

**Person as Lawyer:
How Having a Guilty Mind Explains Attributions of Intentional Agency**

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(this is a commentary on Joshua Knobe's target article)

Abstract. In criminal law foresight betrays a guilty mind as much as intent does: both reveal that the agent is not properly motivated to avoid an illegal state of affairs. This commonality warrants our judgment that the state is brought about intentionally even when unintended. In contrast to Knobe, I thus retain the idea that acting intentionally is acting with a certain frame of mind.

Main Text.

The experimental findings Knobe discusses suggest that normative considerations influence our judgments about non-normative issues. The core finding is this: when an individual brings about a harmful side effect, foresees that he does so but does not care about it, people nevertheless tend to judge that he does so intentionally. The key question is whether these judgments are correct, calling for a revision of prevailing analyses of intentional action, or whether no such revision is needed since the judgments are simply incorrect. The controversy surrounding this finding is marked by a conspicuous absence of the legal perspective (Malle and Nelson 2003 and Nadelhoffer 2006 are exceptions). In particular, it has gone unnoticed that the way 'intent' and 'foresight' are interpreted in law provides support for taking the attributions of intentional agency at face value.

Intention and Foresight in Criminal Law. In criminal law it is common practice to classify cases of foresight as intent, even though the agent does not strictly intend to bring about the relevant effect. Courts are 'entitled to infer' intent from foresight (Ashworth 2006, p.178). The underlying idea is that foresight betrays a guilty mind (*mens rea*) as much as intent does. This insight is often expressed by saying that the agent 'obliquely' intends the effect. An agent obliquely intends an effect when she anticipates it as a consequence of her action, even though it does not contribute to the successful performance of that action (Duff 1996, p.17). In practice this notion of an oblique intention is used only in relation to harmful consequences. So an agent who is said to obliquely intend a consequence will be someone who lacks the proper motivation to avoid a harmful or illegal consequence of her action. My *hypothesis* is that this misalignment between what actually motivates her and what (she realizes) should motivate her warrants our judgment that she brings about the effect intentionally (see Hindriks 2008).

Many foreseen consequences do not really concern us. I might realize that I increase the humidity in my bathroom when I take a shower but normally I do not really care about this and I have no reason to do so. It would be odd to say that I increase the humidity intentionally. When a consequence of my action is harmful, however, I should be concerned about it. When a foreseen consequence should concern us, it makes much more sense to attribute intentional agency. Intentional action would then be broader than intent, but narrower than foresight. Duff argues that 'the wider legal definitions of 'intention' try to capture this broader notion' (1990, p.37). This suggests that legal practice supports the folk attributions of intentional agency.

The *Mens Rea* Explanation. On my hypothesis, intentional action is of special interest to lawyers or prosecutors. A misalignment between what actually motivated a defendant and what (he realized) should have motivated him bears directly on whether he acted intentionally and thereby on whether he satisfies the *mens rea* requirement of the relevant criminal offense. In light of this I call my account of the attributions of intentional agency that Knobe has investigated ‘the *mens rea* explanation’. This explanation shares with Knobe’s account the idea that moral considerations figure in the competences of people who attribute intentional agency. The way in which Knobe’s account differs from mine can be illuminated in terms of the distinction between conduct and fault, between *actus reus* and *mens rea* (interpreted broadly to cover both illegal and immoral acts). Knobe argues that the moral character or badness of the side effect influences judgments of intentional action. This is a matter of *actus reus* rather than *mens rea*.

Knobe’s *actus reus* explanation has an important drawback. The moral character of a consequence that constitutes the *actus reus* is not something mental and does not concern the motivation of the agent. Thus the *actus reus* explanation severs or significantly weakens the tie between intentional action and motivation. In particular, Knobe has to abandon the idea that acting intentionally is a matter of acting with a certain frame of mind. This is a core commitment in our understanding of intentional action (Bratman 1987, Velleman 1989, Setiya 2003). The *mens rea* explanation places the agent’s failure to be motivated appropriately at the center of the relevant attributions of intentional agency; it focuses on the agent’s ignoring a normative reason that counts against his intended action. It thereby preserves the idea that acting intentionally is a matter of acting in a certain frame of mind.

The *mens rea* explanation has at least two other virtues. Its second virtue is that it reveals why the notion of intentional action is so useful as input for judgments about criminal and moral responsibility: culpability and blame require both (illegal or immoral) conduct and fault (*mens rea*) and the notion of intentional action serves to provide (defeasible) evidence for fault (there is no use for a notion broader than intent for beneficial consequences, because, in contrast to blame, praise requires intent; Stocker 1973, p.60). Many have argued that Knobe’s core finding undermines this traditional conception of intentional action and responsibility. The *mens rea* explanation shows that it actually supports it.

The third virtue concerns the shifting standard that Knobe postulates with respect to which issues such as acting intentionally, deciding, and favoring are judged. By changing the focus from what is good or bad to what the agent has reason to do, the *mens rea* account makes better sense of why the default does not apply when legal or moral issues are concerned: people are held to a different standard with respect to what motivates them because (and in particular when they realize that) they have reason to behave differently. Standards shift when legal prosecution or moral criticism becomes pertinent.

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