CONCEPTIONS OF ACTION

*C. ARNOLD**

INTRODUCTION

Consider the following two sentences:

1. "Mr. J. killed a red deer by shooting it."
2. "Mr. T. blackmailed a woman by sending a threatening letter to her through the post."

Sentences such as these, which on the face of them refer to two actions that a man does, one of which he does by doing the other, raise an interesting jurisprudential and legal problem. They raise the problem of what the relation is that exists between such actions.

What relation exists between those actions people perform like killing and blackmailing, which they perform by performing other actions, and those other actions themselves (seemingly prior) like a person's shooting a gun or a person's sending off a letter? It is typical of *many* actions we perform that we perform them by performing others. Of course it could not be the case that *all* the actions we ever performed could only be performed by doing other actions. If that were the case we should never be able to get started on doing anything and hence we would never perform any action. Since we obviously do act, there must exist *some* actions which do not require other actions for their performance. We might call such actions "basic",[1] for now, leaving their analysis until later.

The question asked above can be profitably rephrased. What is the relation between a non-basic action and a basic action when, in a particular case, the non-basic action is performed by performing the basic action? The profit is this; in the long run we cannot clarify the "by-relation" coupling these actions unless we obtain a clear picture of the proper candidates for those first basic actions. The by-relation makes us think about the whole range of things we do from, as it were, the base upwards and requires a theory which will accommodate that range. Once a picture of basic actions emerges, the focus can shift to the "by-relation" itself between action and action, basic and non-basic.

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* M.A., LL.B.(Lond.), B.Phil.(Oxon.), Senior Lecturer in Law, University of Sydney.

[1] A. Danto's expression in his "Basic Actions", (1965) 2 *Amer. Phil. Quart.* 141.

We are a long way from having an agreed theory about action in the books on Jurisprudence or in the cases. The books reveal an array of inconsistent conceptions of action. Recent decisions show the judges using varying and largely unsound accounts. It is not however surprising that there is little sound theory on the by-relation problem. The reason I think is this. There is much sound theory on a different relation, namely that existing between actions and the events which are their consequences. If we consider again those two opening sentences, examples of events would be, in the one case, the death of a deer or the flight of a bullet and in the other case the delivery of a letter. This different relation has often been confused with the by-relation. These two relations need to be separated and accounted for within a single conception of what an action is.

In this paper I defend a theory contained in Austin's general doctrine of action and recently reconstructed by Davidson[2] that the by-relation is an identity relation. The defence takes the form that expressions which refer to individual actions and which are joined with a "by" are essentially elliptical. Fully expanded such expressions, it is argued, are composed of two different descriptions of some single basic action, or bodily movement, and its consequences. Such a defence gives a more plausible conception of action than the rival accounts in cases and in textbooks. If the defence succeeds it has important consequences in connection with the dating and placing of actions in law.

TYPES AND TOKENS

As a preliminary to such a defence, a familiar distinction between types of action and individual actions i.e. between types and tokens must be drawn. This present section dwells on that distinction and adds remarks about identity as it concerns both types of action and individual actions.

Sentences like "Mr. Baxter posted a letter" and "Mr. Jemmison shot a red deer" are intended to refer to actions which actually have occurred. They are sentences about individual actions. For the most part I shall be concerned with such sentences and with individual actions which have occurred. Some sentences which are about actions do not refer to particular individual actions at all. Consider such sentences as "Shooting red deer is dangerous" or "Posting threatening letters at Christmas is anti-social". These sentences do not refer to any individual actions which have occurred. These and similar sentences are about types or kinds of action and they are often called "general action" sentences. For the most part it is action-types which concern theorists of law when they consider the objects of law or when they refer to the rules and principles of law as being action-guiding.

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[2] D. Davidson, "Agency" in *Agent, Action and Reason* (eds. Brinkley, Bronaugh and Marras), 1971, at pp. 18-25. I am indebted to this article. For another defence of identity see E. Anscombe, *"Intention"*, 1959, pp. 39-47.

In his *Of Laws in General,* Bentham considered action-types only in his chapter on the *"Objects of a Law".*[3] A feature of action-types is that they may be modified in any of two ways, each of which narrows the scope of application of the action. First, they may be modified by the addition of circumstances. To borrow an example from Bentham; "Exporting wheat" names an action-type, and "Exporting wheat at night" names an action-type which is one action together with a modifying circumstance which narrows its scope. Second, action-types may be modified by the addition of consequences. Bentham said nothing of this, but it is easy enough to show how the addition of consequences to an action-type would narrow its application. Thus "shooting" is one action-type and "shooting to death" narrows the scope of the original by the addition of one kind of consequence. A familiar feature of language noted by Bentham is that there are often alternative expressions for action-types one of which will specify some modifying circumstance. Thus, as well as the expression "housebreaking at night" there exists the alternative expression "burglary". These are two different expressions for one and the same action-type: the actions they name are identical.

Identity between action-types is always a matter of substitutable expressions, that is to say, different expressions or words are about the same action-type when they are definitions of each other. "Burglary" and "Housebreaking at night" are different expressions for identical action-types. "Blackmail" and "making an unwarranted demand with menaces" similarly name one and the same type of action. The interesting role played by the specification of circumstances in the identity of action-types exercised Bentham for several pages when he considered the objects of a law. The point he stressed is that the definition of one action-type may well specify a wider and different action-type which is then narrowed down to be a fitting definition by the addition of modifying circumstances. Thus Bentham wrote of the general name of any act; "expand it, throw it into the form of a definition, then circumstances appear". It is in this connection that Bentham, in a much quoted passage, likened the relation of an act and its circumstances to that of a substance and its properties.[4]

Bentham's remarks about different descriptions of one and the same action-type concentrate solely upon the role played by circumstances in the expansion of an action. He did not consider the role played by consequences in relation to action-types but it is also true that consequences may similarly figure in the expansion of an action-type. Many action-types obviously require a certain kind of consequence before they can apply. Thus for example a "killing" requires the consequence of a "death", and a "wounding" requires the consequence of a "wound". In fact all transitive verbs can be expanded in terms of causing certain events to happen, and this feature allows again for the idea of different

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[3] J. Bentham, *Of Laws in General* (ed. H. L. A. Hart) 1970, Chapt. V, pp. 41-51.

