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Deborah W. Denno

Fordham University School of Law, DDENNO@law.fordham.edu

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WHEN TWO BECOME ONE: VIEWS ON FLETCHER’S “TWO PATTERNS OF CRIMINALITY”

Deborah W. Denno*

George Fletcher’s Rethinking Criminal Law ("Rethinking") is the ultimate cut-to-the-chase treatise. The book does not belabor the frailties of existing criminal law, but rather predicts an overhaul of much of its doctrine.

In 1978, Fletcher’s bold venture was hailed as a “diligent and sophisticated treatment of basic questions,” “a legal cornucopia and a uniquely important work … [with] numerous insightful and provocative mini-patterns of theory” that “seek fresh modes of analysis” of nearly all of substantive criminal law. These responses explain in part why Rethinking thrives after a quarter of a century.

This essay marks a tribute to Rethinking’s influence by examining two of the book’s well known “patterns of criminality”: (1) “manifest criminality,” which proposes that crimes are acts that any “objective” observer would clearly recognize as illegal without knowing anything about the mental state of the person committing those acts and, in stark contrast, (2) “subjective criminality,” which suggests that crimes are consciously intended and experienced only by those who are committing them and that this sense of intention and experience is highly individual. Fletcher claims that this notion of intending prompts a dualism in criminal law that reflects the differences between the mind (subjective criminality) and the body (manifest criminality). While many philosophers contend that this mind-body division is outmoded, the

* Professor of Law, Fordham University School of Law. I thank Russell Christopher, Lawrence Fleischer, Marianna Politzer, and Ian Weinstein for insightful comments, as well as Juan Fernandez, Janice Greer, and Lawrence Griffin for excellent research assistance.

2. Stephen J. Schulhofer, Book Review, 68 Cal. L. Rev. 181, 181 (1980) (reviewing Rethinking Criminal Law) (noting that Fletcher “evidently concluded that the defects of other theories . . . could be taken for granted, and that his purposes were best served by avoiding methodological squabbles and getting right to the business of developing a full-blown theory of his own” (footnote omitted)).
5. Schulhofer, supra n. 2, at 182.
6. Fletcher, supra n. 1, at 115.
7. Id. at 115-16.
8. Id. at 118.
division resonates throughout criminal law cases and statutes in the form of intent and acts, respectively.  

In *Rethinking*, Fletcher writes in depth about a third and entirely separate pattern of criminality as well as other theoretical concepts. This essay focuses on the manifest and subjective patterns of criminality; Fletcher considers the patterns particularly adept at measuring the extent of diversity among established criminal law doctrines as well as showing how those doctrines can be more unified. Yet the following pages contend that the two patterns of criminality are so interdependent that pragmatically it is difficult and often deceptive to analyze a crime through distinctly "manifest" or "subjective" lenses.

Recent empirical research on conscious and unconscious thought processes shows that people's interpretations of their own or others' acts are highly subjective in ways that the criminal law has not recognized. A separate concept of manifest criminality resting on "objective" observations now seems a bit of a myth. The two patterns of manifest and subjective criminality have become one—subjective criminality characterized (or bolstered) more or less by what Fletcher designates as manifest criminality.

It is understandable why some scholars (including Fletcher) would favor a more manifest approach. The whole area of mental states in the criminal law is so murky, confusing, unsubstantiated, and difficult that most criminal law scholars choose to avoid discussing the topic entirely. A defendant's mens rea is always a construction based on circumstantial evidence. It is alluring to presume that criminal law doctrine can more cleanly and justly rest on objective factors and bypass the mire of mental states entirely. Like subjective criminality, however, manifest criminality rests on a fiction. The criminal justice system cannot comfortably gloss over these dilemmas of pretense in both criminality patterns without ignoring the ever-growing signposts of scientific research.

Part I of the following discussion describes Fletcher's two patterns of criminality in terms of their origins, distinctions, similarities, and utility, as well as other commentators' criticisms of how Fletcher presents them. Part II analyzes some extreme views of the pro-manifest criminality approach developed in

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9. *Id.*

10. For Fletcher, the manifest and subjective patterns do not explain all of criminal law. He believes that the crime of homicide warrants a third and entirely separate pattern—the "pattern of harmful consequences"—because the "central feature of homicide is the death of one person at the hands of another," not the "manifest danger of threatening to kill nor the intent to kill." *Id.* at 121. The specific requirements for offenses fulfilling the harmful consequences pattern (which go beyond just the crime of homicide) constitute the following: (1) the existence of "a concrete harm to a personal interest (death, bodily injury, destruction of property)"; (2) any indication that "natural processes" or "human conduct" might have led to this concrete harm; and (3) the recognition that "it is possible and plausible to punish both negligent infliction of the harmful consequence and the failure to intervene and prevent the harm's occurring." Fletcher, *supra* n. 1, at 385.

11. In the second half of *Rethinking*, Fletcher discusses three other concepts (apart from the three patterns of criminality) that emphasize the important differences that modern criminal law theories either underplay or bypass. *Id.* at 391-875. These three concepts generally concern (1) the differences between wrongdoing to the victim and attributing responsibility to the defendant; (2) within the concept of wrongdoing, the differences between concerns about definition and justification; and (3) the differences between direct and derivative liability. *Id.*
response to scholars' frustration with the ambiguity and enigma of mens rea. While these views have merit in theory, they can be dangerous in practice. The part focuses in particular on one scholar's recommendation that courts take an alternative perspective—either infer a defendant's mental state from that defendant's conduct or presume it based on doctrines maintaining that defendants intend the natural and probable consequences of their actions. Parts III and IV reveal the contradictions and unsubstantiated claims behind the pro-manifest criminality approach by reviewing recent research on conscious and unconscious processes. Such research accentuates the subjective way that individuals perceive either their own or others' acts. Scientifically speaking, subjective criminality should govern in criminal law although it can be made more credible by manifest criminality.

