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MR. CARROLL'S MENTAL STATE
OR
WHAT IS MEANT BY INTENT

Bruce Ledewitz*

I. INTRODUCTION

What does it mean to have a mental state? How is a mental state "had?" Perhaps mental state "simply remains the title for the philosophical difficulty."¹

On August 27, 1999, two men fired 24 bullets at a police station in the Squirrel Hill Section of Pittsburgh, wounding one officer and causing injury to a second who was hurt while diving to the floor. According to newspaper accounts, the two men subsequently arrested for the shooting were charged with attempted homicide, aggravated assault, reckless endangerment, conspiracy, and firearms violations.²

At the preliminary hearing,³ the Chief City Magistrate held the two men for court on all charges except attempted homicide, which was dismissed. The magistrate reportedly ruled that the Commonwealth had failed to prove that the defendants had intended to kill anyone.⁴ The decision was controversial,⁵ but those familiar with criminal law did not find it difficult to understand. The crime of attempt in Pennsylvania, as elsewhere, requires a particular mental state combined with an

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* Professor of Law, Duquesne University School of Law. This article was prepared with the support of the Duquesne Law School Summer Writing Program. I would like to thank Leigh Bailey for the study of criminal law textbooks that she completed several years ago while my research assistant. I also would like to express gratitude to the Wittgenstein Group, a loose collection of teachers and students at Duquesne Law School, who over a ten-year period through regular and careful conversation, worked through LUDWIG WITTGENSTEIN PHILOSOPHICAL INVESTIGATIONS. In particular, Robert Taylor, Peter Wright and Jim Cirilano have shown me what scholarship really means – to question, grow and change.

1. Martin Heidegger wrote those words not about mental state, but about "metaphysics." MARTIN HEIDEGGER, KANT AND THE PROBLEM OF METAPHYSICS 5 (5th ed. 1997).


3. Under Pennsylvania Court rule, a determination is made at a preliminary hearing held subsequent to arrest and charge, as to whether a prima facie case of a defendant's guilt has been established by the Commonwealth. If so, the case is held for trial. If not, the defendant is discharged. PA. R. CRIM. P. 142.

4. See Torsten Ove, A Failure to Prove Intent to Kill; Magistrate Rejects Charges of Attempted Homicide In Police Station Shoot-up, PITTSBURGH POST GAZETTE, Oct. 6, 1999, at B-1.

5. The local prosecutor re-filed the attempted homicide charges. See PITTSBURGH POST GAZETTE, supra note 23 at B-4. A proposal was introduced in the Pennsylvania General Assembly to add a section to the Pennsylvania Crimes Code providing that:

A person commits an offense if he KNOWINGLY, intentionally OR RECKLESSLY discharges a firearm from any location into a building that he knows or reasonably should know to be occupied and with the reasonable expectation that he will cause serious injury or death to an occupant therein.

act. In the case of attempted murder, that mental state is a specific intent to kill. Because of that mental state requirement, it is possible for two men to shoot at an occupied building and yet not be guilty of attempted murder. Or one man might be guilty and the other not guilty. Guilt for attempted murder depends upon whether, at the time of the shooting, each defendant possessed the intent to kill. An observer of the scene could not, therefore, be absolutely certain just from watching the shooting whether the defendants were guilty of attempted murder or not. To be certain of that, one would need to know, or infer, what each defendant was thinking.

For the prosecution, this situation presents difficulties of proof, as the dismissal of the attempt charge shows. The Fifth Amendment to the United States Constitution usually prevents the prosecution from simply asking a defendant what was in his mind at the time of a potentially criminal act. Instead, the prosecution usually must argue that the circumstances of a case prove what was in the mind of a defendant. Often this is not easy to do. In the Pittsburgh case, for example, while the men might have intended to kill an officer, they might also have merely engaged in a macho act of showing contempt for the police, which would not constitute an intent to kill.

This is probably how the magistrate looked at the matter in dismissing the attempted murder charge. It is also how mainstream criminal law - the sort of law found in criminal law casebooks in law school - would view the matter. The prosecution had failed to show specific intent to kill.

Despite its acceptance in legal circles, the view that different mental states might accompany similar actions, which is the mainstream understanding of human conduct in traditional criminal law sources, is odd. It is possible to imagine that these two men went gunning for a particular officer or to seek revenge on any officer they could shoot. One can even imagine proof of such a scenario - a boast to a friend ahead of time perhaps. It is difficult, however, to imagine the opposite 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?

Instead of the mainstream's purported parsing of mental states, what if we assume that no mental state was present at all? Why should we imagine that these

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6. See 18 Pa. Cons. Stat. Ann. § 901(a) (1972) (providing that the crime of attempt requires "intent to commit a specific crime" along with "any act which constitutes a substantial step toward the commission of that crime").
7. See Commonwealth v. Spelts, 612 A.2d 438, 460 n.5 (Pa. Super. Ct. 1992), appeal dismissed as improvidently granted, 643 A.2d 1078 (Pa. 1994) ("A specific intent to kill is necessary to support a conviction for attempted murder. An attempt to commit murder can only constitute an attempt to commit murder of the first degree, because both second and third degree murder are unintended results of a specific intent to commit a felony or serious bodily harm, not to kill.").
8. The Fifth Amendment to the United States Constitution provides protection against self-incrimination: "nor shall [any person] be compelled in any criminal case to be a witness against himself...." U.S. Const. amend. V.
9. By "criminal law" I mean a collective view of things that seems to be present in criminal law codes, cases, classrooms, textbooks and so forth. This view is so dominant it may be considered to be a matter of common sense.
men had any particular objective in their minds or that they could tell us what they had been thinking even if they tried to do so? Maybe they just decided to shoot, "knowing" that there were officers inside, but not thinking about them. Maybe they hated all police officers. Maybe they were mad at things in general. Maybe they had confused feelings. Would they then be liable for attempted murder or not? Why should criminal liability or degree of punishment turn on made-up answers to such questions?10

The Pittsburgh police station shooting case suggests that 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 in an incident like this one 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.

This Article examines the meaning and limits of mental state language in criminal law. Part II of the Article introduces the psychological and moral assumptions of the mainstream approach to criminal law. Part III considers Commonwealth v. Carroll,11 a 1963 case that seems to challenge these assumptions. Part IV presents, as a contrast to mainstream thinking, the insights of the philosopher Ludwig Wittgenstein about the language of mental processes. Part V suggests that presumptions might be used to obviate mental state inquiry, which, unfortunately, raises constitutional issues. Finally, the Conclusion considers the possible consequences of such a change in criminal law.

I began to write this article because of my struggle to teach the foundational criminal law class at Duquesne Law School in the fall of 1999. I have been teaching that course for most of the past twenty years and it certainly never had been problematic for me before. Suddenly, what had seemed self-evident was no longer. The self-evident language of intention had become strange. The sense that what seemed self-evident or a matter of common sense might instead be mysterious and deep led me back to a classic case and to an examination of one of criminal law’s traditional questions: what was Mr. Carroll’s mental state?

II. THE PSYCHOLOGICAL AND MORAL UNDERPINNINGS OF THE MAINSTREAM APPROACH TO THE CRIMINAL LAW

The maxim generally regarded as constitutive of American criminal law is

10. See RichardPosner, The Problems of Jurisprudence 168 (1990) ("[M]aybe there is nothing to read [in the mind of the criminal], or maybe we are not interested in what the murderer was thinking when he pulled the trigger.").
"Actus non facit reum nisi mens sit rea."\textsuperscript{12} This phrase is sometimes taken to mean that in order for a person to commit a crime, that person must be acting with a wrongful intent. That is how the famous aphorism of Oliver Wendell Holmes that "even a dog distinguishes between being stumbled over and being kicked"\textsuperscript{13} was understood by the United States Supreme Court in \textit{Morissette v. United States}.\textsuperscript{14} In \textit{Morissette}, the majority praised "the contention that an injury can amount to a crime only when inflicted by intention."\textsuperscript{15} Even if stumbling and kicking look alike, they are understood to be different because they are accompanied by different intentions.

As James Fitzjames Stephen pointed out in 1883, the maxim also might mean "that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element..."\textsuperscript{16} That is, the maxim might describe the way that criminal law defines crimes. The insistence that crimes have an outward and an internal aspect is the basis for the act and mental state categories of criminal law. Those categories are in turn a reflection of the mind/body dualism of the western philosophical tradition.\textsuperscript{17} It is that dualism that made it difficult for the Pittsburgh magistrate to know whether the defendants in the police station shooting were guilty of attempted murder, even though there was no dispute about what they had done. Though they had done the act, the question was, did they have the requisite mental state?

Stephen characterized this "mental element" as "varying according to the different nature of different crimes."\textsuperscript{18} So each common law crime has its own mental element as described in the elements of that offense. In the case of murder, the mental element was malice; in the case of theft, an intent to deprive the owner of property permanently, and so forth.

In contrast to Stephen's crime-by-crime approach, Michael Moore has suggested that all of the mental elements of crimes can be divided into four main groups: "motivational states of desire, wish, or purpose; cognitive states of belief:

\begin{itemize}
\item \textsuperscript{12} \textit{Edward Coke, The Third Part of the Institutes of the Laws of England}, 107 (1641). The translation often given is "[f]or an act does not make the deed a crime, unless the mind be guilty; that is, unless the intention be criminal." \textit{Black's Law Dictionary}, 16th ed., 1990; see also \textit{Granville Williams, Textbook on Criminal Law}, 70 (2d ed., 1983) (stating that "judges came to accept [this] maxim... as a general principle").
\item \textsuperscript{13} \textit{Oliver Wendell Holmes, Jr., The Common Law} 8 (Boston, Little, Brown & Co. 1881). The complete quote is "Tyranny imposes a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go any farther in the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked." \textit{Id.}, 342 U.S. 246, 249-52 & n.9 (1952) (quoting Holmes).
\item \textsuperscript{14} \textit{Id.} at 250 (stating that this was no "provincial or transient notion" but one "universal and persistent in mature systems of law..."").
\item \textsuperscript{15} \textit{2 James Fitzjames Stephen, History of the Criminal Laws of England} 95 (1883).
\item \textsuperscript{16} See \textit{Thomas C. Grey, Holmes and Legal Pragmatism}, 41 \textit{Stan. L. Rev.} 787, 795-96 (1989) (noting that "British empiricism and its traditional rival, European rationalism, had implicitly shared a dualistic conception of the human being as a spiritual or immaterial mind somehow lodged in a material body.").
\item \textsuperscript{17} \textit{Stephen, supra note 6, at 95.}
\end{itemize}
corative states of intending or willing; and those substitutes for any true mental states called states of negligence."  

There is no fundamental disagreement between Stephen and Moore about the nature of mental states. Moore simply is operating at a higher level of generality. For both of them, a mental state is a private, internal matter experienced directly only by the subject. A mental state is a matter of what I want; what I know or what I will. Other subjects may gain an indirect understanding of these matters — indeed juries must do so — from what I say and do. But only I really know. It is, therefore, also the case that others may be mistaken in their impressions of my mental state, whereas my knowledge of my own mental state is self-evidently accurate.

The way that mental state language works in criminal law can be seen from a short history of murder, probably the crime with the most fully developed mental state requirements in the common law tradition. During the period of the twelfth to the sixteenth centuries, the common law gradually ceased to impose criminal liability for almost all homicides and began to recognize defenses and distinctions among types of killings based upon "the psychical element." By the sixteenth century, the mental state called "malice aforesaid" had emerged, the presence of which defined a homicide as murder rather than manslaughter, thus greatly altering the punishment. At first, malice aforesaid may have required an intent to kill "thought out in advance of the killing." Over time, however, the malice necessary for murder came to be associated with four somewhat different categories: intent to kill, intent to do serious bodily harm, extreme indifference to the value of human life, and intent to commit a felony. Pursuant to the third category, it would be possible to be guilty of murder even though the defendant intended neither to kill nor even to harm the victim, as, for example, in playing Russian roulette by mutual consent. The fourth category is commonly known as felony murder. The important point, however, is that all forms of killing with malice were murder.

