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SHORTER ARTICLES

FLEETING MENTAL STATES

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Prior and Fleeting Mental States

AN important strand in philosophical discussions of intention is the idea that intentions are concerned with planning for the future, with guiding future action[1] and coordinating one's activities over time.[2] In this sense, people "form intentions" about how they will behave in the future. Indeed, forming intentions about the future might seem to constitute the paradigm case of intention; and conduct which executes a previously formed intention or plan might seem to be the paradigm case of intentional conduct. The intention comes first and the conduct follows some time later. Such intentions are often called "bare" or "prior" intentions. However, the concept of acting intentionally does not entail a perceptible time gap between intention and action. We may say of a person who acts on the spur of the moment that their action was intended or intentional; but in such circumstances, intention and action may seem to merge in a way that makes it difficult to disentangle the mental and physical elements of the person's conduct. This is what I mean by "fleeting intentions":[3] when things happen very fast, the idea that acting intentionally involves first forming a plan of action, and then executing it, seems to misrepresent our experience. Something analogous can be said of other "mental states" such as recklessness: a person may become aware of a risk and may decide to take that risk well before engaging in the action of "taking the risk". On the other hand, the sequence of becoming aware of the risk, "deciding to take the risk", and "taking the risk" may occur in such a short space of time that it may be very difficult to

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[1] I use this term and its cognates to cover both acts and omissions as appropriate.

[2] *E.g.* M. Bratman, *Intention, Plans and Practical Reason* (Cambridge, Mass., 1987).

[3] Alfred Mele calls them "proximal intentions": *Springs of Action: Understanding Intentional Behaviour* (New York, 1992).

disentangle the mental and physical elements of the person's conduct. The phenomenon to be examined, then, is "fleeting mental states".

In terms of the distinction between *mens rea* and *actus reus*, fleeting mental states present something of a puzzle because that distinction is generally taken to imply that the mental and physical elements of criminal conduct are distinct and separable, and that mental states are prior to action.[4] As Ashworth says of the phenomenon of fleeting intentions, it renders the term (or, perhaps better, the concept of) "intention" "far less concrete than is sometimes assumed".[5] Cross thought that "when dealing with incidents that occupy a split second, the question 'did the accused contemplate certain results?' is apt to be a little unreal".[6] It is noteworthy, therefore, that courts appear to have found little difficulty in treating fleeting mental states as fulfilling the various requirements of a mental element for criminal liability. This is particularly surprising because it is generally assumed that the law also takes an approach to proof of the mental element of criminal offences which views mental states and physical acts as separate phenomena that are each either directly or indirectly observable.

This article will suggest that although fleeting mental states may appear problematic if we view mental states as metaphysical entities, they are less troublesome if we view mental states as a component in a social practice of allocating responsibility and blame. It also argues that the criminal law does not treat "mental states" as metaphysical entities but as interpretations of behaviour within a social practice of allocating responsibility and blame. To the extent that fleeting mental states present legal difficulties, these relate to proof of the requisite mental state and not to its nature or content.

Theoretical Approaches

I will first examine how several theorists have dealt with fleeting mental states (in particular, fleeting intention, which has received much more attention than other fleeting mental states). As we have seen, Ashworth thinks that the phenomenon of fleeting intentions renders the concept of intention less "concrete" than it is often assumed to be. He explains this comment by saying that "in many . . . crimes the events happen so suddenly and rapidly that a fleeting realisation of what one is doing may be the most that time

[4] This is not, of course, inconsistent with the requirement that *mens rea* and *actus reus* must coincide—i.e. if the mental state is formed prior to the prohibited conduct, it must persist until the time of the conduct.

[5] A. Ashworth, *Principles of Criminal Law*, 3rd. edn. (Oxford, 1999), 177.

