

CRIMINAL LAW IN A POST-FREUDIAN WORLD

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Freudian psychoanalytic theory has greatly influenced the modern definition of criminal culpability. Indeed, much of the language of key criminal statutes, cases, and psychiatric testimony is framed by psychoanalytic concepts. This impact is particularly evident in the Model Penal Code's mens rea provisions and defenses, which were developed in the 1950s and 1960s, a time of Freudian reign in the United States. For contemporary criminal law, however, this degree of psychoanalytic presence is troublesome. Freudian theory is difficult to apply to group conflicts and legal situations, and the theory emphasizes unconscious (rather than conscious) thoughts. The rising new science of consciousness and conscious will provides continuity with Freudian theory. Yet, in contrast to Freudian principles, this new science offers criminal law a means of enlightening existing mens rea doctrine with advanced discoveries that more easily comport with human behavior and evidentiary standards. The results of this author's unprecedented statewide study of criminal jury instructions also suggest that courts are wrong to distort or reduce the significance of mens rea in the ways juries interpret criminal cases. This article concludes that current consciousness research provides a sound vehicle for criminal law doctrine to return the law's focus to the defendant's

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mental state, thereby retaining the moral insights, but not the muddle, that Freudian theory originally contributed.

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I. INTRODUCTION

*The intent of a man shall not be tried, for the Devil himself knoweth not the intention of man.*¹

On Father's Day, 1999, Amy Shanabarger made a shattering discovery. Her infant son, Tyler, lay dead in his crib.² A pathologist concluded that the cause was sudden infant death syndrome.³ Tyler's age (seven months) and condition were consistent with the disorder.⁴ Amy and her husband, Ronald, buried Tyler two days later in a cemetery close to their Indiana home.⁵

The death of a child is a tragedy shared with many other bereaved parents, but what happened next defied imagination. Just hours after Tyler's funeral, Ronald made a stunning admission to his wife. He said that he had killed Tyler by suffocating him while Amy was away working a nightshift.⁶ Trusting that Tyler was in safe hands, Amy did not check on him when she returned home from work, but rather discovered Tyler dead the next morning.⁷

1. Y.B. 17 Edw. 4, fol. 2, Pasch, pl. 2 (1477), *imprinted by Richard Tottle (1572)* (This case was translated from Norman French for Fordham Law School by Ellen Thorington, Assistant Professor of French, Ball State University. The translated and original copies of the case are on file with the author.).

2. *Shanabarger v. State*, 798 N.E.2d 210, 213 (Ind. Ct. App. 2003); Paul Bird, *Man Says He Killed Son to Get Back at His Wife*, IND. STAR, June 25, 1999, at 1A; *Man Killed Son to Spite Wife, Prosecutors Say*, N.Y. TIMES, June 29, 1999, at A12 [hereinafter *Man Killed Son*]; Jeff Zogg, *Sentence Delayed for Killer of Son*, IND. STAR, June 7, 2002, at 4B.

3. *Shanabarger*, 798 N.E.2d at 213; Bird, *supra* note 2, at 1A; *Man Killed Son*, *supra* note 2, at A12.

4. *Shanabarger*, 798 N.E.2d at 214; Bird, *supra* note 2, at 1A; *Man Killed Son*, *supra* note 2, at A12; Zogg, *supra* note 2, at 4B.

5. *Shanabarger*, 798 N.E.2d at 213; Bird, *supra* note 2, at 1A; *Man Killed Son*, *supra* note 2, at A12; Zogg, *supra* note 2, at 4B.

6. *Shanabarger*, 798 N.E.2d at 213-15; Bird, *supra* note 2, at 1A; *Man Killed Son*, *supra* note 2, at A12.

7. *Shanabarger*, 798 N.E.2d at 213-15; Bird, *supra* note 2, at 1A; *Man Killed Son*, *supra* note 2, at A12.

Ronald asked that Amy forgive him to save their marriage.⁸ Not surprisingly, she refused.⁹ But, haunted by Tyler's death, Ronald went to the county jail the next day where he confessed and begged to be shot.¹⁰

Ronald's motive, when it emerged, was as shocking as his crime.¹¹ According to his statements, he had planned his acts with a very specific aim in mind. He wanted to punish Amy.¹² In October 1996, before Amy and Ronald decided to marry, Amy left on a family cruise. While she was away, Ronald's father died. Ronald contacted Amy, fully expecting her to attend the funeral and comfort him, but Amy refused to cut short her vacation.¹³ From that moment, Ronald began to devise a means for revenge. It would begin with marrying Amy the following May. He would impregnate her as quickly as possible and then bide his time while she bonded with the child.¹⁴ He would then kill their offspring, satisfied that he would extract the maximum vengeance and "make Amy feel the way he did when his father died."¹⁵

Ronald hatched this scheme for nearly three years. As a local chaplain said, "the baby meant nothing to him. Tyler was just an instrument of his vindictiveness."¹⁶ On May 8, 2002, a jury found Ronald guilty of murder.¹⁷ Their verdict was based on his nine oral confessions as well as numerous letters he had penned acknowledging his guilt.¹⁸ Ronald was sentenced to forty-nine years in prison.¹⁹ Upset that any sentence might not be harsh enough, Amy wished for Ronald the same pain he had in-

8. *Shanabarger*, 798 N.E.2d at 213-14; Bird, *supra* note 2, at 1A.

9. Bird, *supra* note 2, at 1A.

10. *Shanabarger*, 798 N.E.2d at 213-14; Paul Bird, *Man Confesses to Killing Infant Son Who Lawmen Believed Died of AIDS*, IND. STAR, June 24, 1999, at 1A; Bird, *supra* note 2, at 1A; Jeff Zogg, *Jurors Shown Video of Room Where Tot Died*, IND. STAR, May 2, 2002, at 1S. Amy divorced Ronald in December, 1999. Lynde Hedgpeth, *Holiday Is A Reminder of Tragic Loss*, IND. STAR, June 15, 2002, at 1S.

11. *Today Show: Father in Franklin, Indiana, Charged With Killing His Own Son* (NBC television broadcast, June 28, 1999) (highlighting prosecutor Lance Hamner's characterization of Ronald's revenge motive).

12. *Shanabarger*, 798 N.E.2d at 214.

13. Bird, *supra* note 2, at 1A.

14. *Shanabarger*, 798 N.E.2d at 214; *Man Killed Son*, *supra* note 2, at A12; *Father Convicted of Killing Baby Because Wife Skipped Funeral*, CHI. TRIB., May 9, 2002, at 21 [hereinafter *Father Convicted*].

15. *Man Killed Son*, *supra* note 2, at A12.

16. Douglas Montero, *Born to Die: 'Jesus Would Have Forgiven—But I Can't'*, N.Y. POST, June 29, 1999, at 2.

17. *Shanabarger*, 798 N.E.2d at 214.

18. *Id.*; *Father Convicted*, *supra* note 14, at 21. Ronald Shanabarger was convicted under IND. CODE ANN. § 35-42-1-1(1) (Michie 2004): "A person who . . . knowingly or intentionally kills another human being."

19. Lynde Hedgpeth, *Judge Gives Man 49 Years in Son's Death*, IND. STAR, June 14, 2002, at 1B. Ronald Shanabarger's sentencing took place on June 13, 2002; he will not be eligible for parole for at least 23 years. *Id.* The Court of Appeals of Indiana affirmed Ronald's conviction. *Shanabarger*, 798 N.E.2d at 213.

flicted on Tyler.²⁰ “Revenge is hell, isn’t it?,” she asked when ending her testimony, alluding to Ronald’s motive.²¹

The Shanabarger incident drew headlines not only because of Ronald’s bizarre cruelty. Just as disturbing were the extended series of acts demonstrating Ronald’s conscious intent to kill. According to one expert on infanticide, Ronald Shanabarger was “absolutely unique” in his level of planning.²² Very few crimes are so carefully crafted.²³ In most cases, the defendant’s mens rea (mental state at the time of the crime) can be inferred solely through an attempted reconstruction using whatever circumstantial evidence exists.²⁴

Science has yet to discover a tool with which to read minds.²⁵ At the same time, what people intend, think, and believe are paramount to assessing guilt; in some cases, they can mean the difference between life and death. How odd for a legal system to base so much on something about which it seems to know so little.

In criminal law the “mind” is a mystery—a byproduct of history, culture, and psychology.²⁶ This article contends that Freudian psychoanalytic theory, one of the most influential cultural phenomena of the twentieth century, had a prevailing effect on the development of key criminal law concepts of culpability.²⁷ This proposition should come as

20. Zogg, *supra* note 2, at 4B.

21. *Id.*

22. *Upfront Tonight: Forensic Psychiatrist Neal Kaye, Who Specializes in Cases of Infanticide, Talks About the Shanabarger Case* (CNBC television broadcast, June 28, 1999).

23. See Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CAL. L. REV. 895, 897 (2000) (suggesting that “it is only the occasional crime that requires that the defendant have engaged in the prohibited behavior, or brought about the prohibited result, intentionally”); Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 217 (1996) (noting that the public focuses on the purposeful and intentional wrongdoer while “the most common cruelties are acts of indifference”).

24. Pillsbury, *supra* note 23, at 131–32.

25. For a futuristic account of such a procedure, see PHILIP K. DICK, *THE MINORITY REPORT* (2002).

26. See KARL OLIVECRONA, *LAW AS FACT* 43–48 (1939) (“In reality, the law of a country consists of an immense mass of ideas concerning human behaviour, accumulated during centuries through the contributions of innumerable collaborators.”); Oliver Wendell Holmes, Jr., *The Place of History in Understanding the Law*, in *THE LIFE OF THE LAW: READINGS ON THE GROWTH OF LEGAL INSTITUTIONS* 3, 3 (John Honnold ed., 1964) (“The rational study of law is still to a large extent the study of history . . . because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules.”); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1016 (1932) (noting that mens rea “has no fixed continuing meaning” but rather reflects “the changing underlying conceptions and objectives of criminal justice”); see also James Marshall, *Relation of the Unconscious to Intention*, 52 VA. L. REV. 1256, 1257 (1966) (“Empirically, we know little about intention. The best that psychology can do is to apply empirical knowledge of related psychological phenomena (e.g., motivation, wishing, choice, chance) to the problem of intention.”).

27. This article focuses on Freudian psychoanalytic theory in part because Sigmund Freud’s work “endeavors to construct a systematic theory of human behavior and other theories seem to rest on assumptions derived from it or on challenges to it.” JAY KATZ, JOSEPH GOLDSTEIN & ALAN M. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 3 (1967). Freudian psychoanalytic theory was also at the height of its influence when the Model Penal Code and key state criminal law statutes were being developed. See *infra* Parts III–IV. Sigmund Freud originally defined psychoanalysis as follows:

no surprise. The most pervasive impact of psychoanalytic doctrine on social thinking arose in the same era when many modern criminal law statutes were created.²⁸ While other cultural forces and schools of psychology, such as behaviorism,²⁹ were, of course, also important at the time, Freudian principles dominated. In addition, a substantial portion of the language of key statutes, cases, and psychiatric testimony is framed by psychoanalytic concepts and interpretations.³⁰

For modern-day criminal law, this degree of psychoanalytic input is troublesome. First, it is questionable whether Freudian theory should ever have shaped the criminal law's doctrinal foundations given the theory's awkward applicability to legal situations and group conflicts, as well as its focus on unconscious (rather than conscious) thoughts.³¹ Second, Freudian concepts clash with most modern psychological schools and science.³² For example, while Sigmund Freud considered the distinction between "conscious" and "unconscious" mental processes to be "the fundamental premiss of psycho-analysis,"³³ an increasing consensus on this topic views this difference to be a matter of degree, not dichotomy.³⁴ In turn, many consider Freud's work to be scientifically amiss³⁵ or even inaccurately translated.³⁶ This article need not judge the merits of such

Psycho-Analysis is the name (1) of a procedure for the investigation of mental processes which are almost inaccessible in any other way, (2) of a method (based upon that investigation) for the treatment of neurotic disorders and (3) of a collection of psychological information obtained along those lines, which is gradually being accumulated into a new scientific discipline.

SIGMUND FREUD, *Psycho-Analysis*, in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 235, 235 (James Strachey trans., 1955).

28. See *infra* Parts III-IV.

29. See LON L. FULLER, *THE MORALITY OF LAW* 162-65 (1964) (emphasizing the potential influence of B.F. Skinner's behaviorist psychology on the law's conception of an individual's ability to be a free and responsible agent).

30. See *infra* Parts III-IV.

31. See KATZ et al., *supra* note 27, at 3 ("Since psychoanalysis in theory and practice is concerned with individual man and the resolution of his problems in relation to internal and external demands, and since law is primarily concerned with men in groups (and as groups) in terms of societal demands, psychoanalytic generalizations may not apply to law or may be distorted in translation to law.").

32. See *infra* Parts V-VI.

33. SIGMUND FREUD, *Consciousness and What Is Unconscious*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 13, 13 (James Strachey trans., 1961).

34. See Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002) (questioning two of criminal law's traditional dichotomies, conscious versus unconscious thought processes, and voluntary versus involuntary acts, and suggesting that these dichotomies have no valid scientific basis and in fact use antiquated models of mental functioning); see also JONATHAN MICHEL METZL, *PROZAC ON THE COUCH: PRESCRIBING GENDER IN THE ERA OF WONDER DRUGS* 8 (2003) (noting the view that "many contemporary psychoanalytic thinkers reject traditional, modern, master-narrative definitions of the Oedipus complex, castration anxiety, the superego, civilization, and other concepts that presuppose requisite, developmental binaries of culture versus nature, conscious versus unconscious").

35. See *infra* Part V.

36. Daphne Merkin, *The Literary Freud*, N.Y. TIMES MAG., July 13, 2003, at 40. Adam Phillips, a renowned British writer and psychoanalyst, is currently spearheading the first significant translation of Freud's works in over thirty years. *Id.* According to Phillips, the first English translation of Freud's works, in the form of the twenty-four volume set edited by James Strachey, exaggerated the scientific

contentions to make its point: to the extent that psychoanalytic theory has infused the law, the legal result has been confusion or spotty efforts to amend ill-fitting results.

Generally, the criminal law presumes that conduct is the result of a free and conscious choice,³⁷ with some exceptions.³⁸ Yet, increasingly, discoveries about consciousness challenge the validity of some of our current conceptions of criminal culpability and their historical derivations, particularly psychoanalytic theory.³⁹ Understandably, legislatures and judges favor established precedent, presuming that legal revisions based on the new mind sciences could spur continuous doctrinal upheaval.⁴⁰ There comes a point, however, when the law must accept credible ideas and discoveries to harmonize with the reality of a changed world.⁴¹ To do otherwise perpetuates a “hodgepodge” theory of criminal law based on fictional accounts of justice that are difficult to rectify, and even more onerous to discard.⁴²

Parts II⁴³ and III⁴⁴ of this article demonstrate psychoanalytic theory’s impact on psychiatry, culture, and the law as a backdrop for Part IV,⁴⁵ which examines the language of the Model Penal Code (MPC) and its four widely adopted tiers of mens rea: purpose, knowledge, recklessness, and negligence.⁴⁶ Part IV also analyzes a number of MPC defenses that were uniquely crafted to accommodate the psychiatry of the times in which the MPC was written, including the defenses of extreme mental

and medical foundation of Freud’s writings in order to garner acceptance by the medical establishment. *Id.*

37. See *Morrisette v. United States*, 342 U.S. 246, 252 (1952) (“The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity, and confusion of their definitions of the requisite but elusive mental element.”).

38. See *infra* Part III.

39. See *infra* Part V.

40. See Marshall, *supra* note 26, at 1256. This mind science approach is preferable to other frameworks, such as political theory, because the criminal law “is a human institution, with all the complexities and instabilities that this characteristic implies.” Stephen J. Schulhofer, *The Mathematician, the Monk, and the Militant: Reflections on the Role of Criminal Law Theory*, 88 CAL. L. REV. 705, 707 (2000).

41. As Justice Oliver Wendell Holmes once commented, “it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.” OLIVER WENDELL HOLMES, *Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell* (June 25, 1895), in *SPEECHES* 67, 68 (1896). Likewise, a half century ago, Justice Felix Frankfurter inquired, “I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated.” ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949–53 REPORT 102 (1953) [hereinafter *ROYAL COMM’N REP.*]. It appears the passage of time has yet to provide a sufficient answer.

42. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 697 (2000) (noting that criminal law theory is based on a “hodgepodge of intuition, citations to case law, philosophical references (sometimes laced with misreading), and, of course, policy arguments about the behavior we seek to encourage and discourage”).

43. See *infra* Part II.

44. See *infra* Part III.

45. See *infra* Part IV.

46. MODEL PENAL CODE § 2.02 at 225–26 (Official Draft and Revised Comments 1985).

and emotional disturbance, mistake, and impossibility. The discussion emphasizes that the purpose and rationale of these doctrines make more sense in the context of the MPC's psychoanalytic roots, most particularly the MPC's subjective focus on the defendant's actual state of mind. Part V investigates the new science of consciousness and conscious will, which shows a striking continuity with Freudian theory; however, compared to Freudian principles, this science offers the criminal law ways to enlighten existing mens rea doctrine and defenses with modern discoveries that more readily comport with group behavior and revised evidentiary standards.⁴⁷ Part VI accentuates the relatively greater value of consciousness research through a more detailed examination of the *Shanabarger* case. Part VI also presents the results of this author's unprecedented statewide study of criminal jury instructions regarding defendants' mental states.⁴⁸ The statewide study shows a troubling tendency for many jury instructions to focus nearly exclusively on defendants' acts, not their mental processes, presumably with the goal of avoiding confusing and antiquated culpability standards for jurors. Yet the new consciousness research suggests that courts' efforts to downplay or distort the significance of mens rea in the criminal law are not warranted, and veer dangerously toward a philosophy of act-based reductionism.⁴⁹ In essence, consciousness research gives us a more sound way to benefit from Freudian theory's moral insights because it puts the law's focus back on the defendant's mental state.

Embracing new science does not mean shedding the values that provide the mainstay of our culture and the criminal law—just the reverse is true. There is no clear morals-science division; the two have long influenced each other. Scientific evidence can constrain a wrong-minded legal and moral doctrine in the same way that morals can constrain a wrong-minded legal foray into science.⁵⁰ The issue becomes how science, values, and law work together and the joint product they create.

II. FREUDIAN THEORY'S IMPACT ON PSYCHIATRY, CULTURE, AND CULPABILITY

For a range of reasons, including timing and apparent applicability, psychoanalytic concepts had a singularly significant impact on the framing of the MPC's mens rea provisions, which have been widely adopted

47. See *infra* Part V.

48. See *infra* Part VI.

49. See *infra* Parts V–VI.

50. Scholars writing on psychoanalysis and the law have also recognized this interlinkage between the two disciplines. See Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1059 (1968) ("Law cannot find in psychoanalysis, or for that matter in any science, the moral, political, or social values upon which to base or evaluate its decisions Yet in appraising decisions designed to serve the 'good' and undermine the 'bad,' psychoanalysis may provide insights which suggest a modification of the means by which society, through law, seeks to fulfill its goals.").

by states throughout the country.⁵¹ A failure to appreciate this psychoanalytic-legal link has much to do with the conceptual confusion in interpreting the MPC's four mens rea standards.⁵² Yet any study of the impact of psychoanalytic theory on the criminal law's culpability standards must consider the fuller history leading up to modern mens rea doctrine. Freud's sway on the law was by no means an isolated phenomenon, but rather one part of "an immense mass of ideas concerning human behaviour, accumulated during centuries through the contributions of innumerable collaborators."⁵³

A. A Snapshot History of Mens Rea

Some legal histories of mens rea discuss the continual flux and development of culpability distinctions across at least twelve centuries to the present time.⁵⁴ This article's account proceeds swiftly with a humble goal in mind—to show snapshots of key historical seams leading to the current MPC distinctions as evidence of how societal forces can affect or recreate the law.

In early history, it appears courts did not dare decipher the nature of a defendant's intent; if "the devil himself"⁵⁵ could not know a person's thoughts, how could the courts?⁵⁶ Instead, courts gauged culpability ac-

51. See *infra* Parts III–IV.

52. See *infra* Part III. A recent symposium on the "new culpability" in the criminal law, while excellent and innovative, did not address this issue nor the new science of consciousness. See Symposium, *The New Culpability: Motive, Character, and Emotion in the Criminal Law*, 6 BUFF. CRIM. L. REV. 1 (2002).

53. OLIVECRONA, *supra* note 26, at 48.

54. For a broad overview of the history of mens rea, see generally Sayre, *supra* note 26; Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980) [hereinafter Robinson, *Brief History*]; Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043 (1957–1958); J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1938); Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691 (2002); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635; Stanislaw Frankowski, *Mens Rea and Punishment in England: In Search of Interdependence of the Two Basic Components of Criminal Liability (A Historical Perspective)*, 63 U. DET. L. REV. 393 (1986). Sayre's 1932 article is the most comprehensive piece on the history of mens rea and it serves as a key reference for more recent articles. At the same time, "the origin and early history [of the topic of mens rea remain] obscure, and there is need for research in this field." Turner, *supra*, at 31. Such a muddled history contributes to modern troubles in interpretation. Paul H. Robinson, *Mens Rea*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 995, 995 (Joshua Dressler et al. eds., 2d ed. 2002) [hereinafter Robinson, *Mens Rea*] (explaining that "[f]or a phrase so central to criminal law, mens rea suffers from a surprising degree of confusion in its meaning"); see also Mueller, *supra*, at 1046 (contending that "we simply do not know enough about [mens rea.] this most important of all criminal law concepts, which is admittedly vital for crime repression").

55. Y.B. 17 Edw. 4, fol. 2, Pasch, pl. 2 (1477), *imprinted by Richard Tottle* (1572) (This case was translated from Norman French for Fordham Law School by Ellen Thorington, Assistant Professor of French, Ball State University. The translated and original copies of the case are on file with the author.).

56. See Marshall, *supra* note 26, at 1258–59; see also Turner, *supra* note 54, at 33 (noting that "[o]f course in early times the difficulty felt in ascertaining the mind of man and the rule that a pris-

ording to those facts that were visually available, such as a person's physical injuries.⁵⁷ Commentators generally agree that primitive English law, developed during the fifth century, was basically grounded in strict liability.⁵⁸

Toward the end of the sixth century, England was gradually changing from a mostly tribal society to a centralized state structure, a transition that inspired authorities to view criminal acts not simply as an affront to victims, but also as an offense against the sovereign. By the twelfth century, crimes of homicide, mayhem, robbery, arson, and rape were all blanketed under the jurisdiction of the king's courts.⁵⁹ Likewise, punitive sanctions emerged as the sole response to certain criminal conduct, thereby spurring the growing division between the previously indistinguishable laws of tort and laws of crimes.⁶⁰ While legal principles still seemed primarily based in strict liability, there began to emerge proce-

oner could not himself give evidence tended to produce the practice of imputing mens rea from certain given sets of circumstances") (footnotes omitted).

57. Roscoe Pound, *The End of Law As Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 198–204 (1914); Sayre, *supra* note 26, at 975–94.

58. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MATILAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I*, at 470–73 (2d ed. 1968); *see also* Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 3 (1970) ("The fact that primordial law was thus apparently content to recognize even the most remote causal connection as being sufficient to justify the imposition of penalty suggests strongly an equal indifference toward matters of fault or blameworthiness on the part of the person against whom the proceedings were instituted."); Turner, *supra* note 54, at 41 ("In early law, during the period of what may perhaps be called 'absolute liability', the distinctions between 'intention', 'recklessness', and 'negligence' were irrelevant; it was immaterial whether a man did or did not foresee the possibility of the harm which his conduct was likely to cause."). Granted, court records at the time were skeletal. 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 51–53 (1883); Sayre, *supra* note 26, at 976–77. It is unclear precisely what law was operating, although it appears scant attention was devoted to the mental element of a crime. Early laws focused primarily on dissuading the aggrieved party from pursuing private justice. If the court determined the offender had caused the harm, the law's goal was to compensate the victim and halt the conflict between the parties. Sayre, *supra* note 26, at 976–77. At the same time, "the theory that Anglo-Saxon law was wholly disinterested in whether an injury was committed intentionally, by negligence or accidentally is a gross oversimplification." JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 78 (2d ed. 1960) (noting that "[c]ertainly, at least from Aethelred on, Anglo-Saxon law distinguished intentional harm from accident") (footnote omitted). As years passed, these kinds of distinctions became more apparent.

The chief line of development of which we can be reasonably confident was from the distinction between deliberate wrong-doing and accident to more careful analysis of the former, i.e. of criminal intent. Thus, by the time of Edward I the incapacities resulting from infancy and insanity were recognized as defenses. By the reign of the third Edward, coercion was a defense in certain cases of treason; and it had become settled that in order to hold the owner of an animal criminally liable for injuries done by it, his knowledge of its ferocity must be shown. Self-defense was likewise becoming recognized as a regular ground of exculpation, though a pardon was required. *Id.* at 79 (footnotes omitted).

59. POLLOCK & MATILAND, *supra* note 58, at 453–55. After the Norman Conquest of England in the eleventh century, the number of offenses considered to be under the King's jurisdiction, or "pleas of the Crown," increased from a relatively small group of offenses to a much wider selection of "pleas." *Id.*; *see also* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 8–10 (4th ed. 2002) (noting that in England, "[b]y far the most important consequence of the personalisation of authority was the constitutional ascendancy of the king, especially once England became a single kingdom in the tenth century").

60. POLLOCK & MATILAND, *supra* note 58, at 458. Other, less serious, crimes continued to be punished by monetary penalties. *Id.*

dural mechanisms at this time, such as the “royal pardon,” that considered the actor’s intent.⁶¹

During the thirteenth century, canon law enormously impacted the development of criminal law, and the concept of mens rea.⁶² Offenders were increasingly seen as intentionally debunking the laws handed down from God.⁶³ Such a link is not surprising because religious tenets had long promoted the mental element, as well as the physical act, in the judgment of sin.⁶⁴ According to *Deuteronomy*, people can choose either to follow or violate Biblical law.⁶⁵ The criminal law enfolded these beliefs into a general principle: Punishment was justified, and it should be proportionate to moral guilt.⁶⁶ This early concept of mens rea was considered more than simply the rule that the actor intend to commit a

61. *Id.* at 478–80; Sayre, *supra* note 26, at 978–80. The *Leges Henrici Primi*, compiled in 1118, was an effort to state a body of true English law. STEPHEN, *supra* note 58, at 51; Sayre, *supra* note 26, at 978. While there was uncertainty about what the law actually was, the *Leges* contains many passages suggesting that the law at this time was still based primarily in strict liability. Robinson, *Brief History*, *supra* note 54, at 825–26. Yet there were procedural mechanisms in place by this time, such as the royal pardon, that considered the intent of the actor. Sayre, *supra* note 26, at 979–80. An established custom by the thirteenth century, the royal pardon was used in situations such as killing “by misadventure” (accidental killings) and self-defense. Robinson, *Brief History*, *supra* note 54, at 830–31. Judges were still forced to convict under the old laws with little attention being given to the mental element of a crime; however, the king was able to issue a pardon and save the felon’s life when it appeared to be killing through misadventure or in self-defense. Sayre, *supra* note 26, at 980; *see also* POLLOCK & MAITLAND, *supra* note 58, at 481 (discussing the Statute of Gloucester as it pertains to pardons in homicides).

62. W.S. HOLDSWORTH, 3 A HISTORY OF ENGLISH LAW 371–73 (3d ed. 1927); POLLOCK & MAITLAND, *supra* note 58, at 476–77; Sayre, *supra* note 26, at 983.

In the thirteenth century there are many evidences that the old principles of liability as they existed before the Norman Conquest were still remembered. We have seen that a man who has killed another by misadventure, though deserving a pardon, is guilty of a crime; and the same rule applies to one who has killed another in self defense. . . .

All these survivals point to the permanence of the old principles; but the influence of the civil and canon law tended to make them look archaic. . . . But, as we have seen, they ceased to exercise any appreciable influence on the development of English law after the thirteenth century. In working out the principles of liability . . . English lawyers were thrown back upon themselves, and were obliged to evolve by their own efforts the new principles demanded by an advancing civilization.

HOLDSWORTH, *supra*, at 371 (footnotes omitted).

63. *See* Marshall, *supra* note 26, at 1259.

64. POLLOCK & MAITLAND, *supra* note 58, at 476; *see also* Robinson, *Mens Rea*, *supra* note 54, at 996 (noting that “[w]hile Christian thought on mens rea had a dominant influence over its development in English law, similar concepts are found in nearly all criminal laws, often without a history of Christian influence”).

65. *Deuteronomy* 11:27–28. The Judeo-Christian belief that people voluntarily choose between good and evil was confirmed by Aristotle, who professed that actions resulted from a deliberative and voluntary choice. *See* ARISTOTLE, THE ETHICS OF ARISTOTLE 46–77 (D.P. Chase trans., 1950).

66. The general concept of a mens rea requirement in early common law can be found in the writing of Henry Bracton, a prominent cleric and judge whose work during the mid-thirteenth century was influential in establishing both what the law actually was as well as what he thought it should be. POLLOCK & MAITLAND, *supra* note 58, at 477–78; Sayre, *supra* note 26, at 984. According to Bracton, “a crime is not committed unless the intention to injure exists.” HENRY BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 290 (Samuel E. Thorne trans., 1968). A number of commentators have contended, however, that Bracton’s writing did not necessarily describe English law merely as it existed during his time; rather, Bracton also incorporated ideas from Roman and Canon law. Robinson, *Brief History*, *supra* note 54, at 829–30; Sayre, *supra* note 26, at 984.

crime. Criminal liability required both an intentional act as well as an evil motive.⁶⁷

By the mid-seventeenth century the notion that an evil motive must accompany a criminal act had become universal law.⁶⁸ Yet there was more change to come. Lawmakers were not content with simply requiring a generalized evil state of mind to fulfill the mental element of a crime; rather, they insisted on specific states of mind for specific crimes.⁶⁹

67. For certain crimes, particularly homicide and theft, Bracton insisted that the defendant's actions must be more than intentional; they must also be accompanied with an evil or wicked motive. According to Bracton, a homicide occurred "where one in anger or hatred or for sake of gain, deliberately and in premeditated assault, has killed another wickedly and feloniously and in breach of the king's peace." BRACTON, *supra* note 66, at 341. A person who kills in self-defense kills intentionally; yet he is not criminally liable because his actions are not motivated by "anger or greed." *Id.* at 437-38. Likewise, a defendant is not liable for a death that results accidentally from a lawful conduct performed with due care, such as chopping down a tree. In turn, a person who appropriates property without the consent of the owner is not liable for theft unless he had the specific intent of stealing the property. *Id.* at 425. On the other hand, Bracton did find criminal liability in cases involving negligence. For example, a person is criminally liable if he performs a lawful activity negligently and someone is injured as a result, such as chopping down a tree and not shouting a warning to any potential passerby who is then killed by the falling tree. *Id.* at 384. Similarly, a person is criminally liable if he engaged in unlawful conduct even though he did not intend anyone's death. *Id.* at 341. For a fuller discussion of these issues in a modern context, see Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 460-63 (1990).

68. Sayre, *supra* note 26, at 993. An analysis of early English statutes illustrates the infusion of mens rea and motive. For example, as early as 1547, English legislation was making use of mens rea terms such as "willful" and "malice prepensed." See, e.g., 1 Edw. 6, c. 12, § 13 (1547) (Eng.), 5 STAT AT LARGE (Eng.) 265 (Danby Pickering ed., 1763) ("[B]e it ordained and enacted by the authority aforesaid, That all wilful killing by poisoning of any person or persons, that at any time hereafter, shall be done, perpetrated or committed, shall be adjudged, taken and deemed wilful murder of malice prepensed . . ."). Numerous other statutes enacted from the sixteenth century and thereafter included a variety of other mens rea terms such as "knowingly," "with intention," "malice-forethought," "of purpose," and "on purpose." See, e.g., 31 Eliz., c. 4 (1589) (Eng.), 6 STAT AT LARGE (Eng.) 402 (Danby Pickering ed., 1763) ("[A]ny person or persons having at any time hereafter the charge or custody of any armour, ordnance, munition, shot . . . of the Queen's . . . shall for any lucre or gain, or wittingly, advisedly, and of purpose, to hinder or impeach her Majesty's service . . . shall be judged felony . . ."); 21 Jam., c. 16, § 5 (1623) (Eng.) 7 STAT AT LARGE (Eng.) 274 (Danby Pickering ed., 1763) ("That in all actions of trespass quare clausum fregit, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea, to make any title claim to the land . . . and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such . . . the plaintiff or plaintiffs shall be . . . clearly barred . . ."); 22 & 23 Car. 2, c. 1, § 7 (1670) (Eng.), 8 STAT AT LARGE (Eng.) 333-34 (Danby Pickering ed., 1763) ("[A]ny person or persons . . . on purpose and of malice-forethought, and by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, . . . or cut off or disable an limb or member of any subject of his Majesty, with intention in so doing to maim or disfigure in any the manners before mentioned . . . are hereby declared to be felons . . ."); 5 Ann., c. 31, § 6 (1706) (Eng.), 11 STAT AT LARGE (Eng.) 285 (Danby Pickering ed., 1764) ("it shall and may be lawful to prosecute and punish every such person and persons buying or receiving any goods stolen, . . . knowing the same to be stolen, as for a misdemeanor . . ."); 10 Ann., c. 19 § 97 (1711) (Eng.), 12 STAT AT LARGE (Eng.) 367 (Danby Pickering ed., 1764) ("[A]nd if any person or persons shall, at any time or times, during the continuance of this act, sell any printed, painted, stained or dyed silks, calicoes, linens or other stuffs, as aforesaid, with a counterfeit stamp thereon, knowing the same to be counterfeit, and with intent to defraud her Majesty, . . . (being duly convicted, as aforesaid) shall, for every such offence, forfeit and lose to her Majesty, . . . the sum of one hundred pounds, and shall be adjudged to stand in the pillory in some publick place for the space of two hours").

69. Sayre, *supra* note 26, at 994-1004 (discussing at length the differentiation of homicide in general into particularized offenses with specific, varying intent requirements).

The general concept of an evil motive was reinvented into particularized forms of mens rea.⁷⁰

Social and public concern over specific crimes prompted the trend for different felonies to merit different levels of mental states.⁷¹ The most striking modern derivative of this development is found within the laws of homicide, particularly in the distinctions between murder and manslaughter.⁷² Thus, over the centuries, an evolving revolt pervaded the law. Judicial determinations of moral blameworthiness were gradually overthrown by a movement to distinguish more precisely among an individual's varying mental states.

B. *The Model Penal Code's Culpability Provisions*

By the nineteenth century, a growing precedent⁷³ was sealing the law's focus on particular mental states. Regardless, state criminal codes remained inconsistent and archaic until the 1950s, especially in their attempts to provide statutory guidance for the existing wide range of mental states.⁷⁴ In 1952, the American Law Institute began to draft a model penal code to inspire state legislatures to reform their criminal laws. Ten years and many drafts later, the Institute published a final *Official Draft of the Model Penal Code* that contained Commentaries explaining each provision.⁷⁵ The MPC's provisions defined specific offenses, offered general principles of criminal responsibility,⁷⁶ and, of course, incorporated a version of mens rea.⁷⁷

The MPC drafters pushed the increasingly modern approach to mens rea one step further by reducing the numerous culpability terms that burdened state criminal codes down to four distinct levels of mens rea: purposefully, knowingly, recklessly, and negligently.⁷⁸ Commentators agree that the MPC was "stunningly successful in accomplishing the comprehensive rethinking of the criminal law."⁷⁹ The revamped mens rea standard was, in particular, the MPC's "most significant and enduring

70. *Id.* For an early discussion of the subtle differences between motive and intent, see Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 658-63 (1916-1917).

71. Sayre, *supra* note 26, at 994 ("Since each felony involved different social and public interests, the mental requisites for one almost inevitably came to differ from those of another.").

72. *Id.* at 997-98.

73. See, e.g., *Queen v. Pembrton*, 2 L.R.-C.C.R. 119, 119 (1874) (overturning a conviction for a property offense of breaking a window because the defendant had not intended that particular act and therefore did not "maliciously commit . . . damage" as required by the statute).

74. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947 (1999).

75. See Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1425-28 (1968).

76. *Id.* at 1428.

77. *Id.* at 1429.

78. MODEL PENAL CODE § 2.02 cmt. 1 at 229-30 (Official Draft and Revised Comments 1985).

79. Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1140 (1978).

achievement”;⁸⁰ no part of the MPC “has had greater influence on the direction of American criminal law.”⁸¹

The MPC drafters brought the best science of their times into the MPC’s development in the 1950s and publication in 1962, as well as in updates of the MPC’s Commentaries in the 1970s.⁸² While “unique” and “innovative” fifty years ago, however, the MPC’s mens rea provision “is only the most recent advance in a continuous chain of doctrinal refinements which extends as far back as law and society.”⁸³ The failure to update the MPC further has resulted in a mens rea provision that no longer mirrors current science if it is interpreted in the way it was originally intended.⁸⁴

It helps to consider the influences affecting the MPC’s creation to determine why its provisions started to lag behind science. Predictably, the MPC’s drafters relied on early statutes, cases, and legal literature, which are cited throughout the Commentaries. The material is between thirty and fifty years old, representing a substantially different social and legal culture than exists today.⁸⁵ Yet the MPC was also steered by another powerful source of ideas—Freudian psychoanalysis.⁸⁶ The MPC was a product of an era, the early 1950s and 1960s, when Freudian doctrine carried enormous impact.⁸⁷ When poet W.H. Auden depicted Freud as “no more a person . . . [n]ow but a whole climate of opinion,”⁸⁸ and literary critic Harold Bloom designated him “the central imagination

80. Robinson, *Brief History*, *supra* note 54, at 815.

81. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 137 (3d ed. 2001) (“No aspect of the Model Penal Code has had greater influence on the direction of American criminal law than Section 2.02 of the Code . . .”).

82. The MPC drafters sought “the knowledge, insight and experience offered by the other disciplines and occupations concerned with crime and its prevention.” Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 525 (1955) [hereinafter Wechsler, *Thoughtful Code*]; see also Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952) [hereinafter Wechsler, *Challenge*] (stating that “in no other area of law have legal purposes and methods been subjected to a more sustained and fundamental criticism emanating from without the legal group—especially the psychological and social sciences—but buttressed also from within”).

83. Robinson, *Brief History*, *supra* note 54, at 816.

84. Others have commented on the dated nature of the Model Penal Code. See, e.g., Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 53 (2000) (noting that “[t]he Model Penal Code is ripe for a fundamental reconsideration”).

85. MODEL PENAL CODE § 2.02 cmts. 1–12 at 229–52 (Official Draft and Revised Comments 1985).

86. DREW WESTEN, PSYCHOLOGY: MIND, BRAIN, AND CULTURE 14 (2d ed. 1999) (noting a substantial consensus that Freud “changed the face of intellectual history” with his theory that physical symptoms that lack physical causes and are not “consciously created and maintained” must derive from the unconscious); see also ELI ZARETSKY, SECRETS OF THE SOUL: A SOCIAL AND CULTURAL HISTORY OF PSYCHOANALYSIS 11 (2004) (noting that “as with all great upheavals, [the age of Freud] continued to shape everyday life as well as the landscape of intuitions, dreams, and shadowy memories that we all inhabit”).

87. See *infra* Parts III–IV.

88. W.H. AUDEN, *In Memory of Sigmund Freud*, in ANOTHER TIME 107, 109 (1940) (quoting Auden’s 1939 poem in honor of Freud).

of our age,”⁸⁹ such accounts did not exaggerate; nor did the law escape from such an encompassing psychoanalytic net.⁹⁰ Indeed, the history of modern American psychiatry reflects a paradigm shift from psychoanalytic theory, “the power structure of the profession” during the 1950s and 1960s, to clinical research studies starting in the mid-1970s, which promoted the push toward biological psychiatry.⁹¹ The following sections examine the major tenets of psychoanalysis, most particularly Freud’s distinction between the conscious and unconscious, because of the psychoanalytic paradigm’s substantial effect on the development of modern criminal law doctrine.

C. American Society’s Embrace of Freud

In 1909, Sigmund Freud, a Viennese physician and neurologist, participated in a conference at Clark University, where he presented a series of lectures discussing a theory of the human mind he had created during the previous two decades.⁹² This single visit to the United States⁹³ left an indelible impression on the professionals, laypersons, and press in attendance, who then helped relay the “uniquely swift” communication of Freud’s new ideas.⁹⁴ From 1911 to 1914, some of the “formative years” of the psychoanalytic movement, American society began to change its attitudes toward human behavior, prompted in large part by Freud’s presence.⁹⁵

Freud’s visit to America coincided with a period of emerging discord throughout the country in the areas of American life most suscepti-

89. Harold Bloom, *Freud: The Greatest Modern Writer*, N.Y. TIMES (BOOK REVIEW), March 23, 1986, at 1.

90. See *infra* Part III.

91. METZL, *supra* note 34, at 1; see also PAUL R. MCHUGH & PHILLIP R. SLAVNEY, THE PERSPECTIVES OF PSYCHIATRY 18 (1998) (discussing the factionalism among different schools in psychiatry, particularly the differences between “biological” or “dynamic”); MICHAEL STONE, HEALING THE MIND: A HISTORY OF PSYCHIATRY FROM ANTIQUITY TO THE PRESENT 320–25 (1997) (referring to the “biological revolution in psychiatry” since 1970); Paul R. McHugh, *The Death of Freud and the Rebirth of Psychiatry*, WEEKLY STANDARD, July 17, 2000, at 36 (noting that “as psychiatry becomes more coherent . . . psychiatrists can present themselves to the public just as physicians and surgeons do, and no longer as practitioners of a mystery cult, condescendingly proposing crude, sexualized ideas about human nature”); Lloyd H. Rogler, *Making Sense of Historical Changes in the Diagnostic and Statistical Manual of Mental Disorders: Five Propositions*, 38 J. HEALTH & SOC. BEHAV. 9, 10 (1997) (noting that the changes in medicine in the 1970s created a “paradigm shift” in psychiatry whereby new theories and treatment approaches became “largely discontinuous with the previous formulations”); cf. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 6 (2d ed. enlarged 1970) (emphasizing “the community’s rejection of one time-honored scientific theory in favor of another incompatible with it” and thereby creating “a consequent shift in the problems available for scientific scrutiny”).

92. 1 NATHAN G. HALE, JR., FREUD AND THE AMERICANS: THE BEGINNINGS OF PSYCHOANALYSIS IN THE UNITED STATES, 1876–1917, at 3–16 (1971) (describing Freud’s experiences coming to America and his lectures at Clark).

93. *Id.* at 3.

94. *Id.* at 17.

95. PHILIP RIEFF, FREUD: THE MIND OF THE MORALIST, at xi (1979) (“In America today, Freud’s intellectual influence is greater than that of any other modern thinker.”).

ble to the appeal of psychoanalysis—sexual morality, nervous disorders, and mental illness.⁹⁶ Psychoanalytic theory had newfound prominence due to the psychoanalytic therapies made available to “war neurotics” returning home after World War I.⁹⁷ From the treatment of veterans, psychoanalytic concepts infiltrated mainstream culture, such as magazines, movies, and novels.⁹⁸ There is overwhelming agreement “that Freud exerted a powerful influence, not only on psychology and psychiatry, but on all the fields of culture and that [his influence] has gone so far as to change our way of life and our concept of [the individual].”⁹⁹

Freud considered the distinction between “conscious” and “unconscious” mental processes to be “the fundamental premiss of psychoanalysis.”¹⁰⁰ While many believe that Freud discovered the unconscious,¹⁰¹ a general awareness of the unconscious mind can be traced to antiquity.¹⁰² Historians credit the modern origins of the distinction between conscious and unconscious processes to philosophers responding to René Descartes’s identification of the mind with conscious thinking.¹⁰³

By 1700, there was some notion that unconscious mental processes existed; yet there would be another two centuries before American society more fully recognized this other realm of mental state “thanks to the imaginative efforts of a large number of individuals of varied interests in many lands.”¹⁰⁴ Indeed, Freud contributed the most to ensuring that the concept of the unconscious was firmly accepted by modern psychology, an effort that “transformed the very meaning of psychology.”¹⁰⁵

D. Freud’s Concept of Mind

Freud’s theory was far more complex, however, than the simple dichotomy of conscious versus unconscious often prescribed to him. Rather, he recognized three levels of mental states: (1) consciousness, which is “very transitory; an idea that what is conscious now is no longer so a moment later, although it can become so again under certain conditions that are easily brought about”;¹⁰⁶ (2) preconsciousness, which is a

96. HALE, *supra* note 92, at 17.

97. BEN SHEPHARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* 106 (2001).

98. *Id.* at 163–64.

99. HENRI F. ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS: THE HISTORY AND EVOLUTION OF DYNAMIC PSYCHIATRY* 546 (1970).

100. FREUD, *supra* note 33, at 13.

101. Philip M. Merikle, *Perception Without Awareness: Critical Issues*, 47 *AM. PSYCHOLOGIST* 792, 792 (1992).

102. LANCELOT LAW WHYTE, *THE UNCONSCIOUS BEFORE FREUD* 25 (1960).

103. *See id.* at 26–28.

104. *Id.* at 63; *see also* ELLENBERGER, *supra* note 99, at 3 (noting that the origins of “the systematic investigation of the unconscious mind . . . can be traced back in time through a long line of ancestors and forerunners”).

105. MATTHEW HUGH ERDELYI, *PSYCHOANALYSIS: FREUD’S COGNITIVE PSYCHOLOGY* 57 (1985).

106. FREUD, *supra* note 33, at 14.

“latent” thought or idea “capable of becoming conscious at any time”;¹⁰⁷ and (3) unconsciousness, which is a “very powerful” mental process or idea that “can produce all the effects in mental life that ordinary ideas do . . . though they themselves do not become conscious” because they are repressed.¹⁰⁸

These three states are differentiated, in Freud’s view, by varying levels of a person’s awareness. While conscious, a person is “aware” of certain ideas or conceptions, and while unconscious, the person is “not aware,” although psychoanalysis and other “proofs or signs,”¹⁰⁹ such as dreams,¹¹⁰ may reveal the existence of these otherwise repressed thoughts. Trained psychoanalysts help uncover the unconscious “motives” and “wishes and fears” that can explain their patients’ beliefs and behaviors.¹¹¹

Over time, Freud found these three different levels of awareness “inadequate” and “insufficient” for analyzing mental processes.¹¹² He devised three additional inter-conflicting distinctions to characterize the continual mental struggles that his patients demonstrated: (1) the id, (2) the superego, and (3) the ego.¹¹³ The id, which is completely unconscious, houses an individual’s instinctual drives, both sexual and aggressive.¹¹⁴ The id is also driven by the “pleasure principle,” a concept Freud used to characterize an individual’s unconscious demands for constant satisfaction and immediate gratification, irrespective of the conse-

107. *Id.* (emphasis omitted).

108. *Id.*; see also MICHAEL KAHN, BASIC FREUD: PSYCHOANALYTIC THOUGHT FOR THE TWENTY FIRST CENTURY 20 (2002) (explaining that “Freud drew a sharp line between preconscious and unconscious . . . [although] [i]n practice, however, it often seems difficult to make that clear distinction between those categories”).

109. SIGMUND FREUD, *A Note on the Unconscious in Psycho-Analysis*, in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 260, 260 (James Strachey trans., 1958).

110. See generally SIGMUND FREUD, *The Interpretation of Dreams (First Part)*, in 4 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey trans., 1953); SIGMUND FREUD, *The Interpretation of Dreams (Second Part) and On Dreams*, in 5 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey trans., 1953).

111. KAHN, *supra* note 108, at 8.

112. FREUD, *supra* note 33, at 17.

113. See SIGMUND FREUD, *The Ego and the Id*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 19, 23–27 (James Strachey trans., 1961) [hereinafter FREUD, *Ego and Id*]; SIGMUND FREUD, *The Ego and the Super-ego (Ego Ideal)*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 28, 28 (James Strachey trans., 1961) [hereinafter FREUD, *Ego and Superego*].

114. FREUD, *Ego and Id*, *supra* note 113, at 20–25; FREUD, *Ego and Superego*, *supra* note 113, at 28–39; SIGMUND FREUD, *The Two Classes of Instincts*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 40, 40–47 (James Strachey trans., 1961); SIGMUND FREUD, *The Dependent Relationships of the Ego*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 48, 50–54 (James Strachey trans., 1961) [hereinafter FREUD, *Dependent Relationships*].

quences.¹¹⁵ In contrast, the superego is partly conscious but mostly unconscious; it represents acceptance and learning of the principles and prohibitions enforced by an individual's parents and society and becomes, essentially, a person's conscience.¹¹⁶ Any external attack on the superego, such as parental admonishment, can cause an individual to feel guilty, either consciously or unconsciously, although unconscious guilt can be a particularly troubling and destructive force.¹¹⁷ The ego, which stands for "reason and common sense,"¹¹⁸ mediates among the superego, the id, and the outside world.¹¹⁹

According to Freud, the id continually pressures the ego to have its passions gratified; in turn, the ego decides whether the id's desires will result in danger from the outside world or in punishment from the superego's infliction of guilty feelings.¹²⁰ The ego also has the responsibility of managing repression and other defense mechanisms that individuals use in their lives, all of which are located in the unconscious.¹²¹ Because of the many roles that the ego must manage, Freud understandably believed that the quality of a person's mental health depended on the ego's success.¹²²

An overview of these distinctions in mental states provides just a glance at Freud's paradigm.¹²³ Less relevant to this discussion is the wide span of Freudian theories offering a host of additional explanations for human thought and behavior. This range in complicated theory illustrates the point that such principles and beliefs are most difficult to apply to groups in a legal context; nor is there any evidence that this approach

115. FREUD, *Ego and Id*, *supra* note 113, at 21–25. Freud describes pleasurable and unpleasurable feelings as "more primordial, more elementary, than perceptions arising externally and they can come about even when consciousness is clouded." *Id.* at 22.