The common law crime of murder was divided into two degrees by statutory reform in Pennsylvania in 1794. The new statute provided that:

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20. Francis Bowes, Sayre, Men's Rev. 45 Harv. L. Rev. 974, 984-95 (1932) (examining the historical development of the mental requisites of criminality).
21. Id. at 996-97.
22. WAYNE R. LAFAVE, CRIMINAL LAW § 7.11c (3d ed. 2006).
23. See MODEL PENAL CODE § 210.2, comment 1 at 14-15 (Proposed Official Draft 1962) (outlining the four traditional definitions of "malice aforesaid") [hereinafter MPC]. I use here the "disregard" formulation because that is what the MODEL PENAL CODE itself uses and because it conveys a better sense of this form of murder than alternative formulations like "depraved heart murder."
24. See, e.g., Commonwealth v. Malone, 47 A.2d 445, 449 (Pa. 1946) (holding that participant in game of Russian Roulette, though without intent to kill or injure, engaged in "reckless and wanton disregard of the consequences" of his actions and was thus guilty of murder).

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all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other
kind of willful, deliberate and premeditated killing, or which shall be committed in the
perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be
deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second
degree.26

The vast majority of American jurisdictions ultimately followed the Pennsylvania reform and came
to use degrees of murder to restrict application of the death penalty to intent to kill murder and
felony murder.27 Pennsylvania eventually divided murder further, into three degrees, thus
reserving the death penalty for intent-to-kill murder only.28 Intentional killing was defined in the Pennsylvania
statute by reference to common law terms: a killing that was willful, deliberate, and
premeditated.29

Aside from the examples of poison and lying in wait, these terms — willful, deliberate and
premeditated — were left undetermined in the statute. The classic judicial interpretation of
what intent to kill means, at least in Pennsylvania, was given in Commonwealth v. Drum30 in 1868. In Drum, the crime
of intent-to-kill murder was defined as follows:

In this case we have to deal only with that kind of murder in the first degree
described as “willful, deliberate, and premeditated.” Many cases have been
decided under this clause, in all of which it has been held that the intention
to kill is the essence of the offence. Therefore, if an intention to kill exists, it is
willful [sic]; if this intention be accompanied by such circumstances as
evidence a mind fully conscious of its own purpose and design, it is deliberate;
and if sufficient time be afforded to enable the mind fully to frame the design to
kill, and to select the instrument, or to frame the plan to carry this design into
execution, it is premeditated. The law fixes upon no length of time as necessary
to form the intention to kill, but leaves the existence of a fully formed intent as
a fact to be determined by the jury, from all the facts and circumstances in the
evidence.31

This language from Drum is not actually a definition of “intent to kill.” Rather, intent
to kill — what we can call “bare intention to kill” — is simply one of three
requirements needed to satisfy the statute. Pursuant to Drum, it is possible to have

26. Id. at 600.
27. See MPC § 210.2, cmt. 2 at 16 (noting impact of Pennsylvania legislation).
(1999)) (redefining murder in the first degree to encompass intentional killing, revising murder in the second
degree to cover criminal homicide committed while the defendant was involved in committing a felony, and
adding subsection (c), murder in the third degree, to cover all other kinds of murder).
29. See id. § 2502(d) (defining intentional killing as “[k]illing by means of poison, or by lying in wait, or by
any other kind of willful, deliberate and premeditated killing”).
30. 58 Pa. 9 (1868) (noting that anyone who uses a weapon to take a life, where there is sufficient time to
deliberate and fully form the conscious purpose of killing, is guilty of first degree murder).
31. Id. at 44-45.
an intention to kill and yet not to be guilty of first degree murder. The bare intention to kill is what makes a person’s intent “willful.” In order to satisfy the statute, however, a particular kind of intent to kill is required – one that is deliberate and premeditated.

The Drum approach to defining intent seems certain to leave intention itself obscure. The Drum opinion never asks what it means to intend something, or to intend to do something. Instead, it concentrates on what deliberation and premeditation add to the bare intention to kill.

In today’s world of pop-Freudianism, the description of deliberation in Drum – a “mind fully conscious of its own purpose” – sounds painfully naive. What person is, or could be, fully aware of his purposes, or “real” purposes? But Drum may be aiming at a narrower matter. In order for an intentional killing to be deliberate, it is not necessary that I understand why I formed the intention to kill, but only that I be aware that I do intend to kill. I must announce this intention to myself, so to speak. Thus, a candid murderer, if asked what he was intending to do, would have the self-awareness to say, “I intend to kill X.” This also suggests that there could be people who intend to kill, but who have not gained awareness of their intention. Such people would not be guilty of first degree murder under Drum.

Premeditation, in contrast to deliberation, requires “sufficient time” to plan to carry out the killing. However, this is not planning in the conventional sense, for no minimum length of time is required. All that seems to be necessary under Drum is that the murderer be aware of how he intends to kill. Therefore, the formulation “I am going to kill him with this gun” would define a willful, deliberate, and premeditated killing, even though that awareness might form in only a split second. While such a statement of intention might be said out loud, the language in Drum suggests some sort of internal, mental conversation. That is why intent is known directly only to the person intending.

The formula for premeditation and deliberation in Drum is fairly representa-

32. The interpretation of Drum offered here differs somewhat from the explanation of deliberation and premeditation famously given in the LaFave and Scott hornbook: “It has been suggested that for premeditation the killer asks himself the question, ‘Shall I kill him?’ The intent to kill aspect of the crime is found in the answer, ‘Yes, I shall.’ The deliberation part of the crime requires a thought like, ‘Wait, what about the consequences? Well, I’ll do it anyway.’” WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW, § 7.7 n.4 (2d ed. 1986). There is nothing in Drum about awareness of consequences, only awareness of what one is thinking about doing. If by “consequences” LaFave and Scott mean result, then yes, the criminal must know that death will result from his action. But that does not seem different from intending to kill. If, however, “consequences” means awareness of punishment and an appreciation of the moral stakes involved, then Drum does not require or necessarily contemplate an appreciation of the consequences. On the other hand, the LaFave and Scott interpretation also refers to a sort of internal conversation a person has with himself.

33. “My own intentions are usually known to me in a way different from how they are known to a third person observer, the latter having to make behavioral inferences since he lacks my first-person experience.” MOORE, supra note 19, at 94.
tive of the way American criminal law approaches first degree murder. The disputes among judges in interpreting intent-to-kill murder concern the ramifications of deliberation and premeditation. The cases generally agree that first degree murder requires bare intent to kill, which satisfies the requirement of willful killing. Application of deliberation and premeditation, however — the terms are not always distinguished — have raised two fundamental disputes. First, in order to be guilty of first degree murder or its equivalent, must a defendant have acted after “cool and orderly reflection” as opposed to impulsive or hot blooded reaction? Second, must some appreciable time have elapsed between the decision to kill and the act of killing?

Other than the Pennsylvania reform, the other major modification of the common law approach to mental states was the publication in 1962 of the Proposed Official Draft of the Model Penal Code (MPC) by the American Law Institute. The MPC mental state for murder consisted of an altered version of its mental state provisions in general. The MPC provided generally for three mental states in addition to the questionable “mental state” of negligence. “Purposely” was defined either as conscious object to engage in certain conduct or cause a certain result, or as awareness, belief or hope that certain circumstances exist. “Knowingly” was defined as awareness either of the nature of conduct or the existence of circumstances or it is practically certain that conduct will cause a

34. See, e.g., 2 WHARTON’S CRIMINAL LAW § 142 (15th ed. 1994) (defining premeditation as “the process simply of thinking about a proposed killing before engaging in the homicidal conduct” and deliberation as the “process of carefully weighing the alternatives of killing or not killing”).

35. See generally Matthew A. Pauley, Murder by Premeditation, 36 AM. CRIM. L. REV. 145 (1999) (reviewing the primary legislative and judicial approaches to the meaning of “premeditation” and examining alternatives to the premeditation/deliberation distinction for degrees of murder).

36. See, e.g., BENJAMIN N. CARDozo, Law and Literature and Other Essays and Addresses, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDozo 338, 383-84 (Margaret E. Hall ed. 1947) (noting that there can be no intent without a choice yet that under case law a choice, without more, is sufficient to justify the inference that intent is premeditated and deliberate, and arguing that the distinction between first and second degree murder is too vague to be maintained under the law).

37. See, e.g., People v. Morrin, 187 N.W.2d 434, 448-50 (Mich. Ct. App. 1971) (discussing examples of Michigan first degree murder jurisprudence which demonstrate a growing insistence by the courts that first degree murder be clearly differentiated from second degree murder by the absence of any hot blood or inflamed passion).

38. See, e.g., Austin v. United States, 382 F.2d 129, 135-36 (D.C. Cir. 1967) (noting that the “appreciable time” charge is a meaningful way to convey to the jury the core meaning of premeditation and deliberation).


40. Negligence, unlike the other three categories, does not deal with a defendant’s state of mind at all.

41. MPC § 2.02(2)(a) defining “purposely” as follows:

(a) Purposely
A person acts purposely with respect to a material element of an offense when:

(1) 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
certain result.42 "Recklessly" was defined as conscious disregard of a certain risk.43

The MPC applied these mental states to the crime of murder in such a way that the distinctions among first, second, and third degree murder contained in the Pennsylvania reform were erased. Murder was defined as homicide committed purposely, knowingly, or "recklessly under circumstances manifesting extreme indifference to the value of human life."44 The provision for reckless homicide – extreme indifference – stated the definition of common law malice, which would have constituted third degree murder under the Pennsylvania murder reform. Felony murder, which would have been defined as second degree murder under the Pennsylvania reform, was defined in the MPC as murder through presumed malice. A knowing homicide, which might have been defined as third degree murder because of the absence of a conscious object to kill, was defined simply as murder. The commentary to the MPC noted that at common law, intent to kill included awareness that the death of the victim would result from the defendant's act "even if the actor had no particular desire to achieve such a consequence."45

Finally, an intentional killing – or purposely killing in the MPC – which might

(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.

42. Id. at § 2.02(2)(b) defining "knowingly" as follows:

(b) Knowingly
A person acts knowingly with respect to a material element of an offense when:
(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.

43. Id. at § 2.02(c)(2) defining "recklessly" as follows:

(c) Recklessly
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.

44. Id. at § 210.2(1). The full definition reads:
[C]riminal homicide constitutes murder when:
(a) it is committed purposely or knowingly; or
(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

45. Id. at § 210.2, cmt. 1 at 14.

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have been defined under the Pennsylvania reform as third degree murder if there were an absence of deliberation and premeditation, also was defined simply as murder. In rejecting the use of categories like deliberation and premeditation, the MPC commentary argued that no distinction in punishment should be made between a planned murder and an impulsive one. 46

The MPC aimed at a reform of mens rea. 47 What is common to all the MPC mental states in murder is consciousness or awareness. That is, the person acting purposely, knowingly, or recklessly knows something, and knows that he knows it. In terms of purpose, he knows what his purpose is. In terms of knowing, he knows that he knows. In terms of recklessness, he knows the risk that he disregards. If you were to ask the defendant before the crime was committed, and if the defendant were truthful, he would answer that he did intend to kill or that he knew death would result or that he knew he was risking the death of someone.

This aspect of self-awareness distinguishes the MPC mental states from the other basic MPC foundation of liability—the requirement of a voluntary act. 48 Under the MPC, there is no liability without a voluntary act. 49 For an act to be considered voluntary, it must have been the "product of the effort or determination of the actor, either conscious or habitual." 50 Thus, reflexes, convulsions, unconscious actions, sleepwalking, and hypnotic trances are not voluntary acts. None of these acts would satisfy the mental state requirements in any event, but the

46 Id. at § 210.6, note 4 at 128 ("If the notion that prior reflection should distinguish capital from non-capital murder is fundamentally unsound.").


In the post-World War II United States, the influential Model Penal Code (MPC) has done much to rationalize the law of mens rea. Avoiding the word "intend" entirely, the Code instead divides the traditional understanding of the term into three more precisely defined mental states: "recklessness," "knowledge," and "purpose," the latter of which corresponds to specific intent. States modeling their codes after the MPC have preserved this explicit distinction, although most have substituted the word "intend" for "purpose," thus re-defining "intend" as specific intent.

