

CONVERGENCE OF CIVIL LAW AND COMMON LAW IN THE CRIMINAL THEORY REALM

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I. Western Legal Tradition

The theory and practice of criminal law in common law and civil law jurisdictions have been traditionally viewed by scholars as distinctive and fairly diverse.¹ Each belongs to a tradition that has been regarded as quite different from each other.² However, in several areas, common law and civil law have been increasingly moving toward convergence.³ The purpose of this article is to show that the prevailing theories of offense in these two legal systems constitute an area of convergence between civil law and common law. Underlying this premise is the conception that, despite the view of the majority of authors, common law, especially as applied in the United States, and civil law should be considered as one legal tradition— the so-called

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¹ See generally H. Patrick Glenn, *Are Legal Traditions Incommensurable?* 49 AM. J. COMP. L. 133 (2001) (examining the idea that distinct legal traditions can be compared using their diverse characteristics); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985).

² Julio C. Cueto Rua, *The Future of the Civil Law*, 37 LA. L. REV. 645, 645 (1977).

³ See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 1 (1991).

western legal tradition.⁴ The similarities between civil law and U.S. common law, compared to other legal traditions, outweigh their differences.⁵ Even in those areas where there are still striking differences, both systems are slowly moving toward convergence.⁶

This article starts by examining the evolving convergence of civil law and common law. It briefly addresses the history of the theoretical and philosophical perspectives that contributed to evolution and change within these two systems. Then, the article analyzes general features of the central aspects of criminal law theory in the civil law (Goal-oriented theory) and common law jurisdictions. Finally, this article briefly focuses on the analysis of crimes against life, highlighting the common features of their treatment in civil law and common law criminal law theory. This work intends to pave the way for future research on other areas where civil law and common law also present a certain high degree of uniformity.⁷

II. Convergence

Comparative law has long been concerned with the convergence phenomenon among legal traditions.⁸ Convergence constitutes the evolution of legal institutions within different legal systems where the institution of one system resembles the other; and, the legal norms, principles, and scholarly comments of both are used in equal measure, “even regarded as authoritative as each other.”⁹ Unlike harmonization, which implies “a [deliberate] and negotiated process” aimed at producing a legislative or other conventional act, convergence constitutes a natural

⁴ See RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 25 (3d ed.1985).

⁵ See René David, *Existe-t-il un Droit Occidental? in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 56-64 (Kurt H. Nadelmann et. al ed., 1961).

⁶ See GORDLEY, *supra* note 3, at 1.

⁷ See EDMUNDO S. HENDLER, DERECHO PENAL Y PROCESAL PENAL DE LOS ESTADOS UNIDOS 36 (1996).

⁸ See, e.g., Louis F. Del Duca, *An Historic Convergence of Civil Law and Common Law Systems—Italy's New “Adversarial” Criminal Procedure System*, 10 DICK. J. INT'L L. 73 (1991) (examining the transplant of aspects of the U.S. adversarial system into the Italian Criminal Procedure Code).

⁹ Peter de Cruz, A MODERN APPROACH TO COMPARATIVE LAW 34 (1993).

(unconscious) “common development” of legal institutions “through mutual interest.”¹⁰ Natural convergence is the result of a “tendency [in similar nations] . . . to have similar problems and to arrive at similar legal ways of perceiving and dealing with them.”¹¹ Convergence is not an isolated instance, but rather the natural route that civil law and common law have been taking.¹²

Convergence between areas of common law and civil law is not new.¹³ It traces its roots to the Enlightenment and has been a slow and gradual process.¹⁴ In England, the innovative thinking in the Inns of Court in the period between 1490 A.D. and 1540 A.D. planted the first seeds of the process of integration between common law and civil law. Inspired by Roman law concepts, Lord Mansfield, Blackstone, and other comparative scholars produced seminal works that also prompted the gradual development of convergence.¹⁵ As emphasized by Glenn, “[b]y the nineteenth century English thought had developed a large measure of compatibility with that of the continent,”¹⁶ which was later reinforced with the advent of the European integration.¹⁷

In the United States, this process has been more remarkable and radical.¹⁸ Glenn suggests that “US law represents a deliberate rejection

¹⁰ Carol Harlow, *Voices of Difference in a Plural Community*, 50 AM. J. COMP. L. 339, 341-42 (2002).

¹¹ John Henry Merryman, *On the Convergence (and the Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT. L. 357, 369 (1981).

¹² See David Stevens and Jason W. Neyers, *What's Wrong with Restitution?*, 37 ALTA. L. REV. 221, 227-28 (1999).

¹³ Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 341-43 (1998).

¹⁴ See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 226 (2000).

¹⁵ Schadbach, *supra* note 13, at 342.

¹⁶ GLENN, *supra* note 14, at 226.

¹⁷ See ALAIN A. LEVASSEUR & RICHARD F. SCOTT, *THE LAW OF THE EUROPEAN UNION: A NEW CONSTITUTIONAL ORDER: MATERIALS AND CASES* 1 (2001).

¹⁸ Raj Bhala writes:

An interesting dimension of the convergence between common and civil law systems is the apparently increasingly common practice of American appellate courts to publish slip opinions with a warning that the opinions are not to be cited. This behavior, viewed systemically, might represent a retreat

of common law principle, with preference being given to more affirmative ideas clearly derived from civil law.”¹⁹ While this affirmation may seem rather extreme, the United States was undoubtedly greatly influenced by civil law sources in the nineteenth century, especially by German scholars, whose influence molded the shape of U.S. common law.²⁰ As Glenn notes, “[t]his was evident in substantive law, [especially] in the reception of the ideas of rights,” virtually unknown at the time in the United Kingdom, but even more evident in terms of structures and sources of law.²¹ Civil law has also influenced legislation in the United States.²² Apart from the obvious adoption of codes, courts often interpret legislation by resorting to civilian methodologies under a civil law philosophy.²³

At the same time, common law ideas, styles, and conceptions have greatly influenced civil law. As Tetley notes, “[c]ivil law jurisdictions often have a statute law that is heavily influenced by the common law.”²⁴ Entire legal areas, such as the regulation of securities,²⁵ commercial papers,²⁶ and even constitutional law,²⁷ have been extrapolated from the United States to several civil law countries around the world. Additionally, a mosaic of common law institutions— such as

from stare decisis, and perhaps even a movement toward continental-style adjudication.