116. FREUD, *Ego and Superego*, *supra* note 113, at 34–39. According to Freud, the creation of an individual's superego is the direct result of the resolution of the Oedipus complex in which a child borrows the strength of the father's superego to repress infantile Oedipal desires. *Id.* at 34.

117. FREUD, *Dependent Relationships*, *supra* note 114, at 50–54. In Freud's view, "the excessively strong superego which has obtained a hold upon consciousness rages against the ego with merciless violence." *Id.* at 53.

118. FREUD, *Ego and Id*, *supra* note 113, at 25.

119. FREUD, *Dependent Relationships*, *supra* note 114, at 55–56. Freud metaphorically compares the role of the ego to that of a "constitutional monarch" that sanctions or vetoes laws "put forward by Parliament," which includes the id, super-ego, and the outside world. *Id.* at 55.

120. FREUD, *Ego and Superego*, *supra* note 113, at 28–29, 34–35 (describing the unconscious interactions between ego and superego development); *see generally* FREUD, *Dependent Relationships*, *supra* note 114 (discussing the complex interrelationship between the id and the ego in all of their phases).

121. FREUD, *Ego and Id*, *supra* note 113, at 24–27 (describing the unconscious interactions among the ego, id, and the "repressed").

122. FREUD, *Ego and Superego*, *supra* note 113, at 28; *see also* SIGMUND FREUD, *New Introductory Lectures on Psycho-Analysis*, in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1, 80 (James Strachey trans., 1964) (Freud describes the role of psychoanalysis in aiding the ego to be "more independent of the super-ego, to widen its field of perception and enlarge its organization, so that it can appropriate fresh portions of the id. Where id was, there ego shall be.") (footnote omitted).

123. Voluminous numbers of works have been published about Freud. This article cites only a selected number of sources.

was Freud's hope or expectation. Psychoanalysis was intended to be an individualized form of therapy to alleviate a person's suffering within the context of Freud's deeply pessimistic view of the inherent evil in human nature.¹²⁴ As further sections of this article demonstrate, however, this complexity did not necessarily deter the application of Freudian psychoanalytic theory to legal issues in a way that perhaps once advanced the law but now stalls it.

E. The Dominance of Psychoanalysis in the 1950s and 1960s

Psychoanalytic theory dominated psychiatry at a time when major criminal law statutes were being developed, most notably the decade-long construction of the MPC from 1952 to 1962.¹²⁵ By 1955, for example, all but six of the ninety-three psychiatric training programs in the United States instructed their residents in psychoanalytic concepts; in turn, the residents practiced psychodynamic therapy for up to three thousand hours (fifty percent of the total time) during their three year practicum.¹²⁶ The chief academic psychiatry departments in the country were also chaired by analysts who controlled influential funding organizations.¹²⁷ According to Bertram Brown, the former director of the National Institute of Mental Health, "from 1945 to 1955 it was nearly impossible for a nonpsychoanalyst to become chairman of a department or professor of psychiatry."¹²⁸

These established positions enabled psychoanalysts to control key sources and texts that have become major vehicles of support in criminal law cases determining mental states. For example, in 1951, psychoanalysts overwhelmingly represented the American Psychiatric Association's Committee on Nomenclature and Statistics and therefore dominated the development of the first *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I), which was published by the American Psychiatric Association in 1952.¹²⁹ Now in its fourth (text revised) edition (DSM-IV-

124. See *infra* Part III; see also SIGMUND FREUD, *Analysis Terminable and Interminable*, in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 209, 240-43 (James Strachey trans., 1964) (explaining how the "archaic heritage" within the human mind derived from the past creates the two primal instincts, "Eros and the death-instinct," which in turn prevent psychoanalysis from ever being a complete cure for anyone undergoing it); PETER GAY, FREUD: A LIFE FOR OUR TIME 614-15 (1988) (describing Freud's evolving conception of the role of psychoanalytic therapy in light of the dark "inborn drives" within humans).

125. Robert S. Wallerstein, *The Future of Psychotherapy*, 55 BULL. OF MENNINGER CLINIC 421, 421-26 (1991).

126. *Id.* at 421; see also KAHN, *supra* note 108, at 2 (noting that "[b]etween World War II and the 1960s most students of psychotherapy were taught a great deal of psychodynamic theory; they were not considered well trained without it").

127. METZL, *supra* note 34, at 1.

128. Bertram S. Brown, *The Life of Psychiatry*, 133 AM. J. PSYCHIATRY 489, 492 (1976).

129. METZL, *supra* note 34, at 1; see also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION (DSM-IV-TR) xxv (4th ed. 2000) [hereinafter DSM-IV-TR] (discussing the history of the DSM).

TR),¹³⁰ the DSM, a mainstay of the classification of psychiatric disorders, “is often referred to as ‘the psychiatric profession’s diagnostic Bible.’”¹³¹ This “Bible” originally contained a wide range of psychoanalytically-framed illnesses founded on the presumption that their symptoms, as well as an individual’s personality, stemmed from early life experiences that were forever ingrained on that individual’s unconscious.¹³² Consequently, “analytic concepts affected the ways in which all psychiatrists, analysts and nonanalysts alike, conceptualized mental disease.”¹³³ The next part of this article contends that, despite the increasing modernization of the DSM, analytic concepts also influenced the ways in which MPC drafters conceptualized criminal law provisions and the methods with which lawmakers and courts decided legal issues.

III. FREUDIAN THEORY’S IMPACT ON THE LAW

The MPC and the case law that surrounded its publication were significantly affected by Freudian theories. While not all of these influences are discernable by way of a direct reference to Freud, the pervasive psychoanalytic impact on American psychiatry and culture suggests that the Freudian paradigm was the source of key terminology and ideas.

A. *The Model Penal Code’s Voluntary Act Requirement*

Criminal law presumes that most human behavior is voluntary and that individuals are consciously aware of their acts. On the other hand, it also presumes that individuals who act unconsciously, such as sleepwalkers, are not “acting” at all. Under the criminal law’s voluntary act requirement, unconscious individuals can be totally acquitted even if their behavior causes serious harm.¹³⁴

A striking feature of the MPC’s voluntary act requirement is that it never specifically defines the term “voluntary.”¹³⁵ Instead, it provides four examples of acts that are not voluntary: “(a) a reflex or convulsion;

130. DSM-IV-TR, *supra* note 129, at xxiii. The DSM, first published in 1952, has had periodic revisions, starting in 1968 (DSM-II), 1980 (DSM-III), 1987 (DSM-III-R), 1994 (DSM-IV), and 2000 (DSM-IV-TR). *Id.* at xxiv–vi.

131. Grant H. Morris & Ansar Haroun, “*God Told Me to Kill*”: *Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 1023 (2001).

132. METZL, *supra* note 34, at 1.

133. *Id.*

134. *See infra* Part III.A.

135. *See* MODEL PENAL CODE § 2.01(2) cmt. 2 at 219 (Official Draft and Revised Comments 1985) (stating that “voluntary” is defined “partially and indirectly by describing movements that are excluded from the meaning of the term”); *id.* § 2.01(3) (“Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law.”); *id.* § 2.01(4) (“Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.”).

(b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.”¹³⁶ Although the MPC explains that these examples emphasize “conduct that is within the control of the actor,”¹³⁷ the MPC provides little additional guidance, and is otherwise vague. For example, the MPC’s Commentaries never discuss what would constitute a “conscious” bodily movement, and do not define the term “unconsciousness,” preferring to leave such interpretations to the courts.¹³⁸ Despite this obscurity, the MPC’s Commentaries do make many direct references to a psychoanalytic literature to explain why particular conditions were deemed unconscious and involuntary.¹³⁹

Recent neuroscientific research indicates that the relationship between conscious and unconscious processes is far more dynamic than these legal dichotomies (voluntary/involuntary, conscious/unconscious) would imply. Such fluidity suggests that human behavior need not be conscious or voluntary in the either/or fashion presumed by the voluntary act requirement. Instead, consciousness is manifested in degrees that suggest multiple levels of awareness.¹⁴⁰

Given that the voluntary act requirement is, in theory, the initial filter for individuals brought before the criminal justice system, the concept of a continuum of consciousness is significant. The justice system must evaluate actors with the widest possible range of mental states, behaviors, and potential defenses to determine if they should remain in the system or be acquitted. In the context of such heterogeneity, a forced voluntary/involuntary dichotomy may produce artificial alternatives that risk extreme variations in the punishments for similar acts, depending on how they are ultimately categorized (e.g., involuntary, insane, voluntary and dangerous).

Under the criminal law generally, establishing that a defendant acted voluntarily and consciously is a crucial first step for assessing that defendant’s level of *mens rea*.¹⁴¹ Under the MPC specifically, the voluntary act requirement must be met before it can be determined if a defen-

136. *Id.* § 2.01(2) at 212. As the MPC explanatory note indicates, the first three examples are “specific conditions,” whereas the last example is more generic. *Id.* § 2.01 explanatory note at 213.

137. *Id.* § 2.01 cmt. 1 at 215.

138. *Id.* § 2.01 cmt. 2 at 220 (“The provision [§ 2.01(2)] does not define ‘unconsciousness’ and thus does not attempt a legislative resolution of the issue. It employs the term that has had standing in the statutory law of many states, leaving the problem of interpretation, as it has previously rested, with the courts.”).

139. See Denno, *supra* note 34, at 296–303.

140. See *infra* Part III.

141. See MODEL PENAL CODE §2.01 cmt. 1 at 216 (Official Draft and Revised Comments 1985) (noting that “the demand that an act or omission be voluntary can be viewed as a preliminary requirement of culpability”); see also DRESSLER, *supra* note 81, at 83 (“[A] ‘voluntary act’ . . . is a prerequisite to criminal responsibility, i.e., it is an element of every criminal offense.”).

dant satisfied one of the MPC's four particular mens rea requirements¹⁴² and before it can be shown that the defendant's conduct was not otherwise due to a mental disease or defect under the MPC's insanity provision.¹⁴³

B. *The Model Penal Code's Mens Rea Requirements*

Based on Freud's influence at the time, it is not surprising that the MPC's Commentaries have relatively fewer references to any kind of literature, much less psychoanalytic works, for their interpretation of conscious states of awareness in their mens rea standards. This contrast is especially apparent in comparison to the wealth of psychoanalytic references the Commentaries use to describe unconscious states for their voluntary act requirement.¹⁴⁴ While Freud heralded the distinction between conscious and unconscious thought processes, his theory focuses on the significance of the unconscious; conscious thoughts are treated minimally and primarily as a means of context. Until the 1970s, the scientific community also strictly shunned any study of consciousness outside of the Freudian context.¹⁴⁵ Consciousness was considered the "ghost in the machine,"¹⁴⁶ an unobservable and immeasurable phenomenon rendered irrelevant to objective science.¹⁴⁷

Why then do the MPC's mens rea standards emphasize conscious states of awareness even when there was no common law precedent for it?¹⁴⁸ The MPC drafters' decision to use the term "conscious" consistently in one of the MPC's most significant provisions suggests the pervasiveness of Freudian psychoanalytic theory; yet it also accounts for the MPC's sparse explanation of its mens rea doctrine. Again, at the time of the MPC's development, there was no acceptable theory of conscious-

142. See MODEL PENAL CODE § 2.02 explanatory note at 227, cmt. 1 at 229 (Official Draft and Revised Comments 1985).

143. See *id.* § 4.01 at 163.

144. See *supra* note 139 and accompanying text.

145. See *infra* Part V.

146. See GILBERT RYLE, THE CONCEPT OF MIND 15–18 (1966). "Ghost in the machine" is Gilbert Ryle's derisive phrase depicting the Cartesian view of the human body as an entirely physical thing (the machine) and the human mind as an entirely nonphysical thing (the ghost) that somehow resides within and controls the body. See *id.* at 11, 15–18. Ryle attempts to undermine academia's centuries-long reliance on the mind/body dualism, contending that the distinctions offered by Descartes are false. *Id.*

147. BERNARD J. BAARS, A COGNITIVE THEORY OF CONSCIOUSNESS 5 (1988) (stating that "the twentieth century so far has been remarkable for its rejection of the whole topic [of consciousness] as 'unscientific'"); see also Anthony G. Greenwald, *Unconscious Cognition Reclaimed*, 47 AM. PSYCHOLOGIST 766, 766 (1992) (noting that until recently, academic psychologists' skeptical view of the empirical validity of unconscious cognition "partly explains the omission of the topic of unconscious cognition from many textbooks, and even the omission of the word unconscious from the vocabularies of many psychologists").

148. The MPC's Commentaries cite to a proposal by the Michigan legislature that refers to a person's "conscious objective" in the context of a definition of "intentionally"; however, the reference is only a proposal, and the Commentaries cite to no other statutes that use the same language. See MODEL PENAL CODE § 2.02 cmt. 2 at 236 n.12 (Official Draft and Revised Comments 1985).

ness apart from Freud's, and Freud's model was predominantly confined to depicting the unconscious. Later sections of this article discuss other Freudian threads in the MPC's mens rea doctrine, ranging from the MPC's unparalleled subjectivity of the defendant's state of mind in its four tiers of mental states¹⁴⁹ to the Commentaries' reliance on the heavily psychoanalytic approach of intentionality espoused by Glanville Williams,¹⁵⁰ to the MPC's unique formulations of defenses based upon how defendants view their particular circumstances or situations.¹⁵¹

C. *The Model Penal Code's Drafters*

The writings and positions of key MPC advisory committee members provide further indications that the MPC was steeped in Freudian ideas. While the MPC's drafters valued the contributions of professionals from a span of disciplines outside the law,¹⁵² they particularly relied on psychiatrists¹⁵³ and those in the humanities and social sciences.¹⁵⁴

1. *The "Freudian Four"*

Four MPC committee members stand out in particular because of their enthusiasm over Freud's theories. Lionel Trilling, one of the original committee members,¹⁵⁵ was a Professor of English at Columbia University, a prominent literary critic,¹⁵⁶ and a renowned commentator on Freud.¹⁵⁷ Trilling considered Freud "a figure of heroic proportions" and he "wrote extensively"¹⁵⁸ about the "pervasive" nature of Freud's influ-

149. See *infra* Part IV.A–B.

150. See *infra* Part IV.

151. See *infra* Part IV.D–E.

152. See *supra* note 82 and accompanying text.

153. See, e.g., Wechsler, *supra* note 75, at 1442 (emphasizing the contributions of three psychiatrists in the development of the Model Penal Code's insanity provisions); Herbert Wechsler, *Insanity As A Defense: Panel Discussion*, 37 F.R.D. 365, 380–86 (1965) (discussing in part the role of psychiatrists in devising the insanity defense). The three psychiatrists that Wechsler refers to in the preceding articles—Lawrence Z. Freedman, Manfred S. Guttmacher, and Winifred Overholser—all served on the Criminal Law Advisory Committee for the Model Penal Code. MODEL PENAL CODE, Criminal Law Advisory Committee for Model Penal Code, Part I, General Provisions §§ 1.01 to 2.13, at vi–vii (Official Draft and Revised Comments 1985). Guttmacher was also on the Reportorial Staff for the Model Penal Code. *Id.* Reportorial Staff for Model Penal Code, at v.

154. See *supra* note 82 and accompanying text.

155. MODEL PENAL CODE, Criminal Law Advisory Committee for Model Penal Code, Part I, General Provisions §§ 1.01 to 2.13, at vii (Official Draft and Revised Comments 1985).

156. Trilling, *Lionel 1905–1975*, 105 CONTEMPORARY AUTHORS 426, 427–28 (2002); Thomas Lask, *Lionel Trilling, 70, Critic, Teacher and Writer, Dies*, N.Y. TIMES, Nov. 7, 1975, at 1.

157. See, e.g., LIONEL TRILLING, FREUD AND THE CRISIS OF OUR CULTURE (1955) [hereinafter TRILLING, CRISIS]; Lionel Trilling, *The Legacy of Sigmund Freud: An Appraisal, Part II. Literary and Aesthetic*, 2 KENYON REV. 152 (1940) [hereinafter Trilling, *Aesthetic*].

158. Lask, *supra* note 156, at 40.

ence,¹⁵⁹ stressing that Freud's ideas were "an integral part of our modern intellectual apparatus."¹⁶⁰

Winfred Overholser, superintendent at St. Elizabeth's Hospital,¹⁶¹ was a pioneering advocate of the humane treatment of the mentally ill and the rights of mentally ill defendants.¹⁶² Overholser praised Freud's innovation,¹⁶³ calling him "a serious scientific worker and physician . . . who . . . opened new vistas of thought which go to the heart of human activities in all fields."¹⁶⁴ Overholser also commented on the scope of Freud's theories, stating that they "permeated the entire field of psychiatry and . . . fundamentally altered our views of the nature of mental disorder and of its treatment."¹⁶⁵ Freud's impact is particularly noteworthy in Overholser's writings on the significance of the unconscious. Because the unconscious is "so hidden or disguised," Overholser argued, considering "one symptom or phase of conduct out of its context" would likely result in "serious injustices or misunderstandings."¹⁶⁶ Overholser condemned "[o]ne of the fundamental assumptions of the law" that "most acts are done on a basis of reasoning and a weighing of the pros and cons."¹⁶⁷ Instead, he posited that an individual may "perform acts even against his will," spurred by unacknowledged "emotional drives."¹⁶⁸

Sheldon Glueck shared Overholser's belief that the law erred in its focus on a defendant's free will,¹⁶⁹ rather than the role of "unconscious motivation" when analyzing "criminal intent."¹⁷⁰ A Harvard University Law School professor¹⁷¹ who specialized in the study of criminal behavior and correctional treatment,¹⁷² Glueck claimed that the law did not adequately reflect psychoanalytic theory.¹⁷³ He suggested, for example, that psychoanalytic therapy should be used to treat "psychoneurotic offend-

159. Trilling, *Aesthetic*, *supra* note 157, at 156.

160. TRILLING, *CRISIS*, *supra* note 157, at 11–12 (noting that Freud's ideas "have had a decisive influence upon our theories of education and of child-rearing" and have extended to the areas of anthropology, sociology, literary criticism, and "even theology").

161. MODEL PENAL CODE, Criminal Law Advisory Committee for Model Penal Code, Part I, General Provisions §§ 1.01 to 2.13, at vii (Official Draft and Revised Comments 1985).

162. See *Overholser, Winfred*, in *CURRENT BIOGRAPHY: WHO'S NEWS AND WHY* 1953, at 466, 466–68 (Marjorie Dent Candee ed., 1954); *Dr. Winfred Overholser Dies; Developed Psychiatric Centers*, N.Y. TIMES, Oct. 7, 1964, at 47.

163. Winfred Overholser, *The Meaning of Freud for Our Time*, 164 INT'L REC. MED. 249, 249 (1951).

164. *Id.* at 257.

165. *Id.* at 249.

166. WINFRED OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 23 (1953).

167. *Id.* at 41.

168. *Id.* at 42.

169. SHELDON GLUECK, *CRIME AND JUSTICE* 96–97 (1936).

170. *Id.* at 98.

171. MODEL PENAL CODE, Criminal Law Advisory Committee for Model Penal Code, Part I, General Provisions §§ 1.01 to 2.13, at vi (Official Draft and Revised comments 1985).

172. *Glueck, Sheldon; and Glueck, Eleanor*, in 5 *THE NEW ENCYCLOPAEDIA BRITANNICA* 311 (15th ed. 1994); *Sheldon Glueck of Harvard Dies; Studied the Roots of Delinquency*, N.Y. TIMES, Mar. 13, 1980, at D16.

173. See GLUECK, *supra* note 169, at 96–97.

ers.”¹⁷⁴ According to Glueck, the potential difficulties involved in applying the psychoanalytic method to criminals did not bar experimental therapy, “or at least utilizing the insights that study of psychoanalysis gives into the intricacies of personality maladjustment.”¹⁷⁵

Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore¹⁷⁶ and a leader in the field of forensic psychiatry,¹⁷⁷ considered it “essential” that legal professionals “recognize the role of the unconscious in the making of human judgments and in antisocial behavior.”¹⁷⁸ Describing Freud as “the greatest figure in modern psychiatry,” Guttmacher credited him with spurring “epochal advances” in the profession.¹⁷⁹

The psychoanalytic-oriented publications of these MPC advisors (apart from Trilling) are documented by MPC chief reporter Herbert Wechsler¹⁸⁰ in his renowned *Harvard Law Review* article concerning *The Challenge of the Model Penal Code*.¹⁸¹ A comparably revealing indicator of the impact of Freudian theory on the law, however, is the MPC’s publication of a year-long (1953–1954) correspondence between Wechsler and Guttmacher concerning how criminal responsibility should be defined in the context of the MPC’s insanity provision.¹⁸²

2. *The Wechsler-Guttmacher Correspondence on Criminal Responsibility*

Uniquely inserted into the MPC’s Commentaries on insanity are two Appendixes, A and B. Appendix A consists of a paper by Guttmacher entitled *Principal Difficulties with the Present [1953] Criteria of*

174. *Id.* at 243–44.

175. *Id.* at 244.

176. MODEL PENAL CODE, Criminal Law Advisory Committee for Model Penal Code, Part I, General Provisions §§ 1.01 to 2.13, at vi (Official Draft and Revised Comments 1985).

177. See M.S. Guttmacher, *Psychiatrist, Dies*, N.Y. TIMES, Nov. 8, 1966, at 39; Walter Weintraub, *Psychiatric Residency Training in the V.A.: Then and Now*, MD. PSYCHIATRIST (Spring 1999), http://www.mdpsych.org/SP99_wWeintraub.htm.

178. MANFRED S. GUTTMACHER & HENRY WEIHOFEN, PSYCHIATRY AND THE LAW 20 (1952).

179. *Id.*

180. Wechsler has been uniformly credited for the MPC’s success. See Harold Edgar, *Herbert Wechsler and the Criminal Law: A Brief Tribute*, 100 COLUM. L. REV. 1347, 1353 (2000); Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1359, 1359 (2000); Geoffrey C. Hazard, Jr., *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1362–64 (2000); Henry Paul Monaghan, *A Legal Giant is Dead*, 100 COLUM. L. REV. 1370, 1370 (2000); David L. Shapiro, *Herbert Wechsler—A Remembrance*, 100 COLUM. L. REV. 1377, 1379 (2000); see also Kadish, *supra* note 79, at 1098 (referring to the Model Penal Code as “one of [Herbert] Wechsler’s spectacular achievements”).

181. Wechsler, *Challenge*, *supra* note 82.

182. The MPC’s insanity provision reads as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

MODEL PENAL CODE § 4.01 at 163 (Official Draft and Revised Comments 1985).

Responsibility and Possible Alternatives.¹⁸³ Appendix B, which directly follows Appendix A, contains portions of letters called *Excerpts from Correspondence Between Dr. Manfred S. Guttmacher and Herbert Wechsler Relating to the Problem of Defining the Criteria of Irresponsibility in the Model Penal Code*.¹⁸⁴ Oddly, these Appendixes are not prefaced with an explanation of why they are included in the MPC's Commentaries. For this article's purposes, however, their content and context are direct evidence that Wechsler relied heavily on the opinions of a prominent psychiatrist whose Freudian psychoanalytic bent could not be clearer, particularly as it applied to criminal responsibility. At the same time, the correspondence shows that Wechsler was often quite critical of Guttmacher, pushing back some of the recommendations that Guttmacher was making, to the point that Guttmacher at moments appears to be complaining.

In his *Principal Difficulties* paper, Guttmacher lamented the problems psychiatrists voiced about their in-court testimony concerning criminal responsibility, in particular, "the inability of the psychiatrist to determine the existence or the nonexistence of the individual's capacity to distinguish right from wrong at the time of the crime."¹⁸⁵ Guttmacher based his assertions on the results of questionnaires he sent to two leading organizations of psychiatrists to garner their opinions on the 1843 *M'Naghten* insanity standard,¹⁸⁶ the most widely accepted insanity test in the United States¹⁸⁷ before the MPC's own 1962 standard¹⁸⁸ (which itself has since dwindled in popularity).¹⁸⁹ One Guttmacher questionnaire addressed the 150 psychiatrist-members of the Group for the Advancement

183. *Id.* app. A at 186.

184. *Id.* app. B at 198.

185. *Id.* app. A at 187.

186. The first and strictest insanity test of modern usage was introduced in 1843 by the English House of Lords in the *M'Naghten* case. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843). Under *M'Naghten*, a person is insane if, because of a "disease of the mind" at the time she committed the act, she (1) did not know the "nature and quality of the act" that she was performing; or (2) if she was aware of the act, she did not know that what she "was doing was wrong," that is, she did not know the difference between right and wrong. *Id.* The rule considers only cognitive ability and not volitional conduct. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1210-11 (reviewing the literature criticizing this narrow scope).

187. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 191 (2d ed. 1997).

188. Concern over the narrowness of the *M'Naghten* test prompted attempts over the years to replace it. See Morris & Haroun, *supra* note 131, at 1018-22. The most successful attempt was the MPC's 1962 insanity test, which rapidly gained support from legislatures and courts; by the 1980s, the MPC standard was adopted nearly unanimously by the federal circuit courts and over one-half of the states. MICHAEL L. PERLIN, 4 *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 9A-3.5, at 162 (2d ed. 2001).

189. The popularity of the MPC test diminished substantially in 1981 when a jury found John Hinckley not guilty by reason of insanity, based on the MPC standard, for his attempted assassination of Ronald Reagan. See PERLIN, *supra* note 188, § 9C-1, at 325-28. According to a 1995 survey of insanity laws, about twenty states still use the MPC test, while nearly half of the states apply "some variation of the *M'Naghten*/cognitive-impairment-only test." MELTON ET AL., *supra* note 187, at 193. A handful of states have abolished the insanity defense entirely. Slobogin, *supra* note 186, at 1200 n.2, 1214 (the five states are Idaho, Kansas, Montana, Nevada, and Utah).

of Psychiatry,¹⁹⁰ which was “active in moulding [then] current psychiatric opinion in this country.”¹⁹¹ The second questionnaire was submitted to over 300 psychiatrist-members of the American Psychiatric Association,¹⁹² which developed the DSM “Bible” that this article discussed earlier.

In his paper, Guttmacher also attacked the *M’Naghten* standard’s language with a range of examples of psychiatric cases, all of which are couched in psychoanalytic language.¹⁹³ He noted that the profession had “learned much about unconscious masochistic needs of certain individuals to seek punishment and the overwhelming force of the unconscious in many seriously disordered patients,” while emphasizing “the inadequacy of *M’Naghten*’s rules to deal with such [cases].”¹⁹⁴ As Guttmacher explained, “[t]he problem is not primarily whether there are impulses and unconscious drives that overwhelm some mentally disordered individuals. Most psychiatrists would readily agree that they exist”;¹⁹⁵ rather, “[t]he real difficulty is to draw the nice line between those [individuals] who can and those who can not resist them.”¹⁹⁶ For example, “[e]ven the very severe impulse neurotic and obsessive-compulsive neurotic can momentarily postpone acting out until the certainty of immediate capture is gone.”¹⁹⁷ On the other hand, the criminality of psychopaths “depends basically on the relative force of their antisocial drives and the strength and quality of the superego.”¹⁹⁸ Guttmacher asked that the MPC’s drafters consider these challenges when revising the *M’Naghten* standard.¹⁹⁹

Particularly striking are Wechsler’s reactions to Guttmacher’s paper and the exchanges between the two men. Wechsler often requested Guttmacher’s advice or further clarification. For example, Wechsler asked Guttmacher to “reflect some more upon” the points Wechsler

190. The independent Group for the Advancement of Psychiatry (“GAP”), which now comprises approximately 300 psychiatrists, was founded in 1946. See 1 ENCYCLOPEDIA OF ASSOCIATIONS, NATIONAL ORGANIZATIONS OF THE U.S. 1658 (Kimberly N. Hunt ed., 42d ed. 2005); COMMITTEE ON PSYCHIATRY AND LAW, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S, at 831 (1977). Most of the Group’s members are organized according to a number of working committees that study “various aspects of psychiatry and the application of this knowledge to the fields of mental health and human relations.” *Id.* Working in conjunction with specialists in other disciplines, the GAP espoused three general goals: (1) to gather and evaluate data in the areas of psychiatry, mental health, and human relations; (2) to reexamine traditional concepts and to devise and analyze new ones; and (3) to apply the knowledge acquired through goals (1) and (2) to foster mental health and “good human relations.” *Id.*

191. MODEL PENAL CODE § 4.01 app. A at 187 (Official Draft and Revised Comments 1985).

192. *Id.*; see also *supra* notes 129–32 (discussing the American Psychiatric Association’s creation of the DSM).

193. MODEL PENAL CODE § 4.01 app. A at 188–94 (Official Draft and Revised Comments 1985).

194. *Id.* at 189.

195. *Id.* at 191; see also *id.* at 192 (expressing confidence in a psychiatric consensus that individuals experience mental states “in which the unconscious has temporarily assumed control”).

196. *Id.* at 191.

197. *Id.*

198. *Id.* at 194.

199. *Id.* at 190–91.

raised in his letter to Guttmacher about “nondeterrables” (psychopaths).²⁰⁰ Guttmacher responded to Wechsler in considerable detail, again referring to the significance of the relative strength of the psychopath’s “superego” in controlling the extent of the “nondeterrable’s” criminality.²⁰¹ After several months, Guttmacher also agreed to Wechsler’s request to draft Wechsler “a short memorandum . . . on the types of criminal defendants that I, as a psychiatrist, would like to have held criminally irresponsible.”²⁰² Guttmacher listed four types of criminal defendants—those with intellectual deficiency, psychosis, psychopathy, and neurosis (which includes the “compulsive-obsessive and impulse neurotics—e.g., the true kleptomaniacs and the compulsive sex offenders”).²⁰³

Later on that year, Wechsler again wrote to Guttmacher, noting that he had to compose a symposium comment for the *University of Chicago Law Review*. Wechsler explained that he selected the topic of New Hampshire’s causality standard for insanity,²⁰⁴ which Guttmacher had highlighted in his *Principal Difficulties* paper.²⁰⁵ Wechsler asked Guttmacher, “[c]an I impose on you to give me your most critical reaction to the points that I have made [in the draft]?” adding “[e]specially, if you conceive that the causality test would have a meaning to a medical man that I have not perceived, I would appreciate your telling me at once.”²⁰⁶ Guttmacher replied in writing to Wechsler with thorough comments, setting off a continuing round of correspondence between the two men on the different tests of insanity (including New Hampshire’s) and what the MPC insanity test should be.²⁰⁷

The exchange between Wechsler and Guttmacher makes clear Guttmacher’s substantial role in contributing to the MPC’s insanity standard. It also shows Wechsler’s commitment to honing medical expertise while maintaining full control over both Guttmacher and the insanity standard’s final composition. As Wechsler noted in the last letter to Guttmacher published in the MPC’s Commentaries, “[w]hen we come to talk of [the insanity standard] in the [MPC] Committee, one of the ways in which you will be able to help us most . . . is to educate us”²⁰⁸ The extent of this interchange between Wechsler and Guttmacher in the

200. *Id.* app. B at 199 (Wechsler to Guttmacher, Aug. 10, 1953).

201. *Id.* at 200 (Guttmacher to Wechsler, Sept. 11, 1953) (Guttmacher’s response contains direct excerpts from the paper in Appendix A.).

202. *Id.* at 202 (Guttmacher to Wechsler, Jan. 14, 1954).

203. *Id.* at 202–03.

204. *Id.* at 203 (Wechsler to Guttmacher, Oct. 25, 1954). The comment was published as Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1954–55).

205. MODEL PENAL CODE § 4.01 app. A at 196 (Official Draft and Revised Comments 1985).

206. *Id.* app. B at 203 (Wechsler to Guttmacher, Oct. 25, 1954).

207. *Id.* at 203–10 (Guttmacher to Wechsler, Nov. 8, 1954; Wechsler to Guttmacher, Nov. 11, 1954; Guttmacher to Wechsler, Nov. 22, 1954; Wechsler to Guttmacher, Nov. 24, 1954; Guttmacher to Wechsler, Dec. 6, 1954; Wechsler to Guttmacher, Dec. 8, 1954).

208. *Id.* at 210 (Wechsler to Guttmacher, Dec. 8, 1954).

MPC's Commentaries suggests that what was published there was simply one excerpted indicator of Guttmacher's more pervasive influence throughout the MPC's development.

3. *Freudianism in the Air*

Did the MPC drafters, such as Guttmacher, deliberately attempt to apply Freudian psychoanalytic theory to the provisions they were creating? There is no evidence of an explicit agenda specifying that one psychological theory dominate the development of the MPC.

At the same time, the substance and format of the voluntary act and mens rea requirements do not represent the beliefs of the competing behaviorist theories. Behaviorist theories considered all mental processes, such as conscious and unconscious thought, to be far too subjective to be examined scientifically, and debunked any role for the study of the mind or self in explaining behavior.²⁰⁹ Most likely, the MPC drafters were simply influenced by Freudianism because it was culturally "in the air" and also reflected for some of them a staunch professional focus. It was their view of the world, hence their view of the law.

D. *Interpretations of the Model Penal Code*

A Freudian psychoanalytic presence in the MPC did not stop with a group of MPC drafters, however. Similarly compelling are early commentators' interpretations of the meaning and application of the MPC. Such viewpoints are consistent with the strong psychoanalytic perspective on the law in the decades preceding and following the MPC's publication.²¹⁰

In one of the first articles responding to the publication of the MPC's voluntary act and mens rea provisions, for example, James Mar-

209. Denno, *supra* note 34, at 298–99.

210. The following commentators mesh with the psychoanalytic slant of the era's view of law: ALBERT A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE: ON ETHICS, AESTHETICS, AND "LAW"—ON CRIME, TORT, AND PROCEDURE* (1971) (interpreting a range of jurisprudence from a psychoanalytic perspective); JEROME FRANK, *LAW AND THE MODERN MIND* (1930) (relying on a psychoanalytic perspective in an examination of the basic legal myth); PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* 183 n.8 (1995) ("In an Anglo-American common law context, there exists a quite varied history of jurisprudential recourse to psychoanalysis."); KATZ ET AL., *supra* note 27 (exploring the relationship between psychoanalysis and law across a wide variety of legal fields, cases, and literature); C. G. SCHOENFELD, *PSYCHOANALYSIS AND THE LAW* (1973) (using a psychoanalytic perspective to examine law); Peter Goodrich & David Gray Carlson, *Introduction to LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* 1, 3 (Peter Goodrich & David Gray Carlson eds., 1998) (presenting a volume of essays on "what is arguably the most fundamental or structural of interdisciplinary encounters, namely that of psychoanalysis and law"); Franz Rudolf Bienenfeld, *Prolegomena to a Psychoanalysis of Law and Justice*, 53 CAL. L. REV. 957, 960 (1965) (applying psychoanalytical research to the study of "the psychological elements of law and the function of justice in the formation and application of law").

shall, a prominent practitioner,²¹¹ presumed an entirely psychoanalytic take on offenders' varying states of conscious awareness.²¹² He also criticized the MPC's failure to consider these differing degrees of consciousness in its mens rea provisions, explaining that a psychoanalytic approach to crime is not readily applicable to group behavior.²¹³

As a solution, Marshall proposed an innovative eight-level continuum of how the law should classify the increasing levels of consciousness of criminal behavior. At levels 1 and 2, "pure accident"²¹⁴ and "reflex action"²¹⁵ represent the extreme end of the continuum illustrating unconsciousness because both types of behaviors involve little or no conscious intent whatsoever. At level 8, premeditated and carefully planned acts represent the extreme of the continuum exemplifying consciousness because such behaviors require "conscious action with conscious intent."²¹⁶ The in-between levels (3–7) indicate an increasing degree of conscious choice: acts arising from the unconscious (level 3),²¹⁷ stress, such as panic and hysteria (level 4),²¹⁸ hypnosis and other types of suggestion (level 5),²¹⁹ cultural or group norms, or social interactions (level 6),²²⁰ and acts with foreseeable consequences but without specific intent (level 7).²²¹

211. Glenn Fowler, *James Marshall, Lawyer, Is Dead; Ex-Member of Board of Education*, N.Y. TIMES, Aug. 13, 1986, at D20 (explaining that Marshall had published six books on the topics of political science and legal psychology).

212. Marshall, *supra* note 26, at 1257–81.

213. *Id.* at 1257–60.

214. *Id.* at 1261–62 (noting that "what seems to be purely accidental may have an unconscious origin or purpose," such as the desire to "punish oneself or others" or the influence of "unconscious hostility").

215. *Id.* at 1262 ("[T]he unconscious may also be the motivating force for reflexive behavior. Thus concealed in an outwardly self-protecting act may be the unconscious intent to harm.").

216. The eighth level of the continuum represents a situation in which an individual has a conscious intention to commit a wrongful act. *Id.* at 1261. In so doing, that person is capable of perceiving a choice, making that choice, and also acting on that choice. Marshall warns, however, that while this level "does not present a moral problem or one of psychological purpose," it could "raise psychological questions of evidence," most particularly, "what are the appearances which convince us that someone else intended to behave as he did." *Id.* at 1279.

217. *Id.* at 1262 (noting that actions motivated by the unconscious can be "uncontrollable," "compulsive," or "neurotic" when they "arise from the area of strong but repressed needs"). Marshall relies on Freudian theory to explain the ego's need to create a balance among "the three 'tyrants'—id, superego, and outer environment." *Id.* at 1263–64 (citation omitted). When a person is unable to achieve this balance and one of the "tyrants" assumes control, this imbalance substitutes neurotic unconscious motivations for conscious motivations. *Id.* at 1264.

218. *Id.* at 1266 ("Under conditions of severe stress, reason may abdicate and customary norms of behavior may be overcome or blanketed. The ego may lose control.").

219. *Id.* at 1267–68 (characterizing hypnosis as "a state in which the subject is apparently half awake, half asleep—a sort of pre-conscious state," in which "the subject is more than normally sensitive to suggestion").

220. *Id.* at 1269. According to Marshall, suggestibility is prompted not only by hypnosis and comparable influences, but also by "acculturation, education, law and social order." *Id.* Groups affect "the perceptions, expectations and actions of their members." *Id.* at 1270. Although a person may be consciously aware of this kind of impact, if group norms affect a person's behavior through the unconscious, they limit that person's choice and intent. *Id.* at 1271.

221. *Id.* at 1274. Marshall criticizes the concept of foreseeability and the standard of "reasonable man," who is "the most abnormal fellow." *Id.* at 1275. He claims that the law not only ignores what a person may actually foresee, but also the concept that what a person sees is a result of "experience,"

Although the distinctions among all of these categories can overlap, Marshall believed that the recognition of these levels of degrees of conscious states could help determine whether mens rea was present in a particular case and also indicate possible types of treatment.²²²

According to Marshall's model, even the extreme ends of the continuum of criminal behavior comprise a mix of conscious and unconscious choices.²²³ For example, some behaviors that appear to be accidental or reflexive may actually stem from a range of factors—actors' unconscious wishes to punish themselves or others, various forms of ego defenses, social norms (such as mass panic), or suggestion.²²⁴ On the other hand, even behaviors that seem clearly to be the result of conscious choices may be affected by “unconscious repressions” or “neurotic compulsions” that hinder freedom of action.²²⁵ Theft and robbery, for instance, could be a result of “compulsive fetishism,” that is, compulsive, uncontrolled acts.²²⁶

Marshall's model is conceptually insightful in part because it views consciousness as a continuum, instead of as a stringent consciousness/unconsciousness dichotomy. The model also considers a wide range of influences, such as social and cultural factors, on individuals' unconscious and conscious awareness and their behaviors. Assessments of consciousness reign supreme, as it appears the MPC drafters intended.

At the same time, Marshall's model is scientifically dated and therefore not entirely useful for the reasons that Marshall suggests. No longer would many psychiatrists today view theft and robbery as acts of “compulsive fetishism,” for example. This article embraces a “degrees of consciousness” approach for mens rea but focuses on recent scientific research on consciousness, not Freudian theories. It appears that the long-term dominance of the psychoanalytic perspective on the law may even have steered academics and lawyers away from emphasizing consciousness in current proposals to modernize mens rea doctrine as well as jury instructions on mental state.²²⁷

“expectations,” and a “capacity to feel.” *Id.* at 1277. Therefore, making people responsible for the probable consequences of their behavior may be to convict of an offense not based on a real intention but rather a legally contrived one. What is foreseeable behavior in the eyes of the law may be the result of unconscious wishes, not “conscious intent involving conscious choice.” If that is the case, the behavior is reckless and should not be treated as constructive intent. *Id.*

222. *Id.* at 1261.

223. *Id.* at 1260–61.

224. *Id.* at 1262–63.

225. *Id.* at 1261.

226. *Id.* at 1264 (noting that “[n]eurotic compulsion therefore can be deemed the cause of numerous crimes”).

227. *See infra* Part VI.D.

E. *The Influence of Freudian Psychoanalysis on Case Law*

The MPC drafters and legal commentators on the MPC, such as Marshall, were representative of a social and legal culture immersed in psychoanalytic views of the law. A particularly thorough example of this perspective is the 1967 textbook, *Psychoanalysis, Psychiatry and Law*, which was edited by Jay Katz, Joseph Goldstein, and Alan Dershowitz.²²⁸ The textbook's editors explained that *Psychoanalysis, Psychiatry and Law* was designed to determine if psychoanalysis was applicable to legal issues.²²⁹ Yet, in many ways, the book wonderfully demonstrated that psychoanalysis influenced the development of modern law by way of including numerous clips of cases and legal literature steeped in psychoanalytic concepts,²³⁰ all at or around the time the MPC was published.

1. *Reactions to Guilty Feelings*

Some of the examples in *Psychoanalysis, Psychiatry and Law* show how courts used Freudian theory to correct or temper the perspectives of a wrong-minded judiciary or legal scholar. In *Miller v. United States*, for example,²³¹ Chief Judge David Bazelon of the Court of Appeals of the District of Columbia relied on Freud's theories to modify the evidentiary rule that infers a defendant's guilt from the act of flight.²³² This rule was initially based upon John Henry Wigmore's widely accepted presumption that "guilty consciousness" is "the strongest evidence . . . that the person is indeed the guilty doer."²³³ In an effort to correct this view, the *Miller* court quoted at length Freud's 1906 admonition to lawyers not to be "led astray by a neurotic who, although he is innocent, reacts as though he were guilty, because a lurking sense of guilt that already exists in him seizes upon the accusation made in the particular instance."²³⁴ Likewise, the court cites early research concerning the unconscious in the

228. KATZ ET AL., *supra* note 27.

229. *Id.* at 2-3.

230. There are a number of key cases that Katz et. al's book excludes. See, e.g., *State v. Schantz*, 403 P.2d 521, 527 n.7 (Ariz. 1965) (quoting Jerome Hall, *Mental Disease and Criminal Responsibility*, 45 COLUM. L. REV. 677, 682 (1965), which questions the scientific reliability of the psychiatric branch of psychology, referring to Jung and Freud); *People v. Wolff*, 40 Cal. Rptr. 271, 283 n.14 (Cal. 1964) (quoting the *Gorshen* testimony in a footnote); *Commonwealth v. Berrigan*, 472 A.2d 1099, 1118 (Pa. Super. Ct. 1984) (quoting from Freud's depiction of the human struggle between Love and Death); *Commonwealth v. Trill*, 543 A.2d 1106, 1129 (Pa. Super. Ct. 1988) (quoting Freud's remarks about the difficulty of reducing the study of the mind to a science).

231. 320 F.2d 767 (D.C. Cir. 1963) (Chief Judge Bazelon).

232. *Id.* at 772-73.

233. *Id.* at 773 n.12 (citing 2 WIGMORE ON EVIDENCE § 273).

234. SIGMUND FREUD, *Psychoanalysis and the Establishment of Facts in Legal Proceedings*, in 9 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 103, 113 (James Strachey trans., 1959) (quoted in Goldstein, *supra* note 50, at 1061, referring to *Miller*, 320 F.2d at 772). The *Miller* court, 320 F.2d at 772 n.10, actually quoted a slightly different (albeit more awkward) translation of Freud's work found in SIGMUND FREUD, *Psychoanalysis and the Ascertainment of Truth in Courts of Law*, in 2 COLLECTED PAPERS 13, 23 (1959).

context of polygraph testing²³⁵ in which two psychiatrists concluded that individuals can feel guilt even when they have not done anything at all, nor even experienced criminal intentions.²³⁶ Consequently, the *Miller* court emphasized that trial courts should explain to juries “that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.”²³⁷

Of course, simply because a court turns for support to Freud, or any other psychological theorist, does not suggest that the court will rely on such advisors fully or lucidly. This warning applies even if the decision maker is the famous Judge Bazelon, renowned for endorsing psychiatry’s “direct relevance to cases involving human behavior.”²³⁸ For example, according to Freud, both normal and neurotic individuals may commit crimes in order to ease a long and pre-existing sense of guilt (concerning some other life event).²³⁹ Yet Judge Bazelon’s opinion in *Miller* quotes a rather narrow interpretation of this concept, suggesting instead that, in Freud’s view, “a ‘sense of guilt’ may derive from ‘criminal intentions’ rather than from an actual past misdeed.”²⁴⁰ Such an analysis presumes a certain level of criminal intent that is not warranted.

In turn, in *Pollard v. United States*,²⁴¹ the Sixth Circuit Court of Appeals accepted a range of psychoanalytic testimony that supported the defendant police officer’s claim that he acted under an irresistible impulse²⁴² when he attempted a “very bizarre and ineffectively planned and executed” string of bank robberies.²⁴³ According to the testifying psy-

235. *Miller*, 320 F.2d at 772 n.11 (citing H.B. Dearman & B.M. Smith, *Unconscious Motivation and the Polygraph Test*, 119 AM. J. PSYCHIATRY 1017, 1017–20 (1963)).

236. H.B. Dearman & B.M. Smith, *Unconscious Motivation and the Polygraph Test*, 119 AM. J. PSYCHIATRY 1017, 1017–18 (1963). The authors cited the case of one bank vice-president who responded physiologically to questions on several polygraph tests as though he were guilty of stealing significant sums of money. In fact, the psychiatrists concluded that the questions triggered unconscious responses associated with his guilty feelings of hostility toward his mother and his wife, both of whom were bank customers. *Id.*

237. *Miller*, 320 F.2d at 773. According to Goldstein, this guilt-feeling dynamic would be pertinent in many other areas of the law where feelings of guilt are significant, such as confessions and guilty pleas. Goldstein, *supra* note 50, at 1062.

238. David L. Bazelon, *Psychiatrists and the Adversary Process*, SCI. AM., June 1974, at 18. For a fascinating account of the influence of psychiatry on Judge Bazelon, see DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW (1988).

239. SIGMUND FREUD, *Criminals From a Sense of Guilt*, in 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 332, 332–33 (James Strachey trans., 1957); FREUD, *Dependent Relationships*, *supra* note 114, at 52. As Freud explains,

It was a surprise to find that an increase in this unconscious sense of guilt can turn people into criminals. But it is undoubtedly a fact. In many criminals, especially youthful ones, it is possible to detect a very powerful sense of guilt which existed before the crime, and is therefore not its result but its motive. It is as if it was a relief to be able to fasten this unconscious sense of guilt on to something real and immediate.

Id.

240. *Miller*, 320 F.2d at 772 n.10 (citation omitted).

241. 282 F.2d 450 (6th Cir. 1960).

242. *Id.* at 452–64.

243. *Id.* at 454 n.2.

chiatrist, Pollard's attempted robberies resulted from a mental illness Pollard acquired when his neighbor killed Pollard's wife and infant child. Pollard was consumed with guilt and wanted to be punished for failing to protect his family.²⁴⁴ Before the killings, Pollard's behavior had been "consistently social, well integrated, and constructive," whereas after the killings, he showed "a disassociative type of psychoneurotic reaction."²⁴⁵ Pollard also experienced "unconscious drives" that "might have been related to guilt feelings in connection with the death of his wife and child, which compelled subsequent acts that would certainly lead to apprehension and punishment."²⁴⁶

In essence, then, *Pollard* involved far more than a testifying psychiatrist's claim that the defendant's unconscious was affecting his behavior; rather, the outcome concerned the fuller, more psychoanalytic, suggestion that Pollard's repressed feelings of guilt were playing out in a criminal context. Awareness of this distinction is important if the criminal law is to move forward conceptually, as well as empirically.

2. *Premeditation and Deliberation and the Policeman at the Elbow*

Courts have appeared less accepting of psychoanalytic testimony when it has been applied to the concepts of premeditation and deliberation in cases involving homicides. In *State v. Sikora*,²⁴⁷ for example, the New Jersey Supreme Court affirmed the first degree murder conviction of the defendant after considering psychiatric testimony questioning Sikora's capacity to premeditate and deliberate.²⁴⁸ Prior to shooting his victim, Sikora had been rejected by his girlfriend, and the victim had beaten and humiliated Sikora in front of others.²⁴⁹ According to the court, "[c]riminal responsibility must be judged at the level of the conscious" for a legally sane defendant; therefore, Sikora's guilt could not be eliminated entirely or reduced to second degree murder simply "because, although he did not realize it, [Sikora's] conscious was influenced to think, to plan and to execute the plan by unconscious influences which were the product of his genes and his lifelong environment."²⁵⁰ If such exceptions applied, "the legal doctrine of mens rea would all but disappear from the law."²⁵¹ The court did consider such evidence significant

244. *Id.* at 451.

245. *Id.* at 454.

246. *Id.* at 454 n.2.

247. 210 A.2d 193 (N.J. 1965).

248. *Id.* at 204.

249. *Id.* at 195-204.

250. *Id.* at 202.