[4] *Id.* p. 44.

descriptions of one and the same action-type. There is no good reason to restrict identity between action-types to a consideration of the expansion of expressions in terms of circumstances alone. The importance of considering consequences in relation to identity will emerge later when the by-relation and individual actions are considered.

Much of what is true of action-types is also true of individual actions. If "housebreaking at night" and "burglary" name the same action-type then an individual action of someone's having broken into a certain house at night will be an individual case of burglary. That follows straightforwardly since individual cases have to be described and they can only be described by using the general terms of our language and by applying those terms to a specific instance. What distinguishes types from tokens is that since tokens are individual actions, they must have occurred at a certain time and in a certain place. We can in their case ask for the time and place of occurrence. This distinguishing feature is troublesome. Suppose an individual shoots a man to death. We want to be able to say that his action is equivalent to killing that man, and further that he killed the man by shooting him. We have here different descriptions of one and the same individual action. But if those expressions name *one* action (and not *two*) we need to be able to identify *what* action *that* is in order to be able to date and time both the shooting and the killing. This topic will occupy the first part of this paper.

Bentham was not concerned in his *Of Laws in General* to analyse action-tokens or individual actions, save of course for the general point that any individual action belongs to a type if it has a general description. He could not in that book be concerned with individual actions since he was writing about the objects of Legislation which are action-types. Bentham wrote, for instance, in a passage which refers to another work which does consider individual actions, his *Introduction to the Principles*:

> Concerning acts in general and the fundamental differences that may be remarked in them a good deal has been said in a chapter appropriated to that subject. But what is there observed is applicable rather to individual acts, than to classes of acts as marked out by the names that are in use: such more especially as there is occasion to make use of in books of law.[5]

In a recent article on Bentham's *Of Laws in General,* Professor Hart says something very puzzling. Professor Hart writes:

> Bentham examines with great care the relationship of an act to its circumstances and in so doing throws light on a number of different problems. Thus he investigates the phenomenon which has long intrigued both philosophers and lawyers of the substitutability of different descriptions of the same act: we may say that a man killed

[5] J. Bentham, *Limits of Jurisprudence Defined,* p. 126, referring to his *Introduction to the Principles of Morals and Legislation* (ed. W. Harrison) 1948, Chapter VII, pp. 189-199.

> another or fired a gun with the consequences that the other died or pulled the trigger of a loaded gun with the consequence etc., etc. Bentham compared this relationship of an act to its circumstance to that of a substance to its properties.[6]

Of course granted the identity between killing and firing a gun which results in a death, that is to say between action-types, then any individual action of firing a gun which causes a death will of course be an individual case of killing. Hence these are different descriptions here of the same act. But notice that Professor Hart's example is of individual acts not of types of action, and that his examples use consequences and not circumstances. Bentham is wholly silent on consequences and on individual actions in that book. It is I think important to distinguish action-types and individual actions. Enquiries about identity will differ in each case. In the case of type-type identity,[7] identity is always a matter only of substitutable expressions. In the case of individual actions, it is true that we can talk about identity, but here it is certainly not going to be just a matter of definition or substitutable expressions. Individual actions since they have occurred, raise problems about time and place. If, as Hart writes, we can talk about different descriptions of the same individual action then that individual action will have occurred somewhere at some time. The one action described by the different descriptions will have one time and one place of occurrence. That follows from talk about identity. Thus, to borrow Hart's example, if one man's shooting another man to death is one and the same action as that man's killing the other man then the killing and the shooting to death will have occurred in the same place at the same time. That is obvious if they both describe one and the same action. That result requires defence however not solely by definition but by reference to some account of what single action has occurred which those expressions describe. There is no such defence in *Of Laws in General*. There is no such consideration of token-identity in *Of Laws in General*.

In his account of human action in his *Introduction to the Principles*, Bentham did deal with individual actions. There Bentham did address himself to the question of what is (or counts as) one action. That is one way of addressing oneself to the problem of identity since identity concerns different descriptions of one single action. In fact however Bentham took the question for the most part to mean what differences exist between acts and activities.

In this connection he raised the question, for example, whether, when a man is wounded in two fingers at one stroke, he has one wound or several wounds. He also raised the general question (often raised in

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[6] H. L. A. Hart, "Bentham's 'Of Laws in General' " in *Rechtstheorie* (1971) 55 at pp. 62-63.

[7] On type-type identity and token-token identity generally (not actions) see S. Kripke "Naming and Necessity' in *Semantics for Natural Languages* (eds. Davidson and Harman) 1970, p. 315.

criminal law in connection with duplicity) whether it is one act or many acts when, say, a man does acts belonging to the same type at frequent intervals. These are interesting puzzles about actions. Nowhere however does Bentham take the question about what counts as one action as a way of introducing the problem of different descriptions of one and the same individual action, or whether when we say one man kills another by shooting him we have two descriptions of one action or descriptions of two actions. He said much about what have been called basic actions and made some useful distinctions there. He rightly stated that the consequences of an action are events and again, rightly, he joined an action to the events which are its consequences by a causal relation. It is a pity he never addressed himself to the related problem of the by-relation. To take Bentham's account of type-type identity in *Of Laws in General,* as if he were addressing himself to the question of token-token identity is I think a mistake. Bentham has no theory in that book that would account for different descriptions of one and the same individual action and which would settle the by-relation problem.