The Myth about Stare Decisis and International Trade Law (Part One of A Trilogy), 14 AM. U. INT'L L. REV. 845, 914 n.214 (1999).

¹⁹ GLENN, *supra* note 14, at 230.

²⁰ More recent German scholars, such as Kessler and Prausnitz, played an important role in the development of U.S. contract law. *Siegelman v. Cunard White Star, Ltd.*, F.2d 189, 204-05 (2d Cir. 1955).

²¹ GLENN, *supra* note 14, at 230.

²² Jerome Frank, *Civil Law Influences on the Common Law- Some Reflections on “Comparative” and “Contrastive” Law*, 104 U. PA. L. REV. 887, 922 (1956)

²³ *Id.* at 23; Harlan. F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 13-14 (1936).

²⁴ William Tetley, *Mixed Jurisdictions: Common law v. Civil law (Codified and Uncodified)*, 60 LA. L. REV. 677, 687 (2000).

²⁵ *See, e.g.*, On Securities and Stock Exchanges, No. 1512-XII (March 12, 1992) (Belr.).

²⁶ *See, e.g.*, On Financial Papers, Res. 701 (November 13, 1991) (Kaz.).

²⁷ *See* Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U.L. REV. 1483, 1484 (1997).

probation as an alternative to punishment for criminal conduct,²⁸ cram down procedures for the approval of bankruptcy plans,²⁹ class actions for collective litigation,³⁰ and transfer pricing for the taxation of related companies³¹ have been introduced in civil law countries directly from the United States. Furthermore, the United States also greatly influenced the structure and organization of the legal profession; and, more and more countries now have a bar that looks like the U.S. model. This is especially notable among lawyers practicing international business law in Western Europe and major Latin American countries.³²

Aside from the criminal law theory of offense analyzed below, common law and civil law have been moving toward convergence in several other areas, particularly in the commercial and contractual realms.³³ For example, contract law in both civil law and common law shares a common history³⁴; and, some aspects of contract formation are remarkably similar in both jurisdictions.³⁵ Thus, contract law in Anglo-

²⁸ See National Probation Service Act of Latvia (Valsts Probācijas dienesta likums) (2003) (Lat.), available at <http://www.mk.gov.lv/index.php/files/2/29012.doc> and <http://www.probacija.lv/site/gen/3> (last accessed November 14, 2004).

²⁹ See 1 FRANCISCO QUINTANA FERREYRA, CONCURSOS: LEY 19.551 Y MODIFICATORIAS: COMENTADA, ANOTADA Y CONCORDADA 551-559 (1988) (art. 48 of the Argentine Bankruptcy Act, no. 19.551 (1984)).

³⁰ See Ada Pellegrini Grinover, *Da "class action for damages" à ação de classe brasileira: os requisitos de admissibilidade*, REVISTA IBEROAMERICANA DE DERECHO PROCESAL, Año I, Nº 2, 126 (2002).

³¹ See JUAN MARTIN JOVANOVIĆ, CUSTOMS VALUATION AND TRANSFER PRICING: IS IT POSSIBLE TO HARMONIZE CUSTOMS AND TAX RULES? 1 (2002); VICTOR UCKMAR, IMPUESTOS SOBRE EL COMERCIO INTERNACIONAL 1 (2003).

³² See Octavio R. Acedo Quezada, *Nuevos Retos y Desafíos de una Profesión Jurídica*, 39 REVISTA VINCULO JURIDICO 3 (1999), available at <http://www.ciu.reduaz.mx/vinculo/webvrij/rev39-2.htm> (last accessed November 14, 2004).

³³ See Kalvis Torgans & Amy Bushaw, *Some Comparative Aspects of Contract Law in Civil and Common Law Systems*, 12 INT'L LEGAL PERSP. 37, 47, 72 (2002).

³⁴ GORDLEY, *supra* note 3 at 1.

³⁵ Compare CÓDIGO CIVIL DE LA REPÚBLICA ARGENTINA [CÓD. CIV.] art. 1150 (Arg.), with RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

American states traces its origins to primitive Roman law concepts.³⁶ The forefathers of contract law—Comyn,³⁷ Chitty,³⁸ Story,³⁹ among others—“systematize[d]” the doctrine of contracts in common law,⁴⁰ based on the works of French scholars⁴¹ such as Jean Domat⁴² and Robert Pothier,⁴³ who directly influenced the French Civil Code of 1804. These also influenced other natural law jurists, such as Hugo Grotius⁴⁴ and Pufendorf,⁴⁵ who in turn had been influenced by the Spanish school of natural law, also known as the late scholastics.⁴⁶ As Gordley clearly delineated, common law lawyers illustrated these civil law doctrines with English cases⁴⁷ which the courts certainly did not have in mind when

³⁶ ATILIO ANIBAL ALTERINI, *CONTRATOS: CIVILES, COMERCIALES, DE CONSUMO. TEORIA GENERAL* 15 (1999). See also W.W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* 195 (2d ed. 1952).

³⁷ 1 SAMUEL COMYN, *A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL: WITH CASES AND DECISIONS THEREON IN THE ACTION OF ASSUMPSIT* (Riley 1809).

³⁸ JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE LAW OF CONTRACTS* (Garland 1978) (1826).

³⁹ WILLIAM W. STORY, *A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* (1847).

⁴⁰ James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1847 (2000).

⁴¹ See GORDLEY, *supra* note 3, at 4. Natural law influence can be seen, *inter alia*, in the idea of consent and agreement embedded in the notion of contracts.

⁴² JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* (William Strahan trans., 1722).

⁴³ ROBERT J. POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS* (William D. Evans trans., 1826). Pothier’s contract law was characterized as “law at Westminster as well as Orleans.” WILLIAM JONES, *AN ESSAY ON THE LAW OF BAILMENTS* 29 (Garland 1978) (1781).

⁴⁴ HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey trans., 1925).

⁴⁵ SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM, LIBRI OCTO* (1672).

⁴⁶ GORDLEY, *supra* note 3, at 4.

