. Nor is it always *intended*. For the party who wills the act, may not expect the consequence. If a consequence of the act be *desired*, it is probably *intended*. But (as I shall show immediately) an *intended* consequence is not always *desired*. Intentions, therefore, regard *acts* – or they regard the *consequences of acts*.”

“*act or omission*” – *the criminal codes*:

³³ A difficulty, one might observe, which also bedeviled Professors Hart and Salmond, as well as a number of members of the High Court of Australia.

³⁴ *LJ* p 419, 421.

“Act or omission” also became a familiar concept to anyone with even a passing interest in criminal codification. Its first appearances in what are recognised as the major penal codes occur in 1826 in Edward Livingston’s Benthamic³⁵ *Code of Crimes and Punishments* drafted for the State of Louisiana, and the United States. It occupies a central position in the *Code*³⁶:

“An offence is a voluntary act or omission, done or made contrary to the directions of a penal law.”

In May 1837, Thomas Macaulay completed, more or less single-handedly³⁷, the *Indian Penal Code*³⁸. Macaulay utilized the “act or omission” formula as a foundational concept in respect of offences against the “human body”³⁹.

In his Draft Code for Jamaica⁴⁰, R S Wright included an extending definition of “act”, which was to include “any act or omission, and any series of acts or series of omissions, and any combination of acts and omissions”⁴¹. Using “act” as an

³⁵ See Jerome Hall, “Edward Livingston and his Louisiana Penal Code” (1936) 22 *ABAJ* 191; E H Moore, “The Livingston Code” (1928) 19 (3) *Jnl of the American Inst of Criminal Law and Criminology* 344; for Livingston’s letter to Bentham of 10th August 1829: P Schofield and J Harris (eds), *‘Legislator of the World’: Writings on Codification, Law and Education* (1998) pp 382-384.

³⁶ *The Complete Works of Edward Livingston on Criminal Jurisprudence* (2 vols, 1873), Book I, Chap III, Art 27 (see also Book II, Title I, Chap I, Art 75) Compare section 2 of the Griffith *Code*. Other examples of usage (although by no means an exhaustive list) may be found in the Introductory Report to the *Code*; Book I, Chap I, Art 1, 2, 6; Chap III, Art 46; Book II, Title II, Chap I, Art 81; Title IV, Chap I, Art 124; Chap II, Art 131; Title VII, Chap II, Arts 230, 234; Book of Definitions. The fact that Griffith also used the *Penal Code for the State of New York* in compiling his Draft *Code* makes some brief reference to the former instrument desirable. The Draft of New York’s *Penal Code* (1865) also reveals substantial use of the “act or omission” formula: see *eg* Preliminary Note, p iv, section 2 (*Code* to be exclusive), section 3 (“A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of [prescribed punishments]”), section 20 (involuntary subjection), section 430 (nuisances), section 661 (violation of directors’ duties), sections 737-739 (multiple punishments), section 764 (negligence).

³⁷ *DNB* Thomas Babington Macaulay, Baron (1800-1859); Sir Rupert Cross, “The Making of English Criminal Law: Macaulay” [1978] *Crim LR* 519; K J M Smith, “Macaulay’s ‘Utilitarian’ Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law-Making”, in W M Gordon & T D Fergus (eds), *Legal History in the Making* (1991) pp 145-164.

³⁸ *A Penal Code prepared by the Indian Law Commissioners* (1838). Macaulay had to hand Livingston’s *Code*, as appears from the references to the other work in the extensive “Notes”.

³⁹ See *eg* Sections 294, 304, 308, 309, 327, 329.

⁴⁰ *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica*, C 1893 (Presented to both Houses of Parliament August 9, 1877). The best discussion of the Wright Code is that by Dr Martin L Friedland, “R S Wright’s Model Criminal Code: A Forgotten Chapter in the History of Criminal Law” (1981) 1 *OJLS* 307; and in Friedland, *A Century of Criminal Justice* (1984) Ch 1.

⁴¹ Section 9(v).

operative element, he articulated criminal intention using the contrast between “act” and “event”⁴². Wright’s definition of a “crime” again utilized “act”⁴³:

“Any act which is punishable under this Code or which is punishable on indictment under any other law is in this Code designated as a crime.”