CONCEPTIONS OF IDENTITY: JUDGE AND JURIST

Identity of individual actions is a matter which has come before the courts on a number of occasions. Since identity of individual actions raises questions about time and place, most of the cases involving problems of identity have concerned jurisdiction and similar matters. An interesting recent example from England is *Jemmison* v. *Priddle.*[8] The appellant was shooting deer on B's farm. He had B's permission to hunt there but he did not hold a game licence. The appellant fired three shots at two deer. One shot missed. Another hit and killed one of the deer when it had already left B's farm and was on P's neighbouring land where Jemmison had no permission to hunt. The last shot hit the second deer while it was on B's farm but only wounded it. The deer ran on to P's land where it died from its wound. The appellant was charged with and convicted of unlawfully killing two red deer without a game licence. It would not have been unlawful if the appellant had killed the deer on land where he had permission to hunt. The appellant appealed on the ground that his killing of the second deer was not unlawful. On this point the Lord Chief Justice held:

> [I]f it be right that the second deer was hit on [B's] land and moved on to [P's] land before it dropped, then in my judgment the shooting of the second deer would have been a killing . . . on land where the appellant had the permission of the owner or occupier to hunt. Accordingly, . . . in respect of the second [deer] the killing would have been within his legal rights . . . .[9]

The head-note in the *All England Report,* in an interesting summary says:

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[8] *Jemmison* v. *Priddle* [1972] 1 All E.R. 539; [1972] 1 Q.B. 489.

[9] *Id.* at 543; 494.

> . . . as, however, the second deer had been shot on B's land, the killing had taken place on land where the appellant had the permission of the owner or occupier to hunt even though the deer only dropped when it had passed on to P's land . . . .

Both passages quoted insist that the action of killing and the action of shooting occurred in the same place. The only relation between the action of shooting and the action of killing which justifies that conclusion is that the relation is one of identity. The shooting was identical with the killing. Consequently the killing occurred where and when the shooting occurred. Since Mr. Jemmison shot the deer on B's land he killed that deer on B's land. It follows of course that if the appellant killed the deer on B's land he killed the deer before the deer actually died since the deer died on P's land and the deer took time to get from B's farm to P's land. This may not be as extraordinary as it seems, although the point does not seem to have been discussed in the case. If we think of killing the deer as being equivalent to causing the deer to die then it is obvious that the appellant did cause the deer to die before it died. The appellant caused the deer to die when he and the deer were both on B's land: when he pulled the trigger of the shotgun. This explanation of the case provides a clue to what action it is when we talk about "the man's killing" and "the man's shooting" as different descriptions of one and the same action; that action is the basic action we do without having to do anything else, such as pulling the trigger of the shotgun. In addition it gives a neat answer to the question of the by-relation.

Each of these points must be explained in turn. An act such as the killing is a complex act made of certain acts together with certain consequences. It may be expanded in this case as an act of shooting and a death. But a shooting itself may be expanded as an act of pulling the trigger with the consequence of a bullet being fired. All actions involve at some point (at bottom) an intentional bodily movement which itself cannot be expanded into any other action and a consequence. The killing and the shooting have this bodily movement in common, and this bodily movement is the candidate for the basic action.

The by-relation can now be explained. Sentences such as "He killed the deer by shooting it" are essentially elliptical. The expression following the "by" always needs to be expanded since as it stands it fails to include a consequence which is implicit in the expression occurring before the "by"—in this case a "death". We mean he shot the deer dead. This consequence is contained in the expression "killing" but omitted from the following expression "shooting". Ellipsis occurs in all by-relation sentences. Thus (the sentence) "Mr. T blackmailed a woman by sending a threatening letter to her through the post" is similarly elliptical. Blackmailing requires someone to be blackmailed as a consequence. The action of sending a threatening letter to a woman which has as a consequence that she is blackmailed is one and the same action as the action

of blackmailing. That consequence is left out of the second expression because it is implied in the first. The by-relation is therefore an identity relation.

These two explanations rely on a conception of basic actions which is very close to Austin's general doctrine of action. Austin's general doctrine of action has been mocked on another score by Professor Hart as "nonsense"[10] but that doctrine provides the best account there is for explaining the by-relation. Professor Hart has objected to it that it cannot explain actions which are omissions. This objection is well taken of true omissions but too much should not be made of it. Many omissions may in fact involve a bodily movement. The theory at any rate is intentionally restricted to ordinary actions which do involve movement. Professor Hart also objects that the doctrine misrepresents the way actions appear to ordinary men, since ordinary men do not know what muscles they contract when they act but do know what acts they are doing. It is difficult to see how this could be an objection since Austin is providing a philosophical theory and is not recounting the ordinary man's views. But in any event Austin has alternative expressions for muscular contraction which Professor Hart does find acceptable.

Austin's doctrine of action involving muscular contractions and acts of will is much too well-known to need recounting here,[11] but three lesser known features of it need to be emphasized. First, Austin wrote of "bodily movements" as well as of "muscular contractions" in connection with basic actions. This first description of a basic action is preferable since it avoids Professor Hart's objection above; people do know which part of their body they are moving when they act. Second, although Austin often distinguished acts of will from intentions, he did not do so consistently. Intentions were the mark of consequences only, whereas acts of will were the mark of basic actions as distinct from bodily movements like spasms. Austin does not however consistently give a different account of the meanings of these two terms. They are distinct only in what their objects are.[12] There seems to be no reason therefore why we should not uniformly talk about intention in connection with bodily movements and consequences throughout, as in fact Bentham did. This avoids the problem of introducing yet more acts in the form of acts of will and ending with an infinite regress on our hands. Finally, although Austin

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[10] H. L. A. Hart, *Punishment and Responsibility*, 1968, Chapter IV, "Acts of Will and Responsibility" pp. 90-112 and Notes pp. 255-256.

[11] J. Austin, *Lectures on Jurisprudence* (5th ed., ed. Campbell), 1885, Lecture XIX, pp. 410-424. Many of the quotations are given in H. L. A. Hart, *Punishment and Responsibility, op. cit.* p. 98.