[6] R. Cross, "The Mental Element in Crime" (1967) 83 L.Q.R. 215, 226.

allows". This suggests that if the actor in such circumstances adverts to what they are doing but nevertheless goes on to do it, they will be treated, in the criminal law at least, as having intended what they did. For present purposes, there are two related difficulties with this account. One is that it seems to ignore the distinction, between realising what one is doing and choosing to do it, which forms the basis of the legal distinction between recklessness and intention. Another is that both the mental state of choosing to act in a particular way, and the mental state of being aware that one's conduct carries certain risks, can be either prior or fleeting. It does not help in explaining the phenomenon of fleeting intentions to refer to the phenomenon of fleeting awareness.

Philosophers have adopted several different tactics for dealing with fleeting intentions. One is to explain how, despite first appearances, fleeting intentions may precede action. Finnis, for instance, distinguishes between two different ways of forming a plan—by a "ponderous or formal process of deliberation" on the one hand; and "in a moment", "instantly and informally", on the other.[7] However, one senses his unease about fleeting intentions in the fact that he feels the need to describe prior intentions in terms ("ponderous", "formal") which make them sound mechanical and artificial. Finnis's account of fleeting intentions is driven by his understanding of intention in terms of plans and choices, and by the consequent need to explain fleeting intentions in these terms. His understanding of intention in turn derives from his more general ethical views. For him, it is extremely important to maintain a distinction between, on the one hand, consequences of action which are chosen (i.e. intended) and, on the other hand, what he calls "side-effects". He would certainly not accept Ashworth's account of fleeting intentions in terms of "realisation of what one is doing".

Adams and Mele draw a distinction between *forming* an intention and *acquiring* an intention.[8] Intentions can be acquired, they say, "at something approaching the speed of thought"; and so there is no problem in the notion of spontaneous action being preceded by an intention so to act. By contrast, Searle deals with fleeting intentions by denying that intentions necessarily precede conduct. He distinguishes between prior intentions and "intentions

[7] J. Finnis, "Intention and side-effects" in R.G. Frey and C.W. Morris (ed.), *Liability and responsibility: Essays in law and morals* (Cambridge, 1991), 37.

[8] F. Adams and A. Mele, "The Role of Intention in Intentional Action" (1989) 19 Canadian J. of Philosophy 511–532. Curiously, Mele is prepared to accept that fleeting intentions may not be conscious: "Strength of Motivation and Being in Control" (1997) 34 American Philosophical Quarterly 319, 323.

in action",[9] and says that intentions in action do not precede action but are part of it. There is some empirical research which, in Mele's view, supports his theory as against Searle's.[10] However, it is difficult to see how the dispute between the two views could ever be settled by empirical evidence because it is fuelled by different conceptions of intention. Mele apparently rejects what Searle accepts, namely that an action can be intentional even if the relevant intention does not precede the action. Mele bases his rejection of Searle's idea of "intention in action" on a desire for "theoretical simplicity".[11] He prefers his theory because it purports to explain all instances of intentional action, whereas "intention in action" is put forward to explain only certain types of intentional action (such as "sudden or impulsive actions") and is, anyway, "far from persuasive"—to Mele, although, one assumes, not to Searle.

All of these theorists seem to view physical behaviour and mental states as in some sense separately identifiable. For instance, although Searle does not accept that there is a class of mental entities "lying outside the physical world altogether", he does believe in "the existence and causal efficacy of the specifically mental aspects of mental phenomena".[12] Some thinkers apparently reject such views about intention and other mental states. Duff says that

> [w]e must guard against the temptation of supposing that verbs such as ... "intend" must refer to mental acts or states which are separate from the actions we ... intend to do.[13]

On the contrary, he says, "we can identify our own or other people's intentions only in and through the actions which we or they intend to do".[14] For Duff, a judgment that a person acted intentionally is an interpretation, not an observation:

> in trying to understand a person's actions (what he is doing and why), I am trying to see what they mean; to discern the pattern of which they are part, their relation to their context, and the direction in which they are moving.[15]

[9] J.R. Searle, *Intentionality* (London, 1983), 83ff. Searle's views are discussed by Adams and Mele, n. 8 above. One disadvantage of Searle's approach is that under it actions which, by repetition, become "automatic" can be described as intentional if they are means to an end in relation to which the agent has formed a prior intention (*e.g.* changing gear in the process of executing a prior intention to drive to work: Searle, *ibid.*, 84–85). This account reduces the distinction between intentionality and voluntariness to the point where the phrase "intentional act" becomes (almost) pleonastic.
[10] Mele, n. 8 above (1997).
[11] Mele, n. 3 above, 185.
[12] Searle, n. 9 above, 263.
[13] R.A. Duff, *Intention, Agency and Criminal Liability* (Oxford, 1990), 46.
[14] *Ibid.*, 128.
[15] *Ibid.*, 132.