251. *Id.* at 203.

for determining Sikora's sentence (life imprisonment or death), however.²⁵²

Likewise, in *People v. Gorshen*,²⁵³ the Supreme Court of California upheld a second degree murder conviction despite expert testimony suggesting that Gorshen lacked both the intent to kill and malice aforethought.²⁵⁴ In *Gorshen*, the defendant killed his boss several hours after the two had argued over the defendant's drinking on the job.²⁵⁵ Testimony by renowned psychoanalytic psychiatrist Bernard Diamond²⁵⁶ specified that Gorshen suffered from "chronic paranoid schizophrenia, a disintegration of mind and personality"²⁵⁷ and that Gorshen "acted almost as an automaton."²⁵⁸ Diamond claimed further "that in his opinion 'actions, like the threat to kill, the going home to get the gun and so forth'—actions which 'in an ordinary individual' would be evidence 'that he intended to do what he did do, and that this was an act of free will and deliberation'—in defendant's case were, rather, 'just as much symptoms of his mental illness as the visions and these trances that he goes into.'"²⁵⁹ Citing Freud in an article Diamond had written, which the prosecution quoted at length in court, Diamond concluded that what appears to be "voluntary choice is merely [a person's] conscious rationalization of a chain of unconsciously determined processes."²⁶⁰ The *Gorshen* court agreed to narrow the concept of premeditation and deliberation according to such evidence; yet it did not accept Gorshen's argument that this mental condition should lead to manslaughter. Rather, the court noted that the facts of the case would have constituted a "perfect" first degree murder charge but for the mitigating effects of Diamond's testimony and Gorshen's lack of a criminal record.²⁶¹

In contrast to Sikora, who had no prior record of mental disturbance, Gorshen had a substantial psychiatric history; for over twenty years Gorshen had experienced "trances," "voices," and "visions," "particularly of devils in disguise committing abnormal sexual acts," which, within a year of the shooting, led Gorshen to be "concerned about loss of

252. *Id.* at 203–04; see also *Criminal Law—Criminal Responsibility—Implications of Psychiatric Testimony that Premeditation was a Product of Forces Beyond Control of Defendant*, 20 RUTGERS L. REV. 363, 371–72 (1966).

253. 336 P.2d 492 (Cal. 1959); see also Bernard L. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 73–81 (1961) (providing an account of the *Gorshen* case).

254. *Gorshen*, 336 P.2d at 504.

255. *Id.* at 494–95.

256. See David Perlman, *UC Educator Dr. Bernard Diamond*, 77, S.F. CHRON., Nov. 20, 1990, at B6.

257. *Gorshen*, 336 P.2d at 495.

258. *Id.* at 496.

259. *Id.* Notably, the *Sikora* court was not persuaded by the defendant's attempt to use *Gorshen* as precedent. *State v. Sikora*, 210 A.2d 193, 203 (N.J. 1965).

260. *Gorshen*, 336 P.2d at 497. The prosecutor quoted from Diamond's article, *With Malice Aforethought*, 2 ARCHIVES CRIM. PSYCHODYNAMICS 1, 27 (1957); however, the trial court took into account the whole article, not just the quoted portion. *Gorshen*, 336 P.2d at 496 & n.4.

261. *Gorshen*, 336 P.2d at 504.

sexual power” and his “manhood.”²⁶² According to Diamond, when Gorshen’s boss asked him to leave his place of work, it was as though he was telling Gorshen, “[y]ou’re not a man, you’re impotent . . . you’re a sexual pervert.”²⁶³ Evidence that two police officers were with Gorshen at the time Gorshen shot his boss fueled Diamond’s view that “even the fact that policemen were right at his elbow and there was no possibility of getting away with this, still it couldn’t stop the train of obsessive thoughts which resulted in the killing.”²⁶⁴

What is striking about *Gorshen*, however, is the extent to which the court voiced its ambivalence and confusion over Diamond’s reliance on Freudian theory to explain the defendant’s acts, emphasizing that the theories were “too advanced” for the law of the day.²⁶⁵ Laden with the conceptual baggage of psychoanalysis, it is understandable why the court may have had difficulty applying a Freudian model to the facts of a particular defendant’s case.

The psychoanalytic testimony in the cases discussed so far was voiced relatively responsibly, however. Joseph Goldstein warned of legal decisions in which Freudian theories could be ridiculously abused. For example, in *State v. Damms*,²⁶⁶ a prominent attempted murder case, it would be absurd to contend that the defendant was proving his sexual impotence when he pulled the trigger of an empty pistol held at the head of his estranged wife and yelled, “It won’t fire. It won’t fire.”²⁶⁷ Indeed, at least indirectly, Freud expressed concern over the misuse of psychoanalytic reasoning in a homicide case in which the defendant was convicted of murdering his father (despite the lack of objective evidence) based on the expert witness’s testimony about the strength of the Oedipus Complex and the universal death wish that sons have for their fathers.²⁶⁸ Likewise, Freud urged that no “deeper motives” be attributed to the plain facts of a case in which the son of one of Freud’s prior servants shot his father while the father was raping the defendant’s half-

262. *Id.* at 495.

263. *Id.* at 496.

264. *Id.*

265. *Id.* at 498. According to the *Gorshen* trial court, “in all probability [Dr. Diamond’s] theories are correct . . . that [the defendant] had no particular intent to commit this crime . . . [b]ut it seems to me that my hands are tied with the legal jurisprudence as it stands today.” *Id.*

266. 100 N.W.2d 592 (Wis. 1960).

267. *Id.* at 594; see also Goldstein, *supra* note 50, at 1060 (citing SIGMUND FREUD, *Three Essays on the Theory of Sexuality*, in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 135, 160–62, 208–12 (James Strachey trans., 1955)) (noting a particularly compelling example of what the law must not do when it relies on psychoanalysis or other sciences: “The insidious temptation to take Freud’s *Three Essays on the Theory of Sexuality* as an affirmative vote for genitality and thus as a justification for official social condemnation of what he neutrally labels ‘a perversion’—‘a pathological disorder’—must be resisted”).

268. SIGMUND FREUD, *The Expert Opinion in the Halsmann Case*, in 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 251, 252 (James Strachey trans., 1961).

sister.²⁶⁹ In essence, there is no evidence that Freud ever encouraged or endorsed the application of his theories to the criminal law.

Of course, Freudian theories and psychoanalytic testimony have been applied to many more criminal law topics, ranging from the law of confessions²⁷⁰ to particular insanity standards.²⁷¹ Such theories have also been shown to be relevant to other legal doctrines, including contracts, patents, torts, and medical malpractice.²⁷² But, as authors (including Freud) have noted, the psychoanalytic model has limited general applicability to the law, in part because the individualized information on which it relies for its theories is typically not available for particular defendants. Therefore, persons who demonstrate similar kinds of behaviors may be motivated by vastly different unconscious forces, whereas persons who demonstrate different kinds of behaviors may share the same causal factors.²⁷³ As Goldstein explained, “a symptom common to different people may reflect a variety of different dynamic explanations

269. ERNEST JONES, 3 *THE LIFE AND WORK OF SIGMUND FREUD: THE LAST PHASE 1919–1939*, at 88 (1957). According to Jones:

In November [1922] the son of an old servant of Freud's shot his father, though not fatally, while the latter was in the act of raping the youth's half-sister. Freud did not know the youth personally, but his humanitarian nature was always moved by sympathy with juvenile difficulties. So, paying all the legal expenses himself, he engaged Dr. Valentin Teirich, the leading authority in that sphere and founder of an institution for the reform of judicial procedures in such cases, to defend the youth. He also wrote a memorandum saying that any attempt to seek for deeper motives would only obscure the plain facts.

Id.

270. Some psychoanalytic theories propose, for example, that police interrogation techniques elicit false confessions by appealing to a basic human compulsion towards confession. See THEODOR REIK, *THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT* 260–79 (1959). According to Reik, a subject's urge to express forbidden wishes and drives manifests itself in a compulsion to confess. *Id.* at 194. The subject experiences feelings of guilt based on his perception of suppressed desires and a need for punishment. *Id.* at 203. The act of confessing partially gratifies the suppressed wish because the subject takes pleasure in the anxiety in the act of confessing. Confessing also partially gratifies the subject's need for punishment through the fear he experiences during the act of confessing. *Id.* at 204–05. Thus, an innocent person may offer a false confession in order to propitiate feelings of guilt (not necessarily associated with any criminal act or specific behavior) and the desire for punishment. Generally, Reik characterizes the false confessor as a neurotic. See *id.* at 262. Presumably, psychologically healthy people are unlikely to confess to crimes that they did not commit. Therefore, the class of persons who may confess falsely in response to promises of moral benefit is small. The theories of literary critic and Freud scholar, Peter Brooks, suggest that the pressure of accusation alone may be enough to elicit a false confession. See PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 21 (2000). The suspect need not be reminded that confessing will result in psychological relief or moral benefit because the promise of absolution is a very appealing aspect of confession. See *id.* According to Brooks, confession has dual constative/performative aspects. The constative aspect is the confessor's assertion that he has transgressed out of his guilt. *Id.* The performative aspect is the act of confessing through which the confessant gains absolution. *Id.* This dual nature of confession creates the danger that the performative, the action of confessing as the means to absolution, will produce the constative, the admission of crimes. *Id.* at 22. Therefore, a suspect may confess falsely in order to accomplish the performative aspect as the only propitiation of guilt. *Id.*

271. KATZ ET AL., *supra* note 27, at 503–630.

272. See GOODRICH, *supra* note 210, at 181–222; KATZ ET AL., *supra* note 27, at 267–97.

273. Goldstein, *supra* note 50, at 1064.

or causes and . . . a single ‘traumatic’ event may reverberate in different ways in different people.”²⁷⁴

Yet Goldstein contended that Freudian theories had some legal role. Psychoanalysis could be useful to the law in terms of the “generalizations about the intrapsychic processes at work in all individuals,” such as the reliance on defense mechanisms, the pleasure principle, and the roles of the id, ego, and superego.²⁷⁵ That said, lawyers who depend on Freudian psychoanalysis “for a finished theory offering a complete explanation of any and all human activity will either be duped or disappointed.”²⁷⁶

F. *The Influence of Freudian Psychoanalysis on Legal Commentators*

There are pervasive references to Freudian psychoanalytic concepts in the writings²⁷⁷ and court cases of some leading legal scholars and Supreme Court Justices.²⁷⁸ For example, in his famous treatise, Glanville Williams discusses the criminal law’s definition of “intention” entirely in terms of psychoanalytic views of unconscious motivations, providing illustrations of the “repressed” and “undesirable wishes” that certain individuals may hold (commonly revealed in dreams) and that can become manifest in a “neurotic symptom.”²⁷⁹ Indeed, a recent article contends that Justice Oliver Wendell Holmes was similarly impacted by Freudian theories because “[t]he psychological concept most salient in Holmes’s

274. *Id.* at 1072.

275. *Id.* at 1073.

276. *Id.* at 1077.

277. OLIVER WENDELL HOLMES, *Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York* (February 15, 1913), in *SPEECHES* 98, 101 (1918) (“It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong.”); *see also* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921) (referring to “the forces of which judges avowedly avail to shape the form and content of their judgments” and recognizing that “[e]ven these forces are seldom fully in consciousness” because “[d]eep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”).

278. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 188 (1963) (Goldberg, J.) (“[An investment advisor] should continuously occupy an impartial and disinterested position, as free as humanly possible from the *subtle* influence of prejudice, *conscious or unconscious*; he should scrupulously avoid any affiliation, or any act, which subjects his position to challenge in this respect.”) (citation omitted); *Pub. Util. Comm’n v. Pollak*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J. recusal explanation) (“[R]eason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves.”); *Chi., Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907) (Holmes, J.) (contending that an administrative body need not explain the reasons for its decisions because its reasoning demonstrates “an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . which may lie beneath consciousness without losing their worth”); *United States v. Farina*, 184 F.2d 18, 24 (2d Cir. 1950) (stating that jurors should not have to provide reasons for their verdicts because the explanations “lie beneath consciousness”) (quoting *Chi., Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907)).

279. GLANVILLE WILLIAMS, *CRIMINAL LAW* 36–38 (2d ed. 1961).

early legal writings was the notion of the unconscious.²⁸⁰ This view is in stark contrast to prior scholarship that stressed Justice Holmes's essentially behavioristic jurisprudence based on objective standards of reasonableness.²⁸¹ There is also strong evidence that Justice Holmes's judicial model reflected his belief in the strength of unconscious factors and their dynamic relationship to other forces—deep-seated instinctual desires and passions, intuitions, “inner conflict, irrationality, imagination and transcendent faith in the ‘infinite.’”²⁸² While it may be a stretch to imply a causal link between the work of Justice Holmes and Freud, a colleague of Holmes's suggested just that in a letter he wrote to the Justice in 1929: “The sound foundation of Freud's (if his followers don't wrong him) crazy sky-scraper seems to have been discovered by you long ago.”²⁸³

The renowned authors of *Psychoanalysis, Psychiatry and Law* claimed that the impact of psychoanalysis raised interesting questions for the law:

Does law develop out of recognition, express or implied, that id out of control would destroy us as individuals and as a society? Does law rest on the assumption that man has both an ego and a superego which require nutriment for the control of the id? Does law, though a part of reality, develop as do ego and superego, out of a continuous interaction with id and reality?²⁸⁴

Criminal law scholars no longer phrase their questions about law and human behavior in the same psychoanalytic way. Yet this point constitutes this article's theme. The development of the MPC centered on a mind psychology that, while impressively forward-thinking in the 1950s and 1960s, is, in retrospect, ill-suited for application to legal provisions. Likewise, Freud's own views of the relationship between conscious and unconscious processes were far more intricate and permeable than the MPC acknowledged.²⁸⁵ Indeed, much of Marshall's article criticizing the MPC's mens rea provisions soon after their publication concerned this particular drawback to the MPC.²⁸⁶

Even if the MPC had successfully captured Freud in all his complexity, over the last four decades the status of psychoanalysis as a science has been seriously undermined, despite the power of the psychoanalytic

280. Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 433 (1998).

281. See *id.* at 435–36 (summarizing the scholarship).

282. Dailey, *supra* note 280, at 431. As Dailey argues, “[t]he psychological ideas central to Holmes's legal thought refute the prevailing view of Holmes as a behaviorist or other strictly empirical observer of human nature.” *Id.* at 438.

283. *Id.* at 509 (citation omitted).

284. KATZ ET AL., *supra* note 27, at 87.

285. See *supra* Part II.D.

286. See *supra* notes 211–27 and accompanying text; see also Goldstein, *supra* note 50, at 1054 (noting shortly after the MPC was published that “it may be that the psychoanalytic theory of man as an individual is too complex to permit productive explorations of what may be even more complex—groups of human beings interacting in the legal process”); *supra* Part III.D (discussing Marshall's arguments).

establishment.²⁸⁷ The purpose here is not to debate the value of Freudian ideas, nor of psychoanalysis generally. Rather, this article contends that if the criminal law's Freudian-based concept of consciousness is properly understood and recognized, then the MPC's four standards of mental states make a great deal more sense. The following section examines the MPC's mens rea standards from a Freudian frame of mind.

IV. THE MODEL PENAL CODE'S LAW OF THE MIND

As every law student learns, criminal liability consists of two main elements: (1) the mens rea, which refers to the defendant's mental state at the time she commits the social harm; and (2) the actus reus, which refers to the defendant's voluntary act that causes the social harm.²⁸⁸ For example, if *A* intentionally picks up a gun and shoots *B*, a federal officer, *A* has performed a voluntary act (shooting Officer *B*) that caused *B*'s death (the social harm), and she did so intentionally (the mental state).²⁸⁹ While there is far more complication and debate concerning how these two elements relate both substantively and temporally, commentators agree that the mens rea element is "the most significant identifying mark of the criminal law."²⁹⁰ Unfortunately, it is also the most confusing. This section focuses on the MPC's definition of mens rea because of its dramatic impact on state statutes.

A. *The Structure of Mens Rea*

The MPC's Commentaries provide a relatively scant discussion and bibliography to explain why certain terms, particularly the references to "conscious" and "aware," are selected for their mens rea provisions. At

287. See generally HANS J. EYSENCK, *THE DECLINE AND FALL OF THE FREUDIAN EMPIRE* (2004) (calling into doubt the validity of psychoanalysis as a science); E. FULLER TORREY, *FREUDIAN FRAUD: THE MALIGNANT EFFECT OF FREUD'S THEORY ON AMERICAN THOUGHT AND CULTURE* (1992) (pointing out the lack of scientific foundation in Freudian theory and assessing its widespread cultural appeal against its usefulness); RICHARD WEBSTER, *WHY FREUD WAS WRONG: SIN, SCIENCE, AND PSYCHOANALYSIS* (1995) (arguing that psychoanalytic theory failed to provide a scientific explanation for all human nature); Peter Brooks, *Introduction to WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* 1, 2 (Peter Brooks & Alex Woloch eds., 2000) (noting that psychoanalysis "has become commonplace but also has been challenged in its most basic assumptions"). But see Morton F. Reiser, *Can Psychoanalysis and Cognitive Emotional Neuroscience Collaborate in Remodeling Our Concept of Mind-Brain?*, in *WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* 248, 253-54 (Peter Brooks & Alex Woloch eds., 2000) (commenting that "psychoanalysis provides access to critically important levels and kinds of mental functions that are not addressed by other disciplines"); Robert G. Shulman & Douglas L. Rothman, *Freud's Theory of the Mind and Modern Functional Imaging Experiments*, in *WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* 267, 267 (Peter Brooks & Alex Woloch eds., 2000) (accepting that "the unconscious is acknowledged to contribute significantly to mental processes").

288. See, e.g., MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 17-43 (1993).

289. DRESSLER, *supra* note 81, at 81-141.

290. Finkelstein, *supra* note 23, at 900.

the same time, such terminology comports with a psychoanalytic framework. Just as significantly, legal commentators interpreted the MPC's mens rea doctrine as having a psychoanalytic foundation soon after the MPC was published.²⁹¹

The MPC defines mens rea according to four (presumably) distinct forms: purpose, knowledge, recklessness, and negligence.²⁹² All four forms hierarchically represent (from highest to lowest) the level at which an individual is aware of three main elements that may constitute the actus reus of a criminal offense: (1) the actor's conduct (for example, *A*'s act of shooting Officer *B*), (2) the results of that conduct (*B*'s death), and (3) the attendant circumstances surrounding the actor's conduct (for example, the fact that *B* is a federal officer).²⁹³ The following sections discuss these elements within the context of the four MPC mens rea terms and their drawbacks.

1. *The Model Penal Code's Forms of "Purpose" and "Knowledge"*

The MPC term "purposely," which requires the highest level of an individual's awareness, substitutes for the common law term of acting intentionally or with intent.²⁹⁴ In MPC language, people act purposely if it is their "*conscious object* to engage in conduct of [a certain] nature or to cause a [certain] result."²⁹⁵ If an element of the offense involves attendant circumstances, people act purposely if they are "*aware* of the existence of such circumstances" or they "*believe[]*" or "*hope[]*" such circumstances exist.²⁹⁶

As Marshall noted, this kind of provision is not only vague but wrongly worded. Use of "the word 'hopes' as an alternate to 'awareness' and 'belief' is scarcely valid,"²⁹⁷ or, as one recent commentary emphasized, relevant to culpability.²⁹⁸ Likewise, how will a jury determine

291. See *supra* Part IV.D.

292. All four forms of mens rea pertain to a "material element" of an offense, which is defined as an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.

See MODEL PENAL CODE § 1.13(10) at 209 (Official Draft and Revised Comments 1985).

293. See *id.* § 1.13(9) at 209.

294. *Id.* § 1.13(12) at 210.

295. *Id.* § 2.02(2)(a) at 225 (emphasis added). A person acts purposely with respect to a material element of an offense,

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Id.

296. *Id.* (emphasis added).

297. Marshall, *supra* note 26, at 1258.

298. See, e.g., SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 203 (7th ed. 2001). As Sanford Kadish and Stephen Schulhofer explain, "[n]ot all possible mental states are relevant to the law's purposes. Whether the defendant

the differences among such variant terms as “awareness,” “belief,” and “hope”?²⁹⁹ The MPC’s Commentaries completely overlook these questions. Yet it is important to consider the source of such language, which does not appear in pre-MPC state statutes.

The MPC’s phrasing for “purpose” is also difficult to parse in relation to the MPC’s definition of knowledge.³⁰⁰ People act knowingly if they are “*aware*” of the nature of their conduct or that attendant circumstances exist.³⁰¹ If an element of an offense involves a result, they act knowingly if they are “*aware* that it is *practically certain* that [their] conduct will cause such a result.”³⁰² Therefore, when individuals act knowingly, it is not their conscious objective to achieve such a result; rather they are practically certain or aware of a high probability that their conduct will cause such a result.³⁰³ According to one view, “purpose” reflects a more “aggressively ruthless” mental state than the “mere ‘calloousness’” of “knowledge.”³⁰⁴ Yet such distinctions are difficult in practical application, and the MPC does not clarify what the “awareness” in “knowledge” should mean.

2. *The Model Penal Code’s Forms of “Recklessness” and “Negligence”*

For many commentators, recklessness is the most central, but also the most perplexing, mens rea form to interpret,³⁰⁵ particularly because of its key role in capping liability. Unless the MPC otherwise specifies,

acted regretfully, arrogantly, eagerly, *hopefully*, and so forth may be relevant for a judge contemplating the sentence to be imposed.” *Id.* (emphasis added).

299. Marshall, *supra* note 26, at 1258.

300. In English law, “knowing” is not a category separate from “intention” but rather one of two ways of defining intention. Intention “is defined as a decision to bring certain consequences or states of affairs about in so far as it lies within one’s powers to do so and with the aim of so doing (‘direct’ intention), or the doing of an act in the knowledge that a particular result will or is virtually certain to occur (‘oblique’ intention.)” (citations omitted). NICOLA LACEY & CELIA WELLS, RECONSTRUCTING CRIMINAL LAW: TEXT AND MATERIALS 41 (2d ed. 1998).

301. MODEL PENAL CODE § 2.02(2)(b) at 225–26 (Official Draft and Revised Comments 1985) (emphasis added). A person acts knowingly with respect to a material element of an offense,

(i) if the element involves the nature of his conduct or the attendant circumstances, he *is aware* that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he *is aware* that it is practically certain that his conduct will cause such a result.

Id. (emphasis added).

302. *Id.* (emphasis added).

303. *Id.* (emphasis added). MPC section 2.02(7) provides some clarification of the definition of “practically certain” in 2.02(b) through the use of the phrase, “aware of a high probability.” MODEL PENAL CODE § 2.02(7) at 227 (Official Draft and Revised Comments 1985). Even though section 2.02(7), as written, refers only to a “circumstance,” it appears comparably applicable to the “result.” See Robinson, *Brief History*, *supra* note 54, at 819 n.20.

304. Robinson, *Brief History*, *supra* note 54, at 819.

305. See e.g., Alan R. White, *Carelessness, Indifference and Recklessness*, 24 MOD. L. REV. 592, 593–94 (1961). According to White, the terms “inattention,” “indifference,” and “lack of anxious thought” should not be used interchangeably in describing states of mind. *Id.* at 593. Lack of anxiety and indifference may be described as states of mind, but inattention may not. White claims that to pay attention to something is to “look at it, listen to it, think about it,” and these are activities, not states of mind. *Id.* at 594.

recklessness constitutes the minimum level of culpability for a crime when there is a silent element.³⁰⁶ People act recklessly with respect to a result when they “consciously disregard a *substantial and unjustifiable* risk” that their conduct will cause the result.³⁰⁷ However, the MPC provides stipulations about the kind of risk: “The risk must be of such a nature and degree that . . . its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”³⁰⁸

One fine-lined distinction between knowledge and recklessness relies, respectively, on the certainty of the risk—“high probability” in contrast to “substantial (and unjustifiable) risk.” But the broader distinction among the categories is even more critical. Purposeful and knowing conduct can be considered willful or intentional, while reckless conduct or less is, at most, careless or risk-taking.³⁰⁹ Yet recklessness can be difficult to distinguish from negligence, the lowest mens rea level, which has its own record of controversy.

From the start of the MPC’s publication, some commentators have claimed that negligence should never constitute a mental state for criminal liability because it is based on people’s normative beliefs of what people expect of others, not who those others really are.³¹⁰ Individuals act negligently with respect to a result when they “*should be aware* of a substantial and unjustifiable risk” that their conduct will cause the result.³¹¹ When comparing “recklessness” to “negligence,” the difference is

306. MODEL PENAL CODE § 2.02(3) at 226 (Official Draft and Revised Comments 1985).

307. *Id.* § 2.02(2)(c) at 226 (emphasis added). According to the MPC’s definition:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

Id.

308. *Id.*

309. Robinson, *Brief History*, *supra* note 54, at 818–19.

310. See Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 633 (1963). According to Hall, psychological notions about “unconscious willing” are sometimes advanced as the basis of penal liability. *Id.* at 639. He argues against this proclivity. *Id.* First, this psychological theory is far from being well established in “critical circles.” *Id.* Even if the theory is correct, it has very little relevance to the (conscious) action that is central to just punishment. Hall claims that to open the “Pandora’s box” of psychiatry, “which delves principally into the unconscious aspects of human nature, is to obscure the central issue and to abandon completely the essential criterion of the morality of penal law.” *Id.* Further, “the exclusion of negligence from penal liability is based on the great difference between consciousness and unawareness, between action or conduct and mere behavior.” *Id.* at 643. In another article, Hall states that persons with a psychiatric ideology assert that there is no important difference between voluntary action and inadvertent behavior. Jerome Hall, *The Scientific and Humane Study of Criminal Law*, 42 B.U. L. REV. 267, 270 (1962). He attributes this theory to an “increased awareness that emotional drives, adverse conditioning and the consequent misinterpretation of situations produce strong, frequently unconscious motives for criminal conduct.” *Id.* However, he also claims that the ethical-legal principle does not imply innocence because of any of these factors. *Id.*

311. MODEL PENAL CODE § 2.02(2)(d) at 226 (Official Draft and Revised Comments 1985) (emphasis added). According to the MPC’s definition:

one of culpable “awareness” (recklessness) as opposed to culpable “unawareness” (negligence) of a substantial risk.³¹² As with recklessness, there are stipulations about the kind of risk involved in negligence. The risk “must be of such a nature and degree that the actor’s *failure to perceive* it . . . involves a gross deviation from the standard of care that a *reasonable person* would *observe* in the actor’s situation.”³¹³ Again, this terminology is difficult. Is failure to perceive synonymous with the failure to be aware? If not, how could a jury tell the difference between the two? Likewise, who should the reasonable person be—the bland, faithful, objective reasonable man or his warring subjectivist cousins?³¹⁴

In sum, all of the mens rea terms are vague, but the focus on a defendant’s level of awareness is paramount. The terms “purposely” and “conscious object,” as well as the terms “recklessly” and “consciously disregard,” appear to be relatively more straightforward because they explicitly require some degree of conscious thought. Likewise, the negligence standard of “should be aware” is based on people’s normative expectations of what they anticipate from others. The more challenging analysis involves the MPC’s knowledge requirement because it does not incorporate a standard of conscious awareness; rather, a defendant merely needs to be “aware that it is practically certain that his conduct will cause” a particular result. Knowledge is also not gauged according to the normative expectations of others.

B. *The Foundation of the Mens Rea Structure*

The MPC’s mens rea provision was groundbreaking, but it has always been difficult to interpret. The MPC’s Commentaries that exist reveal little about the foundation of the mens rea structure, particularly as it pertains to precedent and the era’s psychology.

First, it appears that prior to the MPC’s creation of its four culpability provisions, no other state statute had used the words “consciously” or

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

Id.

312. Robinson, *Brief History*, *supra* note 54, at 819.

313. MODEL PENAL CODE § 2.02(2)(d) at 226 (Official Draft and Revised Comments 1985) (emphasis added).

314. For an excellent discussion of the tension between objective and subjective standards, see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 203–25 (2003). The reasonable man standard has not avoided a psychoanalytic interpretation. See, e.g., Goodrich & Carlson, *supra* note 210, at 3 (“The intentional subject and the ‘reasonable man’ are disassembled in psychoanalysis to reveal a chaotic and irrational libidinal subject, a sexual being, a body and its drives. . . . Psychoanalysis in this sense might be taken to represent law’s unconscious, its ‘other scene,’ and, at least in this regard . . . it constitutes an exorbitant threat to the order and reason of the legal system.”).

“aware” in the same way to depict an individual’s mental state,³¹⁵ despite the numerous adjectives that had been applied to characterize culpability over the centuries.³¹⁶ As the MPC’s Commentaries note, for example, “[n]o statutory definition of recklessness could be found that existed prior to the initial [Model Penal] Code formulation in 1955.”³¹⁷ Yet the MPC provision and its Commentaries never define, nor even address, what the terms consciousness or awareness should mean in the mens rea context except to accentuate their importance as mental state discriminators.³¹⁸

The foundation for the MPC’s mens rea structure reflects a Freudian psychoanalytic slant for reasons that were previously discussed.³¹⁹ The behaviorist theories of the time rendered conscious and unconscious mental processes irrelevant for empirical study, a bias that held for all scientific disciplines until the 1970s, when research on consciousness surged to its current prolific state.³²⁰ Freudian theory was the only existing and viable psychological model of conscious and unconscious thought.³²¹ Indeed, recent commentary contends that, paradoxically, the founding father of behaviorism, John B. Watson (1878–1958), “was fascinated by the discoveries of psychoanalysis.”³²² Despite Watson’s “mask of anti-Freudian bias,” new research shows that he “surprisingly emerges as a psychologist who popularized Freud and pioneered the scientific appraisal of [Freud’s] ideas in the laboratory,” albeit in the context of strict behaviorist tenets.³²³ Regardless, Freudian theory’s focus on unconscious processes accounts in part for the rather specific delineation of involuntary states under the MPC’s voluntary act requirement (e.g., conduct during sleep or hypnosis) and the far more amorphous designation of what constitutes conscious processes under the mens rea requirements.

The MPC’s Commentaries on mens rea also frequently cite to Glanville Williams’s treatise on criminal law.³²⁴ Williams’s treatise presents a staunchly Freudian conception of intent and unconscious motiva-

315. The terms “conscious” and “purpose” were used together in some early cases, however. *See, e.g., Commonwealth v. Drum*, 58 Pa. 9, 16 (1868) (noting that if an intention to kill is “accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate”).

316. MODEL PENAL CODE § 2.02 cmt. 1 at 230 n.3 (Official Draft and Revised Comments 1985) (explaining that at the time the Model Penal Code was drafted, there were “76 different methods of stating the requisite mental element in present federal criminal statutes”).

317. *Id.* § 2.02 cmt. 3 at 238.

318. “Conscious” and “aware” are key terms in specifying the heightened level of perception required of a defendant and the distinctions among the different levels: “conscious object” (purposely) versus “aware that his conduct” (knowingly); “consciously disregards” (recklessly) versus “should be aware” (negligently). *See id.* § 2.02 at 225–26.

319. *See supra* Part III.

320. JOHN G. TAYLOR, *THE RACE FOR CONSCIOUSNESS* 6–9 (1999).

321. *See supra* Part II.C–D, *infra* Part V.A.

322. Mark Rilling, *John Watson’s Paradoxical Struggle to Explain Freud*, 55 AM. PSYCHOLOGIST 301, 301 (2000).

323. *Id.* at 301–11.

324. MODEL PENAL CODE § 2.02 cmt. 1 at 231 n.3, cmt. 2 at 233 n.6, cmt. 4 at 242 n.26, cmt. 4 at 243 n.28, cmt. 4 at 244 n.33, cmt. 5 at 244 n.35 (Official Draft and Revised Comments 1985).

tions³²⁵ that Williams supported by a reference to Freud's *Psychopathology of Everyday Life*.³²⁶ As an aside, Williams was Herbert Wechsler's colleague at Columbia Law School in 1956, while Wechsler was supervising the MPC's creation.³²⁷

The MPC's Commentaries also emphasize that the MPC's use of the terms purposely, knowingly, and recklessly represents a subjective inquiry into a defendant's mental attitude, not an objective inquiry based upon a reasonable person standard.³²⁸ As the Commentaries explain, "[i]t was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended."³²⁹ But such a subjectivist, "actual state of mind of the actor,"³³⁰ approach comports with the individualistic slant of Freudian psychoanalytic theory. The subjective approach also contrasts sharply with the objective standard followed by England³³¹ and Canada,³³² countries that were not nearly as influenced by Freud as the United States.³³³

Lastly, the MPC's terminology of consciousness and awareness of the defendant's subjective state of mind enables far greater access to psychological evidence and interpretations than an objective reasonable man standard. Even the mental state of negligence is worded in terms of the actor's "failure to perceive" a risk that would be expected from a reasonable person; awareness is the key term that differentiates recklessness from negligence. As the MPC's Commentaries explain, "[m]uch of this confusion [in terminology] is dispelled by a clear-cut distinction between recklessness and negligence in terms of the actor's awareness of the risk

325. See *supra* note 279 and accompanying text.

326. WILLIAMS, *supra* note 279, at 36 n.1.

327. See Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129* (1956) (listing Williams as a Visiting Professor at Columbia University, 1956).

328. MODEL PENAL CODE § 2.02 cmt. 2 at 234-35 (Official Draft and Revised Comments 1985).

329. *Id.* at 235.

330. *Id.* at 236.

331. *Id.* at 234. According to the MPC's Commentaries:

The Model Penal Code's approach to purpose and knowledge is in fundamental disagreement with the position of the House of Lords in *Director of Public Prosecutions v. Smith*. That case effectively equated "intent to inflict grievous bodily harm" with what the defendant as a reasonable man must be taken to have contemplated, thus erecting an objective instead of a subjective inquiry to determine what the defendant "intended."

Id. (footnote omitted).

332. See Don R. Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence*, 15 CRIM. L.Q. 160, 187-88 (1973). Stuart notes that despite the traditional emphasis placed on the subjective mens rea requirement, there is a tendency in Canadian law to rest criminal responsibility on "the objective stand of inadvertent negligence." *Id.* According to Stuart's explanation for this approach, the notion of subjective mens rea cannot be squared with the fact that many actions are taken without conscious thought. "A scheme which presupposes a mind that always functions consciously and always reasons forward from premises to conclusions, is utterly remote from life." *Id.* (quoting from PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 102 (1963)). Stuart claims that because there are many types of conduct that are conscious and performed with foresight, an abandonment of the subjective test is not called for, simply more honesty about what the legal system is actually doing. *Id.*

333. See *supra* Part II.C.

involved.”³³⁴ Given the psychology of the times, Freudian theories would constitute the tool for making such interpretations of differing levels of awareness.

Indeed, the relationship between conscious and unconscious thought processes, and a Freudian influence, becomes most apparent in the MPC’s justification for why negligent defendants should be punished. “When people have knowledge that . . . punishment, may follow conduct that inadvertently creates improper risk, they are supplied with an additional motive to take care before acting . . . this motive may promote awareness and thus be effective as a measure of control.”³³⁵ Therefore, individuals can basically train themselves to better obey laws by becoming more cognizant of the deeper mental states that may cause them to act rashly, or even criminally. In line with Freudian theory’s focus on the thought processes that underlie behavior, the MPC’s Commentaries note that those who do not train themselves to become more aware may have a character deficiency: “[M]oral defect can properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them.”³³⁶

C. *Recommendations for Changing the Mens Rea Structure*

There have been numerous debates over the decades concerning the value and rationale for mens rea generally and the MPC’s creation of mens rea terms specifically. The first and most basic question, of course, is whether mens rea should even be an element of an offense, an issue raised most pointedly by Barbara Wootton³³⁷ and conceptually adopted by some legal economists.³³⁸ Wootton’s argument that mens rea is significant at the sentencing phase but not the guilt phase³³⁹ sounds persua-

334. MODEL PENAL CODE § 2.02 cmt. 4 at 242 (Official Draft and Revised Comments 1985).

335. *Id.* at 243. According to C.C. Turpin, negligence involves mental “inadvertence,” that is, a lack of attention in a strict psychological sense. In a wider (and in Turpin’s view more useful) sense, this “inadvertence” includes “failure to attend to or contemplate possible present or future situations, acts or events, not presented to the consciousness as external stimuli—a failure to apply the mind to (think of) possibilities, or the action that is appropriate to them.” C. C. Turpin, *Mens Rea in Manslaughter*, 1962 CAMBRIDGE L.J. 200, 201–02.

336. MODEL PENAL CODE § 2.02 cmt. 4 at 243 (Official Draft and Revised Comments 1985).

337. BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 43–64 (1963).

338. See Finkelstein, *supra* note 23, at 895–97.

339. WOOTTON, *supra* note 337, at 43–64. According to Wootton,

the presence or absence of the guilty mind is not unimportant, but . . . mens rea has, so to speak—and this is the crux of the matter—got into the wrong place. Traditionally, the requirement of the guilty mind is written into the actual definition of a crime. No guilty intention, no crime, is the rule. Obviously this makes sense if the law’s concern is with wickedness: where there is no guilty intention, there can be no wickedness. But it is equally obvious, on the other hand, that an action does not become innocuous merely because whoever performed it meant no harm. If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident. The question of motivation is in the first instance irrelevant.

sive; yet this article sides with tradition and common moral judgment. Maintaining mens rea as an element of criminal offenses affirms society's commitment to the values of human autonomy and dignity, as well as to the criminal law's essentials of blame and guilt.³⁴⁰ This perspective also meshes with theories of consciousness concerning the freedom with which people view their own conduct and the conduct of others.³⁴¹

What is perplexing is how few commentators on mens rea have highlighted the role of consciousness in the MPC's mens rea provisions despite the pervasive presence of the term. A host of scholars have intelligently struggled with the dilemmas posed by requiring a mens rea element.³⁴² Very simply, proposals for reforming the mens rea structure fall into two camps: (1) the "unified approach," which promotes a single concept of mens rea,³⁴³ and (2) the "four-plus approach," which designates a concept of mens rea as an addition to the four established MPC forms.³⁴⁴

One type of unified approach³⁴⁵ suggests that the MPC forms of mens rea, apart from negligence, should be reduced to one form only—recklessness.³⁴⁶ Purpose and knowledge can be subsumed under recklessness because all three forms "exhibit the basic moral vice of insufficient concern for the interest of others,"³⁴⁷ in other words, "callousness" or "indifference."³⁴⁸ According to this approach, negligence should not be subsumed because it "does not reliably track the moral vice of insufficient concern that all the other legitimate forms of criminal culpability display."³⁴⁹ Therefore, negligence should not be considered a form of criminal culpability.³⁵⁰

Id. at 52 (emphasis omitted).

340. See Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 287 (1968); Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 32 (1982). See also Finkelstein, *supra* note 23, at 896 (concluding that the "fundamental features of economic analysis . . . make it ill-suited to explain the existence of the criminal law's mens rea requirement").

341. See *infra* Part VI.

342. This article does not have sufficient space to acknowledge all of the outstanding contributions to this area, so it selects a few representative scholars and written works.

343. See Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 931 (2000).

344. See, e.g., Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597 (2001); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953 (1998); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992); *infra* notes 352–54 and accompanying text.

345. Alexander, *supra* note 343, at 931.

346. *Id.*

347. *Id.*

348. *Id.* at 935–37. See also *id.* at 935 (explaining that "[i]f recklessness consists of imposing unjustifiable risks on others, then it can be characterized as displaying the central moral vice of insufficient concern"; further, "all recognized forms of criminal mens rea other than negligence display this single moral vice, and . . . they do so in ways that establish their unity rather than their separateness").

349. *Id.* at 932. This view is further described and defended in varying ways by, among others, Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990); Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963); Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543 (1983); Michael J. Zimmerman, *Negligence and Moral Responsibility*, 20 NOÛS 199

This unified approach suggests that the four-plus approach to mens rea is either unnecessary, redundant, or unwanted.³⁵¹ That claim is quite broad, given the diversity of the four-plus proposals which promote reforms ranging from a re-definition or expansion of the concept of recklessness,³⁵² to an entirely new form of mens rea,³⁵³ to affirming the independent significance of more conventional concepts, such as indifference.³⁵⁴

The purpose here is not to criticize these proposals on a doctrinal level; debates on those issues exist elsewhere.³⁵⁵ Rather, this discussion suggests that even if the amended formulations of the MPC's mens rea standards are workable, they either ignore or downplay morally and scientifically important features of consciousness that are relevant to criminal liability. From this perspective, Freudian theory was an invaluable contribution to mens rea doctrine. Whether or not a defendant is consciously aware of her behavior or makes it her conscious object to commit a crime or disregard its risk lies at the heart of the criminal law. The requirement goes far beyond semantics or an academic exercise; consciousness is the critical first step in establishing liability, and unconsciousness is a key step in negating it. Such principles may well explain

(1986); Michael J. Zimmerman, *Moral Responsibility and Ignorance*, 107 ETHICS 410 (1997). There are also those who intensely counter this view. Jeremy Horder, *Gross Negligence and Criminal Culpability*, 47 U. TORONTO L.J. 495 (1997); James A. Montmarquet, *Culpable Ignorance and Excuses*, 80 PHIL. STUD. 41 (1995); James A. Montmarquet, *Zimmerman on Culpable Ignorance*, 109 ETHICS 842 (1999); Steven Sverdlik, *Pure Negligence*, 30 AM. PHIL. Q. 137 (1993).

350. Alexander, *supra* note 343, at 932. As Alexander explains, [w]e end up with a single moral injunction for how to choose when one is uncertain about the consequences his acts will cause: choose only those acts for which the risks to others' interests—as you estimate those risks—are sufficiently low to be outweighed by the interests, to yourself and others, that you are attempting to advance (discounted by the probability of advancing those interests).

Id. at 939.

351. *Id.* at 931.

352. See, e.g., R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 158–63 (1990) (suggesting that recklessness incorporate “practical indifference,” which reflects that the actor is not sufficiently concerned about the risk she is creating); Ferzan, *supra* note 344, at 600–01 (proposing the concept of “opaque recklessness” to net, under the criminal justice system, individuals who may not be considered criminally culpable because they “knowingly engage in risky behavior but fail to think through why their actions are ‘risky’ or ‘bad’ or ‘dangerous’”); Simons, *supra* note 344, at 471–77 (dividing existing criminally culpable mental states into two groups (states of belief and states of desire) and proposing the addition of a fifth form of mens rea—the desire-form state of recklessness—to account for culpability founded on desire-based harms, such as indifference or callousness towards the interests of others).

353. Michaels, *supra* note 344, at 954–63 (advancing the additional new mental state of “acceptance” to resolve the problems with the MPC's view of willful blindness as knowledge of a high probability (without a contrary belief) and the common law's purposeful avoidance doctrine; therefore, “acceptance” fills the conceptual void between knowledge and recklessness in cases of willful blindness and depraved heart murder); Pillsbury, *supra* note 23, at 212 (proposing “indifference” as a separate element for cases of murder and manslaughter, thereby requiring prosecutors to produce more evidence about the defendant's acts of carelessness and motives, that is, “reasons beyond the accused's immediate goals and awareness”).

354. See *supra* notes 352–53 and accompanying text.

355. See Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997); Ferzan, *supra* note 344, at 597.

why the MPC's four-part structure, with all its inherent awkwardness, is deeply embedded in state statutes and why it would take a criminal law revolution to change it.

For these reasons, this article does not recommend eliminating the MPC's four-part structure, at least for now, but rather advocates modernizing it. The MPC's structure can be clearer and more contemporary if it can be based on a non-Freudian conceptual framework that still rests on the moral and scientific underpinnings of consciousness.

D. Extreme Mental and Emotional Disturbance as a Paradigm Shift

A number of the MPC's innovative approaches for providing mitigation for a defendant's mental state, such as the defense of extreme mental and emotional disturbance (EMED), provide additional support for demonstrating the powerful influence of Freudian theory on the MPC drafters.³⁵⁶ Under the MPC, a defendant who otherwise would be guilty of murder can be found guilty of the lesser offense of manslaughter if it is determined that the defendant killed another person while "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."³⁵⁷ The MPC elaborates that "[t]he reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the [defendant's] situation under the circumstances as he believes them to be."³⁵⁸ The defense has been adopted in a substantial number of states, although it has been controversial.³⁵⁹

The EMED doctrine has two parts, subjective and objective. The subjective part requires that the defendant possess feelings sufficiently intense to cause a loss of self control at the time of the murder, but not so intense that it would constitute a state of mind comparable to insanity. In other words, the defendant must be extremely emotionally disturbed (for example, by passion, anger, or grief) and act under its influence; mere irritability or unhappiness are not sufficiently intense emotions.³⁶⁰ The objective part requires a reasonable explanation or excuse for the emotional disturbance that caused the person to lose control and kill; however, the part is subjective to the extent that it is determined "from

356. This section focuses on EMED because it is a concept unique to the Model Penal Code, while acknowledging that there are other significant doctrines that would also be applicable, such as the insanity defense and diminished capacity. Notably, the MPC states explicitly that it "does not recognize diminished responsibility as a distinct category of mitigation," although MPC section 4.02 "does permit use of psychiatric testimony to negate required state of mind." MODEL PENAL CODE § 210.3 cmt. 5 at 72 (Official Draft and Revised Comments 1985).

357. *Id.* § 210.3(1)(b) at 43.

358. *Id.*; see also Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997) (providing an overview of EMED cases).

359. See generally Nourse, *supra* note 358.

360. MODEL PENAL CODE § 210.3(1)(b) cmt. 5 at 61-64 (Official Draft and Revised Comments 1985).

the viewpoint of a person in the actor's situation."³⁶¹ The MPC is ambiguous about the meaning of reasonableness.³⁶²

The relevance of a person suffering from EMED is solely an MPC creation. Unlike the great majority of other MPC provisions, the EMED doctrine was not derived directly, or even in modified form, from other state statutes or case law.³⁶³ At the same time, the EMED defense was intended to combine, at least conceptually, two doctrines from the common law: sudden heat of passion (which the EMED broadened substantially)³⁶⁴ and partial responsibility (diminished capacity).³⁶⁵ The EMED defense is strikingly different from the heat of passion defense, however: (1) a provocative act need not instigate the EMED defense (the defendant need only experience an extreme mental and emotional disturbance); (2) if there is provocation, the decedent need not be the source; and (3) even if the decedent was the provoker, the provocative act or injury need not comply with the traditional categories of provocation (such as infidelity); rather, any event, even the decedent's words, can be the basis for a manslaughter instruction.³⁶⁶

In general, the EMED doctrine is more subjective than what had existed before it despite the objective cap of the reasonableness stan-

361. *Id.*; see also *State v. Dumlao*, 715 P.2d 822, 829 (Haw. Ct. App. 1986) (stating that the term "extreme emotional disturbance" in the context of the manslaughter defense is the "emotional state of an individual, who: (a) has no mental disease or defect that rises to the level . . . [of insanity]; and (b) is exposed to an extremely unusual and overwhelming stress; and (c) has an extreme emotional reaction to it, as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions") (citation omitted).

362. The drafters of the EMED defense, whether by design or omission, did not carefully define the constitution of a reasonable disturbance. Some scholars are critical of the broadened, subjective focus of EMED:

I previously criticized the drafters of the Code for coupling diminished capacity with provocation doctrine. My claim was that it is unwise to bring both defenses under one umbrella. Provocation deals with the emotions and actions of ordinary persons, whereas diminished capacity relates to the thinking processes and actions of unordinary persons. Provocation deals with ordinary human weaknesses, while diminished capacity focuses on special weaknesses, on illnesses and pathologies.

Joshua Dressler, *Why Keep The Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 985 (2002).

363. MODEL PENAL CODE § 210.3(1) cmt. 2 at 48 (Official Draft and Revised Comments 1985) (noting that the law on manslaughter "at the time the Model Penal Code was drafted was not well developed by statutory provision" and in the majority of states "was either undefined by statute or the subject of the barest skeletal delineation").

364. *Id.* cmt. 3 at 49 (explaining that the concept of EMED "represents a substantial enlargement of the class of cases which would otherwise be murder but which could be reduced to manslaughter under then existing law because the homicidal act occurred in the 'heat of passion' upon 'adequate provocation'").

365. DRESSLER, *supra* note 81, at 542.

366. MODEL PENAL CODE § 210.3 cmt. 5 at 60-65 (Official Draft and Revised Comments 1985); see also MODEL PENAL CODE TENTATIVE DRAFT § 201.3 cmt. at 46-47 (Tentative Draft No. 9 (1959)) [hereinafter MODEL PENAL CODE 1959] (noting that the second part of the EMED defense was introduced to eliminate "the rigid rules that have developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be enough" and to "avoid[] a merely arbitrary limitation on the nature of the antecedent circumstances that may justify a mitigation").

dard;³⁶⁷ it also defies the early common law's "stance against individualization of the standard for determining adequacy of provocation."³⁶⁸ Similarly, the EMED defense "reflects the trend of many modern decisions to abandon preconceived notions of what constitutes adequate provocation and to submit that question to the jury's deliberation."³⁶⁹

The development of the EMED defense was fueled by the MPC drafters' recognition that there had been "tremendous advances made in psychology" since the turn of the twentieth century as well as "a willingness on the part of the courts, legislatures, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma."³⁷⁰ Of course, the advanced psychology at the turn of the twentieth century, and at the time of the MPC's creation, was Freudian psychoanalysis.³⁷¹

These temporal and substantive ties between the EMED defense and psychoanalysis can be traced through the work of the MPC drafters over the 1952–1962 decade. For example, the paradigm shift signaling the end of the heat of passion defense (in the EMED states) and the beginning developments of the EMED defense was documented in a tentative draft of the MPC, published in 1955.³⁷² This tentative draft was released three years after the American Psychiatric Association's publication of the nearly exclusively psychoanalytic DSM-I.³⁷³ Recall that the American Psychiatric Association was one of two organizations that Manfred Guttmacher polled to assess psychiatrists' views on the

367. MODEL PENAL CODE § 210.3 cmt. 3 at 49–50, cmt. 5 at 54, cmt. 5 at 60 (Official Draft and Revised Comments 1985).

368. *Id.* cmt. 5 at 56–57.