The provisions dealing with insanity, intoxication and mistake⁴⁴ were also to operate upon an “act”.

Sir James Fitzjames Stephen’s *Digest of the Criminal Law*, first published in 1877, is arguably the single most important document in the history of English criminal codification. Preparing it, Stephen was to say, was the hardest work he ever did⁴⁵. His purpose in compiling the *Digest* was to demonstrate the feasibility of criminal codification in England; and when he came to prepare the Draft Codes, and especially the Draft of 1878, he needed only to recast the *Digest* to produce the desired result⁴⁶. In Chapter 3 of the *Digest*, Stephen set out what he classified as “General Exceptions”. A number of these exceptions⁴⁷ were premised upon an “act”. His use of “act or omission” was generally confined to offences which could involve commission by negligence⁴⁸. This approach was largely preserved in the 1878 Draft Code⁴⁹, with the addition – necessary due to the nature of the code – of provisions as to the application of the code⁵⁰, and the place of commission of offences⁵¹.

⁴² Section 10. See also sections 11 and 12 (negligence and causation), which revolve around the “event”.

⁴³ Section 19.

⁴⁴ Sections 38, 39, 40.

⁴⁵ Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) p 377.

⁴⁶ L Stephen *op cit* at 380.

⁴⁷ Infancy (Articles 25 & 26); insanity (Art 27); drunkenness (Art 29); compulsion (Art 31); necessity (Art 32); ignorance of law (Art 33); ignorance of fact (Art 34); accidents causing bodily injury (Art 210). It also appears in his treatment of attempts (Art 49).

⁴⁸ Common nuisance (Art 176); failure to perform duty (Art 211); dangerous acts (Art 216); duties of special skill (Art 217); “killing” (Art 219); unlawful homicide (Art 222); endangering railways (Art 240).

⁴⁹ *Criminal Code (Indictable Offences) Bill*, No 178 of 1878, *House of Commons Papers* 1878-79, vol 2, p 5. A background to the Draft Codes is contained in the latter part of D H Brown’s “Abortive Attempts to Codify English Criminal Law” (1992) 11 (1) *Parliamentary History* 1-39; also *The Genesis of the Canadian Criminal Code of 1892* (1989) Ch 2.

⁵⁰ Section 3.

⁵¹ Section 4.

The Royal Commission of 1879, of which Stephen was a member, produced a further Draft Code as an Appendix to its report⁵². This Code was very similar to its predecessor. The place of commission provision, in addition to attaching jurisdiction to an “act” or “omission”, introduced the term “event”, in the sense of a happening necessary to the completion of the offence⁵³. The use of “act” in Part III (Justification and Excuse) was reduced, but “act or omission” remained pivotal in the chapter on Homicide⁵⁴.

The Criminal Code Bill of 1880⁵⁵ was the third and final Draft Code in which Stephen was directly involved. Although unsuccessful in England, it provided the impetus for codes which were to be introduced in Canada, New Zealand, and eventually Queensland. The Bill used “act or omission” to underpin its definition of an “offence”⁵⁶, and, coupled with “event”, to define jurisdiction⁵⁷. “Act or omission” also found its place in the General Part⁵⁸, and in respect of nuisances⁵⁹, and homicide⁶⁰.

Austin and pre-Code theory:

Austin’s basic theory of action was generally accepted through the second half of the nineteenth century, and into the twentieth century. At the time Griffith compiled the *Code*, it represented orthodox opinion:

“An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff’s harm is no part of it, and very generally a long train of such sequences intervenes.”⁶¹

“...law, in availing itself of the term *act*, must have recourse to some one of [the] popular meanings, and when it has selected one, it must adhere to

⁵² *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences*, Command 2345, 1879, *House of Commons Papers* 1878-1879, vol 20, p 169.

⁵³ Section 4.

⁵⁴ Part XVI.

⁵⁵ *Criminal Code Bill*, No 2 of 1880, *House of Commons Papers* 1880, vol 2, p 1.

⁵⁶ Section 2.

⁵⁷ Section 5.

⁵⁸ Sections 21, 22 (infancy) and 23 (insanity).

⁵⁹ Section 146.