Duff uses the phenomenon of fleeting intentions to support his rejection of the separability of mental states from physical behaviour. On the other hand, he does not deny "that we often . . . intend to act before we act".[16] Nor does he claim to have proved the "separability thesis" to be wrong; and it is not clear whether he believes this to be possible.[17] Moreover, he purports to be engaged in essentially the same enterprise as Mele and Searle, namely "metaphysics", "the philosophy of mind" or, in Duff's words, "the philosophy of action". He does not seem to think that interpretation is all there is to intention: it is the case both that we sometimes interpret people's behaviour as intentional *and* that people's behaviour is sometimes intentional. He is offering an account of what intention is, not just an account of a social practice of interpreting people's behaviour as intentional.

Regardless of the strengths or weaknesses of Duff's theory as an exercise in the philosophy of mind and action, his interpretational account of mental states does offer a useful lead in understanding why the law apparently has little difficulty with fleeting intentions.

Two Views of Mental States in Criminal Law

There are two quite different ways of viewing intention and other "mental states".[18] One is to treat them as real metaphysical entities (distinct from brain-states), as a function or expression of human agency and free will, and as part of human nature. Following this tack, understanding intention (for instance) requires quasi-scientific investigation of, or speculation about, human nature. From this perspective, the important question about the criminal law concerns the extent to which it instantiates or embodies an accurate quasi-scientific understanding of mental states.[19] A very different approach is to treat mental states as elements of social practices of holding and being held responsible, and of allocating praise and blame. Taking this line, what is meant by "intention" is not primarily a matter of scientific knowledge but of normative stipulation. For instance, we may define intention solely in terms of plans and purposes, or we might be prepared to extend it to conscious awareness of a high-probability risk. From this perspective, the choice between different definitions of intention depends on views about the functions of and justifications for the criminal law, not on "the truth" about human nature and identity.

[16] *Ibid.*, 47. Duff analogises prior intentions to promises *ibid.*, 132–133.
[17] See the discussion of dualism *ibid.*, ch. 6.
[18] These approaches are simplified paradigms: they do not exactly represent the views of anyone in particular, or perhaps of anyone at all. Nor are they the only possible approaches.
[19] Which Ashworth refers to as "the factual element" of the autonomy principle: n. 5 above, 27–28.

Moreover, because the relevant social practices of which mental states are an element are concerned with allocating praise and blame, deciding when a person has acted intentionally is just as important as defining (or understanding) what intentional conduct is. And because mental states are not directly observable, it seems plausible to suppose that proving that a person acted intentionally (for instance) will involve "interpreting" their physical behaviour that can be directly observed. Whatever the role of interpretation in understanding the nature and content of mental states, it is central to the task of deciding whether mental-state requirements for criminal liability are satisfied.

These two approaches to understanding mental states are not mutually exclusive or even necessarily in conflict with one another. A person might, for instance, think that there "really are" such things as intentions, and that the legal definition of intention should accurately track the best scientific understanding of what intentions really are. But the two approaches are certainly apt to lead to quite different accounts of the meaning and significance of intention and so on. Whereas the scientific approach purports to tell us what mental states are, the social-practice approach views mental states in terms of a combination of normative stipulation of the content of the various mental states that can attract criminal liability, and interpretive analysis of human behaviour as manifesting, or not manifesting, such a mental state.

