



Original Articles

Mens rea ascription, expertise and outcome effects: Professional judges surveyed

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ABSTRACT

A coherent practice of *mens rea* ('guilty mind') ascription in criminal law presupposes a concept of *mens rea* which is insensitive to the moral valence of an action's outcome. For instance, an assessment of whether an agent harmed another person *intentionally* should be unaffected by the *severity* of harm done. Ascriptions of intentionality made by laypeople, however, are subject to a strong outcome bias. As demonstrated by the Knobe effect, a knowingly incurred negative side effect is standardly judged intentional, whereas a positive side effect is not. We report the first empirical investigation into intentionality ascriptions made by professional judges, which finds (i) that professionals are sensitive to the moral valence of outcome type, and (ii) that the worse the outcome, the higher the propensity to ascribe intentionality. The data shows the intentionality ascriptions of professional judges to be inconsistent with the concept of *mens rea* supposedly at the foundation of criminal law.

1. Introduction: the Knobe effect and criminal jurisprudence

1.1. Two concepts of intentionality

Consider Knobe's well-known CHAIRMAN scenario: The chairman of a company is approached by his advisor, who recommends a new business strategy. The strategy is expected to increase profits and to harm the environment. The chairman responds that he does not care about the environment and gives his advisor the green light. Everything turns out as predicted: Profits increase and the environment suffers. Did the chairman harm the environment intentionally? The overwhelming majority of philosophically uninitiated people judge the foreseen negative side effect intentional. But faced with identical cases that differ only in so far as the outcome is not negative but positive (i.e. the environment benefits from the new strategy), the side effect is predominantly judged as a nonintentional by-product of the main action. The asymmetry – frequently called the 'Knobe effect' – has been widely replicated (Knobe, 2003a, 2003b, 2004; Mele & Cushman, 2007; for survey articles, cf. Cova, 2016; Feltz, 2007). The effect is found robustly across different cultures (Dalbauer & Hergovich, 2013; Knobe & Burra, 2006) and ages (Leslie, Knobe, & Cohen, 2006). It extends to a wide range of ascriptions of mental states such as desire (Tannenbaum, Ditto, & Pizarro, 2007), knowledge (Beebe & Buckwalter, 2010; Beebe & Jensen, 2012), belief (Beebe, 2013; Kneer, in press) and attributions of non-mental properties such as causal involvement

(Knobe & Fraser, 2008).

The folk concept of intentionality, this suggests, is sensitive to moral valence – it is morally, or normatively, *charged*. If the outcome is negative, foreknowledge standardly suffices for people to ascribe intentionality, if it is positive, foreknowledge does standardly not suffice. ('Standardly' since the introduction of further factors such as agent regret can disrupt the asymmetry, cf. Phelan and Sarkissian (2008), Cushman and Mele (2008) and Cova, Dupoux, and Jacob (2012)). The folk concept differs from what we will call the *clinical* concept of intentionality, i.e. the concept prevalent in law and philosophy. On this view, intentionality involves both a cognitive element, i.e. awareness or knowledge of the consequences, and a conative element, i.e. a desire or other pro-attitude to bring about the envisioned consequences. (Adams, 2015; Butler, 1978; Katz, 1987; Mele, 1992; Moore, 2011). For an action to count as intentional, both elements are necessary, independently of the moral valence of the outcome (for dissenting views cf. Harman (1976) and Lowe (1978), for comparative discussion across law and philosophy, cf. Duff (1989)). Criminal law standardly invokes the clinical concept of intentionality. The US Model Penal Code (section 2.02), for instance, distinguishes explicitly between the *mens reas* intentionality (or purpose) and knowledge (the agent's awareness that his actions will produce a certain result). But this distinction could not be upheld in an unqualified fashion if knowledge was sometimes sufficient for intentionality, as the Knobe effect suggests.

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1.2. The mismatch between folk psychology and the law

The foregoing discussion suggests a severe mismatch between the concept of intentionality at the foundation of criminal law on the one hand, and the folk concept of intentionality on the other. Citizens might thus misinterpret the law, question the verdicts of high-profile trials and challenge the law's legitimacy more generally (Robinson & Darley, 1995; Tyler, 2006). In Anglophone jurisprudence, where laypeople juries attribute *mens rea*, the mismatch is particularly problematic: While the law draws a clear, outcome-independent distinction between the *mens rea*s of intentionality and knowledge, on the folk view knowledge can suffice for the ascription of intentionality. If this is the case only, or predominantly, with respect to side effects, then those taken to trial for harmful side effects are judged by different standards than those charged for harmful main-effects. When main effects are at stake, foreknowledge is *not* sufficient for intentionality ascription (and thus the most severe punishment), when side effects are at stake, it is. Note also that a small, though significant minority of laypeople employ a clinical concept of intentionality. This, too, challenges the principle of a fair and equal trial for all: Defendants who have acted with mere foreknowledge (i.e. without a pro-attitude towards the side-effect) will be attributed the *mens rea* of knowledge by juries holding the clinical view, others will be attributed the more inculpatory *mens rea* of intentionality by juries employing the normatively charged concept of intentionality. Advocates of a strict distinction between intentionality and foreknowledge are thus concerned that defendants who act with mere foreknowledge might frequently be judged and punished too harshly.¹

Perhaps, one might think, the impact of the mismatch just described is exaggerated: The fact that central legal and folk concepts differ does not mean that the folk cannot grasp, or – under careful instruction as is common practice in criminal trials – ascribe *mens rea*s as defined by the law. There is a small empirical literature that investigates whether the legally uninitiated can competently distinguish the *mens rea*s laid out in the US model penal code, and whether they can rank them appropriately in terms of culpability and punishment. Experiments by P. H. Robinson and Darley (1995) suggest that, by and large, they can. The majority of studies (Ginther et al., 2014; Levinson, 2005; Severance, Goodman, & Loftus, 1992; Shen, Hoffman, Jones, Greene, & Marois, 2011) however, report that the folk have considerable difficulties in reliably distinguishing the different *mens rea* concepts and in ranking their respective culpability in ways consistent with the Model Penal Code. What is more, the provision of jury instructions are standardly found to be of little help, which might be one of the reasons why jurors so frequently ask for clarifications of *mens rea* concepts in criminal trials (Lacey, 1993).