⁶⁰ Sections 167, 168.

⁶¹ O W Holmes Jr, *The Common Law* (1881) p 91. This observation was made in the context of tortious liability. He perceived no distinction in respect of conduct underpinning criminal liability: see p 54.

it without deviation. The only one which is at all adapted to its purposes is that of *voluntary muscular motion*. The application of the term *act* to resolutions of the will or the conscience is unsuitable for law, because law is directly concerned only with that part of men's conduct which is exposed to the judgment of the senses. Whatever inquiry it directs to be made into states of mind and feeling is wholly subordinate and auxiliary to the inquiry into the probable consequences, and, therefore, into the true nature, of *voluntary muscular motions*.

Acts, then, in the eye of the law, are such muscular motions as are preceded by the peculiar phenomenon entitled *will*.”⁶²

“An act is the bodily movement which follows immediately upon a volition. What follows upon an act in connection with it are its consequences. It is necessary to remember this, although, in common language, we often use the word ‘act’ to express both an act and its consequences; as, for example, when we speak of an act of murder. Without a bodily movement no act can be done. A silent and motionless man can only forbear.”⁶³

Stephen, in his *General View of the Criminal Law of England*⁶⁴, refined Austin's basic proposition one step further:

“What...is an action? An action is a set of voluntary bodily motions combined by the mind in reference to a common object. This definition asserts, first, that an action is a combination of certain external motions, with certain internal sensations, the existence of which, in the person moving, is inferred from the fact that similar motions on the part of the observer are preceded and accompanied by such sensations.”

⁶² Sheldon Amos, *The Science of Law* (8th Ed, 1896) pp 100-101; DNB: 1835-1886; Professor of Jurisprudence, University of London; *The Science of Law* went through eight editions from 1874 to 1896; it was preceded in 1872 by *A Systematic View of the Science of Jurisprudence*, which expounded a similar view of “act”: see p 93.

⁶³ Sir William Markby, *Elements of Law* (6th Ed, 1905) §215; DNB: 1829-1914; *Elements of Law* underwent six editions from 1871 to 1905; as testimony to Markby's standing, “It was in Markby's rooms at All Souls that he, Thomas Erskine Holland, Frederick Pollock, James Bryce, and William Anson initiated the Law Quarterly Review...”.

⁶⁴ (1863) p 75. The second edition, of 1890, displayed only minor variation: “VOLUNTARY ACTS – A voluntary action is a group of bodily motions accompanied or preceded by volition, and directed to some object.”

By this formulation, Stephen injected a practical element, in acknowledging that most “acts” which were the concern of the law were, in fact, complex acts consisting in the co-ordination of a number of simple acts⁶⁵. For example, the shooting of a firearm requires the performance of a number of individual or simple acts, including holding the weapon, steadying the weapon, aiming the weapon, and depressing the trigger. These separate acts, as Stephen observed, are combined, by the will, to achieve the common object, namely the discharging of the weapon in the direction of a particular target. Austin’s theory remains basic to this conceptualization, in that a claim that an act was involuntary needs to be linked to one of these simple acts, *eg* that the act of depressing the trigger occurred during a struggle, or by reflex, and was not a “willed act”; or *eg* that the aiming of the weapon was not a “willed act” in that a third party, at the critical moment when the trigger was depressed by the shooter, pushed the barrel of the weapon towards a different target.

Austin and post-Code theory:

Austinian action theory continues to be relevant to the practical operation of the criminal law. It has been substantially codified in both the *Model Penal Code*⁶⁶, and in the Commonwealth *Criminal Code*⁶⁷. Modern commentary commonly acknowledges Austin’s trinity of act, circumstance, and consequence (or event), as representing the most useful analytical approach to the physical elements of a criminal offence⁶⁸. One of the leading contemporary criminal code theorists, Professor Paul Robinson, confirms this view⁶⁹:

“Writers disagree as to the precise definition of an ‘act’. Some writers define ‘act’ as simply a muscular movement. This is the most common modern usage. Others define it as a willed movement. The disagreement is

⁶⁵ Austin himself had acknowledged that it was common usage to use the term “act” to refer to such complex undertakings as shooting a weapon: *LJ* p 415. “Acts” of driving and shooting remain classic modern examples of complex acts; each may require further breakdown if, for example, it is alleged that a simple act (within the complex) was unwilled

⁶⁶ Section 1.13(9).