Commonsense and Normative Stipulation

I want next to suggest that the social-practice approach to mental states helps to explain certain features of the criminal law that otherwise might seem puzzling. Take, for instance, the judicial ploy of appealing to "commonsense" or "the ordinary person's understanding" in order to resolve disputes about the "meaning" of concepts such as "intention".[20] What role could such appeals to "folk psychology" play in the process of developing a quasi-scientific account of intention? Philosophical discussions of intention that have an apparently quasi-scientific purpose, often contain references to "commonsense" or "ordinary usage". For example, Bratman begins his book on intention by saying that "much of our understanding of ourselves and others is rooted in a commonsense psychological framework",[21] and the word "commonsense" is used liberally throughout the book to describe the concepts Bratman is analysing. Although such assertions about common usage and understanding are typically not based on

[20] N. Lacey, "A Clear Concept of Intention: Elusive or Illusory?" (1993) 56 M.L.R. 621.
[21] Bratman, n. 2 above, 1.

rigorous empirical investigation, their function is to provide a sort of empirical basis for the philosopher's initial "assumptions" or "intuitions" about the meaning of the concept under analysis. Typically, these assumptions and intuitions are then tested and, if necessary, adjusted and refined, in the light of competing assumptions and intuitions about the concept, and in the light of what is understood about other related concepts and about how the world works, to produce what Rawls calls a "reflective equilibrium"[22] "between our ordinary unreflective ... beliefs and some theoretical structure which might unify and justify these ordinary beliefs".[23] The aim, in Bratman's words again, is to develop "an adequate theory of intention" and a "systematic framework within which to understand [commonsense] ways of characterizing mind and action in terms of intention".[24] For the philosopher-scientist, folk psychology is an important datum, and a starting point for analysis. But it is no more than this. If popular usage and understanding is at odds with "the truth" revealed by the philosopher's analysis and reflections, then it can be characterised as "mistaken".[25]

The function of judicial appeals to commonsense and ordinary usage is quite different. For judges, the folk psychology of intention, for instance,[26] does not provide raw material for a quasi-scientific investigation of human nature and the relationship between mind and action, but rather a potential source of legitimisation for normative judgments about responsibility. Judicial appeals to "commonsense about intention" are underpinned by the assumption that intention *should* be understood in a commonsense way, as the ordinary person would. John Bell explains this assumption in terms of a "consensus" model of judicial law-making, and as a response to ideas about judicial impartiality and the role of courts in a democratic society.[27] Judicial appeals to common usage and understanding are typically unsupported by empirical evidence. In effect, judges invest their own "intuitions" about common usage, or their own normative judgments about responsibility, with the quality of "commonsense". For all the court

[22] J. Rawls, *A Theory of Justice* (London, 1972), 20, 48–51. Rawls developed the idea of reflective equilibrium in the context of explicitly normative moral philosophy, but the basic procedure also seems to fit the sort of analytical philosophy we are concerned with here.

[23] R. Dworkin, "The Original Position" in N. Daniels (ed), *Reading Rawls: Critical Studies of "A Theory of Justice"* (Oxford, 1975), 22.

[24] Bratman, n. 2 above, 1–2.

[25] For a clear example of this strategy see M. Zimmerman, *An Essay on Moral Responsibility* (Totowa, NJ, 1988), ch. 1, esp. 13–15. See also D.C. Dennett, *The Intentional Stance* (Cambridge, Mass, 1987), 47.

[26] The idea of "commonsense" is also pervasive in judicial (and non-judicial—see H.L.A. Hart and Tony Honoré, *Causation in the Law*, 2nd edn. (Oxford, 1985)) analyses of causation.

[27] J. Bell, *Policy Arguments in Judicial Decisions* (Oxford, 1983), ch. VII.

typically knows, the dispute between the parties in the case before it as to the proper application of the concept in question reflects more widespread disagreement in society at large. If so, the appeal to *common*sense and *ordinary* usage assumes a non-existent homogeneity of ethical belief and corresponding linguistic usage.

At all events, I would argue that we can better understand the role of judicial appeals to commonsense about intention as part of a set of social "responsibility practices" than as an exercise in quasi-science.