Let's briefly take stock: The Knobe effect reveals a serious mismatch between the normatively charged folk concept of intentionality and the clinical concept of intentionality prevalent in criminal law. The mismatch matters both theoretically and practically, since the legally uninitiated have difficulties adapting to the clinical concept in contexts of

¹ A worry: What drives the Knobe effect are differently valenced outcomes. But – one might argue – the distinction between positive and negative moral or normative valence is mute as regards legal matters, since the only outcomes of relevance are negative ones. One doesn't get taken to court for exemplary behavior, but for breaking the law, standardly associated with doing harm or damage. Though there might thus be an asymmetry across positive and negative outcomes, the fact that only the latter matter ensures equality before the law: Those doing harm do not get judged differently from those doing good, because the latter don't get judged in court in the first place. As the main discussion should make clear, however, this worry misses the mark. The problematic here addressed arises *not* from the asymmetry of intentionality judgments across differently valenced outcomes, but from potentially different concepts of intentionality at work in criminal law – one that requires a conative attitude besides foreknowledge, and another one which does not. Differently put, the problem arises from the fact that a clear distinction between the *mens rea*s of intentionality and knowledge is not guaranteed in similarly, that is, negatively valenced, cases.

criminal jurisprudence. In order to better understand the conceptual conflict, and devise ways to address it, the next sections explore the Knobe effect and its implications for the nature of intentional action in more depth.

1.3. Competence v. bias accounts

The Knobe effect has sparked extensive debate as to whether the normatively charged concept captures the nature of intentionality better than the clinical one that dominates the philosophical literature and the law (for reviews see Feltz (2007), Pettit and Knobe (2009), Cova (2016)). Certain scholars argue that the Knobe effect constitutes a *bias*, and that the folk use of intentionality is frequently distorted (Adams & Steadman, 2004; Alicke, 2008; Alicke & Rose, 2010; Nadelhoffer, 2004a, 2004b, 2006; Sauer & Bates, 2013). In contrast to such views, several scholars have argued that the Knobe effect testifies to people's *competence* in intentionality ascriptions (cf. e.g. Hindriks, 2008; Knobe, 2010b; Machery, 2008; Pettit & Knobe, 2009; Uttich & Lombrozo, 2010). According to Knobe, for instance, intentionality ascriptions are sensitive to moral concerns since the *concept* of intentionality itself is constitutively tied to moral features. According to Uttich and Lombrozo (2010), the conscious violation of salient norms such as protecting the environment constitutes *evidence* in favor of certain mental states such as intentionality, whereas norm-conformance does not. The view differs from Knobe's in so far as it invokes a clinical *concept* of intentionality, whose *application* is deemed sensitive to moral and conventional norms. It differs from bias accounts, since the evaluation of behavior *vis-à-vis* salient norms is considered an epistemically rewarding, and hence rational, feature of mindreading.

Advocates of competence accounts are inclined to find fault with the law and propose a revision of the legal concept of intentionality (Duff, 2015; Kobick, 2010). Suggestions of this sort echo an influential article by Malle and Nelson (2003), who argue that when central legal and folk concepts are at odds, the law should adopt the latter so as to foster 'clarity of *mens rea* concepts and a reconciliation of the legal and the layperson's view of human behavior' (2003: 563). It bears emphasis, however, that this strategy is only sensible if the folk concepts of *mens rea* are sufficiently *uniform* and *systematic*, so as to allow a coherent and reliable practice of *mens rea* attribution. Drawing on Malle and Knobe (1997, 2001), Malle & Nelson argue that most people do indeed converge on a single concept of intentionality (uniformity is thus satisfied), and that said concept 'is systematic in that the judgments are predictable from five core components – belief, desire, intention, awareness, and skill.' (2003: 574).

The proposal of adopting folk concepts of *mens rea* for legal purposes can be challenged on two grounds: First, even if sufficiently uniform and systematic, the lay notion of intentionality might still be considered philosophically confused and thus unfit for legal purposes (Adams, 2015). Second, one might have doubts about the uniformity and systematicity of the folk concepts of *mens rea*. Uniformity is under pressure since a significant minority does *not* manifest a side-effect effect with respect to intentionality. This suggests that there are *multiple* folk concepts of intentionality – Cushman and Mele (2008), for instance, identify 'two and a half' such concepts, Lanteri (2012) counts even more. Similar worries regarding uniformity arise for the ascription of the *mens rea* of knowledge, where a significant minority is not susceptible to the epistemic side-effect effect, cf. Beebe and Buckwalter (2010) as well as Beebe and Jensen (2012).

As advocates of bias accounts are quick to point out, the Knobe effect casts doubt on the systematicity of the folk concept of intentionality: When negative side-effects are at stake, desire – one of Malle & Nelson's core components of intentionality – does not seem to play a role, whereas when positive side-effects or main effects are under consideration, it does. What is more, evidence by Nadelhoffer (2006) demonstrates that moral factors independent of outcome valence such as the character of the defendant and victim – certainly not among the

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