[12] Sometimes Austin acknowledged that the only difference between will and intention is that will goes to acts which are done and intention goes to consequences and the future, and there is no suggestion that apart from their objects they mean different things—See *Id.* p. 435. Elsewhere however (and for the most part) "will" is linked to "desire" and "intention" is linked to "foresight". See *Id.* pp. 421-24. This also seems the judicial view of intention. It is I think quite wrong.

talked about intentional bodily movements—basic actions—as the only actions a man actually does, he did not mean it was improper to say that non-basic actions which include consequences are not actions. On the contrary of course it is perfectly proper. Austin's thesis is a reductionist one; according to Austin all actions (non-basic) like killings and blackmailings must be reducible to some basic action, a bodily movement, and to some consequence, and to some intention. A man cannot act that is to say without his body being moved with certain results, and without intending that movement. These three features allow us to see why there may be different descriptions of the same individual action. Whatever a man does may be described in one of two ways. His action may be described without direct reference to consequences as a non-basic action, as a killing or as a blackmailing. Alternatively his action may be described by introducing consequences and identifying some action or basic action of his, as a pulling of the trigger together with a death resulting. This distinction of descriptions is brought out by Austin in a carefully argued passage:

> The only difficulty with which the subject is beset, arises from the concise or abridged manner in which (generally speaking) we express the objects of our discourse.
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> 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:[13] 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 parts of the train which are my acts 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 the subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will.*[14]

Austin then repeated the distinction between acts which are intentional bodily movements and acts which are those bodily movements coupled with consequences, and he continued in connection with the latter:

> Nor is it in our power to discard these forms of speech . . . . To analyse, mark, and remember their complex import, is all that we can accomplish.
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> Accordingly, I most often speak of '*acts*' when I mean *acts and their consequences* . . . .[15]

Austin's analysis allows us to explain how two quite different

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[13] Not quite true. I can kill you with a gun by clubbing you with it and I don't shoot you. But Austin's point is made.

[14] Austin, *op. cit. supra* n. 11, p. 415. (Emphasis in original.)

[15] *Id.* p. 420.

descriptions of non-basic actions like killing and shooting can nevertheless be different descriptions of one and the same basic action, the intentional bodily movement. The point is that intentional bodily movements may have certain consequences, events like deaths and woundings, and those events are caused by the basic action. When those events occur we may rely upon them to describe the basic action in another way, not as an action plus consequence but as a non-basic action. All non-basic actions are reducible to basic actions and the events (consequences) they cause and identity between non-basic actions rests upon identifying a basic action and noting its varying consequences.

Since any non-basic action is identical with a basic action and its consequence, it is dated and located by the occurrence of the basic action itself. This explains how a person can shoot and kill a deer at the same time in the same place and yet kill it before it dies (an event). There is a crucial distinction, which Davidson has recently drawn attention to, between the following questions:[16]

(a) What is the relation between one person's pulling the trigger of a gun (basic action) and the flight of the bullet, and the wounding, and the death of a deer (events)? The answer is that the events occur subsequently to the basic action and are caused by it. The events are consequences and the relation between action and events is therefore a causal relation.

(b) What is the relation between one person's pulling the trigger of a gun (basic action) and that same person's firing a gun, and wounding something, and killing a deer (all being non-basic actions)? This cannot be a causal relation. If it were a causal relation then killing a deer would have to be a different action from, and subsequent to, pulling the trigger. Those matters that are related by cause must occur at different times, one before the other.

But clearly when two actions are considered, the by-relation does not figure at all in a description. If a man shoots a deer and then kills it by another action he clearly does not kill by that shooting. When a man kills by shooting we do mean there was only one action. By-relation expressions abbreviate the full narrative. The by-relation is an identity relation therefore and not a causal relation. Once Jemmison had pulled the trigger he had by that act set in train all that needed to be done to kill the deer. His pulling the trigger did not cause him to go on and kill the deer; rather it caused an event—the deer's death. The court in that case therefore drew the correct conclusion that the relation between the killing and the shooting was identity and that they occurred at the same place: where he pulled the trigger of the shotgun. These different descriptions can be tied together as actions by saying a man does one by doing the other. It is because these different descriptions are descriptions

[16] Davidson, *op. cit. supra* n. 2, p. 20.

of one and the same basic action that we can explain how Mr. Jemmison could kill the deer where and when he fired the gun. Actions which are identical occur at the same time and in the same place; that follows from identity. It is because, however, non-basic actions are reducible to actions and consequences that Mr. Jemmison was able to kill the deer before the deer died, for here we have stopped considering the actions of Mr. Jemmison and moved to consider the consequences of his basic action. We have moved from (b) to (a) and these are different.

A full defence of this theory would need to argue that the names of all non-basic actions are analysable in terms of some other (basic) action which causes certain events. Surely, for example, "cause to die" is substitutable in all contexts for "kill". In this connection it is interesting that legislation typically uses such alternatives. Consider for an example, the Deposit of Poisonous Waste Act 1972 (U.K.). Section 1 of that Act makes it an offence to "deposit waste on land, or cause . . . waste to be deposited on land". Do our legislators see the first case as quite a different case from the second? Of course the intention behind the language of "causing waste to be desposited" is to capture in addition, say, the unauthorised person who instructs another to deposit waste for him. It might be thought misleading to say in this case that the instructing person deposits waste. But it would be extraordinary if it were thought that the instructed man who deposits waste does not cause waste to be deposited. That would be a wholly false conception of action.