See also Paul H. Robinson, A Brief History of Distinctions in Criminal Culpability, 31 HASTINGS L.J. 815, 815-21 (1980) (discussing the transition from the Anglo-Saxon mens rea scheme to the modern MPC system with its four mens rea distinctions).

48 MPC § 2.01 provides that

1. A person is not guilty of an offense unless his liability is based on conduct which 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.
inclusion of habitual acts as voluntary suggests that voluntary acts need not manifest self-awareness. Under the MPC, it is the mental state category that requires internal awareness.

As even this cursory examination shows, the common law and the MPC share a certain understanding of human conduct: people know what they are doing. The rest of us have to guess what another person means, but that person knows. It may be too strong to say that people choose to do what they do, for they may or may not experience “choosing,” but they certainly are aware of what they are about to do.

A fundamental structure of morality follows from this psychology. Because I know what I am about to do, I could stop my act in light of what I know. Again, it is not so much that I choose to go forward as that I do not choose to stop. I deserve blame for whatever wrongs I do intentionally. This moral theory has been critically referred to as punishing according to the actor’s character. If I did not know what I was doing, the act would not reveal anything about my character. But because I do know, and still act, my bad character, at least to the extent of the bad act, is manifest. Causing death is not the issue. So accidental killing is not murder. Nor is unconscious killing revealing of character. So, in the famous sleepwalking case of King v. Cogdon, a sleepwalking woman who killed her daughter with an ax was acquitted of murder.

Assessment of character is a pressing issue for American criminal law because of the need to select the appropriate punishment. Potential application of the death penalty is what drives many of the distinctions in criminal law, including the Pennsylvania division of murder into degrees of murder. Presumably, that division was made along the lines of mental states in order to identify the most culpable killers.

51. See Moore, supra note 19, at 51 n.19 (“[t]he choice to do evil on a particular occasion that makes a person morally responsible for any wrong that follows from such choice . . .”)

52. See George P. Fletcher, The Individualization of Excusing Conditions, 47 S. Cal. L. Rev. 1269, 1271 (1974) (“The premise seems to be that if a violation of the law does not accurately reveal the actor’s character, it is unjust to punish him for what he has done.”).

53. Moore argues that one deserves blame for one’s choices irrespective of whether a choice is “in or out of character” Moore, supra note 19, at 51 n.19. This is, of course, an insightful observation. Nevertheless, character is shown by lapse as well as by usual, faithful commitment.

54. Unreported case heard before the Supreme Court of Victoria, Australia in December 1950. For a discussion of the case, see Norval Morris, Somnambulistic Homicide: Ghosts, Spiders, and North Koreans, 5 RES JUDICATAE 29, 29-31 (1951).

55. This sort of formulation concerning character and act is problematic even though it might gain broad acceptance in the legal community. Moore has sensibly pointed out that a person who hates his or her child enough to kill the child while sleepwalking obviously has a bad character, even if the criminal law does not apply sanctions for acts committed while sleepwalking. Michael S. Moore, More on Act and Crime, 142 U. Pa. L. Rev. 1740, 1816-17 (1994) noting that “[w]e each have a responsibility for our character, and Mrs. Cogdon has some blurry aspects to hers about which she should feel guilty.”

56. See George P. Fletcher, RETHINKING CRIMINAL LAW 253 (1978) (noting that the statutes, similar to Pennsylvania’s, that create a new standard of “premeditation and deliberation” are intended to determine whether murder act warrants the “extreme penalty of death”).

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What we are seeking to punish in criminal law is sin,\textsuperscript{57} which sometimes is referred to by the less religious sounding term, "moral desert."\textsuperscript{56} As Peter Westen has written, "[t]he criminal justice system . . . is a condemnatory, or 'blaming,' institution."\textsuperscript{59} While we do not punish all sins – not wrongful thoughts nor harmless conduct maliciously intended, for example\textsuperscript{60} – when we do punish, we aim to know the soul of the defendant. This is the context out of which we have created degrees of murder.\textsuperscript{61} When we are confident that the soul of the offender is truly and fully evil, even the death penalty may be inflicted. The mental state structure is thus a holdover from a more expressly theological time.

That theological structure, however, may have been more nuanced in its judgments about people than we tend to believe today. We are accustomed to invoking the Bible as if it were quite similar to the judgments of American criminal law. For example, the Biblical tradition usually is said to distinguish between intentional and accidental killing, much as American law emphasizes this distinction.\textsuperscript{62} There are even strangely modern, legal-sounding translations of the Biblical text, as if the Book of Numbers were a common law source.\textsuperscript{63}

The text in the Book of Numbers, from which lying-in-wait murder\textsuperscript{64} appears to be derived, indeed might be distinguishing between intentional and unintentional killings, as American criminal law sources suggest. However, the text may be suggesting something additional. The Revised Standard Version of the Bible translates the text in the Book of Numbers as follows:

\textsuperscript{57} As Joel Cornwell puts it, the "culpable identity . . . is the manifestation of something like sin . . . ." Joel R. Cornwell, The Confusion of Causes and Reasons in Forensic Psychology: Deconstructing Mens Rea and Other Mental Events, 33 U. RICH. L. REV. 107, 129 (1999).

\textsuperscript{58} E.g., Moore, supra note 55, at 1721 ("the overarching purpose of criminal punishment . . . is retributive: people should be punished because (and only in proportion to) their moral deserts.").

\textsuperscript{59} Peter Westen, Egelhoff Again, 36 AM. CRIM. L. REV. 1203, 1207 (1999).

\textsuperscript{60} See John F. Preiss, Witch Doctors and Battleship stalkers: The Edges of Exculpation in Entrapment Cases, 52 VAND. L. REV. 1869, 1902 (1999) (discussing Attorney General v. Silem, 159 Eng. Rep. 178, 221 (Ex. D. 1863), which held that an attempt to kill by means of witchcraft is not attempted murder because laws are not written to "punish sin, but to prevent crime and mischief").

\textsuperscript{61} Westen, supra note 59, at 1209 ("[P]eople are responsible for homicides only to the extent of their motivations and awareness.").


\textsuperscript{63} See Gordon J. Beggs, Challenges in Judging: Some Insights From the Writings of Moses, 44 CLEV. ST. L. REV. 145, 161 (1996) (quoting the NIV STUDY BIBLE 2 (Kenneth Barker et al. eds., 1985), purporting to be translating 35 Numbers 6, 16-28: "if anyone with malice aforethought shoves another or throws something at him intentionally . . . .").

\textsuperscript{64} Of the language of the Pennsylvania reform statute of 1794, supra note 26: "by means of poison or by lying in wait."
And if he stabbed him from hatred, or hurled at him, lying in wait, so that he died, or in enmity struck him down . . . he . . . shall be put to death . . . . 65

But, if he stabbed him suddenly without enmity . . . though he was not his enemy . . . [then a lesser punishment is possible]. 66

The distinction here is not only between intentional and accidental killings, although that distinction is plainly present. There is also the idea in this text of killing suddenly, absent enmity. Aside from accident, what could it mean to kill without hatred? Maybe the text is pointing toward killing without knowing that you hate. There is a famous American case in which there was a sudden killing, but without clear intention; there was a shooting of someone who, if not really a loved one, was at least not an enemy. The case is Commonwealth v. Carroll, 67 and it is this case that raises the question (although it does not answer), what does intent to kill mean? Indeed, what do we mean by intention in general?

III. MR. CARROLL CHALLENGES THE MAINSTREAM APPROACH

Donald Carroll was convicted of first degree murder, after a bench trial following a general guilty plea, for the shooting death of his wife. 68 On appeal to the Pennsylvania Supreme Court, he argued that the evidence supported only a conviction of second degree murder because intention and premeditation were lacking. In a majority opinion by Chief Justice Bell, 69 the court upheld the conviction of murder in the first degree.

The evidence may have seemed to the majority to put Carroll in a somewhat sympathetic light. His wife suffered from mental illness, eventually diagnosed as “schizoid personality type.” There was apparently some evidence at the trial of her “sadistic ‘discipline’” toward the couple’s young children. She had received psychiatric treatment for her condition and was considered “much improved.”

Carroll’s wife insisted in 1960 that Carroll resign from the army, where he had had a successful career. In January 1962, Carroll, who was still in some form of government service, attended an electronics school in North Carolina for nine days. This occasioned what the opinion described as a “violent argument” with his wife. Prior to his departure for North Carolina, Carroll’s wife requested that he leave a loaded .22 caliber pistol on the windowsill at the head of their bed, which he did. On the evening of Carroll’s return, he told his wife that he had been assigned to teach at a school in another city, which would necessitate his absence from home “four nights out of seven for a ten week period.” 70 Another argument

65. 35 Numbers 20-21 (Revised Standard).
66. Id. at 22-25.
68. Id. at 913.
69. Justices Jones and Cohen concurred in the result. Id. at 918.
70. Id. at 913-14.
ensued, lasting from dinner until 4 a.m., at which time Carroll shot his wife. After the shooting, Carroll cleaned the area, wrapped his wife's body in a blanket and put it in the cellar. That night he placed the body near a trash dump with a rug over it. Then he took his children to his parents' home.

After his arrest, Carroll described the shooting in a statement to the police:

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 between 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. I reached up and grabbed the pistol and brought it down and shot her twice in the back of the head.⁷¹

Carroll also described the shooting in testimony at the trial:

[I started to think about my 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 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.⁷²

Carroll's attorney asked him on direct examination whether, "[a]t the time you shot her, Donald, were you fully aware and intend to do what you did?" To which Carroll replied, "I don't know positively. All I remember hearing was two shots and feeling myself go cold all of a sudden."⁷³

Psychiatric evidence also was introduced on the issue of intent. Dr. Davis of the Allegheny County Behavior Clinic, and thus a neutral rather than a defense witness,⁷⁴ testified that Carroll was

for a number of years * * * passively going along with a situation which he * * *
* [was] not controlling and he * * * [was] not making any decisions, and finally a decision * * * [was] forced on him * * *. He had left the military to take this

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⁷¹ Id. at 914 (emphasis in original).
⁷² Id. (emphasis in original).
⁷³ Id.
⁷⁴ See Commonwealth v. McCusker, 292 A.2d 286, 289 (1972) (describing the examination of prisoners by the Behavior Clinic as a part of "normal governmental duties").
assignment, and he was averaging about nine thousand a year; he had a good
job. He knew that if he didn’t accept this teaching assignment in all probability
he would be dismissed from the Government service, and at his age and his
special training he didn’t know whether he would be able to find employment.
More critical to that was the fact that at this point, as we understood it, his wife
issued an ultimatum that if he went and gave this training course she would
leave him **. He was so dependent upon her he didn’t want her to leave. He
couldn’t make up his mind what to do. He was trapped **.^5

Dr. Davis testified at trial that Carroll’s

‘rage,’ ‘desperation,’ and ‘panic’ produced ‘an impulsive automatic reflex type
of homicide, **^ as opposed to an intentional premeditated type of homicide.
**^ Our feeling was that if this gun had fallen to the floor he wouldn’t have
been able to pick it up and consummate that homicide. And I think if he had to
load the gun he wouldn’t have done it. This is a matter of opinion, but this is
our opinion about it.**^6

Affirming the conviction in the Carroll case should have been a simple matter.
On appeal, the prosecution was entitled to all reasonable inferences to uphold the
fact finder’s verdict. The trial judge as fact finder could have found that Carroll
decided to kill his wife at a very early point, perhaps as early as the time she asked
him to leave the gun by the bed days before the killing. Certainly, the fact finder
was free to find that Carroll decided to kill his wife sometime during their last
argument and merely waited for her to go to sleep before pulling the trigger. In
terms of that account, willfulness, deliberation and premeditation would be present
under any understanding of those terms.

