

Intention and Awareness of Wrongdoing

Exploring the Intersections between Experimental Philosophy and German Criminal Law

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Intention has traditionally been one of the fundamental legal and philosophical notions. Since the emergence of experimental philosophy, it has become obvious that people regard intention as a value-laden concept. This finding came as a surprise to experimental philosophers, and consensus has not been reached yet on how to interpret it. While struggling with this unexpected discovery, empirically-minded philosophers have been unaware of the fact that the evaluative dimension of intention had already been noticed and comprehensively analysed by German criminal law scholars. Abandoning the futile attempt to develop a value-free notion of intention, these legal theorists initiated a thoroughgoing transformation (so-called normativization) of intention, but nevertheless failed to reach agreement on one of the main issues regarding the 'value-impregnation' of intention: the relationship between intention and awareness of wrongdoing. This paper aims to help resolve these disputes by exploring the intersections between experimental philosophy and German legal jurisprudence.

I. Introduction

Since common-law systems are still in “the quest for the general part”¹ of criminal law, criminal law “dogmatics” is a discipline that is almost peculiar to the civil law tradition. Although it is sometimes regarded as being overly abstract even within the Continental legal culture, it has managed to produce a rather solid “general theory of crime”,² which not only serves as a guide to judges and other legal professionals, but also strives to ponder some fundamental questions in its own right. Such an aim has been most successfully achieved by German legal scholars, who have created a system of criminal law praised by some as “unparalleled in comprehensiveness and complexity”.³

Historically, the ambitions of some German criminal law scholars were exceptionally high: they aspired to base criminal law on such concepts as “ontic structures”, “the nature of the thing” etc.⁴ Nowadays scholars have lowered their aspirations, but the “general theory of crime” has not lost much of its extralegal appeal. It can be rightfully said that it transcends the boundaries of positive law and contributes to understanding some essential philosophical concepts.

One of such concepts is, undoubtedly, intention. The German Penal Code (Strafgesetzbuch – StGB) does not even contain a definition of intention, but the scholars have never-

theless developed an extensive literature on the topic. In the absence of legal definition, this concept is being shaped by doctrinal disputes, which are marked primarily by systematic, deductive reasoning, and not so much by case-based, inductive approach. The German model of intention has had a great influence on other civil law systems, including those which have explicitly defined intention in their penal codes (e.g., Austria, Switzerland, Slovenia and Croatia).

A very different approach to the concept of intention is taken by experimental philosophers, who seek to break with aprioristic, “armchair” philosophy through empirical surveys of folk intuitions. Instead of focusing on top-down conceptual analysis, the new philosophic movement has chosen to try the bottom-up approach. In some areas of research, including the one we are dealing with, this has brought some success. Recent work in the emerging field of experimental philosophy has shown that “people have a quite complex and sophisticated understanding of the criteria for intentional action”,⁵ and that they “show remarkably consistent patterns in their intuitions about concrete cases”.⁶

Exploring the folk intuitions has led to a proliferation of philosophical literature on intention. Valuable insights have been gained, but new questions appeared as well. In a study conducted by *Joshua Knobe*, it was noticed that “people seem considerably more willing to say that a side-effect was brought about intentionally when they regard that side-effect as bad than when they regard it as good”.⁷ This seemingly stunning finding has initiated much discussion among experimental philosophers: it became obvious that the folk concept of intention is somehow “contaminated” by normative elements, but it was unclear what they are and how they work. This matter attracted much attention throughout the field, but consensus has not been reached yet.

While trying to solve the riddle of the “good” and the “bad” intention, experimental philosophers have not taken into account that many of the questions they are dealing with have already been addressed by German criminal law scholars. At the same time, German legal scholars seem to be oblivious to the fact that there is much to learn from something as mundane as folk intuitions.⁸ As I shall try to show, there is a clear resemblance between the problems which arise in those two seemingly unrelated fields of enquiry, and much can be learned by bringing them together, that is, by

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¹ *Fletcher*, *Rethinking Criminal Law*, 2000, p. 393.

² See, e.g., *Jescheck/Weigend*, *Strafrecht, Allgemeiner Teil*, 5th ed. 1996, p. 194.

³ *Dubber*, *German Law Journal* 6 (2005), 1049 (1051).

⁴ See, e.g., *Welzel*, *Naturrecht und materiale Gerechtigkeit*, 4th ed. 1962; *Stratenwerth*, *Das rechtstheoretische Problem der „Natur der Sache“*, 1957.

⁵ *Kobick/Knobe*, *Brooklyn Law Review* 75 (2009), 409 (420).

⁶ *Kobick/Knobe*, *Brooklyn Law Review* 75 (2009), 409 (420).

⁷ *Knobe*, *Analysis* 63 (2003), 190 (193).

⁸ However, there are a few instances of authors crossing the border between legal dogmatics and experimental philosophy. See, e.g., *Joerden*, in: *Heinrich/Jäger/Achenbach/Aemlung/Bottke/Haffke/Schünemann/Wolter* (eds.), *Strafrecht als Scientia Universalis, Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011*, 2011, p. 593.

combining the top-down approach of legal dogmatics and the bottom-up approach of experimental philosophy.