369. *Id.* cmt. 5 at 61.

370. *People v. Patterson*, 347 N.E.2d 898, 908 (N.Y. 1976) ("It is consistent with modern criminological thought to reduce the defendant's criminal liability upon proof of mitigating circumstances which render his conduct less blameworthy.").

371. *See supra* notes 125–33.

372. The Model Penal Code Tentative Draft on the EMED defense alludes to cases illustrating limitations under the common law provocation defense that the MPC drafters intended to broaden. *See* MODEL PENAL CODE 1959, *supra* note 366, § 201.3 cmt. at 47–48. Referring to the MPC's 1959 Tentative Draft, Victoria Nourse comments that the MPC drafters were inspired by the "theory that the provocation defense exists to protect free choice." Nourse, *supra* note 358, at 1339 (analyzing the "heat of passion" defense in light of changes in law and societal norms). While the provocation defense does allow for the possibility that the actor intended to commit the act that kills, it is not entirely clear that the MPC drafters wanted to preserve that aspect in the EMED defense. Also, it is difficult to locate the source of Nourse's comment. Similarly, Herbert Wechsler, who was critical of the common law, maintained that "the law . . . employs unsound psychological premises such as 'freedom of will' . . . that it is drawn in terms of a psychology that is both superficial and outmoded, using concepts like 'deliberation,' 'passion,' 'will,' 'insanity,' 'intent.'" Wechsler, *Challenge*, *supra* note 82, at 1103. Further, while the MPC Commentary on EMED, written more than ten years after Wechsler's article, seems to have tempered Wechsler's language, it has still maintained the essence of his point. The EMED defense is broader in scope than provocation and "may allow an inquiry into areas which have been treated as part of the law of diminished responsibility or the insanity defense." MODEL PENAL CODE § 210.3 cmt. 4 at 54 (Official Draft and Revised Comments 1985).

373. *See supra* note 129 and accompanying text.

M'Naughten standard, opinions which Herbert Wechsler took very seriously.³⁷⁴

The EMED defense was designed to accommodate psychiatric testimony to the maximum extent possible. Therefore, it can be presumed that, at least initially, the defense relied on a heavy psychoanalytic foundation. A sizeable amount of case law supports this presumption.³⁷⁵ In *People v. Patterson*,³⁷⁶ for example, the first key case on the EMED defense, the New York Court of Appeals emphasized that “[a]n action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken.”³⁷⁷ Instead, it is possible “that a significant mental trauma has affected a defendant’s mind for a substantial period of time, *simmering in the unknowing subconscious and then inexplicably coming to the fore.*”³⁷⁸ Likewise, the successful EMED defense of Richard Herrin detailed in psychiatrist Willard Gaylin’s account of the 1977 murder of Bonnie Garland was based entirely on a Freudian psychoanalytic model which Gaylin describes most pointedly in a chapter entitled, *A New Testament: Psychoanalysis*.³⁷⁹ Other Freudian theories also show parallels with the underlying foundation of the EMED defense.³⁸⁰

374. See *supra* note 192 and accompanying text.

375. See, e.g., *McClellan v. Commonwealth*, 715 S.W.2d 464, 468–69 (Ky. 1986) (“Extreme emotional disturbance may reasonably be defined as follows: Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.”); *People v. Casassa*, 404 N.E.2d 1310, 1315–17 (N.Y. 1980) (referring to unconscious emotional factors underlying extreme mental and emotional disturbance); see also *infra* notes 376–79 and accompanying text. For a discussion of theoretical and conceptual issues, see EHRENZWEIG, *supra* note 210, at 210–41.

376. 347 N.E.2d 898 (N.Y. 1976).

377. *Id.* at 908.

378. *Id.* (emphasis added). A comparison between *Casassa* and *Patterson* suggests that the *Patterson* definition of the external stressor that gives rise to the defendant’s disturbance is more Freudian because its focus is on the degree of the defendant’s reaction to it rather than on the quality of the stressor itself: “[E]xtreme’ . . . requires disturbance excessive and violent in its effect upon the defendant experiencing it.” *Patterson*, 347 N.E.2d at 901. The *Casassa* court concentrates more on the external stressor itself and whether or not it is reasonable that the defendant had a reaction to it that led to a killing act. *Casassa*, 404 N.E.2d at 1315–17. There are also several Freudian theories that surface when considering the delay between the trauma and the killing act. According to Freud, for example, neurotics do not successfully repress the “incompatible wish.” They have “driven it out of consciousness and out of memory.” SIGMUND FREUD, *Five Lectures on Psychoanalysis (Second Lecture)*, in 11 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 9, 27 (James Strachey trans., 1957). However, “the repressed wishful impulse continues to exist in the unconscious. It is on the look-out for an opportunity of being activated, and when that happens it succeeds in sending into consciousness a disguised and unrecognizable substitute for what had been repressed, and to this there soon become attached the same feelings of unpleasure which it was hoped had been saved by the repression.” *Id.* The *Patterson* court used similar reasoning. See *Patterson*, 347 N.E.2d at 908.

379. WILLARD GAYLIN, THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE 153–202 (1982); see also *id.* at 213–41 (discussing the psychoanalytic rationales for Richard Herrin’s conscious and unconscious motivations in killing Bonnie Garland in the context of both the insanity defense and the extreme mental and emotional disturbance defense).

380. Freud’s theory of the “pleasure principle” appears consistent with the EMED defense. For example, according to Freud, humans respond to stimuli in idiosyncratic proportion to the amount of

E. Mistakes and Other Concessions to What Individuals Believe

The EMED defense represents only one of a range of defenses that the MPC individualizes for defendants. For example, the MPC allows defendants to make mistakes of fact and, under certain circumstances, mistakes of law that can negate the defendant's mens rea.³⁸¹ While the MPC's Commentaries cite Glanville Williams's treatise to show that the mistake doctrine "is not a new rule,"³⁸² other MPC provisions with a subjectivist approach deviated more substantially from common law precedent. For instance, the MPC goes against the grain of the common law by disallowing the defense of impossibility for attempts;³⁸³ instead, the MPC emphasizes the "circumstances as the actor believes them to be rather than as they actually exist."³⁸⁴ The Commentaries note that Williams supports such an approach.³⁸⁵ Likewise, the MPC's Commentaries stress that the MPC's treatment of all the major provisions concerning "General Principles of Justification"³⁸⁶—which "make the test of justification the actor's belief in the necessity for using force"—exists "in marked contrast to many of the formulations preceding the Model Code."³⁸⁷ The pre-MPC tests "require not only a belief in the justifying circumstances but a belief based upon reasonable grounds."³⁸⁸

In general, much of the MPC's doctrine³⁸⁹ reveals a consistent subjectivist trend that accentuates the defendant's belief in addition to the defendant's conduct and the objective circumstances of the crime (and some may claim at the expense of "conduct that is externally equivocal").³⁹⁰ The MPC's mens rea provisions and innovative features also reflect an earlier psychology that appears to be far less applicable to criminal law cases today. This situation prompts concern and questions. Is there a newer science that can support a viable paradigm shift? Can this new science fit within a Freudian framework? The next part of this arti-

pain or pleasure the stimuli cause. That response, however, is not a qualitative function of the stimuli; rather, it is proportionate to the mode of operation of the system. SIGMUND FREUD, *Beyond the Pleasure Principle*, 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 7, 29 (James Strachey trans., 1955). Freud describes a protective barrier against stimuli from the outer world although some "excitations from outside" are traumatic or strong enough to "break through" the barrier or "protective shield." *Id.* This "external trauma is bound to provoke a disturbance on a large scale in the functioning of the organism's energy and to set in motion every possible defensive measure." *Id.* Freud writes that after this trauma occurs, "the mental apparatus" is "flooded with large amounts of stimulus" and the goal is to bind and control it. *Id.* at 29–30.

381. MODEL PENAL CODE § 2.04 at 267 (Official Draft and Revised Comments 1985).

382. *Id.* cmt. 1 at 270–71 n.3 (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 173 (2d ed. 1961)).

383. *Id.* § 5.01(1)(a) at 295; *id.* § 5.01 cmt. 3 at 307–20.

384. *Id.* explanatory note at 297.

385. *Id.* cmt. 3 at 318 (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 634 (2d ed. 1961)).

386. *Id.* § 3.09 cmt. 2 at 150 (citing §§ 3.03–3.08).

387. *Id.*

388. *Id.*

389. See generally DRESSLER, *supra* note 81.

390. MODEL PENAL CODE § 5.01 cmt. 3 at 319 (Official Draft and Revised Comments 1985).

cle examines these questions in the context of modern discoveries about consciousness and conscious will.

V. THE NEW RESEARCH ON CONSCIOUS WILL

Some commentators insist that the advent of “objectifiable, biological” psychiatry has radically changed the dominance of psychoanalysis, and diminished beliefs in the effect of early life experiences on personality.³⁹¹ While many clinicians still rely on psychoanalysis, the therapy is now used mostly in combination with other kinds of treatment programs that may include medications.³⁹² Without question, psychoanalysts have lost their hold on leadership positions in academic departments.³⁹³ Likewise, the DSM-IV³⁹⁴ and leading psychiatric journals³⁹⁵ now predominantly stress the biological component of mental illness. For example, although Freud concentrated nearly exclusively on the unconscious, modern biological psychiatry basically assumes “a world of all consciousness” by promoting new theories and procedures that “often claim to denature the unconscious entirely.”³⁹⁶

Others contend, however, that the existence of this trend may not be as real as it seems,³⁹⁷ nor would it be entirely beneficial even if it were real, despite the difficulties posed by psychoanalytic influences. Rather, biological psychiatry “needs to be read socially, environmentally, histori-

391. ELLIOT S. VALENSTEIN, *BLAMING THE BRAIN: THE TRUTH ABOUT DRUGS AND MENTAL HEALTH* 1 (1998) (contending that modern psychiatry has spurred a shift “from blaming the mother to blaming the brain”); see also Bruce E. Wexler, *Cerebral Laterality and Psychiatry: A Review of the Literature*, 137 AM. J. PSYCHIATRY 279, 279 (1980) (“Until recently, students of brain function have been hampered by the lack of conceptual or investigative approaches to the brain independent of theories of the mind.”). Whereas modern psychologists have criticized Freud for his emphasis on an individual’s biological orientation, they were referring to Freud’s focus on particular kinds of biological issues—such as an individual’s instincts (the need for food, sex, self preservation, etc.), which are inherited, or Freud’s notion of an individual’s “latency period,” what he considered the inherited tendency for an individual’s sex drive to decrease substantially around age seven and then return in full force at puberty. KAHN, *supra* note 108, at 4.

392. John F. Greden & Jorge I. Casariego, *Controversies in Psychiatric Education: A Survey of Residents’ Attitudes*, 132 AM. J. PSYCHIATRY 270, 270–74 (1975); Gerald L. Klerman et al., *A Debate on DSM-III*, 141 AM. J. PSYCHIATRY 539, 539–42 (1984); Arnold M. Ludwig & Ekkehard Othmer, *The Medical Basis of Psychiatry*, 134 AM. J. PSYCHIATRY 1087, 1087–92 (1977); see also EDWARD SHORTER, *A HISTORY OF PSYCHIATRY: FROM THE ERA OF THE ASYLUM TO THE AGE OF PROZAC* vii (1997) (noting that in the second half of the twentieth century, “a revolution took place in psychiatry” whereby the profession moved from Freud to Prozac, and “[o]ld verities about unconscious conflicts as the cause of mental illness were pitched out and the spotlight of research turned on the brain itself”).

393. See generally DAVID HEALY, *THE ANTIDEPRESSANT ERA* (1997) (discussing the radical changes in world psychiatry with the introduction of drug regimes).

394. Gerald Grob, *The Origins of DSM-I*, 148 AM. J. PSYCHIATRY 421, 421–31 (1991); Klerman et al., *supra* note 392, at 539.

395. See METZL, *supra* note 34, at 2 (referring to, as examples, the AMERICAN JOURNAL OF PSYCHIATRY, ARCHIVES OF GENERAL PSYCHIATRY, and BIOLOGICAL PSYCHIATRY).

396. *Id.* at 24.

397. *Id.* at 4.

cally, and, indeed, psychoanalytically” so that it can be correctly understood and past confusions or inaccuracies are not perpetuated.³⁹⁸

In terms of the criminal law, this article endorses both sides of this debate. To the extent that Freudian theories emphasize the unconscious, their applicability is limited when it comes to interpreting behavior that the criminal law deems conscious. Freud’s theory of the unconscious also attempts to explain human psychological motivations through a range of concepts that have not always been verified empirically—repressed trauma and memories, resistance, subpersonalities (id, ego, superego), psychic energies, primitive drives, as well as a secret mental life often revealed by way of dreams, mistakes, and symptoms.³⁹⁹

The new science of consciousness and conscious will shows a striking continuity with Freudian theory. For example, the research corroborates that people process much, if not most, information in the central nervous system unconsciously, and that individuals can learn behaviors without self awareness.⁴⁰⁰ Indeed, rather confusingly, the new science still uses the terms “conscious” and “unconscious.” However, the ideas behind these terms have changed fundamentally, demonstrating an unconscious more sophisticated and significant than Freud’s,⁴⁰¹ as the next section explains. Further, in contrast to Freudian theories, this new science can meet key evidentiary standards for admissibility, such as those presented in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁰² Of course, the ongoing surge of consciousness research also better refines our concepts of conscious awareness.

A. *The Scientific Study of Consciousness*

Initially, consciousness was examined philosophically in the context of the mind-body dilemma,⁴⁰³ the Cartesian dualist view that the world is divided into two mutually exclusive parts, the mental and the physical.⁴⁰⁴

398. *Id.* at 6.

399. See *supra* note 287 and accompanying text (providing an overview of a literature critical of the empirical weaknesses of Freudian theory).

400. See STEVEN JOHNSON, *MIND WIDE OPEN: YOUR BRAIN AND THE NEUROSCIENCE OF EVERYDAY LIFE* 64–70 (2004); TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 13 (2002).

401. See WILSON, *supra* note 400, at 1–16 (discussing “Freud’s genius, Freud’s myopia”). As Steven Johnson explains, although “Freudian assumptions about how the mind works remain ubiquitous in our culture—so ubiquitous, in fact, that we seldom even think of their original provenance,” the new mind science “presents us with a new grammar for understanding our minds” which “can get to a level of fluency that will make you a more informed, more self-aware inhabitant of your own head.” JOHNSON, *supra* note 400, at 184.

402. 509 U.S. 579 (1993).

403. See JULIAN JAYNES, *THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND* 3 (1976).

404. In the seventeenth century, René Descartes and Galileo Galilei drew clear distinctions between the physical reality depicted by science and the mental reality of the soul, which they believed was beyond the purview of scientific research. This dualist perspective aided scientific research at the time because religious authorities had ceased doubting scientists’ motives and because the physical

A number of commentators have claimed that the criminal law's concepts of mens rea and actus reus reflect this mind-body dualism and that the divide causes confusion.⁴⁰⁵ While there is merit to this argument, the criminal law's elemental form of dualism scarcely resembles the distinction originally brought forth by Descartes.⁴⁰⁶ Also, the mens rea/actus reus division coincides with new research on how we experience conscious will.⁴⁰⁷

At various points in time, especially from 1920 to 1960, the study of consciousness nearly ceased.⁴⁰⁸ The major culprit was behaviorism, which contended that consciousness was not a worthy topic because all conduct could be reduced to reflexes and conditioned responses.⁴⁰⁹ Almost simultaneously, Freudian theory's immense impact⁴¹⁰ reclaimed the subject, but with its own conceptual take.⁴¹¹ Empirical investigations of consciousness outside of psychoanalysis remained virtually nonexistent.⁴¹² Starting in the 1970s, the growing disappointment with then-current psychological theories introduced an era of research that acknowledged the reality and significance of conscious and unconscious processes but dispensed with Freudian concepts and theories.⁴¹³

world was mathematically accessible in ways that the mind was not. However, in the twentieth century, this dualism proved problematic because it perpetuated the view that consciousness and other mental phenomena are outside the physical world and therefore beyond the reach of natural science. See JOHN SEARLE, *THE MYSTERY OF CONSCIOUSNESS* 6 (1997) [hereinafter SEARLE, *MYSTERY*]; see also JOHN SEARLE, *MINDS, BRAINS, AND SCIENCE* 10 (1984) [hereinafter SEARLE, *MINDS*] (noting that because of the influence of Descartes' seventeenth century philosophy, "we have an inherited cultural resistance to treating the conscious mind as a biological phenomenon like any other"). There are still modern-day dualists. Roger Penrose, for example, believes there are three worlds. In addition to the physical and mental worlds, there is a world of abstract objects, such as numbers. See generally ROGER PENROSE, *SHADOWS OF THE MIND: A SEARCH FOR THE MISSING SCIENCE OF CONSCIOUSNESS* (1994). For an excellent overview of the historical and modern philosophical foundations of consciousness, see M.R. BENNETT & P.M.S. HACKER, *PHILOSOPHICAL FOUNDATIONS OF NEUROSCIENCE* (2003).

405. Pillsbury, *supra* note 23, at 133–35.

406. See *supra* note 404 and accompanying text. For an enlightening and modern philosophical account of the mind-body problem, see NICHOLAS HUMPHREY, *THE MIND MADE FLESH: ESSAYS FROM THE FRONTIERS OF PSYCHOLOGY AND EVOLUTION* 90–114 (2002).

407. See *infra* Part V.B.

408. See JAYNES, *supra* note 403, at 14–15.

409. *Id.*; see also BAARS, *supra* note 147, at 7 (noting that "[b]ehaviorism utterly denied that conscious experience was a legitimate scientific subject").

410. See *supra* Part II.C.

411. Of course, a long philosophical history preceded and influenced Freud. See *supra* Part II.A. However, the eventual acceptance of Freud's views provided the foundation for current experimental work demonstrating that individuals can engage in a wide range of sophisticated mental processing without being aware of it. See Daniel C. Dennett, *Consciousness*, in *THE OXFORD COMPANION TO THE MIND* 160, 162 (Richard L. Gregory ed., 1987).

412. See *supra* Part II.E.

413. See generally Denno, *supra* note 34 (reviewing in detail the research on consciousness); see also JEAN-PIERRE CHANGEUX, *THE PHYSIOLOGY OF TRUTH: NEUROSCIENCE AND HUMAN KNOWLEDGE* 71–110 (M.B. DeBevoise trans., 2004) (examining the modern philosophical and empirical literature on consciousness).

While there is much controversy over how,⁴¹⁴ or even whether, consciousness should be defined,⁴¹⁵ for the sake of simplicity this article uses a conglomeration of some of the more common perspectives⁴¹⁶ to reach a working definition. Generally, consciousness “refers to the sum of a person’s thoughts, feelings, and sensations, as well as the everyday circumstances and culture in which those thoughts, feelings, and sensations are formed.”⁴¹⁷

These modern, non-Freudian, concepts of conscious and unconscious processes are now established in science, drawing from a wealth of empirical research on how people perceive, remember, feel, and process information.⁴¹⁸ Of course, as might be expected in science, there is debate and disagreement about this research.⁴¹⁹ But one idea stands out: the boundaries between our conscious and unconscious are permeable, dynamic, and interactive, and there is no valid scientific support for a sharp dichotomy.⁴²⁰

A range of studies supports the interaction between the conscious and unconscious. In the 1960s, for example, Benjamin Libet and his colleagues began a series of experiments to examine the process by which people make decisions about willed movements—that is, when individuals consciously believe that they have committed voluntary acts. These

414. See DANIEL C. DENNETT, *CONSCIOUSNESS EXPLAINED* 21 (1991); see also JAYNES, *supra* note 403, at 1 (“Few questions have endured longer or traversed a more perplexing history than this, the problem of consciousness and its place in nature.”).

415. See TAYLOR, *supra* note 320, at 18; see also Francis Crick & Christof Koch, *Toward a Neurobiological Theory of Consciousness*, 2 *SEMINARS IN THE NEUROSCIENCES* 263, 264 (1990) (“Until we understand the problem [of consciousness] much better, any attempt at a formal definition is likely to be either misleading or overly restrictive, or both.”); Dennett, *supra* note 411, at 160 (noting that “[s]ome have gone so far as to deny that there is anything for the term [consciousness] to name”).

416. This article need not become embroiled in the debate about defining consciousness; the discussion does not attempt to study the mechanisms underlying consciousness but rather how the law can incorporate our current knowledge of it. See, e.g., SEARLE, *MYSTERY*, *supra* note 404, at 5 (commenting that “if we distinguish between analytic definitions [of consciousness], which aim to analyze the underlying essence of a phenomenon, and commonsense definitions, which just identify what we are talking about, it does not seem to me at all difficult to give a commonsense definition of the term”).

417. Denno, *supra* note 34, at 273–74; see also DAVID J. CHALMERS, *THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY* 4 (1996). These experiences of consciousness are enormously far ranging: visual, auditory, tactile, olfactory, taste, temperature (hot and cold), bodily sensations, mental imagery, conscious thought, emotions, and sense of self. CHALMERS, *supra*, at 6–10; Dennett, *supra* note 411, at 160–64 (referring to the subjective quality of experience). According to David Chalmers, awareness (“a state wherein we have access to some information, and can use that information in the control of behavior”), is “a psychological property associated with experience itself, or with phenomenal consciousness.” CHALMERS, *supra*, at 28; see also NICHOLAS HUMPHREY, *THE INNER EYE* 52–53 (1986) (discussing the range of definitions of consciousness); JAYNES, *supra* note 403, at 2 (referring to “the difference between what others see of us and our sense of our inner selves and the deep feelings that sustain it”). As Thomas Nagel has explained in a widely quoted phrase, “the fact that an organism has conscious experience at all means, basically, that there is something it is like to be that organism.” Thomas Nagel, *What Is It Like to Be a Bat?*, 83 *PHIL. REV.* 435, 436 (1974).

418. See generally Denno, *supra* note 34, at 308–37 (reviewing the consciousness research).

419. *Id.* at 317–20 (examining the debates in the consciousness research).

420. *Id.* at 337 (demonstrating the overwhelming consensus within a wide range of disciplines that consciousness exists in degrees).

experiments can be illustrated by a simplified description of Libet's early study of human subjects engaging in random hand movements while Libet measured their electrical brain activity.⁴²¹ EEG recordings, which permit these measurements to be carried out with almost millisecond precision, indicated that the brain impulses associated with the subjects' movements began *before* the subjects reported a conscious decision to move.⁴²² Specifically, the motor-planning areas of subjects' brains were activated one third of a second—or about 300 to 350 milliseconds—prior to the subjects reporting awareness of their intent to act. Libet and others thus theorized that a subject's decision to move a finger or a wrist must have originated unconsciously and only later appeared to that person as a conscious desire.⁴²³

Libet's ongoing experiments and publications generated immense public interest. His research implied that people could not control their own thoughts.⁴²⁴ Further, if uncontrollable brain functions dictated mundane behaviors such as flexing a wrist, what about more complex actions such as firing a gun? For this article's purposes, the newly discovered role of the unconscious called into question two of the most fundamental tenets of criminal law—voluntary acts and *mens rea*.

Libet tempered his conclusions, however, by observing that the conscious mind still had an opportunity to block a subject's movements before they actually occurred. His research revealed the existence of a 150 to 200 millisecond period during which an individual could consciously veto the unconscious mind's proposed movement. This is the amount of time that passes after an individual becomes consciously aware of the intention to act, but before that individual moves.⁴²⁵ Therefore, in the eyes of one researcher, "what consciousness actually gives us is a veto—not so much freewill, as free-won't."⁴²⁶

421. See THE VOLITIONAL BRAIN: TOWARDS A NEUROSCIENCE OF FREE WILL at ix–xxi (Benjamin Libet et al. eds., 1999) [hereinafter VOLITIONAL BRAIN]; Benjamin Libet, *The Neural Time Factor in Conscious and Unconscious Events*, in EXPERIMENTAL AND THEORETICAL STUDIES OF CONSCIOUSNESS 123, 124–35 (Gregory R. Bock & Joan Marsh eds., 1993); Benjamin Libet, *Are the Mental Experiences of Will and Self-Control Significant for the Performance of a Voluntary Act?*, 10 BEHAV. & BRAIN SCI. 783, 783–85 (1987) [hereinafter Libet, *Mental Experiences*]; Benjamin Libet, *Cortical Activation in Conscious and Unconscious Experience*, 9 PERSP. IN BIOLOGY & MED. 77, 79–83 (1965); Benjamin Libet et al., *Production of Threshold Levels of Conscious Sensation by Electrical Stimulation of Human Somatosensory Cortex*, 27 J. NEUROPHYSIOLOGY 546, 546–78 (1964); Benjamin Libet, *The Timing of a Subjective Experience*, 12 BEHAV. & BRAIN SCI. 183, 183–84 (1989) [hereinafter Libet, *Timing*]; Benjamin Libet, *Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action*, 8 BEHAV. & BRAIN SCI. 529, 530–38 (1985) [hereinafter Libet, *Unconscious*]. A collection of Libet's research on timing can be found in BENJAMIN LIBET, NEUROPHYSIOLOGY OF CONSCIOUSNESS: SELECTED PAPERS AND NEW ESSAYS (1993).

422. Libet, *Unconscious*, *supra* note 421, at 530–36.

423. *Id.* at 530–39.

424. JOHN MCCRONE, GOING INSIDE: A TOUR ROUND A SINGLE MOMENT OF CONSCIOUSNESS 133 (1999).

425. Libet, *Unconscious*, *supra* note 421, at 537.

426. RITA CARTER, CONSCIOUSNESS 86 (2002). According to Libet, such results suggest only that the concepts of free will and individuality need to be revised, not rejected. See Libet, *Timing*, *supra* note 421, at 183. While the processes linked to free will may not lead to an individual's initiation of a

Numerous experiments have replicated Libet's results over the decades, using behaviors more complex than simple hand motions.⁴²⁷ Nonetheless, interpretations and acceptance of Libet's results are varied.⁴²⁸ Early assertions that his findings suggest a "binary" state in which conscious awareness "clicked on" after one third of a second⁴²⁹ have given way to the reigning theory of a gradually evolving consciousness. According to this latter concept, a person's thought process begins with the unconscious and then moves through pre-conscious states to finally reach a settled state of consciousness. Libet's experiments are thus considered to represent a single complete brain reaction, rather than two separate modes of processing.⁴³⁰

With respect to criminal law doctrine, Libet's research confirms that there appears to be no sound scientific basis for the MPC's dichotomy between voluntary and involuntary behavior. The issue of consciousness is far more intricate and subjective than the criminal law treats it.

B. *The Meaning and Function of Conscious Will*

Within recent years, consciousness research has taken a broader focus on how individuals perceive intentionality and their conscious will, concerns that are ripe with applicability to the criminal law. Some areas of psychology presume that scientists could explain all human behavior if they were privy to every individual's internal makeup (e.g., physiology, neuroanatomy, etc.) and experiences (e.g., memory, culture, etc.).⁴³¹ A belief in conscious will, on the other hand, suggests that people truly make their own decisions.⁴³² This new scientific research attempts to

voluntary act, they will contribute to selecting and controlling volitional results. See VOLITIONAL BRAIN, *supra* note 421, at xv–xvii (discussing neuroscientific theories of free will); Libet, *Mental Experiences*, *supra* note 421, at 783–86 (clarifying a theory of free will in response to criticisms of Libet's research); see also Bob Holmes, *Irresistible Illusions*, 159 *NEW SCIENTIST* 32, 35 (1998) (quoting neurologist and psychologist Vilayanar Ramachandran about the concept of "free won't").

427. MCCRONE, *supra* note 424, at 120–64.

428. All of this research spurs chicken-and-egg debates in the neurosciences, particularly when an individual's emotions are at issue. The debates center on what comes first: conscious awareness of the emotion (for example, fear), or the autonomic processes that accompany it, such as a pounding heart or increased adrenalin. See Libet, *Mental Experiences*, *supra* note 421, at 783; Libet, *Timing*, *supra* note 421, at 183. These debates were originally recognized by William James. See William James, *On Some Omissions of Introspective Psychology*, 9 *MIND* 1, 2–3 (1884).

429. MCCRONE, *supra* note 424, at 134.

430. *Id.* at 134–39.

431. DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* 1–2 (2002).

432. *Id.* at 2. The concepts of will and intentionality were initially discussed in philosophical terms by Aristotle when he asserted, for example, that "a man acts unjustly if he has hurt another of deliberate purpose." ARISTOTLE, *supra* note 65, at 128. Franz Brentano readdressed the terms in 1874 by distinguishing between mental acts and mental contents. According to Brentano, there is intentional content in all mental acts, including desires, hopes, expectations, and memories. See FRANZ BRENTANO, *PSYCHOLOGY FROM AN EMPIRICAL STANDPOINT* 138–53 (Oskar Kraus & Linda L. McAlister eds., 1st English ed., Antos C. Rancurello et al. trans., Routledge & Kegan Paul Ltd. (1973) (1874) (originally published in German as "*Psychologie vom empirischen Standpunkt*"). Of course, intentionality is an important component of modern efforts to characterize consciousness. See SEARLE, *MINDS*, *supra* note 404, at 16 (defining "intentionality" as "the feature by which our mental

confront these quite conflicting perspectives by indicating that people's belief in their own conscious will may not always comport with the reality of their own behavior. In other words, conscious will "is an illusion in the sense that the experience of consciously willing an action is not a direct indication that the conscious thought has caused the action."⁴³³

A discussion of this kind of topic prompts thoughts about the free will versus determinism debate.⁴³⁴ While this article does not revisit this frequently examined issue⁴³⁵ in detail, the debate certainly warrants some attention because Part VI's recommendations presume an acceptance of free will. Likewise, this article believes that simplistic summaries of complex mind sciences that are used to support so-called deterministic accounts of human behavior have no place in science nor in law. Scientists such as Libet and Daniel Wegner, whose research is relied on heavily in this Part,⁴³⁶ have both been recipients of the deterministic label, which they have both promptly dismissed. Instead, these scientists offer their own models of free will that incorporate their neuroscientific discoveries.⁴³⁷

This article uses the science of consciousness and conscious will to criticize reductionist and behaviorist views of mens rea, ranging from Barbara Wootton's proposals⁴³⁸ to an unfortunate modern jurisprudence that regards new techniques (such as DNA collection) as opportunities

states are directed at, or about, or refer to, or are of objects and states of affairs in the world other than themselves").

433. WEGNER, *supra* note 431, at 2 (emphasis omitted); *see also* Daniel M. Wegner & Thalia Wheatley, *Apparent Mental Causation: Sources of the Experience of Will*, 54 AM. PSYCHOLOGIST 480, 480 (1999) (discussing an experiment showing that individuals "can arrive at the mistaken belief that they have intentionally caused an action that in fact they were forced to perform when they are simply led to think about the action just before its occurrence"; therefore, the actual causal mechanisms of behavior may be present in the unconscious, rather than conscious, mind).

434. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 90-112 (1968); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74-75 (1968).

435. Thomas A. Green, *Freedom and Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1915 (1995) ("Enough has been written from a philosophical perspective on the relationship between free will and the law that it is not easy to justify yet another such undertaking."); *see also* Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?* 137 U. PA. L. REV. 615 (1988) (discussing a broad range of criminal defenses within the context of the free will versus determinism debate).

436. This Part relies heavily on Wegner's book, *The Illusion of Conscious Will*, to provide a review of the most recent research on conscious will. *See* WEGNER, *supra* note 431. Some individuals have criticized the book's lack of philosophical debate about the existence of free will. *See* John Horgan, *More Than Good Intentions: Holding Fast to Faith in Free Will*, N.Y. TIMES, Dec. 31, 2002, at F3. That said, *The Illusion of Conscious Will* has received excellent reviews by the scientific and philosophical communities. Also, there has been no indication that there are problems with the reliability and validity of the research that Wegner examines, which is this article's focus. *See* James Kennedy, *We Don't Think the Way We Think We Think*, 296 SCIENCE 1973, 1973 (2002); Eddy Nahmias, *When Consciousness Matters: A Critical Review of Daniel Wegner's The Illusion of Conscious Will*, 15 PHIL. PSYCHOL. 527, 527-39 (2002).

437. For an insightful article discussing the free will issue in the context of both Libet's and Wegner's viewpoints, *see* Bruce N. Waller, *Empirical Free Will and the Ethics of Moral Responsibility*, 37 J. VALUE INQUIRY 533 (2004); *see also supra* note 426 (summarizing Libet's support for a belief in free will).

438. *See supra* notes 337-39 and accompanying text.

to downplay the criminal law's culpability requirements. Free will and moral responsibility may not be inextricably linked in the ways that many theorists such as Willard Gaylin⁴³⁹ have assumed;⁴⁴⁰ yet philosophers and ethicists surely can (and do) inform the criminal law about the moral role of the new neuroscience, along with many of those (like Libet and Wegner) who conduct the research. Likewise, the new consciousness research gives us a more precise way to benefit from the moral insights that Freudian theory contributed to the law because it puts the law's focus back on the defendant's mental state.

1. *The Scope and Definition of Conscious Will*

Typically, conscious will is viewed in one of two ways—either as the feeling of voluntariness when people perform an action, or the causal link between people's minds and their actions.⁴⁴¹ While these definitions of conscious will are often assumed to be synonymous, research suggests that they are distinct and that their differences are significant.⁴⁴² For example, sometimes people's actions do not feel internally willed, such as when they engage in an automatic reflex action or commit a criminal act in the midst of an epileptic seizure.⁴⁴³

In general, there are four basic conditions of human action.⁴⁴⁴ Normal voluntary action occurs when a person commits an action and has the feeling of committing that action. In contrast, normal inaction takes place when a person does not commit an action and has no feeling of committing that action.⁴⁴⁵ Automatism, or one variant of unconsciousness, exists when a person commits an action but has no feeling of committing that action. The illusion of control comes about when a person does not commit an action but has a feeling of committing an action.⁴⁴⁶

Wegner maintains that all voluntary action is an illusion (a claim that is open to considerable debate).⁴⁴⁷ Yet Wegner makes a special dis-

439. See *supra* note 379 and accompanying text.

440. See Waller, *supra* note 437, at 533–42 (questioning the tight link between free will and moral responsibility).

441. WEGNER, *supra* note 431, at 3.

442. *Id.*; see also Waller, *supra* note 437, at 539–41 (comparing views of conscious will).

443. See, e.g., Chris Frith, *Ownership and Agency*, in CARTER, *supra* note 426, at 227 (discussing “how fragile this sense of ownership and agency can be”). The experience of will also depends upon the timely occurrence of thought prior to action. For example, thought that occurs far in advance of action is not likely to be seen as causal—thinking about dumping soup on your boss's head one day, and not thinking about it again until doing it several days later is not likely to be regarded as willful. Wegner & Wheatley, *supra* note 433, at 483–84.

444. WEGNER, *supra* note 431, at 8–9.

445. *Id.*

446. *Id.*

447. Libet has taken a significant role in criticizing Wegner's work, particularly Wegner's discounting of an individual's ability to veto behavior. See, e.g., BENJAMIN LIBET, *MIND TIME: THE TEMPORAL FACTOR IN CONSCIOUSNESS* 144 (2004) (emphasizing that “nowhere in his book does Wegner discuss the veto phenomenon and its provision of a potential causative role for conscious will” and noting that the “role would be one of controlling the final appearance of a voluntary act, even if

inction for episodes when individuals think they are in control of something but in fact are not; for example, they think they are playing a video game when in actuality the pre-game demo is in operation.⁴⁴⁸ Similarly, individuals claim no experience of will when performing such “motor automatism” as Ouija-board spelling, pendulum divining, and automatic writing.⁴⁴⁹

Human beings are frequently erroneous perceivers of their own actions. Under certain circumstances, they will assume responsibility for conduct over which they have no control.⁴⁵⁰ This effect can be achieved through trickery or social pressure, as two psychologists illustrated in a recent study showing that subjects falsely accused of damaging a computer by pressing the wrong key in a mock test of their laboratory reaction time eventually came to believe that they did in fact “remember” their “crime.”⁴⁵¹ The likelihood that the subjects would sign a confession, feel guilt, and generate facts to support their beliefs was heightened when their alleged computer damage error was “witnessed” by a confederate of the experimenters and the task occurred so quickly the ruse could not be detected.⁴⁵² As a result, scientists “must be careful to distinguish between such *empirical will*—the causality of the person’s conscious thoughts as established by a scientific analysis of their covariation with the person’s behavior—and the *phenomenal will*—the person’s reported experience of will.”⁴⁵³ While people appreciate their own conscious will best because they think they know when they have experienced it, they have far more difficulty assessing conscious will in others.⁴⁵⁴

the voluntary process is initiated unconsciously before conscious will appears”). Likewise, Libet challenges Wegner’s argument that conscious causality is “illusory,” contending that his own findings contradict Wegner’s theory because the veto function of conscious will serves as evidence of an individual’s sense of independent choice and conscious control. *Id.* at 152–54. It is beyond this article’s scope to enter into the Libet-Wegner debate, which is ongoing in the scientific and philosophical literature. Rather, this article accepts both points of view as potential ways to incorporate modern-day notions of consciousness and conscious will into the criminal law.

448. WEGNER, *supra* note 431, at 9–10. For the purposes of this article, “unconsciousness” is included with automatism because the same human condition could apply to both an unconscious state and an automatism. Further, Wegner’s definition of “automatism” would comport with the science of unconsciousness. The notion of an illusion of control was introduced by Ellen Langer nearly thirty years ago to characterize a state of sensation when individuals feel they are engaged in a behavior when they actually are not. *See* Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 311–28 (1975); *see also* ELLEN J. LANGER, *THE PSYCHOLOGY OF CONTROL* 23–134 (1983) (detailing the theory of an “illusion of control”).

449. Wegner & Wheatley, *supra* note 433, at 482.

450. CARTER, *supra* note 426, at 209–45; WEGNER, *supra* note 431, at 10–11; *see, e.g.*, Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125–28 (1996); Helena Matute, *Illusion of Control: Detecting Response-Outcome Independence in Analytic but Not in Naturalistic Conditions*, 7 PSYCHOL. SCI. 289, 289–93 (1996).

451. Kassin & Kiechel, *supra* note 450, at 126–27.

452. *Id.* at 127.

453. WEGNER, *supra* note 431, at 14.

454. Individuals can know directly only their own consciousness; they project whatever consciousness they see in others. HUMPHREY, *supra* note 417, at 86.

It appears that the reason people are more willing to support the idea of conscious will over scientific findings is because of their intuition, which is based on people's understanding of causal agency. People consider themselves and most other living things to be causal agents; accordingly, they view mere objects as things that move only when acted upon.⁴⁵⁵ "The conscious causal agency of human beings is accompanied, in particular, by relevant *intentions, beliefs, desires, and plans.*"⁴⁵⁶ The experience of will comes about when an intention occurs just prior to action. In general, then, people use causal agency as a way of comprehending human behavior.

This attribution of causal agency to the mind is a distinctly human ability. According to the research of Simon Baron-Cohen, for example, every individual possesses an "intentionality detector" that seeks out actions that appear to be willed both in the particular individual as well as in others.⁴⁵⁷ When an individual's detector is absent or damaged, as in the case of autistic individuals, such "mindblindness" can make it difficult for that individual to understand other people's mental states.⁴⁵⁸

Dilemmas in human attribution arise, however, when people miscomprehend some of the causal factors that motivate their own behavior, and therefore believe wrongly that their conscious will always causes their actions. The illusion of consciousness is much like a magician performing what appears to be an easy trick by actually carrying out a complex series of operations (unbeknownst to the audience). Humans like to simplify the process, seeing only the trick (what they think they intend to

455. CARTER, *supra* note 426, at 209–45. For example, in one experiment, subjects were shown a cartoon film of three geometric shapes moving around a square in various directions and at various speeds. Fritz Heider & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 AM. J. PSYCHOL. 243, 244–46 (1944). The majority of the subjects interpreted the film in terms of actions of animated beings, chiefly of persons. Although the movements of the shapes were random, the subjects attributed causal agency to the shapes, and even attributed the shapes with having motives for taking a particular action. *Id.* at 246–59.

456. WEGNER, *supra* note 431, at 17–18. People also have different explanations for the workings of the mind versus the workings of every other object. When explaining things mechanically (for example, the movement of clock hands), "people apply intuitive versions of physics to questions of causality." *Id.* at 21. When using a mental explanatory system, "people apply implicit psychological theories to questions of causality, focusing on issues of conscious thoughts and the experience of will." *Id.* According to Chalmers, however, the "chemical and quantum" aspects of the brain are irrelevant to the production of consciousness. Rather, consciousness arises in terms of the functional organization of the brain. See CHALMERS, *supra* note 417, at 243 (arguing in favor of attributing conscious will to physical objects).

457. See SIMON BARON-COHEN, *MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND* 63 (1995).

458. *Id.*; see also DANIEL C. DENNETT, *THE INTENTIONAL STANCE* 13–33 (1987) (noting the variability in people's abilities to perceive minds and explaining that people assume an "intentional stance" in their view of people's minds that they would not assume when viewing causation between physical objects); OLIVER SACKS, *AN ANTHROPOLOGIST ON MARS: SEVEN PARADOXICAL TALES* 244, 244–96 (1995) (documenting the life of Temple Grandin, a highly accomplished and educated adult with autism, who lacked mind perception but acquired the ability to comprehend human behaviors and emotions through particular effort); Alan M. Leslie, *Pretending and Believing: Issues in the Theory of ToMM*, 50 COGNITION 211, 211–38 (1994) (labeling such skills of intentionality a "Theory-of-Mind-Mechanism").

do and thus do).⁴⁵⁹ In other words, peoples' minds create appearances for them.⁴⁶⁰

2. *Examples of Research on Conscious Will*

According to a host of scientists, the processes that create conscious will are "psychologically and anatomically distinct from the processes whereby mind creates action."⁴⁶¹ Therefore, it is difficult to know whether a person's action was voluntary and purposeful, or involuntary, just from observing that person in the course of performing the act. At the same time, most voluntary actions, or the attempt to engage in voluntary actions, create in people a feeling of doing.⁴⁶²

The research on consciousness and conscious will is vast. This brief overview provides a foundation for analyzing the findings in ways that may better refine the criminal law's concepts of mental state.

A striking facet of conscious will is its strength and consistency. For example, research has shown that some people experience conscious will in a body part that no longer exists. In one study of a phenomenon dubbed "phantom limb,"⁴⁶³ more than ninety-five percent of the adult amputees examined reported that they still felt their amputated limb's presence; further, the percentage of children experiencing phantom limb increased as a function of the age at which their limb was amputated.⁴⁶⁴ This sense of phantom limb can range from involuntary sensations, in instances when amputated individuals think that someone else is trying to

459. WEGNER, *supra* note 431, at 26–27. The underpinnings of a magic trick are the audience's perception of causality. A set of causal events appears to occur in a particular sequence—the magician's assistant lies down on a table, the magician waves a magic wand over the assistant, the assistant levitates. The magician's waving of the wand appears to cause the assistant to levitate; in reality, a concealed, more complex sequence of events makes the assistant appear as if she is levitating. She is actually being held up by a lift hidden behind a special curtain. *See id.*; *see also* Harold H. Kelley, *Magic Tricks: The Management of Causal Attributions*, in *PERSPECTIVES ON ATTRIBUTION RESEARCH AND THEORY: THE BIELEFELD SYMPOSIUM 19* (Dietmar Görlitz ed., 1980).

460. *See* JULIAN PAUL KEENAN ET AL., *THE FACE IN THE MIRROR: THE SEARCH FOR THE ORIGINS OF CONSCIOUSNESS 77–97* (2003); TAYLOR, *supra* note 320, at 13–40; WILSON, *supra* note 400, at 183–221. People sometimes have the sense of being dragged along despite themselves by their internal processes, which, though they come from people's own minds, seem to work against them. "[N]one of us enjoys the thought that what we do depends on processes we do not know; we prefer to attribute our choices to volition, will, or self-control. . . . Perhaps it would be more honest to say, 'My decision was determined by internal forces I do not understand.'" MARVIN MINSKY, *THE SOCIETY OF MIND* 306 (1985) (emphasis omitted). Of course, this view was expressed centuries ago by Benedictus de Spinoza. SPINOZA, *ETHICS* 107 (G.H.R. Parkinson trans., Oxford University Press 2000) ("[H]uman beings think themselves to be free in so far as they are conscious of their volitions and of their appetite, and do not even dream of the causes by which they are led to appetite and to will, since they are ignorant of them.").

461. WEGNER, *supra* note 431, at 29.

462. *See supra* notes 433, 441–49 and accompanying text.

463. *See* S. WEIR MITCHELL, *INJURIES OF NERVES AND THEIR CONSEQUENCES* 348 (Dover Publications 1965) (1872). After the amputation of a limb, patients experience an illusion that the amputated limb still exists and can change position. *Id.* at 348–60.

464. Lynette A. Jones, *Motor Illusions: What Do They Reveal About Proprioception?*, 103 *PSYCHOL. BULL.* 72, 76 (1988).

touch their missing limb, to voluntary sensations, when the amputees believe that they can move their limb or the nonexistent fingers or elbows that are part of it.⁴⁶⁵ It appears that the continued feeling of the presence of the missing limb is dependent not on a nerve/muscle connection, but rather on the sensation of the phantom voluntary movement.⁴⁶⁶ For example, amputees can experience willful movement by watching anyone make physical actions at the location where their own limb should be. If someone is wiggling their fingers where the amputees' hands would be if their hands were present, the amputees will think they are wiggling their own fingers.⁴⁶⁷ This result suggests that people's intentions to lift their limbs creates an experience of conscious will even when there is not actually any action. At the same time, none of the research on phantom limbs has successfully pinpointed the anatomical or physiological cause of why people experience conscious will.⁴⁶⁸

Experiments have also demonstrated how individuals attribute intent to themselves, that is, when people believe that they consciously intended their voluntary actions. In essence, if people are entertaining ideas that are relevant to the action that is caused, they are more likely to feel that they were the person who actually caused the act.⁴⁶⁹ This con-

465. *Id.*

466. See also Marshall Devor, *Phantom Limb Phenomena and Their Neural Mechanism*, in *THE MYTHOMANIAS: THE NATURE OF DECEPTION AND SELF-DECEPTION* 327, 327–55 (Michael S. Myslobodsky ed., 1997); W.R. Henderson & G.E. Smyth, *Phantom Limbs*, 11 *J. NEUROLOGY NEUROSURGERY & PSYCHIATRY* 88, 88–112 (1948).

467. See generally V.S. RAMACHANDRAN & SANDRA BLAKESLEE, *PHANTOMS IN THE BRAIN: PROBING THE MYSTERIES OF THE HUMAN MIND* (1998); V.S. Ramachandran et al., *Illusions of Body Image: What They Reveal About Human Nature*, in *THE MIND-BRAIN CONTINUUM: SENSORY PROCESSES* 29, 29–60 (Rodolfo Llinás & Patricia S. Churchland eds., 1996); V.S. Ramachandran & D. Rogers-Ramachandran, *Synaesthesia in Phantom Limbs Induced with Mirrors*, in 263 *PROCEEDINGS OF THE ROYAL SOCIETY, LONDON* 377, 377–86 (1996).

468. WEGNER, *supra* note 431, at 44. The full implication of attempts to locate conscious and unconscious processes is perhaps best illustrated in studies of individuals suffering from anosognosia. See RAMACHANDRAN & BLAKESLEE, *supra* note 467, at 127–57. Occasionally, anosognosia results when there is stroke damage to the right side of an individual's brain, which leaves the individual paralyzed on the left side of the body. *Id.* at 127–28. Although the paralysis is obvious, anosognosics, who are totally sane and rational, insist that their lifeless limbs are functional. *Id.*

469. CARTER, *supra* note 426, at 209–45; WEGNER, *supra* note 431, at 63–64; Frith, *supra* note 443, at 227. A series of experiments by Albert Edward Michotte suggest that most impressions of causality are simply a matter of perception. A. MICHOTTE, *THE PERCEPTION OF CAUSALITY* 18–26 (T.R. Miles & Elaine Miles trans., Basic Books 1963). Subjects were shown a white screen across which they were told that two square objects (*A* and *B*) would move in certain patterns. In one experiment, square *A* moves towards square *B* and stops when it has reached *B*. *B* moves off at a slower speed. *Id.* at 18–22. Most observers have the impression that *A* causes *B* to move; only a small number of observers perceived that the movement of *B* was unrelated to the movement of *A* and had a separate cause. *Id.* at 22–26. According to Michotte, the belief that people have an active will or inner freedom which causes their actions is also only a matter of perception. The belief is explained by people's ability to foresee the result of an act before they carry out the act and by a specific feeling of inner activity or of willing the action. *Id.* According to the renowned psychologist Leon Festinger, post-action justification is a central phenomena of cognitive dissonance; people conform their attitudes to believe an act was willful even when the act was unintended. LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1–31 (1957). The experience of conscious will may also depend on the perception of contingency between the act and the outcome. Lauren B. Alloy & Naomi Tabachnik, *Assessment of*

cept of causal agency originated as early as the turn of the twentieth century. In 1899, for example, Theodor Ziehen proposed that a person's sense of causal agency is yielded when they think of themselves before the action occurs.⁴⁷⁰

Later empirical research established that the sequence of relevant thoughts before the action will affect an individual's experience of conscious will. Individuals are more likely to understand their thoughts as causal when they process relevant thoughts at an appropriate interval before the commission of the act. In other words, people develop the feeling of acting when they believe that their own thoughts caused the action.⁴⁷¹ These perceptions may not reflect reality, however. "This uncertainty in causal inference means that no matter how much we are convinced that our thoughts cause our actions, it is still true that both thought and action could be caused by something else that remains unobserved, leaving us to draw an incorrect causal conclusion."⁴⁷² Regardless, people feel a sense of will when they think that their conscious intention has caused the voluntary action they find themselves doing.⁴⁷³

Covariation by Humans and Animals: The Joint Influence of Prior Expectations and Current Situational Information, 91 *PSYCHOL. REV.* 112, 112–41 (1984).