Within the confines of this essay, there are no set recommendations for how the criminal law should operate with its "subjective + manifest" approach; consciousness research demonstrates the factual and conceptual fragility of both the manifest and subjective patterns of criminality. Yet, there is an underlying theme: it's time for the criminal justice system to confront the mens rea mystery by going back to school to keep up with advances in the cognitive sciences. Kudos to Fletcher for conceptualizing the manifest and subjective framework and for braving the thicket of mental states at the time that he did. Fletcher's two patterns were at the forefront; now they merely need some modernizing in light of new science.

I. FLETCHER'S "TWO PATTERNS OF CRIMINALITY"

Fletcher suggests that there are two competing "patterns of criminality"—manifest criminality and subjective criminality. He initially detected both patterns in the requirements of the law of theft, but the patterns can be used to study a range of other crimes.\(^\text{12}\) The major premise of manifest criminality "is that the commission of the crime be objectively discernible at the time that it occurs."\(^\text{13}\) In other words, an impartial witness would realize that the defendant's conduct was criminal without even knowing anything about the defendant's intention to engage in that conduct.\(^\text{14}\)

Two corollaries stem from these characteristics of manifest criminality: (1) the perception that individuals know what a crime is because it is based on a shared community experience and is not simply an imposed product of the legislature, and (2) the notion that the defendant's "intent" becomes a significant issue only after the defendant's act has occurred.\(^\text{15}\) Therefore, intent is provided a secondary role in any determination of liability—"a challenge to the authenticity of appearances, rather than as a basis for inculpating the actor."\(^\text{16}\) "It is not

\(^{12}\) Id. at 115.
\(^{13}\) Id. at 115-16.
\(^{14}\) Fletcher, supra n. 1, at 116.
\(^{15}\) Id. at 117.
\(^{16}\) Id.
thought of as some mysterious inner dimension of experience that exists independently from acting in the external world.”

Subjective criminality takes an entirely different tact. It assumes that “the core of criminal conduct is the intention to violate a legally protected interest.” Intent is “a dimension of experience totally distinct from external behavior” and “an event of consciousness, known to the person with the intent but not to others.”

The manifest and subjective patterns of liability have five key elements in common which reflect a kind of mind-body dualism that Fletcher finds baffling throughout the criminal law. The five elements are: (1) the “act,” (2) the “intent,” (3) the “union of act and intent,” (4) the “danger to the community,” and (5) the “intrusion upon the public sphere.” Fletcher claims that these five shared elements make it seem as though the manifest and subjective patterns of criminality (and therefore criminal law theories) are more united than they really are because the patterns treat each criminal element differently. For example, with manifest criminality, the “act” element helps to demonstrate clearly the actor’s “criminal plan.” With subjective criminality, however, the “act” element provides some evidence of “the firmness of the actor’s resolve” but not “the content of the actor’s intent.” According to Fletcher, the reasons for this distinction between the patterns are straightforward: no one can know what the actor is really thinking. Likewise, with manifest criminality, the “intent” requirement fuels an observer’s presumption that an individual’s criminal conduct indicates a criminal desire; in contrast, with subjective criminality, “intent” reflects an individual’s conscious decision to engage in a crime. Predictably, these contrasts between act and intent emerge in the third element specifying their union. For subjective criminality “it is quite plausible to think of acts and intents as occurring at distinct moments of time”; yet, such unity represents only a “conceptual point” for manifest criminality. As Fletcher explains, courts do not stray from the mandated union of act and intent even though “[t]his is a very curious requirement to insist upon in the pattern of subjective criminality, for when the intent is not overtly manifested, only the actor knows exactly when he intends to steal.” Assessments of when the defendant intends to engage in a criminal act therefore assume “the quality of fiction.”

17. Id.
18. Id. at 118.
19. Fletcher, supra n. 1, at 118.
20. Id. at 118-19.
21. Id. at 119-20.
22. Id. at 120.
23. Id.
24. Fletcher, supra n. 1, at 120.
25. Id.
26. Id.
27. Id.
28. Id.
Fletcher’s fourth and fifth elements add a new twist to the comparison between manifest and subjective criminality; these two elements are not currently mandated requirements for establishing whether a crime occurred, even though they are significant for determining what behavior should be criminal. Regardless, the two patterns of criminality treat the fourth and fifth elements differently. For manifest criminality, the fourth element of “danger” is demonstrated “in the act itself”; for subjective criminality, danger “is the intent to violate a protected interest.” Fletcher discusses the fifth element, “intrusion upon the public sphere,” in terms of how disparately the two patterns regard their shared commitment to “the principle that purely private conduct should be immune from the criminal law.” For manifest criminality, “purely private” constitutes “all routine, unthreatening conduct”; for subjective criminality, “the realm of the private is reduced to the world of fantasy, belief and other purely subjective experience.”

Fletcher uses the manifest and subjective patterns of criminality to examine doctrinal developments and tensions in a range of theft offenses (embezzlement, false pretenses, burglary), attempts, possession offenses, treason, conspiracy, and related doctrines. Fletcher’s analysis of burglary—the breaking and entering of a dwelling house at night with the intent to commit a felony therein—seems to be one of his clearest examples of how the manifest and subjective patterns operate together. Burglary directly involves both patterns and also contains two types of intent: (1) the intent to break and enter a dwelling, which is “manifested” by the acts of breaking and entering, and (2) the intent to commit a felony inside the dwelling. This second type of intent (the intent to commit a felony inside the dwelling) does not require a manifested act to provide evidence that the defendant wanted to commit a felony; rather, observers need only believe that the defendant had a felonious mental state. Because of the inchoate and relatively unsubstantiated nature of this second intent in burglary, “it has provided powerful evidence for the way of looking at intent that is characteristic of subjective criminality.”

Fletcher claims that the most striking conflict between burglary’s manifest and subjective elements of criminality lies in the analysis of the element of “breaking.” At the time Rethinking was developed, there were legislative trends that eliminated the requirement of an actual breaking. Statutes allowed instead any entry at all (or, depending on the jurisdiction or rule, a breaking that is merely unlicensed or trespassory). The key requirement was merely some indication that

29. Fletcher, supra n. 1, at 121.
30. Id.
31. Id.
32. Id. at 122-234.
33. Id. at 125-26.
34. Fletcher, supra n. 1, at 125-26.
35. Id. at 126.
36. Id.
the defendant entered the dwelling with a felonious intent. As Fletcher claims, "[o]ne could hardly imagine a clearer instantiation of the pattern of subjective criminality." His concern was that this trend could get out of control and spawn new offenses or broaden others.