II. Intention as a Value-Laden Concept

1. The Side-Effect Effect

In 2003, experimental philosopher *Joshua Knobe* conducted a significant study of folk intuitions. *Knobe's* original question to the respondents was as follows: “The vice-president of a company went to the chairman of the board and said, ‘We are thinking of starting a new program. It will help us increase profits, but it will also harm the environment.’ The chairman of the board answered, ‘I don’t care at all about harming the environment. I just want to make as much profit as I can. Let’s start the new program.’ They started the new program. Sure enough, the environment was harmed” Other respondents were given a vignette which was exactly the same, except that the word “harm” was replaced by “help”.⁹

The results of the experiment were rather surprising: while 82 % of the respondents said that the harmful side effect was brought about intentionally (“harm scenario”), only 23 % said that the beneficial side effect was produced intentionally (“help scenario”). To put it simply, it turned out that people tend to ascribe intention more willingly when a side effect of an action is harmful than when it is beneficial.

This finding – called the “side-effect effect” or the “*Knobe* effect” – came as a shock to some philosophers. It was clearly contrary to the conventional wisdom in the philosophy of action which saw intention as a value-free concept. Soon afterwards, the side-effect effect was proved to exist in other languages and cultural contexts.¹⁰ Moreover, it was shown that the effect does not apply only to intention, but also to many other psychological concepts (desire, decision etc).¹¹ In other words, it became apparent that the asymmetry between the harm and help scenario is not something peculiar to English language, or to the concept of intention, but a phenomenon that is characteristic of human psychology in general.

Although the “moral asymmetry” between the two scenarios is obvious, it is not clear why it appears in the first place. Some philosophers regard the asymmetry as an irrational “performance error”, which arises because “affective or emotional responses sometimes inappropriately bias our otherwise rational judgments”.¹² The others, including *Knobe*, do not consider moral judgements to have a negative biasing effect; for them, the results of the said experiment imply that the “people’s concept of intentional action is bound up in a fundamental way with evaluative questions – with questions about good and bad, right and wrong, praise and blame”.¹³

⁹ *Knobe*, *Analysis* 63 (2003), 190 (191).

¹⁰ *Knobe/Burra*, *Journal of Cognition and Culture* 6 (2006), 113.

¹¹ *Pettit/Knobe*, *Mind and Language* 24 (2009), 586.

¹² *Nadelhoffer*, *Philosophical Explorations* 9 (2006), 203 (214).

¹³ *Knobe*, *Philosophical Psychology* 16 (2003), 309 (309 f.).

2. “Normativization” of Intention in German Legal Jurisprudence

To a legal scholar raised in the civil law tradition, the evaluative (“normative”) loading of intention should not come as a surprise. Assertions such as that “intention represents a normative legal concept despite its psychological content”¹⁴ are nowadays commonplace, and the only question that is still unanswered is how far the process of “Normativierung” should go, i.e., what should be kept of the psychological, “value-free” concept of intention.¹⁵

The rise of the “normative” concept of intention in criminal law dogmatics coincides with the decline of the so-called theory of final action, which strived to create an ontological concept of intentional action.¹⁶ That effort went nowhere, since it became apparent that a plausible concept of intention should include not only “sinnliche Wahrnehmung” (sensory perception), but also “geistiges Verstehen” (intellectual comprehension) of the relevant facts.¹⁷ Thus, an agent who does not “intellectually comprehend” each single element of the offence cannot be said to act intentionally. For instance, an agent who is not aware that an object she takes is a third person’s property cannot be considered a perpetrator of theft, because theft requires an intention.

Although there is a broad consensus in German legal theory that intention is not a value-free concept, there is a profound confusion about some implications of the “value-ladenness” of intention. One of the major controversies is the relationship between intention and “Unrechtsbewusstsein” (awareness of wrongdoing). The latter notion was torn apart from intention by the proponents of the theory of final action, i.e. by the very scholars who introduced the unviable value-free concept of intention. Their idea was to purge intention, as an allegedly non-normative concept, from any normative elements, and awareness of wrongdoing was undoubtedly among those. After the demise of finalism, two camps emerged: one arguing for reincorporation of awareness of wrongdoing into intention, and the other in favour of status

¹⁴ *Gaede*, *ZStW* 121 (2009), 239 (279).

¹⁵ There are nevertheless some dissenting voices regarding the normative component of intention. For example, *Joerden* claims that intention is a notion that precedes evaluation. In his opinion, the core concept of intention remains the same regardless of whether an action is blameworthy or praiseworthy. Meanwhile, the side-effect effect stems from the asymmetry between the two *Knobe's* questions; while the harm scenario clearly refers to a blameworthy act, the help scenario does not refer to a praiseworthy (supererogatory) act. As can be seen, *Joerden* regards the *Knobe* effect as a sort of “performance error”. This certainly has to do with the fact that *Joerden* believes it is logically impossible to derive an “ought” from an “is”, see *Joerden* (fn. 8). For a more thorough explanation of *Joerden's* viewpoints, see *Joerden*, *Logica Universalis* 6 (2012), 201.

¹⁶ See *Welzel*, *Das Deutsche Strafrecht*, 11th ed. 1969, p. 33-38.