⁴⁷ The “gist of the action” of debt, that is, the defendant owes the plaintiff and wrongfully withholds it, which derives entirely from German Law, constitutes a clear example of this borrowing. See J. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 16 (1888). Much of the debate around cause and consideration originated in the fact that Blackstone, and several 19th century

they decided those cases.⁴⁸ In turn, all civil law theory has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed in Continental Europe and around the world.⁴⁹

The formation of contracts in civil law jurisdictions is based on an agreement by the parties⁵⁰ which must extend to all essential terms of the contract: consent of the parties; their capacity to contract; the existence of a certain object forming the matter of the contract; and, a lawful cause. However, in some civil law states, such as Argentina⁵¹ or Louisiana,⁵² the civil code expressly states that consent must be given in the form of offers or proposals from one party to the other, which must be accepted by the other; and, it regulates the offer and acceptance in a way that resembles U.S. common law contract theory.⁵³ For example, in Argentina the rules dealing with the offer prescribe that offers may be

common law authors, borrowed directly from civil law explanations of cause to define and explicate the notion of consideration. However, cause and consideration may not be deemed identical, for they are not governed by the same principles and they do not even act similarly.

⁴⁸ See GORDLEY, *supra* note 3, at 5.

⁴⁹ However, unlike common law, civil law developed from the most modern Roman law solutions. See ALTERINI, *supra* note 36, at 15.

⁵⁰ Pitman B. Potter, *Doctrinal Norms and Popular Attitudes Concerning Civil Law Relationships in Taiwan*, 13 UCLA PAC. BASIN L.J. 265, 268 (1995). Contract law borrows from the theories of free will and private autonomy and espouses the primacy of freedom of contract as the basis for creation and enforcement of private obligation. *Id.* at 269.

⁵¹ See Cód. Civ. art. 1144 (Arg.).

⁵² See LA. CIV. CODE ANN. art. 1927 (West 1987) ("A contract is formed by the consent of the parties established through offer and acceptance").

⁵³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 50-70 (1981). Since a contract is formed when the offer is accepted, common law developed a series of important rules dealing with when, how, and by whom an offer may be accepted. These rules indicate that an acceptance is effective for bilateral contracts when the acceptance is sent in accordance with the forms prescribed by the offeror. *Id.* § 50. This shows that "the offeror is the master of his offer," that is, the offeror may prescribe the method by which the offer may be accepted. *Id.* § 30 cmt. a. If not sent by an authorized medium, acceptance is effective when it is actually received by the offeror. *Id.* § 50. If the offeror does not prescribe a form for the acceptance, the acceptance may be given in any reasonable method. *Id.* § 65. For unilateral contracts, acceptance is effective when the offeree has begun to perform. *Id.* § 54.

revoked as long as they have not been accepted,⁵⁴ except when the offeror has waived his right to revoke them, or, he has obliged himself to maintain them for a certain period of time.⁵⁵ Also, for the acceptance of the offer, like in the United States,⁵⁶ Argentine law follows the “mailbox rule,”⁵⁷ whereby the contract is formed once the offeree sends acceptance of the offer.⁵⁸

Another example of convergence takes place in the space field. Space launch agreements share a very high degree of uniformity in their main elements, structure, and organization in both common law and civil law jurisdictions.⁵⁹ The structure, as well as the wording, of these contracts follows the organization, structure, and language of the contracts generally used in common law practice.⁶⁰ In launch services contracts in civil law and common law states, the most important clauses

⁵⁴ See CÓD. CIV. art. 1150 (Arg.).

⁵⁵ *Id.*

⁵⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981).

⁵⁷ However, unlike U.S. law, the offeree may revoke his acceptance before it is received by the offeror even if the acceptance has already been dispatched. In U.S. contract law, if the acceptance is sent before the revocation of the acceptance, the contract is formed and the revocation of the acceptance has no legal effect. *Id.*

⁵⁸ The requirements for contract formation in civil law are greater in quantity and more complex than in common law, such as the object requirements. However, some of these requirements—or at least similar ones based on the same underlying policy—are also present in common law, albeit in a different aspect of and with a different role in contract law, with slightly similar consequences, such as the civil law lesion exception and the common law unconscionability defense. See ARTHUR TAYLOR VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* 529 (1957). The lesion defence may be invoked when a party, exploiting the need or inexperience of the other, obtains disproportionately advantageous terms. See, e.g., CÓDIGO CIVIL DE CHILE [CÓD. CIV.] art. 1888 (Chile).

⁵⁹ See generally Tanja L. Masson-Zwaan, *The Martin Marietta Case or How to Safeguard Private Commercial Space Activities*, in PROCEEDINGS OF THE THIRTY-FIFTH COLLOQUIUM ON THE LAW OF OUTER SPACE 239 (1992) (discussing the impact of the Martin Marietta case on space launch agreements internationally).

⁶⁰ See VALERIE KAYSER, *LAUNCHING SPACE OBJECTS: ISSUES OF LIABILITY AND FUTURE PROSPECTS* 244 (2001).

are the ones embodying the risk management system.⁶¹ This includes “a complex system of reciprocal waivers of liability, indemnification granted by the states, commitments to obtain insurance, limitations of liability, sole contractual remedies in the event of default, exclusion of liability clauses, [and, the inclusion of the best efforts principle, or] *obligations de moyens*, . . . among other [contractual clauses].”⁶² The risk management systems included in these contracts derive from remarkably similar prescriptions in the law of these states,⁶³ with the consequent result that risk management clauses in most of these agreements throughout the civil law and common law realms are virtual carbon copies.⁶⁴

Additionally, the doctrinal analyses on these agreements are also analogous in the civil law and common law worlds.⁶⁵ Civil law authors freely base their analysis and doctrinal comments on U.S. and other common law works⁶⁶ and U.S. authors rely heavily on civil law

⁶¹ Julian Hermida, *Risk Management in Arianespace Space Launch Agreements*, 25 ANNALS AIR & SPACE L. 143, 144, 155 (2000).

⁶² Julian Hermida, *Legal Aspects of Space Risk Management: The allocation of risks and assignment of liability in commercial launch services* 9 (2000) (unpublished LL.M. thesis, McGill University, Montreal) (on file with author).

⁶³ In the United States, see 49 U.S.C. §§ 70101-70121 (2000) (governing commercial space launch activities), formerly the Commercial Space Launch Act of 1984 (CSLA), as amended 1988. In France these regulations are embodied in agreements executed at the national and agency levels. See JULIAN HERMIDA, *LEGAL BASIS FOR A NATIONAL SPACE LEGISLATION* 155 (2004). In Australia, the Australian Act on Space Activities contains a detailed and exhaustive regime on responsibility and liability. See *Space Activities Act*, No. 123, Part 4 Division 1 (1998) (Austl.), available at <http://fraise.univ-brest.fr/~kerrest/IDEI/Australie-spaceact.pdf> (last visited Mar. 25, 2005). In the Russian Federation, the Space Activity law contains the provisions regarding the reallocation of liability arising from space activities. See *Law of the Russian Federation “About Space Activity,”* No. 5663-1 (1993) (Russ.), available at http://www.oosa.unvienna.org/SpaceLaw/national/russian_federation/decre_5663-1_E.html (last visited Mar. 25, 2005).