RECENT CASES ON JURISDICTION

For the most part the conception of action just defended is not the judicial conception. Recent cases on jurisdiction show that the judges conceive of non-basic actions as taking place not where the basic action of which they are composed occurs, but where the crucial or important consequences of that basic action occur. They reach this conclusion in one of two ways. First, judges sometimes argue that the relation between such non-basic and basic actions is causal; they achieve this by failing to distinguish events from actions. Thus where one man kills another by shooting him, it is sometimes argued in the cases that the death (event) is the result of one man's shooting and hence his killing (action) is subsequent. Alternatively it is sometimes argued that a basic action may be "stretched" until the last consequence as one continuing action. Thus, where A kills B, this action would be "stretched" out from the shooting to the death so that A is killing B as it were all the time from the shooting right up to the end of B. Which of the two judicial devices is used often depends on the action-type involved. "Attempts" are favoured for "stretching"; "shooting" is often favoured for the first device. Neither device has any sound theory behind it. *Jemmison* v. *Priddle* is not only inconsistent with either device but also a welcome relief from fiction. Often fictions are justified by policy. But neither device is justified by policy here since it is doubtful policy to want to extend an existing jurisdiction over crimes. In any event considerations of policy are not

raised by the judges. They argue, as it were, analytically and logically in an attempt to arrive at a conception of action which makes sense. The operation of those two devices is well illustrated in a number of recent cases on jurisdiction.

Treacy v. *D.P.P.*[17]

The appellant wrote a letter addressed to a Mrs. X in West Germany. In that letter he demanded that she send him £175 to an address in England under the threat that if she did not he would send some photographs of her and another man to her husband. He posted the letter on the Isle of Wight on July 1st 1969 and it was received some days later in Frankfurt, West Germany, by Mrs. X. The appellant was charged with blackmail contrary to Section 21 of the Theft Act 1968 (Eng.). The particulars alleged that on July 1st 1969 within the jurisdiction of the Central Criminal Court, the appellant made an unwarranted demand of the sum of £175 from Mrs. X with menaces with a view to gain for himself.

The Court of Appeal was willing to assume that the last constituent element of an offence determined the place where the offence was committed. The case was therefore argued in that court on the question whether that last element was the posting or the receipt. The court was consequently involved in a complex enquiry into defining the phrase "make an unwarranted demand".

The appellant was convicted on the grounds that the demand was made when and where the letter was posted. The case went to the House of Lords on the following point of law: "whether, when a person with a view to gain for himself or with intent to cause loss to another, makes an unwarranted demand with menaces by letter posted in England and received by the intended victim in West Germany, the person can be tried in England on a charge under Section 21 of the Theft Act 1968".

Notice that if the assumption, which the Court of Appeal was willing to make, is not made, then the question is ambiguous.

1. It can mean: Does posting a demanding letter in England which is eventually received abroad amount to making a demand in England before the letter is received? This is a question of definition, which the Court of Appeal answered in the affirmative.
2. It can mean: When a person posts a demanding letter which is eventually received abroad, does that mean the action of making a demand was made abroad or in England? This raises a question about where complex actions take place when they consist of basic actions performed in one country and consequences performed abroad.

The important difference between 1 and 2 is that even if it is decided

[17] *Treacy* v. *D.P.P.* [1971] A.C. 537.

under 1 that the last constituent element of the offence was the receipt and that this occurred abroad, that does not determine that the action of demanding took place abroad. To reach that conclusion one must also make the assumption the Court of Appeal made that ties the place of actions to the place of their consequences.

Most of the arguments used by Counsel were about the first interpretation above. Counsel for the appellant spent some time in consideration of the place of actions. Counsel for the Crown, using an idea of Glanville Williams, argued in favour of the view that complex acts are performed where the physical part of them occurs and not where their consequences occur, i.e., against the assumption. None of the judges discussed this interpretation.

The House of Lords was divided on two matters. Firstly the majority (Lord Reid and Lord Morris of Borth-y-Gest dissenting) thought that the last constituent element of "demanding" was posting by the accused and not receipt by the victim. The majority therefore thought that the act of demanding took place in England. Notice that it does not follow from Lord Reid's and Lord Morris' contrary view that receipt is a constituent element of "demanding" that therefore the act of demanding took place in Germany. However both Lord Reid and Lord Morris did say that that act of demanding took place in Germany. It seems extraordinary to me to say that Treacy blackmailed Mrs. X in Germany even though he never left the Isle of Wight. The way Lords Reid and Morris reached this conclusion is of course by making that same assumption that the Court of Appeal made that acts occur where their last consequences occur. But that is to adopt a conception of action which fails to distinguish between actions and events. What seems to have persuaded Lord Morris to dissent was the argument that if the appellant made his demand in England on July 1st he was blackmailing Mrs. X before she knew it since she received the letter some days later. And you cannot blackmail someone who does not know it. But with respect this argument is not correct. If one thinks of the action of blackmailing as equivalent to causing someone to be blackmailed then of course you can blackmail someone before they know it. Lords Reid and Morris also questioned what would have happened if the letter had not been received. Surely then there was no blackmailing. But again this seems off the point. Granted that the letter is received then why cannot that fact turn some earlier action like posting a letter into the action of blackmailing. Lord Diplock and Lord Hodson (Lord Guest agreeing with Lord Hodson) disagreed with the dissenting judges on the meaning of making a demand. Lord Diplock was very careful to distinguish physical acts from their consequences and argued that blackmail was an offence requiring only the physical act of posting a demanding letter.

Secondly the House of Lords was divided on the question of the extent of English jurisdiction. The minority (Lords Reid and Morris) limited English jurisdiction to acts occurring in England. The majority

(Lord Hodson, Lord Guest and Lord Diplock) thought that the wording of the Theft Act did not contain any geographical limitation of jurisdiction over blackmail to acts committed in England. Lord Diplock in addition extended English jurisdiction to events occurring abroad, regarding the risk of extension as unreal. Lord Diplock said:

> The consequence of recognising the jurisdiction of an English court to try persons who do physical acts in England which have harmful consequences abroad as well as persons who do physical acts abroad which have harmful consequences in England is not to expose the accused to double jeopardy. This is avoided by the common law doctrine of autrefois convict and autrefois acquit . . . .[18]

It follows from Lord Diplock's speech in particular that English jurisdiction is wider than was thought in the earlier case of *Cox* v. *Army Council*[19] where it seemed to extend only to acts committed in England. Of course there is an argument—the argument used to explain *Jemmison* v. *Priddle*—to show that non-basic acts, composed of basic acts performed in England and consequences occurring abroad, are in fact performed in England. Since however the judges disagreed about the meaning of the phrase "making a demand", none of their Lordships took the opportunity to upset the Court of Appeal's assumption and thereby give English law an intelligent conception of action. All the judges seem in fact to agree that the last constituent element determined the place of an action. What divided the court was the question whether the last constituent element of blackmailing was the posting in England or the receipt in Germany. The converse case to *Treacy* occurred in 1971.