¹⁷ See, e.g., *Roxin*, *Strafrecht, Allgemeiner Teil*, vol. 1, 4th ed. 2006, § 12 para. 100.

quo.¹⁸ In the following chapters we will try to resolve these disputes by resorting to folk intuitions about intention.

III. How to Interpret the Side-Effect Effect: The Quest for the Missing Link

Explaining the side-effect effect is not straightforward: it is patent that the ascription of intention depends on the moral status of the action in question, but the whole meaning of the effect is still not fully clear. The first point to note is that the “moral asymmetry” cannot be considered a “performance error”, which would allegedly contaminate the otherwise pure concept of intention. The long-lasting debates of German legal scholars have shown that the value-free concept of intention is wholly unviable; thus, such a concept should be abandoned in experimental philosophy as well. In other words, *Knobe* is right when he claims that the concept of intentional action is intrinsically bound up with evaluative questions.

Although this conclusion can serve as a starting point for further discussion, it does not explain what kind of moral asymmetry there is between the “good” and the “bad” intention. It is still unclear who brings about the relevant moral judgement, i.e., whose “moral code” serves as the basis of evaluation. Certainly, the person who ascribes intention, be it a judge or a survey participant, cannot possibly enter the agent’s mind, so the moral judgement can be considered, in a way, her own, but she can nevertheless choose different standards to determine the moral status of an action. More specifically, she can base the ascription of intention on her own moral standards, but also on the assumed moral code of the agent himself or on the prevailing social (moral or legal) rules.

1. Unconscious Moral Judgments as the Source of the “Moral Asymmetry”?

One of the possible sources of the asymmetry are the evaluator’s own moral judgements about the goodness or badness of certain behaviour. In *Knobe*’s opinion, non-conscious moral judgements of survey respondents play a great role in ascribing intention. He comes to this conclusion through a further survey of folk intuitions, in which the respondents were given a story about a society governed by the “racial identification law”. This law served to identify people of certain races so that they could be sent to concentration camps. The survey showed that people were more willing to assign intention to an agent who violated the requirements of this law than to an agent who fulfilled the very same requirements, no matter that the law itself was strikingly immoral. According to *Knobe*, this result stems from the fact that people unconsciously judge norm violations (“transgressions”) as morally unacceptable and tend not to revise their judgements when they reflect upon the matter more carefully.¹⁹

However, if moral judgements of the evaluator himself are an essential part of the concept of intention, then these judgements should not be distorted so easily by the fact that a norm is violated. If people are prone to consider norm violations as a contributing factor in ascribing intention, this might not be because they unconsciously regard norm violations as something significant, but rather because they regard conscious norm violations or violations of salient norms as something noteworthy in ascribing intention.

2. Norm Violation as the Missing Link

The entire problem presented in the previous paragraph may sound like a pointless quibble, but it is more than just that. To sum up the matter, there are much more straightforward ways to explain the importance of norm violation for the folk concept of intention, than to claim that the evaluator’s moral judgements somehow become skewed. The fact that the evaluator takes norms into account means that he does not assess the intentionality of an act on the basis of his own moral judgements, but on some sort of socially sanctioned morality, i.e., on the basis of norms. To put it simply, “subjects do not have to think that violating the norm is a bad thing or that conforming to it is a good thing”.²⁰

The latter point is very important, but there is still some way to go, as it seems that intention has to do not only with violating a rule, but also with the agent’s awareness of violating a rule (“awareness of wrongdoing”, to use a civil law term). This is what *Holton* suggests when talking about violating a norm “knowingly”.²¹ In his own words, “it makes perfect sense that we incorporate our judgement that a norm was intentionally violated into our assessment of whether the outcome was intentionally brought about”.²²

In addition to this theory, there are other attempts to explain the side-effect effect based on norm violation. According to a view called the “salient norm hypothesis”, it could be that the salience of a norm is crucial to ascribe intention to an agent. To clarify what is meant by the term “salient norm”, I shall briefly introduce the study which showed that participants are more inclined to attribute intention when some side effect violates a salient norm than when it does not violate such a norm.²³

In one of the two individual surveys which were conducted in the study, all respondents were given a scenario in which a person named Carl was uncertain whether to invest inherited money or give it to a charity. However, not all respondents received the same continuation of the scenario. In one of the versions, a friend says to Carl, “If you invest the money, you may be able to retire in comfort,” while in another one a friend says, “If you give the money to Oxfam, you will help a lot of people”.²⁴ There were two endings as well:

²⁰ *Holton*, *Analysis* 70 (2010), 417 (420).

²¹ *Holton*, *Analysis* 70 (2010), 417 (420).

²² *Holton*, *Analysis* 70 (2010), 417 (423).

²³ *Robinson/Stein/Alfano*, *Philosophical Studies* 172 (2015), 177.

²⁴ The survey includes two more versions of the scenario. In one of them, a friend mentions both options (investing money

¹⁸ For an English-language overview of these issues, see *Arzt*, *Brigham Young University Law Review* 1986, 711.

¹⁹ *Knobe*, *Midwest Studies in Philosophy* 31 (2007), 90.

in the first one Carl ends up investing the money, and in another one Carl ends up donating the money. Finally, the respondents were asked whether Carl intentionally made (or did not make) his retirement more comfortable, and whether Carl intentionally helped (or did not help) others.