⁶⁴ Hermida, *supra* note 62, at 9.

⁶⁵ JULIAN HERMIDA, *COMMERCIAL SPACE LAW: INTERNATIONAL, NATIONAL AND CONTRACTUAL ASPECTS* 129 (1997).

⁶⁶ See, e.g., LEOPOLD PEYREFITTE, *DROIT DE L'ESPACE* 102 (1993) (examining launch service contracts); KAYSER, *supra* note 60, at 150; Anibal H. Mutti, *Contrato de transporte especial*, 6 REVISTA DEL INSTITUTO NACIONAL DE

treatises,⁶⁷ especially since judicial decisions in the United States are marginal due to the existence of legislatively⁶⁸ mandated contractual waivers of liability,⁶⁹ which bar the possibility of making claims to the contract counterpart, as well as its contractors and subcontractors⁷⁰ and the special characteristics of the space industry.⁷¹

Another illustration of this phenomenon lies in the nature of the obligations of the space launch carrier. In the United States, the nature of the services rendered by the carrier are given by the best efforts principle,⁷² whereby the launch services provider limits its obligations to make its best efforts instead of warranting the actual placing of the satellite in orbit.⁷³ In other words, by means of the best efforts principle, the parties refrain from promising the accomplishment of their respective obligations, committing themselves only to making their best efforts to achieve success.⁷⁴ This coincides with the *obligations de moyen* nature, which these agreements have in French law,⁷⁵ where the object of the

DERECHO AERONÁUTICO Y ESPACIAL 73 (1986); MIREILLE COUSTON, DROIT SPATIAL ECONOMIQUE 241 (1994)(examining launch service contracts).

⁶⁷ See, e.g., R. BENDER, SPACE TRANSPORT LIABILITY: NATIONAL AND INTERNATIONAL ASPECTS 7 (1995); GEORGE D'ANGELO, AEROSPACE BUSINESS LAW 125 (1994) (examining launch service contracts).

⁶⁸ 49 U.S.C. § 70112.

⁶⁹ S. COMM. ON COM., SCI., AND TRANSP., 100TH CONG., COMMERCIAL SPACE LAUNCH ACT AMENDMENTS OF 1988 14 (Comm. Print 1988).

⁷⁰ Pamela L. Meredith, *Risk Allocation Provisions in Commercial Launch Contracts*, in PROCEEDINGS OF THE THIRTY-FOURTH COLLOQUIUM ON THE LAW OF OUTER SPACE 264, 267 (1991).

⁷¹ See KAYSER, *supra* note 60, at 150.

⁷² HERMIDA, *supra* note 65, at 17.

⁷³ See generally Bernhard Schmidt-Tedd, *Best Efforts Principle and Terms of Contract in Space Business*, in PROCEEDINGS OF THE THIRTY-FIRST COLLOQUIUM ON THE LAW OF OUTER SPACE 330 (1988) (discussing the "best efforts principle" in space launch contracts).

⁷⁴ HERMIDA, *supra* note 65, at 17. This principle is associated with both a reduction and a waiver of liability and is one of the techniques used for the contractual allocation of risks among the participants in a commercial space transaction.

⁷⁵ Under French law, Arianespace launch services agreements have been categorized within the scope of article 1779 of the French Civil Code, which governs industry and services leases, thus stressing the *obligations de moyen* as one of its central features. In French law, the *obligations de moyen* entail a duty

contract is not the carriage of the payload from one site to a certain orbit but, rather, the efforts to place it in orbit.⁷⁶

This process toward convergence does not mean that civil law and common law are one and the same.⁷⁷ On the contrary, as will be analyzed below, there are still important differences virtually in every area of these two systems. However, these differences mainly deal with a different order of priority in sources, i.e., civil law gives predominance “to doctrine (including the codifiers’ reports) over jurisprudence, while the opposite is true in the common law.”⁷⁸ The style of judicial decisions is also different, e.g., “civil law judgments [use] a more formalistic [discourse] than common law [decisions].”⁷⁹ The style followed by scholarly authors also differs in both systems.⁸⁰ According to Tetley, the

to do one’s best as opposed to the *obligations de resultat*, which require a duty to achieve a particular outcome. CIVIL CODE [C. CIV.] art. 1779 (Fr.). It read as follows: “there are three principal species of hiring of labour and industry: (1) the hiring of workmen who engage themselves in the service of any one; (2) that of carriers, as well by land as by water, who are charged with the conveyance of person, or commodities;(3) that of persons who undertake work by estimate or by contract.”

⁷⁶ For this reason, French authors, as well as some Argentine commentators, postulate that the nature of the agreement does not fall within the traditional category of transportation agreements in the strict sense. See Mutti, *supra* note 66, at 73.

⁷⁷ Merryman, *supra* note 11, at 357, 359. For Merryman, there is a process of convergence and divergence taking place at the same time. Merryman sees the root of divergence in the redistribution of local power and major separatist movements in the Western world.

⁷⁸ Tetley, *supra* note 24, at 701. Tetley explains “this difference in priority through the role of the legislator in both traditions. French civil law adopts Montesquieu’s theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law,” *id.*

⁷⁹ *Id.* at 702. “Civil law decisions are indeed shorter than common law decisions, and are separated into two parts—the *motifs* (reasons) and the *dispositif* (order). This is because civil law judges are especially trained in special schools created for the purpose, while common law judges are appointed from amongst practising lawyers, without special training,” *id.*

⁸⁰ See Gwenaëlle Postic, *Comparaison of the sources of Law in the French Civil law system and in the Australian Common law system* 19, Actualite Juridique

common law author “focuses on fact patterns . . . [and] analyzes cases presenting similar but not identical facts, extracting from the specific rules, and then, through deduction, determines the often very narrow scope of each rule, and sometimes proposes new rules to cover facts that have not yet presented themselves.”⁸¹ Tetley states that the civil law author “focuses rather on legal principles . . . [and] traces their history, identifies their function, determines their domain of application, and explains their effects in terms of rights and obligations . . . [to deduce] general and exceptional effects.”⁸² The differences also encompass diverse interpretation methods.⁸³ As Tetley points out, “[i]n civil law jurisdictions, the first step in interpreting an ambiguous law . . . is to discover the intention of the legislator by examining the legislation as a whole,⁸⁴ including the [preparatory works], as well as the provisions more immediately surrounding the obscure text.”⁸⁵ Tetley notes that “[i]n common law jurisdictions . . . statutes are to be objectively constructed according to certain rules⁸⁶ standing by themselves” against a case law background.”⁸⁷

(May 28, 2003), at <http://www.droit-ntic.com/pdf/cl20030520.pdf> (last accessed November 7, 2004).