470. THEODOR ZIEHEN, INTRODUCTION TO *PHYSIOLOGICAL PSYCHOLOGY* 293–305 (C.C. Van Liew & Otto W. Beyer trans., MacMillan Co. 3d ed. 1899).

471. Self attention is associated with the perceived causation of action. In an experiment, subjects were asked to decide who was responsible for a hypothetical event—for example, that they were running down a hotel corridor and bumped into a housekeeper. Subjects who were more self aware were more likely to assign causality to themselves. Self-consciousness was manipulated by having the subjects sit facing a mirror. SHELLEY DUVAL & ROBERT A. WICKLUND, *A THEORY OF OBJECTIVE SELF AWARENESS* 187–206 (1972). Having subjects watch a video image of themselves or listen to their recorded voice also enhances causal attribution to oneself. Frederick X. Gibbons, *Self-Attention and Behavior: A Review and Theoretical Update*, in 23 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 249, 254–56 (Mark P. Zanna ed., 1990).

472. WEGNER, *supra* note 431, at 66; *see also* JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 130 (1983) (“[I]t is always possible that something else might actually be causing the bodily movement we think the experience [of acting] is causing. It is always possible that I might think I am raising my arm when in fact some other cause is raising it. So there is nothing in the experience of acting that actually guarantees that it is causally effective.”).

473. These kinds of mechanisms do not occur without qualification. In general, there are three primary requirements for the experience of conscious will: priority, consistency, and exclusivity. WEGNER, *supra* note 431, at 69. First, thought should precede the action and do so in a timely manner. *See* ALAN BADDELEY, *WORKING MEMORY* 4–8 (1986) (concluding that individuals can mentally retain a thought for purposes of recall for no longer than about thirty seconds and that if significant intervening events occur, retention time is even shorter); FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 112–14 (1958) (noting that a thought experienced for more than a few seconds before the commission of an act will probably not be linked as a causal unit); MICHOTTE, *supra* note 469, at 231–52 (concluding that, after an investigation of the phenomenology of causality (or what causation looks like), for something to be perceived as the cause of something else, an event has to occur just before the effect); Wegner & Wheatley, *supra* note 433, at 482 (demonstrating with Ouija board experiments that people can be led to feel that they have performed a willful action when in fact they have done nothing). Second, the thought should be consistent with the action because individuals are more likely to sense causality if there is some logical link between the causes and their effects. *See* RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 195–272 (1980); Hillel J. Einhorn & Robin M. Hogarth, *Judging Probable Cause*, 99 *PSYCHOL. BULL.* 3, 3–17 (1986); Herbert M. Jenkins & William C. Ward, *Judgment of Contingency Between Responses and Outcomes*, 79 *PSYCHOL. MONOGRAPHS*, No. 594 at 1,1–17 (1965). Third, the

Both internal and external thoughts can compete with actions. Examples of internal competing thoughts abound in the law, such as when individuals commit crimes in the heat of passion and therefore appear less responsible for their actions.⁴⁷⁴ External thoughts can also be seen as breaking the chain of causal exclusivity. Sometimes when individuals are interacting in a group they become confused about their own actions and attribute them to others, as Stanley Milgram's famous experiments on authority demonstrated.⁴⁷⁵ In sum, the experience of will represents the way people's minds portray their actions to themselves, which may not necessarily comport with their actual behavior.

Research suggests that the underlying causal mechanism responsible for this experience and for people's actions is a series of unconscious mental processes.⁴⁷⁶ The effect can be powerful. "The illusion of will is so compelling that it can prompt the belief that acts were intended when they could not have been. It is as though people aspire to be ideal agents who know all their actions in advance."⁴⁷⁷ In other words, much of what people do is not consciously planned out; their actions are not always the product of ex-ante conscious thought. People may have a vague idea of some of their intentions and then, after completing their actions, go back mentally and fill in the details so that they believe they did what they consciously planned to do.⁴⁷⁸ As Wegner notes, this phenomenon fits

thought should not be confounded with other possible causes of the action because individuals are more apt to fail to perceive a causal effect if there are multiple potential causes available; in other words, people tend to discount the causal influence of one potential cause if others are present. Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 219, 219-66 (Leonard Berkowitz ed., 1965); Harold H. Kelley, *Attribution in Social Interaction*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 1, 1-26 (Edward E. Jones et al. eds., 1972); John McClure, *Discounting Causes of Behavior: Are Two Reasons Better Than One?*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 7, 7-17 (1998).

474. WEGNER, *supra* note 431, at 91; *see supra* Part IV.D.

475. Wegner uses the Milgram experiment as an example of exclusivity. WEGNER, *supra* note 431, at 94. In the experiment, subjects were instructed by an authoritative-looking doctor to press a button that would deliver an electric shock to a man sitting in another room (other variations of this experiment were performed as well). The subjects could not see the man, but they could hear his protestation from the adjacent location. Although the subjects were responsible for pushing the button and delivering the shock, they were found to experience an "agentic shift," in other words, the subjects attributed the cause of their pushing the button and the delivery of the shock to the doctor. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 132-34 (1974); *see also* ERIKA BOURGUIGNON, *POSSESSION* 5 (1976) (observing that some people attribute external causation to spirits so that voluntary behavior is explained by an imagined outside agency).

476. *See* CARTER, *supra* note 426, at 209-45; WEGNER, *supra* note 431, at 96.

477. WEGNER, *supra* note 431, at 145 (emphasis removed).

478. *Id.*; *see also* Patrick Haggard & Helen Johnson, *Experiences of Voluntary Action*, 10 *J. CONSCIOUSNESS STUD.* 72, 72 (2003) (reviewing experiments showing that "phenomenology of action is partly a post hoc reconstruction"). Motor automatism results from the inconsistency between thought and action. For example, people who have dowsed for water with a Y-shaped stick have often claimed that the stick moves itself. In fact, holding the stick with both hands moves the wrists together or apart, causing unpredictable upward or downward movement of the stick's point. People lose track of the relationship between what they are doing and the cause of the stick's movement. EVON Z. VOGT & RAY HYMAN, *WATER WITCHING USA* 121-52 (2d ed. 2000). Another example of automatism is the movement of a handheld pendulum. People often believe that the pendulum sways on its own accord. The people are unaware that their own muscular movement is causing the pendulum to

with Freud's "defensive rationalization" theory which states that people tend to create reasons for their actions when they do not know their real intentions.⁴⁷⁹ It may be easier for people to accept an ideal of conscious agency, and apply that ideal to many of their actions, than to admit that they simply do not know why they act the way they do. Individuals cannot understand that they may have had ideas that have subsequently been proven false.⁴⁸⁰

Again, unconscious thoughts are the source for such cognitive machinations. At any one moment, a person is doing too many things to be conscious of them all.⁴⁸¹ For this reason, many people's daily experiences can be analogized to posthypnotic suggestion. For all people know, they could have been hypnotized because they are unaware of much of what they do. When people become aware that they are doing

swing. Their perceived involuntariness arises from the inconsistency between thought—perhaps the desire to keep the pendulum steady—and action—despite the desire to hold it steady, the pendulum moves anyway. Wegner & Wheatley, *supra* note 433, at 485. Timothy Wilson agrees that to the extent a person's response or behavior is caused by unconscious processes, the conscious self will confabulate a reason why the person acted in a particular manner. See WILSON, *supra* note 400, at 93–99. Likewise, Wilson's beliefs are consistent with Wegner's theory that in some instances conscious causality is only an illusion and a person's response or behavior was determined by unconscious processes. *Id.* at 106–07. To illustrate this point, Wilson provides the following hypothetical:

Suppose, for example, we observe a customer in a fast-food restaurant ask for a chicken sandwich, and we ask her why she ordered what she did. She would probably say something like, "Well, I usually order the burger, fries, and shake, but I felt more like a chicken sandwich and unsweetened ice tea today. They taste good and are a little healthier." These are precisely the thoughts she was thinking before she asked for the sandwich and thus were responsible for what she ordered—a clear case of conscious causality.

Or is it? . . . We experience a thought followed by an action and assume that it was the conscious thought that caused the action. In fact a third variable—[an unconscious] intention—might have produced both the conscious thought and the action. Seeing [an] obese person, for example, might have been the cause of thoughts about healthy food and the ordering of a chicken sandwich. The conscious thoughts may not have caused the behavior, despite the illusion that they did so.

Id. Therefore, in this illustration, the conscious thought that precedes the ordering of the chicken sandwich is really a post-hoc explanation of an unconscious response to seeing an obese person. *Id.*

479. WEGNER, *supra* note 431, at 151. Wegner refers specifically to Freud's work on dreams. See *supra* note 110 and accompanying text. There are many other illustrations of this phenomenon. For example, people acting in groups have a tendency to spread out the effort contributed to the activity. See Bibb Latané, Kipling Williams & Stephen Harkins, *Many Hands Make Light the Work: The Causes and Consequences of Social Loafing*, 37 J. PERSONALITY & SOC. PSYCHOL. 822, 822–32 (1979). In one experiment, a group of subjects in a small room was asked to clap and yell as loudly as possible. Each member of the group was then separated into individual rooms and asked to clap and yell as loudly as possible. *Id.* at 824–28. In the group setting, the subjects were found to have "loafed" on their task; they clapped and yelled more loudly when they were alone than when they were in the group. The group setting diminishes the impact of social forces on the individual members. *Id.* at 828–32.

480. See Daniel M. Wegner, *The Mind's Best Trick: How We Experience Conscious Will*, 7 TRENDS IN COGNITIVE SCI. 65, 65 (2003) (discussing the "mental tricks" we all experience and noting that "[b]ased on your conscious perceptions of your thoughts and actions, it would be impossible to tell in any given case whether your thought was causing your action, or something else was causing both of them").

481. Denno, *supra* note 34, at 314–16 (discussing the purpose of conscious and unconscious processes).

something, they invent a reason for doing it regardless of whether or not the reason existed from the start.⁴⁸²

Almost everything individuals do can be described and identified in many different ways.⁴⁸³ Wegner provides a criminal law scenario as an example of this phenomenon—a possible felony murder with burglary as the underlying felony.

Consider the case of the action of “shooting a person.” A burglar might go to an empty home with the conscious plan of stealing a TV and be carrying a gun in case he might need to protect himself. Hearing noises in the next room, he pulls out the gun. At this moment, if the homeowner steps into the room, the burglar might think of the next action in many ways. He might “protect himself,” “aim at the sound,” “squeeze the trigger,” “commit a felony,” “take a human life,” “shoot someone,” “make a mess,” “keep from getting caught,” or yet more things—all in the same action. Now, it is widely believed, and rightly so, that “*to the extent that someone is paying attention to their behavior, they do not normally allow themselves to perform actions without reason.*” Yet the burglar in this case might merely be attending to the behavior of “aiming” or “squeezing” and so pretty much miss the point of what the action is all about. The action could well be murder, and in this sense, it is committed without reason.⁴⁸⁴

Just looking at the burglar’s actions alone, a witness would think that the burglar intended to kill, not knowing the mental progression involved in the different acts—starting with the effort to provide self protection and moving on to pulling the trigger out of panic and then to killing a human being, an after-the-fact realization.⁴⁸⁵ “Will, intention, and action snap together like puzzle pieces,” and it seems that the pieces can be put together in any sequence.⁴⁸⁶ In order for people to conceive of themselves as conscious agents, every action they create must include a “conscious intention, action, and will.” As Wegner explains, “[i]ntention and action imply will; intention and will imply action; and action and will imply intention. An ideal agent has all three.”⁴⁸⁷

482. WEGNER, *supra* note 431, at 157.

483. *See id.* at 159.

484. *Id.* at 159–60 (emphasis added) (citation omitted).

485. *See id.* at 160. Wilson’s theories support Wegner’s explanation of the felony-murder scenario. According to Wilson, many of people’s responses to events are not directed by conscious thought but rather automatic, implicit, or “gut” responses that arise [un]consciously and are acted upon with little conscious control. *See* WILSON, *supra* note 400, at 31–32.

486. WEGNER, *supra* note 431, at 184–85.

487. *Id.* at 186. People often brag when good comes of their actions, but they quickly look for excuses when their actions produce a bad result. Such behavior is more understandable when it is revealed that people often see themselves as ideal agents. *See* Dale T. Miller & Michael Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction?*, 82 PSYCHOL. BULL. 213, 213–25 (1975); Melvin L. Snyder et al., *Attributional Egotism*, in 2 NEW DIRECTIONS IN ATTRIBUTION RESEARCH 91, 91–113 (John H. Harvey et al. eds., 1978).

People can also lose their feelings of conscious will over their own actions or project their feelings away to other individuals.⁴⁸⁸ If people believe they can attribute a thought or action to someone else, and someone else is there to whom that thought or action can be attributed, people can enable their consciousness to be so influenced.⁴⁸⁹ Individuals tend to focus on the causal properties of others, and this propensity heightens the likelihood that they will project their actions elsewhere.

C. *How People Perceive Themselves and Others*

How does research on conscious will relate to the criminal law's concept of intentionality? Commentators agree that conscious will is a universal human experience. All individuals believe that they cause their acts and that they voluntarily decide what they will do, moment to moment.⁴⁹⁰ Conscious will is undergone in much the same way as sensing the color red or recognizing a friend's voice or enjoying a beautiful day.⁴⁹¹ What then produces this effect?

New research suggests that people's experiences of will stem from the same kinds of mental processes they depend on when they perceive causal links in general; in other words, people believe their actions are willed "when they interpret their own thought as the cause of their action."⁴⁹² Thus, people's feelings of conscious will can exist separately and

488. See *supra* note 454 and accompanying text.

489. See WEGNER, *supra* note 431, at 199. A striking example of people projecting the cause of their own actions onto an outside agent is the phenomenon known as facilitated communication (FC). John W. Jacobson et al., *A History of Facilitated Communication: Science, Pseudoscience, and Antiscience*, 50 AM. PSYCHOL. 750, 750-65 (1995). FC was developed as a means for therapists to communicate with people suffering from severe speech and motor impairment. A trained facilitator would hold the disabled person's hand over a keyboard supporting the typing finger; the disabled person would then be able to type responses to questions with the help of the facilitator. The facilitator was not to guide the disabled person's movement or affect their answer in any way, but let the disabled person type a response with the facilitator just steadying the person's hand. The result was that disabled persons, who had never before spoken a word, wrote grammatically correct, complex sentences. *Id.* at 750-54. With time, FC drew the skepticism of many who believed that the facilitators controlled the responses. FC's advocates and practitioners, however, argued vigorously that the disabled person controlled the responses and the facilitator made no contribution. *Id.* at 754-57. There is now overwhelming evidence that the facilitator is completely responsible for the communications and that the disabled persons are incapable of answering the questions. *Id.* at 757-62.

490. See generally SEARLE, *supra* note 472; see also SEARLE, MINDS, *supra* note 404, at 94-97. According to John Searle, the experience of engaging in voluntary intentional human conduct, as opposed to hypnosis or passive reception, suggests that people possess alternative courses of action and, therefore, free will. *Id.* at 95. "[E]volution has given us a form of experience of voluntary action where the experience of freedom . . . is built into the very structure of conscious, voluntary, intentional human behaviour." *Id.* at 98.

491. Wegner & Wheatley, *supra* note 433, at 480; see also *supra* notes 417-19 and accompanying text.

492. Wegner & Wheatley, *supra* note 433, at 480 (emphasis omitted). See also Jason W. Brown, *The Nature of Voluntary Action*, 10 BRAIN & COGNITION, 105, 105-20 (1989); Stevan Harnad, *Consciousness: An Afterthought*, 5 COGNITION & BRAIN THEORY, 29, 29-47 (1982); Irving Kirsch & Steven Jay Lynn, *Hypnotic Involuntariness and the Automaticity of Everyday Life*, 40 AM. J. CLINICAL HYPNOSIS 329, 329-48 (1997); Langer, *supra* note 448, at 311-28; Libet, *Unconscious*, *supra* note 421, at 529-39; Nicholas P. Spanos, *Hypnotic Behavior: A Cognitive, Social Psychological Perspective*, 7

apart from any real causal link between their thoughts and actions, as Libet's research has shown.⁴⁹³ These findings may explain why individuals believe they are acting involuntarily during episodes of automatism (such as an epileptic seizure)—because they perceive little to no connection between their prior thoughts and action—but, conversely, why they may exaggerate perceptions of this thought-action link in other circumstances.⁴⁹⁴ The factors that affect assessments of this thought-action link include the following: time (how close the thought occurs relative to the action); memory (research has shown that retention time for a thought is generally less than thirty seconds); priority (thoughts occurring after an action rather than before will rarely be perceived as causal); consistency (outside observers attribute causation to people whose personalities are viewed as being consistent with the behaviors they are being linked to); and exclusivity (people tend to experience more or less conscious will, respectively, based on whether or not their thoughts appear to be the exclusive cause of their actions).⁴⁹⁵

In light of all of these influences, this research shows that individuals can form the mistaken belief that they have intentionally caused an action that, unknown to them, they were actually made to perform when they were encouraged merely to think about the action just before it occurred.⁴⁹⁶ In other words, people can feel willful action when they have actually done nothing at all. Individuals may not be consciously aware of the real causal factors driving their behavior because the factors stem from the unconscious. Likewise, people can label these precursor thoughts as “intentions” and think the thoughts have causal significance when they are in fact merely “previews” of the behavior that people may

RES. COMM. IN PSYCHOL., PSYCHIATRY & BEHAV. 199, 199–213 (1982); Sean A. Spence, *Free Will in the Light of Neuropsychiatry*, 3 PHIL., PSYCHIATRY & PSYCHOL. 75, 75–90 (1996).

493. See Libet, *Unconscious*, *supra* note 421, at 529–39.

494. Wegner & Wheatley, *supra* note 433, at 480.

495. See *supra* note 473 and accompanying text.

496. Perhaps one of the more intriguing approaches illustrating this conclusion derived from an experiment using a Ouija board. Wegner & Wheatley, *supra* note 433, at 487–89. Daniel Wegner and Thalia Wheatley tested whether people would feel like they had moved the Ouija pointer if they simply thought about where it would go just before its movement, although the movement was produced by someone else. *Id.* In their study, known as the “I Spy Experiment,” the experimenter sat facing the subject across a small table. On the table was a square board mounted atop a computer mouse. The experimenter and subject each put their finger tips on the board so that they moved the mouse together in slow circles (also moving a cursor across a computer screen). The screen contained fifty images from the children's book, *I Spy*. The pair was to stop moving the mouse every thirty seconds. The participants wore headphones that would play music and words in intervals signaling to the pair when to stop moving the mouse (the experimenter was actually hearing instructions on where to move the mouse). *Id.* at 487–88. For example, the experimenter would get instructions to move the mouse over the swan. The subject would hear music followed by the word “swan” at an interval of thirty seconds before, five seconds before, one second before or one second after the experimenter stopped the mouse on the swan. *Id.* at 488. Even though the subject did not actually control the stops of the mouse, the subject had the experience of consciously stopping the mouse on a particular object when the subject heard the name of the object at an interval of five seconds or one second before the stop. The subjects also had the experience of conscious will at intervals of thirty seconds before and one second after, but with much less frequency. *Id.* at 488–89.

perform.⁴⁹⁷ This attribution corresponds to what Daniel Dennett has termed an “intentional stance” toward people—“viewing psychological causation not in terms of causal mechanism but rather in terms of agents who have desires and beliefs that cause their acts. Conscious will is part of the process of taking an intentional stance toward oneself.”⁴⁹⁸

Of course, such findings do not negate the traditional view that there are real links between thought and action much of the time. Presumably, conscious intention prior to action can be an accurate indicator about what people are actually thinking before they react. At the same time, the research suggests that people’s interpretations of their conscious will may not always be reliable, particularly if they are not good self-interpreters.⁴⁹⁹

D. *Where Does Consciousness Research Leave Us?*

In terms of the criminal law’s concepts of mens rea and voluntary acts, the new view of consciousness (along with the older view proposed by Marshall) prompts several insights. First, as Marshall’s model⁵⁰⁰ and more recent research has suggested,⁵⁰¹ the conscious/unconscious dichotomy that distinguishes voluntary (conscious) from involuntary (unconscious) acts is not warranted. Consciousness exists in degrees. A synthetic division is unrealistic and unneeded even at either end of the consciousness continuum.

The new science also challenges the proposed unified approach to mens rea.⁵⁰² On the one hand, the unified approach is appealing for its apparent ease and conceptual clarity. If the four MPC forms of mens rea are so difficult to distinguish, why keep them? Likewise, the unified position is based on the moral irrelevance of the differences in mental states defined under the MPC. In other words, under the unified approach, criminal liability is imposed properly when a defendant shows a lack of concern; as a moral matter, it is irrelevant if that defendant is indifferent to others purposely, knowingly, etc.

This article contends, however, that consciousness is morally relevant because the research shows that consciousness exists in degrees. Some acts might be accompanied by such a low level of consciousness that a defendant could not be said to be “indifferent” to the interests of others. Jurors would need guidance in making these moral distinctions,

497. *Id.* at 490.

498. *Id.* (citing DENNETT, *supra* note 458).

499. Wegner & Wheatley, *supra* note 433, at 490.

500. Marshall, *supra* note 26, at 1260–70.

501. Denno, *supra* note 34 (providing a thorough analysis of the consciousness research and illustrating a consensus that consciousness exists in degrees).

502. *See supra* notes 343, 345–51 and accompanying text.

lest they be left conceptually on their own if there was simply one level of mens rea.⁵⁰³

The new consciousness research also questions the four-plus approaches to mens rea that attempt to put culpability states in separate categories,⁵⁰⁴ for example, distinctions between “belief-states” and “desire-states.”⁵⁰⁵ As the new research has shown, belief states and desire states are conceptually inseparable, overlapping as well as interacting; parting the two would be misleading. There should be doctrinal lines in the criminal law, but the four-plus approach is not the proper vehicle for drawing them.

VI. THE NEW CONSCIOUSNESS APPLIED TO THE CRIMINAL LAW

Is the new consciousness research of greater value to the criminal law than the Freudian model? This article claims that it is for a number of reasons, both conceptual and practical. The following sections first return to the case of Ronald Shanabarger, described in the Introduction,⁵⁰⁶ to compare the Freudian and modern non-Freudian approaches to the case’s available facts. Recall that Shanabarger was convicted of murder, which is defined in Indiana as “knowingly or intentionally kill[ing] another human being.”⁵⁰⁷ After highlighting the weaknesses of the Freudian approach, the sections then discuss how the new non-Freudian research can better meet evidentiary standards as well as clarify criminal jury instructions on mental state.

A. *Conscious Intentions: A Freudian Approach*

Based upon the facts known about the *Shanabarger* case, several Freudian theories could be relevant to explaining why Shanabarger killed his son. For example, a connection could be made between the death of Ronald Shanabarger’s father as an important archetypal (and certainly Freudian) theme and Ronald’s vengeful act of killing his son, Tyler, on the eve of Father’s Day. It is likely that Ronald planned the execution specifically on a powerfully emotive parental holiday. Yet it also appears that the death of Ronald’s father served more as a triggering event than a focal point of the subsequent crime. The real issue in

503. This article’s emphasis on the significance and degrees of consciousness is consistent with Joshua Dressler’s contention “that ‘culpability’ is not naturally an all-or-nothing concept” in the context of proposed revised models for mens rea. Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander’s Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 963 (2000).

504. See *supra* notes 344, 352–54 and accompanying text.

505. See Simons, *supra* note 344, at 482–95.

506. See *supra* notes 1–22 and accompanying text.

507. IND. CODE ANN. § 35-42-1-1(1) (Michie 2004).

this case, according to Freud's essay, *Mourning and Melancholia*, lies in Ronald's possible "disposition to obsessional neurosis."⁵⁰⁸

Analyzing the circumstances through a Freudian lens suggests that Ronald suffered from a melancholic illness that expanded to this obsessional neurosis in reaction to his wife Amy's refusal to curtail her vacation and comfort him when his father died. Although it appears that the death of Ronald's father may have cultivated a vulnerability in Ronald to developing this Freudian melancholic reaction, it is not necessary to the doctrine. Freud states that the instances that give rise to the illness (melancholia) "include all those situations of being slighted, neglected or disappointed."⁵⁰⁹

Freud describes the relationship that exists between two people prior to a melancholic reaction, which may have been similar to that of Ronald and Amy: "[A]n attachment of the libido to a particular person, had at one time existed; then, owing to a real slight or disappointment coming from this loved person, the object-relationship was shattered."⁵¹⁰ The three preconditions of melancholia are, "loss of the object, ambivalence, and regression of libido into the ego."⁵¹¹ When Amy refused to accommodate Ronald, according to a reading of Freud, a shift occurred on an unconscious level⁵¹² in Ronald's perception of his relationship with Amy. In essence, Ronald's "narcissistic identification with the object [i.e., Amy, became] a substitute for the erotic cathexis, the result of which is that in spite of the conflict with the loved person the love-relation need not be given up."⁵¹³

Following Freud's paradigm, Ronald no longer saw Amy as an erotic partner after the insult, but rather viewed her in a narcissistic, completely self-serving manner. As a result, Ronald lost his relationship with Amy as he perceived it, and ambivalence toward Amy ensued. According to Freud, this period of ambivalence can spawn some difficult emotions in an individual with obsessional neurosis toward the former beloved. "If the love for the object . . . takes refuge in narcissistic identification, then the hate comes into operation on this *substitutive object*,

508. SIGMUND FREUD, *Mourning and Melancholia*, 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 243, 251 (James Strachey trans., 1957).

509. *Id.*

510. *Id.* at 249.

511. *Id.* at 258.

512. *Id.* at 257.

513. *Id.* at 249. In a fuller account of Freud's words, Ronald's shift in his characterization of Amy could be described as,

a strong fixation to the loved object must have been present [however,] . . . the object-cathexis must have had little power of resistance . . . so that the object-cathexis, when obstacles come in its way, can regress to narcissism. The narcissistic identification with the object then becomes a substitute for the erotic cathexis, the result of which is that in spite of the conflict with the loved person the love-relation need not be given up.

Id.

abusing it, debasing it, making it suffer and deriving sadistic satisfaction from its suffering.”⁵¹⁴

Freud discusses how both the melancholic individual and the obsessive neurotic seek to take revenge on the original object (in this case, Amy).⁵¹⁵ In the melancholic, this revenge is often manifested in self-recrimination, inwardly directed punishment that is meant ultimately to punish the original object. The final manifestation of this vengeance is suicide, although, as Freud comments, suicide is completely antithetical to an ego-driven organism because the person must “consent to [his] own destruction.”⁵¹⁶

In the *Shanabarger* case, Ronald did not commit suicide; however, he did beg his jailers to shoot him after he confessed to killing his son.⁵¹⁷ According to Freud, “no neurotic harbours thoughts of suicide which he has not turned back upon himself from murderous impulses against others.”⁵¹⁸ Ironically, perhaps Ronald Shanabarger found a way to commit a kind of suicide and murder simultaneously by purposely creating a life with the object of his hatred (Amy) and then killing a part of each of them by way of the baby’s murder.

B. *Conscious Intentions: A Modern Non-Freudian Approach*

A modern approach to the *Shanabarger* case has an entirely different take than the Freudian approach. Given that the mens rea of intent lies on a continuous scale reflecting qualitative degrees of consciousness, what factors could a court consider to determine where Ronald Shanabarger should fall on this scale? On the one hand, Ronald’s acts constituted a clear and elaborate series of behaviors designed to meet his final goal of revenge. His plot included some of society’s most seriously considered lifestyle changes: marrying and conceiving a child. Not only did the prosecution contend that Ronald was consciously aware that he was taking these steps, but Ronald’s confession indicated that he consciously planned them.⁵¹⁹ Indeed, it was later discovered that Ronald had taken out a \$100,000 life insurance policy on Tyler and was already thinking of ways to spend the money, thereby throwing a confusing spin on his possible motives.⁵²⁰

This scenario of Ronald’s level of conscious awareness, however, is based simply on considering his acts alone without accounting for anything about his mental state. Yet facets of Ronald’s record suggest that Ronald’s degree of consciousness could possibly have been compromised

514. *Id.* at 251 (emphasis added).

515. *Id.* at 251–52.

516. *Id.* at 252.

517. See *supra* note 10 and accompanying text.

518. FREUD, *supra* note 508, at 252.

519. See *supra* notes 1–18 and accompanying text.

520. *Shanabarger v. State*, 798 N.E.2d 210, 215 (Ind. Ct. App. 2003).

in some way. Such evidence could be significant because research also shows that consciousness is not one entity, but rather a number of interactive parts.⁵²¹

A particularly compelling perspective on consciousness proposes a five-part model that reflects a continuum of low-to-high level brain processing in which an individual acquires with age the following attributes: (1) the sense of self; (2) the sense of others (e.g., empathy); (3) the intention to act (e.g., the meaning or sense attached to mental states); (4) the experience of emotions; and (5) phenomenal qualities, what philosophers call “qualia” for short.⁵²² These categories overlap, and they also relate to those factors that can influence individuals’ perceptions of their conscious will. For example, there is an emotional component in most states of consciousness that is capable of completely taking over awareness. Presumably, blind rage is “a state of mind in which emotion fills the whole of consciousness” to the point where people may be capable of murder even though they may not consciously experience their emotional memory.⁵²³ The interactive aspects of this five-part consciousness model could be applicable to a defendant like Shanabarger.

According to one forensic psychologist, for example, Ronald “has serious emotional problems and disorders, is socially inept, has unusual beliefs, strange thoughts and social anxiety, and never really functioned on a normal level.”⁵²⁴ Ronald’s tested IQ of 88 was below the normal range of 90–109, and “he is more vulnerable to suggestions from others than 98 percent of the population.”⁵²⁵ In turn, the defense emphasized that Ronald had no prior criminal record, operated under extreme mental and emotional disorder, “was impaired by a mental defect, and acted under the substantial influence of another person,” that other person being Amy, who the defense suggested may have contributed to her son’s death.⁵²⁶ Indeed, the judge considered Ronald’s “diminished mental ability” and lack of record in his decision to decline sentencing Ronald to life in prison.⁵²⁷

521. See TAYLOR, *supra* note 320, at 25–27.

522. *Id.* at 25–26, 32. Phenomenal qualities, “qualitative feels,” or “qualia” for short, constitute the most primitive components (and therefore foundation) of consciousness. CHALMERS, *supra* note 417, at 4. For example, an individual may have the raw feel of the color red when looking at a red rose. Qualia supposedly comprise four controversial characteristics: (1) intrinsicness (they are not related to other objects); (2) ineffableness (they cannot be described to others); (3) transparency (they can be seen through); and (4) atomicity (they cannot be reduced to smaller or more primitive components). TAYLOR, *supra* note 320, at 32. For a fuller discussion of this issue, see DANIEL C. DENNETT, *KINDS OF MINDS: TOWARD AN UNDERSTANDING OF CONSCIOUSNESS* (1996).

523. TAYLOR, *supra* note 320, at 30.

524. Jeff Zogg, *Father Convicted of Killing His Son*, IND. STAR, May 9, 2002, at 1A [hereinafter Zogg, *Father Killing Son*]; see also Jeff Zogg, *Shanabarger Case May Go to Jury Today*, IND. STAR, May 7, 2002, at 1S [hereinafter Zogg, *Jury*] (concluding, after over nine hours of testing, that “Shanabarger has extreme social disorders, eccentric thinking and mental disorders, is emotionally alienated from most people, has bizarre thinking patterns and gave morbid responses that were uncalled for”).

525. Zogg, *Jury*, *supra* note 524, at 1S.

526. Zogg, *Father Killing Son*, *supra* note 524, at 1A.

527. Hedgpeth, *supra* note 19, at 1B.

A person's tested intelligence and level of consciousness "are not necessarily related";⁵²⁸ yet a low score on intelligence, especially to the point of mental retardation, can affect an individual's behavior and adaptive skills. Such skills include facets of levels three (the intention to act) and four (the experience of emotions) of the previously mentioned five-part consciousness model.⁵²⁹ In *Atkins v. Virginia*,⁵³⁰ for example, the United States Supreme Court held that the execution of mentally retarded individuals constituted cruel and unusual punishment under the Eighth Amendment.⁵³¹ The Court's decision was based in part on an assessment of country-wide legislation indicating that "society views mentally retarded offenders as categorically less culpable than the average criminal."⁵³² Likewise, the Court's reasoning in *Atkins* has been echoed in other sorts of circumstances, most notably the execution of juveniles.⁵³³

The *Atkins* Court explained that clinical definitions of mental retardation require that an individual manifest two characteristics—subaverage intellectual functioning (which the Court did not define) as well as "significant limitations in adaptive skills."⁵³⁴ These skills include the ability "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others."⁵³⁵ The Court recognized that there was no evidence to suggest that mentally retarded persons engage in more crime than others; however, "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."⁵³⁶ Again, such characteristics would negatively affect levels three (the intention to act) and four (the experience of emotions) of the five-part consciousness model.

Other research on consciousness suggests how certain neurological disorders, independent of intelligence, can compromise social and adaptive skills as well as the abilities necessary to plan and control emotions. As Baron-Cohen's examination of autism has indicated, for example, when an individual's "intentionality detector" is damaged, such "mind-blindness" can impair how that individual can perceive actions that appear to be willed both internally and in others.⁵³⁷ While most autistics have above-average intelligence test scores and superior general logic

528. CARTER, *supra* note 426, at 36.

529. *See supra* note 522 and accompanying text.

530. 536 U.S. 304 (2002).

531. *Id.* at 320–21.

532. *Id.* at 316.

533. *See Roper v. Simmons*, 125 S.Ct 1183, 1200 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

534. *Atkins*, 536 U.S. at 318.

535. *Id.*

536. *Id.*

537. *See supra* notes 457–58 and accompanying text.

skills, they are “mind reading-impaired” and inept at social intelligence. They must go to school to learn to comprehend facial expressions and to assess people’s inner thoughts,⁵³⁸ in other words, to “get a sense of others,” which is level two of the five-part consciousness model.⁵³⁹

Autistic symptoms also exist on a continuum, ranging from the most severe cases to millions of more minor cases of individuals who are simply poor mind readers, awkward in social situations and dense at social cues.⁵⁴⁰ Numerous people who would never be labeled mentally ill have the same kinds of “experiential distortions” characteristic of individuals diagnosed with schizophrenia and autism.⁵⁴¹ One serious type of outcome of these disorders (which is acerbated by stress) is a phenomenon called dissociation, which can result in disturbances in perception as well as a loss of the sense of self,⁵⁴² level one of the five-part model of consciousness.⁵⁴³

By all accounts, Ronald Shanabarger failed to perceive the consequences of his acts. As commentators noted, Ronald would not have been implicated in the murder had he not confessed to committing it; yet, without the confession, “he wouldn’t have the pleasure of the revenge.”⁵⁴⁴ According to one forensic psychiatrist, Ronald “missed the step” that if he told Amy he killed Tyler there would be a penalty to his vengeance, such as an arrest and even the possibility of losing his own life. Most likely, Ronald also did not anticipate how much remorse he would feel.⁵⁴⁵ At the same time, the defense threw doubts on Ronald’s professed motive. According to one defense expert, “it would be inconsistent that someone would have planned for three years to kill a child not yet conceived, and that that person would have so much guilt that he would confess and want to go to prison It doesn’t go together.”⁵⁴⁶

Some support for the defense expert’s conclusion derives from the five factors that Wegner contends influence individuals’ perceptions of the link between their thoughts and actions in order to establish their sense of conscious will: time, memory, priority, consistency, and exclusivity.⁵⁴⁷ In terms of time, for example, nearly three years passed between Ronald’s father’s death (October 1996) and when Ronald killed Tyler (June 1999). While individuals may perceive little to no connec-

538. JOHNSON, *supra* note 400, at 32.

539. *See supra* note 522 and accompanying text.

540. CARTER, *supra* note 426, at 258–60. In recognition of this broad continuum of autism, Simon Baron-Cohen and his colleagues offer a test called the Autism Spectrum Quotient that individuals can take to place themselves on the autism continuum. *See Take the AQ Test*, WIRED MAGAZINE (Dec. 2001), <http://www.wired.com/wired/archive/9.12/aqtest.html>.

541. CARTER, *supra* note 426, at 260.

542. *Id.*

543. *See supra* note 522 and accompanying text.

544. *Upfront Tonight*, *supra* note 22.

545. *Id.*

546. *Id.*

547. *See supra* notes 473, 495 and accompanying text.

tion between their thoughts and actions when they engage in an involuntary act (such as an epileptic seizure), evidence suggests that they may exaggerate their beliefs about their prior thoughts and actions in other kinds of circumstances. An emphasis on the long time span between Ronald's thought and act is not to suggest that Ronald's account is false, simply that it is more open to question, especially in light of the other Wegner factors. For example, in empirical studies, memory for a thought is short-lived (less than thirty seconds), particularly if significant intervening events occur between the thought and the act. Over a three-year period, such intervening events are likely, therefore heightening the impact of another factor, exclusivity. People tend to discount the causal influence of one potential cause if other potential causes are available. Likewise, the defense expert focused on the consistency factor with respect to Ronald's stated motive about his acts; Ronald's long-term plans to kill were "inconsistent" with a desire to confess and be incarcerated.⁵⁴⁸

The *Shanabarger* case also would have been far weaker, and perhaps nonexistent, without Ronald's confession. The variables that persuade people to confess have been the source of some interest in the consciousness literature. As prior research on consciousness has indicated, even individuals with average abilities will be far more likely to confess to a "crime" if "witnesses" tell them they performed a certain act.⁵⁴⁹ Criminological research and a recent surge of court case reversals⁵⁵⁰ have demonstrated the difficulty of relying predominantly on defendants' confessions because people can confess to acts they never performed.

Indeed, Wegner's research review suggests that even individuals who have unquestionably committed a crime and are unrepentant may misrepresent the reasons for their actions both to others and to themselves.⁵⁵¹ For example, Ronald may have told Amy that he married and impregnated her to exact revenge for her insult to him three years prior, but in reality killed Tyler for some other reason entirely. Given that people's experiences of conscious will derive from the same kinds of mental processes they depend on when they perceive causal links in general,⁵⁵² it can be questioned whether Ronald is able to assess accurately his own reasons for engaging in an action.

Clearly, Ronald's jury was ambivalent about his sentence. This indecision, as well as Ronald's lack of a criminal record and "diminished

548. See *supra* notes 1–15, 473, 495 and accompanying text.

549. See *supra* notes 450–52 and accompanying text.

550. Some recent scholarship indicates that false confessions occur with enough frequency that the legal community should be concerned. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429–30 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 981 (1997).

551. WEGNER, *supra* note 431, at 338.

552. See *supra* Part V.

mental ability,” prompted the judge to sentence Ronald for less than the life-without-parole recommendation that the prosecution had urged.⁵⁵³

This section’s examination of the *Shanabarger* case does not conclude that reliance on consciousness studies would make all defendants appear less responsible for their actions. Indeed, revelations about consciousness research suggest that the criminal justice system’s liability scheme is both too broad and too narrow in its culpability net⁵⁵⁴ (a topic beyond this article’s scope). Lighter penalties may be due for some defendants who seem to be more consciously aware than they actually are, whereas liability may be due for some defendants who appear to be unconscious when they really are not.

In the *Shanabarger* case itself (based on the limited facts available), the new consciousness research could be useful for assessing both Ronald’s level of mens rea and his appropriate sentence. For example, the research may clarify whether Ronald engaged in premeditated and deliberated acts and whether he should have been eligible for the death penalty, an area of the law that constitutionally allows for the introduction of a broad range of mitigating evidence.⁵⁵⁵ In another context, however, the research could reveal that a defendant was more responsible and aware than the criminal justice system traditionally would have concluded.

Regardless of how consciousness research is applied, its results should not be introduced on a standardless case-by-case basis. Rather, such evidence should be properly guided in the context of jury instructions. The following sections address the value of consciousness research in light of this author’s statewide study of criminal jury instructions regarding defendants’ mental states.

C. *The Value of Research on Consciousness and Conscious Will*

This section discusses the greater value of modern consciousness research relative to a Freudian model, while also recognizing the consistencies between the two paradigms. First, it is unlikely that any of the Freudian theories presented in expert testimony in prior case law would be admitted into court under modern evidentiary standards such as those articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵⁵⁶ In *Daubert*, the Supreme Court held that the trial court must take on a gatekeeping function for determining the reliability and admissibility of scientific evidence based upon a number of factors, ranging from the sci-

553. Hedgpeth, *supra* note 19, at 1B.

554. See Denno, *supra* note 34.

555. See LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 137–56 (2004) (discussing the major case law concerning mitigating evidence in death penalty cases).

556. 509 U.S. 579 (1993).

entific theory's amenability to empirical testing to its general acceptance by the scientific community.⁵⁵⁷

It is beyond this article's range to discuss the evidentiary viability of consciousness research. Yet there is solid support for the following presumptions: Most consciousness research meets the appropriate evidentiary standards for admissibility under *Daubert*; the relevance of particular types of this research should be debated by the experts; and the applicability of the research should ultimately be judged by the jury, who are the experts on the kind of human behavior that pertains to consciousness. This presumption concerning the evidentiary acceptability of most consciousness research is uncontroversial because the criminal law explicitly embraces the reality and doctrinal foundation of consciousness.⁵⁵⁸

Much of the advanced consciousness research is conceptually compatible with a Freudian model and has confirmed empirically some facets of it; however, the new research has also taken on a scientific life of its own that has no psychoanalytic parallel. Likewise, this new research offers more generic insights into both conscious and unconscious mental processes. Freudian psychoanalysis, in contrast, was developed as a form of therapy to investigate the unconscious underpinnings of an individual's behavior. As a result, it can be clumsy to insert the Freudian model into cases and statutes dealing with conscious awareness.

Modern findings on consciousness and conscious will are also applicable to group behavior in a way that Freudian theories were never intended. There is a consensus that the new research has surpassed the Freudian model in terms of precision and sophistication. Recent consciousness studies can continually offer insights into mental processes that can be tested for their validity and reliability on numerous subjects.

The differences between Freudianism and modern consciousness research run deeper, though, than mere contrasts in empirical eligibility and focus on levels of awareness. As one scholar has noted, for example, "Freud has been judged a fatalist about character, and with reason."⁵⁵⁹ Because Freud believed that evil is inherent in people, his theories make evil banal; it appears everywhere.⁵⁶⁰ Modern consciousness research draws no such conclusion about human character, perhaps because the

557. *Id.* at 592–95 (citation omitted). The primary factors in *Daubert* are: (1) testability (whether the scientific theory is amenable to empirical testing); (2) peer review and publication (a criterion that is relevant but not dispositive); (3) error rate; (4) controlling standards; (5) general acceptance (recognizing that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism"); and (6) other factors (which are not dispositive but may be significant, such as whether the research conducted was relevant to the litigation at issue). *Id.*

558. See *supra* notes 134–51 and accompanying text.

559. RIEFF, *supra* note 95, at 52.

560. See generally GAY, *supra* note 124 (providing a thorough review of Freud's life and major works).

research is so clearly a conglomeration of a wide diversity of disciplines, each with its own agenda.⁵⁶¹

Despite these advantages of the new research, this article makes no claim that it is any panacea to solving the complexities of the mind, either in culture or in law. After all, consciousness has been deemed one of the “last surviving mysteries”;⁵⁶² “[f]ew questions have endured longer or traversed a more perplexing history.”⁵⁶³ Any suggestion that this new research could somehow fix the comparable enigma of mens rea doctrine would be fantastical. Yet meeting such a goal is not the point of this article, which instead urges a more contemporary morality for legislative and judicial doctrine by way of groundbreaking scientific findings.

D. *The Strength of Mens Rea in Jury Instructions*

This article highlights a concern that, over the last three decades, the chasm between psychoanalytic theories and the law may be prompting a greater emphasis on criminal acts over the criminal mind in determining liability. There is an appeal to focusing on acts, as Bruce Ledewitz recently contended.⁵⁶⁴ He claims that under current standards, judges and jurors are required to imagine what internal conversations took place in the defendant’s mind and there is no way to determine if they are wrong. Ledewitz advocates returning to the historical practice of presuming the defendant’s mental state from the physical evidence available; in other words, it should be presumed that defendants intended the natural and probable results of their conduct.⁵⁶⁵ Such a “presumption could operate precisely to avoid fruitless inquiry into mental processes that we really do not understand and probably do not much care about.”⁵⁶⁶

Ledewitz is not alone in his opinion. Among the more striking indicators of this act-based trend are some of the current criminal jury instructions available on mental states. In order to examine this issue more thoroughly, this author conducted a unique statewide study of criminal

561. TAYLOR, *supra* note 320, at 6, 42. The most significant disciplines now studying consciousness include the following: philosophy (which examines the logical aspects of the mysteries of the mind and the brain); psychology (which probes how different stimuli or tasks influence individuals’ perspectives of their inner conscious states); neuropsychology (which analyzes the neural attendants to psychological responses); neuroanatomy and physiology (which investigate the structure and function of the brain’s nervous tissue); neural network research (which creates theories of the brain’s neural networks); engineering and computer science (which develop instruments for examining the brain and analyzing data); physics (which proffers more accurate tools and theories); and mathematics (which applies mathematical constructs to help explain the implications of various brain theories). *Id.* at 42.

562. DENNETT, *supra* note 414, at 21.

563. JAYNES, *supra* note 403, at 1.

564. Bruce Ledewitz, *Mr. Carroll’s Mental State or What is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 72–83 (2001).

565. *Id.* at 99–104.

566. *Id.* at 102.

jury instructions on criminal culpability.⁵⁶⁷ Parts of this study are summarized in this article's Appendix of five tables.⁵⁶⁸

Table 1 (Appendix)⁵⁶⁹ lists the titles of the jury instructions from each state that address the permissibility of act-based inferences of mental state, dividing those states that allow the inference from those that discourage or prohibit it. Table 2 (Appendix)⁵⁷⁰ provides the fuller text of the relevant sections of every jury instruction in Table 1 to demonstrate in more detail the basis for Table 1's classifications. Table 3 (Appendix)⁵⁷¹ designates the titles and pertinent sections of state jury instructions that use the term "conscious" (or some derivative term) when defining or describing a defendant's mental state. Table 4 (Appendix)⁵⁷² shows the titles of the jury instructions from each state that address mental state without reference to a requirement of "consciously." The text of the relevant sections of every instruction in Table 4 is provided in Table 5 (Appendix).⁵⁷³

567. All instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in this study: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions.

568. *See infra* app. tbls. 1-5. Table 6 of the Appendix provides citation information for all jury instructions included in Tables 1-5. *See infra* app. tbl.6. Substantive analyses aside, this study is also informative because it reveals the difficulty of researching and acquiring state jury instructions. Legal research databases such as LexisNexis and Westlaw provide jury instructions for some states, but neither database has a comprehensive collection. The majority of the jury instructions reviewed in this study were attained in hard copy via interlibrary loan requests from state, law school, court, and law firm libraries. (The criminal jury instructions for Hawaii, New Mexico and North Dakota are not currently published in hard copy, so these states' instructions were obtained from their respective state court websites.) Predictably, the acquisition of jury instructions in hard copy is a time-consuming process. Even after the instructions are located and requested, obstacles often arise. Some libraries send out only whole volumes, while others prefer to send a few specific instructions rather than the full collection. While understandable, such limitations render general research a challenge. In other instances, problems are administrative rather than policy related. When the eighth edition of Tennessee's criminal pattern jury instructions was recently published, the publishing company sold its complete run to the public before filling the standing orders of the state's law libraries. The libraries' acquisition of the latest edition was therefore delayed. These restrictions and complications make it extremely difficult to actually obtain hard copies of the instructions. Yet another barrier to a comprehensive review of criminal jury instructions is the potential for a state to have multiple models. As this article later discusses, more than one drafting committee might exist for any given state, resulting in confusion as to which set of instructions is most likely to be used. *See infra* notes 596-97 and accompanying text (describing California's two sets of jury instructions). Outdated instructions pose a problem as well; many states simply release supplemental instructions to reflect revisions, rather than publishing a complete updated set of instructions. Given the difficulty of researching and obtaining even the original instructions, it is virtually impossible to ensure that every subsequent supplement has been located. In general, then, this article's study attempted to include the relevant jury instructions from each state, but the inclusion of every version of the jury instructions for a particular state cannot be guaranteed. Likewise, this article's study bases its analysis on the most recent instructions available to the author. The dates of the instructions cited in the appendix are noted whenever possible.

569. *See infra* app. tbl.1.

570. *See infra* app. tbl.2.

571. *See infra* app. tbl.3.

572. *See infra* app. tbl.4.

573. *See infra* app. tbl.5.

The following discussion gives a brief overview of the history and challenges of criminal jury instructions as a backdrop for analyzing this author's jury instruction study. It is beyond this article's scope to detail further the vast literature on this topic.

1. *The Development and Application of Jury Instructions*

Jury instructions are often jurors' first, and only, introduction to the law that they will be asked to apply. Through such instruction, judges teach the jury about relevant legal concepts.⁵⁷⁴ Deficient instructions may violate defendants' constitutional rights to a fair trial, since jurors who do not understand the law may apply it improperly or rely instead on some other method of decision-making.⁵⁷⁵ Considering the significance of jury instructions, a remarkable amount of inconsistency and ambiguity surround their development and application.⁵⁷⁶ Even more striking is the degree to which these flaws are acknowledged, yet unresolved.⁵⁷⁷

Many commentators blame the complexity of jury instructions on the nature of the adversarial process.⁵⁷⁸ Both the prosecution and the defense compose and request instructions to suit their individual and op-

574. See Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 404 (1990) (noting that "the primary role of jury instructions" is "to teach jurors about the law"); see also Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 54 (1999) (stating that jurors "learn the law through the judge's instructions").