In the view of the authors of the study, Carl violates a salient norm when he acts contrary to what his friend suggested. In case his friend mentioned investing the money, but Carl ends up donating it, he violates a salient “Self Norm”. On the other hand, if his friend mentioned donating the money, but Carl ends up investing it, he violates a salient “Others Norm”. Although it may sound strange that Carl violates any norm by not conforming to his friend’s vague suggestion (especially in case Carl is advised to follow his own selfish interests), there is a rather simple way of explaining the findings of this study: when a norm had been expressly mentioned to the agent, he cannot possibly say he was unaware of it. In other words, by being exposed to a norm, an agent definitely becomes aware of it.

If we take this interpretation a step further, the “salient norm hypothesis” comes very close to *Holton’s* theory, for both these theories hold a valid view that it is not the evaluator’s own “moral code” that matters, but the norm violation itself and the agent’s attitude towards it. The importance of this conclusion can hardly be overestimated, as it shows that intention and awareness of norm violation are intrinsically interconnected. I believe this has profound implications for criminal law. Therefore, we shall return to German legal jurisprudence and develop these ideas more thoroughly.

IV. Awareness of Wrongdoing as a Legal Concept and Its Relation to Intention

Recent interpretations of the side-effect effect rightly suggest that intention and awareness of norm violation are inextricably intertwined. In a strictly legal sense, this would mean that the concept of intention has much to do with awareness of legal norm violation, i.e. with awareness of wrongdoing.

In German criminal law, the relation between intention and awareness of wrongdoing has been explored for decades. Thus, this issue now rests upon a solid foundation. Today there are two major theories about this relationship: “Vorsatztheorie” (theory of intention) and “Schuldtheorie” (theory of culpability). Generally speaking, the “Vorsatztheorie” regards awareness of wrongdoing as an integral part of intention, while the “Schuldtheorie” separates the two concepts. However, things are not that easy, as both these theories come in various forms.

Before we proceed to present each of the two theories, there is an important remark to be made. Despite all the differences, both theories reject the legal principle that *ignorantia juris non excusat* (also known as *error juris nocet*). The rejection of this principle has become so deeply rooted in the German-based legal systems that it has almost ceased to be a

and donating it to a charity), while in the last one neither option was mentioned (i.e., only the first part of the scenario was shown to respondents).

matter of discussion.²⁵ Of course, this also means that the difference between the theory of intention and theory of culpability is not that significant in the long run, as they both claim that, in one way or another, error of law should exclude or diminish criminal responsibility (depending on whether it is avoidable or not). Nevertheless, the question of whether or not awareness of wrongdoing belongs to intention is not without importance, as we shall see in the following sections.

1. The Theory of Intention

On the conceptual level, the theory of intention dates back to the beginning of the 20th century,²⁶ but it had not been considered a separate theory until the theory of culpability appeared as its rival. Today there are two main forms of the theory of intention: “strenge Vorsatztheorie” (strict theory of intention) and “modifizierte Vorsatztheorie” (modified theory of intention).

The strict theory of intention simply treats awareness of wrongdoing as an integral part of intention. In other words, this theory holds that unless an agent is aware that she violates a legal rule, she cannot be said to be acting intentionally.²⁷ On the other hand, the modified theory of intention suggests that “materielles Unrechtsbewusstsein” (substantive awareness of wrongfulness) should be considered an integral part of intention, while “formelles Unrechtsbewusstsein” (formal awareness of wrongfulness) should be regarded as an independent concept. This means that the actor’s awareness that his act is socially harmful (“substantively wrongful”) would be a necessary part of his intention, whereas his awareness that the act in question is legally prohibited (“formally wrongful”) would be relevant only after ascribing intention.²⁸

²⁵ Leaving aside, for the moment, the question of the relationship between intention and awareness of wrongdoing, I consider such a unanimous decision against *ignorantia juris non excusat* fully justified. The idea of abandoning the ancient principle is firmly based on the “Schuldprinzip” (the culpability principle), as shown in the works of the early opponents of *error juris nocet*. See, e.g., *Köhler*, *Die Strafbarkeit bei Rechtsirrtum*, 1904, p. 107-120; v. *Sikorski*, *Die Behandlung des Rechtsirrtums*, 1908, p. 86-89.

²⁶ Some authors attribute the theory of intention – at least partially – to *Karl Binding*, the originator of the “Normentheorie”, who saw the essence of crime in conscious norm violation. See, e.g., *Müller*, *Die Problematik der Rechtsblindheit oder Rechtsfeindschaft im Sinne der eingeschränkten Vorsatztheorie*, 1966, p. 50.

²⁷ *Schmidhäuser*, *Einführung in das Strafrecht*, 2nd ed. 1984, p. 198.

²⁸ This does not imply that formal awareness of wrongfulness is meaningless in criminal law. For the proponents of the “modifizierte Vorsatztheorie”, awareness of a legal prohibition is a separate element of culpability. That is, an agent who is not aware of the legal prohibition acts intentionally, but he is either not culpable or acts with diminished culpability. See *Otto*, *Grundkurs Strafrecht, Allgemeine Strafrechtslehre*, 7th ed. 2004, § 15 para. 5 ff.