⁸¹ Tetley, *supra* note 24, at 701

⁸² *Id.* at 702.

⁸³ See F. H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 45 (Greenwood Press 1977) (1953).

⁸⁴ See Shael Herman, *The Fate and Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 413 (1996).

⁸⁵ Tetley, *supra* note 24, at 704.

⁸⁶ KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 265-68 (3d rev. ed. 1998).

⁸⁷ Tetley, *supra* note 24, at 704. However, when analyzed in light of the other traditions, such as Talmudic, Islamic, Hindu or Asian, it is easy to observe that the similarities between civil law and common law outweigh their differences. For example, Talmudic and Islamic traditions are rooted in the word of God as revealed in sacred books. See GLENN, *supra* note 14, at 87. Hindu law is wrapped in Hindu philosophy and theology. GLENN, *supra* note 14, at 160. The differences between common law and civil law are, as seen above, mainly in style, terminology, interpretation, conception and emphasis on certain elements over others rather than on their structure or fundamental philosophical conceptions. The comparisons between civil law and common law, on the one hand, and the rest of the legal traditions, on the other, exceed the scope of this article. Reference to some of these differences have been included here only as

Both civil law and modern U.S. common law share similar fundamental social objectives,⁸⁸ which include the protection and encouragement of individual and personal rights, and are both enrolled in a liberal philosophy and conception of the world.⁸⁹ Thus, each of their doctrinal structures is based on similar legal concepts. They both divide private law into large legal fields, such as property, tort, and contracts, among others, and analyze these fields in a similar way. Their organization of the law, and its larger concepts, are also alike even if particular rules are not.⁹⁰

III. Criminal Law in Civil Law Jurisdictions

Unlike common law, where, despite some substantive differences in various jurisdictions, there is a somewhat uniform understanding of offenses, in civil law jurisdictions, there are two competing schools that dispute the monopoly on the interpretation of criminal offenses: the Causalist school and the Goal-oriented school.⁹¹ The Causalist school, which traces its origins to the works of Franz von Liszt, Gustav Radbruch and Ernst Beling, is centered on the disvalue of the caused result.⁹² The causal explanation of crime departs from an ideal or idealized concept of conduct. It conceives the action as a

mere illustrations and are not part of the thesis sustained in this article, that is, that civil law and common law are gradually moving toward convergence, where the theory of offense in the criminal realm is one example of this phenomenon.

⁸⁸ See Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons From the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 200-201 (2000).

⁸⁹ See Ernst Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 431, 448 (1950).

⁹⁰ See GORDLEY, *supra* note 3, at 4.

⁹¹ In a very loose sense, their debates resemble those of common law's retributivism vs. utilitarianism, but the main difference is that both Causalist and Goal-oriented schools focus primarily on the theory of offense rather on the theory of punishment. In the modern civil law world, the debate has a clear victor in both academic and judicial circles: the Goal-oriented school. In common law, both retributivists and utilitarians deeply influence different aspects of criminal law.

⁹² J. R. du Plessis, *Hans Welzel's Final-Conduct Doctrine—An Importation from Germany We Could Well Do Without*, 101 S. AFR. L.J. 301, 309 (1984).

voluntary physical movement that causes a result that is captured by the definitional terms and it relegates the analysis of its goal to the analysis of blameworthiness, i.e., both *dolus* (will) and *culpa* (negligence) are treated as part of the reproach.⁹³ It has been widely criticized because it ignores and negates the constitutive function of the will as a factor for directing the action, and because it understands the act as a mere causal process triggered by any voluntary act.⁹⁴ It fails to recognize that every act is a work where human will directs its external causal happening.

The Goal-oriented, also known as the Final Conduct, school departs from Hans Welzel's work.⁹⁵ It is premised on a different conception of conduct, which is considered a goal-oriented and voluntary act. Its analysis is intrinsically intertwined with both its external manifestation and the actor's goals. While the emphasis of the Causalist school is on the disvalue of the result, the Goal-oriented school's stress is on the disvalue of the action.⁹⁶ For Welzel, "crime should be viewed teleologically, in other words, in terms of [its] purpose or [goal]."⁹⁷ A crime is an action that falls within the definitional terms of the offense and is wrongful, unjustified, and blameworthy, and may be attributed to the actor for not having conformed to the norm.⁹⁸

In practice, an action analyzed in light of the Causalist and the Goal-oriented schools will have different consequences. The Causalist school, for example, understands attempted crimes as a mere causal process that does not produce a result. The Goal-oriented school analyzes it as an action that aims at a desired result where the will still plays a primordial role even if the intended result does not take place.⁹⁹

Both schools have in common the fact that they attempt to explain all crime phenomena in an abstract and comprehensive fashion. Civil law jurisprudence places a considerably higher importance on general theories and abstract principles than its common law

⁹³ See HANS WELZEL, *EL NUEVO SISTEMA DEL DERECHO PENAL: UNA INTRODUCCION A LA DOCTRINA DE LA ACCION FINALISTA* 51 (Montevideo and Buenos Aires: B de F 2001).

⁹⁴ See *Id.*

⁹⁵ See du Plessis, *supra* note 92, at 309.

⁹⁶ See ENRIQUE BACIGALUPO, *DERECHO PENAL: PARTE GENERAL* 80 (2d ed. 1999).

⁹⁷ Du Plessis, *supra* note 92, at 310.

⁹⁸ See WELZEL, *supra* note 93, at 97.

⁹⁹ See *id.* at 52.

counterpart.¹⁰⁰ This difference stems from the origins of both systems. Civil law has emerged as “reason’s instrument,” based on the Greek tradition of “rational enquiry,” the Aristotelian concept of the “excluded middle,” deductive thought, and “constructions [with a great] normative and explanatory force.”¹⁰¹ It is, therefore, “highly systematized and structured and relies on declarations of broad, general principles, often ignoring the details.”¹⁰² The theories of offense in civil law jurisdictions reflect the origin and methodology of civil law. Since the goal-oriented theory permits a better understanding of the offense, and has increasingly been adopted in the civil law world in Germany, Italy, Spain, Latin America,¹⁰³ the analysis of the theory of offense in civil law is done through the lens of this theory.