575. Power, *supra* note 574, at 56.

576. See, e.g., Kramer & Koenig, *supra* note 574, at 405 (showing a "mixed juror understanding of complex judicial instructions, discusses this mixed understanding, and argues for changes in the current method of jury instruction, including the use of written instructions and simpler language").

577. See Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 163-64 (2004) (questioning courts' "steadfast reliance" on the "presumption that jurors understand and follow a trial court's formal jury instructions" because "it is not supported by an adequate foundation . . . historical experience . . . empirical data . . . or common sense"). See also Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 788 (2000) (emphasizing that "[f]or a quarter of a century, social science researchers have expressed concern about jurors' ability to understand the law"); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 77-78 (1988) (explaining that judges, lawyers, and social scientists have long questioned jurors' ability to understand judges' instructions on how to apply the relevant law). Examples of proposed reforms include rewriting the instructions to increase clarity and accuracy, offering instruction on the law at the beginning (as well as the end) of the trial, and providing the jurors with a written copy of the instructions for use during deliberation. See Ellsworth & Reifman, *supra*, at 801; see also Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 552 (2004) (arguing in favor of preinstruction). However, "a number of forces within the American legal system . . . deter attempts to rewrite jury instructions," including a "lack of writing skills, lack of time, fear that appellate courts will find error in the rewrites, or belief that confusing instructions benefit certain clients." Steele & Thornburg, *supra*, at 78-79.

578. Steele & Thornburg, *supra* note 577, at 79 ("The structure and pressure of the adversary system inhibit efforts at change."); see also Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1085 (2001) ("For the most part, the courts have not been especially effective as a mechanism for reforming the language of jury instructions.").

posing needs. The lack of a unified effort leads to instructions that are often lengthy and difficult to follow. In general, lawyers are more apt to value the beneficial slant of the instruction over its clarity.⁵⁷⁹

Judges, tasked with choosing the correct descriptions of the law, are equally disinclined to focus on clarification of the requested instructions.⁵⁸⁰ Typically, judges have a fair amount of discretion in selecting the method by which they instruct jurors, and this leeway theoretically enables them to pick the most appropriate instruction.⁵⁸¹ Fearing appellate reversal, however, they often prefer to rely on instructions that have already been accepted in previous judicial opinions or are taken directly from the applicable statutes. This strategy may better shield judges from attack on appeal, but it skirts the problem of perpetuating incomprehensible instructions. It also often results in instructional language more appropriate for an audience of lawyers than jurors.⁵⁸²

Beginning in the twentieth century, efforts to improve jury instructions centered on the development of “model,” “pattern,” or “standard” instructions. Task forces, commissions, and committees were established to devise these instructions, which resembled forms that could be customized to the facts of a given lawsuit. The goal was not only to address the problems of consistency and clarity, but also to ensure accuracy and efficiency.⁵⁸³ On some levels, standardized instructions were successful. Yet new challenges (and variations of the old) were quick to arise.

579. Tiersma, *supra* note 578, at 1085–86.

One would think that in a fair number of trials one side would have an interest in jurors following the law, while the other side might prefer to ignore or minimize the legal rules. The former would presumably fight for clear instructions, while the latter would prefer the existing obscurity. As far as I know, however, lawyers seldom use this strategy, at least as far as jury instructions are concerned. As a result, lawyers tend not to object to the language of jury instructions until perhaps raising it on appeal, after they have lost the case. At this point, of course, appellate judges are likely to reply that it is too late; they should have objected at trial.

Id. at 1086; *see also* Simon, *supra* note 577, at 556 (refuting the argument that permitting counsel to submit special requests for preinstruction might complicate preparation and delay trials by pointing out that “in most cases, the jurisdiction’s pattern jury instructions are not a cause of dispute”); Steele & Thornburg, *supra* note 577, at 78–79 (listing forces that “deter attempts to rewrite jury instructions” and noting that lawyers often believe “confusing instructions benefit certain clients” and that “in the adversary system . . . each side [is] more concerned with its clients than with clarity”).

580. Power, *supra* note 574, at 55.

581. *See* Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25, 25–26 (2002) (stating that judges may “simply read the statute to the jury” or “read versions of the law drawn from appellate opinions or model jury instructions”).

582. Tiersma, *supra* note 578, at 1084; *see also* Kramer & Koenig, *supra* note 574, at 404 (explaining that “‘pattern’ or ‘standard’ instructions” were developed “to minimize the use of jury instructions as a tool to obtain appellate reversal”).

583. *See* Ritter, *supra* note 577, at 192 n.169 (citations omitted); *see also* Power, *supra* note 574, at 55 (“Reformers called for ‘pre-endorsed pattern instructions,’ which would be mandated or recommended for use in all cases. Presumably, these instructions would be immune from appellate challenge and would help trial judges avoid having to select from the self-serving and potentially erroneous instructions submitted by attorneys.”). *But see* Thomas Lundy, *Going Beyond the Standard Pattern Instructions Part I: The Inherent Limitations of Pattern Instructions*, at http://www.juryinstruction.com/article_section/articles/article_archive/article33.htm (2001) (arguing that “[d]espite the lip-service given to concerns of clarity and juror understanding, in practice the standard instructions serve the primary purpose of allowing the judge and attorneys to spend less time working on jury instructions”).

The original drafting committees consisted primarily of legal professionals—judges, lawyers, and legislators. While this composition increased the likelihood of legal accuracy and technical precision, few committee members were skilled at explaining legal terms in a layperson's language.⁵⁸⁴ Nor were the members as fully aware of the incomprehensibility problem, since jury research had yet to become a full-fledged field of scientific study.⁵⁸⁵ More recently, experts from a variety of disciplines have examined the negative consequences of convoluted instructions, and they have proposed remedies. For example, a jury review commission established by the Judicial Council of California encouraged the inclusion of “linguists, communications experts, and other non-lawyers” (in addition to judges and lawyers) for a “Task Force on Jury Instructions” that the commission was recommending.⁵⁸⁶

Social science research has been particularly influential on jury instruction reform because, as the legal community increasingly concedes, the reality of how jurors decide cases can differ from theoretical legal constructs.⁵⁸⁷ Likewise, social scientists have developed numerous theories concerning how jurors reach decisions. The “coherence-based reasoning model,” for example, suggests that jury instructions are ineffective not only because of their convolution, but also because most jurors have basically made their decision by the time the judge provides them the rules.⁵⁸⁸ This closed-mindedness is a particular risk for jurors who are

584. Steele & Thornburg, *supra* note 577, at 78–79 (attributing lawyers' reluctance to rewrite jury instructions to a “lack of writing skills,” and noting that “[t]he complexity of the law and the law's occasional vagueness make rewriting difficult even for those willing to try”).

585. See Ritter, *supra* note 577, at 192–93. See also Tiersma, *supra* note 578, at 1098 (noting that judges and lawyers “tend to be poor evaluators of whether and how the ordinary lay public understands legalese,” since “such language is so familiar to . . . members of the legal profession”).

586. Tiersma, *supra* note 578, at 1100 (citation omitted); see also William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043 (1995) (noting that research into jury decision-making in capital cases “is being conducted by a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members”); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 224 (1996) (advocating the application of “linguistic principles that facilitate comprehension” and “improve the ability of jury instructions to convey legal standards accurately and effectively”); Penelope Pether, *Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project*, 24 S. ILL. U. L.J., 53, 53–54 (1999) (recommending the use of “critical discourse analysis, a technique for reading texts developed in linguistics, as a way to identify limitations in a significant contemporary United States criminal law reform initiative, the ‘plain language’ or ‘psycholinguistic’ redrafting of pattern jury instructions”).

587. Bowers, *supra* note 586, at 1068 (“The legal formulation of guilt determination has always been understood as an ideal or normative description of how jurors should decide cases, not necessarily a description of what they really do.”); see also Ellsworth & Reifman, *supra* note 577, at 817 (noting that, in some reform jurisdictions, “social science research has been embraced wholeheartedly . . . [i]f anything, the reformers' confidence in the social science research surpasses that of the social scientists themselves”).

588. This theory further contends that by the time jury instructions are issued, “it is more difficult to educate jurors as to the correct legal rules because the misconceived rule is already integrated into a coherent and stable mental model, and the evidence is skewed accordingly.” Simon, *supra* note 577, at 553. Proponents also note that “[c]oherence research overcomes an important limitation of the story model,” because it is applicable “in a range of evidentiary situations” where the facts of a situation are at issue, rather than a series of events that could construct a narrative. *Id.* at 563–64.

least versed in the law and therefore most apt to follow erroneous preconceptions, especially when the crimes in question are more recognizable, such as burglary or murder, as opposed to, for example, antitrust violations.⁵⁸⁹

One of the foremost theories of juror decision-making is the “story model.”⁵⁹⁰ This model suggests that each juror constructs a narrative—a “sequence of motivated events”—based on the facts and evidence offered during trial.⁵⁹¹ When presented with jury instructions and permissible verdicts, jurors choose the verdict that best matches this narrative. In other words, the stories that jurors develop during trial dictate their subsequent decisions.⁵⁹²

Like the coherence-based reasoning model, the story model suggests that jurors reach at least a speculative decision prior to receiving instructions from the judge.⁵⁹³ The story model also implies that if judicial instructions do not offer a verdict that fits jurors’ narratives, jurors will be dissatisfied and uncertain about the outcome of the trial. In that circumstance, they may prefer to oversimplify their narratives and discard incongruous instructions until a corresponding verdict is available.⁵⁹⁴ Thus, the issue may not be incomprehensibility, but rather instructions that don’t comport with jurors’ perceptions of justice. Other social science theories also suggest that jurors’ personal experiences and opinions influence the decision making process.⁵⁹⁵

589. *Id.* at 553.

590. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991).

591. Bowers, *supra* note 586, at 1068 (explaining that as this narrative develops, jurors “become increasingly resistant to evidence that would cause them to reconstruct it”).

592. *Id.* (citations omitted); Simon, *supra* note 577, at 566–67 (discussing a Supreme Court decision that evidentiary relevance should be based in part upon “how the piece of evidence interacts with the other evidence and how it contributes to the argument’s overall narrative force,” because “the prosecution should be allowed to present its case in a manner that corresponds to the holistic way in which jurors process evidence”); see also Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1137–38 (2001) (explaining that the “story model” suggests that juries “utilize their past experiences to filter and understand the various pieces of evidence . . . to develop alternative interpretations, or, ‘stories,’ about the events that led to the dispute now on trial”).

593. Christopher N. May, “*What Do We Do Now?: Helping Juries Apply the Instructions*,” 28 LOY. L.A. L. REV. 869, 882 (1995); Pennington & Hastie, *supra* note 590, at 520.

594. May, *supra* note 593, at 883–84 (further elaborating that “[t]he effort to avoid cognitive dissonance may explain, in psychological terms, why juries sometimes decide cases on the basis of instinct, emotion, or conscience, rather than according to the letter of the law”).

595. This expansive literature is not referenced in detail here. See Tiersma, *supra* note 578, at 1082 (“If a judge does not explain to the jury what it is supposed to do, the jury will do what it feels is best.”); see also Ellsworth & Reifman, *supra* note 577, at 800 (citing research indicating jurors’ allegiance “to preexisting ideas even when instructions are written clearly”); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1465 (1995) (arguing that jurors “must generalize from past experience” in reaching decisions); Pether, *supra* note 586, at 61–62 (recommending the use of “critical discourse analysis” on jury instructions, since “they occupy a complicated site of transference and contestation of power between judge, lawyers, litigants and jury” and “are perhaps the point at which legal discourse engages most explicitly with ‘common sense’ discourse, the cultural stories which shape how we interpret and construct the world”); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 869 (1991) (noting that jurors typically have preconceptions about the law prior to becoming jurors, thus “[t]he objective of jury in-

Competition among drafting committees creates yet another set of obstacles to jury instruction reform. When California's "Task Force on Jury Instructions" was appointed, for example, an existing commission had already released state jury instructions that were copyrighted and generating royalties for the Los Angeles Superior Court. Rather than joining forces, the committees that formed the original instructions continued to work separately from the task force appointed to revise them. Thus, California has two sets of jury instructions from which to select, potentially negating the goals of efficiency and consistency among instructions.⁵⁹⁶ California is not alone among states in providing several versions of standardized instructions.⁵⁹⁷

Few safeguards exist against flawed instructions once they are standardized.⁵⁹⁸ If judges are in a situation where appellate reversal is relatively less threatening, they may find themselves with a new motivation to ignore incomprehensible or inapplicable instructions. Because the instructions are standard, any given instruction is likely to have been used in numerous previous cases. Judges may hesitate to declare an instruction poorly drafted when doing so might invite vast numbers of prisoners to challenge the constitutionality of the same instruction that was presumably so instrumental in their convictions.⁵⁹⁹

Nonetheless, model jury instructions now "dominate the legal landscape,"⁶⁰⁰ and the committees that issue them typically hold some level of "official statewide status."⁶⁰¹ The status of the actual instructions varies from state to state. Jury research indicates that "many states with pattern or standardized instructions either require or strongly recommend that they be used when available."⁶⁰² Other state courts seem to temper

struction . . . must be concept revision, not merely concept formation"); Vidmar & Diamond, *supra* note 592, at 1160 (citing numerous studies supporting "the theme of jurors using 'common sense' notions to judge expert evidence and judicial instructions"). Other social psychology phenomena may impact jury decision making as well. A key tenet of social psychology that has been applied to the field of jury research is the idea that jurors' individual characteristics are less likely to determine their behavior than the characteristics of the situation. Although this observation was noted in the context of the public's perceptions of jurors, rather than jurors' perceptions of defendants, the principle that individuals tend to misinterpret the implications of others' actions seems significant to both situations. Ellsworth & Reifman, *supra* note 577, at 794-95 (citations omitted).

596. Tiersma, *supra* note 578, at 1100-01.

597. See Ritter *supra* note 577, at 192 n.168 (citations omitted) ("[I]n modern day courts one will frequently hear varying renditions of legal principles. This is because jury instruction manuals often offer alternatives among approved instructions.").

598. See, e.g., Lundy, *supra* note 583 (observing that "pattern instructions often preempt the adversarial process with regard to jury instructions," and noting that "[t]he proliferation of pattern instructions has lulled many judges and lawyers into a sense of complacency") (quoting BNA Criminal Practice Manual § 131.101 (1999)).

599. Tiersma, *supra* note 578, at 1088.

600. Power, *supra* note 574, at 55.

601. Tiersma, *supra* note 578, at 1099 (noting that California's jury instruction committees "are unusual in that they have no official statewide status").

602. *Id.* at 1086. The foreword to Idaho's criminal jury instructions notes, for example, that the Idaho Supreme Court "appointed a committee of lawyers and judges to undertake the first comprehensive drafting of pattern criminal jury instructions." *Forward* [sic] to Idaho Criminal Jury Instruc-

the value of their instructions, expressing at least tacit acknowledgment of their shortcomings.⁶⁰³ The degree of acceptance of pattern instructions also does not always remain constant—in some states, they appear to have shifted in favor.⁶⁰⁴ Regardless of their official status, model jury instructions have become an integral part of the American legal system.

tions (1995). The foreword then explains that after the Idaho Supreme Court reviewed the revised instructions, the court provided the following qualification:

Whenever the latest edition of the Idaho Criminal Jury Instructions (ICJI) contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the ICJI instruction, unless the judge finds that a different instruction would more adequately, accurately or clearly state the law.

Id. Many states include similar kinds of conditional statements, stressing the dangers of “exclusive or inflexible reliance upon the pattern instructions.” Lundy, *supra* note 583 (listing relevant excerpts from the jury instructions of three federal circuits and eighteen states (including the District of Columbia)).

603. This article’s study found a number of instances in which jury instruction committees in different states qualified the utility of their criminal jury instructions. Louisiana, for example, introduces its criminal jury instructions by cautioning judges and lawyers that the guidelines “are not intended for uncritical use.” Louisiana Civil Law Treatise, Vol. 17 Criminal Jury Instructions, § 1.01 *Use of Criminal Jury Instructions* (1994). Rather, they “require careful and critical evaluation in light of their specific use and judicial and statutory developments.” *Id.* The introduction further states that “[t]he proposed instructions have not been promulgated or officially approved by the Supreme Court of Louisiana. They are suggested to assist judges and attorneys as guidelines and as a framework for preparing instructions to meet the needs of a particular case and court.” *Id.* Michigan notes that “[t]he Michigan Criminal Jury Instructions do not have the official sanction of the Supreme Court, and their use is not required. In fact, a standard instruction may be erroneous, misleading, and inadequate in a particular case.” Michigan Non-Standard Jury Instructions, Criminal, §1.02. *Standard Jury Instructions* (1999). Michigan further warns that “[t]he role of the Supreme Court’s committee on standard criminal jury instructions is to draft instructions that reflect existing law in clear language, but not to change existing law.” *Id.* Likewise, it includes an “editor’s caution” that while the standard instructions “should be considered by counsel for possible submission in a request for instructions, jury instructions from any source . . . should be examined carefully before submission.” *Id.* Michigan trial court judges are “not required to give proffered instructions on a theory of the case verbatim even if the statements are accurate, if the court determines that the language of the instruction is, on the whole, confusing, inarticulate, inartfully organized or simply difficult to understand.” *Id.* at § 1:03. The Oregon State Bar Bulletin explains that “[b]oth the civil and criminal [jury] instructions have been developed through the years by two separate jury instruction committees of the Oregon State Bar, which meet regularly to evaluate and develop jury instructions for use at trial.” Stephanie Midkiff, *Oregon Law & Practice—A New Practitioners’ Tool*, OR. ST. B. BULL. 25, 28–29 (July 2004) (citation omitted). The bulletin emphasizes that these instructions “are not pre-approved by the Oregon Supreme Court, and there is nothing sacred about any particular set of instructions.” *Id.* at 29. The Users’ Guide for the Oregon criminal jury instructions further elaborates: “The uniform instructions . . . do not have the force and effect of a statute. There is no statutory requirement that instructions be given in uniform jury instruction form. The uniform instructions are only a framework for building a set of instructions.” *Id.* at 29 (citation omitted).

604. In an “Important Notice” preceding the table of contents for its criminal jury instructions, for example, Arizona’s Criminal Jury Instructions Committee notes the following:

In the past, the Arizona Supreme Court has expressed a qualified approval for various jury instructions, which were then published as *Recommended Arizona Jury Instructions*. However, the Arizona Supreme Court has determined that it will no longer issue qualified approvals for any jury instructions. Due to the action by the Court, members of the Board of Governors established guidelines for future RAJIs and decided that this disclaimer should be included for all RAJIs. The instructions have also been renamed *Revised Arizona Jury Instructions (RAJI (Criminal))* as the Instructions are no longer “recommended.” These instructions are being published without Supreme Court approval. As a result, the following instructions are offered solely as the work product of the Criminal Rules Committee and the Criminal Jury Instructions Ad Hoc Committee, whose members, however, spent many hours in preparing these instructions.

Important Notice to Revised Arizona Jury Instructions (Criminal) (1989 rev. 1996, 2000).

2. *A Statewide Study of Criminal Jury Instructions*

The difficulties of developing clear and concise jury instructions are amplified when those instructions concern as amorphous a concept as intent.⁶⁰⁵ It is widely acknowledged that, without a confession or established facts, jurors must rely on circumstantial evidence to make decisions regarding mental state.⁶⁰⁶ Many researchers consider this reliance problematic, since a defendant's behavior is open to numerous interpretations,⁶⁰⁷ and jurors may favor their own preconceptions over the law.⁶⁰⁸ Although the combination of each juror's subjective experiences may enrich the jury,⁶⁰⁹ particularly when it confronts challenging questions prompting a focus on a defendant's intent,⁶¹⁰ jurors' ability to eventually agree upon a mental state does not necessarily indicate comprehension of the underlying law.⁶¹¹ Even jurors who do attempt to follow instructions are unlikely to receive much guidance because vague statutes pro-

605. Brown, *supra* note 581, at 37 (noting in the context of a specific example that "the difficult factual question of the defendant's intent" is a "considerable task" for jurors); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1274-76 (2000) (emphasizing the importance of a jury's determination of mental state).

606. See Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 158 (2003) ("Absent an admission or other clear evidence of an actor's intent, the prosecutor and, ultimately, the fact-finder must infer the actor's mental state from the circumstances surrounding the offense."); see also Ritter, *supra* note 577, at 202 n.219 (noting that "legislatively created [evidentiary] presumption[s]" are often permitted "to ease the prosecutor's burden of producing evidence of a defendant's intent").

607. See Thomas Lundy, *Flight Evidence and Jury Instructions: Ideas for Clipping the Prosecution's Wings*, CHAMPION, Oct. 2000, at 41-42 (examining jurors' possibly different interpretations of "consciousness of guilt").

608. See Taylor-Thompson, *supra* note 606, at 158-59; see also Taylor-Thompson, *supra* note 605, at 1275 (observing that jurors "often must infer the actor's state of mind from conduct open to numerous interpretations," and that determinations of mental state "often hinge on a juror's personal interpretation of behavior"). Research on the insanity defense has indicated that jurors' "prior beliefs may override or modify their interpretation" of expert evidence. Vidmar & Diamond, *supra* note 592, at 1158. Also, "while jurors do consider the judicial instruction of the judge and the expert, they nevertheless construe the evidence to comport with their intuitive or 'common sense' beliefs about what is insane and what is not." *Id.* at 1159.

609. Advocates of an unanimity requirement, rather than majority rule, state that the "intensive examination of the evidence" and "spirited debates" prompted by the need for consensus compel jurors to seriously evaluate the viewpoints of other jurors' perspectives on the evidence. Taylor-Thompson, *supra* note 605, at 1274.

610. Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1207 (1998) (noting that "mental state elements" often serve "the key function of guiding the liability decisions").

611. See M. Varn Chandola & Anoop Chandola, *A Cognitive Framework for Mens Rea and Actus Reus: The Application of Contactics Theory to Criminal Law*, 35 TULSA L.J. 383, 385 n.15 (2000) (noting that jurors' "determination as to whether the defendant possesses the culpable mental state . . . to be guilty of the crime . . . does not mean that jurors truly understand how the model of mens rea and actus reus is to operate in a criminal trial").

duce broad jury instructions⁶¹² that encourage jurors to resort to their own strategies for making mental state determinations.⁶¹³

This article's study shows that a substantial number of state criminal jury instructions avoid the morass of mental state by focusing predominantly on a defendant's acts. Indeed, the current act-based trend among many jury instructions regarding mental states suggests that the judges, lawyers, and jury instruction committees are trying to address this problem by encouraging jurors to rely on a defendant's behavior to determine the inner workings of that defendant's mind. As Table 1 (Appendix)⁶¹⁴ shows, the criminal jury instructions of thirty-four states and the District of Columbia permit an inference of mental state from circumstantial evidence.

Among the states that permit such inferences, however, there is a broad continuum of reliance—particularly with respect to whether there is any mention (or not) of the defendant's mental state. Alaska's Criminal Pattern Jury Instruction § 1.15, for example, states unequivocally: "State of mind may be shown by circumstantial evidence. It can rarely be established by any other means."⁶¹⁵ Vermont's instruction is one of the strictest in terms of curtailing any reference to what is going on in the defendant's mind: "'Criminal intent' is not the secret intent of the defendant, but the intent that can be determined from his (her) conduct and all other circumstances that surround it."⁶¹⁶ Ohio seems to follow a similar logic, first asserting that "[p]urpose and intent mean the same thing" and then explaining that "[t]he purpose with which a person does an act is known only to himself, unless he expresses it to others or indi-

612. Taylor-Thompson, *supra* note 606, at 158–59 ("Given the difficulty of determining intent, criminal statutes necessarily define states of mind broadly, offering general categories that roughly track an actor's mental process" while the jury instructions derived from these statutes apply to specific determinations of an actor's liability).

613. *Id.* (noting, in the context of adolescent defendants, that this "deliberative process invites juries to interpret acts by applying their own experiences and common sense judgments" and thus draw inferences about intent, even when "these crude approximations seem incompatible with what we know—and what cognitive and developmental research tells us—about adolescent decision-making"). *But see* Simon, *supra* note 577, at 565–66 (arguing that recognizing the narrative force of evidence, and its "power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict" is to "[take] a step toward a realistic reckoning with the capabilities and limitations of human cognition") (citation omitted).

614. *See infra* app. tbl.1. These thirty-four states are Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

615. *See infra* app. tbl.1. It is interesting to note, however, that Alaska's jury instruction manual also states that a pattern instruction regarding evidence of flight is no longer provided since "the probative value of flight evidence is often weak." Alaska Court System Criminal Pattern Jury Instructions, § 1.28 *Flight* (2000 rev. 2004).

616. *See infra* app. tbl.1 (Vermont Jury Instructions, Civil And Criminal, § 5.47 *Instruction: Specific Intent* (1993) (emphasis omitted)).

cates it by his conduct.”⁶¹⁷ These states seem to share Ledewitz’s belief that intent is, or should be considered, synonymous with the defendant’s acts and available circumstances.

States representing the other end of the continuum still instruct juries to rely on circumstantial evidence, but provide more balance by letting the juror know that intent is, in some aspect, an operation of the mind. Many states allow the inference but make a point of cautioning jurors against shifting the burden of proof to the defendant,⁶¹⁸ and advise them that a defendant’s actions alone are not conclusive of guilt.⁶¹⁹ Massachusetts Superior Court Criminal Practice Jury Instruction § 4.19, titled “Consciousness of Guilt,” contains one of the more eloquent acknowledgments of the latter caveat:

If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people.⁶²⁰

Instructions like this soften the kinds of recommendations that Ledewitz makes and assure juries that while they may infer people’s intention from their conduct, the inference is not required. Yet even such articulate recognition of the fallibility of act-based inferences rings somewhat hollow when judges offer jurors no alternative method of determining mens rea.⁶²¹

New York represents an interesting example of a state that initially emphasized the mental element in its jury instruction, but then recently incorporated a far more act-based instruction, a change that the New

617. See *infra* app. tbl.1 (Ohio Jury Instructions Criminal, Vol. 4, § 409.01 *Purposely, motive R.C. 2901.22(A)* (2004)).

618. See, e.g., *infra* app. tbl.2 (Arizona, California, Maine, New Jersey, and New York).

619. See, e.g., *infra* app. tbl.2 (California, Connecticut, Delaware, Louisiana, Maryland, Massachusetts, North Carolina, North Dakota, Pennsylvania, and Tennessee).

620. See *infra* app. tbl.2.

621. Some states do encourage jurors to rely on their own “common sense and personal experience” when deciding which inferences are justified. Maine Jury Instruction Manual, § 6-10 *Evidence to Be Considered. Instruction* (4th ed. 2004); see also North Carolina Pattern Jury Instructions for Criminal Cases, § 120.10 *Definition of [Intent][Intentionally]* (1987 supp. 2003) (“You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.”). However, this instruction can hardly be described as an “alternative” to act-based inferences. For one thing, research indicates that instructing jurors to rely on their common sense and personal experiences is redundant, since jurors already have a natural inclination to fall back on preconceptions when making decisions. Furthermore, this instruction could be dangerous. These preconceptions are potentially erroneous, and jurors are already prone to generalize the facts of a case in order to select a verdict that is consistent with their personal notions of justice. These instructions represent, in fact, an interesting reversion to the early nineteenth century American legal system in which jurors were not instructed on the law because it was thought to be too complex, and were instead “expected to use their common sense” to decide cases. Tiersma, *supra* note 578, at 1083.

York Committee on Criminal Jury Instructions implemented in 2000 to make the instruction less confusing. Prior to 2000, New York's jury instructions did not include a separate official definition of intent. However, intent was defined in the context of other instructions, such as the instruction for first degree murder, which described intent as a "conscious objective or purpose."⁶²² Unofficially, intent did have a separate definition; jurors were told that "a person acts intentionally with respect to a result . . . when his *conscious objective* is to cause such result or to engage in such conduct."⁶²³ These references to "conscious objective" derive, of course, from the MPC's definition of "purpose" under the MPC's mens rea instruction.⁶²⁴ Yet, the New York instruction also noted that "[w]hat a defendant intends is of course an *operation of his mind*" and that "[a] jury, even if present at the time of the commission of the crime, cannot examine the *invisible operation of a person's mind*."⁶²⁵ Therefore, given the circumstances, "the law permits the jury to consider what the defendant said verbally" and also "the acts and conduct of the defendant before, during or after the commission of the crime."⁶²⁶

In 2000, an expanded charge on intent that elaborated on the requisite mental state was added to New York's criminal jury instructions. This instruction excludes any mention of conscious object or the jury's inability to examine the invisible operation of a person's mind. Instead of addressing what intent means, the instruction provides guidance on how to determine intent based on what the jury may consider. Examples of such circumstantial evidence would be a "person's conduct and all of the circumstances surrounding that conduct" including what the person said, any result that followed the person's conduct, and whether the result was "the natural, necessary and probable consequence of that conduct."⁶²⁷ Judges were instructed to add these expanded charges "[a]s necessary" to instructions that already included definitions of intent.⁶²⁸ For instructions pertaining to crimes that do not specify intent, but for which intent can be inferred, the act-based definition of intent provided in the 2000 expanded charges may control.

Given that New York's expanded charge on intent in the 2000 revision of its criminal jury instructions excluded any reference to the defendant's conscious object, a key question is raised: Does consciousness play any role in other state jury instructions in the way the term plays a

622. Criminal Jury Instructions, Penal Law, *Murder First Degree (Capital) (Intentional Murder—Prior Murder Conviction) Penal Law 125.27(1)(a)(ix)* (rev. 1996) (New York).

623. Criminal Jury Instructions, New York, Vol. 1, *CJI 9.31 Intent: General Instruction* (1st ed. 1983) (emphasis added).

624. See *supra* Part III.A. and accompanying text.

625. Criminal Jury Instructions, New York, Vol. 1, *CJI 9.31 Intent: General Instruction* (1st ed. 1983).

626. *Id.*

627. Criminal Jury Instructions, 2nd ed., General Charges (Official), *Expanded Charge On Intent (approved 2000)*, available at <http://www.nycourts.gov/cji/1-General/cjgc.html>.

628. *Id.*

role in the MPC provisions? According to Table 3 (Appendix),⁶²⁹ the jury instructions of thirty-eight states and the District of Columbia use the term conscious (or some derivative term) when defining or describing a defendant's mental state. The District of Columbia and thirty-one of these thirty-eight states also have at least one jury instruction listed in Table 1. Of the states listed in both Table 3 and the "permits inference" section of Table 1, twenty states have the same instruction in both tables—in other words, twenty states use some derivative of the term conscious in permitting jurors to make act-based inferences regarding mental state.⁶³⁰ Most of the eighteen Table 3 states that do not have the same instruction listed in the "permits inference" section of Table 1 do have an intent provision that resembles the MPC's, although some of the instructions are somewhat more elaborate to make them more comprehensible to a jury. Likewise, as Table 4 (Appendix)⁶³¹ shows, numerous states have instructions that parallel the MPC's provisions but without any reference to a requirement of "consciously."

In general, however, the majority of instructions reflect a heavy reliance on circumstantial evidence as a means of determining mental state—albeit to varying degrees and all within the Supreme Court's prescribed constitutional limits on presumptions and burden shifting.⁶³² This tendency toward act-based instructions gives a veneer of simplicity that is not warranted despite the purported goal of providing greater clarity for juries. Similarly, this article disagrees with the recommendations made by Barbara Wootton and others concerning the proper place of *mens rea*. They claim that because of the uncertainties over gauging mental

629. See *infra* app. tbl.3. These thirty-eight states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Wisconsin, Wyoming.

630. The thirty-one Table 3 states that also have at least one jury instruction listed in Table 1 are Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and Wisconsin. The twenty states listed in both Table 3 and the "permits inference" section of Table 1 that use the same instruction in both tables are California, Connecticut, Delaware, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Montana, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and Wisconsin. It should be noted that in the case of New York, the overlapping instructions are from the "unofficial" version of the state's criminal jury instructions. Of the "official" instructions, as revised in 2000, those that define intent using the term "conscious" do not specifically permit act-based inferences, and the expanded charges that specifically permit act-based inferences do not use the term "conscious."

631. See *infra* app. tbl.4.

632. See *Sandstrom v. Montana*, 442 U.S. 510, 512–14 (1979) (holding that it is unconstitutional for a court to instruct a jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts," for crimes where intent is an element unless there is some qualification; the Court explained that such a charge could deprive the defendant of his right to due process (specifically, the requirement that the prosecution prove every element of the crime charged beyond a reasonable doubt) because a jury could interpret such a charge either as a conclusive presumption or a burden shifting presumption).

states, mens rea determinations should be made by a judge and considered at sentencing only, while actus reus determinations (which presumably would rely on more objective criteria) would be made at trial for the purposes of conviction.⁶³³

This article contends that the new consciousness research shows that so-called objective indicators such as acts invite far more subjective interpretation than we could ever think possible. Further, the act-based approach dilutes the benefits that derive from judges' and jurors' moral interpretations of what they believe constituted the defendant's intent. In essence, modern consciousness research reclaims the "ethical verve" that Freudian theory originally contributed to the law.⁶³⁴ Like its psychoanalytic predecessor, the new science accentuates the significance of a defendant's mental state. Yet the new research also goes so much further than Freudianism in terms of its empirical sophistication and evidentiary acceptability. As Herbert Wechsler noted, "though the law purports to be concerned with the control of specified behavior, it rejects or does not fully use the aid that modern science can afford."⁶³⁵ Now seems to be an ideal time to embrace science and allow it to progress the law.

VII. CONCLUSION

Much of the criminal law's doctrine of culpability and consciousness is based on a Freudian psychoanalytic model that reflects the culture and psychology of the times (the 1950s and 1960s) when the Model Penal Code developed its widely adopted mens rea provisions and defenses. For this reason, the purpose, rationale, and subjective focus of the Model Penal Code's doctrine makes more sense when interpreted in the context of a Freudian framework. For modern-day criminal law, however, this degree of psychoanalytic impact is troublesome. Freudian theory has awkward applicability to group conflicts, it focuses on unconscious rather than conscious thought processes, and most of it would not pass modern evidentiary standards.

The new science of consciousness and conscious will shows a striking continuity with Freudian theory. However, the science also offers the criminal law ways to enlighten existing mens rea doctrine and defenses with progressive discoveries that more readily comport with group dynamics and evidentiary standards. Results of the new consciousness research suggest that increasing efforts to downplay or distort the significance of mens rea in the criminal law are not warranted and dangerously veer toward a philosophy of act-based reductionism. This concern is particularly pronounced in light of this author's statewide study of criminal

633. See *supra* notes 337–41 and accompanying text.

634. RIEFF, *supra* note 95, at 300 ("Freudianism restored to science its ethical verve In this way Freud has given us a popular science of morals that also teaches us a moral system.").

635. Wechsler, *Challenge*, *supra* note 82, at 1103.

jury instructions regarding defendants' mental states. The study shows that a substantial number of states have no instructions on criminal intent whatsoever. The majority of states that do have instructions rely heavily on circumstantial evidence, with little to no mention of the defendant's mental processes that may be involved in the criminal act.

Recent efforts to clarify the terminology of mental states may result in a trend to dismiss the significance of cognitive processes altogether. Among the many values that current consciousness research offers, however, is the ability to reestablish the mental and moral emphasis on the law that Freud initially garnered and that present-day jurisprudence may all too easily lose.

APPENDIX

TABLE 1¹

CRIMINAL JURY INSTRUCTIONS CLASSIFIED ACCORDING TO WHETHER JURORS CAN INFER MENTAL STATE FROM A DEFENDANT'S ACTS

Table 1 classifies criminal jury instructions according to whether jurors are allowed to make inferences about a defendant's mental state based upon that defendant's acts.² For the relevant text of any Table 1 instruction, refer to Table 2. Citation information for all Table 1 instructions is available in Table 6.

INSTRUCTIONS THAT ALLOW JURORS TO INFER MENTAL STATE FROM A DEFENDANT'S ACTS

State	Instruction
ALASKA	§ 1.15 <i>State Of Mind—Circumstantial Evidence</i>
ARIZONA	<i>Standard Criminal 9 Flight or Concealment</i> , at 9 ² § 1.056(a)(2) <i>Intent—Inference</i> , at 29
CALIFORNIA	§ 2.02 <i>Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State</i> , at 33–34 § 2.03 <i>Consciousness Of Guilt—Falsehood</i> , at 35–36 ² § 2.06 <i>Efforts To Suppress Evidence</i> , at 38
CONNECTICUT	§ 3.16 <i>Flight</i> , at 254–56 § 7.1 <i>Intent (§ 53a-3(11))</i> , at 2
DELAWARE	<i>Flight</i> <i>Permitted Inference Of Intention, Recklessness, Knowledge Or Belief</i>
<i>(Continued on next page)</i>	

1. All jury instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in Tables 1–6: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions. Seven additional states were excluded from Tables 1 and 2 because they did not have relevant information: Alabama, Arkansas, Colorado, Minnesota, Missouri, South Carolina, and Wyoming.

2. In addition to jury instructions, Table 1 lists relevant authorial addenda. In some states, the committee or advisory group that developed the jury instructions also provided addenda to accompany them. The addenda typically appear beneath the instructions, or on a subsequent page. Sometimes the addenda have a title (e.g., “Commentary”). The addenda serve a number of functions, which range from further clarifying an instruction's meaning to providing information about its development or current status.

TABLE 1—*Continued*

State	Instruction
DISTRICT OF COLUMBIA	§ 3.02 <i>Proof Of State Of Mind</i> , at 202
FLORIDA	§ 3.5(c) <i>Accessory After the Fact</i> , at 34
GEORGIA	§ 1.41.10 <i>Intent</i> , at 33 § 1.41.11 <i>No Presumption Of Criminal Intent</i> , at 34
HAWAII	§ 3.16 <i>State Of Mind—Proof By Circumstantial Evidence</i>
KANSAS	§ 54.01 <i>Presumption Of Intent</i> , at 95
KENTUCKY	§ 3.01 <i>Intentionally</i> , at 86 ²
LOUISIANA	§ 5.08 <i>Flight of the Defendant</i> , at 50 ²
MAINE	§ 6-10 <i>Evidence to Be Considered. Instruction.</i> § 6-13 <i>Presumptions-Inferences. Instruction.</i> § 6-39 <i>Inferred Intent. Instruction.</i>
MARYLAND	§ 3:24 <i>Flight Or Concealment Of Defendant</i> , at 82 [Similar instruction for § 3:26 <i>Concealment Or Destruction Of Evidence As Consciousness Of Guilt</i> , at 86; § 3:27 <i>Suppression, Alteration Or Creation Of Evidence As Consciousness Of Guilt</i> , at 88; § 3:28 <i>Bribery Or Witness Intimidation As Consciousness Of Guilt</i> , at 89] § 3:31 <i>Proof Of Intent</i> , at 95
MASSACHUSETTS	§ 1.9 <i>Intent: General And Specific</i> § 4.12 <i>Knowledge</i> § 4.19 <i>Consciousness Of Guilt</i>
MICHIGAN	§ 4:02 <i>Instruction on Inferring State of Mind in Assault Cases</i> , at 71
MISSISSIPPI	§ 3:12 <i>Flight By Defendant</i>
MONTANA	§ 1-017(b) <i>Circumstantial—Inference of Mental State</i> § 1-020 <i>Flight by Defendant</i> § 2-108 <i>Mental State Inference</i>
NEBRASKA	§ 5.1 <i>States Of Mind Proved Inferentially</i> , at 67

(Continued on next page)

TABLE 1 — *Continued*

State	Instruction
NEW HAMPSHIRE	§ 1.19 <i>Flight By The Defendant</i> , at 21 § 1.19-a <i>What Does Evidence That A Person Ran Away Prove?</i> , at 22 § 2.02 <i>Proof Of Intent</i> , at 36 <i>Mental States—Proof of Mental State</i> , at 39
NEW JERSEY	<i>Flight</i> <i>State Of Mind</i>
NEW MEXICO	§ 14-141. <i>General criminal intent</i>
NEW YORK	§ 4:18. — <i>Intent</i> , at 148–49 § 4:37. <i>Consciousness of Guilt</i> , at 176–77 § 4:38. — <i>Commentary</i> , at 177 ² § 4:44. <i>Flight</i> , at 184 § 4:45. — <i>Commentary</i> , at 184–85 ² § 4:54. <i>Intent</i> , at 202–03 § 4:55. — <i>Commentary</i> , at 203–05 ² <i>Expanded Charge On Intent</i> <i>Expanded Charge On Knowingly</i>
NORTH CAROLINA	§ 104.35 <i>Flight—In General.</i> § 120.10 <i>Definition of [Intent][Intentionally].</i>
NORTH DAKOTA	§ K-5.38 <i>Proof of Intent</i> § K-5.40 <i>Flight [Concealment]</i>
OHIO	§ 409.01 <i>Purposely, motive R.C. 2901.22(A)</i> , at 57–58
OKLAHOMA	§ 9-8 <i>Evidence—Flight</i> , at 460
PENNSYLVANIA	§ 3.14 <i>Consciousness Of Guilt, Flight Or Concealment As Showing</i> § 3.15 <i>Consciousness Of Guilt, Conduct Of Defendant As Showing</i>
SOUTH DAKOTA	§ 1-12-3 <i>Intent—How Manifested</i>
TENNESSEE	§ 42.18 <i>Flight</i> , at 929
TEXAS	§ 12:620.30 <i>Extraneous Offenses or Conduct—To Prove Intent, Knowledge, Design, Scheme, or System</i>
VERMONT	§ 5.47 <i>Instruction: Specific Intent</i>

(Continued on next page)

TABLE I—*Continued*

State	Instruction
VIRGINIA & WEST VIRGINIA	§ 101:09 <i>Flight by Defendant</i> , at 477 § 24-177. <i>Presumed From Act Of Killing</i> , at 108
WISCONSIN	§ 172 <i>Circumstantial Evidence: Flight, Escape, Concealment</i> , at 1

INSTRUCTIONS THAT DO NOT ALLOW JURORS TO INFER MENTAL
STATE FROM A DEFENDANT'S ACTS

State	Instruction
ALASKA	§ 1.28 <i>Flight</i> ²
GEORGIA	§ 1.36.10 <i>Flight</i> , at 31
IDAHO	§ 309 <i>Defendant's Intent Manifested By Circumstances</i> ²
ILLINOIS Pattern Non-pattern	§ 3.03 <i>Flight</i> , at 88 § 3.03 <i>Flight</i>
INDIANA	§ 12.23. <i>Escape</i> . ² § 12.25. <i>Flight</i> . ²
NEVADA	§ 2.100. <i>Flight</i> § 3.04— <i>Flight</i>
NEW MEXICO	§ 14-5030. <i>Flight</i> . ²
WASHINGTON	§ 6.21 <i>Evidence Of Flight</i> , at 140 ²

TABLE 2¹

THE RELEVANT TEXT OF CRIMINAL JURY INSTRUCTIONS
CONCERNING WHETHER JURORS CAN INFER MENTAL STATE FROM A
DEFENDANT'S ACTS

Table 2 contains the relevant text of the criminal jury instructions listed in Table 1.² Citation information for all Table 2 instructions is available in Table 6.

1. All jury instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in Tables 1–6: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions. Seven additional states were excluded from Tables 1 and 2 because they did not have relevant information: Alabama, Arkansas, Colorado, Minnesota, Missouri, South Carolina, and Wyoming.

2. In addition to jury instructions, Table 2 lists relevant authorial addenda. In some states, the committee or advisory group that developed the jury instructions also provided addenda to accompany them. The addenda typically appear beneath the instructions, or on a subsequent page. Sometimes the addenda have a title (e.g., “Commentary”). The addenda serve a number of functions,

State	Instruction
<p>ALASKA</p> <p><i>§ 1.15 State Of Mind—Circumstantial Evidence</i></p>	<p>“State of mind may be shown by circumstantial evidence. It can rarely be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what another person does or fails to do, no one can see or hear the state of mind with which another person’s act were done or omitted. But what a person does or fails to do may indicate that person’s state of mind. In determining issues of state of mind, the jury is entitled to consider any statements made and acts done or omitted by the person, and all facts and circumstances in evidence which may aid determination of state of mind.”</p>
<p><i>§ 1.28 Flight²</i></p>	<p>“No pattern instruction.” [The <i>Use Note</i> states in part] “Because the probative value of flight evidence is often weak, such evidence should be introduced with caution.”</p>
<p>ARIZONA</p> <p><i>Standard Criminal 9 Flight or Concealment, at 9²</i></p>	<p>“In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant’s running away, hiding, or concealing evidence, together with all the other evidence in the case. [You may also consider the defendant’s reasons for running away, hiding, or concealing evidence.] Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.” [The <i>Comment</i> notes that] “because this instruction, even without the optional language, calls attention to a specific and isolated fact regarding the defendant’s behavior and has a tendency to suggest that the defendant should be required to explain his or her behavior, the Criminal Rules Committee believed that the additional language reminding the jury of the State’s burden of proof is appropriate.”</p>
<p><i>(Continued on next page)</i></p>	

which range from further clarifying an instruction’s meaning to providing information about its development or current status.