Today the theory of intention – in both its forms – represents a minority opinion in German criminal law theory. The main reason for this is that the German Penal Code distinguishes (albeit indirectly) between intention and awareness of wrongdoing,²⁹ which means the “Vorsatztheorie” is contrary to the current legislation. The same can be said for other countries which have adopted the German model (e.g., Austria, Switzerland and Croatia).

However, the current legislative model is not the only reason why this theory is rejected by some scholars. Its critics point out that the “Vorsatztheorie” narrows the concept of intention too much, as it prevents ascribing intention to the agents who are not aware of the “Unrecht” (wrongfulness) of their act. Having in mind that negligence is not punishable unless specifically stated otherwise,³⁰ such a narrowing would cause impunity of these agents. For instance, an offender who mistakenly believes that document forgery is not prohibited could not be convicted of the offence in question, since intention could not be ascribed to him, and negligence is not punishable in the particular case.

Another argument against the theory of intention states that this theory is contrary to the role of law as an objective order, because it makes the validity of rules depend on dispositions of individual citizens. In the words of one of the prominent German criminal law scholars, *Claus Roxin*, the “Vorsatztheorie” would cause punishment to depend on what an agent *considers* forbidden, and not on what really *is* forbidden.³¹

Although the above objections represent the opinion of the majority, I firmly believe that none of them should be regarded as an insurmountable obstacle for the theory of intention. Of course, the fact is undeniable that the theory of intention is contrary to the current German Penal Code, as well as the penal codes of all the countries which followed the German model, but this does not mean that the theoretical premises of the “Vorsatztheorie” should be rejected in advance. This is to say, if there are valid reasons to accept the theory of intention, these reasons should trigger future legal changes, regardless of the fact that the theory of intention is obviously opposed to the positive law. Before we proceed to investigate the objections to the theory of intention more thoroughly, we shall analyse the rival “Schuldtheorie” (theory of culpability).

2. The Theory of Culpability

Contrary to the “Vorsatztheorie”, the now-prevailing³² “Schuldtheorie” regards awareness of wrongdoing as a concept independent from intention. This theory was developed not so much as a reaction to the problems of the “Vorsatztheorie”, but as a means to accomplish a larger goal, namely, to create a value-free concept of intention, which was sup-

posed to become one of the central notions of criminal law theory. Such aspirations were fuelled by phenomenological philosophy, which was popular in Germany at the time. In the writings of the originator of the theory of final action and one of the most zealous advocates of the theory of culpability, *Hans Welzel*, the connection with this branch of philosophy is obvious, especially with the ideas of *Nicolai Hartmann*.³³

The theory of culpability comes in many forms. We shall name a few: “strenge Schuldtheorie” (strict theory of culpability), “vorsatzunrechtsausschließende eingeschränkte Schuldtheorie” (limited theory of culpability which excludes intentional wrongdoing), “rechtsfolgenverweisende eingeschränkte Schuldtheorie” (limited theory of culpability which refers to legal consequences), “unselbständige Schuldtheorie” (dependent theory of culpability), “rechtsfolgenselbständige Schuldtheorie” (theory of culpability with autonomous legal consequences) etc. Some of these German expressions are difficult even to translate adequately, and explaining them in detail would be very time-consuming.³⁴ Furthermore, such an analysis would require a thorough clarification of the “Straftatsystem” (criminal offence system), but such a task is outside the scope of this work.³⁵ This is why the differences between particular types of the theory of culpability will not be discussed here.

Notwithstanding those differences, various forms of the theory of culpability are all susceptible to the same problem: namely, how to distinguish between intention and awareness of wrongdoing. Having in mind that the basic assumption of the “Schuldtheorie” is separation of these concepts, this question cannot be avoided.

Drawing the borderline between the two notions has caused much trouble, especially since the downfall of the theory of final action, i.e., since it became apparent that the value-free concept of intention is absolutely unviable.³⁶ In such circumstances, it turned out to be necessary not simply to distinguish awareness of wrongdoing from intention, but to differentiate between awareness of wrongdoing and the value-laden concept of intention, which proved to be extremely difficult. This led to some dubious and counterintuitive solutions. For example, an agent is deemed to lack intention if he hunted during the closed season, mistakenly thinking that the closed season had already passed. On the contrary, a person who hunted during the closed season, without knowing there had ever been a closed season at all, is not deemed to lack

²⁹ §§ 16, 17 StGB.

³⁰ § 15 StGB.

³¹ *Roxin* (fn. 17), § 12 para. 9.

³² It is widely acknowledged in German legal theory that the Penal Code (§ 17 StGB) chose the theory of culpability over the theory of intention. See, e.g., *Neumann*, JuS 1993, 793.

³³ This connection is explicitly acknowledged by *Welzel*. See *Welzel* (fn. 16), p. 37.

³⁴ For a brief and useful overview of these theories, see *Scheffler*, Jura 1993, 617.

³⁵ For an English-language introduction to the “Straftatsystem”, see *Bohlander*, *Principles of German Criminal Law*, 2009.