R. v. *Baxter*[20]

The accused posted letters from Northern Ireland to pools promoters in Liverpool. In the letters he falsely claimed that he had correctly forecast the results of matches played and that he was entitled to winnings of £1,700. Littlewoods and Vernons, the pools promoters, did not part with any money but informed the police. The accused was charged in Liverpool with attempting to obtain property by deception contrary to Section 15 of the Theft Act 1968 (Eng.). The accused contended that the attempt was made and completed in Northern Ireland and that the English courts had no jurisdiction.

The Court of Appeal (Sachs, and Fenton Atkinson, L.JJ. and Mars-Jones, J.) held that English courts had jurisdiction and that an offence had been committed.

Of course if Lord Diplock was right in the passage cited above from *Treacy* then English courts would have jurisdiction here in *Baxter* because the consequences of the accused's action occurred in England,

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[18] *Id.* at 562.

[19] *Cox* v. *Army Council* [1962] 1 All E.R. 880; [1963] A.C. 48.

[20] *R.* v. *Baxter* [1971] 2 All E.R. 359; [1972] 1 Q.B. 1.

notwithstanding that the act itself of attempting may have taken place in Northern Ireland. The Court of Appeal however argued that the act of attempting occurred in England and that for that reason it had jurisdiction. In this case, it was argued, the letters were delivered and read in England and this completed the man's attempt. At any time between posting and reading it could be truly said that he was attempting a crime. The argument used by Sachs, L.J. (for the court) to reach such a result was this. Suppose a man puts a bomb on a train. The train is travelling across countries. The bomb is placed before the border is reached, and is discovered after the border is crossed. At the moment of discovery Sachs, L.J. argued, it can plainly be said of the person who put it there that he is then attempting to cause an explosion.

But this argument of Sachs, L.J. does not go through. Consider the following: Suppose X puts dynamite in the trouser pocket of an astronaut at Cape Kennedy in February. The astronaut flies off to Venus and lands there ten months later. He puts his hand in his pocket and is blown to pieces. According to Lord Justice Sachs' argument, it follows that X killed the astronaut on Christmas Day on Venus, although we may assume X never went further than Cape Kennedy and was, for instance, sunning himself on the beach on Christmas Day. Surely the correct conception of action is one that allows us to say that X killed the astronaut in February. Suppose X had died in March. It would follow from Lord Justice Sachs' view that X killed the astronaut after X was dead, a view which needs some explaining surely. That a fiction is involved here comes clearly from Sachs, L.J.'s concluding remarks. He quotes with approval part of the judgment from *Simpson* v. *The State*.[21] In that case a bullet fired by a man in South Carolina struck the boat of a man standing in waters of Georgia. The court argued:

> He started across the river with his leaden messenger and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the State line, up to the moment that it stopped, in Georgia.

Sachs, L.J. adds that English law achieves the same result without using a doctrine of constructive presence. But if the jurisdiction of English courts was founded in *Baxter* upon the idea that the attempt took place in England then it has found its own equally remarkable conception of action.

These recent cases have been considered in *R.* v. *Wall*.[22] In that case the court followed *Baxter* and found that English law had jurisdiction over acts which were done abroad in order to avoid regulations in

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[21] (1893) 92 Ga. 41; 17 S.E. 984 (Jerrome Hall, *Cases* 742); quoted in Glanville Williams' "Venue and the Ambit", see n. 26 *infra*.

[22] *R.* v. *Wall* [1974] 2 All E.R. 245; [1974] 1 W.L.R. 930, especially at 248-49; 934-35 approving *R.* v. *Baxter*.

England.[23] The court quoted with approval from Fenton Atkinson, L.J. in *R.* v. *Millar*: "To make a man responsible for a crime, . . . it is not essential that he should be present at the place where the crime takes effect. . . ."[24] "Crime" is a neutral term. It is unclear whether an action or an event is intended. If responsibility goes to actions rather than events, as the cases suggest, then these cases do amount to a doctrine of constructive presence.

Similar cases have occurred in Australian courts. In *R.* v. *Waugh*[25] the accused wrote and posted a letter in Victoria addressed to a certain Connolly in Tasmania. The letter contained the false representation that a friend was ill and that money was needed to go to Queensland. Money was sent although Connolly knew the representation was false. The accused was charged in Victoria with attempting to obtain money by false pretences. The case is like *Treacy* and the converse of *Baxter*. Waugh was convicted.

Madden, J. argued that the act of posting was part of a series of acts which, if successful, would have resulted in his obtaining money in Victoria. Cussen, J. thought it was immaterial that the false pretence may have been made in Tasmania. The case is rightly decided, but notice how the expression "a series" suggests that the defendant's attempting to obtain money was something he did after he posted the letter.

Notice too that Madden, J. is talking about acts when he means events. This is not a pedantic point. These and similar cases involve the use of a conception of action which simply makes no sense. When a man attempts to obtain money by posting a demanding letter, these actions of his are not part of any series of actions. Such a man does not attempt to obtain money after he has posted a letter. The by-relation means he does one single action which achieves a number of results. But "attempting to obtain" is not one of those results. The failure to distinguish between actions and consequential events leaves the by-relation wholly unexplained and leads to the fiction about constructive presence.