Fletcher also noted that the pattern of subjective criminality dominated criminal law doctrine at the time Rethinking was published because of the Model Penal Code's subjective orientation. He predicted this subjective pattern would continue to control. Fletcher's perception was correct, particularly because the criminal law has overwhelmingly adopted many of the Model Penal Code's provisions. Regardless, it is not entirely clear what role Fletcher intended that the pattern of subjective criminality take in criminal law doctrine. This ambiguity has at least two sources. Even though Fletcher's account of the two patterns of criminality adds creative insight, Fletcher's ambition to analyze so much doctrine can at times be confusing. As a result, scholars attempting to interpret Fletcher fill in his conceptual gaps with their own beliefs about the proper direction of the criminal justice system.

According to Stephen Schulhofer's review of Rethinking, for example, "Fletcher's approach leads him to de-emphasize and at times to reject the subjective mental factors that bear most directly on voluntary choice and personal blame worthiness." Schulhofer concedes that the stance he attributes to Fletcher is "nowhere neatly summarized" in Rethinking but rather "implied." Further, it reflects Fletcher's fears that an emphasis on subjective intention unduly propels the criminal law's focus on crime prevention and the future dangerousness of defendants. Yet, Schulhofer considers Fletcher's concerns misguided. During the era when manifest criminality was more pronounced, convictions "based solely upon the defendant's bad character and perceived dangerousness were particularly common." The very concerns that Fletcher spotlights argue for, not against, the need for subjective intention in the criminal law.

Schulhofer is not alone in his critique of Fletcher. In a recent article, Bruce Ledewitz claims that in Rethinking, "Fletcher is content that criminal law uses language, in particular the language of intention, in an unthinking way." Likewise, Fletcher believes "[i]t does not matter that lawyers make no effort to clarify intention because [their] job is merely to move cases." According to Ledewitz, Fletcher is "wrong" to take this view and he is too "ready instantly to

37. Id. at 128.
38. Id.
39. Fletcher, supra n. 1, at 129.
40. Schulhofer, supra n. 2, at 193-94.
41. Id. at 194.
42. Id. at 194 n. 57.
43. Id. at 194.
45. Id.
excuse lawyers from following the advice he had just given them" about the problems concerning the criminal law's use of the word intentional.46

Ledewitz's article raises a series of intriguing and difficult issues important to the criminal law. Unfortunately, as this essay explains, Ledewitz does not adequately clarify and detail the kinds of problems he finds with Fletcher's views and provides unsatisfactory solutions of his own.

There are also somewhat discrepant interpretations between Schulhofer and Ledewitz concerning Fletcher's perspectives on intention (within the broader context of subjective criminality). Schulhofer views Fletcher as de-emphasizing or rejecting "subjective mental factors" because Schulhofer thinks that such factors are crucial to affirming a moral philosophical account of the law.47 Ledewitz, on the other hand, believes that subjective criminality increasingly continues to dominate criminal law doctrine along with a growing "confidence that we can know the minds of others and... that it is ethically imperative that we do so..."48 In order to counter this trend, Ledewitz suggests that the criminal law focus more on manifest criminality and expand the use of presumptions, especially the presumption that people intend the natural and probable consequences of their acts.49

Part II examines Ledewitz's arguments more closely to illustrate the extremes to which Fletcher's views may be stretched to promote the role of manifest criminality. While many of Fletcher's concerns about the unregulated reliance on subjective criminality are warranted, Ledewitz appears to take too many steps beyond Fletcher's recommendations. At other times, it is difficult to know the exact position that Ledewitz is advocating because he does not seem to recognize the extent to which manifest and subjective criminality are intertwined. Likewise, some of Ledewitz's recommendations contradict the very criticisms he is making, most particularly his efforts to promote the doctrines of inferences and presumptions. Those doctrines rely heavily on subjective assessments. That said, Ledewitz refreshingly confronts the rationales behind a number of key criminal law issues and revives old debates with some innovative perspectives, inappropriate though they may be.

II. ARGUMENTS AGAINST THE FORCE OF SUBJECTIVE CRIMINALITY

Ledewitz's article uses two problematic cases as vehicles for suggesting a solution that promotes a variant of manifest criminality that is far more radical than anything Fletcher appears to have intended in Rethinking. Ledewitz starts his arguments by pinpointing one of the greatest difficulties the criminal law faces and which lies at the heart of the tension between Fletcher's concept of manifest and subjective patterns of criminality. In essence, the criminal law's assessment of any defendant's mental state at the time the defendant engages in a criminal act is

46. Id.
47. Schulhofer, supra n. 2, at 192-201.
49. Id. at 100.
based on circumstantial evidence only. The criminal law creates a scenario of what a defendant may have been thinking (or not thinking) without having knowledge of the reality. Ledewitz 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 right or wrong.\(^{50}\) He echoes Fletcher’s claim that intentionality is a “fiction.”\(^ {51}\) This criminal law dilemma has been debated for centuries.\(^ {52}\)

In order to hone his point, Ledewitz starts his article with a 1999 Pittsburgh case in which two men fired twenty-four bullets at a police station. The incident injured two officers, one of whom was shot and the other hurt by diving to the floor. The two defendants were charged with a number of crimes, including aggravated assault and reckless endangerment; yet, their attempted homicide charge was dismissed because the defense successfully argued that the State had not proven the defendants had attempted to kill anyone.\(^ {53}\) Given the difficulty in judging what was going through these men’s heads while they were firing their guns (their “internal conversations”), Ledewitz recommends the following: “Instead of the mainstream’s purported parsing of mental states, what if we assume that no mental state was present at all?”\(^ {54}\)

There are conflicts between Ledewitz’s analysis of the case and some of Fletcher’s theories. First, Ledewitz claims that the “mind/body dualism of the western philosophical tradition” complicates determinations of the defendant’s intent when there is no question (at least in Ledewitz’s mind) of the kind of act that has been committed.\(^ {55}\) He cites this dualism as one of the causes of the difficulties in analyzing the defendants’ mental states in the Pittsburgh shooting case.\(^ {56}\) At the same time, Ledewitz does not explain how such criminal law cases should otherwise be handled. What charges should the Pittsburgh defendants have received?