But Chief Justice Bell did not approach the case from the point of view of “only
the evidence which is favorable to the Commonwealth” in which first degree
murder was clearly proved.**^7 The starting point of his discussion of the case was,
instead, that “even if we believe all of defendant’s statements and testimony, there
is no doubt that this killing constituted murder in the first degree.”**^8

Chief Justice Bell did not entirely hold to this expression and the structure of the
opinion that resulted reveals much about the court’s understanding of intent. The
issue in the Carroll appeal was whether the evidence supported a finding of first
degree murder. Such a finding required, first, an intent to kill, which could be
proved in different ways, including “a defendant’s words or conduct or from the
attendant circumstances together with all reasonable inferences therefrom,” particu-
larly the intentional use of a deadly weapon upon a vital part of the body.**^1

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75. Carroll, 194 A. 2d at 916 (ellipses in original).
76. Id. at 916-17 (ellipses in original).
77. Id. at 916.
78. Id.
79. Id. at 915.
addition to intent to kill, the evidence also had to support deliberation and premeditation. Although Chief Justice Bell did not organize his discussion around those requirements, his analysis did include them.

The court's opinion treated two issues. First, was there enough time for the requirement of premeditation to be satisfied? Second, did the psychiatric testimony undermine the prosecution's case that a finding of either intent to kill or premeditation would be legally unsupportable?

In terms of time for premeditation, the opinion took Carroll at his word, concluding that the impulse to kill his wife was sudden and in no sense planned. But that did not preclude a finding of premeditation. Chief Justice Bell seemed to conclude that once intent to kill is established, the existence of premeditation and, presumably, deliberation as well, are jury questions only. Essentially, no time is too short for premeditation to be satisfied.

As Matthew Pauley has pointed out, there are different ways in which this idea—that no time is too short for premeditation to be satisfied—might be understood.80 One reason that no time is too short might be that, in fact, intent to kill is all that is required for first degree murder in Pennsylvania-type statutes. In other words, the terms premeditation and deliberation in these statutes are simply redundant. On the other hand, the Carroll opinion might mean that premeditation and deliberation do require something more than intent to kill, but that the something—calm reflection about the killing, perhaps—can be satisfied almost instantaneously.

It is on this point, whether more than intent to kill is needed to satisfy first degree murder, that Carroll assumes its doctrinal significance in American law and can be contrasted with opinions in other cases that seem to require clearer evidence of reflection, planning, and self-awareness.81 This disagreement leads to continuing controversy over whether, for example, the drunken killer, the enraged killer, the youthful killer, the impulsive killer and so forth should be held guilty under the deliberate and premeditated formula and indeed whether that formula should be retained or discarded.

While these are important doctrinal issues, it was not the question of time to premeditate, but the meaning and effect of the psychiatric testimony that mostly drew Chief Justice Bell's attention in the Carroll opinion. Dr. Davis testified not only that the killing had not been premeditated, but that it had not been intentional—that it had been instead an "automatic reflex type of homicide" during which Carroll would have been unable to pick up the gun had it fallen to the floor.

It is instructive for the examination of intent that, unlike Carroll's argument that there was insufficient time for premeditation, which was treated as irrelevant because no amount of time is too short, the psychiatric evidence of automatic

80. Pauley, supra note 35, at 150-54.
81. This is why Pauley uses the Carroll opinion as illustrating one of the two basic approaches to premeditation in American criminal law. See generally Pauley, supra note 35.
reflex was not ignored on the ground that even an automatic reflex action is sufficient to sustain first degree murder. Instead of stating that Carroll was guilty even if the psychiatric testimony were accepted, the court's opinion rejected Dr. Davis's testimony on three grounds. First, the fact finder might not have believed Dr. Davis (presumably Chief Justice Bell was referring to the accuracy of the diagnosis rather than Dr. Davis's sincerity). Second, Dr. Davis was relying on the statements of Carroll, who, despite the court's own earlier discussion of Carroll's statements as true, the jury also might not have believed. Finally, the psychiatric opinion evidence was entitled to little weight because the defendant's own acts and statements "believe the opinion."  

Chief Justice Bell apparently accepted the proposition that an automatic reflex killing would not be murder of the first degree. Such cases would include sleepwalkers who kill, hypnotized people who kill, and any other example of a defendant's dissociative state in which self-consciousness is absent or altered. The MPC rejects criminal liability for acts taken in such a condition on the ground that there has been no voluntary act. Chief Justice Bell seemed to agree that such actions do not constitute murder of the first degree, although perhaps on the ground that there is then no intent to kill, which was Carroll's argument.

Chief Justice Bell affirmed Carroll's conviction because he disagreed with Dr. Davis's conclusion about Carroll's condition. This was not a matter of claiming that Carroll was lying in his testimony and statements. Rather, based on the facts of the case, including Carroll's own statements, it was clear to Chief Justice Bell that Carroll was not acting automatically or on reflex, at least as the law understands these terms. Thus, the rejection of Dr. Davis's conclusion — that there was no premeditation or intent to kill — was similar to the court's overall conclusion that Carroll was guilty even, or maybe especially, if Carroll's own words were believed. In the opinion, the key to guilt was Carroll's active emotion and ability to remember at the time of the killing:

From his own statements and from his own testimony, it is clear that, terribly provoked by his allegedly nagging, belligerent and sadistic wife, defendant remembered the gun, deliberately took it down, and deliberately fired two shots into the head of his sleeping wife. There is no doubt that this was a wilful [sic], deliberate and premeditated murder.

It is not clear what Chief Justice Bell meant by Carroll's acting "deliberately," since sleepwalkers also act in seemingly purposeful ways — they sometimes pick

82. Carroll, 194 A.2d at 917.
83. MPC § 2.01 ("A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.").
84. Carroll, 194 A.2d at 917 (emphasis in original).
85. See Bernard Williams, Voluntary Acts and Responsible Agents, 10 OXFORD J. LEGAL STUD. 1 (1990) (describing somnambudistic action as "purposive action").
up weapons and use them, for example – and yet sleepwalkers are not guilty of first degree murder. But it is clear that, to the court, Carroll was not a sleepwalker, nor was he in any other such state of automatism. A sleepwalker is not provoked and does not remember something like a gun in the middle of sleepwalking. From Chief Justice Bell's perspective, Carroll was awake and thinking, not sleepwalking or acting in any other automatic or reflex pattern. Since Carroll was conscious, Chief Justice Bell heard something like irresistible impulse in Dr. Davis's testimony, which the opinion rejected as a defense to intent to kill murder. Leaving aside the question why a sleepwalker or someone in a similar state should not be held guilty of first degree murder, Carroll was not in such a state.

After all that, however, the court in Carroll never attempted to clarify the meaning of intent to kill. Carroll was not, after all, claiming to have been sleepwalking or unconscious. The failure of the court to address intent, in a case centering on intent to kill, shows that intent itself was seen as self-evident. But defining intent is actually quite difficult, as the Carroll case demonstrates.

A well-known definition of intent ~ that given in Cunliffe v. Goodman 86 ~ is adopted for intent to kill murder in Hyam v. D.P.P. 87

An 'intention' to my mind connotes a state of affairs which the party 'intending' ~ I will call him X ~ does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.

It is not obvious that Carroll fits this definition. Carroll maintained that, as far as he knew, he never decided to kill, and never intended to kill, his wife. That was the meaning behind the question from his attorney. "[a]t the time you shot her, Donald, were you fully aware and intend to do what you did?" 88 Carroll himself was not certain of the answer to this question.

It is possible that Carroll decided to kill his wife and at the trial did not remember doing so. That would not be a defense because all that is required for conviction of first degree murder is intent to kill at the time of the killing, not

87. 2 All E.R. 43, 50 (H.L. 1974) commenting that "I know of no better judicial interpretation of 'intention' or 'intent' than that given in a civil case by Asquith L.J.")
88. Id. (quoting Cunliffe, 2 K.B. at 253, and adopting Lord Justice Asquith's definition of intent in a murder case).
89. Carroll, 104 A.2d at 914.

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memory of the event later. It is also possible that Carroll simply was lying. Perhaps Carroll planted the whole thing.

It is also possible, however, that at the time of the shooting, Carroll had no particular mental state at all. Perhaps he was not thinking about shooting his wife. Maybe he just shot her. That is what Carroll’s statements actually suggest. Would that amount to intent to kill?

At the end of the opinion, Chief Justice Bell addressed this question, albeit obliquely. He compared the evidence in Carroll’s case, and the psychiatric testimony in it, to the testimony in Commonwealth v. Tyrrell. "Defendant’s psychiatrist did not testify that the defendant was insane. What he did say was that because defendant’s wife frequently picked on him and just before the killing insulted or goaded him, defendant had an emotional impulse to kill her which he could not resist."

Chief Justice Bell also quoted language from the Tyrrell opinion concerning the effect that recognizing such blind impulses as defenses or mitigation would have:

"[S]ociety would be almost completely unprotected from criminals if the law permitted a blind or irresistible impulse or inability to control one’s self, to excuse or justify a murder or to reduce it from first degree to second degree. In the times in which we are living, nearly every normal adult human being has moments or hours or days or longer periods when he or she is depressed and disturbed with resultant emotional upset feelings and so-called blind impulses; and the young especially have many uncontrolled emotions every day which are euphemistically called irresistible impulses."

It is apparent that Chief Justice Bell regarded Carroll as having suffered from a blind impulse he could not resist and that such a condition was not considered any sort of defense to the charge of first degree murder. It should be noted, however, that the portion of the Tyrrell opinion quoted in Carroll was dealing with the concept of control or lack of control exhibited by the defendant. The question in Carroll was different — whether the defendant intended to kill his wife at all. The usual way of resolving that question — the presumption of intent to kill from the use of a deadly weapon — was not ultimately relied on in the Carroll opinion because of

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90. See generally Jonathan M. Purvey, Annotation, Amnesia as Affecting Capacity to Commit Crime or Stand Trial, 46 A.L.R.3d 544, 551 (1972) ("[A]ll of the cases in this annotation which are concerned with the issue support, either expressly or by necessary implication, the general rule that amnesia, in and of itself, is not a defense to a criminal charge unless it is also shown that the accused, at the time of the act, did not know the manner of the act and that it was wrong.").
91. 174 A.2d 852, 856 (Pa. 1961) (rejecting the doctrine of irresistible impulse "whether used to denote legal insanity, or as a device to escape criminal responsibility for one's acts or to reduce the crime or its degree" under Pennsylvania law).
92. Carroll, 194 A.2d at 917 (quoting Tyrrell, 174 A.2d at 856-57).
93. Id. at 917-918 (quoting Tyrrell, 174 A.2d at 857 n.3) (emphasis in Carroll opinion).
Chief Justice Bell’s desire to affirm the conviction based on Carroll’s “own statements and from his own testimony.”

Thus, we are left with the description of Carroll’s mental state as indeed, “blind.” The word “blind” suggests that the matter was not thought about. It could be said that Carroll had no mental state. At the time of the shooting, he was perhaps simply acting, not thinking of anything at all. When the opinion then affirmed the conviction for first degree murder based on that description of Carroll’s mental state, the court was saying in effect that such a mental blank is sufficient to satisfy intent to kill. All that is required for conviction of first degree murder is action by the defendant that we recognize as purposeful – in this case, lifting a gun, pointing it, and pulling the trigger. No added mental condition or process or state is needed.

The above description is not a criticism of the outcome in the Carroll case. Carroll picked up a gun and shot his wife. If he is not guilty of first degree murder, who is? All the same, the Carroll opinion clearly departs from the careful mental map described in Drum. It is not clear how the statutory language of deliberation and premeditation, to say nothing of intent to kill itself, applies to Carroll. In terms of deliberation, Carroll was not fully conscious of his own purpose. For that matter, if this sort of blank mental state is defined as intentional, how could such intent ever be deliberate and premeditated? How can a blank be fully formed, or held for any length of time? It is this minimalist approach to intention, not the court’s application of premeditation, that is important and revealing in Carroll.