JURISPRUDENCE

Several of the cases referred to above cite Glanville Williams' influential article on "Venue and the Ambit of Criminal Law".[26] In part 3 of that article Professor Williams discusses the place of a crime.

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[23] See also *D.P.P.* v. *Doot* [1973] 1 All E.R. 940; [1973] A.C. 807, especially at 943; 817 *per* Lord Wilberforce who uses the neutral word "crime" rather than get involved in acts and events. Lord Wilberforce also talks about "facts" in connection with jurisdiction.

[24] *R.* v. *Robert Millar (Contractors) Ltd. and Robert Millar* [1970] 1 All E.R. 577; [1970] 2 Q.B. 54 at 580; 73 derived from Russell (12th ed., 1964), pp. 128-29.

[25] *R.* v. *Waugh* [1909] V.L.R. 379.

[26] Glanville Williams, "Venue and the Ambit of Criminal Law", Part 3, (1965) 81 *L.Q.R.* 518.

He writes that where a person commits a crime across a frontier two views are possible: that the crime is committed where the offender is and that it is committed where the last constituent element of his crime occurs. Professor Williams describes these two views as initiatory and terminatory theories of jurisdiction, and his desire to defend the initiatory theory is to be applauded. Professor Williams rightly criticizes the terminatory theory for using the fiction that a person acts at some other place than the place where he is and he cites *Simpson* v. *The State*. As part of his defence of the initiatory theory, however, Professor Williams relies upon an argument that distinguishes between the commission and the completion of an offence. He writes:

> The terminatory theory has taken root in England since the acceptance by the courts of the argument that a crime must be deemed to be committed when the last necessary element occurs. The argument is the apparently logical one that since the crime is not completed *until* the last element occurs, it must be completed at the place *where* the last element occurs. In other words, the question "Where?" must be answered in the same way as the question "When?"
> However, the logic of this is spurious. It would be logical to assert that a crime is fully *consummated* when and only when the last necessary element takes place, because a denial of this proposition would involve a self-contradiction. But the time of consummation is not necessarily the same as the time of commission. The word "commission" naturally refers to the defendant's physical act, in contradistinction to the term "consummation" which refers to all the elements of the crime including the consequences of acts.[27]

In support of this Professor Williams asks us to consider the case where D shoots at P inflicting a wound from which P later dies. He argues that since the crime of murder requires a death the crime is not consummated or completed until P dies. But it is consistent with this, he writes, to assert that the crime of murder was committed when D shot P.

He adds:

> No logic compels us to say that a crime is committed when its consummation takes place. Similarly, no logic requires us to say that a crime is committed *where* its consummation takes place. The natural view in the above example is that D committed the crime where he stood, not where P stood or where P afterwards died.

As much as one wants to see the demise of the terminatory theory, if the initiatory theory entails drawing a distinction between commission and completion, it is itself unacceptable. Although Professor Williams uses the word "crimes" throughout and this hovers between a reference to actions and to events, it is clear from his account of the terminatory theory that he is primarily concerned with actions. This is because

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[27] *Id.* at 520-21. (Emphasis in original.)

responsibility attaches to a man's actions. However when what he has written is unambiguously phrased in terms of actions, we can see why his account is unacceptable. Suppose a man kills another by shooting him and that he shoots him by pulling the trigger of a shotgun. According to Professor Williams' distinction, we can say that he committed the killing when he performed the physical act, i.e., pulled the trigger of the shotgun. But it would seem that according to Professor Williams he completed the killing later only when the death occurred since killing requires for its consummation a death. What conception of killing is this? What theory of action allows a man to commit the killing of another when he shoots him and also allows him to complete the killing when the other person dies, it being one and the same action of killing? It is when we couch Professor Williams' theory in terms of actions rather than "crimes" that we see so clearly this odd conclusion. The truth is that consummation and completion of actions take place at the same time, when and where the basic action itself takes place. There is nothing self-contradictory about a conception of action that allows A to kill B before B dies. There is something odd about the idea of completing one action like killing B long after you have committed that same action. It is because Professor Williams has concentrated on one kind of description of actions, namely on physical actions and their consequences, and not on the alternative description of the by-relation between actions that his account gives such a curious conception of action.

If the right account of the by-relation is identity then in Professor Williams' example the shooting and the killing are committed in the same place and at the same time and are completed in the same place and at the same time. That follows from identity and the reduction of all non-basic actions to basic actions.

Reductionism does not mean that non-basic actions are not actions. Of course they are. The reduction is one of analysis only in order to allow the components of non-basic actions to be seen. The crucial thing in this analysis is to separate on the one hand the relation a basic action has with a non-basic one and on the other hand the relation a basic action has with its consequences. The failure to make this distinction makes Professor Williams' account of the initiatory theory untenable and has caused one senior Australian judge, unfairly I think, to criticize Austin's general doctrine of action.

The Criminal Code of Queensland[28] (adopted also in Papua and New Guinea) exempts a person from criminal responsibility for any "act or omission which occurs independently of the exercise of his will, or for any event which occurs by accident". The Codes of Western Australia and Tasmania have a similar provision.

As it stands such a provision could mean to refer by "an act" either to physical acts (basic acts) or to those acts with which a man is

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[28] The Queensland Criminal Code, s. 23.

in fact charged and which could be non-basic acts. If only physical acts are meant to be included then all offences under the Code could be offences of strict liability. The only act of will required is one that goes to the physical act alone. The consequences of that act need not be intended or willed. If those consequences occurred otherwise than by accident there would be liability. On the other hand if that provision is intended to refer to the non-basic act of a charge, then no offence could be of strict liability and all offences would require intention as to consequences. On this view the reference in the section to events occurring by accident is not strictly needed since any such events which occurred would not be willed or intended. You cannot intend an accident.