Ledewitz’s implied solutions to this conundrum are troublesome. While Ledewitz states outright that the criminal justice system does not know the “internal conversations” the Pittsburgh defendants were having when they shot at the police station, he seems much more confident in assuming that attempted murder was part of their plan rather than reckless endangerment, for example.\(^ {57}\) “It is difficult . . . to imagine [this] scenario – that these men actually went to the police station to shoot at the building while thinking that no one would be hurt. Why would they do that?”\(^ {58}\) This conclusion is particularly problematic because

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50. Id. at 72-73.
51. Id. at 101; see also Fletcher, supra n. 1, at 120.
53. Ledewitz, supra n. 44, at 71.
54. Id. at 72.
55. Id. at 74.
56. Id.
57. See id. at 72.
58. Ledewitz, supra n. 44, at 72.
the Pittsburgh shooter case was reported in newspapers only and is not a formal decision (the facts are limited). For this reason, it is unclear why Ledewitz chose the case. Rather contradictorily, Ledewitz acknowledges that individuals are not the best judges of why others may act the way that they do because a person’s mental state is so subjective: “[O]thers may be mistaken in their impressions of my mental state, whereas my knowledge of my own mental state is self-evidently accurate.” Yet modern research on consciousness questions the accuracy with which individuals view even their own mental states, much less the mental states of others. Ledewitz’s readers can only wonder why he would not attribute the same sort of analysis of mental state to the Pittsburgh shooters rather than assuming that their acts say it all.

Ledewitz examines in more detail another example of what he considers to be mental state confusion, the 1963 case of Commonwealth v. Carroll. In Carroll, the Supreme Court of Pennsylvania affirmed the trial court’s conviction of first degree murder, thereby discounting Donald Carroll’s contention that the evidence only supported a conviction of second degree murder because he did not intend to kill his wife. In essence, the court equated the requirements of “premeditation and deliberation” necessary for first degree murder with Carroll’s specific intent to kill. According to the court, a specific intent to kill could be determined “from a defendant’s words or conduct” and could also “be inferred from the intentional use of a deadly weapon on a vital part of the body of another human being.”

At trial, Carroll testified that he and his wife were arguing in their bedroom when he took down a gun they kept for safety purposes over their bed and shot his wife twice in the back of her head. While the Carroll court never attempted to specifically define what “intent” meant, Ledewitz claims that Carroll’s intent to kill his wife was simply seen by the court as “self-evident.” Also, Carroll gave a muddled account of the decisions he made when he picked up the gun; yet, testimony indicated that he was conscious of what he was doing.

Because of all of these difficulties involved in assessing Carroll’s frame of mind, Ledewitz proposes presuming that defendants intend the natural and probable results of their conduct. Such a presumption could operate to avoid the “fruitless inquiries” into mental processes that the criminal justice system cannot understand. As Ledewitz explains, “[w]hy should criminal liability or degree of

59. Id. at 71-72.
60. Id. at 75.
61. See infra pts. III & IV.
63. Id. at 916-18.
64. Id. at 913-18.
65. Id. at 915.
66. Id. at 914.
67. Ledewitz, supra n. 44, at 88.
68. Id. at 100-07.
69. Id. at 102.
punishment turn on made-up answers to such questions” concerning what a
defendant such as Carroll was thinking?\textsuperscript{70}

There are several difficulties with Ledewitz’s analysis. First, “presuming” a
defendant’s mental state from conduct is based on a fiction since the fact finder
would be using evidence of the present to predict a future intent that may have no
basis in reality. Ledewitz contravenes the very criticisms he makes of the
subjective pattern of criminality because the subjective pattern similarly relies on
constructions of mental states.

Carroll is also a peculiar choice for illustrating how courts look at a
defendant’s mental state. Carroll was decided over forty years ago and only one
year after the Model Penal Code was published.\textsuperscript{71} In 1963, much of the criminal
law was still reeling from the disorganization of common law mens rea standards
and state legislatures were just gearing up to benefit from the Model Penal Code’s
overhaul.\textsuperscript{72} Ledewitz notes that “[t]he MPC aimed at a reform of mens rea”\textsuperscript{73} and
that reform bolstered the concept that mental states require some level of
consciousness or awareness.\textsuperscript{74} Why then pinpoint Carroll as a representative
vehicle for analysis?

It appears Ledewitz selected Carroll to support his position that the criminal
law should focus more on manifest criminality and presume a defendant’s mental
state from non-mental evidence. Ledewitz is correct about Carroll’s deficiencies;
the Carroll court could have done a much better job of determining intent in the
way that a number of modern courts have. But Ledewitz’s efforts to provide
interpretative solutions to Carroll’s facts are questionable and often confusing.
For example, Ledewitz suggests that affirming the conviction in Carroll “should
have been a simple matter” because the trial judge had a range of choices to
determine when Carroll decided to kill his wife.\textsuperscript{75} Carroll’s decision could have
started anywhere from the moment his wife first requested that she have a gun
near the bed to the point at which she fell asleep on the morning of her killing.\textsuperscript{76}
Ledewitz attempts to dissect the Carroll court’s analysis and its failure to

\textsuperscript{70} Id. at 73. According to Ledewitz,

there is something deeply wrong with the way criminal law views human conduct. When we
try to imagine which of two mental states – intent to kill or not – was present . . . we are, as it
were, imagining which of two internal conversations took place; in fact no such conversation
might have taken place at all, or both might have taken place, or a jumble of feelings, some
expressed, some never expressed, might have moved a defendant.