At first glance, it may seem that the MPC, which does not require intent to kill in order to convict someone of its highest degree of homicide and which condemns the impulsive killer equally with the killer who plans the death, avoids these conceptual problems. But that is not the case. All the relevant mental states in MPC murder require consciousness of something. While consciousness might be considered a different mental state from intention, consciousness also does not seem to be satisfied by Carroll. At the time of the shooting, Carroll did not have a conscious object; nor was he aware that death would result; and he was not consciously disregarding a risk – that is, if the words conscious and aware are meant to describe an internal mental state of some kind. We can suppose that Carroll was aware in a general way that death can result from shooting someone. That is, Carroll would no doubt have answered “yes” if asked at some earlier point, does death result from firing a gun at someone at point blank range? But, Carroll was not aware at the moment of the shooting that he was shooting his wife, or that he was shooting at all. So, it is hard to say that Carroll was disregarding any risk at the time of the shooting. Carroll’s guilt of murder is problematic under the MPC as well as under the Pennsylvania statute.

The MPC acknowledges that sometimes there is no mental state accompanying an action. It calls such an instance a bodily movement that is the product of

94. Id. at 917.
“habitual” effort or determination. This is something like the action of the checkout person at the supermarket who has ceased to think of the act of counting and adding up. The checkout person could become aware of these actions, but does not. The MPC is emphatic that such habitual action is still a voluntary act. However, 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?” Like Carroll, such a person has no conscious object, is not aware of the context and is not consciously disregarding a risk. Such a person is “miles away,” thinking of something else.

Is the point of Carroll that mental states do not matter? But they clearly do matter, at least in some ways. What if Carroll had picked up the gun to put it away and had then tripped? If the gun had gone off and his wife had been killed, Carroll would not be guilty of first degree murder. He would be guilty of, if anything at all, only involuntary manslaughter. We could say of Carroll in that case that he lacked the intention to kill. So his mental state would be very important. Yet, in tripping, Carroll’s lack of intention would amount to a sort of internal blankness similar to that which Carroll actually experienced and for which his conviction was affirmed.

Or, what if Carroll had thought the gun was unloaded? In such a case, even if he had pointed the gun at his wife, saying, “sometimes I just want to kill you” and then had pulled the trigger, the resulting death of his wife would not be first degree murder. In that situation, Carroll would be understood as not having intended to kill, even though in a sense, his actions would be the same as in the actual Carroll case.

Or, what if Carroll had intended to shoot his wife in the arm, but had missed and killed her? Then I suppose the resulting criminal liability would be no more than third degree murder, for Carroll certainly would have lacked the specific intent to kill.

What if Carroll actually had offered any of these accounts of his mental state? In what sense could such an account be false? After all, how would Carroll really know what had been in his mind, apart from interest in a detailed plan to kill his wife and then to pretend to have done it spontaneously? I have been writing as if Carroll had claimed that his mind was blank during the shooting. Actually, Carroll did not remember whether he was thinking something or not. And what would it be like for a person to remember what he was thinking at the moment he shot his wife? What would that be a memory of? How would you know you had gotten it right?

We might see in Carroll a wholly different account of mental life. The Carroll

95. MPC § 2.01(4) exempting from the definition of voluntary act “a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual”.
96. We might say instead that tripping is not a voluntary act under MPC § 2.01.
97. I have left out of these possibilities any direct reference to the subconscious aspects of Carroll’s situation, so as not to further complicate the Carroll case. Imagine Carroll 1, 2 and 3. The first Carroll plans to kill
case lends support to Kevin Keeler’s conclusion that “what the law calls ‘mental state’ turns out not to be subjective, unobservable thoughts and feelings, but rather to signify various patterns of conduct and expectation that are socially familiar and directly observable.” 98 Carroll had no unobservable thoughts, but he exhibited the familiar conduct of having shot someone. Is that understanding what Chief Justice Bell intuited without commenting on the nature of intent? But then why was the psychiatric testimony supporting automatic reflex such a problem for the opinion? A shooting out of automatic reflex action would still present a familiar pattern of shooting someone. Would not Carroll then still be guilty even if the psychiatric testimony were correct? Then what of sleepwalking?

For the moment, let us assume only that people sometimes are like Carroll – that they sometimes do not know or remember whether they had been thinking something or that they sometimes have not been thinking anything at all, even while acting. Imagine the professional hit man. He has decided to kill when he enters into the “contract” to kill. But at the time of the actual shooting, the hit man also, like the checkout person, may be acting out of habit and be thinking of something very different.

Now imagine that the hit man, just before pulling the trigger, changes his mind and no longer wishes to kill the victim. But then, in the same split second, the hit man realizes that if he refuses to shoot, he himself will be killed. If he now shoots, can he raise a defense of duress? 99 What if he decides to pretend to carry out the contract, but only to wound the victim? Of what crime is he guilty of if he then misses and “accidentally” kills the victim?

I have presented hypotheticals like these to my students in my Criminal Law

98. Kevin L. Keeler, Direct Evidence of State of Mind: A Philosophical Analysis of How Facts in Evidence Support Conclusions Regarding Mental State, 1985 Wis. L. Rev. 435, 438 (analyzing the philosophical assumptions underlying the law’s use of mental concepts).

99. That is, can the defense be raised as a matter of mental state, ignoring traditional limits on this defense, such as possible non-applicability to homicide or the responsibility of the defendant for being in such a situation in the first place? See generally Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits, 62 S. CAL. L. REV. 1331 (1989) (outlining the development of the defense of duress and its underlying rationales).
course – conspirators who aid, but have not yet decided to join, a conspiracy, or gunman who plan to kill their victims in self-defense by arranging an attack on themselves that they can defend only through deadly force. The characters in these stories have precisely what Carroll lacked – clarity of mental decision-making and later memory of that clarity. Carroll forces us to question whether his sort of clarity is attainable – not that thoughts do not exist, but that clear distinctions among thoughts may amount to arbitrary closure of what is a dynamic continuity.100

Other, similarly unattainable, mental state distinctions are operative in criminal law. For example, all self-defense provisions, whether requiring reasonable belief or not, also require sincere belief that such force is necessary to protect the individual.101 On the other hand, retaliation against an aggressor is excluded from self-defense.102

Given that purported distinction between self-defense and retaliation, the self defense charge to the jury when a battered wife shoots her sleeping husband after years of physical abuse, may amount to asking whether at the time she acted, she more feared her husband than hated him.103 That question does not have an answer. Certainly, the defendant may not know how to answer it any better than anyone else.

Similarly unanswerable questions arise in intent-to-kill cases when an intention other than intent to kill might be said to be present. For example, in Director of Public Prosecutions v. Smith,104 the defendant tried to drive away from the police after apprehension, thereby killing an officer who was hanging onto the car. The defendant argued that rather than an objective standard, his own intention as to the officer should govern the outcome of the case.105 But even if an expression of remorse is made very sincerely at the time of a crime – “I knew the man, I wouldn’t

100. See Cornwell, supra note 57, at 149 (“State of mind, however, is more accurately described as a conclusionary label applied retrospectively to make sense of multiple streams of consciousness [rather than as a scientifically measurable event].”).
101. See, e.g., Stephen A. Saltzburg, et al., Criminal Law 737 (2d ed. 2000) (“[M]ost courts . . . require that the defendant’s fear be both honest and reasonable in order to make out a claim of self-defense . . . .”)
102. “A preemptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late.” George F. Fletcher, A Crime of Self-Defense: Bernard Goetz and the Law on Trial 20 (1988).
103. See Note, Does Wife Abuse Justify Homicide?, 24 Wayne L. Rev. 1705, 1716-20 (1978) (criticizing cases that stretch the definition of self-defense in order to include what appear to be killings of revenge).
104. 3 All E.R. 161 (H.L. 1960).
105. Id. The House of Lords endorsed an objective inquiry into the accused’s intention to cause grievous bodily harm. That is, what would the accused as a “reasonable man” have contemplated in such circumstances? Six years later, the Criminal Justice Act of 1967 specifically rejected the Smith rule and the possibility that reasonableness judgments would govern the determination of intention. See Rex v. Collins, Jr., Negligent Murder: Some Statewide Footnotes to Director of Public Prosecutions v. Smith, 49 Cal. L. Rev. 294, 293-96 (1961) (rejecting application of the reasonableness test for murder); Howard Ross & J.E. Hall Williams, The Law Commission: Imputed Criminal Intent, 30 Mod. L. Rev. 431, 440 (1967) (same).
do it for the world. I only wanted to shake him off ... "106 - what does anyone know, including the defendant, about what he did or did not mean to do at the time? At the time, he almost certainly was not thinking about anything, not even about getting away. He was just trying to get away.

In another famous example of contrasting claimed intentions, Ms. Hyam set fire to an inhabited house in order to get rid of a romantic rival.107 How would she know if she only intended to scare the person, as opposed to trying to kill her or not caring whether she died or not? How likely is it that any internal conversation took place along these lines? It is more likely that many confused "conversations" took place. If that is the case, then any later account of internal mental state is likely to be a defense or prosecution lawyer's invention. This is not a matter of the defendant's lying, but of there not being anything consistently "there," internally, to point to.

If not knowing one's intention seems odd to the reader with regard to acts of violence, think back instead to telling your partner for the first time that you loved him or her. Didn't the words surprise you as they came out of your mouth? Carroll's shooting was like that. But would anyone suppose that your declaration of love was not intentional?

I am no more capable than is Chief Justice Bell to give a satisfying account of human mental life. All I wish to suggest here is that we impose a non-existent clarity and apparent objectivity on mental states. For criminal law to be intelligible, we need a different, and more attentive, understanding of thoughts, feelings and actions. We may see the outline of such a richer understanding in the thinking of the philosopher Ludwig Wittgenstein.

IV. THE EVANESCENCE OF INTENTION

Someone tells me: "Wait for me by the bank". Question: Did you, as you were saying the word, mean this bank? - This question is of the same kind as "Did you intend to say such-and-such to him on your way to meet him?" It refers to a definite time (the time of walking, as the former question refers to the time of speaking) - but not to an experience during that time. Meaning is as little an experience as intending.108

If intending is not an experience, what is it? The court concluded that Carroll intended to kill his wife. To what kind of thing was Chief Justice Bell referring in that conclusion? The opinion was not referring to a thought or feeling that Carroll

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106. Smith, 3 All E.R. at 161.
107. Hyam v. Director of Pub. Prosecutions, 2 All E.R. 41, 42 (H.L. 1974) (finding that a defendant who set fatal arson fire to an occupied residence had displayed intent to do great bodily harm, necessary for murder under English law; defendant maintained that she set the fire only to scare her romantic rival).

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had, because there is doubt that he had the thought or feeling to kill his wife before he fired the gun. Nor was there any fact in the situation for Carroll to be aware of.

Is intention, then, just what Carroll did—that is, his actions in picking up the gun and firing it? But that is not a helpful formulation either. Wittgenstein never denied that mental processes happen—he said he was not a “behaviorist in disguise.” Mental state evidence might have been highly relevant in Carroll’s case. Carroll could have testified, for example, that he thought the gun was unloaded. A fact finder might be suspicious of such testimony, of course, but the statement would be comprehensible. People do have thoughts and these thoughts may be relevant to intention.

My intention was no less certain as it was than it would have been if I had said “Now I’ll deceive him.” But if you had said the words, would you necessarily have meant them quite seriously? (Thus the most explicit expression of intention is by itself insufficient evidence of intention.)

We might call Carroll a special case of blank intention. Usually, if I intend to kill my wife—or do any other intentional act, like pack to go to Florida—I have at some time said to myself something like, “I will kill my wife” or “I’m going to Florida.” Carroll, on the other hand, apparently said nothing to himself at all.

Wittgenstein is showing us that when internal conversations do take place, they are not much different from external ones. If I said to my friend, “I will kill my wife,” he would not be sure that I meant it or that I would go through with it. He would have to find out what led up to the statement. Was my emotional response a normal marital pattern or some unusual event? He would not know how serious I was until he found out what I later did. Indeed, he still would not know whether I had meant it then.

Surprisingly, I am in the same situation after the conversation that my friend is. I do not know for sure that I will act on my statement. And if the conversation had been an internal one in my head, I also would not know.