Interpretation and Proof

The social-practice approach also helps us to appreciate the importance of interpretation of human conduct for an understanding of the role of mental states in criminal law. Whatever role interpretation should be assigned in our search for "the truth" about other minds and the relationship between mind and action, it plays a critical part in the law as a means of forging a normative link between human mental states and conduct on the one hand, and the allocation of responsibility and blame on the other. It is one thing to have settled the issue of what intention (for instance) is, but quite another to prove that a person acted intentionally. The traditional legal starting point for proving intention (and other mental states) is the idea that mental states are not directly, but only indirectly, observable; and that in order to determine whether a person's conduct was intentional and whether its consequences were intended, we must rely either on that person's account of their frame of mind at the relevant time, or on "inferences" from their conduct and its surrounding circumstances.

On reflection, however, it seems that what the legal process of proving intention is apt to yield is not an indirect picture of an accused's mental state, but rather an interpretation of the accused's conduct—of what they said and did, viewed against a background of "relevant" circumstances. Consider, first, testimony of the accused about their mental state. Even leaving aside the possibility of lies, defects of memory and *ex post facto* rationalisations, and assuming truthfulness, the agent's own account of their mental state will inevitably be mediated through their understanding of the concept of intention. In other words, the account is unlikely to consist merely of "raw" data about the agent's frame of mind. Rather, it will provide the accused's own interpretation of what they said and did in the relevant circumstances, couched in terms of their understanding of relevant concepts and norms.

In the common case where the subject's mental state has to be inferred from behaviour and surrounding circumstances, the

interpretative nature of findings of intention seems even clearer. In such cases, I would argue, a judgment that a person's conduct was intentional will be underpinned by an assertion about the "normal person", not about the agent. The (implicit) reasoning will go something like this: "the accused's conduct must have been intentional because what the agent did is not the sort of thing that people normally do unintentionally";[28] or "the accused must have intended these consequences because they are not the sort of thing that people normally bring about unintentionally". If I am right about this, "inferred intention" as we might call it, is not a frame of mind at all; rather it consists of a contextualised interpretation of what the accused did and said based on a judgment about the way people normally (ought to) behave.[29]

At this point, I should repeat that I do not see the social-practice account of intention and other mental states as an alternative to a quasi-scientific account, but rather as a way of understanding the nature and role of mental states in criminal law. The argument just made about proof of intention does not involve a rejection of quasi-scientific (or "realist" or "ontological") approaches to understanding human nature and human agency in favour of a "pragmatic" (or "interpretational" or "instrumentalist") approach. I am not assuming that interpretation is all there is to mental states; and the law certainly leaves that issue open. Nor is my argument that when a person is found, by inference, to have intended conduct or its consequences, they did not so intend. They may or may not have. Rather my point concerns the nature of legal liability for intentional conduct and the role intention plays in our legal-responsibility practices. Consider strict liability: an important justification for strict liability, first put forward by Justice Oliver Wendell Holmes, and taken over by modern economic analysts of law,[30] is that it increases the chance that those guilty of fault will be held liable in circumstances where proof of fault is difficult, albeit possibly at the cost of imposing liability in some cases in the absence of fault. Similarly, the "normal behaviour test of intention" can be seen as a concession to the difficulty of

[28] In *DPP* v. *Morgan* [1976] A.C. 182, 214 Lord Hailsham said that unreasonableness of belief (of consent to intercourse) can only be evidence of (and no more than evidence of) lack of honest belief. I am going one step further and saying that at least in cases where the accused gives no testimony as to their mental state, the only question the law *can* answer is whether, given what the accused did and said in the relevant circumstances, it is reasonable to conclude that he or she had the required mental state. Legal liability should not turn on questions that cannot be answered with the resources available.

[29] In Dennett's terms (n. 25 above, esp. 17, 25–26, 39–40), the law takes "the intentional stance" to understanding and explaining human behaviour.