\textsuperscript{71} Id. The American Law Institute (ALI) began drafting the Model Penal Code and Commentaries in
1952 for purposes of state-wide implementation. Model Penal Code xii (ALI 1985). Between 1953 and
1960, the ALI considered thirteen Tentative Drafts that comprised various portions of the text and
accompanying comments. Id. By 1962, the ALI approved of and promulgated the Proposed Official
Draft of the entire Code (without Commentaries). Id. A decade later, work started on updating the
Commentaries for final publication. Id. The Code has not been changed since.

\textsuperscript{72} Deborah W. Denno, Criminal Law in a Post-Freudian World, 2005 U. Ill. L. Rev. ___
(forthcoming).

\textsuperscript{73} Ledewitz, supra n. 44, at 80.

\textsuperscript{74} Id.

\textsuperscript{75} Id. at 85.

\textsuperscript{76} Id.
sufficiently define the meaning of “intent.” Yet, he does not address the significance of Carroll’s other factual and procedural oddities (for the purpose of discussing intent). Lastly, Carroll was a bench-trial. Typically, juries decide the issue of intent so that they can bring in a community (and human) standard of what that term should mean in the context of jury instructions tailored to provide them guidance. Therefore, many of the factors that bear on intent determinations were simply not at issue in Carroll in the way they perhaps would have been if a jury had been making the decision, particularly in light of modern evidentiary standards. It is a bit distorting to use a bench trial to show the deficiencies of subjective criminality. The jury’s instructions and involvement are better barometers of how intent is deciphered in the criminal law.

What also becomes clear in Carroll is the court’s nearly complete dismissal of a psychiatrist’s expert testimony that “‘rage’, ‘desperation’, and ‘panic’ produced ‘an impulsive automatic reflex type of homicide, . . . as opposed to an intentional premeditated type of homicide.” According to the expert, Carroll would never have completed the killing had his state of mind been interrupted in any way, for example, if the gun had fallen on the floor or if Carroll had needed to load it. The Carroll court provides three responses to this argument: (1) There is no obligation for either a judge or jury to believe any of the testimony presented to them, either by the expert or the defendant; (2) the psychiatrist’s expert testimony relied predominantly on the defendant’s own words “which need not be believed and which are in some instances opposed by the facts themselves”; and (3) “very little weight” need be given to “a psychiatrist’s opinion of a defendant’s impulse or lack of intent or state of mind”; this guideline particularly applies in a case like Carroll “when [the] defendant’s own actions, or his testimony or confession, or the facts themselves, belie the opinion.”

The Carroll court’s approach signifies the kind of manifest criminality that prompted the criminal law’s move toward a more subjective criminality; basically, the court considers Carroll’s actions and words and little beyond that. Also, Carroll’s actions seem to speak louder than his words because the court makes clear that the fact finder need not believe Carroll nor give weight to the expert psychiatrist who relies on Carroll’s account.

Such a “minimalist approach” by the Carroll court troubles Ledewitz. At the same time, Ledewitz’s analysis and solutions illustrate a dangerous variant of manifest criminality. Ledewitz states that the Model Penal Code’s range of mental states does not provide a solution to the Carroll court’s dilemma because “all” of those mental states that are relevant “require consciousness of something”

77. Id. at 85-90.
78. 194 A.2d at 916.
79. Id. at 916-17.
80. Id. at 917.
81. Id.
82. Ledewitz, supra n. 44, at 90.
and "consciousness also does not seem to be satisfied by Carroll."83 Yet, under the Model Penal Code's mens rea provision,84 only two of the four mens rea terms "require consciousness of something"—"purposely" and "recklessly." "Knowingly" does not mention consciousness; nor does "negligently," a mens rea term that Ledewitz does not even acknowledge although he does not say why. According to Ledewitz's analysis and definition of consciousness, a substantial portion of defendants could never be convicted of homicide under the Model Penal Code because they did not seem to be consciously aware of their behavior. At the same time, Ledewitz states that Carroll was not "unconscious" either, on the same level as a sleepwalker for instance.85

Rather than offering to revamp the Model Penal Code, Ledewitz instead suggests "that we impose a non-existent clarity and apparent objectivity on mental states."86 For example, the enigma of intention can be "understood in a criminal trial" by turning to the early common law's use of presumptions, particularly the presumption that people intend the natural and probable results of their acts.87 While Ledewitz recognizes the constitutional prohibitions associated with this doctrine, he derides the criminal law's continuing effort to focus on a subjective pattern of criminality. The Model Penal Code fostered the subjective approach by way of its emphasis on consciousness and awareness.88 Further, Ledewitz states that the doctrine of presumption already incorporates and "recognizes" intention in the concept of natural and probable consequences.89 Indeed, Ledewitz's reliance on manifest criminality becomes most pronounced (and troublesome) in his application of the natural and probable consequences doctrine to the facts of the Carroll case. The following excerpts from Ledewitz's article illustrate the difficulty of his analysis.

In Carroll, the court was satisfied, or at least willing to assume, that the defendant was telling what he thought was the truth about what happened. Carroll shot his wife without previously thinking about it, in a kind of blank mental state. For the court, these "facts" satisfied the standard of intent to kill. No additional mental event had to occur for guilt to be established. For Carroll's counsel to ask whether, despite these facts, Carroll "intended" to kill, was to confuse a description of a context—which is what intent-to-kill language actually does— with some kind of would-be factual/empirical inquiry concerning whether intent to kill was present in addition to what Carroll did. So an instruction that someone like Carroll is presumed to intend the consequences of his actions would not relieve the prosecution of any burden to prove facts. In Carroll, there was no "fact" left for the prosecution to prove.90

83. Id.
84. Model Penal Code § 2.02.
85. Ledewitz, supra n. 44, at 90-91.
86. Id. at 94.
87. Id. at 100.
88. Id. at 101.
89. Id. at 103.
90. Ledewitz, supra n. 44, at 104.
All that Ledewitz says in this excerpt, however, can be interpreted in an entirely different way. Carroll is an extreme case doctrinally because it defines “intent to kill” so narrowly. Most courts have broadened the deliberation and premeditation language of the doctrine to require some sort of reflection. Alternatively, courts have gone the route of the Model Penal Code and have eliminated the premeditation and deliberation language entirely. Also, as the next part of this essay demonstrates, Ledewitz’s conception of consciousness and the presumed objectivity of “facts” is as dated as the 1963 Carroll case.