TABLE 2—Continued

State	Instruction
§ 1.056(a)(2) <i>Intent—Inference</i> , at 29	“Intent may be inferred from all the facts and circumstances disclosed by the evidence. It need not be established exclusively by direct sensory proof. The existence of intent is one of the questions of fact for your determination.”
CALIFORNIA § 2.02 <i>Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State</i> , at 33–34	“The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count [s] ___, ___, ___ and ___], [or] [the crime[s] of ___, ___, ___, which [is a] [are] lesser crime[s]],] [or] [find the allegation ___ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”
§ 2.03 <i>Consciousness Of Guilt—Falsehood</i> , at 35–36 ²	“If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.” [The <i>Comment</i> notes that]
(Continued on next page)	

TABLE 2—*Continued*

State	Instruction
	<p>“Where a material fact is established by the evidence and is shown that defendant’s testimony as to that fact is willfully untrue, this circumstance not only furnishes a ground for disbelieving his or her other testimony, but also tends to show consciousness of guilt. (People v. Amador, 8 Cal. Rptr. 499, 501, 502 (4th Dist. 1970).) Prior statements, although exculpatory in form, if false constitute evidence of consciousness of guilt. (People v. Cooper, 7 Cal. App. 3d 200, 204–05, 86 Cal. Rptr. 499, 501, 502 (4th Dist. 1970).)”</p>
<p>§ 2.06 <i>Efforts To Suppress Evidence</i>, at 38</p>	<p>“If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by ____], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”</p>
<p>CONNECTICUT § 3.16 <i>Flight</i>, at 254–56</p>	<p>“The flight of a person accused of crime is a circumstance which, when considered together with all the facts of the case, may justify a finding of the defendant’s guilt. However, flight, if shown, is not conclusive. It is to be given the weight to which you, the jury, think it is entitled under the circumstances. (Here there was evidence that the defendant knew he was being sought for this charge and fled from the area on the day of his arrest. There is also evidence tending to explain this flight, namely that the defendant was fleeing to escape arrest on other charges pending against him, and not this charge. If you find that he was fleeing from this charge, you may consider it as evidence of his consciousness of guilt; if you find that he was not fleeing from this charge, you should</p>
<p>(Continued on next page)</p>	

TABLE 2—*Continued*

State	Instruction
	not consider it as evidence of his consciousness of guilt. It is up to you to give the evidence the weight to which you think it is entitled).”
§ 7.1 <i>Intent</i> (§ 53a-3(11)), at 2	“Now, intent is a mental process. A person may take the stand and testify as to what his or her intention was. And you may believe that testimony or not according to whether or not you find that it warrants belief. But intention often can only be proven by the actions and statements of the person whose act is being examined. No one can be expected to come into court and testify that he looked into another person's mind and saw there a certain intention. It is often impossible and never necessary to prove criminal intent by direct evidence. Intent may be proven by circumstantial evidence as I have explained that term to you. Therefore, one way in which the jury can determine what a person's intention was at any given time, aside from that person's own testimony, is first by determining what that person's conduct was, including any statements he made, and what the circumstances were surrounding that conduct, and then, from that conduct and those circumstances inferring what his intention was. In other words, a person's intention may be inferred from his conduct. You may infer from the fact that the accused engaged in conduct that he intended to engage in that conduct. This inference is not a necessary one. That is, you are not required to infer intent from the accused's conduct, but it is an inference that you may draw if you find it is a reasonable and logical inference. I remind you that the burden of proving intent beyond a reasonable doubt is on the state.
DELAWARE <i>Flight</i>	“In this case the State contends that the defendant fled following the commission of the crime. Evidence of flight of a person immediately after the commission of a crime or
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	evidence of evasion of arrest are admissible in criminal cases as circumstances tending to disclose consciousness of guilt. Such facts, if proved, may be considered by you in light of all other facts proved, including any explanation by the defense as to the reasons for such action. Whether or not such evidence shows a consciousness of guilt and the significance to be attached to such circumstances are matters for your determination.”
<i>Permitted Inference Of Intention, Recklessness, Knowledge Or Belief</i>	“It is, of course, difficult to know what is going on in another person’s mind. Therefore, our law permits the jury to draw an inference, or in other words, to reach a conclusion, about the defendant’s state of mind from the facts and circumstances surrounding the acts the defendant is alleged to have done. In reaching this conclusion, you may consider whether a reasonable man in the defendant’s circumstances would have had or lacked the requisite intention, recklessness, knowledge or belief. You should, however, keep in mind at all times that it is the defendant’s state of mind which is at issue here, and in order to convict the defendant you are required to find beyond a reasonable doubt that she in fact acted with the required recklessness.”
DISTRICT OF COLUMBIA § 3.02 <i>Proof Of State Of Mind</i> , at 202	“Someone’s [intent][knowledge][insert other appropriate <i>mens rea</i>] ordinarily cannot be proved directly, because there is no way of directly looking into the workings of the human mind. But you may infer the defendant’s [intent] [knowledge][insert other appropriate <i>mens rea</i>] from the surrounding circumstances. You may consider any statement made or acts [done][omitted] by the defendant, and all other facts and circumstances received in evidence which indicate the defendant’s [intent] [knowledge] [insert other appropriate <i>mens rea</i>].
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	[You may infer, but are not required to infer, that a person intends the natural and probable consequences of acts [knowingly done][knowingly omitted].] It is entirely up to you, however, to decide what facts to find from the evidence received during this trial. You should consider all the circumstances in evidence that you think are relevant in determining whether the government has proved beyond a reasonable doubt that the defendant acted with the necessary state of mind.”
FLORIDA <i>§ 3.5(c) Accessory After the Fact</i> , at 34	“The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.”
GEORGIA <i>§ 1.36.10 Flight</i> , at 31	“(Note: After January 10, 1991, it is reversible error to charge the jury on flight. <i>Renner v. State</i> , 260 Ga. 515 (1990).)” (emphasis in original)
<i>§ 1.41.10 Intent</i> , at 33	“Intent is an essential element of any crime and must be proved by the State beyond a reasonable doubt. Intent may be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act. Whether or not you draw such an inference is a matter solely within your discretion.”
<i>§ 1.41.11 No Presumption Of Criminal Intent</i> , at 34	“This defendant will not be presumed to have acted with criminal intent, but you may find such intention (or the absence of it) upon a consideration of words, conduct, demeanor, motive, and other circumstances connected with the act for which the accused is being prosecuted.”
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
HAWAII § 3.16 <i>State Of Mind— Proof By Circumstantial Evidence</i>	“The state of mind with which a person commits an act such as [‘intentionally’] [‘knowingly’] [‘recklessly’] may be proved by circumstantial evidence. While witnesses may see and hear, and thus be able to give direct evidence of what a person does or fails to do, there can be no eye-witness account of the state of mind with which the acts are done or omitted. But what a person does or fails to do may or may not indicate the state of mind with which he/she does or refrains from doing an act.”
IDAHO § 309 <i>Defendant’s Intent Manifested By Circumstances</i> ²	“The committee recommends that no instruction be given stating that a defendant’s intent can be inferred by the circumstances. This is a matter of argument to the jury. <i>Francis v. Franklin</i> , 471 U.S. 307, 105 S. Ct. 1965, 85 L.Ed.2d 344 (1985), disapproved the presumption that a person intends the natural consequences of his/her act as improperly shifting the burden on a defendant in violation of the 14th Amendment.”
ILLINOIS §3.03. <i>Flight</i> , at 88 [Pattern]	“The Committee recommends that no instruction be given on this subject. Although evidence of flight is a proper subject of argument, its probative value is questionable. The use of flight instructions has frequently been found to constitute error.” (citations omitted)
§3.03. <i>Flight</i> [Non-pattern]	“The Supreme Court Committee recommends that no instruction on this subject be given.”
INDIANA § 12.23. <i>Escape</i> . ²	“This instruction has been deleted.” [The <i>Comments</i> note that] “Instructions on flight should not be given. <i>Dill v. State</i> , 741 N.E.2d 1230 (Ind. 2001). The same rationale for concluding flight instructions are error applies to instructions on escape, and so the Committee
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	has deleted this instruction.” (emphasis in original)
§ 12.25. <i>Flight</i> . ²	“This instruction has been deleted.” [The <i>Comments</i> note that] “Instructions on flight should not be given. <i>Dill v. State</i> , 741 N.E.2d 1230 (Ind. 2001).” (emphasis in original)
KANSAS § 54.01 <i>Presumption Of Intent</i> , at 95	“Ordinarily, a person intends all of the usual consequences of (his)(her) voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.”
KENTUCKY § 3.01 <i>Intentionally</i> , at 86 ²	[The <i>Case Notes</i> cite <i>McGinnis v. Commonwealth</i> , 875 S.W.2d 518, 524 (Ky. 1994) as standing for the proposition that] “Intent can be inferred from consequences, notwithstanding a disclaimer.”
LOUISIANA § 5.08 <i>Flight of the Defendant</i> , at 50 ²	“If you find that the defendant fled immediately after a crime was committed or after he [or she] was accused of a crime, the flight alone is not sufficient to prove that the defendant is guilty. However, flight may be considered along with all other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt.” [The <i>Comments</i> note that] “Evidence of flight is traditionally admissible to show consciousness of guilt.”
MAINE § 6-10 <i>Evidence to Be Considered</i> . <i>Instruction</i> .	“You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited solely to what you
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	see and hear as the witnesses testify. You may draw from the facts which you find have been proven, such reasonable inferences as you believe are justified in the light of your own common sense and personal experience.”
<i>§ 6-13 Presumptions-Inferences. Instruction.</i>	“It is up to you to decide whether to adopt any inference or not. You are not compelled to accept any inference established by law. You may reject an inference if you wish. The ultimate decision is up to you. But you must remember that the burden remains on the State to prove each and every element of the offense beyond a reasonable doubt.”
<i>§ 6-39 Inferred Intent. Instruction.</i>	“Intent or mental state ordinarily cannot be proved directly, because there is rarely direct evidence of the operations of the human mind. But you may infer a person’s intent or state of mind from the surrounding circumstances. You may consider any statement made and any act done or omitted by the person, and all other facts in evidence which indicate state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.”
MARYLAND <i>§ 3:24 Flight Or Concealment Of Defendant, at 82</i> [Similar instruction for <i>§ 3:26 Concealment Or Destruction Of Evidence As Consciousness Of Guilt, at 86; § 3:27</i>	“A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence.
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TABLE 2—Continued

State	Instruction
<i>Suppression, Alteration Or Creation Of Evidence As Consciousness Of Guilt</i> , at 88; § 3:28 <i>Bribery Or Witness Intimidation As Consciousness Of Guilt</i> , at 89]	You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.”
§ 3:31 <i>Proof Of Intent</i> , at 95	“Intent is a state of mind and ordinarily cannot be proven directly, because there is no way of looking into a person's mind. Therefore, a defendant's intent may be shown by surrounding circumstances. In determining the defendant's intent, you may consider the defendant's acts [and statements], as well as the surrounding circumstances. Further, you may, but are not required to, infer that a person ordinarily intends the natural and probable consequences of [his] [her] acts [and/or omissions].”
MASSACHUSETTS § 1.9 <i>Intent: General And Specific</i>	“In determining whether the defendant acted ‘intentionally,’ you should give the word its ordinary meaning of acting voluntarily and deliberately and not because of accident or negligence. Intent is essentially a state of mind. It means the purpose or objective of a person at the time of an action. The intention of a person is to be ascertained by his or her acts and the inferences to be drawn from what is externally visible. Intent ordinarily cannot be proved directly because there is no way of reaching into and examining the operations of the human mind. However, you may determine the defendant's intent from any statement or act committed or omitted, and from all the other circumstances that indicate his or her state of mind, provided first that you find that any or all such circumstances occurred. The jury may, but need not necessarily, infer from the conduct of a person that he or she intended the
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	natural and probable consequences of his or her own acts.”
§ 4.12 <i>Knowledge</i>	“Knowledge may be proved by circumstantial evidence. The knowledge that a person possesses at any given point in time may not ordinarily be proved directly, because there is no way to directly show how the human mind works. In determining what a person knew at a particular time, you may consider any statements made or acts done or omitted by that person, and all the other facts and circumstances shown in the evidence that may aid in your determination of that person's knowledge. In considering a defendant's statements, you must first conclude beyond a reasonable doubt that these statements were voluntary, as I have previously explained voluntary to you.”
§ 4.19 <i>Consciousness Of Guilt</i>	“You have heard evidence suggesting that the defendant: [Outline the nature of the evidence: Flight If the Commonwealth has proven that the defendant did (conduct), you may consider whether such actions indicate feelings of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt on (this charge) (these charges). You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case. If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. However, you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people. Finally, remember that, standing
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	alone, such evidence is never enough by itself to convict a person of a crime. You may not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence”
<p>MICHIGAN</p> <p><i>§ 4:02 Instruction on Inferring State of Mind in Assault Cases, at 71</i></p>	<p>“The offense charged requires a particular intent on the part of the defendant. You must think about all the evidence in deciding what the defendant's state of mind was at the time of the alleged assault. The defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the defendant, and any other circumstances surrounding the alleged assault. You may infer that the defendant intended to kill if [he or she] used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon.”</p>
<p>MISSISSIPPI</p> <p><i>§ 3:12 Flight By Defendant</i></p>	<p>“‘Flight’ is a circumstance from which guilty knowledge and fear may be inferred. If you believe from the evidence in this case beyond a reasonable doubt that the defendant, ____, did flee or go into hiding, such flight or hiding is to be considered in connection with all other evidence in this case. You will determine from all the facts whether such flight or hiding was from a conscious sense of guilt or whether it was caused by other things and give it such weight as you think it is entitled to in determining the guilt or innocence of the defendant, ____.”</p>
<p>MONTANA</p> <p><i>§ 1-017(b) Circumstantial—Inference of Mental State</i></p>	<p>“You are instructed that circumstantial evidence may be used to determine the existence of a particular mental state. You may infer</p>
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	mental state from what the Defendant does and says and from all the facts and circumstances involved.”
<i>§ 1-020 Flight by Defendant</i>	“If you are satisfied that the crime charged in the information has been committed by someone, then you may take into consideration any testimony showing, or tending to show, flight by the Defendant. This testimony may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given such circumstance and significance if any, to be attached to it, are matters for the jury to determine.”
<i>§ 2-108 Mental State Inference</i>	“Purpose and knowledge ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the Defendant’s state of mind, including his/her purpose and knowledge, from the Defendant’s acts and all other facts and circumstances in evidence which indicate his/her state of mind.”
NEBRASKA <i>§ 5.1 States Of Mind Proved Inferentially, at 67</i>	“Intent (purpose, knowledge, willfulness, premeditation, deliberation) is an element of (here insert crime). In deciding whether the defendant acted with intent (purpose, knowledge, willfulness, premeditation, deliberation) you should consider (his, her) words and acts and all the surrounding circumstances.”
NEVADA <i>§2.100. Flight</i>	“You are instructed that the flight of a person immediately after the commission of the crime, or after a crime has been committed with which he is charged, is a circumstance in establishing his guilt, not sufficient in itself to establish guilt, but a circumstance which the jury may consider in determining his guilt or innocence. The weight to which that circumstance is entitled is
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	a matter for the jury to determine in connection with all the evidence introduced in the case.”
<i>§3.04—Flight</i>	“The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.”
NEW HAMPSHIRE <i>§ 1.19 Flight By The Defendant, at 21</i>	“Flight does not create a presumption of guilt. Innocent people sometimes have a fear of authority which does not necessarily reflect actual guilt. However, you may consider flight as tending to show feelings of guilt, and you may also consider feelings of guilt as evidence tending to show actual guilt, but you are not required to do so. You should consider the evidence of flight by the defendant in connection with all other evidence in the case and decide how important you think it is.”
<i>§ 1.19-a What Does Evidence That A Person Ran Away Prove?, at 22</i>	“The fact that a person ran away after a crime or after being accused of committing a crime, is not enough by itself to prove that he/she is guilty. I did not say that you should not take such evidence into account. You should take it into account. I am simply saying that if that is the only evidence against the defendant, it isn’t enough to prove him/her guilty. How important such evidence is in combination with other evidence is for you to decide.”
<i>§ 2.02 Proof Of Intent, at 36</i>	“Whether the defendant acted ____ is a question of fact for you to decide. Keep in mind that there is often no direct evidence of intent because there is no way of examining the operation of a person’s mind. You should
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	consider all the facts and circumstances in evidence in deciding whether or not the State has proven that the defendant acted ____.”
<i>Mental States—Proof of Mental State</i> , at 39	“Whether the defendant acted purposely/knowingly/recklessly/negligently] is a question of fact for you to decide. Keep in mind that there is often no direct evidence of mental state because there is no way of examining the operation of a persons [sic] mind. You should consider all the facts and circumstances in evidence in deciding whether the State has proven that the defendant acted [purposely/knowingly/recklessly/negligently].”
NEW JERSEY <i>Flight</i>	“Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving was to evade accusation or arrest for the offense charged in the indictment . . . If you find the defendant's explanation credible, you should not draw any inference of the defendant's consciousness of guilt from the defendant's departure. If, after a consideration of all the evidence, you find that the defendant, fearing that an accusation or arrest would be made against (him/her) on the charge involved in the indictment, took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of a consciousness of guilt. It is for you as judges of the facts to decide whether or not evidence of flight shows a consciousness of guilt and the weight to be given such evidence in light of all the other evidence in the case.”
<i>State Of Mind</i>	“A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary, members of the jury, that the state produce witnesses to
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	testify that an accused said he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and his/her conduct, and from all he/she said and did at the particular time and place, and from all of the surrounding circumstances.”
NEW MEXICO <i>§ 14-141. General criminal intent.</i>	“Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him].” (citations omitted)
<i>§ 14-5030. Flight.</i> ²	“The flight of a person immediately after the commission of a crime, or after he has been accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not defendant's conduct amounted to flight, and if it did, whether or not it shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively for you to decide.” [The <i>Use Note</i> states that] “No instruction on this subject shall be given.”
NEW YORK <i>§ 4:18. —Intent</i> , at 148–49	“Intent is a mental operation which can be proven usually by the facts and circumstances leading up to, surrounding, and following the events in question. Intent is basically a subjective element, that is, the operation of a person's mind. However, since we cannot x-ray a person's mind to determine what he is thinking, you may infer a person's intent by his acts or words or both. Premeditation is not a
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	prerequisite in determining intent. Intent may be formed in seconds or in a brief instant before the commission of an act. However, it is necessary for the intent to be formed prior to or during the commission of the act or acts resulting in the commission of the crime. You may, but need not, infer that a person intends that which is the natural and probable consequences of the acts done by him. This permissible inference in no way, however, shifts the burden of proof beyond a reasonable doubt with respect to this element of intent from the shoulders of the prosecution.”
§ 4:37. <i>Consciousness of Guilt</i> , at 176–77	“You have heard evidence offered by the People that the defendant(s) (describe act, e.g., flight, fabrication, false alibi, threats to witnesses, etc.). Proof of these alleged acts by an accused may be offered as evidence of conduct showing consciousness of guilt. Such evidence is ordinarily of slight probative value, and, in fact, none whatsoever unless there are facts pointing to the motive which prompted the ____ and showing that it was knowing and intentional. This is circumstantial evidence, and you may or may not infer consciousness of guilt from the fact of defendant's _____. If two inferences can be drawn from defendant's conduct, one consistent with innocent purpose and one consistent with consciousness of guilt, you must draw the inference consistent with innocent purpose. Such evidence of consciousness of guilt may be used to strengthen other evidence of guilt. However, evidence of consciousness of guilt is not sufficient, in and of itself, to convict the defendant of any crime charged in the indictment, nor does it in any way shift the burden of proving the defendant's guilt beyond a reasonable doubt from the prosecution.”
§ 4:38.— <i>Commentary</i> , at 177 ²	“It is well established that before a jury may be charged that a defendant's assertion of a false
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	<p>explanation may imply a consciousness of guilt, the People must seek to prove the falsity of the statement by evidence independent of that offered directly to prove the defendant's guilt. It is one thing to disbelieve a defendant. That is a jury's right. It is quite another, though, to suggest to a jury that they could, at the same time, transpose such belief into corroboration of the People's case. This tends impermissibly to shift the burden of proof. Hence, the rule permits only that part of a defense, which by independent proof is shown to be a fabrication, to be considered for the inference of consciousness of guilt. The jury should be charged that if two inferences could be drawn from defendant's conduct, one consistent with consciousness of guilt and one consistent with innocent purpose, the jury must draw the inference consistent with an innocent purpose." (citations omitted)</p>
<p>§ 4:44. <i>Flight</i>, at 184</p>	<p>"You have heard evidence offered by the People that the defendant(s) fled from the police who had to pursue the defendant(s) in order to apprehend him (her) (them). Flight by an accused may be offered as evidence of conduct showing a consciousness of guilt. Such evidence is ordinarily of slight value and in fact none whatever unless there are facts pointing to the motive which prompted the flight and showing that the flight was knowing and intentional. This is circumstantial evidence and thus you the jury may or may not infer consciousness of guilt from the fact of the defendant's flight. Such evidence of consciousness of guilt may be used to strengthen other and more tangible evidence of guilt and is not sufficient in and of itself to convict the defendant of any crime charged in the indictment."</p>
<p>§ 4:45.—<i>Commentary</i>, at 184–85²</p>	<p>"[T]he ambiguity of evidence of flight requires that the jury be closely instructed as to its</p>
<p>(Continued on next page)</p>	

TABLE 2—*Continued*

State	Instruction
	weakness as an indication of guilty of the crime charged, and that evidence of flight is of limited probative force. Although evidence of flight may be indicative of consciousness of guilt, it is only circumstantial evidence It is error for the trial judge to instruct the jury that ‘flight, when unexplained, is a consciousness of guilt, and hence, guilt itself.’” (citations omitted)
§ 4:54. <i>Intent</i> , at 202–03	“Intent is a mental operation which can be proved, usually by what a person says and does and by the facts and circumstances leading up to, surrounding, and following the events in question. Intent is basically a subjective element: the operation of the mind of another human being, the defendant. We cannot x-ray a person's mind to determine what he is thinking. However, experience has shown us that in determining the question of ‘intent’ you may, by considering all the facts and circumstances leading up to, surrounding, and following the events in question, determine what a person intended. You are permitted, but not required, to infer that the defendant intended the natural and probable consequences of his (her) acts. This permissible inference in no way shifts the burden of proof onto the defendant. Where intent is an element of the crime charged, the People bear the burden of proving that the defendant possessed the requisite culpable intent beyond a reasonable doubt.”
§ 4:55.— <i>Commentary</i> , at 203–05 ²	“Intent is a subjective state of mind and is demonstrated by objective evidence. There should be objective indications of a defendant's state of mind to corroborate the defendant's own subjective articulation. The defendant's intent is to be judged in the light of all the circumstances, including the permissible inference that a person intends that which is a natural, necessary and probable consequence of the act done by him, where appropriate, and is to be proved beyond a reasonable doubt.
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	<p>Defendant's conduct before, during and after the commission of the crime may properly be considered by the jury on the question of intent. Courts should not give an instruction to juries that 'a person is presumed to intend the natural consequences of his act unless the act was done under circumstances or under conditions which precluded the existence of such an intent.' The Supreme Court's decision in <i>Sandstrom</i> left a multitude of cases in its wake. Although some courts have characterized a charge of 'presumed intent' as being error of constitutional magnitude, even such an error may be waived by a defendant's failure to make a timely objection. Other courts have held that the charge of presumed intent is not unconstitutional per se, so long as the court makes clear that the instruction describes only a permissible inference of fact on the issue of criminal intent which the jury may, but is not required to, draw from the evidence. The New York Court of Appeals has recommended that judges avoid the use of phrases which could be construed or even misconstrued as shifting any part of the burden to the defendant." (citations omitted)</p>
<i>Expanded Charge On Intent</i>	<p>"The question naturally arises as to how to determine whether or not a defendant had the intent required for the commission of a crime. To make that determination in this case, you must decide if the required intent can be inferred beyond a reasonable doubt from the proven facts. In doing so, you may consider the person's conduct and all of the circumstances surrounding that conduct, including, but not limited to, the following: what, if anything, did the person do or say; what result, if any, followed the person's conduct; and was that result the natural, necessary and probable consequence of that conduct. Therefore, in this case, from the facts you find to have been proven, decide</p>
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	whether or not you can infer beyond a reasonable doubt that the defendant had the intent required for the commission of this crime.”
<i>Expanded Charge On Knowingly</i>	“As necessary, add after the definition of knowingly in the CJI2d charge for a specific offense: The question naturally arises as to how to determine whether a person had the knowledge, that is, the awareness, required for the commission of a crime. To make that determination, you must decide if the required knowledge can be inferred beyond a reasonable doubt from the proven facts. In doing so, you may consider the person’s conduct and all of the circumstances surrounding that conduct, including, but not limited to, what, if anything, did that person do or say.” (emphasis omitted)
NORTH CAROLINA <i>§ 104.35 Flight—In General.</i>	“The State contends (and the defendant denies) that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish defendant’s guilt.” (citation omitted)
<i>§ 120.10 Definition of [Intent] [Intentionally]</i>	“Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.”
NORTH DAKOTA <i>§ K-5.38 Proof of Intent</i>	“Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. We simply cannot look into the head or mind of another person. But
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	you may infer the Defendant's intent from all of the surrounding circumstances. You may consider any statement made or act done or omitted by the Defendant and all the facts and circumstances in evidence which indicate the Defendant's state of mind.”
<i>§ K-5.40 Flight [Concealment]</i>	“The voluntary flight [concealment] of a Defendant immediately after [the commission of a crime] [being accused of a crime that has been committed] is not sufficient in itself to establish guilt, but it is a circumstance which, if proved, you may consider in the light of all other evidence of the case, in determining guilt or innocence. You alone must determine whether the evidence of flight [concealment] shows a consciousness of guilt and the significance of that evidence.”
OHIO <i>§ 409.01 Purposely, motive R.C. 2901.22(A), at 57–58</i>	“To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.”
OKLAHOMA <i>§ 9-8 Evidence—Flight, at 460</i>	“To find that the defendant was in flight you must find beyond a reasonable doubt that: First, the defendant departed/(concealed himself/herself)/(escaped or attempted to escape from custody), Second, with a consciousness of guilt, Third, in order to avoid arrest for the crime with which he/she is charged. If after a consideration of all the evidence on this issue, you find beyond a reasonable doubt that the defendant was in flight, then this flight is a circumstance which you may consider with all the other evidence in this case in determining the question of the defendant's guilt. However, if you have a reasonable doubt that defendant was in flight, then the fact of any depar-
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	ment/(escape or attempt to escape from custody) is not a circumstance for you to consider.” (emphasis omitted)
<p>PENNSYLVANIA</p> <p><i>§ 3.14 Consciousness Of Guilt, Flight Or Concealment As Showing</i></p>	<p>“There was evidence, including the testimony of (___), which tended to show that the defendant (fled from the police) (hid from the police) (___). (The defendant maintains that he did so because ___.) The credibility, weight and effect of this evidence is for you to decide. Generally speaking when a crime has been committed and a person thinks he is or may be accused of committing it and he flees or conceals himself such flight or concealment is a circumstance tending to prove the person is conscious of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may flee or hide for some other motive and may do so even though innocent. Whether the evidence of flight or concealment in this case should be looked at as tending to prove guilt depends upon the facts and circumstances of this case and especially upon motives which may have prompted the flight or concealment. You may not find the defendant guilty solely on the basis of evidence of flight or concealment.”</p>
<p><i>§ 3.15 Consciousness Of Guilt, Conduct Of Defendant As Showing</i></p>	<p>“There was evidence tending to show that the defendant (made false and contradictory statements when questioned by the police) (___). If you believe this evidence you may consider it as tending to prove the defendant’s consciousness of guilt. You are not required to do so. You should consider and weigh this evidence along with all the other evidence in the case.”</p>
<p>SOUTH DAKOTA</p> <p><i>§ 1-12-3 Intent—How Manifested</i></p>	<p>“The intent with which an act is done is shown by the circumstances surrounding the act, the</p>
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
	manner in which it is done, and the means used.”
TENNESSEE <i>§ 42.18 Flight, at 929</i>	<p>“The flight of a person accused of a crime is a circumstance which, when considered with all the facts of the case, may justify an inference of guilt If flight is proved, the fact of flight alone does not allow you to find that the defendant is guilty of the crime alleged. However, since flight by a defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant. On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered, or by the facts and circumstances of the case. Whether there was flight by the defendant, the reasons for it, and the weight to be given to it, are questions for you to determine.” (footnotes omitted)</p>
TEXAS <i>§ 12:620.30 Extraneous Offenses or Conduct—To Prove Intent, Knowledge, Design, Scheme, or System</i>	<p>[The Texas instruction offers the following two alternatives for limiting instructions with respect to state of mind] “You are to consider the evidence just offered, if you give it any consideration at all, as you know that is in your discretion what evidence that you give validity and credibility to, but you are to consider it only for the purpose for which it is offered, that is, going to show the state of mind, if any, of the accused, AB, at the time of the incidents You are to consider it for that purpose only as to the state of mind of the defendant in connection with the charges against him in the indictment.” [or] “Evidence of an alleged event . . . has been admitted in evidence for the limited purpose of showing intent or knowledge, if it does do so You may only use the evidence to assess [defendant’s] intent or knowledge.”</p>
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
VERMONT <i>§ 5.47 Instruction: Specific Intent</i>	<p>“‘Criminal intent’ is not the secret intent of a defendant, but the intent that can be determined from his (<i>her</i>) conduct and all other circumstances that surround it The intent with which a person does an act is known by the way in which the actor expresses it to others, or indicates it by conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done, the method used, and all other facts and circumstances established by the evidence.” (emphasis in original)</p>
VIRGINIA <i>§ 101:09 Flight by Defendant, at 477</i>	<p>“While flight of a person from the scene where a crime has been committed raises no presumption that such person is guilty of having committed the crime, flight, if proven, is a circumstance that you may take into consideration along with other facts and circumstances tending to prove guilt or innocence, and it may be given such weight you deem proper in connection with other pertinent and material facts and circumstances in the case.”</p>
VIRGINIA & WEST VIRGINIA <i>§ 24-177. Presumed From Act Of Killing, at 108</i>	<p>“The court instructs the jury, that the law is, that a man is taken to intend that which he does, or which is the natural and necessary consequence of his own act The court instructs the jury that upon a charge of murder malice is presumed from the fact of the killing. When the killing has been proven and is unaccompanied by circumstances of palliation, the burden of introducing evidence to disprove malice is thrown upon the accused; if, however, upon consideration of all the evidence you have a reasonable doubt whether the killing was done with malice or not, you should not find the accused guilty of murder.” (citations omitted)</p>
<i>(Continued on next page)</i>	

TABLE 2—*Continued*

State	Instruction
WASHINGTON <i>§ 6.21 Evidence Of Flight,</i> at 140 ²	“The committee recommends that no instruction be given on evidence of flight.” [The <i>Note On Use</i> states that] “It is the view of the committee that an instruction on flight singles out and emphasizes particular evidence and for that reason should not be given. The fact of flight and the inferences therefrom may be argued to the jury under the circumstantial evidence instruction in a proper case.” [The <i>Comment</i> states that] “Even though a defendant’s flight to avoid prosecution may be admissible evidence to prove guilt, it should not be the subject of a jury instruction.”
<i>§ 6.25 Presumed To Intend Natural Consequences Of Acts,</i> at 141 ²	“No instruction should be given to the effect that a person is presumed to intend the natural and probable consequences of his or her own acts.” [The <i>Comment</i> notes that] “Decisions of the United States Supreme Court make it clear that the jury should not be instructed that the law presumes that a person intends the ordinary consequences of his or her own voluntary acts. Such an instruction unconstitutionally relieves the State of its burden of proving the elements of the crime beyond a reasonable doubt.” (citations omitted)
WISCONSIN <i>§ 172 Circumstantial Evidence: Flight, Escape, Concealment,</i> at 1	“Evidence has been presented relating to the defendant’s conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.”

TABLE 3¹
 CRIMINAL JURY INSTRUCTIONS USING THE TERM “CONSCIOUS”
 (OR A DERIVATIVE TERM) TO DEFINE OR DESCRIBE MENTAL STATE

Table 3 contains the relevant text of jury instructions that use the term “conscious,” or some derivative of that term, to define or describe the terms “mental state” and/or “intent” to a jury.² Table 3 includes only the section of text that specifically relates to the definition or description of these terms, and not necessarily the entire text. Citation information for all Table 3 instructions is available in Table 6.

State	Instruction
ALABAMA <i>Ala. Code § 13A-2-2(3)</i> <i>Recklessly</i>	[Defines general charge as] “A person acts recklessly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” [Defines specific charge as] “A person acts recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk that [insert result . . .] will occur (or exists).”
ARIZONA <i>Standard Criminal 17 Voluntary Act</i> , at 17	“Before you may convict the defendant of the charged crime(s), you must find that the State proved beyond a reasonable doubt that the defendant [committed a voluntary act] [or] [omitted to perform a duty imposed upon the defendant by law
<i>(Continued on next page)</i>	

1. All instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in Tables 1–6: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions. Eight additional states were excluded from Table 3 because they did not have relevant information: Alaska, Georgia, Idaho, Kansas, Nebraska, South Dakota, Washington, and West Virginia.

2. In addition to jury instructions, Table 3 lists relevant authorial addenda. In some states, the committee or advisory group that developed the jury instructions also provided addenda to accompany them. The addenda typically appear beneath the instructions, or on a subsequent page. Sometimes the addenda have a title (e.g., “Commentary”). The addenda serve a number of functions, which range from further clarifying an instruction’s meaning to providing information about its development or current status.

TABLE 3—*Continued*

State	Instruction
	that the defendant was capable of performing.] A voluntary act means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant [committed the act voluntarily] [or] [failed to perform the duty imposed on the defendant.]”
<i>Standard Criminal 29 “Recklessly” or “Reckless Disregard” Defined, at 26c</i>	“‘Recklessly [reckless disregard]’ means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur [or that the circumstance exists]. The risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation.”
<i>§ 1.056(c) Recklessly (Reckless Disregard) Defined, at 31</i>	“‘Recklessly [reckless disregard] _____’ means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that conduct will result in _____. The risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation .”
ARKANSAS <i>§ 1001 Capital Murder</i>	[Defines “knowingly” as] “A person acts knowingly (or with knowledge) with respect of his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.” [Defines “purposely” as] “A person acts purposely with respect to the results of his conduct when it is his conscious object to cause the results.”
<i>§ 1004 Manslaughter</i>	[Defines “recklessly” as] “A person acts recklessly with respect to the results of his
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	conduct when he consciously disregards a substantial and unjustifiable risk that results will occur.”
<p>CALIFORNIA <i>§ 2.03 Consciousness Of Guilt—Falsehood</i>, at 35–36</p>	<p>“If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt.”</p>
<p><i>§ 2.06 Efforts To Suppress Evidence</i>, at 38</p>	<p>“If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by ____], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt.”</p>
<p>COLORADO <i>§ 6:01 Requirements For Criminal Liability—In General</i>, at 71</p>	<p>“A crime is committed when the defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state. Voluntary act means an act performed consciously as a result of effort or determination. Culpable mental state means [intentionally, or with intent] [knowingly or willfully] [recklessly] [with criminal negligence], as explained in this instruction. Proof of the commission of the act alone is not sufficient to prove that the defendant had the required culpable mental state. The culpable mental state is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence. [A person acts ‘intentionally’ or ‘with intent’ when his conscious objective is to cause the specific result proscribed by the statute defining</p>

(Continued on next page)

TABLE 3—*Continued*

State	Instruction
	the offense. It is immaterial whether or not the result actually occurred.] -or- [A person acts 'knowingly' or 'willfully' with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts 'knowingly' or 'willfully' with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.] -or- [A person acts 'recklessly' when he consciously disregards a substantial and unjustified risk that a result will occur or that a circumstance exists.] -or- [A person acts 'with criminal negligence' when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists.]”
CONNECTICUT § 3.16 <i>Flight</i> , at 254	“Flight, when unexplained, tends to prove consciousness of guilt.”
§ 7.1 <i>Intent</i> (§ 53a-3(11)), at 2	“Our statute provides that a person acts ‘intentionally with respect to a result or to conduct described by the statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.’ Intentional conduct is purposeful conduct, rather than conduct that is accidental or inadvertent.”
§ 7.3 <i>Recklessness</i> (§ 53a-3(13)), at 15	“A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists . . . Recklessness, then, means being aware of a substantial and unjustifiable
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	risk and consciously disregarding that risk. It is more than failing to perceive such a risk. There must be an awareness of the risk and a conscious disregard of it.”
DELAWARE <i>Flight</i>	“Evidence of flight of a person immediately after the commission of a crime or evidence of evasion of arrest are admissible in criminal cases as circumstances tending to disclose consciousness of guilt . . . Whether or not such evidence shows a consciousness of guilt and the significance to be attached to such circumstances are matters for your determination.”
<i>Count I—Murder First Degree—Intentional Killing [1, Voluntary Act]</i>	“‘Voluntary act’ means a bodily movement performed consciously or habitually as a result of effort or determination.”
<i>Count I—Murder First Degree—Intentional Killing [2, Intentionally]</i>	“The defendant acted intentionally. That is, it must have been the defendant’s conscious object or purpose to cause death in this case.”
<i>Count I—Murder First Degree—Intentional Killing [2, Recklessly]</i>	“The defendant acted recklessly. That is, the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that the death of another person would result from his/her conduct.” ³
DISTRICT OF COLUMBIA <i>§ 3.01 Intent—Note, at 197</i> ²	[Although the Committee no longer recommends a separate instruction on intent, due to the confusing nature of the distinction between “general” and “specific” intent, this <i>Note</i> indicates that the 1978 version of the Criminal Jury Instructions for the District of Columbia defined intent as
<i>(Continued on next page)</i>	

3. The jury instructions in Delaware also use the phrase “conscious indifference” in describing the offense of reckless driving.

TABLE 3—*Continued*

State	Instruction
	meaning that] “a person had the purpose to do a thing. It means that he [acted][failed to act] consciously or voluntarily and not inadvertently or accidentally.”
FLORIDA § 3.5(a) <i>Principals</i> , at 32	[Refers to the requirement that] “the defendant ha[ve] a conscious intent that the criminal act be done”
HAWAII § 6.02 <i>State Of Mind—Intentionally</i>	“A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct. A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist. A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.”
§ 6.04 <i>State Of Mind—Recklessly</i>	“A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature. A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist. A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result. A risk is substantial and unjustifiable if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law abiding person would observe in the same situation.”
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
ILLINOIS § 5.01 <i>Recklessness—Wantonness</i> , at 140	“A person [(is reckless) (acts recklessly)] when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. [An act performed recklessly is performed wantonly.]”
§ 5.01A <i>Intent</i> , at 141	“A person [(intends) (acts intentionally) (acts with intent)] to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct.”
§ 5.01B <i>Knowledge—Willfulness</i> , at 142	“[1] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists. [2] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct. [3] [Conduct performed knowingly or with knowledge is performed willfully]”
INDIANA § 9.01. <i>Voluntary Conduct. I.C. 35-41-2-1(a).</i> ²	[The <i>Comments</i> note that the Indiana Criminal Law Study Commission was tasked with “revamping and updating the substantive criminal laws of the state” upon which this instruction was modeled. Therefore] “the Commission’s comments on the purpose of the statute are instructive.” [The Commission explained that] “[t]he term <i>voluntary</i> is used in this
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	<i>Code as meaning behavior that is produced by an act of choice and is capable of being controlled by a human being who is in a conscious state of mind.</i> ” (emphasis in original)
§ 9.05. <i>Culpability. I.C. 35-41-2-2.</i>	“[Intentionally] [Knowingly] [Recklessly] is defined by statute as follows: A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so. [If a person is charged with intentionally causing a result by his conduct, it must have been his conscious objective not only to engage in the conduct but also to cause the result.] A person engages in conduct ‘knowingly’ if, when he engages in this conduct, he is aware of a high probability that he is doing so. [If a person is charged with knowingly causing a result by his conduct, he must have been aware of a high probability that his conduct would cause the result.] A person engages in conduct ‘recklessly’ if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.”
KENTUCKY § 3.01 <i>Intentionally</i> , at 86	“A person acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.”
§ 3.03 <i>Wantonly</i> , at 87	“A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of con-
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	duct that a reasonable person would observe in the situation.”
LOUISIANA <i>§ 5.08 Flight of the Defendant</i> , at 50	“If you find that the defendant fled immediately after a crime was committed or after he [or she] was accused of a crime, the flight alone is not sufficient to prove that the defendant is guilty. However, flight may be considered along with all other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt.”
MAINE <i>§ 6-40 Voluntariness Defined. Instruction.</i>	“A person commits a crime only if he engages in voluntary conduct. A person acts voluntarily if he acts as a result of conscious choice, not a reflex, seizure or some other act over which he has no conscious control.”
MARYLAND <i>§ 3:24 Flight Or Concealment Of Defendant</i> , at 82 [Similar instruction for <i>§ 3:26 Concealment Or Destruction Of Evidence As Consciousness Of Guilt</i> , at 86; <i>§ 3:27 Suppression, Alteration Or Creation Of Evidence As Consciousness Of Guilt</i> , at 88; <i>§ 3:28 Bribery Or Witness Intimidation As Consciousness Of Guilt</i> , at 89]	“A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.”
MASSACHUSETTS <i>§ 1.9 Intent: General And Specific</i>	“There are two forms of intent: general and specific. General intent is when we do
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	things more or less unconsciously, such as sitting down in a chair. We would not do it unless our mind first resolved to do it, but it does not require any concentration or focusing of the mind. Specific intent is the act of concentrating or focusing the mind for some perceptible period. It is a conscious act and the determination of the mind to do an act. It is contemplation rather than reflex, and it must precede the act.”
§ 4.12 <i>Knowledge</i>	“The term ‘knowingly’ as it is used to describe a state of mind of the defendant means that (he/she) was conscious and aware of (his/her) (act/omission), realized what (he/she) was doing, and did not (act/fail to act) because of mistake or accident. An act is done knowingly if the defendant is aware of the act and aware that it was done voluntarily or intentionally. As the defendant does not need to prove anything in this trial, (he/she) does not need to show that (he/she) did not act through mistake or accident. The Commonwealth does not need to prove that the defendant knew (his/her) (act/omission) was unlawful.”
§ 4.19 <i>Consciousness Of Guilt</i>	“You have heard evidence suggesting that the defendant: [Outline the nature of the evidence: Flight] . . . If the Commonwealth has proven that the defendant did (conduct), you may consider whether such actions indicate feelings of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt on (this charge) (these charges). You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case. If you decide that such
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people. Finally, remember that, standing alone, such evidence is never enough by itself to convict a person of a crime. You may not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence”
MICHIGAN <i>§2:35 Definition— Knowingly, at 57</i>	“The term ‘knowingly,’ as used in these instructions to describe how an alleged act was done, means an act done consciously and with an awareness of what was being done. It does not mean an act done out of ignorance, mistake or accident.”
MINNESOTA <i>§ 5.07 Conspiracy— Elements²</i>	[A 2003–04 pocket part adds to the <i>Comment</i>] “A conscious and intentional purpose to break the law is an essential element of the crime of conspiracy” [quoting <i>State v. Kuhnau</i> , 622 N.W.2d 552, 556 (Minn. 2001)]
MISSISSIPPI <i>§ 3:12 Flight By Defendant</i>	“You will determine from all the facts whether such flight or hiding was from a conscious sense of guilt”
MISSOURI <i>§ 330.00—Definitions Purpose or Purposely</i>	“A person acts purposely, or with purpose, with respect to the person’s conduct or to a result thereof when it is his or her
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	conscious object to engage in that conduct or to cause that result.”
<i>§ 333.00—Definitions Reckless or Recklessly</i>	“A person acts recklessly or is reckless when the person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.”
MONTANA <i>§ 1-020 Flight by Defendant</i>	“If you are satisfied that the crime charged in the information has been committed by someone, then you may take into consideration any testimony showing, or tending to show, flight by the Defendant. This testimony may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt.”
<i>§ 2-106 Purposely</i>	“A person acts purposely when it is his conscious object [to engage in conduct of that nature] or [to cause such a result].
NEVADA <i>§3.04—Flight</i>	“Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.”
NEW HAMPSHIRE <i>§ 2.03 Purposely, at 37</i>	“Part of the definition of the crime of ____ is that the defendant acted purposely. This means that the State must prove that the defendant had the conscious object to do certain acts or to achieve a certain result. The key words here are ‘conscious object.’ Conscious object means that the defendant had a specific intent. It means that the defendant desired to cause a certain
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	result or do the prohibited acts. It is not enough for the State to prove that the defendant created a risk of injury or harm. To prove that the defendant acted purposely requires more than that. It requires proof that the defendant specifically intended or desired to bring about a particular result or to do the particular acts.”
§ 2.05 <i>Recklessly</i> , at 39	“Part of the definition of the crime of ____ is that the defendant acted recklessly. To prove that the defendant acted recklessly, the State must prove . . . that the defendant consciously disregarded the risk. In other words, the defendant decided to disregard the risk and took a chance in doing certain acts that a particular result would occur.”
<i>Mental States—Purposely</i> , at 35	“Part of the definition of the crime of ____ is that the defendant acted purposely. A person acts purposely when his/her conscious object is to [cause a certain result] [engage in certain conduct]. The State must prove that the defendant had the conscious object to [cause this result] [engage in this conduct]. The key words here are ‘conscious object’. To have a ‘conscious object’ means to have a specific intent. It means that the defendant desired to [cause a certain result] [engage in certain conduct].”
<i>Mental States—Recklessly</i> , at 37	“Part of the definition of the crime of ____ is that the defendant acted recklessly. A person acts recklessly when he/she is aware of and consciously disregards a substantial and unjustifiable risk that [certain circumstances existed when he/she acted] [his/her conduct would cause a certain result] There are several components of a reckless mental state that the state must prove.” [These include the following] “The defendant consciously disregarded
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
	the risk. In other words, he/she elected to disregard the risk and take the chance that [certain circumstances existed] [his/her conduct would cause a particular result].”
NEW JERSEY <i>Flight</i>	“It is for you as judges of the facts to decide whether or not evidence of flight shows a consciousness of guilt and the weight to be given such evidence in light of all the other evidence in the case.”
§ 2C:17-1a <i>Aggravated Arson</i> [Among other jury instructions]	“A person acts purposely with respect to the nature of (his/her) conduct or a result thereof if it is (his/her) conscious object to engage in conduct of that nature or to cause such a result.” (footnote omitted)
NEW MEXICO § 14-5030. <i>Flight</i> . ²	“The flight of a person immediately after the commission of a crime, or after he has been accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not defendant's conduct amounted to flight, and if it did, whether or not it shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively for you to decide.” [Use Note no. 1 states that] “No instruction on this subject shall be given.”
NEW YORK § 4:18. — <i>Intent</i> , at 148–49	“A person acts intentionally with respect to a result or to conduct described by a statute defining a crime when his conscious objective is to cause such result or to engage in such conduct.”
§ 4:37. <i>Consciousness of Guilt</i> , at 176–77	“Proof of these alleged acts by an accused may be offered as evidence of conduct showing consciousness of guilt.”
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
§ 4:38— <i>Commentary</i> , at 177 ²	“It is well established that before a jury may be charged that a defendant’s assertion of a false explanation may imply a consciousness of guilt, the People must seek to prove the falsity of the statement by evidence independent of that offered directly to prove the defendant’s guilt.”
§ 4:44. <i>Flight</i> , at 184	“Such evidence of consciousness of guilt may be used to strengthen other and more tangible evidence of guilt and is not sufficient in and of itself to convict the defendant of any crime charged in the indictment.”
§ 4:45.— <i>Commentary</i> , at 184–85 ²	“It is error for the trial judge to instruct the jury that ‘flight, when unexplained, is a consciousness of guilt, and hence, guilt itself.’”
§ 4:54. <i>Intent</i> , at 202–03	“A person acts ‘intentionally’ with respect to a result or to conduct when his conscious aim or objective is to cause such result or to engage in such conduct.” (citation omitted)
§ 4:58.30 <i>Knowledge [New]</i> , at 94	“The doctrine of ‘conscious avoidance of knowledge’ (‘CA’) has emerged to facilitate the prosecution and conviction of defendants who engage in a stratagem of ‘deliberate blindness’ or obliviousness to the true state of affairs in order to avoid specific knowledge of the facts surrounding his participation in a crime so as to provide him with a ‘lack of knowledge’ defense.” (citation omitted)
<i>Murder First Degree (Capital) (Intentional Murder—Prior Murder Conviction) Penal Law 125.27(1)(a)(ix)</i> [Among other jury instructions]	“The term ‘intent’ used in this definition has its own special meaning in our law . . . INTENT means conscious objective or purpose. Thus, a person acts with intent to cause the death of another person when his or her conscious objective or purpose is to cause the death of that person.”
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
NORTH CAROLINA § 104.35 <i>Flight—In General.</i>	“Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt.”
NORTH DAKOTA § K-5.40 <i>Flight [Concealment]</i>	“You alone must determine whether the evidence of flight [concealment] shows a consciousness of guilt and the significance of that evidence.”
OHIO § 409.01 <i>Purposely, motive</i> R.C. 2901.22(A), at 57–58	“Purpose is a decision of the mind to do an act with a conscious objective of (producing a specific result) (engaging in specific conduct). To do an act purposely is to do it intentionally and not accidentally.”
OKLAHOMA § 9-8 <i>Evidence—Flight</i> , at 460	“To find that the defendant was in flight you must find beyond a reasonable doubt that: <u>First</u> , the defendant departed/(concealed himself/herself)/(escaped or attempted to escape from custody), <u>Second</u> , with a consciousness of guilt”
PENNSYLVANIA § 3.14 <i>Consciousness Of Guilt, Flight Or Concealment As Showing</i>	“Generally speaking when a crime has been committed and a person thinks he is or may be accused of committing it and he flees or conceals himself such flight or concealment is a circumstance tending to prove the person is conscious of guilt.”
§ 3.15 <i>Consciousness Of Guilt, Conduct Of Defendant As Showing</i>	“If you believe this evidence you may consider it as tending to prove the defendant’s consciousness of guilt.”
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
SOUTH CAROLINA <i>Intentional</i> , at 353	“An act is done intentionally if it is done with a conscious awareness of knowledge of the nature of the act involved and with the purpose of committing that act. If the act was the result of ignorance, mistake, or accident, it was not done intentionally even if the mistake or accident was negligent or reckless.”
<i>Knowing</i> , at 354	“An act is done knowingly if the defendant was consciously aware of what he or she was doing. If the act was the result of ignorance, mistake, or accident, it was not done knowingly even if the mistake or accident was negligent or reckless.”
<i>Knowledge Of A Fact</i> , at 355	“A defendant who is not conscious of a fact does not act with knowledge of that fact even though a reasonable person in the same situation as defendant would have been consciously aware of that fact. Knowledge is based on what a person was aware of, not what he or she ought to have been aware of.”
<i>Reckless</i> , at 356	“Recklessness means something more than mere negligence or ordinarily carelessness . . . [it] requires a conscious awareness that one is not exercising due care.”
TENNESSEE § 2.08 <i>Alternative instruction: Definition of “intentionally,”</i> at 17 ²	“A person acts ‘intentionally’ when that person acts with a conscious objective or desire either: (1) to cause a particular result; or (2) to engage in particular conduct.” [The <i>Comments</i> state that] “The Committee is of the opinion that the statutory definition of ‘intentionally’ may be confusing to jurors. Therefore, the trial judge may wish to use this definition in addition to, or instead of, the statutory definition.”
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
§ 2.10 <i>Alternative instruction: Definition of “recklessly,”</i> at 19 ²	“A person acts ‘recklessly’ if that person is aware of but consciously disregards a substantial and unjustifiable risk either: (1) that a particular result will occur; or (2) that a particular circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.” [The <i>Comments</i> state that] “The Committee is of the opinion that the statutory definition of ‘recklessly’ may be confusing to jurors. Therefore, the trial judge may wish to use this definition in addition to, or instead of, the statutory definition.”
§ 42.18 <i>Flight,</i> at 929	“However, since flight by a defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant.”
TEXAS § 12:470 <i>Culpability</i>	“A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.”
VERMONT §5.47 <i>Instruction: Specific Intent</i>	“‘Intent’ is a decision of the mind to do an act knowingly, with a conscious objective of accomplishing a certain result . . . If you find that (<i>defendant</i>), for any reason whatever, did not consciously and knowingly act with the specific intent to commit the crime alleged at the time and place in question, then the crime charged cannot have been committed and you must find (<i>defendant</i>) not guilty of that crime.” (emphasis in original)
<i>(Continued on next page)</i>	

TABLE 3—*Continued*

State	Instruction
§ 5.52 <i>Instruction: The Term Recklessly</i>	“[A] person acts recklessly with respect to a material element of an offense when he or she consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”
VIRGINIA § 101:09 <i>Flight by Defendant</i> , at 477 ²	[The <i>Comment</i> states that] “Although a defendant’s flight from the crime scene is admissible to prove consciousness of guilt, a failure to flee is not evidence of innocence . . . While appellant’s flight might have been attributable to several causes [i.e. , several offenses] ‘consciousness of guilt’ could be inferred by the trial court if any one of those causes was the instant offense.” (citations omitted)
WISCONSIN § 172 <i>Circumstantial Evidence: Flight, Escape, Concealment</i> , at 1	“Evidence has been presented relating to the defendant’s conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.”
WYOMING § 5.11 <i>Recklessly—Defined</i>	“‘Recklessly’ is defined as the following conduct: A person acts recklessly when he consciously disregards a substantial and unjustified risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”

TABLE 4¹
OTHER CRIMINAL JURY INSTRUCTIONS CONCERNING A DEFENDANT'S
MENTAL STATE

Table 4 lists other criminal jury instructions concerning a defendant's mental state apart from those instructions provided in Tables 1–3.² For the relevant text of any Table 4 instruction, refer to Table 5. Citation information for all Table 4 instructions is available in Table 6.