⁶⁷ Section 4.1.

⁶⁸ D A Stroud, *Mens Rea, or Imputability under the Law of England* (1914) p 1; S Harris, *Principles of the Criminal Law* (13th Ed, 1919) pp 9-10; Dean Roscoe Pound, 4 *Jurisprudence* (1959) Ch 26; Jerome Hall, *General Principles of Criminal Law* (2nd Ed, 1960) p 171 *et seq*; Rollin M Perkins, *Criminal Law* (2nd Ed, 1969) pp 548-549; Glanville Williams, *Textbook of Criminal Law* (1978) p 33; J C Smith & B Hogan, *Criminal Law* (4th Ed, 1978) pp 36-37; G W Paton, *A Textbook of Jurisprudence* (4th Ed, 1972) pp 310-311 (“...for the purpose of analysis, the strict use of terms is necessary...”); Joshua Dressler, *Understanding Criminal Law* (4th Ed, 2006) p 94.

⁶⁹ Paul H Robinson, *Criminal Law: Case Studies and Controversies* (2005) p 480.

not of practical importance because the act requirement is nearly always drafted to require not only an act but a *voluntary* act...

Other writers define 'act' to include the circumstances and consequences of the act. But this usage is not the modern view and, if it was adopted, it would undercut the modern offence definition system that divides the objective components of an offence into conduct, circumstance, and result elements."

Robinson also summarised the purposes to be served by a modern act requirement⁷⁰:

"...the act requirement serves to bar punishment for unexternalized thoughts, attempts to give some minimal objective confirmation that a defendant's intention does exist, provides a time and place of occurrence of an offence, offers a starting-point for resolving the thorny issue of liability and punishment for multiple related offences, and limits in a modest way governmental power to define offences."

The most influential opposing view to the Austinian concept of "act" was that expressed by Sir John Salmond⁷¹. Salmond suggested a wide view of "act", which was to include the "act" (in its Austinian sense), the circumstances, and the consequences⁷²:

"Every act is made up of three distinct factors or constituent parts. These are (1) its *origin* in some mental or bodily activity or passivity of the doer; (2) its *circumstances*; and (3) its *consequences*. Let us suppose that in practicing with a rifle I shoot some person by accident. The material elements of my act are as follows: its origin or primary stage, namely a series of muscular contractions, by which the rifle is raised and the trigger is pulled; secondly, the circumstances, the chief of which are the facts that the rifle is loaded and in working order, and that the person killed is in the line of fire;

⁷⁰ Paul H Robinson, "Should the Criminal Law Abandon the *Actus Reus* – *Mens Rea* Distinction?", in S Shute, J Gardner & J Horder, *Action and Value in Criminal Law* (1993) p 193. See also *Case Studies and Controversies*, *op cit* pp 480-483. The reference to "multiple related offences" is given in the context of s.654 of the Californian *Penal Code* which, like section 16 of the Queensland *Code*, operates upon an "act or omission".

⁷¹ The first edition of *Jurisprudence* appeared in 1902, after the Code was passed. This major treatise had been preceded, in 1893, by *The First Principles of Jurisprudence*. Salmond's treatment of "act" in this earlier work anticipated some of the ground later to be covered, *eg* the "positive" and "negative" acts (*ie* the latter including omissions), "internal" and "external" acts (the "internal" act having been rejected by Austin), and intentional and unintentional acts.

⁷² J W Salmond, *Jurisprudence* (1902) pp 401-402.

thirdly, the consequences, the chief of which are the fall of the trigger, the explosion of the powder, the discharge of the bullet, its passage through the body of the man killed, and his death. A similar analysis will apply to all acts for which a man is legally responsible.”