Action

The Goal-oriented theory of offense departs from a real and teleological concept of act, which is conceived as a voluntary and end-oriented doing. It is centered on the notion that an action may only be understood as far as the agent’s goal is perceived.¹⁰⁴ Derived from Welzel’s conception, the notion of act is the backbone of the theory of offense. It constitutes a reaction to the causal mode of understanding that prevailed in Continental criminal law at the beginning of the last century.¹⁰⁵ It constitutes a premise upon which the whole theory of offense has been built. Hence, if there is no act, there may not be an offense. For Welzel, human action is the exercise of a goal-oriented activity, which is based on the fact that the human being may foresee,

¹⁰⁰ Arthur Taylor von Mehren, *LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW* 3 (1988); Ponoroff, *supra* note 88, at 200.

¹⁰¹ GLENN, *supra* note 14, at 132-135.

¹⁰² Tetley, *supra* note 24, at 683.

¹⁰³ See Stanislaw Pomorski, *Reflections on the First Criminal Code of Post-Communist Russia*, 46 AM. J. COMP. L. 375 at 383 (1998); BACIGALUPO, *supra* note 96, at 49.

¹⁰⁴ See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 438 (1978).

¹⁰⁵ “Hans Welzel and his followers advanced an even more radical thesis: that objective harm to legally protected interests is only of marginal importance. It is rather the negative societal quality of the conduct itself, as colored by the wrongful state of mind, that makes conduct antisocial.” Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 B.Y.U. L. REV. 51, 71-72.

within certain limits, the possible consequences of his conducts and direct his activities towards a certain goal.¹⁰⁶ Thanks to his causal knowledge, he may orient the external causes in accordance with his objectives and dominate these causes completely. Thus, a goal-oriented activity is conceived as an activity consciously aimed at the fulfillment of objectives according to a plan.¹⁰⁷ As these objectives are based on the capacity of the will to foresee – again, within certain limits– the consequences of its intervention in the causal course and on its capacity to direct and redirect this course, according to a plan; the nucleus of the action is the will. It constitutes the factor that configures and directs the causal course.¹⁰⁸

In civil law jurisdictions, for analytical purposes, the act is divided into internal and external aspects.¹⁰⁹ The internal aspect of the act consists of the goal and the selection of the means to achieve the goal. The external aspect of the act is the actual materialization or exteriorization of the act.¹¹⁰ For example, in a murder, the defendant first represents her goal, i.e., the death of a person, and the means to achieve the death, including all concomitant results.¹¹¹ This ontological conception of the act derives from an Aristotelian view of conduct, for whom, every activity has an end or goal.¹¹² Criminal law in civil law jurisdictions departs its analysis of the offense from this ontological conception of action.

Therefore, absence of act– and thus the end of the need to continue the inquiry about whether there is a crime or not– involves those situations where there is no voluntary human act. These situations include irresistible physical force,¹¹³ whether arising from a third person or from a natural force, or from an involuntary state, which includes the state of unconsciousness and the incapacity to direct one's actions, such

¹⁰⁶ See WELZEL, *supra* note 93, at 51.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See BACIGALUPO, *supra* note 96, at 245.

¹¹⁰ See E. R. ZAFFARONI, *MANUAL DE DERECHO PENAL: PARTE GENERAL* 339 (2003).

¹¹¹ See *Id.* at 339.

¹¹² ARISTOTLE, *THE NICOMACHEAN ETHICS* 153 (R.W. Browne trans., 1853) (Book VI, Chapter II of *The Nicomachean Ethics*).

¹¹³ See, e.g., CODE PÉNAL [C. PÉN] art. 122-2 (Fr.).

as in the case of a neurological defect that impedes the control of one's movements.¹¹⁴

In common law jurisdictions, the concept of action has been reduced to a mere movement generated by the will, which "minimizes the importance of the desires... of the actor."¹¹⁵ This notion reminisces many of the elements of the causal theory of acting which Welzel and his followers reacted against.¹¹⁶

Definitional terms of the offense

The definitional terms are a legal and logically necessary device, of a predominantly descriptive nature, whose main function is to individualize the actions that are criminally relevant.¹¹⁷ The inquiry of the existence of a crime consists of analyzing whether a particular conduct falls into the criminal definition of the offense.

Contingent on the goal of the conduct, there are willful and negligent definitions. Depending on the way in which the prohibited conduct is individualized, there are active and omissive definitions. These categories can, of course, be combined.¹¹⁸ Basically, the active definitional terms contain the description of the prohibited act, such as the prohibition to kill another human being.¹¹⁹ Its omissive counterpart describes the due act, and thus all other acts are prohibited.¹²⁰

Willful definitional terms

The willful and active definitional terms have a dual objective and subjective nature, where the definitional terms individualize conducts according to the circumstances which are both in the external and internal, psyches, of the individual. While the willful definitional terms always imply a result—objective aspect of the definitional terms—it is characterized by the will of this result, i.e. the subjective willful aspect.¹²¹ Thus, for example, the definitional terms for simple homicide,

¹¹⁴ See, e.g., CÓDIGAL PENAL [CÓD. PEN.] art. 34 (Arg.).

¹¹⁵ FLETCHER, *supra* note 104, at 440.

¹¹⁶ See WELZEL, *supra* note 93, at 51.

¹¹⁷ See ZAFFARONI, *supra* note 110, at 355.

¹¹⁸ See BACIGALUPO, *supra* note 96, at 314.

¹¹⁹ See, e.g., KRIMINĀLLIKUMS [KRIM.] § 116 (Lat.) (Latvian Criminal Code).

¹²⁰ See, e.g., CÓDIGO PENAL [BOL. C.P.] art. 13 (Bol.); CÓD. PEN. art. 108 (Arg.).

¹²¹ See ZAFFARONI, *supra* note 110, at 355.

theft and sexual assault state that whoever causes the death of another human being,¹²² takes away another's property,¹²³ or engages in sexual conduct without his or her partner's consent,¹²⁴ is, respectively, criminally liable.