State	Instruction
ALABAMA	<i>Ala. Code § 13A-2-2(1) Intentionally (Non-Capital Offense)</i> <i>Ala. Code § 13A-2-2(2) Knowingly</i> <i>Ala. Code § 13A-2-3 Mental State (Mental Culpability)</i>
ARIZONA	<i>Standard Criminal 27 "Intentionally" or "With Intent To" Defined, at 26b</i> <i>Standard Criminal 28 "Knowingly" Defined, at 26c</i> <i>§ 1.056(a)(1) Intentionally or With Intent To Defined, at 28</i> <i>§ 1.056(b) Knowingly Defined, at 30</i> <i>§ 2.021 Included Mental States—Knowingly, at 38</i> <i>§ 2.022 Included Mental States—Recklessly, at 39</i>
CALIFORNIA	<i>§ 3.30 Concurrence Of Act And General Criminal Intent, at 117</i>
<i>(Continued on next page)</i>	

1. All instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in Tables 1–6: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions. Nineteen additional states were excluded from Tables 4 and 5 because they did not have relevant information: Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, and Wisconsin. Tables 4 and 5 also exclude criminal jury instructions regarding negligence, strict liability, or affirmative defenses, such as intoxication.

2. In addition to jury instructions, Table 4 lists relevant authorial addenda. In some states, the committee or advisory group that developed the jury instructions also provided addenda to accompany them. The addenda typically appear beneath the instructions, or on a subsequent page. Sometimes the addenda have a title (e.g., "Commentary"). The addenda serve a number of functions, which range from further clarifying an instruction's meaning to providing information about its development or current status.

TABLE 4—Continued

State	Instruction
	§ 3.31 <i>Concurrence Of Act And Specific Intent</i> , at 119 § 3.31.5 <i>Mental State</i> , at 120 § 3.33 <i>Act Alone—No Intent Involved</i> , at 122
DELAWARE	<i>Count I—Murder First Degree—Intentional Killing [3, Knowingly]</i>
DISTRICT OF COLUMBIA	§ 3.03 “ <i>Knowingly</i> ”— <i>Note</i> , at 203 ² § 3.04 “ <i>Willfully</i> ”— <i>Note</i> , at 204 ²
HAWAII	§ 6.03 <i>State Of Mind—Knowingly</i>
KANSAS	§ 54.01-A <i>General Criminal Intent</i> , at 97
KENTUCKY	§ 3.02 <i>Knowingly</i> , at 87 § 3.04 <i>Recklessly</i> , at 87
LOUISIANA	§ 4.01 <i>Criminal Intent</i> , at 35
MAINE	§ 6-38 <i>Criminal State of Mind</i> . § 6-46 <i>Motive. Instruction</i> .
MICHIGAN	§ 3.9 <i>Specific Intent</i>
MINNESOTA	§ 7.10 “ <i>Know</i> ”—“ <i>Intentionally</i> ”—“ <i>With Intent</i> ”— <i>Defined</i> , at 93
MISSOURI	§ 330.00— <i>Definitions Knowingly, Knowing, Knowledge, or Knew</i>
MONTANA	§ 2-104 <i>Knowingly</i>
NEBRASKA	§ 4.0 <i>Definitions (States of Mind)</i> , at 54
NEW HAMPSHIRE	§ 2.01-a <i>Understand What A Crime Is</i> , at 35 § 2.04 <i>Knowingly</i> , at 38 <i>Definition Of A Crime</i> , at 21 <i>Mental States—Knowingly</i> , at 36
NEW MEXICO	§ 14-141. <i>General criminal intent</i> .
NEW YORK	<i>Expanded charge on intent</i>
OHIO	§ 409.11 <i>Knowingly R.C. 2901.22(B)</i> , at 61
SOUTH CAROLINA	<i>Willful</i> , at 358
SOUTH DAKOTA	§ 1-11-1 <i>Intentionally—Definition</i> § 1-12-1 <i>Intent—General</i> § 1-12-2 <i>Intent—Specific</i>
TENNESSEE	§ 2.09 <i>Alternative instruction: Definition of “knowingly,”</i> at 18 ² § 42.22 <i>Evidence of mental state</i> , at 934
TEXAS	§ 12:470 <i>Culpability</i>

(Continued on next page)

TABLE 4—*Continued*

State	Instruction
VERMONT	§ 5.48 <i>Instruction: The Term Knowingly</i> §5.53 <i>Instruction: The Term Willfully</i>
VIRGINIA & WEST VIRGINIA	§ 24-177A. <i>In General</i> , at 107
WASHINGTON	§ 10.01 <i>Intent-Intentionally—Definition</i> , at 149 § 10.02 <i>Knowledge-Knowingly—Definition</i> , at 150 § 10.03 <i>Recklessness—Definition</i> , at 153 § 10.05 <i>Willfully—Definition</i> , at 156
WYOMING	§ 5.15 <i>Voluntarily—Defined</i>

TABLE 5¹

THE RELEVANT TEXT OF OTHER CRIMINAL JURY INSTRUCTIONS
CONCERNING A DEFENDANT'S MENTAL STATE

Table 5 contains the relevant text of the instructions listed in Table 4.² Table 5 includes only the section of text that specifically relates to the definitions or descriptions pertinent in Table 4, and not necessarily the entire text. Citation information for all Table 5 instructions is available in Table 6.

State	Instruction
ALABAMA <i>Ala. Code § 13A-2-2(1) Intentionally (Non-Capital Offense)</i>	[Defines general intent as] “A person acts intentionally with respect to a result or to conduct when his or her purpose is to cause that result or to engage in that conduct.” [state the applicable conduct charged . . .]”
<i>(Continued on next page)</i>	

1. All instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in Tables 1–6: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions. Nineteen additional states were excluded from Tables 4 and 5 because they did not have relevant information: Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, and Wisconsin. Tables 4 and 5 also exclude criminal jury instructions regarding negligence, strict liability, or affirmative defenses, such as intoxication.

2. In addition to jury instructions, Table 5 lists relevant authorial addenda. In some states, the committee or advisory group that developed the jury instructions also provided addenda to accompany them. The addenda typically appear beneath the instructions, or on a subsequent page. Sometimes the addenda have a title (e.g., “Commentary”). The addenda serve a number of functions, which range from further clarifying an instruction’s meaning to providing information about its development or current status.

TABLE 5—Continued

State	Instruction
<i>Ala. Code § 13A-2-2(2)</i> <i>Knowingly</i>	[Defines specific intent as] “A person acts intentionally when his or her purpose is to [Defines general charge as] “A person acts knowingly with respect to conduct or to a circumstance when he or she is aware that his or her conduct is of that nature or that the circumstance exists.” [Defines specific charge as] “A person acts knowingly when he or she is aware that his or her acts will be considered [state the applicable conduct charged . . .]”
<i>Ala. Code § 13A-2-3 Mental State (Mental Culpability)</i>	“If a culpable mental state is required on the part of the defendant with respect to any material element of the crime charged, then the crime is said to be one of ‘mental culpability’. It requires that at the time of voluntary commission of an act or of voluntary omission of an act which the person is physically capable of performing, he must have acted (<u>either</u>): (1) intentionally (2) knowingly (3) recklessly (<u>or</u>) (4) with criminal negligence.” (emphasis in original)
ARIZONA <i>Standard Criminal 27 “Intentionally” or “With Intent To” Defined, at 26b</i>	“‘Intentionally’ [or ‘with intent to’] means that a defendant’s objective is to cause that result or to engage in that conduct.”
<i>Standard Criminal 28 “Knowingly” Defined, at 26c</i>	“‘Knowingly’ means that a defendant acted with awareness of [or belief in] the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known that the conduct is forbidden by law.”
<i>§ 1.056(a)(1) Intentionally or With Intent To Defined, at 28</i>	“‘Intentionally’ [or ‘with intent to’] as used in these instructions means that a defendant’s objective is to cause that result or to engage in that conduct.”
<i>§ 1.056(b) Knowingly Defined, at 30</i>	“‘Knowingly’ means that a defendant acted with awareness of [or belief in] the existence of conduct or circumstances constituting an offense. It does not mean that a defendant
<i>(Continued on next page)</i>	

TABLE 5—*Continued*

State	Instruction
	must have known the conduct is forbidden by law”
§ 2.021 <i>Included Mental States—Knowingly</i> , at 38	“If the State is required to prove that the defendant acted ‘knowingly,’ that requirement is satisfied if the State proves that the defendant acted ‘intentionally.’”
§ 2.022 <i>Included Mental States—Recklessly</i> , at 39	“If the state is required to prove that the defendant acted ‘recklessly,’ that requirement is satisfied if the State proves that the defendant acted ‘intentionally’ or ‘knowingly.’”
CALIFORNIA § 3.30 <i>Concurrence Of Act And General Criminal Intent</i> , at 117	“In the crime[s] ___ [and] [allegation[s]] charged in Count[s] ___, ___ and ___, [namely, ___, ___ and ___,] [and the crime[s] of ___, ___ and ___, which [is a] [are] lesser crime[s].] [and the allegation[s] ___,] there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] [she] is acting with general criminal intent, even though [he] [she] may not know that [his] [her] act or conduct is unlawful.”
§ 3.31 <i>Concurrence Of Act And Specific Intent</i> , at 119	“In the [crime[s]] [and] [allegation[s]] charged in Count[s] ___, ___ and ___ [or which [is a] [are] lesser crime[s] thereto], [namely,] ___, ___ and ___, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the [crime] [or] [allegation] to which it relates [is not committed] [or] [is not true. [The specific intent required is included in the definition[s] of the [crime[s]] [or] [allegation[s]] set forth elsewhere in these instructions.] [The crime of ___ requires the specific intent to ___.] [And the crime of ___ requires the specific
(Continued on next page)	

TABLE 5—Continued

State	Instruction
	intent to ____.] [And the allegation of ____ requires the specific intent to ____.]”
§ 3.31.5 <i>Mental State</i> , at 120	“In the crime[s] charged in Count[s] ____, ____ and ____ [or which [is a] [are] lesser crime[s] thereto], [namely, ____, ____ and ____], there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed. [The mental state[s] required [is] [are] included in the definition[s] of the crime[s] set forth elsewhere in these instructions.] In the crime of ____, the necessary mental state is _____. [In the crime of ____, the necessary mental state is _____.] [In the crime of ____, the necessary mental state is _____.]”
§ 3.33 <i>Act Alone—No Intent Involved</i> , at 122	“In the crime[s] charged in Count[s] ____ [or the crime[s] of ____ which [is a] [are] lesser crime[s] thereto], the doing of the act is a crime. The intent with which the act is committed is immaterial to guilt.”
DELAWARE <i>Count I—Murder First Degree—Intentional Killing [3, Knowingly]</i>	“The defendant acted knowingly. In other words, he was aware that he possessed a deadly weapon.”
DISTRICT OF COLUMBIA § 3.03 “ <i>Knowingly</i> ”— <i>Note</i> , at 203 ²	“Instruction 3.05, which defined ‘knowingly’ in the 1978 edition, was deleted in the 1993 edition . . . [T]he Committee has included the precise mental state required for each offense within the instruction for that offense. Each instruction with only a ‘knowingly’ <i>mens rea</i> requirement reflects the observation of the court in <i>Campos v. United States</i> , 617 A.2d 185, 188 (D.C. 1992), that ‘knowledge is not usually defined in terms of volition.’”
§ 3.04 “ <i>Willfully</i> ”— <i>Note</i> , at 204 ²	“The 1993 edition deleted Instruction 3.06, which defined ‘willfully’ in the 1978 edi-
<i>(Continued on next page)</i>	

TABLE 5—*Continued*

State	Instruction
	tion . . . [T]he Committee has included the precise mental state required for each offense within the instruction for that offense. This approach is particularly useful for this <i>mens rea</i> because the precise meaning of this term sometimes depends upon the statutory language defining the offense . . . Thus, courts should be sensitive to the fact that the appropriate definition of ‘willfully’ may vary from offense to offense.” (citation omitted)
HAWAII § 6.03 <i>State Of Mind— Knowingly</i>	“A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature. A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.”
KANSAS § 54.01-A <i>General Criminal Intent</i> , at 97	“In order for the defendant to be guilty of the crime charged, the State must prove that (his)(her) conduct was intentional. Intentional means willful and purposeful and not accidental. Intent or lack of intent is to be determined or inferred from all of the evidence in the case.”
KENTUCKY § 3.02 <i>Knowingly</i> , at 87	“A person acts knowingly with respect to conduct or to a circumstance when he is aware that his conduct is of that nature or that the circumstance exists.”
§ 3.04 <i>Recklessly</i> , at 87	“A person acts recklessly with respect to a result or to a circumstance when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the stan-
<i>(Continued on next page)</i>	

Table 5—Continued

State	Instruction
	dard of care that a reasonable person would observe in the situation.”
LOUISIANA § 4.01 <i>Criminal Intent</i> , at 35	which exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act. General criminal intent is present when the circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. General criminal intent is always present when there is specific intent. Whether criminal intent is present must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances. You may infer that the defendant intended the natural and probable consequences of his acts.”
MAINE § 6-38 <i>Criminal State of Mind</i> .	“Most, but not all, crimes include, as an element that must be proven beyond a reasonable doubt, a culpable state of mind—“intentionally,” “knowingly,” “recklessly” or “criminal negligence.” The jury should be instructed as to the meaning of the relevant states of mind. The statutory definitions provide a good basis of language for instructions . . . A mental state instruction is required, even if none is expressly stated in the statute regarding the specific crime, unless the context of the statute defining the crime requires otherwise. Accordingly, care should be taken to see if a mental state instruction must be given, even if no mental state element is included in the statute defining the crime.”
§ 6-46 <i>Motive. Instruction.</i>	“The State must prove that the defendant acted [intentionally or knowingly], but the State need not prove any specific motive for the acts alleged. However, evidence of the
<i>(Continued on next page)</i>	

TABLE 5—*Continued*

State	Instruction
	presence or absence of motive is a matter for you to consider in determining whether [intentional or knowing conduct] has been proven beyond a reasonable doubt.”
MICHIGAN § 3.9 <i>Specific Intent</i>	“The crime of ___ requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that [he/she] did the acts with the intent to cause a particular result. For the crime of ___ this means that the prosecution must prove that the defendant intended to [<i>state the required specific intent</i>]. The defendant’s intent may be proved by what [he/she] said, what [he/she] did, how [he/she] did it, or by any other facts and circumstances in evidence.” (emphasis in original)
MINNESOTA § 7.10 “Know”— “Intentionally”—“With Intent”— <i>Defined, at 93</i>	“‘To know’ requires only that the actor believes that the specified fact exists. ‘Intentionally’ means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor’s conduct criminal and that are set forth after the word ‘intentionally.’ ‘With intent to’ or ‘with intent that’ means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act, if successful, will cause that result.” (footnote omitted)
MISSOURI § 330.00— <i>Definitions Knowingly, Knowing, Knowledge, or Knew</i>	“A person knew, or acts knowingly, or with knowledge, (a) with respect to his or her conduct or to attendant circumstances when the person (is) (was) aware of the nature of his or her conduct or that those circumstances (exist) (existed), or (b) with respect
<i>(Continued on next page)</i>	

TABLE 5—*Continued*

State	Instruction
	to a result of a person's conduct when he or she (is) (was) aware that his or her conduct (is) (was) practically certain to cause that result."
MONTANA <i>§ 2-104 Knowingly</i>	"A person acts knowingly: [when the person is aware of his or her conduct] or [with respect to a specific circumstance defined by an offense, when the person is aware of that circumstance] or [when the person is aware there exists the high probability that the person's conduct will cause a specific result] or [with respect to a specific fact, when the person is aware of a high probability of that fact's existence.]"
NEBRASKA <i>§ 4.0 Definitions (States of Mind), at 54</i>	"A. 'DELIBERATE' . . . Deliberate—that is, not suddenly or rashly but (doing an act) after first considering the probable consequences. B. 'MALICE' . . . Intentionally doing a wrongful act without just cause or excuse. C. 'PREMEDITATION' . . . Premeditation—that is, forming the intent to (act) before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to (act) is formed before the act and not simultaneously with the act. D. 'PURPOSEFUL' <i>Substitute the Word "Intentional" For the Word 'Purposeful.'</i> E. 'RECKLESS . . . Reckless—that is, disregarding a substantial and unjustifiable risk that (here insert particulars) in circumstances in which disregarding this risk was a gross deviation from what a reasonable, law-abiding person would have done. F. 'WILLFUL' <i>Substitute the Word 'Intentional' For the Word 'Willful.'</i> " (emphasis in original)
NEW HAMPSHIRE <i>§ 2.01-a Understand What A Crime Is, at 35</i>	"In deciding whether a person is guilty of a crime, it is absolutely necessary for you to
<i>(Continued on next page)</i>	

Table 5—Continued

State	Instruction
	know both what the person's actions were and what his/her intentions were. The word intent refers to what a person mentally believes his/her physical acts will accomplish."
§ 2.04 <i>Knowingly</i> , at 38	"Part of the definition of the crime of ____ is that the defendant acted knowingly. This means that the State must prove that the defendant was aware that his acts would cause the prohibited result. The State does not have to prove that the defendant specifically intended or desired a particular result. What the State must prove is that the defendant was aware or knew that his conduct would cause the result."
<i>Definition Of A Crime</i> , at 21	"In deciding whether a person is guilty of a crime, you must determine both what the person's actions were and what his/her state of mind was."
<i>Mental States—Knowingly</i> , at 36	"Part of the definition of the crime of ____ is that the defendant acted knowingly. A person acts knowingly when he/she is aware of the nature of his/her conduct or the circumstance under which he/she acted. The state does not have to prove that the defendant specifically intended or desired a particular result. What the state must prove is that the defendant [was aware that his/she [sic] conduct would cause a certain result] [was aware of the nature of his/her conduct] [was aware of the circumstance under which he/she engaged in the conduct]."
NEW MEXICO § 14-141. <i>General criminal intent</i>	"In addition to the other elements of _____ (<i>identify crime or crimes</i>), the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime [even though he may not know
<i>(Continued on next page)</i>	

Table 5—Continued

State	Instruction
	that his act is unlawful].” (emphasis in original, citations omitted)
<p>NEW YORK <i>Expanded Charge On Intent</i></p>	<p>“As necessary, add after definition of intent in the CJI2d charge for an offense: Intent does not require premeditation. In other words, intent does not require advance planning. Nor is it necessary that the intent be in a person’s mind for any particular period of time. The intent can be formed, and need only exist, at the very moment the person engages in prohibited conduct or acts to cause the prohibited result, and not at any earlier time.” (emphasis in original)</p>
<p>OHIO <i>§ 409.11 Knowingly R.C. 2901.22(B)</i>, at 61</p>	<p>“A person acts knowingly, regardless of his purpose, when (he is aware that his conduct will probably cause a certain result) (he is aware that his conduct will probably be of a certain nature). A person has knowledge of circumstance when he is aware that such circumstances probably exist.”</p>
<p>SOUTH CAROLINA <i>Willful</i>, at 358</p>	<p>“An act is done ‘willfully’ if done voluntarily, intentionally, and with the specific intent to do something the law forbids. In other words, a criminal act is willful if the actor knows the conduct is unlawful and acts with bad purpose either to disobey or to disregard the law.”</p>
<p>SOUTH DAKOTA <i>§ 1-11-1 Intentionally—Definition</i></p>	<p>“The words ‘intent’ or ‘intentionally’ (or any derivatives thereof) as used in these instructions means a specific design to cause a certain result (or when the material part of a charge is the violation of a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, a specific design to engage in conduct of that nature).”</p>
(Continued on next page)	

TABLE 5—*Continued*

State	Instruction
§ 1-12-1 <i>Intent—General</i>	“In the crime of ___ the defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful.”
§ 1-12-2 <i>Intent—Specific</i>	“In the crime of ___ there must exist in the mind of the perpetrator the specific intent to _____. If specific intent did not exist, this crime has not been committed.”
TENNESSEE § 2.09 <i>Alternative instruction: Definition of “knowingly,”</i> at 18 ²	“A person acts ‘knowingly’ if that person acts with an awareness either: (1) that his or her conduct is of a particular nature; or (2) that a particular circumstance exists; or (3) that the conduct was reasonably certain to cause the result.” [The <i>Comment</i> states] “The Committee is of the opinion that the statutory definition of ‘knowingly’ may be confusing to jurors. Therefore, the trial judge may wish to use this definition in addition to, or instead of, the statutory definition.”
§ 42.22 <i>Evidence of mental state,</i> at 934	“The state must prove beyond a reasonable doubt the culpable mental state of the accused. Culpable mental state means the state of mind of the accused at the time of the offense. This means that you must consider all of the evidence to determine the state of mind of the accused at the time of the commission of the offense. The state of mind which the state must prove is contained in the elements of the offense(s) as outlined in these instructions [<i>above</i>] [<i>below</i>]. In this case, you have heard evidence that the defendant might have suffered from a mental [<i>disease</i>] [<i>defect</i>] which could have affected [<i>his</i>] [<i>her</i>] capacity to form the culpable mental state required to commit a particular offense. [The testimony must demonstrate
<i>(Continued on next page)</i>	

TABLE 5—*Continued*

State	Instruction
	<p>that the defendant's inability to form the requisite culpable mental state was the product of mental disease or defect, not just a particular emotional state or mental condition. However, it is for the jury to determine whether or not the defendant might have suffered from a mental disease or defect.] If you find from the evidence that the defendant's capacity to form a culpable mental state may have been affected, then you must determine beyond a reasonable doubt what the mental state of the defendant was at the time of the commission of the offense to determine of which, if any, offense [<i>he</i>] [<i>she</i>] is guilty. [Whether the defendant had the capacity to form the culpable mental state required to commit a particular offense is not to be confused with the defense of insanity. If you find by clear and convincing evidence that the defendant was insane as defined in these instructions at the time of the commission of the offense, the defendant must be found not guilty of all offenses."] (footnotes omitted, emphasis in original)</p>
<p>TEXAS § 12:470 <i>Culpability</i></p>	<p>“A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.”</p>
<p>VERMONT §5.48 <i>Instruction: The Term Knowingly</i></p>	<p>“A person acts ‘knowingly’ when ‘he (<i>she</i>) is aware that it is practically certain that his (<i>her</i>) conduct will cause such a result.’ In deciding whether (<i>defendant</i>) acted knowingly, it is your job to determine what his (<i>her</i>) state of mind actually was at the time of</p>

(Continued on next page)

TABLE 5—*Continued*

State	Instruction
	the alleged crime, and not what it should have been.” (emphasis in original)
§ 5.53 <i>Instruction: The Term Willfully</i>	“An act is done ‘willfully’ if it is done intentionally, designedly, knowingly, or purposely, without justifiable excuse.”
VIRGINIA & WEST VIRGINIA § 24-177A. <i>In General</i> , at 107	“The trial court granted Instruction 15 which informed the jury that in establishing capital murder the Commonwealth was required to prove that the killing was willful, deliberate and premeditated. The jury was instructed that the Commonwealth had the burden of proving beyond a reasonable doubt ‘[t]hat the defendant intended to kill . . .’ The jury was also instructed that ‘[I]n determining whether the intent has been proved, you may consider the conduct of the person involved and all the circumstances revealed by the evidence.’” (citations omitted)
WASHINGTON § 10.01 <i>Intent-Intentionally-Definition</i> , at 149	“A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.”
§ 10.02 <i>Knowledge-Knowingly-Definition</i> , at 150	“A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime. If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge. [Acting knowingly or with knowledge also is established if a person acts intentionally.]”
§ 10.03 <i>Recklessness-Definition</i> , at 153	“A person is reckless or acts recklessly when he or she knows of and disregards a
<i>(Continued on next page)</i>	

TABLE 5—*Continued*

State	Instruction
	substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. [Recklessness also is established if a person acts [intentionally] [or] [knowingly].]"
<i>§ 10.05 Willfully-Definition, at 156</i>	"A person acts willfully when he or she acts knowingly."
WYOMING <i>§ 5.15 Voluntarily—Defined</i>	"Voluntarily means intentionally. An act which is done voluntarily is not one which is done accidentally."
<i>§ 21.01C Purposely—Defined</i>	"'Purposely' means intentionally."

TABLE 6¹

CITATION INFORMATION FOR ALL JURY INSTRUCTIONS INCLUDED IN TABLES 1–5

State	Citation Information
ALABAMA	State of Alabama, Criminal Code—Pattern Jury Instructions, Criminal (3d ed. 1994) Ch. 2 Culpability/Parties <i>Ala. Code § 13A-2-2(1) Intentionally (Non-Capital Offense)</i> <i>Ala. Code § 13A-2-2(2) Knowingly</i> <i>Ala. Code § 13A-2-2(3) Recklessly</i> <i>Ala. Code § 13A-2-3 Mental State (Mental Culpability)</i>
ALASKA	Alaska Court System Criminal Pattern Jury Instructions (2000 rev. 2004) Part I General Instructions
<i>(Continued on next page)</i>	

1. All instructions are on file with the author at Fordham University School of Law. Copies are also available on the internet at <http://www.fordham.edu/law/faculty/denno/fordhamjuryinstruction-home.html>. Four states were not included in Tables 1–6: Iowa, Oregon, Rhode Island, and Utah. Iowa and Oregon do not appear to have criminal jury instructions on point (specifically relating to mental state, intent, or inferences); Rhode Island and Utah do not have any criminal jury instructions.

TABLE 6—Continued

State	Citation Information
	§ 1.15 <i>State Of Mind—Circumstantial Evidence</i> § 1.28 <i>Flight</i> ²
ARIZONA ³	Revised Arizona Jury Instructions (Criminal) (1989 rev. 1996, 2000) General Criminal Jury Instructions <i>Standard Criminal 9 Flight or Concealment</i> , at 9 ² <i>Standard Criminal 17 Voluntary Act</i> , at 17 <i>Standard Criminal 27 “Intentionally” or “With Intent To” Defined</i> , at 26b (Added 1996) <i>Standard Criminal 28 “Knowingly” Defined</i> , at 26c <i>Standard Criminal 29 “Recklessly” or “Reckless Disregard” Defined</i> , at 26c (Added 1996) Revised Arizona Jury Instructions (Criminal) (1989 rev. 1996, 2000) Statutory Criminal Jury Instructions (Recommended) <i>§ 1.056(a)(1) Intentionally or With Intent To Defined</i> , at 28 <i>§ 1.056(a)(2) Intent—Inference</i> , at 29 <i>§ 1.056(b) Knowingly Defined</i> , at 30 <i>§ 1.056(c) Recklessly (Reckless Disregard) Defined</i> , at 31 <i>§ 2.021 Included Mental States—Knowingly</i> , at 38
<i>(Continued on next page)</i>	

2. In addition to jury instructions, Table 6 lists relevant authorial addenda. In some states, the committee or advisory group that developed the jury instructions also provided addenda to accompany them. The addenda typically appear beneath the instructions, or on a subsequent page. Sometimes the addenda have a title (e.g., “Commentary”). The addenda serve a number of functions, which range from further clarifying an instruction’s meaning to providing information about its development or current status.

3. Both the Revised and Recommended Arizona Jury Instructions (Criminal) are found in the same volume. The *Important Notice* to the Revised Arizona Jury Instructions (Criminal) states the following:

In the past, the Arizona Supreme Court has expressed a qualified approval for various jury instructions, which were then published as *Recommended Arizona Jury Instructions*. However, the Arizona Supreme Court has determined that it will no longer issue qualified approvals for any jury instructions. Due to the action by the Court, members of the [Arizona State Bar] Board of Governors established guidelines for future [jury instructions] and decided that this disclaimer should be included for all [jury instructions]. The instructions have also been renamed *Revised Arizona Jury Instructions*. . . as the Instructions are no longer “recommended.”
Id. at iii (emphasis in original).

TABLE 6—*Continued*

State	Citation Information
	§ 2.022 <i>Included Mental States—Recklessly</i> , at 39
ARKANSAS	Arkansas Model Jury Instructions, Criminal, Vol. 1 (2d ed. rel. 4, 2004) [among other instructions] § 1001 <i>Capital Murder</i> § 1004 <i>Manslaughter</i>
CALIFORNIA	California Jury Instructions, Criminal (July 2004 ed.) Part 2. Evidence And Guides—Consideration, A. General Rules § 2.02 <i>Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State</i> , at 33–34 § 2.03 <i>Consciousness Of Guilt—Falsehood</i> , at 35–36 ² § 2.06 <i>Efforts To Suppress Evidence</i> , at 38 Part 3. Culpability For Crime, D. Criminal Intent § 3.30 <i>Concurrence Of Act And General Criminal Intent</i> , at 117 § 3.31 <i>Concurrence Of Act And Specific Intent</i> , at 119 § 3.31.5 <i>Mental State</i> , at 120 § 3.33 <i>Act Alone—No Intent Involved</i> , at 122
COLORADO	Colorado Jury Instructions, Criminal (rev. 1983) Ch. 6 Culpability and Accountability § 6:01 <i>Requirements For Criminal Liability—In General</i> , at 71
CONNECTICUT	Connecticut Practice Series—Criminal Jury Instructions, Vol. 5 (3d ed. 2001 updated 2003) Part I. General Instructions For Criminal Cases, Ch. 3 Evidence and Witnesses § 3.16 <i>Flight</i> , at 254–56 Connecticut Practice Series—Criminal Jury Instructions, Vol. 5A (3d ed. 2001 updated 2003) Part II. Instructions On Criminal Culpability, Ch. 7 Mens Rea
<i>(Continued on next page)</i>	

TABLE 6—Continued

State	Citation Information
	<p>§ 7.1 <i>Intent</i> (§ 53a-3(11)), at 2 (updated by 2003 pocket part)</p> <p>§ 7.3 <i>Recklessness</i> (§ 53a-3(13)), at 15</p>
DELAWARE	<p>Delaware Criminal Code: Pattern Jury Instructions (1985)⁴</p> <p><i>Flight</i></p> <p><i>Knowingly</i></p> <p><i>Permitted Inference Of Intention, Recklessness, Knowledge Or Belief</i></p> <p><i>Count I—Murder First Degree—Intentional Killing [1, Voluntary Act]</i></p> <p><i>Count I—Murder First Degree—Intentional Killing [2, Intentionally]</i></p> <p><i>Count I—Murder First Degree—Intentional Killing [2, Recklessly]</i></p>
DISTRICT OF COLUMBIA	<p>Criminal Jury Instructions for the District of Columbia (4th ed. rev. 2004)</p> <p>III. Definitions and Proof</p> <p>§ 3.01 <i>Intent—Note</i>, at 197²</p> <p>§ 3.02 <i>Proof Of State Of Mind</i>, at 202</p> <p>§ 3.03 <i>“Knowingly”—Note</i>, at 203²</p> <p>§ 3.04 <i>“Willfully”—Note</i>, at 204²</p>
FLORIDA	<p>Florida Standard Jury Instructions in Criminal Cases (4th ed. 2002)</p> <p>Part One: General Instructions, Ch. 3 Final Charge to the Jury</p> <p>§ 3.5(a) <i>Principals</i>, at 32</p> <p>§ 3.5(c) <i>Accessory After the Fact</i>, at 34</p>
GEORGIA	<p>Suggested Pattern Jury Instructions, Volume II: Criminal Cases (3d ed. 2003)</p> <p>Evidence</p> <p>§ 1.36.10 <i>Flight</i>, at 31</p> <p>Definition Of Crime</p>
<i>(Continued on next page)</i>	

4. The compilation of Delaware's pattern jury instructions does not appear to be an organized manual developed by a committee, but rather an informal collection of instructions that was used to direct jurors in actual cases. The informality of this collection is illustrated by the fact that few of the cases are identified by name, and several pages of the collection contain hand-written comments. Some of the instructions are repeated, apparently having been pulled from more than one case. While there are slight discrepancies in wording among the repeat instructions, their substance is consistent.

TABLE 6—Continued

State	Citation Information
	§ 1.41.10 <i>Intent</i> , at 33 § 1.41.11 <i>No Presumption Of Criminal Intent</i> , at 34
HAWAII	Hawai'i Criminal Jury Instructions ⁵ 3. Instructions At End Of Case § 3.16 <i>State Of Mind—Proof By Circumstantial Evidence</i> 6. Responsibility § 6.02 <i>State Of Mind—Intentionally</i> § 6.03 <i>State Of Mind—Knowingly</i> § 6.04 <i>State Of Mind—Recklessly</i>
IDAHO	Idaho Criminal Jury Instructions (1995) ⁶ § 309 <i>Defendant's Intent Manifested By Circumstances</i> ²
ILLINOIS	Illinois Pattern Jury Instructions, Criminal, Vol. 3 (4th ed. 2000) Ch. 3 Particular Types of Evidence §3.03. <i>Flight</i> , at 88 Ch. 5 Mental State, Accountability, And Responsibility § 5.01 <i>Recklessness—Wantonness</i> , at 140 § 5.01A <i>Intent</i> , at 141 § 5.01B <i>Knowledge—Willfulness</i> , at 142 Illinois Non-Pattern Jury Instructions—Criminal (3d ed. 2003) Part I. Introduction—Criminal, Ch. 3 Particular Types of Evidence §3.03. <i>Flight</i>
INDIANA	Indiana Pattern Jury Instructions—Criminal (3d ed. 2003)

(Continued on next page)

5. Hawaii no longer publishes jury instructions in hard copy. The criminal jury instructions used in this appendix were found on the state's judiciary web site, at <http://www.courts.state.hi.us/index.jsp>. The footnotes from these online instructions suggest that the last hard copy of Hawaii's jury instructions was published in 1991.

6. The Idaho Courts website, at http://www.isc.idaho.gov/crjury/idaho_courts_e.htm, indicates that as of March 15, 2004, the Idaho Supreme Court appointed members to a Criminal Jury Instructions Committee to review and update the state's pattern criminal jury instructions. The instruction cited in this appendix does not appear to have been modified.

TABLE 6—Continued

State	Citation Information
	Ch. 9 Basis of Liability § 9.01. <i>Voluntary Conduct. I.C. 35-41-2-1(a).</i> ² § 9.05. <i>Culpability. I.C. 35-41-2-2.</i> Ch. 12 Evidence § 12.23. <i>Escape.</i> § 12.25. <i>Flight.</i> ²
KANSAS	Pattern Instructions for Kansas—Criminal (3d ed. with 1999 supp.) Ch. 54.00 Principles Of Criminal Liability § 54.01 <i>Presumption Of Intent</i> , at 95 § 54.01— <i>A General Criminal Intent</i> , at 97
KENTUCKY	Kentucky Instructions To Juries, Vol. 1 Criminal (1999) Ch. 3 Assaults And Restraints Of Persons, Part I. Definitions § 3.01 <i>Intentionally</i> , at 86 ² § 3.02 <i>Knowingly</i> , at 87 § 3.03 <i>Wantonly</i> , at 87 § 3.04 <i>Recklessly</i> , at 87
LOUISIANA	Louisiana Civil Law Treatise, Vol. 17 Criminal Jury Instructions (1994) Chapter 4. General—Offense Charged § 4.01 <i>Criminal Intent</i> , at 35 Chapter 5. General—Evidence Presented § 5.08 <i>Flight of the Defendant</i> , at 50 ²
MAINE	Maine Jury Instruction Manual (4th ed. 2004) Ch. 6 Representative Criminal Instructions § 6-10 <i>Evidence to Be Considered. Instruction.</i> § 6-13 <i>Presumptions-Inferences. Instruction.</i> § 6-38 <i>Criminal State of Mind.</i> § 6-39 <i>Inferred Intent. Instruction</i> § 6-40 <i>Voluntariness Defined. Instruction.</i> § 6-46 <i>Motive. Instruction.</i>
MARYLAND	Maryland Criminal Pattern Jury Instructions (2003 with supp.) Part I, Ch. 3 Evidentiary Instructions § 3:24 <i>Flight Or Concealment Of Defendant</i> , at 82
<i>(Continued on next page)</i>	

TABLE 6—*Continued*

State	Citation Information
	<p>§ 3:26 <i>Concealment Or Destruction Of Evidence As Consciousness Of Guilt</i>, at 86</p> <p><i>Consciousness Of Guilt</i>, at 89</p>
	<p>§ 3:27 <i>Suppression, Alteration Or Creation of Evidence As Consciousness of Guilt</i>, at 89</p> <p>§ 3:31 <i>Proof Of Intent</i>, at 95</p>
MASSACHUSETTS	<p>Massachusetts Superior Court Criminal Practice Jury Instructions (2003)</p> <p><i>Vol. I, Instructions Common to All Criminal Cases § 1.9 Intent: General And Specific</i></p> <p><i>Vol. II, Ch. 4, Part I. Instructions Regarding Special Issues § 4.12 Knowledge</i></p> <p><i>Vol. II, Ch. 4, Part I. Instructions Regarding Special Issues § 4.19 Consciousness Of Guilt</i></p>
MICHIGAN	<p>Michigan Non-Standard Jury Instructions, Criminal (1999)</p> <p>Ch. 2 In General</p> <p>§2:35. <i>Definition—Knowingly</i>, at 57</p> <p>Ch. 4 Assaultive Offenses</p> <p>§ 4:02 <i>Instruction on Inferring State of Mind in Assault Cases</i>, at 71</p> <p>Michigan Criminal Jury Instructions (2d ed. 2003)</p> <p><i>CJI2d § 3.9 Specific Intent</i></p>
MINNESOTA	<p>Minnesota Practice, Vol. 10 Minnesota Jury Instruction Guides Criminal (4th ed. with 2005 supp.)</p> <p>Part I—The General Part, B. General Principles of Criminal Law</p> <p>Ch. 5 Anticipatory Crimes</p> <p>§ 5.07 <i>Conspiracy—Elements (updated by 2003–04 pocket part)</i>²</p> <p>Ch. 7 Defenses—Miscellaneous</p> <p>§ 7.10 “<i>Know</i>”—“<i>Intentionally</i>”—“<i>With Intent</i>”—<i>Defined (1999)</i></p>
MISSISSIPPI	<p>Mississippi Model Jury Instructions, Criminal (2005)</p> <p>Ch. 3. Definitions</p> <p>§ 3:12 <i>Flight By Defendant</i></p>

(Continued on next page)

TABLE 6—*Continued*

State	Citation Information
MISSOURI	Missouri Approved Instructions—Criminal (n.d.) § 333.00 Definitions—Specific § 330.00— <i>Definitions Knowingly, Knowing, Knowledge, or Knew</i> § 330.00— <i>Definitions Purpose or Purposely</i> § 333.00— <i>Definitions Reckless or Recklessly</i>
MONTANA	Montana Criminal Jury Instructions (1999 with 2003 supp.) Ch. 1 Preliminary and General Instructions § 1-017(b) <i>Circumstantial—Inference of Mental State</i> § 1-020 <i>Flight by Defendant</i> Ch. 2 Definitions/Principles of Liability § 2-104 <i>Knowingly</i> § 2-106 <i>Purposely</i> § 2-108 <i>Mental State Inference</i>
NEBRASKA	Nebraska Practice Series, Vol. 1 Nebraska Jury Instructions, Criminal (2d ed. with 2003 supp.) Ch. 4. Definitions § 4.0 <i>Definitions (States of Mind)</i> , at 54 Ch. 5. Evidence and Credibility § 5.1 <i>States Of Mind Proved Inferentially</i> , at 67
NEVADA	Jury Instructions for Nevada Criminal Trials (n.d.) §2.100. <i>Flight</i> Nevada criminal pattern jury instructions [Draft copy] [electronic resource, published by Eighth Judicial District Court] (2001) ⁷ §3.04— <i>Flight</i>
NEW HAMPSHIRE	New Hampshire Criminal Jury Instructions, Offenses (1985) ⁸

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7. The preface to the Nevada Criminal Pattern Jury Instructions [Draft copy] notes the following: “The Eighth Judicial District Court undertook the task of modernizing criminal jury instructions in the spring of 2001 . . . It is the intent of the committee to review all comments and proposals before finalizing the standard criminal instructions. The finalized set will then be submitted to the Supreme Court for its consideration with a request for adoption.”

8. In its “Preface to the 1985 Edition,” the New Hampshire Bar Association Criminal Justice Section Criminal Jury Instructions Committee notes that “these instructions are not designed as ‘pattern’ instructions,” but rather are “to be used as a starting point for drafting instructions tailored to the facts of each individual case.”

TABLE 6—Continued

State	Citation Information
	<p>§ 1.19 <i>Flight By The Defendant</i>, at 21</p> <p>§ 2.02 <i>Proof Of Intent</i>, at 36</p> <p>§ 2.03 <i>Purposely</i>, at 37 § 1.19-a <i>What Does Evidence That A Person Ran Away Prove?</i>, at 22</p> <p>§ 2.01-a <i>Understand What A Crime Is</i>, at 35</p> <p>§ 2.04 <i>Knowingly</i>, at 38</p> <p>§ 2.05 <i>Recklessly</i>, at 39</p> <p>New Hampshire Criminal Jury Instructions [Draft] (2003)⁹</p> <p>I. General Instructions</p> <p><i>Definition Of A Crime</i>, at 21</p> <p><i>Mental States—Knowingly</i>, at 36</p> <p><i>Mental States—Purposely</i>, at 35</p> <p><i>Mental States—Recklessly</i>, at 37</p> <p><i>Mental States—Proof of Mental State</i>, at 39</p>
NEW JERSEY	<p>Model Jury Charges, Criminal (5th ed. 2000)</p> <p><i>Flight</i> (approved 2000)</p> <p>§ 2C:17-1a <i>Aggravated Arson</i> (approved 1980)</p> <p><i>State Of Mind</i> (approved 1993)</p>
NEW MEXICO	<p>New Mexico Statutes and Court Rules/Contents of Judicial Volumes/Uniform Jury Instructions—Criminal¹⁰</p> <p><i>Ch. 1 General Instructions, Part D. General Instructions, UJI 14-141. General criminal intent.</i></p> <p><i>Ch. 50 Evidence and Guides For Its Consideration, Part B. Evaluation of Evidence, UJI 14-5030. Flight.</i>²</p>
(Continued on next page)	

9. In a letter intended as a preface to all circulated copies of its draft instructions, the New Hampshire Bar Association Criminal Jury Instructions Drafting Committee notes the following: “The draft instructions that the committee has completed most of its work on have not been reviewed or approved by the Bar’s Task Force on Criminal Jury Instructions, which oversees the Drafting Committee. Therefore, these drafts represent no more than the work-in-progress of the committee. They do not carry the imprimatur of the New Hampshire Bar Association.”

10. New Mexico no longer publishes jury instructions in hard copy. The criminal jury instructions used in this appendix were found on the New Mexico Supreme Court Law Library web site at <http://fsccl.org/>.

TABLE 6—*Continued*

State	Citation Information
NEW YORK	<p>Charges To The Jury And Requests To Charge In A Criminal Case, Vol. I (rev. 1988 with 2003 supp.)</p> <p>Ch. 4 General Instructions</p> <p>§ 4:18. — <i>Intent</i>, at 148–49</p> <p>§ 4:37. <i>Consciousness of Guilt</i>, at 176–77</p> <p>§ 4:38. — <i>Commentary</i>, at 177²</p> <p>§ 4:44. <i>Flight</i>, at 184</p> <p>§ 4:45. — <i>Commentary</i>, at 184–85²</p> <p>§ 4:54. <i>Intent</i>, at 202–03</p> <p>§ 4:55. — <i>Commentary</i>, at 203–05²</p> <p>§ 4:58.30. <i>Knowledge [New]</i>, at 94 (<i>New addition in 2003 Cumulative Supplement</i>)</p> <p>Criminal Jury Instructions, Penal Law (rev. 1996)</p> <p><i>Murder First Degree (Capital) (Intentional Murder—Prior Murder Conviction) Penal Law 125.27(1)(a)(ix)</i></p> <p>Criminal Jury Instructions, 2nd ed., General Charges (Official)¹¹</p> <p><i>Expanded Charge On Intent</i></p> <p><i>Expanded Charge On Knowingly</i></p>
NORTH CAROLINA	<p>North Carolina Pattern Jury Instructions for Criminal Cases (1987 supp. 2003)</p> <p>Part I General</p> <p>§ 104.35 <i>Flight—In General. (replacement in 1994)</i></p> <p>§ 120.10 <i>Definition of [Intent][Intentionally].</i></p>
NORTH DAKOTA	<p>North Dakota Pattern Jury Instructions—Criminal¹²</p> <p>§ K-5.38 <i>Proof of Intent</i></p> <p>§ K-5.40 <i>Flight [Concealment]</i></p>
<i>(Continued on next page)</i>	

11. This set of instructions is now published at <http://www.nycourts.gov/cji/1-General/cjigc.html>, which is located on the New York State Unified Court System web site. According to the New York State Office of Court Administration, Committee on Criminal Jury Instructions, the online instructions are “the only current and official publication of [Criminal Jury Instruction, 2d ed.] charges, and replace[] all [Criminal Jury Instruction, 2d ed.] charges previously published in a printed format.” *Id.* at <http://www.nycourts.gov/cji/0-TitlePage/History.htm>.

12. North Dakota does not publish jury instructions in hard copy. The criminal jury instructions used in this appendix were found on the State Bar Association of North Dakota web site at http://www.sband.org/Pattern_Jury_Instructions/criminal_index.asp.

TABLE 6—Continued

State	Citation Information
OHIO	Ohio Jury Instructions Criminal, Vol. 4 (2004) Ch. 409 Definitions <i>§ 409.01 Purposely, motive R.C. 2901.22(A)</i> , at 57–58 <i>§ 409.11 Knowingly R.C. 2901.22(B)</i> , at 61
OKLAHOMA	Vernon's Oklahoma Forms 2d, Uniform Jury Instructions, Criminal (2003 ed.) <i>Ch. 9 Evidence, § 9-8 Evidence—Flight</i> , at 460
PENNSYLVANIA	Pennsylvania Criminal Suggested Standard Jury Instructions (1979 supp. 2000) Part I. General Instructions, Ch. III Evidence <i>§ 3.14 Consciousness Of Guilt, Flight Or Concealment As Showing</i> <i>§ 3.15 Consciousness Of Guilt, Conduct Of Defendant As Showing</i>
SOUTH CAROLINA	Jury Instructions For Criminal Cases In South Carolina (2d ed. 2001) Ch. VII Miscellaneous Substantive Law Instructions, A. Mental State, Defendant's Requested Instructions <i>Willful</i> , at 358 <i>Intentional</i> , at 353 <i>Knowing</i> , at 354 <i>Knowledge Of A Fact</i> , at 355 <i>Reckless</i> , at 356
SOUTH DAKOTA	South Dakota Pattern Jury Instructions (Criminal) (1996 rev. 2003) Section I—General Principles <i>§ 1-11-1 Intentionally—Definition</i> <i>§ 1-12-1 Intent—General</i> <i>§ 1-12-2 Intent—Specific</i> <i>§ 1-12-3 Intent—How Manifested</i>
TENNESSEE	Tennessee Pattern Jury Instructions Criminal, Vol. 7 (8th ed. 2004) Ch. 2 Burden of Proof <i>§ 2.08 Alternative instruction: Definition of “intentionally,”</i> at 17 ² <i>§ 2.09 Alternative instruction: Definition of “knowingly,”</i> at 18 ²

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TABLE 6—Continued

State	Citation Information
	<p>§ 2.10 <i>Alternative instruction: Definition of “recklessly,”</i> at 19²</p> <p>Ch. 42 General Instructions</p> <p>§ 42.18 <i>Flight,</i> at 929</p> <p>§ 42.22 <i>Evidence of mental state,</i> at 934</p>
TEXAS	<p>Texas Criminal Jury Charges (2003)</p> <p>Ch. 12 Special Charges</p> <p>§ 12:470 <i>Culpability</i></p> <p>§ 12:620.30 <i>Extraneous Offenses or Conduct—To Prove Intent, Knowledge, Design, Scheme, or System</i></p>
VERMONT	<p>Vermont Jury Instructions, Civil And Criminal (1993)</p> <p>Ch. 5 General Remarks by the Court; Witness and Evidence</p> <p>§5.47 <i>Instruction: Specific Intent</i></p> <p>§5.48 <i>Instruction: The Term Knowingly</i></p> <p>§5.52 <i>Instruction: The Term Recklessly</i></p> <p>§5.53 <i>Instruction: The Term Willfully</i></p>
VIRGINIA	<p>Virginia Practice Series, Jury Instructions (2004)</p> <p>Part IV Crimes—Forms Of Instructions, Subpart A. In General, Ch. 101. Weighing the Evidence—Particular Matters</p> <p>§ 101:09 <i>Flight by Defendant,</i> at 477²</p>
VIRGINIA & WEST VIRGINIA	<p>Virginia—Instructions For Virginia And West Virginia (5th ed. 2002)</p> <p>Volume 2A Criminal Law, I. Criminal Offenses, 15. Homicide (c) Murder (2) Intent to Kill</p> <p>§ 24-177. <i>Presumed From Act Of Killing,</i> at 108</p> <p>§ 24-177A. <i>In General,</i> at 107</p>
WASHINGTON	<p>Washington Pattern Jury Instructions, Criminal, Vol. 11 (2d ed. 1994 supp. 1998)</p> <p>Part II. Evidence And Guides For Its Consideration, Ch. 6 Evaluation of Evidence</p> <p>§ 6.21 <i>Evidence of Flight,</i> at 140²</p> <p>§ 6.25 <i>Presumed To Intend Natural Consequences Of Acts,</i> at 141²</p>

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TABLE 6—*Continued*

State	Citation Information
	Part III. Principles of Liability, Ch 10 General Requirements of Culpability <i>§ 10.01 Intent-Intentionally—Definition</i> , at 149 <i>§ 10.02 Knowledge-Knowingly—Definition (updated by 1998 pocket part)</i> , at 150 <i>§ 10.03 Recklessness—Definition (updated by 1998 pocket part)</i> , at 153 <i>§ 10.05 Willfully—Definition</i> , at 156
WISCONSIN	Wisconsin Jury Instructions, Criminal, Vol. 1 (2004) <i>§ 172 Circumstantial Evidence: Flight, Escape, Concealment</i> , at 1 (revised 1991; revision approved 1999)
WYOMING	Wyoming Pattern Criminal Jury Instructions (1996) <i>§ 5.11 Recklessly—Defined</i> <i>§ 5.15 Voluntarily—Defined</i> <i>§ 21.01C Purposely—Defined</i>