Salmond retained the basic three components of action identified by Austin. The difference was one of nomenclature: Austin identified the initial element as the “act”; whereas Salmond called it the “origin”, and used “act” to describe the *whole* of the transaction⁷³. Salmond was aware of the contrary view and, referring specifically to Austin and Holmes, observed⁷⁴:

“By some writers the term *act* is limited to that part of the act which we have distinguished as its origin. According to this opinion, the only acts, properly so called, are movements of the body. ‘An act’, it has been said, ‘is always a voluntary muscular contraction and nothing else’. That is to say, the circumstances and consequences of an act are not part of it, but are wholly external to it. This limitation, however, seems no less inadmissible in law than contrary to the common usage of speech. We habitually and rightly include all material and relevant circumstances and consequences under the name of the act. The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which this result is effected. To trespass on another man’s land is a wrongful act; but the act includes the circumstance that the land belongs to another man, no less than the bodily movements by which the trespasser enters upon it.”

The only ground argued for this departure in terminology was what Salmond called the “common usage of speech”⁷⁵. He did, however, add a footnote to this part of his text⁷⁶:

“It is unfortunate that there is no recognised name for the origin or initial stage of the act, as contrasted with the totality of it. Bentham calls the former the *act* and the latter the *action*... But in common usage these two

⁷³ On Salmond’s view, compare K W Saunders, “Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition” (1987-88) 49 *U Pitts LR* 443; Saunders points out that Salmond recognised that the transaction was separable into the three parts, namely origin, circumstances, and consequences, and observes, “The choice of terms is less important than the recognition of separability” (p 452).

⁷⁴ *Ibid* pp 402-403.

⁷⁵ On the “common usage” argument, see Saunders *op cit* pp 450-451.

⁷⁶ *Ibid* p 403.

terms are synonymous, and to use them in this special sense would only lead to confusion.”

Salmond’s view did attract some adherents⁷⁷, but it was not a prevailing view at the time the *Code* was constructed, and the influence it should exert upon the interpretation of “act” in its codal context is questionable⁷⁸.

Conclusions:

The implications of accepting the Austinian “act” as underpinning fundamental provisions within the Griffith *Code* are important. To step back, and to refocus upon some of the sections within the General Part of the *Code*, through “Austinian eyes”, is to see them in a quite different light. A voluntary act is no longer the inherently-ambiguous concept which generated so much divergence of opinion in the Queensland Court of Criminal Appeal, and in the High Court of Australia; it becomes, instead, the finite “willed bodily movement” of traditional criminal law theory.

Did Griffith anticipate that “act or omission”, and in particular “act”, would carry a specific meaning⁷⁹; and if he did, what was his intended content of “act”⁸⁰?

⁷⁷ See *eg* W H Hitchler, “The Physical Element of Crime” (1935) 39 *Dick LR* 95.

⁷⁸ Similarly with the chameleonic expression *actus reus*, which does not seem to have entered legal usage as a description of the physical elements of a crime until it was so used by Professor C S Kenny in the first edition of his *Outlines of Criminal Law* in 1902: see Jerome Hall, *General Principles of Criminal Law* (2nd Ed, 1960) p 222, citing a private communication with Professor J W C Turner.

Salmond’s assertion that there was “no recognised name” for his “origin” stage of action seems somewhat disingenuous, having regard to the fact that “act” had been the preferred choice of Bentham, Austin, Holmes, Sheldon Amos and Markby. It might add weight to Glanville Williams’ assertion that “Salmond’s method in writing the book [*Jurisprudence*] was to give a smooth and lucid presentation of his own point of view, mostly as though it were the only opinion in the world”. Dr Williams edited the tenth and eleventh editions of Salmond’s *Jurisprudence*: see R F V Heuston, “Sir John Salmond” (1964) 2 (2) *Adel LR* 220-225.

⁷⁹ “...Griffith, who was confident of his own opinions, would have thought that the words of s.23 [“act”] were perfectly plain...”: The Right Honourable Sir Harry Gibbs, “Queensland Criminal Code: From Italy to Zanzibar” (2003) 77 *ALJ* 232, at p 236.