³⁶ Even before finalism came to an end, some supporters of the theory of culpability had realized the impossibility of creating a value-free concept of intention. Nevertheless, they opted for the “Schuldtheorie” because of its “practicability”. See *Sax*, ZStW 69 (1957), 412 (428 f.).

intention, but awareness of wrongdoing.³⁷ The other disadvantage of the theory of culpability is that it raises the importance of some far-fetched, almost bizarre legal concepts, such as “gesamttatbewertende Tatbestandsmerkmale” (the elements of the criminal act which require evaluation of the act as a whole), which would otherwise be of little significance.³⁸

As said before, such subtle distinctions and peculiar concepts are inevitable if we choose to support the “Schuldtheorie”. But then again, it is rather questionable if this kind of hair-splitting is needed at all, or a better solution would be to reunite intention and awareness of wrongdoing and avoid the unnecessary difficulties. In any case, before calling for the restoration of the “Vorsatztheorie”, the objections to it should be addressed first.

3. Reconsidering the Objections to the Theory of Intention

a) *Is the theory of intention narrowing the scope of intention too much?*

According to one of the most popular objections, the “Vorsatztheorie” narrows the concept of intention, thereby making it impossible to ascribe intention to some agents whose actions – from a broader ethical or criminal policy perspective – deserve to be called intentional. This refers primarily to agents who disregard rules without being directly aware that their actions are forbidden by law. The opponents of the theory of intention fear that such offenders would often be granted impunity under the assumptions of the “Vorsatztheorie”, as intention could not be ascribed to them, while negligence is punishable only under an explicit provision.

However, these fears are unfounded.³⁹ If an agent consciously disregards rules, it means that she takes a clearly hostile attitude toward the law, so it cannot be said that she lacks awareness of wrongdoing. This is something both camps should agree upon. Consequently, if we follow the premises of the theory of intention, these agents can be attributed intention without a problem. In other words, it appears that under the “Vorsatztheorie” there is no limbo between intention and negligence in which the offender who disregarded rules could seek refuge. That is why this whole argument may be considered an exaggeration created by the authors who were “hypnotized by the thought that otherwise many criminals would escape their deserved punishment”.⁴⁰

To demonstrate this point, we can use an example which was originally supposed to prove the erroneousness of the theory of intention. It states that a parent who had severely

abused his child,⁴¹ and later claimed that he had not known that such an act was forbidden by law, could not be punished for his deed unless we embrace the “Schuldtheorie”.⁴² But this argument is unconvincing, for even if the parent did not know that there was an explicit legal prohibition of child abuse (which is hard to believe, but theoretically possible), he must have known that his action was blatantly socially harmful. That is perfectly sufficient to establish the agent’s intention without having to conform to the requirements of the theory of culpability. Since the notion of intention should definitely include situations in which a rule is consciously disregarded, I hold that the above objection does not refute the theory of intention.

b) *Is the theory of intention opposed to the role of law as an objective order?*

We may now turn to another objection, which states that the theory of intention is opposed to the role of law as an objective order. In the eyes of its critics, the theory of intention would make the validity of rules depend on the disposition of individual citizens. Consequently, punishment would not depend on what really *is* forbidden, but on what an agent *considers* forbidden.

In my opinion, this objection is erroneous. To begin with, the theory of intention has nothing to do with the validity of norms; if an actor could not be ascribed intention because he had lacked awareness of wrongdoing, this would not make the particular rule invalid.⁴³ Simply put, the “Vorsatztheorie” cannot be said to diminish the role of law as an objective order in any manner. What might be affected eventually is the efficacy of rules. However, this risk is largely overestimated, as there is no real danger that even a remotely significant portion of society would be unaware of basic moral and legal norms. In other words, “[i]t is almost impossible to live in a society, to be raised in it, and above all, to speak its language without knowing the fundamental norms of its legal code”.⁴⁴ Certainly, there is a possibility that some defendants would falsely claim that they were not aware of wrongdoing, but this is not a problem peculiar to the “Vorsatztheorie”, since it can be experienced by legal systems which endorse the “Schuldtheorie” as well. The only way this problem could be completely circumvented is by re-establishing the *ignorantia juris non excusat* principle, but such a solution would be rightfully unacceptable for both sides of the argument; after all, “[t]here is no mistake in the legal sense which is not a mistake of law and a mistake of fact at the same time”.⁴⁵

³⁷ OLG Celle NJW 1954, 1618.

³⁸ For more on this concept, see *Roxin* (fn. 17), § 10 para. 45-52.

³⁹ One of the most passionate supporters of the “Vorsatztheorie”, *Heinz Koriath*, rightly claims that these fears contain an “irrational element”. See *Koriath*, Jura 1996, 113.

⁴⁰ *Spendel*, in: Jescheck/Vogler (eds.), *Festschrift für Herbert Tröndle zum 70. Geburtstag am 24. August 1989*, 1989, p. 89 (90).

⁴¹ § 225 StGB.

⁴² The example is taken from *Roxin*, who is a somewhat sceptical supporter of the “Schuldtheorie”. See *Roxin* (fn. 17), § 7 para. 46.

⁴³ This point against the objection was put forward by *Koriath*, Jura 1996, 113 (122).

⁴⁴ *Koriath*, Jura 1996, 113 (122).