[30] See D. Rosenberg, *The Hidden Holmes* (Cambridge, Mass, 1995) 126, 138–140; S. Shavell, *Economic Analysis of Accident Law* (Cambridge, Mass, 1987), 26–32, 264–265.

proving intention—a rebuttable presumption of intention,[31] in other words. Because it is rebuttable, the agent may escape liability by convincing the court that the conduct in question and its consequences were not intended. But if it be accepted that even the accused's report of his or her mental state will consist of a contextualised interpretation of his or her conduct, the way for the accused to rebut the presumption of intention is to persuade the court that the better contextualised interpretation of his or her conduct is that it was not intentional.

The effect of the rebuttable presumption approach is that a legal finding of intention does not entail a proposition about the accused's (subjective) mental state at the relevant time, based on an indirect observation of the accused's mind. Rather it rests on an interpretation of the accused's conduct based on a statement about normal behaviour. It does not follow that the agent did not act intentionally. But it does follow that having acted intentionally is not a necessary condition of incurring legal liability for having acted intentionally. If the best interpretation of the accused's conduct is that it was intentional, then the accused can be held legally liable for having acted intentionally. In short, a legal finding that a person acted intentionally is a contextualised interpretation of their conduct.

The argument, then, is that *mens rea* in criminal law is best understood as being based not on quasi-scientific assertions of "the truth" about human nature and human agency, but rather on normative judgments about responsibility and fault, and on contextualised interpretations of human conduct in terms of such normative judgments. A finding of *mens rea* does not entail (but neither is it incompatible with) the existence of a particular mental state; rather it is a judgment of culpability based on an interpretation of what a person said and did in certain "relevant" circumstances. Within this framework, the *actus reus* of a criminal offence consists of words and conduct in relation to which a contextualised judgment of culpability is to be made.

The "Problem" of Fleeting Mental States

Against this background, we can see why the phenomenon of fleeting mental states—which may appear problematic if we equate *mens rea* with a "guilty mind" and contrast it with *actus reus*, understood as "guilty conduct"—has attracted little or no attention from appellate courts. Think of intention. If we understand *mens*

[31] This is an evidentiary presumption, and should not be confused with an irrebuttable presumption such as "a person is presumed to intend the natural and probable consequences of their conduct".

rea in the way suggested, a finding that an accused acted intentionally amounts to a judgment that under the best interpretation of what they did and said in the relevant circumstances, they acted "intentionally" as defined by the law. Let us suppose, for the sake of argument, that the law defines intention solely in terms of plans and purposes; and let us suppose a case in which a person is prosecuted for an offence of intention which was committed "spontaneously", "on the spur of the moment". The "problem" for the law is not whether spontaneous conduct can be intentional, because the law tells us that if the best interpretation of the conduct was that it executed a plan or purpose, it was intentional. Rather the problem is one of interpretation of the accused's conduct and proof that the accused's conduct was intentional. When a person acts spontaneously, it may be very difficult to say that the best interpretation of their conduct was that it executed a plan or purpose. The fewer relevant words and the less relevant conduct we have to interpret, and the more temporally compressed the relevant circumstantial context of those words and conduct, the harder it will be to say convincingly (let alone, beyond reasonable doubt) that the person's relevant conduct executed a plan or purpose.

Interpreting the problem of fleeting mental states as being one of proof, rather than one about the nature or content of the relevant mental state, suggests a couple of practical reasons why the courts might have less difficulty with fleeting mental states than would be expected. One is that in serious cases where the issue of mental state is most likely to be contested, judges (and others) feel (perhaps subliminally) that they can leave it to the "good sense" of the jury to give proper weight to the distinction between prior and fleeting mental states; and another is that prosecutors may, for obvious reasons, choose, when possible, to deal with spontaneous conduct by prosecuting for an offence that does not require proof of a mental state.

At a more abstract and theoretical level, the conclusion is that it is important to distinguish between metaphysical questions about the nature of mental states and about the relationship between mental states and action, on the one hand; and questions about the nature and functions of our social responsibility practices on the other. The tools and techniques used by philosophers of mind and action may not provide us with the best understanding of the social practices of blaming found in the criminal law.