⁸⁰ An important question is whether Griffith contemplated that “act or omission” would retain the same content wherever it was used in the *Code*. The traditional rule – that the same word should carry the same meaning throughout the instrument – has been described as weak or readily rebutted. Where the term is used frequently and constitutes an integral part of fundamental concepts, the presumption may be substantially stronger: compare *Clarke v Kato* [1997] 1 WLR 1647, 1659G *per* Lord Clyde, on “road” in the *Highway Act 1988*(UK). Where a code is involved, the

Griffith's former Associate, Mr Douglas Graham, provided a valuable insight into the Chief Justice's penchant for precision in language⁸¹:

“[Sir Samuel] ...had a passion for accuracy and precision of thought. Nothing irritated him as much as slovenliness or ambiguity in thought or expression. He could not abide the advocate who sought by ‘words to darken counsel’. ‘The essence of argument’, he constantly said, ‘is the definition of your terms’, and he added that most disputes would never come to Court if the disputants could only make sure of the meaning of the words they used.”

The brief review of other codification undertakings of the nineteenth-century set out above shows that, in failing to define “act”, or “voluntary act”, Griffith was in redoubtable company. If this failure was a shortcoming on Griffith's part, then it was one which was shared by every other potential codifier⁸². Griffith has been described by high modern authority as a “master of the criminal law”⁸³. His achievement in the *Code* justifies that description. Using the Stephen-based Bill of 1880 as his foundation, he drew ideas from selected foreign codes and, while maintaining consistency with Stephen's style and language, took his *Code* to a new level with his development of statutory replacements for *mens rea*⁸⁴.

The probability is that Griffith intended “act”, in the context of “act or omission”, to have a finite meaning. That meaning, one can be virtually certain, reflected the

assumed codal aims of clarity and certainty favour a consistent content, at least in the absence of absurdity.

⁸¹ A Douglas Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (1939) at p 59.

⁸² Including Sir James Fitzjames Stephen.

⁸³ Sir Harry Gibbs, *Queensland Judges on the High Court* (2003) p 29. This writer would suggest that Justice (later Chief Justice) Gibbs stood second only to Griffith himself in respect of the interpretation of the *Code*: “His reasoning in *Kaporonovski* and *Stuart* should be compulsory reading for all students of the Queensland Criminal Code”: Justice G N Williams, *Queensland Judges, op cit*, at p 62.

⁸⁴ “[Sections 22, 23 and 24] embody the rule as to *mens rea*”: Sir S W Griffith, *Draft of a Code of Criminal Law* (1897) p 12 n 1. This writer would include, among Griffith's especially-notable statutory achievements, section 16 of the *Code* (double punishment). The original section, as drafted by Griffith, went directly to the core of the leading contemporary authorities of *Wemyss v Hopkins* (1875) LR 10 QB 378, and *R v Miles* (1890) 24 QBD 423. The Royal Commission on the *Code* recommended the addition of the “homicide exception” (or “delayed death exception”) to the original text, which addition accurately reflected the qualifying effect of *R v Morris* (1867) LR 1 CCR 90.

settled meaning of “act”, as a legal conception, as it stood in 1899⁸⁵. Austin’s analysis of human action was the only serious contender to this title⁸⁶. It is reasonably certain that it was *not* intended to include all the physical elements of an offence (or as sometimes called, the *actus reus*) , as Griffith made clear in his reference to what was to become section 12 of the *Code*, which was to confer jurisdiction⁸⁷:

“...in a case where several acts or events are collectively necessary to constitute an offence, and where some only of those acts or events occur within the jurisdiction, the rest occurring out of the jurisdiction...”

⁸⁵ “...and when it has selected one [meaning], it must adhere to it without deviation”: S Amos fn 62 above.

⁸⁶ A qualified view was offered by Dr E C Clark, in *An Analysis of Criminal Liability* (1880), pp 23-24, where he instanced the case of the man with a rapier, extending his arm, and thus piercing his victim’s chest. This caused him to suggest that: “Consequences very *near*, and what would be considered, in the judgment of all ordinary men, very *certain*, are taken as ‘parts of the act’: more correctly speaking, as inseparably connected with the first bodily movement...[a]cts, then, are, I believe, in the ordinary popular sense of the word, movements of the body coupled with the more immediate consequences of those movements”. This work, it has been said, was not very influential: C H S Fifoot, *Judge and Jurist in the Reign of Queen Victoria* (1959) p 124. It was this same proximity between act and consequence which challenged the High Court in *Kaporonovski*. The approach taken by Gibbs J, and that which, it is suggested with respect, was correct, was that although there might be a contemporaneity between the latter stage of the act, and the initial stage of the consequence (in that the act of thrusting the rapier continues so long as force continues to be applied, while the consequence commences immediately upon the slightest piercing of the victim’s chest) it may still be necessary (albeit in rare cases) to draw the analytical distinction between the two aspects of the transaction.