The objective aspect of the willful definitional terms includes the result, the descriptive elements, the normative elements, the agents or actors- both active and passive- and a causal connection between the act and the result.¹²⁵ The result of the act implies a physical mutation, or change in the outside world, as there is no act without a result. Similarly, as in common law, the result is the negation or endangering of a legally protected interest, such as life,¹²⁶ national defense,¹²⁷ or consented adult relations.¹²⁸

Descriptive normative elements in the definitional terms refer to other circumstances included in the definitional terms that resemble the common law concept of attendant circumstances. Examples of descriptive normative elements include age in statutory rape¹²⁹ or the concept of eligible voter in electoral crimes.¹³⁰ The causal connection between the act and the result implies an analysis that is similar to the "but for" test used in common law jurisdictions.¹³¹

The subjective aspect comprises the *dolus* and other subjective elements.¹³² The *dolus* is the central element, and it connotes the will to realize the subjective definitional terms.¹³³ It also necessarily

¹²² C. PÉN art. 221-1 (Fr.).

¹²³ KRIM. § 175 (Lat.).

¹²⁴ CÓDIGAL PENAL [C.P.] art.181 (Spain).

¹²⁵ See BACIGALUPO, *supra* note 96, at 244.

¹²⁶ CODICE PENALE [C.P.] art. 575 (Italy).

¹²⁷ CHINESE CRIMINAL CODE [C.C.C] ch. VII (P.R.C.) (People's Republic of China).

¹²⁸ CÓD. PEN. art. 116 (Arg.).

¹²⁹ C.C.C art. 236 (P.R.C.).

¹³⁰ § 107b STRAFGESTZBUCH [StGB] (F.R.G.) (Germany).

¹³¹ Dennis Klimchuk, *Causation, Thin Skulls and Equality*, 11 CAN. J. L. & JURIS. 115, 118 (1998).

¹³² See BACIGALUPO, *supra* note 96, at 314.

¹³³ For a historical analysis of the notion of *dolus* in civil law criminal theory, see L.A. Zaibert, *Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis*, 1 BUFF. CRIM. L. R. 459 (1997).

presupposes knowledge.¹³⁴ Thus, its structure consists of two aspects: cognitive and volitional.¹³⁵ The cognitive aspect requires the effective knowledge, and a somewhat present knowledge, of the objective elements of the definitional terms, i.e., the descriptive and normative elements, the result and causal connection.¹³⁶ In turn, the volitional aspect includes the direct *dolus*, i.e., when the defendant directly wants the result, first degree, or when the result is the necessary consequence of the chosen means,¹³⁷ second degree, such as when a defendant plants a bomb in an airplane to kill one passenger and ends up killing all passengers and crew,¹³⁸ and the eventual *dolus* or *dolus eventualis* - when the defendant imagines the possibility of a concomitant result and includes it within the *dolus* of the chosen act.¹³⁹

The direct *dolus* of first degree equates to the intentional or purposeful *mens rea* of common law.¹⁴⁰ Second degree direct *dolus* is equivalent to the *mens rea* of knowledge and the eventual *dolus* counterpart in common law is recklessness.¹⁴¹ So, despite a difference in terminology and some minor differences in the application and views, the general principles and conception of crimes requiring a willful state of mind are essentially the same in both common law and civil law jurisdictions.¹⁴²

Absence of *dolus*

In those cases where there is no *dolus*, there are no willful definitional terms; therefore, unless the crime is susceptible to being committed negligently, there is no need for further inquiry and thus no

¹³⁴ Felix A. Cifredo Cancel, *La Intencion y los Otros Elementos Subjetivos del Injusto Penal en los Sistemas Anglosajon y Civilista: Hacia Una Teoria Unitaria*, 63 REV. JUR. U.P.R. 39, 48 (1994).

¹³⁵ See, e.g., 33 P.R. LAWS ANN. § 3062 (2001).

¹³⁶ BACIGALUPO, *supra* note 96, at 316.

¹³⁷ ZAFFARONI, *supra* note 110, at 415.

¹³⁸ *Id.*

¹³⁹ See Monica Feria Tinta, *Commanders on Trial: The Blaskic Case and the Doctrine of Command Responsibility Under International Law*, 47 NETH. INT'L L. REV. 293, 304-05 (2000).

¹⁴⁰ HENDLER, *supra* note 7, at 142.

¹⁴¹ Cifredo Cancel, *supra* note 134, at 69.

¹⁴² See HENDLER, *supra* note 7, at 142.

crime.¹⁴³ The goal-oriented theory of offense is also concerned with the case where behavior does not coincide with any or all of the elements of the willful definitional terms.¹⁴⁴ A behavior is not considered to fall within the willful definitional terms if an objective or subjective aspect is missing. For example, there is absence of objective aspect of the definitional term if there is no wrongful result,¹⁴⁵ such as in the case of contraband if a person does not actually exit the country or does not even go through customs with prohibited goods.¹⁴⁶ In this case, there may be an attempted crime of contraband, but not contraband.

Another situation is when there is no causal link between the conduct and the result, i.e., when, using common law terms, the “but for” test¹⁴⁷ is not satisfied. Other situations include the absence of attendant circumstances, when, for example, speeding does not occur in a public street but in a closed course in a private estate,¹⁴⁸ or where the actor or the victim does not possess the requirements set forth in the definitional terms, such as in a case of bribery where the person who receives money is not a public officer or a person with special public service obligations.¹⁴⁹

The absence of subjective aspects gives rise to an error or mistake, namely, there is dissonance between the objective facts¹⁵⁰ and the actor’s subjective perception of the facts.¹⁵¹ The mistake may be over the descriptive elements of the definitional terms. In the crime of sexual assault, there is a mistake if the defendant thinks he is raping a

¹⁴³ See generally Carlos Chinchilla Sandoval, *El Error de Tipo*, 10 CIENCIAS PENALES: REVISTA ASOCIACION DE CIENCIAS PENALES DE COSTA RICA, 51 (1995), available at <http://www.cienciaspenales.org/revista10f.htm> (last visited Mar. 25, 2005); Alonzo Salazar, *Error de tipo y error de prohibicion en la dogmatica hispoamericana*, 20 CIENCIAS PENALES: REVISTA ASOCIACION DE CIENCIAS PENALES DE COSTA RICA 56 (2002), available at <http://www.cienciaspenales.org/revista10f.htm> (last accessed October 22, 2004).

¹⁴⁴ BACIGALUPO, *supra* note 96, at 325.