⁴⁵ *Binding*, *Die Normen und ihre Übertretung*, vol. 3, 1918, p. 116.

c) *Some other arguments against the theory of intention*

While the above two arguments are not the only ones against the “Vorsatztheorie”, the others are even less plausible. For instance, some authors claim the theory of intention fails to recognize the difference between intention as “Objekt der Wertung” (the object of evaluation), and awareness of wrongdoing as “Wertung des Objekts” (evaluation of the object). To be more precise, this argument states that intention precedes evaluation, whereas awareness of wrongdoing is an element of the evaluation itself. In *Welzel’s* words, “awareness of wrongdoing is not something the actor is blamed for, but rather the reason why the actor is blamed for his unlawful intention”.⁴⁶

Although this distinction is still quite popular, it is utterly unconvincing,⁴⁷ since intention is not merely an object of subsequent evaluation, but a concept that cannot be conceived at all without evaluation. As it tries to separate intention from value judgments, this argument is nothing else but another futile attempt to develop a value-free concept of intention.

Besides the latter, there are some other arguments that (vainly, for sure) seek to establish a value-free concept of intention, which would not be able to encompass awareness of wrongdoing. Among the more obscure of these arguments is an assertion that “intention and awareness of wrongdoing require two psychologically rather different types of awareness”;⁴⁸ while intention entails “Wahrnehmung” (perception), awareness of wrongdoing requires mere “Wissen” (knowledge). Practically, this would mean that sheer knowledge of the relevant facts is not enough to ascribe intention, or, in other words, that the minimum level of awareness needed for intention is set somewhat higher than in case of awareness of wrongdoing. Nevertheless, it is hard to understand why such a distinction was introduced in the first place, if not in order to deepen the alleged gap between a “purely descriptive” notion such as intention, and awareness of wrongdoing as a concept that undeniably involves normative judgement.

Despite all the efforts of the proponents of the theory of culpability, it proved to be extremely difficult to split awareness of wrongdoing and intention. Before turning to experimental philosophy once again, I will conclude this chapter with the words of *Anthony Duff*, that, although written in a different context, clearly doom any prospect to achieve what the originators of the theory of culpability strived for: to develop a viable value-free concept of intention:

“[I]ntention is not, and should not be, a purely descriptive concept: [...] it helps to structure our ascriptions of responsibility not by providing a purely factual grounding for such ascriptions, but rather by helping us to determine who should be held retrospectively responsible for what in the light of our normative (and often contested) understandings of the pro-

spective responsibilities that we have in virtue of our positions as moral agents, as citizens, and as filling any of the many roles that we play in our life.”⁴⁹

V. Lessons from Experimental Philosophy: A Case for Reuniting Intention and Awareness of Wrongdoing

In the previous chapter, we analysed some common arguments against integrating awareness of wrongdoing and intention. Since none of these arguments seem credible, I maintain that there is no reason to regard the “Vorsatztheorie” as theoretically unsound.

However, the fact that the theory of intention is not inherently flawed does not necessarily mean it should gain the upper hand; after all, the “Schuldtheorie” has been accepted for quite a long time by the majority of German scholars, as well as more than a few legislatures, and it cannot be said that it has produced unacceptable results. Having this in mind, it might as well be claimed that there is no reason to abandon the theory of culpability and revert to the theory of intention. But then again, it should not be forgotten that the theory of culpability requires a lot of fastidious work in establishing criteria for distinguishing intention and awareness of wrongdoing, and if there is nothing wrong with merging these two concepts, then all this effort is superfluous.

Although it is theoretically possible to support either point of view, I still think there is a strong reason to accept the “Vorsatztheorie” as a framework for defining the relationship between intention and awareness of wrongdoing. This reason is that folk intuitions clearly show intention is not just a descriptive notion, as some would like to think, but a profoundly normative concept. Of course, some might deny the importance of ordinary language in resolving legal or philosophical disputes, but if we do not at least try to follow the intuitions about basic mental concepts, we will not be able to come up with anything more than a circular argument. Indeed, even if we proceed to form a concept of intention which is indifferent to ordinary human intuitions, it must be kept in mind that any concept that would significantly depart from the average layman’s understanding of intention would be faced with a serious crisis of legitimacy. To conclude, “intuitions are bedrock, although they are not infallible and not privileged – a sort of ‘bedrock by default’”.⁵⁰

Another argument which might dispute the claim that the surveys of folk intuitions support the “Vorsatztheorie” is the fact that some varieties of the “Schuldtheorie” do not consider intention a purely descriptive notion. In other words, it cannot be said that the normative understanding of intention belongs exclusively to the “Vorsatztheorie”, as there have been efforts to create a workable normative concept of intention within the framework of the theory of culpability. These efforts, as we already showed, have been accompanied by

⁴⁶ *Welzel* (fn. 16), p. 161.

⁴⁷ *Koriath* rightly called this line of reasoning the most confusing of all the arguments against the theory of intention. See *Koriath*, *Jura* 1996, 113 (121).

⁴⁸ *Welzel* (fn. 16), p. 160.

⁴⁹ *Duff*, in: Baker/Horder (eds.), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams*, 2013, p. 148 (170). For more on this topic, see *ibid.*, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law*, 1990.

⁵⁰ *Double*, *The Non-Reality of Free Will*, 1991, p. 19.

considerable difficulties, but this is not the only reason to dismiss their value; the other, even more important reason is that the theory of culpability is contrary to fundamental human intuitions about what constitutes intention. I will try to demonstrate this in the next few lines.