The prominence of Austin’s theory was countenanced by the inclusion of a relevant quotation in *A New Dictionary of the English Language*, vol 1, (Murray Ed, 1888), and which still finds a place in its direct descendant, the *Oxford English Dictionary*. The case of *R v Tricklebank* [1994] 1 Qd R 330 represents, so far as ascertained, the only occasion upon which Austin’s concept of “act” was possibly applied. Ironically, it was misapplied. The case concerned “act” in section 16 of the *Code*, and in the course of attributing content to “act” in the section, Demack J (at 340-341) referred to the *Oxford English Dictionary* which contained an abbreviated reference to Austin’s theory. Demack J seized upon the words “The only objects which can be called acts are the consequences of volition” in possible support of a conclusion that “being adversely affected by liquor” was an “act”. However, the quotation contained in the *OED* was abridged. Recourse to Austin’s work itself provides the full statement of principle: “...the only objects which can be called acts, are consequences of volitions. A voluntary movement of my body, or a movement which follows a volition, is an *act*. The involuntary movements which are the consequences of certain diseases, are *not* acts”: *LJ* pp 414-415. In Austinian terms, the relevant transaction would be viewed thus: the desire to drink gave rise to a volition which preceded and caused the “acts” of raising the vessel to the lips, pouring the contents into the mouth, and swallowing the beverage; the blood alcohol reading was a *consequence* of those acts. In the context of the specific offence in question, the blood alcohol reading was a *circumstance*, or *concomitant*.

⁸⁷ Letter of 29/10/1897, p 7.

Of course, the meaning of particular words in a statute may not remain constant. For example, it might be argued that the content of “act” should vary with shifts in popular meaning, or development in technological or scientific theory. Further, the potential for ambiguity of a particular term increases where the term remains undefined for the purposes of the particular instrument. This might be a deliberate policy - a “purposive ambiguity” may better serve a community where it allows that community to reflect its contemporary values⁸⁸. Should “act”, in the *Code*, enjoy the “flexibility” offered by either the “statute is always speaking” principle, or its own inherent ambiguity?

To use as an example section 23, the voluntary conduct requirement is a foundation of criminal responsibility in Queensland. What is it that must be voluntary? It is the accused’s conduct; or more precisely, the accused’s act or omission. It has been settled, as least since *Kaporonovski*⁸⁹ (and often re-affirmed⁹⁰) that it is the narrow (Austinian) concept of “act” which must be voluntary. If “act” is accorded a different content, it necessarily results in a shifting of the foundation of criminal liability; and, as is consequential upon any foundational shift, the structure which rests upon it – in this case the day-to-day administration of the criminal law – cannot but be affected. It is hard to see that a return to pre-*Kaporonovski* uncertainty as to the content of “act” is a desirable development. There are, no doubt, cases which test the theory⁹¹, but it does continue to provide the most workable basis upon which to assess the complexities of human action, as well as maintaining the consistency required by the criminal law.

Professor Fletcher⁹² has argued that basic philosophical concepts, such as action theory, should not be part of a criminal code. Rather should the drafters leave such definition to the endeavours of the scholars, drawing upon that developing body of doctrine when required to articulate an aspect of the theory for the purpose of the case at hand. Codes which allow for this assimilation of philosophical theory and “black-letter” criminal law he would describe as “deferential” codes. Codes like the *Model Penal Code* (and, one would assume, the Commonwealth’s *Criminal Code*), which purport to enter the philosophical enclave through definition of

⁸⁸ The prime example is probably “reasonable”, eg “reasonable force”, “reasonable precautions”, or “reasonable care”, “reasonably necessary” and so on.

⁸⁹ *Kaporonovski v R* (1973) 133 CLR 209, per Gibbs J.

⁹⁰ *R v Van Den Bemd* [1995] 1 Qd R 401; *R v Taiters, ex parte Attorney-General* [1997] 1 Qd R 333; *R v Condon* [2010] QCA 117.