This essay contends that the confidence and clarity concerning what the criminal justice system considers either an “intent to kill” or “facts” can be misleading and therefore justifies limits on an extreme manifest criminality approach. With that goal in mind, the next part discusses the importance of new work on consciousness to show how deceptive the criminal justice system’s reliance on acts alone can be for representing a defendant’s mental state. The part then links this discussion to Fletcher’s two patterns of criminality, focusing on the interdependence between both patterns. The analysis emphasizes discoveries in consciousness research in particular because defendants’ levels of conscious awareness are so critical to the criminal law’s interpretation of mental states. Such research can also demonstrate the merging of manifest and subjective approaches.

III. THE IMPORTANCE OF CONSCIOUSNESS

Psychological research on consciousness has burgeoned during the past three decades, based upon a firm philosophical foundation. While a definition of “consciousness” is controversial and has taken on many different kinds of meanings, the term typically 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.” The great mystery of consciousness is, of course, its subjectivity—“the inner picture we each have of what it is like to be ourselves.” This picture arises from a person’s past memories and present experiences, both of which enable that person to interpret and perceive their everyday life within their own particularized framework. Individuals have direct knowledge only of their own consciousness; they can only estimate the conscious state of another person.

Consciousness consists of a number of interactive parts that represent different levels of mental sophistication depending on when an individual develops a range of five different abilities: “(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, or

92. Id. at 273-74.
94. Id. at 311.
what philosophers call ‘qualia,’” which consist of the more primitive components of consciousness, such as the “raw feel” of the color red when an individual looks at a red rose.\footnote{1999.}

What is particularly significant in the context of Fletcher’s patterns of criminality and Ledewitz’s discussion of mental states is that consciousness exists in degrees; the line between awareness and lack of awareness is not as clear as it may seem.\footnote{2000.} Further, on a daily basis, most people’s mental processes are not at a heightened state of consciousness; rather, they occur in a “twilight world of not properly conscious impulses, inklings, automatisms, and reflexive action.”\footnote{2001.} A good example of these varying states is what a person encounters during the process of driving a car. Beginning drivers are at a heightened level of awareness, concentrating on every move that they make and focused on every consequence of their acts. Very experienced drivers, however, operate at what appears to be a mindless state. They can talk to a passenger or mentally plan their day because the mechanics of driving are habitual and require minimal focus. Research suggests that our brains are geared to function at this minimal level of consciousness lest human beings would be so overwhelmed with the minor functional aspects of their lives that they would never be able to move beyond the mere basics.\footnote{2002.} At the same time, even the lowest level of consciousness, such as the habit of changing gears while driving, is distinguishable from an unconscious state, such as sleepwalking. The reasons for this clarification are important to the criminal law. Minimally conscious states are still accessible to an individual’s thought processes whereas unconscious states are not.\footnote{2003.}

Bernard Baars illustrates the varying degrees to which consciousness is accessible in a continuum of three types of conscious states that are organized based upon the brain’s representations of memory: (1) “[c]learly conscious phenomena, [such as] [c]lear mental images, [d]eliberate inner speech, [and] [m]aterial deliberately retrieved from memory”; (2) “fuzzy, difficult-to-determine events, [such as] [a]ctive but unrehearsed items in immediate memory [and] [s]ubliminal events that prime later conscious processes”; and (3) “[c]learly unconscious (or non-conscious) events, [such as] unretrieved material in long-term memory.”\footnote{2004.} This kind of research (which is only briefly mentioned here) confirms that consciousness is not the “either/or” dichotomy in the way that the criminal

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\footnote{1999.} \textit{Id.} at 311-12.
\footnote{2000.} See generally Denno, supra n. 91, at 311.
\footnote{2001.} John McCrone, Going Inside: A Tour Round a Single Moment of Consciousness 135 (Faber & Faber Ltd. 1999).
\footnote{2002.} \textit{Id.}
\footnote{2003.} Denno, supra n. 91, at 314.
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\textit{Clearly conscious phenomena:} Attended percepts; Clear mental images; Deliberate inner speech; Material deliberately retrieved from memory; fleeting mental images; Peripheral or “background” perceptual events; Abstract but accessible concepts. \textit{Fuzzy, difficult-to-determine events:} Active but unrehearsed items in immediate memory; Presuppositions of conscious concepts; Fully habituated stimuli; Subliminal events that prime later conscious

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law treats it.\textsuperscript{101} Regardless, the criminal law must draw lines between these varying mental states to assess a defendant's liability.

Ledewitz is understandably perplexed by the legal implications of the different levels of consciousness that all human beings experience daily. For example, he ponders the habitual action of the supermarket checkout person “who has ceased to think of the act of counting and adding up.”\textsuperscript{102} Ledewitz notes that the Model Penal Code would view such behavior as a voluntary act.\textsuperscript{103} He claims “the recognition that mindless activity is voluntary is not enough to establish that it is conscious or aware. That is, would the checkout person at a particular moment of habit be guilty or not guilty of the crime of ‘purposely, knowingly or recklessly checking out?’”\textsuperscript{104}

This question is difficult to answer because “checking out” is not a crime; it is a bit of a challenge determining what the “liability” for it would be. Nonetheless, Ledewitz’s checkout hypothetical suggests that the checkout person is consciously aware of what they are doing even if that awareness may be in the “twilight world” in which human beings spend a good deal of their day operating. To label such mental activity as “mindless” is wrong, legally and scientifically.

These determinations also become difficult because of the Cartesian dualist way that the voluntary act requirement is couched. The requirement can apply either to the defendant’s mental state (mens rea) or to the defendant’s acts (actus reus), a distinction that arises in Carroll and can easily become conflated. Typically, courts use the term “unconsciousness” to characterize a defendant’s claim that she lacked the mental state to have committed the crime and use the term “automatism” to refer to the defendant’s claim that she did not engage in a voluntary movement. Therefore, the defense of unconsciousness can be different than the defense of automatism even though both defenses are used to support the defendant’s claim that she did not act voluntarily.