Now how different does Carroll really look? If I can intend something without saying it to you, why can I not intend it without saying it to myself? And if I can say it to you without really intending it, perhaps I can even say it to myself without intending it. “But what is the meaning of the word ‘five’?—No such thing was in question here, only how the word ‘five’ is used.” The word “intentionally” may have a different use in the statement “Carroll intentionally killed his wife” from the word “intend” in the statement “I intend to kill my wife.” Carroll’s actions were in the past while my killing would be in the future. In the latter case, something of a prediction is being made about how likely it is that I will attempt to kill my wife. This prediction might be important if someone were deciding how much police

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109. Id. at 102, ¶ 307 (internal quotation omitted).
110. Id. at 164-65, ¶ 641.
111. Id. at 3, ¶ 1.
protection she needed. But in the statement about Carroll, perhaps all that is being said is that he is responsible for the death.

Undoubtedly, there is something to H.L.A. Hart's view that statements like "He did it," when used in a legal context, are words of ascertainment of blame or responsibility rather than words of description. The court in Carroll's case was certainly making a judgment that Carroll's conviction would stand. Yet Hart himself distinguishes the statement, "Smith hit her" — a statement of ascertainment — from the statement "he set himself or intended to hit her" — an assertion "that some inferred mental event occurred in Smith's mind." The use of the phrase "intended to kill" excludes "intended to wound" and other sorts of intentions. Its use is not simply ascriptive.

Why do I want to tell him about an intention too, as well as telling him what I did? Not because the intention was also something which was going on at that time. But because I want to tell him something about myself, which goes beyond what happened at that time.

The language of intention is not a description of something that was happening inside me. Nor is it only the conclusion of the judge that I will go to prison or be executed for what I did. The statement, "I never intended to hurt him" is used in similar fashion to the statement, "I'm sorry that it happened." This is why Carroll could say, in all sincerity, "I never intended to kill my wife." The court, in asserting the opposite, was then disagreeing to some extent with Carroll's interpretation of what transpired.

"For a moment I meant to . . . ." That is, I had a particular feeling, an inner experience; and I remember it.—And now remember quite precisely! Then the 'inner experience' of intending seems to vanish again. Instead one remembers thoughts, feelings, movements, and also connexions with earlier situations.

There is no question that we sometimes act intentionally, as "common sense" tells us the word "intent" is used. We look in the mirror, see our long hair, decide to go to the barber and then do so. If, when we arrive, the barber shop is closed, we can say unproblematically, "I intended to get a haircut, but the shop was closed."

But when the context is fuller and our emotions are more engaged, the matter of "intention" can be elusive. So, if Ms. Hyam is going to set fire to the house of her rival when the rival is home, does her statement to another or to herself that "I'm

112. H.L.A. Hart, The Acession of Responsibility and Rights, in LOGIC AND LANGUAGE 151 (Antony Flew ed., 1965) (arguing that "the philosophical analysis of the concept of a human action has been inadequate and confusing, at least in part because sentences of the form 'He did it' have been traditionally regarded as primarily descriptive whereas their principle function is . . . descriptive").

113. Id. at 169.

114. WITTGENSTEIN, supra note 108, at 167, ¶ 659.

115. Id. at 165, ¶ 645.

only going to scare her" mean anything? Does it mean that she does not intend to kill her rival? Aside from whether Ms. Hyam's statement is sincere, and aside from whether she rationalized after the event, and aside from the policy issue of whether such a person should be sanctioned as if she had intended death. Wittgenstein asks us whether "intending" is a sufficiently clear concept that serious consequences should follow from conclusions about it. Upon self-reflection, Ms. Hyam might discover only her anger and jealousy, not a unified intention – either to kill or to scare.

In light of the evanescence of intention, its use in criminal law seems unwarranted in general and certainly unwarranted as the critical test of liability and punishment. When a defendant sets fire to a house in order to harm someone in any way — including just scaring the victim — it should not be a matter of needed investigation whether the defendant had a stray hope or thought that no one would be physically hurt. The defendant might have had such a thought or might not. The defendant might have had a thought that burning a house is really dangerous or might not. The defendant might have hoped that maybe the person in the house would die or not die, or might not. Or all these thoughts might have been present at different times. And many other emotions might have been present as well. To force a name to this jumble, whether intent to kill or intent to accomplish something else, should not be the law's task. Insofar as intention matters, the meaning and role of intention should be different.

We are now ready to begin to consider what that role should be — what more nuanced uses of a criminal defendant's thoughts might remain meaningful, even in light of the teachings of Wittgenstein. The reader may imagine, for example, that "innocent" actions that cause social harm would inevitably be condemned as criminal if the criminal law were to recognize and reject the uncertainties and confusions surrounding the use of intention. However, such actions could still be exempted from punishment.

This can be seen in a case of alleged theft of a coat. Asking the jury whether I intended to deprive the owner of his coat might be just as pointless as asking whether Carroll intended to kill his wife. When I pick up someone else's coat "thinking that it is mine," I am not doing any thinking about the coat at all. The erroneous recognition of the coat as mine did not proceed consciously — though I do not mean that it proceeded unconsciously either. The recognition of my coat did not "occur" at all — in the sense of experiencing recognition. It just seemed to be my coat and I picked it up.

If later I am arrested for stealing someone else's coat, I will say, "I thought that coat was mine." My statement is not false exactly; it is just shorthand for an involved description of the context and what I did.

What I am "remembering" when I say, "I thought that coat was mine" is not the feeling of thinking "this is my coat," for I no more had that feeling than the reader is now thinking of where he or she is sitting. Rather, I am "remembering" the absence of what a thief would have been thinking. The thief would have admired
the coat, would have wished he had one like it, would have estimated what it might bring if he stole it, would have thought how unfair it was that another person should have such a coat while he has none and so forth. All of this is missing from my situation.

It is not meaningless to ask whether I ever had a thought that the coat was not mine. In the case of theft, society seems prepared to acquit me if I never had a thought that the coat belonged to someone else. This stance is not inconsistent with the teachings in this section. Wittgenstein did not, after all, deny that people think about things. So there are crimes in which thoughts do, or at least might, actually matter. A person picking up a coat with the sort of mental blank that Carroll had is not guilty of theft.

What the Carroll case does show, however, is that often, and perhaps usually in the instance of homicide, society is not at all concerned with the presence or absence of a particular thought. Nor is this only so with regard to convicting on the basis of intent to kill. It is equally the case, for example, with regard to acquittal based on self-defense.

Self-defense is supposedly based upon a mental event – a sincere thought to defend oneself – much as murder in the first degree is supposedly based upon the mental event of intent to kill. However, when someone comes at me in an attack with a knife and I defend myself by shooting him to death, I may in fact be just as blank mentally as was Carroll. It is unlikely that I thought of self-defense before I shot. It is more likely that I simply acted.

The absence of an express thought of self-defense would, of course, not invalidate the defense. Self-defense has really no more to do with particular thoughts than does intent-to-kill murder. No one could imagine a prosecutor in a murder trial cross-examining a defendant by asking, “Isn’t it a fact that as the victim advanced on you and aimed his knife at you, you had no clear thought to protect yourself? Isn’t it a fact that you acted first, and only thought about the danger you had been in, later, after your assailant was dead?”

Such a line of cross-examination would be absurd precisely because mental activity, while it does occur and thoughts do come into our minds, is often not relevant at all in the outcomes of criminal law, despite criminal law’s language of intention. We do not yet, however, have a vocabulary capable of expressing that insight.

If we keep the wisdom of Wittgenstein in mind, it may prove possible eventually to provide a fuller account of mental states in criminal law. This Article is only a small step. Unfortunately, there may be resistance in the legal profession to accepting Wittgenstein, as well as other thinkers, as important guides to criminal law.

117. See WITTGENSTEIN, supra note 108 and accompanying text.
118. See supra notes 101-102 and accompanying text.
There is a sort of Babbitt-like refusal of many lawyers to learn anything from philosophy. In his classic work, *Rethinking Criminal Law*, George Fletcher summarized the implications of Wittgenstein’s insights for the confused thinking of American lawyers and judges concerning intention. Building on Wittgenstein, Fletcher explained that the “fallacy of assuming that ‘something happens’ internally whenever one acts intentionally,” a fallacy certainly present in the Carroll opinion, “follows from assuming that because there is a word intention, it must name some particular thing.” Our error is one of naming, or as Wittgenstein wrote, “If I do speak of a fiction, then it is of a grammatical fiction.” Wittgenstein would teach lawyers not to attempt to clarify this reified essence of intention and fit it into a scheme of other reified essences.

But even Fletcher, despite writing a work that was reformist in its whole orientation, was ready instantly to excuse lawyers from following the advice he had just given them. “It may be that the demands of systemic thinking in the law pull us into the search for these chimerical essences.” By “systematic thinking,” Fletcher was referring to the responsibility of law to decide every case. He seems to believe that any way of encountering the world that would bring to light the world’s manifold quality only would make the lawyer’s task more difficult. Fletcher is content that criminal law uses language, in particular the language of intention, in an unthinking way. It does not matter that lawyers make no effort to clarify intention because our job is merely to move cases.

Fletcher is wrong about this. There is nothing pragmatically useful about the

119. See generally SINCLAIR LEWIS, BABBITT (1922) (telling the story of Babbitt, a self-delusional white-collar man who conforms unthinkingly to prevailing middle-class standards). This use of the figure from the novel is a popular characterization rather than a fair or thoughtful evaluation of white-collar workers in the early twentieth century. See Deborah C. Malamud, Engineering the Middle Classes: Class Line-Drawing In New Deal Hours Legislation, 96 MICH. L. REV. 2212, 2231-33 (1998) (discussing the culture and status of white-collar workers in the 1920s and 1930s).

120. A celebrated example of the barren anti-intellectualism of American law occurred in Justice Antonin Scalia’s book, A MATTER OF INTERPRETATION (Amy Gutmann ed., 1997). The book consists of an essay by Justice Scalia concerning the nature of interpretation and several responses by well-known academics, mostly lawyers. At the beginning of his response, Ronald Dworkin comments, gratuitously, that “Justice Scalia has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle . . . . These are considerable achievements.” Id. at 115. I know that Dworkin was making a joke, but what kind of joke? Who was he assuring that he also thought Jacques Derrida and Hans-Georg Gadamer to be egg-heads without relevance to legal thinking? Does Dworkin imagine for a moment that he himself has made any contribution remotely comparable to the efforts of these men? For that matter, the failure of Justice Scalia to take contemporary thinking seriously undermines his own efforts and, at least according to one commentator, has led him to follow “certain postmodern themes” with which he may or may not agree. Stephen Feldman, The Supreme Court in a Postmodern World: A Flying Elephant, 84 MINN. L. REV. 673, 678 (2000) (discussing the role of post-modernism in the Supreme Court’s recent jurisprudence).

121. FLETCHER, supra note 56.
122. Id. at 451-52 (citations omitted).
123. WITTGENSTEIN, supra note 108, at 102-03, ¶ 307 (emphasis added).
124. FLETCHER, supra note 56, at 452.
125. Id. at 451 (“The engine of the law requires us to make a decision in every case, and therefore there is no room for a middle ground where the concept idles . . . .”).
confusions of Carroll and other cases concerning intention. Careful thinking about and observation of our mental activities do not yield merely an "accurate philosophical account," but a more intelligible, coherent and useful account of mental life or of whatever is the matter at hand. Without that effort, cases like Carroll are inevitably going to make what could be planar matters into more obscure ones. So, if in light of Philosophical Investigations, American law seems confused and incoherent, this is not a specialized intellectual problem, but a general failing that has practical consequences. In other words, there is no tension between thinking well and acting well. There is no tension between philosophy and law.

V. PRESUMPTIONS OF MENTAL STATES

How could recognition of the evanescence of intention actually be operationalized in a criminal trial? After all, short of a Wittgensteinian rewrite of the statute book - a task as yet quite beyond us - phrases like "intent to kill" are not going to disappear from criminal law. So any new understanding of mental states will have to fit somehow within forms that treat intention as a separate category, much as is done at present.

Surprisingly, the common law already had a tool that minimized conceptual confusion over intention—presumptions, particularly the presumption that a person intends the natural and probable result of his or her actions. At present, expansion of the use of presumptions of this sort in criminal law is likely to be found unconstitutional as a violation of due process. But as will be shown below, that constitutional analysis is itself premised on just the sort of confusion over intention that the Carroll case exposes. Understood properly, presumptions in certain criminal law contexts do not threaten constitutional values.