⁹¹ An example is *Kaporonovski* itself.

⁹² G P Fletcher, “Truth in Codification” (1997-98) 31 *UC Davis LR* 745, and “Dogmas of the Model Penal Code” (1998-99) 2 *Buff Crim LR* 3.

fundamental concepts, he denoted “imperialistic”⁹³. From a practical viewpoint, the strongest objection to this course involves the necessity for doctrinal stability in the criminal law: consistency in doctrine is unattainable when it is sought to erect that doctrine upon the shifting sands of philosophical theory. Even assuming that some consensus could be reached by the action philosophers, the law is faced with the unacceptable situation of remaining uncertain pending such agreement⁹⁴.

The utility of action theory in assistance of the law depends entirely upon the task it is expected to perform. In articulating his three components of human action, Austin made it possible to assign the various rules of criminal responsibility to an appropriate place within this action paradigm. As a result, we have today a fairly clear demarcation between the phases of action, and their relevant role in assessing criminal liability: “act” (section 23(1)(a), “1st limb”), “circumstances” (sections 22(2) and 24⁹⁵), and “consequences” (or “events”) (section 23(1)(b), “2nd limb”).

If Griffith did adopt to the use of his *Code* the Austinian conception of action, one can be reasonably certain that he did so, *not* because he believed that it represented philosophical truth, but because it was calculated to perform a practical and useful function⁹⁶:

⁹³ Note Professor Robinson’s response: “In Defence of the Model Penal Code: A Reply to Professor Fletcher” (1998-99) 2 *Buff Crim LR* 25.

⁹⁴ Former Justice J B Thomas of Queensland’s Supreme Court, in both judicial and extrajudicial contexts, has argued against the introduction of action theory into the criminal law: *R v Morgan* [1999] QCA 348 para 6; “Judge Fears Potential for Disaster” (1995) *Australian Lawyer* (June) 12, and subsequent correspondence: (1995) *Australian Lawyer* (Aug) 14; (1995) *Australian Lawyer* (Oct) 6, 7. Action theory is a “highly specialized branch of philosophy”: D Husak, Review (1995) 6(2) *Criminal Law Forum* 327. Its full implications may well be beyond many lawyers (including the present writer), but there is nothing especially complex about Austin’s theory: it does no more than provide a wider theoretical basis for Gibbs J’s interpretation of “act” in *Kaporonovski v R*, which is now firmly established as the law of Queensland (see *R v Taiters* [1997] 1 Qd R 333) and guides the way for the development of the law, along the same lines, throughout the *Code*. The fact that the theory may derive from another discipline is nothing unusual in the law: “...law is often not the autonomous discipline that many of its practitioners and theorists want it to be; rather, law is a borrower – in the first instance, from ethics, and ultimately, from metaphysics. In the criminal law in particular, legal liability both does and should by-and-large track moral responsibility, making legal distinctions (like that between acts and omissions) take point and substance from underlying moral distinctions”: Professor Michael Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (2010) vii.

⁹⁵ Section 22(claim of right) is a specialized “circumstantial” exculpation, in that it applies only to the mental element attending property offences. Mental states, under the *Code* scheme, are circumstances, not “acts”. Austin had rejected the idea of mental (or internal) acts: *LJ* pp 420-421.

⁹⁶ Rollin M Perkins, *Criminal Law* (2nd Ed, 1969) pp 546 *et seq*, esp pp 548-549.

“The choice [as to which meaning of ‘act’ is selected] must be based upon convenience rather than upon philology. And, for the purposes of judicial discussion, convenience will best be served by encouraging the present trend toward the limitation of the word ‘act’ ‘to denote an external manifestation of the actor’s will’ without the inclusion of the results which follow, leaving, however, sufficient latitude to permit the word to be used, as a sort of dialectic shorthand, to express certain common and complicated manifestations of the will, such as shooting and driving.”

Any “choice”, in respect of the Queensland *Code*, was made by Sir Samuel Griffith in 1897. The result of that choice was a General Part which was, and which remains, brilliant in its sheer simplicity. Perhaps it was to this achievement that Griffith was referring when expressing his particular satisfaction with Chapter 5.