To begin with, we need to briefly recall *Knobe's* initial experiment, which showed that people were more willing to ascribe intention to rule violators ("harm condition"), than to actors who did not violate any rule in a comparable situation ("help condition"). Such an outcome means that there is a clear asymmetry between the "norm-violating" and "norm-neutral" scenario. Moreover, a further experiment indicated that people were more willing to assign intention to an agent who violated a rule than to an agent who conformed to a rule even when the rule was flagrantly unethical (the "racial identification law" case).

Although these experiments call for an explanation, a unanimous conclusion has not been reached yet. Nevertheless, I do not see any other plausible explanation for these phenomena except for that proposed by *Holton*⁵¹ and (in a lesser degree) the authors of the "salient norm hypothesis".⁵² For even if the first experiment, which introduced the side-effect effect, was not so straightforward, the latter unquestionably brings us closer to a unified interpretation of the folk intuitions about intention, which must include some reference to norm violation.

The exact role of norm violation in the notion of intention is still not completely clear. On the one hand, it is obvious that intention does not have to do with the sheer fact that the norm was violated, but with the actor's knowledge that he violated the norm. On the other hand, to satisfy the knowledge condition the actor does "not need to treat violation of the norm as a regulatory guide",⁵³ or, in other words, he does "not need to be ready to modify [his] behaviour to ensure that the norm is violated".⁵⁴ The required level of knowledge seems to be somewhere between these two extremes; that is, it is essential that the actor was aware of wrongdoing and nevertheless proceeded with the intended action, but it is not necessary that his specific aim was to violate the norm.

This line of reasoning can also be applied to *Knobe's* initial survey, which demonstrated the respondents' readiness to ascribe intention to rule violators who simply ignored a norm, without being especially fond of its violation. Thus, in ordinary language, the "I don't care" attitude is apparently sufficient for intention, at least in situations resembling the "harm scenario" ("I don't care at all about harming the environment. I just want to make as much profit as I can").⁵⁵

These findings should have a profound impact on the long-standing dispute between the "Schuldtheorie" and "Vorsatztheorie", and cause the latter to regain its appeal in spite of the current decline. The reason for this is straightforward: in ordinary language, the agent's attitudes towards the norm are highly important in ascribing intention. To put it differently, the action that violates a norm cannot be called intentional unless the actor knows there is a norm against such an action. This is exactly what the theory of intention claims, although in a slightly different wording.

Apart from refuting the very separation of intention and awareness of wrongdoing, folk intuitions give us ground to dismiss two fears that are common in German legal scholarship: the fear that accepting the theory of intention would virtually mean giving impunity to law-disregarding citizens, and that merging intention and awareness of wrongdoing might weaken the role of law as an objective order. Bearing in mind that people tend to ascribe intention even to the indifferent executive in the "harm scenario", both these arguments lose their weight. For although the executive did not aim to violate the norms against pollution, he undoubtedly chose to disregard these norms. Considering that such an attitude is sufficient to attribute intention, it cannot be said that the "Vorsatztheorie" causes the legal order to become dependent on subjective dispositions of individual citizens, or that it might grant exemption from punishment to citizens disrespectful of law.

VI. Conclusion

With the emergence of experimental philosophy, the notion of intention has secured its position as one of the key philosophical concepts. However, in spite of the proliferation of literature on the subject, the new discipline has not managed to explain the "side-effect effect", a newly observed phenomenon that revealed the existence of normative "contamination" of the folk concept of intention.

Although the search for a uniform interpretation of the "side-effect effect" has been largely unsuccessful, some solutions appear on the horizon. Particularly promising are those which emphasize the importance of norm violation in ascribing intention. In this paper, I tried to show how the efforts to incorporate norm violation into the concept of intention can be supported by the "Vorsatztheorie", which is advocated by a number of prominent German legal scholars. I firmly believe that establishing a link with the theory of intention can help experimental philosophers to explore the relation between intention and norm violation and thereby resolve a great deal of problems with interpreting the "side-effect effect".

As well as experimental philosophy, legal theory can also benefit from mutual exchange. Certainly, the value-ladenness of intention was noticed by German legal scholars long before the establishment of experimental philosophy, but this does not mean that the surveys of folk intuitions about intention should be ignored, as they can be used by legal scholars to reaffirm the normative loading of intention. Furthermore, the results of the surveys might help to untangle the dispute between the proponents of the "Vorsatztheorie" and the

⁵¹ *Holton*, *Analysis* 70 (2010), 417.

⁵² *Robinson/Stein/Alfano*, *Philosophical Studies* 172 (2015), 177.

⁵³ *Holton*, *Analysis* 70 (2010), 417 (419).

⁵⁴ *Holton*, *Analysis* 70 (2010), 417 (419).

⁵⁵ I will leave aside the "help scenario", because legal theory rarely deals with the attribution of intention in such circumstances.

“Schuldtheorie” about the relationship between intention and awareness of wrongdoing, and cause the “Vorsatztheorie” to regain its appeal. In other words, it seems that the results of the surveys of folk intuitions could serve as a decisive argument in favour of reuniting intention and awareness of wrongdoing.