Some time ago, a colleague of mine at Duquesne Law School suggested that criminal law should be no-fault in orientation. The suggestion startled me. Surely criminal law, with its emphasis on moral desert, is inappropriate for a no-fault approach. Indeed, criminal law has moved instead toward individuated justice at the point of liability. The emphasis currently upon what was in the mind of the defendant at the time of the act is one manifestation of this emphasis on individuation. George Fletcher's well known "two patterns of criminality" in Rethinking Criminal Law identified and distinguished this modern search for

126. Id. at 452.

127. There are a number of criminal law contexts that involve similar mental state claims. See, e.g., State v. Egelhoff, 900 P.2d 560, 562-63 (Mont. 1995), rev'd, Egelhoff v. Montana, 518 U.S. 37 (1996) (involving defendant claiming that his intoxication induced a fugue state of automatism during which he was wholly unconscious of what he was doing); see also Westen, supra note 59, at 1276 (discussing Egelhoff).

subjective guilt from the older pattern of manifest criminality. The MPC's consistent reliance on consciousness, awareness, and similar concepts continues this movement into the psyche of the accused. The most recent criminal law manifestation of this subjective tendency is the growth of so-called motive crimes.

Outside criminal law as well, the confidence that we can know the minds of others and the commitment that it is ethically imperative that we do so has grown. Perhaps the best example of this approach is the requirement of "intent to discriminate" in the law of equal protection established in Washington v. Davis. Under the requirement of intent to discriminate, the focus of legal analysis is not upon the effect of adopted government policies upon particular groups, but upon the attitude held by the decision maker when the projected effect was recognized—whether the policy was adopted "because of" or "in spite of" the projected effect.

On one level, the Carroll case casts doubt upon the seriousness with which law actually investigates such intention. Carroll lacked obvious intent, but that did not bar his liability. It may be that, despite law's rhetoric, liability usually is not premised on supposed mental events. At least that is what Carroll suggests.

On a more fundamental level, Carroll also suggests that supposed categories of intention are a jumble of thoughts, suppressed thoughts, fears and wishes that cannot be categorized neatly except on a rather arbitrary basis. We eventually may see this and come to regard the mental state terms we are using as merely elegant fictions. Intention, which we maintain is so important, may not in fact be crucial nor ascertainable nor even meaningful. It is in this sense, that criminal law could be imagined as no-fault in orientation.

Surprisingly, these insights, which seem radical when baldly stated, are already reflected, to some extent, in criminal law. For example, despite the purportedly subjective focus of criminal law, the inference that a defendant who intentionally uses a deadly weapon on a vital part of another human being intends to kill that

129. Fletcher, supra note 56, at 115-19.
130. See generally Adam Candeub, Motive Crimes and Other Minds, 142 U. Pa. L. Rev. 2071 (1994) (arguing that laws that require determining intent and motivation to a high specificity present courts with decisions that cannot be made on a sound basis because motive crimes push necessary inferential strategies beyond a point where mental state inferences can be considered valid).
132. Personnel Admn'r v. Feeney, 442 U.S. 256, 257 (1979) (noting that discriminatory intent "implies more than intent as volition or intent as awareness or consequences"). See generally Eric Schnapper, Two Categories of Discriminatory Intent, 17 Harv. C.R.-C.L. L. Rev. 31 (1982) (arguing that the Court's jurisprudence fails to distinguish goal discrimination from means discrimination and that both are proscribed by the Equal Protection Clause). Just as in criminal law, the emphasis on subjective intent in the law of equal protection inevitably raises the issue of the unconscious. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322 (1987) (arguing that "the [E]qual [P]rotection [C]lause requires the elimination of government decisions that take race into account" without good reason).
person, which was cited in Carroll, often eliminates any need for inquiry into the actual mental state of a defendant. Perhaps all that is needed in order for criminal law to deal more coherently with mental states is greater acceptance of such inferences or presumptions, which usually would obviate the need for inquiry into mental states; the burden of proof could then be placed on a defendant who relies on a mental state defense to explain unusual circumstances.

There was such a general presumption at common law—that someone was presumed to intend the natural and probable consequences of his actions. If broadly utilized, this presumption could operate precisely to avoid fruitless inquiry into mental processes that we really do not understand and probably do not much care about. However, today, this presumption is not used robustly. It is regarded as merely what is usually the case or as a fair inference rather than as a sound principle for understanding what intention means. This presumption is said not to shift the burden of proof to the defendant, when such shifting is just what should be done with the whole notion of mental states.

The first step to rehabilitating this presumption is to rethink it in light of the meaning of human action. Intention is not a matter of a stray thought that might

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133. 194 A.2d at 915 ("The specific intent to kill . . . may be inferred from the intentional use of a deadly weapon on a vital part of the body of another human being.").

134. This is the so-called deadly weapon doctrine or rule. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 613-14 (2d ed. 1986) (discussing logical conclusion that using a deadly weapon against another presumably involves intent to kill). In the Carroll case, the presumption might have been of little assistance because the defense denied that Carroll used the gun "intentionally" in the first place.

135. It has been speculated that the deadly weapon doctrine constituted the original application of the more general presumption that one intends the natural and probable consequences of one's acts. See Walter E. Oberer, The Deadly Weapon Doctrine—Common Law Origin, 75 HARV. L. REV. 1565, 1573 (1962).

136. In State v. John, 72 S.W. 525 (Mo. 1903), the defendant, while engaged in his occupation as dog catcher, provoked the derision of some boys on the street, who aroused him to anger and caused him to attack a bystander, who he killed by striking him on the jaw with his fist. It was held that, under the circumstances, the defendant must be presumed to have intended to kill. Id. at 527. The appellate court stated, "The court properly instructed the jury that a man is presumed to intend the natural and probable consequences of his acts . . . . A strong brawny man will not be allowed to approach an innocent citizen in a public highway and deal him a deadly blow with his fist in a vital part and when death, the natural consequence of his act ensues, be heard to say that he merely intended to punish him and not to kill him." Id.

137. See Cavaiezeh v. Ohio Farmers Ins. Co., 509 P.2d 1057, 1082 (Ariz. Ct. App. 1973) (affirming declaratory judgment decreeing that homicide was intentional and, therefore, insurance companies were not liable on their farm-owner's policies, which contained exclusionary provisions for deliberate acts of insured, and rejecting contention of victim's wife that trial court erred in charging jury that one is presumed to intend the natural and probable consequences of his act because there was evidence to contrary). The court also stated that the inference that one intends the natural and probable consequences of his act is founded on a logical inferences process, that when a person voluntarily commits an act he usually intends the natural consequences thereof. Id. The court added that this inference merely advised the jurors that they were allowed to use circumstantial evidence, the commission of the act, to determine whether the consequences were intended. Id.

138. See Riggins v. State, 174 S.E.2d 908, 912 (Ga. 1970) (holding that instruction that defendant had burden of proving insanity by preponderance of evidence was proper, and instruction that person is presumed to be of sound mind, that acts are presumed to be product of will, and that person is presumed to intend natural and probable consequences of acts did not shift burden of proof where, immediately following instruction, court stated that presumptions were not conclusive, were rebuttable, and did not shift burden of proof to defendant).
accompany an action, which the presumption then spares the fact finder from having to find. Rather, intention is already present in the natural and probable consequences of actions. That is what the presumption recognizes. Shifting the burden of proof to the defendant at that point allows for explanation of unusual circumstances that render my actions “not what they seem.”

There is, unfortunately, a potential barrier to using the presumption this broadly. Under *Francis v. Franklin*, it would probably be unconstitutional to rely on the presumption that a defendant is presumed to intend the natural and probable consequences of his actions in a strong way in a criminal case. What I hope to indicate below is that the application of due process analysis in the area of intention is premised on the same fruitless search for intent as a separate event or entity that characterizes criminal law generally.

A full treatment of the due process limit on the use of presumptions in criminal law is well beyond the scope of this Article. Therefore, the following discussion must remain a mere sketch. Nevertheless, even a short examination strongly suggests that *Carroll* undermines constitutional rejection of presumptions of intent. In light of what the *Carroll* court understood intent to mean, intent to kill in a case like *Carroll* simply could not be the subject of an unconstitutional presumption. Properly understood, presumptions about intent to kill and, by extension, about other sorts of intention as well, do not conflict with legitimate constitutional concerns.

A presumption has been defined as “a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.” So, for example, a statute making it a crime for certain persons to receive a firearm shipped in interstate commerce might provide for a presumption that possession of a firearm shall give rise to a presumption that the firearm was shipped in interstate commerce.

139. Aside from the due process issues raised in the text, there are, of course, the potential Fifth Amendment self-incrimination issues inherent in requiring such explanation from a criminal defendant. On the other hand, the defendant still need not testify and may bring forth evidence of mental state from other sources, or indeed may just argue against the presumption.


141. In *Francis*, the defendant was charged with murder, which the state of Georgia defined as causing the death of another human being “unlawfully and with malice aforethought.” *Id.* at 311 n.1. His sole defense was that he lacked the requisite intent to kill because the fatal shots were fired accidentally. *Id.* at 311. On the dispositive issue of intent, the trial court instructed the jury that “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.” *Id.* The Supreme Court stated that charging the jury that the presumption “may be rebutted” may have indicated that the defendant bore an affirmative burden of persuasion as to his intent once the state proved the underlying act giving rise to the presumption. *Id.* at 318. See also Remarks of Ronald J. Tabak, *Carter Center Symposium on the Death Penalty – July 24, 1997*, 14 GA. ST. U. L. REV. 329, 336 (1998) (commenting on *Francis v. Franklin*, which he argued before the Supreme Court).


The modern constitutional framework for analysis of criminal law presumptions was set forth in *County Court of Ulster v. Allen*,[144] which differentiated presumptions into two types, mandatory and permissive. In *Allen*, the Court upheld a New York statutory presumption that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle, as applied to the facts of that case.[145] The New York statute permitted, but did not require, the fact finder to find one fact – possession of the firearm – from the establishment of another – occupation by a defendant of a vehicle in which the firearm was found.

The notion that intent to kill in a case like *Carroll* is the sort of fact that could be the subject of an unconstitutional presumption is just the kind of misunderstanding about intent that Wittgenstein was demonstrating.[146] In *Carroll*, the court was satisfied, or at least was 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.[147] 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.

The role of a presumption in a case like *Allen*, as opposed to *Carroll*, is potentially quite different and certainly raises legitimate constitutional concerns. In *Allen*, the New York statutory presumption might have had the effect of relieving the prosecution from proving that a defendant had seen or had been told about a firearm in a car. Without knowledge, there could be no possession.

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144. 442 U.S. 140, 159-60 (1979).
145. *Id.* at 147.
146. It might well be pointed out that the concept of “possession” in *Allen* has its own *Carroll*-like issues of intention. Nevertheless, there was in *Allen* at least a complex of other questions that could be susceptible to unconstitutional presumptions, such as whether a defendant had seen the weapon in question. Thus, Justice Stevens’s opinion for the Court emphasized the visibility and physical proximity of the guns to the defendants. *See Allen*, 442 U.S. at 163.
147. *See* Cornwell, * supra* note 57, at 124-26 (arguing that a defendant’s state of mind is not a truly “verifiable event”).

*When we ask about a defendant’s state of mind… we are not asking about an empirical predicate inherent in a measurable object … Rather, we are asking about the comparative proximity of angles from which to view the defendant’s actions as his identity, drawing the defendant’s emotional boundaries in a way that makes sense to us.*

*Id.* at 125-26.
Obviously presuming knowledge, as opposed to proving it, poses a due process issue. Conversely, a presumption in *Carroll* only would serve to weaken the defense argument—an argument that in light of this Article seems incoherent—that intent to kill might not be present when a sane person commits a non-accidental killing. As Joel Cornwell has said, asserting that there is no intent in that context is not an argument about facts as much as it is a category mistake.\(^\text{148}\)

In other words, in *Allen*, a presumption might relieve the prosecution from having to prove something. However, in *Carroll*, a presumption would be merely a restatement of what the prosecution had already proved.