An argument can be made, for example, that Carroll did have sufficient awareness to realize that he fired the gun because he did remember the incident.

\textsuperscript{101} See generally Denno, supra n. 91.
\textsuperscript{102} Ledewitz, supra n. 44, at 91.
\textsuperscript{103} In particular, Ledewitz mentions Model Penal Code § 2.01(d). See Ledewitz, supra n. 44, at 91 n. 95. The voluntary act provision reads as follows (excluding omission and possession):

(1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:
   (a) a reflex or convulsion;
   (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.

Model Penal Code § 2.01.
\textsuperscript{104} Ledewitz, supra n. 44, at 91.
quite clearly. Also, after his arrest Carroll gave a relatively lucid account about his feelings and activities on the evening he killed his wife.\textsuperscript{105}

We went into the bedroom a little before 3 o'clock on Wednesday morning where we continued to argue in short bursts. Generally, she laid with her back to me facing the wall in bed and would just talk over her shoulder to me. I became angry and more angry especially what she was saying about my kids and myself, and sometime before 3 and 4 o'clock in the morning I remembered the gun on the window sill over my head. I think she had dozed off. \textit{I reached up and grabbed the pistol and brought it down and shot her twice in the back of the head.}\textsuperscript{106}

At trial, Carroll expressed concern that his wife had been physically abusing their children. According to Carroll's testimony,\textit{[h]e started to think about the children, “seeing my older son’s feet what happened to them. I could see the bruises on him and Michael’s chin was split open, four stitches. I didn’t know what to do. I wanted to help my boys. Sometime in there she said something in there, she called me some kind of name. I kept thinking of this. During this time I either thought of or felt—I thought of the gun, just thought of the gun. I am not sure whether I felt my hand move toward the gun—I saw my hand move, the next thing—the only thing I can recollect after that is right after the shots or right during the shots I saw the gun in my hand just pointed at my wife’s head. She was still lying on her back—I mean her side. I could smell the gunpowder and I could hear something—it sounded like running water. I didn’t know what it was at first, didn’t realize what I’d done at first. Then I smelled it. I smelled blood before.” }

Q. At the time you shot her, Donald, were you fully aware and intend to do what you did?

A. I don’t know positively. All I remember hearing was two shots and feeling myself go cold all of a sudden.\textsuperscript{107}

As Ledewitz explains, Carroll cannot claim unconsciousness because he was aware of what he was doing.\textsuperscript{108} Also, Carroll appeared to recall a substantial amount of detail about what he was seeing, thinking, feeling, and smelling.\textsuperscript{109} Even if the defense of unconsciousness is not available, it is comparably difficult to claim automatism. Carroll is not acting like an individual engaged in a reflex or some sort of epileptic seizure. Carroll appears to be acting voluntarily.

A clever defense attorney could try to raise a range of other defenses, such as provocation or diminished capacity. But the real point in the case is whether or not Carroll had the intent to kill. This essay claims that it is not sufficient simply to look at Carroll’s acts and conclude that he did.

\textsuperscript{105} Carroll, 194 A.2d at 914.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Ledewitz, supra n. 44, at 90.
\textsuperscript{109} Carroll, 194 A.2d at 914.
IV. THE UNRELIABILITY OF ACTS

A component of consciousness research concerns how individuals perceive intentionality and their "conscious will." In a nutshell, the research suggests that individuals commonly misperceive their own actions and "that the experience of consciously willing an action is not a direct indication that the conscious thought has caused the action." Further, in some situations individuals will assume responsibility for behavior that they cannot contain. In controlled experiments, for example, psychologists have found that subjects will "confess" to "crimes" they did not commit when falsely accused of them (such as damaging a computer by pressing the "wrong" key that they never pressed).

The reasons for this phenomenon are varied. For the most part, it appears that people view themselves and others as causal agents, a perspective that "is accompanied, in particular, by relevant intentions, beliefs, desires, and plans." Difficulties arise when people are wrong about some of the factors that motivate their behavior and therefore inaccurately believe that their conscious will causes their actions. In an effort to simplify the process of perceiving, people's minds create appearances for them. This phenomenon is not fleeting but steadfast. For example, experiments with amputees show that such individuals sense conscious will in a body part that no longer exists. In other words, they believe that their amputated limb can feel, touch, or move. This research suggests that the intention to lift a limb creates an experience of conscious will even when no action actually exists.

Research also shows how individuals attribute intent to themselves, particularly if they are thinking about ideas that are relevant to the action that is caused. In essence, people are more likely to have the feeling of acting when they think that their own thoughts caused the action. While a number of factors influence this effect, a primary source is unconscious mental processes. Unconscious thoughts can lead an individual to believe that his or her acts were intended even though they were not. For example, if a husband unconsciously harbors a desire that his wife die, he may think that he intended to kill her when he mistakenly runs her over while backing his car out of their driveway.

Typically, a person is also confronted with too many competing thoughts to be consciously aware of them all. This phenomenon suggests that most people do

110. Denno, supra n. 72.
114. Denno, supra n. 72.
116. Denno, supra n. 72.
117. Id.
not consciously plan all of their behaviors. They may have a vague notion of some of their intentions prior to acting, but when the action is complete, they compose explanations for the details so that they believe they consciously thought about their actions. In other words, they tend to compose a scenario to rationalize their actions when they are not certain of their actual intentions.118 In Carroll, the defendant testified to a number of competing thoughts at the time he killed his wife.119 It was difficult for him and the court to know which of his urges was dominating when he pulled the trigger.120 Carroll’s own confusion appeared to blur any kind of a scenario to rationalize his actions.