The provision is ambiguous. Its ambiguity has been considered by the courts on a number of occasions. In *Timbu-Kolian* v. *R.*[29] the defendant had a row with his wife and went to sit alone in the darkness of another room. His wife followed carrying their four-month-old son. The argument continued in the dark. Eventually the defendant picked up a stick and hit out at his wife, intending to chastise her. He struck the child on the head and caused its death. The defendant was found not guilty of manslaughter on two grounds. First, striking the child was held not to be an act of his, and second, the death was found to be an accidental event. The first view is plausible of course only if "act" is construed non-basically, (i.e., the accused did not intend to strike the child), rather than basically, (i.e., the accused did not intend to move his hand and arm). Clearly he did intend that movement. The High Court took the opportunity to discuss basic actions. To quote from Windeyer, J.:

> In short I do not read the word "act" in section 23 [the provision above] as limited by its strict Austinian sense . . . . It seems to me that in its context in s. 23, the word "act" must refer to some act which, if it were a willed act, would render the doer of it liable to punishment for an offence.[30]

That does seem to be the best way to interpret section 23. Windeyer, J. continues:

> A man is not punishable for a bodily movement, but for a bodily movement which produces some prescribed consequences . . . . If the weapon was levelled at some person at such a range that to discharge it must cause a wounding or a killing, it is the wounding or killing which, as I see it, is the punishable act.

Notice here the "slide", in the language, from events ("cause a wounding or a killing") to actions ("the wounding or the killing . . . is the punishable act"). This confusion continues in a subsequent passage:

> Suppose a man hits a glass window with a heavy hammer, thereby

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[29] *Timbu-Kolian* v. *R.* (1968) 119 C.L.R. 47.

[30] *Id.* at 64.

> shattering the glass. Would the breaking of the glass not be his act. . . . Again, if a man stabs another with a knife, why is not the wounding of the victim his willed act? True, it can be said to be but the result of the act of plunging a knife into the victim's body. But it is an inescapable result and the wounding of the victim is therefore to my mind the act of the assailant.[31]

But "the breaking of the glass" and "the wounding of the victim", if they are results of acts cannot be acts at all themselves. They must be events caused by acts, and there is nothing inescapable about such events being caused. What seems to have led Windeyer, J. to this is a misunderstanding of Austin. Windeyer, J. argues that if all actions are reducible to basic actions, then an action like a man's breaking a glass window, since it is not basic, is not an action at all. To avoid such a conclusion he makes such an action the result of a basic action. Rightly wanting to reject the idea that non-basic actions are not actions, Windeyer, J. conflates acts with events and ties them to basic actions as their results. In his *Jurisprudence* Salmond says much the same. But it makes no sense to say that when a man wounds another by stabbing him, then one action is the result of another action. If it were he would have to perform one action after the other, and he clearly does not. Similar confusions about action make Salmond say[32] that a man standing in England who shoots another in Scotland commits murder in Great Britain but not in any one part of it. These absurdities and difficulties are all due to not distinguishing those different relations that actions and events have to basic actions and which I mentioned earlier. It is to Austin's credit that he never confused them.

CONCLUSION

The main thrust of this paper is that some clear conception of the by-relation was crucial to decisions in cases like *R.* v. *Baxter* and *D.P.P.* v. *Treacy*. The judges and writers on jurisprudence seem to have thought they were accounting for that relation when they gave an account of the relation between a man's physical act and its consequences. But this is not so. As a result judges have been led to fictions like continuing actions and "constructive presence" in cases concerning action. It might appear acceptable to jurists to consider the judicial conception of action as an alternative or different conception of action. After all no great

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[31] *Id.* at 64-65. Yet in an earlier case under s. 13 of the Tasmanian Code, the opposite was decided. In *R.* v. *Vallance* [1960] Tas. S.R. 51, the defendant was charged with unlawful wounding. Although it was not in fact necessary in the case for the court to decide what "act" meant in s. 13, since on either view the wounding was intended, the court did take the opportunity to discuss acts. Burby, C.J. thought that act "clearly refers to the actual physical action of the accused". Crisp, J. asserted that s. 13 required only that the defendant's "primary act" be intentional. On *Timbu-Kolian, Vallance* and similar cases see I. D. Eliott, "Mistakes, Accidents and the Will: The Australian Cases" (1972) 46 *A.L.J.* 255, 328.

[32] Salmond, *Jurisprudence* (1902), pp. 399-404 (on acts) and pp. 407-10 (on place and time of an act).

harm is being done by that conception. It might be argued that there is a legal account and a non-legal account of action and that these two accounts can simply be separated. In support of this it is sometimes argued by jurists for instance that the purpose behind Hart's Inaugural Lecture was to render the non-legal account of certain terms irrelevant to legal analysis. Hart argued there that legal terms like "rights" and "duties" (and "action") must be elucidated solely by reference to legal rules and that statements in which such legal terms occur are in fact used to draw conclusions from legal rules. But there is nothing in any of this which makes the non-legal account irrelevant. On the contrary that would ignore the way judges argue in cases, since they argue in terms of ordinary examples, and ordinary concepts. The question of criticism is entirely left open by Hart.[33] There is nothing in Professor Hart's doctrine which would argue against the use of an analysis of a non-legal term in criticism of the judicial analysis of its legal counterpart. Where those analyses diverge and where that divergence is not a result of having to decide borderline cases, nor a matter of policy, but rather is a result of incorrect argument, then criticism by reference to the natural and ordinary concept seems a vital consideration for jurisprudence.

Salmond once wrote, on "possession",[34] that there were not two ideas of possession, a legal one and a natural one. On the contrary he thought that there was only one idea to which the actual rules of law imperfectly conformed. In the case of action such imperfection suggests, to my mind at least, that the time is ripe for the judges to abandon their conception of action in favour of one freed from unsound devices. *Jemmison* v. *Priddle,* properly explained, could be a welcome move in that direction.

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[33] H. L. A. Hart, *Definition and Theory in Jurisprudence* (1953, reprinted 1966). See p. 11 on disregarding the non-legal account of possession.

[34] Salmond, *Jurisprudence* (1902), p. 290.