Unfortunately, due process, as currently understood, probably condemns presumptions even in a case like *Carroll*. This can be seen in *Sandstrom v. Montana*,\(^\text{149}\) a well-known presumption case that resembles *Carroll*. On the point of intent, *Sandstrom* amounts to a more confused version of the *Carroll* case, though at the level of constitutional criminal procedure as opposed to substantive criminal law.

In *Sandstrom*, the defendant was charged with “deliberate homicide,” which apparently could be satisfied by a showing that the defendant acted voluntarily with the mental state of “purposely” or “knowingly.” The trial judge charged the jury that “[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.”\(^\text{150}\) The Court reversed the conviction on the ground that the instruction constituted an unconstitutional shift in the burden of proof.

The Court’s misunderstanding of mental states in *Sandstrom* was similar to that of the defense attorney asking Carroll whether he intended to kill his wife.\(^\text{151}\) Actually, there was no “fact” in *Sandstrom* that the jury was being asked, unconstitutionally, to presume.

*Sandstrom* admitted committing the killing by means of shovel and knife, but counsel argued that he did not do so purposely or knowingly. *Sandstrom* did not testify. Thus, on the issue of intention, the jury had before it only evidence of the nature of the attack—“blows to her head from a shovel, and five stab wounds to her back”\(^\text{152}\) and psychiatric testimony. On the basis of the testimony of two psychiatrists, counsel for *Sandstrom* argued that because of his personality disorder, aggravated by alcohol consumption, he lacked the intent to kill.\(^\text{153}\) What the psychiatrists actually testified, according to the Supreme Court of Montana, was that, “[W]hile defendant may not have had the specific intent to kill at the time of the offense, it was their opinion that he had the intent to ‘silence’ Mrs. Jessen, and

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\(^\text{148}\) Id. at 124-25 (referring to Gilbert Ryle’s term to describe inappropriate linking of disparate concepts because of grammatical similarities in the way we speak of them).


\(^\text{150}\) Id. at 513.

\(^\text{151}\) See supra note 73 and accompanying text.


\(^\text{153}\) *Sandstrom*, 442 U.S. at 512.
was conscious of his activity in bringing about the result.” The trial court then charged the presumption on the question of purposely and knowingly killing.

Since the victim could not be silenced except by death, Sandstrom’s “defense” amounted to the same claim as that made by Carroll - some form of automatism. That is, the defense was arguing that Sandstrom did not have any sense of deciding to kill the victim. But we now can see that aside from what the defendant admitted, there was nothing else for the prosecution to prove in Sandstrom. Intent to kill does not and should not be understood as requiring that the thought “I will now kill her” be present in the mind of the killer.

In Sandstrom, the United States Supreme Court unanimously reversed the conviction. Such a strong, though confused, decision demonstrates the widespread nature of the current misunderstanding about intension and its proper relationship to both elements of crimes and due process. No doubt the Court will eventually permit the use of the presumption of intending the natural consequences of an action, but only after the Court and the legal culture come to a new understanding of intention.

A presumption of the type that persons are presumed to intend the natural and probable consequences of their actions would have eliminated the necessity for the prosecution to prove precisely what the defendants were thinking when they fired the shots in the Pittsburgh case of shooting into the police station. We may suppose that the defendants thought many things that night. But if they thought nothing at all, they were no different from Carroll. And if they thought they would just scare the police, they were no different from Ms. Hyam. And if they thought lots of things and only can remember some and cannot be certain what they “decided” to do that night, they were no different from the rest of us. While it may be difficult to know what sanction they deserve, the formal determination that their mental state was one thing as opposed to another does not make the decision as to sanction easier.

Common law malice - like the presumptions above - also operated to avoid inquiry into mental states in the early history of murder, since all forms of malicious killing were murder. If nothing but common law malice had been relevant in the Carroll case, it would have been a simple matter to hold that Carroll was indifferent to the value of human life, even without being certain of any more specific mental state. Such indifference would not create the illusion of a mental

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155. 442 U.S. at 527 (Burger, C.J. & Rehnquist, J., concurring).
156. The failure to understand the use of intension does not necessarily mean that the Court was wrong to have reversed in Sandstrom. Even if intent to kill were reinterpreted along the lines suggested by this Article, presumptions in criminal cases still would have to be carefully monitored. After all, our system is one of jury decision and even if a defendant confesses, the jury cannot be instructed that they should convict. Nevertheless, the misunderstanding of intent manifest in Sandstrom can encourage juries to confuse the issue of guilt and to look for intent as a separate entity when intent already has been proved.
157. See supra notes 20-24 and accompanying text.
event the way the phrases "intent to kill" or "intended to kill" seem to do. Perhaps, then, it was the humane division of murder into degrees of liability in Pennsylvania, a division adopted to mitigate punishment, that led to the current emphasis upon intention. In other words, intent-to-kill murder, while it creates the conceptual difficulties of a case like Carroll, must be acknowledged as having limited the reach of the death penalty. That juxtaposition gives pause for any proposed reform of intention in criminal law. For if emphasis on internal mental states began as a way of mitigating punishment, what effect might a de-emphasis of intent in criminal law have?

VI. MENTAL STATES AND THE HAESSNESS OF PUNISHMENT

Any proposed reform in criminal law, however well-intentioned, can have the unanticipated effect of making the criminal justice system harsher than it had been previously. Sentencing reform, for example, began as reform, but ended up with the unintended effect that most criminals simply serve longer sentences. The proposal in this Article, that intention in criminal law be reexamined and its role greatly reduced, could have a similar result. The difference between a finding of intent to kill and a finding of no such intent can be the difference between first degree murder and either second degree or third degree murder, depending on the presence of another felony. One difference among these degrees is eligibility for the death penalty. So a reduction in the complexity of mental states to return to a

158. See supra notes 27-28 and accompanying text.
160. The Pennsylvania murder statute, for example, provides in part:

§ 2502. Murder
(a) Murder of the first degree. — A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.
(b) Murder of the second degree. — A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.
(c) Murder of the third degree. — All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.


§ 1102. Sentence for murder and murder of an unborn child.
(a) First degree. —

(1) A person who has been convicted of murder of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa. C.S. § 9711 (relating to sentencing procedure for murder of the first degree).

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(b) Second degree. — A person who has been convicted of murder of the second degree or of second degree murder of an unborn child shall be sentenced to a term of life imprisonment.

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broader and simpler basis for liability. Like malice or broad presumptions, could have an unintended effect of allowing more persons to be found guilty of first degree murder and increasing the number of prisoners who receive the death penalty. 162

To see this, imagine two defendants walking into a store and shooting the clerk during a robbery. A jury in this situation may return a conviction for either first or second degree murder. Doctrinally, the difference is only whether the jury finds intent to kill. Since a robbery is not an assassination, we may assume that often the shooter simply shoots without thinking about the matter, and thus that many such cases are like Carroll. We also may assume that many juries return only convictions for second degree murder in these situations. In other words, juries perform some kind of filtering process in such cases, and we call that filter "intent to kill."

I have no wish to eliminate that filtering process. However, since this Article shows the unreliability of the notion of intent to kill, I wonder on what basis juries really make such decisions. Perhaps juries convict of first degree murder defendants who anticipate, ahead of time, the possibility of death and judge the panicked defendant to be guilty only of second degree murder. Certainly planning as the requirement for first degree murder has been tried in the past, though with mixed results. 163

162. See, e.g., Tison v. Arizona, 481 U.S. 137 (1987) (permitting imposition of death penalty upon defendant who participated in a major way in felony that resulted in murder and acted in reckless indifference to the value of human life [essentially the common law malice standard]).

163. The notion of a planned killing, which the Pennsylvania murder reform could have been understood as proscribing in first degree murder, see supra notes 31-38 and accompanying text, is neither inherent nor a fiction and could serve as a limit on imposition of the most severe criminal liability. Planned killing does not require a finding of intent to kill as an independent mental state or event. Planning something is a recognizable activity and first degree murder could be restricted to such planning. In this way, the worst crimes could be assigned the harshest punishments without resort to intention.

Unfortunately, reliance on a requirement of planning in first degree murder cases has failed in the past. See, e.g., People v. Anderson, 447 P.2d 942 (Cal. 1968). The brutal killer in the well-known Anderson case was spared conviction of first degree murder (and, hence, the death penalty) because the California Supreme Court reversed the conviction for an absence of planning. 447 P.2d at 948 (applying the terms "deliberate" and "premeditated" so as to require more reflection than simply an "intent to kill"). See also Pauley, supra note 35 (reviewing the primary legislative and judicial approaches to the meaning of "premeditation" and "deliberation"). But the Anderson outcome is not really satisfying — apart, that is, from general opposition to the death penalty. In Anderson, the ten year-old victim’s body suffered over sixty knife wounds. It is not obvious why Anderson should not receive society’s highest condemnation.

Dissatisfaction with planning as a standard led in California to a softening of the Anderson approach. See People v. Perez, 831 P.2d 1159, 1163 (Cal. 1992) (holding that Anderson’s premeditation and deliberation factors “while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive”). More generally, the MODEL PENAL CODE earlier had rejected planning to kill as a limiting concept, maintaining that the impulsive killer may have just as callous a character as at least some killers who reflect upon the killing beforehand. MPC § 210.6 cmt. 4 at 127.
Perhaps juries in returning convictions for second degree murder in such cases are exercising a rough mercy. That is what Benjamin Cardozo thought -- that the role of mental state language is simply to give juries a way to be merciful.\footnote{164} Wittgenstein thought this, too, in a sense, for he said that in using the language of intention, I want to tell you "something about myself."\footnote{165} There is also the possibility that juries use the language of intent to kill in more sinister ways -- to make judgments based on race, sexual preference, and class, or perhaps the matter is simply arbitrary -- like being hit by lightning.\footnote{166}

What is unlikely is that juries in these or other sorts of cases are making judgments about the thoughts in the defendant's head at the time of the killing. That sort of judgment, which is what we say we are doing, would lead juries to see nothing but a confusing fog of mental interactions. Perhaps recognizing that unfortunate possibility will help prevent it from occurring.

In short, an aspect of reform of mental states in the criminal law would have to include acknowledgment that mental state language does invite juries not to make some type of judgment that sometimes has the effect of limiting punishment. Some mechanism would be needed to retain that jury role.\footnote{167}

The fact that we do not know what juries do when they find "intent to kill," and that whatever they do is not what we say, illustrates the harm in current mental state language. The effort to identify mental states prevents us from seeing criminals and crimes as they are, or even from realizing that we do not see them as they are. When a jury decides that someone intended to kill and therefore deserves a harsh punishment, we feel justified in the punishment. We forget that neither the jurors nor the rest of us have a clear idea of what those words mean. There are fewer differences among criminals and crimes than we say and much less ground for confidence in our judgments than we think. I hope facing this reality will lessen our confidence in judging what we think people deserve.

\footnotetext{164}{See Cardozo, supra note 36, at 283-84.}
\footnotetext{165}{Wittgenstein, supra note 114 and accompanying text.}
\footnotetext{166}{Cf. Portman v. Georgia, 408 U.S. 238, 399 (1972) (Stewart J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").}
\footnotetext{167}{Matthew Pauley considers various legislated formulas defining degrees of homicide: the mean of death, the status of the victim, the discretion of the fact finder or aggravation and mitigation at sentencing. Pauley, supra note 35, at 166-69. Once the notion of intent loses its primacy, the division of criminal law between intentional and unintentional wrongdoing, especially in the law of homicide, would fade. In that scenario, the proposal of Samuel Pilsbury -- that harm caused to others out of indifference, even without awareness of the risks involved, justified subsequent punishment -- might be applied to a Carroll or a Hyman in order to sidestep the question of what precisely they intended. See Samuel H. Pilsbury, Crimes of Indifference, 49 Rutgers L. Rev. 125 (1996). The MPC did try to do this by expanding murder to include reckless homicide, but the MPC's emphasis upon consequences and awareness of risks reintroduced conceptual problems very similar to those of intent.}