A range of other circumstances can heighten the chance that someone will think that they intended their actions. These circumstances include time (how close the person’s thought is in relation to the action), memory (the amount of time that an individual retains this thought), priority (thoughts that take place after the action are less likely to be viewed as causal), consistency (witnesses to a behavior or a description of it, such as judges and juries, are more likely to attribute causation to people whose personalities are consistent with the behaviors they allegedly performed), and exclusivity (people tend to experience conscious will when their thoughts appear to be the exclusive cause of their actions).121

Such research cannot be taken out of perspective, however. For the most part, there are solid links between people’s thoughts and their actions much of the time. That said, the research questions the rationale for an extreme manifest criminality approach in the criminal law. Simply looking at people’s actions is not a clear gauge of whether they intended their actions or the natural and probable consequences of them. In other words, presuming intent from people’s acts is also based on a fictional account of their mental states. The manifest pattern of criminality faces the same risk of distortion as the subjective pattern, and the two patterns are also difficult to distinguish.

Consider the “facts” of the Carroll case, for example. According to Carroll’s account both at the time of his arrest and at trial, he had a number of conflicting thoughts during the extended argument he was having with his wife: (1) her concerns about the amount of time he was away from home and the new job that would be taking him away even more—concerns that started the argument between them; (2) Carroll’s knowledge that his wife was physically abusing his sons and his desires to help them; (3) the abusive way Carroll’s wife was treating him and talking to him in addition to his wife’s comments about their sons (which Carroll does not specify); (4) Carroll’s worries that his wife was going to leave him and his dependency on her; (5) Carroll’s memory about the gun above the bed.122

Of course, there is evidence to suggest “to the extent that someone is paying attention to their behavior, they do not normally allow themselves to perform

118. Id.
119. 194 A.2d at 914; see also infra n. 122 and accompanying text.
120. Carroll, 194 A.2d at 914.
122. Carroll, 194 A.2d at 914.
Carroll’s testimony indicates, however, that a myriad of factors had caught his attention.

If an outside observer were looking just at Carroll’s actions alone, he or she might think that Carroll intended to kill because he discharged a deadly weapon (a gun) at a vital organ (his wife’s head), the natural and probable consequences of which would most surely result in death. As Ledewitz says, “Carroll picked up a gun and shot his wife. If he is not guilty of first degree murder, who is?” Yet, there is no definite evidence to suggest that Carroll was focusing on those consequences; rather, the mental sequence appears far more subtle and convoluted. Of course, no one knows the true sequence, not even Carroll, but this is the point. Is there any greater reason to believe one version of events over another, or even Carroll’s version of events? Judges and juries must create a story based on what they determine to be the most convincing evidence.

There have been debates about subjective criminality and the role of mens rea in the criminal law for decades. In 1963, Barbara Wootton125 raised the issue most directly; she has been followed in more recent times by some legal economists.126 According to Wootton, mens rea should be significant at the sentencing phase but not the guilt phase because an action is still “socially damaging” even if the person performing it did not intend to harm.127 “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.”128 Therefore, Wootton’s determination of guilt would be based on what the defendant did rather than what the defendant intended; mens rea would have a bearing on the defendant’s sentence however.

Ledewitz’s proposal seems even more radical. Yet, the reasons he relies on for support introduce no more certainty into the criminal law. Further, research suggests that the components of manifest criminality overlap with subjective criminality. Both patterns of criminality should affirm our commitment to the values of human autonomy and dignity as well as to the criminal law’s essentials of

124. Ledewitz, supra n. 44, at 90.
125. Barbara Wootton, Crime and the Criminal Law 43-64 (Stevens & Sons 1963).
127. Wootton, supra n. 125, at 52.
128. Id. 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—get 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.

Id.
blame and guilt. This perspective meshes with theories of consciousness concerning the freedom with which people view their own conduct and the conduct of others.

V. CONCLUSION

This essay examines two patterns of criminality that George Fletcher conceptualizes in *Rethinking Criminal Law*: "manifest criminality," which views crimes as acts that are objectively recognized as criminal irrespective of any knowledge of a defendant's mental state, and "subjective criminality," which views crimes as consciously intended and experienced by defendants in a highly individualized way. When *Rethinking* was published, Fletcher's two-pattern perspective contributed marked insight to the framework of the criminal law, detecting doctrinal similarities and differences that had been underplayed or unnoticed. Fletcher has also been one of the few scholars to confront directly the confusing doctrine of mental states, an area of criminal law that is largely neglected despite its overwhelming significance in determining a defendant's liability.

Fletcher's two-pattern structure remains as important as it ever was. This essay contends, however, that the balance between the two patterns has shifted over the last twenty-five years. As Fletcher predicted, the impact of the manifest criminality pattern has waned relative to subjective criminality. Recent research on conscious and unconscious thought processes suggests that this shift is fitting. There is consistent and compelling evidence that individuals perceive their acts and the acts of others in a highly subjective way, casting doubt on presumptions that manifest criminality is necessarily a more objective vehicle for assessing a defendant's mental state. Rather, the two patterns of criminality are now so conceptually intertwined that they could probably best be characterized as one pattern—"subjective + manifest"; subjective criminality dominates, supported by components of manifest criminality.

Of course, this observation that the two patterns have become one is no solution to the perplexing condition of mens rea in the criminal law. It does warn, however, that efforts to go too far in the other, manifest criminality, direction are ill advised. Scholars proposing a stronger manifest criminality bent in the criminal law turn a blind eye to evidence that a defendant's conduct cannot be viewed wholly objectively. Rather, the criminal justice system must confront the enigma of mens rea more directly by becoming more aware of the revelations of new scientific research. Such research can indicate when the justice system's practices concerning defendants' mental states are amiss, even if they appeal to common sense. The research also suggests that irrespective of the shift in the two patterns,

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129. This approach has been primarily attributed to subjective criminality. *See* Sanford H. Kadish, *The Decline of Innocence*, 26 Cambridge L.J. 273 (1968); Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 Emory L.J. 9, 32 (1982); *see also* Finkelstein, *supra* n. 126, at 896 (concluding that the "fundamental features of economic analysis make it ill-suited to explain the existence of criminal law's mens rea requirement").
Fletcher's model continues to inspire the key framework for monitoring the pulse, accuracy, and morality of criminal law doctrine—after all these years.