¹⁴⁵ See, e.g., KRIM. § 190 (Lat.) (smuggling provision).

¹⁴⁶ See, e.g., C.C.C § 153 (P.R.C.) (smuggling provision).

¹⁴⁷ 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 35 (3d ed. 2000).

¹⁴⁸ See, e.g., KRIM. § 260 (Lat.) (traffic safety provision).

¹⁴⁹ § 332 StGB (F.R.G.).

¹⁵⁰ See, e.g., C.P. arts.14.1, 14.2 (Spain).

¹⁵¹ FLETCHER, *supra* note 104, at 683.

doll when in fact he is having un-consensual sex with a woman.¹⁵² A mistake may also arise from the normative elements of the definitional terms. This would be the case, for example, when a person who believes he is a juror, but is not, discusses a criminal case he believes he is trying with another person, when in fact he has been called only as a witness and no such prohibition exists.¹⁵³ The mistake may also be about the causal links. The common law doctrine of transferred intent¹⁵⁴ has also been analyzed in civil law under the Latin name of *aberratio ictus*.¹⁵⁵ The majority of authors that subscribe to the goal-oriented theory tend to dismiss this doctrine as irrelevant, and thus, the missed target will give rise to any inchoate crime and the unintended target may originate a negligent crime, if such a crime may be committed negligently.¹⁵⁶

Negligent definitional terms

The “negligent” definitional terms individualize the act because of the way the result is achieved. The conduct is not penalized on account of its targeted result but on account of the causal chain selected to achieve the proposed result.¹⁵⁷ This way of achieving a result violates a general duty of care.¹⁵⁸ However, the degree of care that is required for each crime varies significantly according to the circumstances.¹⁵⁹ Thus, for example, the defendant’s targeted result may be a legitimate one, such as arriving early at work, but the conduct to achieve that result, speeding, may violate the required duty of care.¹⁶⁰

¹⁵² See, e.g., CÓDIGO PENAL DE PUERTO RICO [P.R.] § 99 (P.R.) (rape provision).

¹⁵³ See KRIM. § 295 (Lat.) (interference in a trial of a matter).

¹⁵⁴ See 21 AM. JUR. 2D *Criminal Law* § 135 (1998).

¹⁵⁵ Damásio de Jesus, *Aberratio Ictus e Imputação Objetiva*, COMPLEXO JURÍDICO DAMÁSIO DE JESUS, (March 2002), at www.damasio.com.br/novo/html/frame_artigos.htm (last accessed on October 24, 2004).

¹⁵⁶ See SANTIAGO MIR PUIG, DERECHO PENAL PARTE GENERAL 101 (6th ed. 2002).

¹⁵⁷ BACIGALUPO, *supra* note 96, at 344.

¹⁵⁸ ZAFFARONI, *supra* note 110, at 425.

¹⁵⁹ *Id.*

¹⁶⁰ See C.P. art.382 (Spain) (traffic provision).

Traditionally, some civil law jurisdictions had created a negligent offense, called *crimen culpa*,¹⁶¹ which was an omnicomprehensive crime that caught virtually all criminally negligent conduct, or directly admitted that any willful crime could be committed negligently.¹⁶² Now, the majority of criminal codes in civil law countries have resorted to the creation of some specific crimes which may only be committed negligently.¹⁶³

There are both objective and subjective aspects of the negligent definitional terms. The objective aspect includes: the violation of the duty of care, the causal connection, the result, and the determinant relation between the violation of the duty of care and the result.¹⁶⁴ The test used is, again, the “but for” test,¹⁶⁵ where the result would not have occurred but for the violation of the duty of care.¹⁶⁶ The subjective aspect includes the will to carry out the conduct in the selected manner and the foreseeability that the conduct will cause the result.¹⁶⁷ This permits two degrees of knowledge: conscious negligent,¹⁶⁸ where defendant foresaw the result and rejected that possibility, such as when defendant while driving a car at high speed considered that his speeding may cause the death of a pedestrian, but he trusted that he would be able to prevent the death by dodging the pedestrian or stopping the car¹⁶⁹; and, unconscious negligent,¹⁷⁰ where defendant could have foreseen the result but did not

¹⁶¹ See STS, July 16, 2002 (R.J., No. 1330) (Spain).

¹⁶² CÓDIGO PENAL PARA EL DISTRITO FEDERAL [C.P.D.F.] art. 60 (Mex.) (Mexico) (repealed January 10, 1994).

¹⁶³ See Julio F. Mazuelos Coello, *El delito imprudente en el Código penal peruano. La infracción del deber de cuidado como creación de un riesgo jurídicamente desaprobado y la previsibilidad individual*, DERECHO PENAL: ASPECTOS FUNDAMENTALES DE LA PARTE GENERAL DEL CÓDIGO PENAL PERUANO 147 (2003) (examining negligence in the Peruvian Penal Code), available at <http://www.unifr.ch/derechopenal/anuario/03/Mazuelos.pdf> (last visited Mar. 25, 2005). See also, e.g., KRIM. §§ 10, 123 (Lat.); CÓDIGAL PENAL [PORT. C.P.] art. 15 (Port.) (Portugal); C.P. art. 43 (Italy).

¹⁶⁴ ZAFFARONI, *supra* note 110, at 428.

¹⁶⁵ 1 WITKIN AND EPSTEIN, *supra* note 147, at § 35.

¹⁶⁶ ZAFFARONI, *supra* note 110, at 426.

¹⁶⁷ *Id.* at 428.

¹⁶⁸ BACIGALUPO, *supra* note 96, at 344.

¹⁶⁹ See KRIM. § 260(2) (Lat.) (traffic provision).

¹⁷⁰ BACIGALUPO, *supra* note 96, at 344.

do it.¹⁷¹ Conscious negligence equates to a reckless state of mind whereas unconscious negligence compares to negligence in common law.¹⁷²

Absence of negligence

As in the willful definitional terms, the goal-oriented theory also admits situations where there is absence of negligence.¹⁷³ First and foremost, there is no negligence if there is no violation of a duty of care, such as in the case where an aircraft pilot abides by all air navigation rules and an accident still takes place.¹⁷⁴ Like in the willful definitional terms, lack of causal connection entails absence of negligence. Take, for instance, an aircraft pilot who neglects to switch off the automatic pilot when required, and the aircraft crashes to the land. If the plane, in fact, crashes because of a bomb explosion in the cabin, there is no negligence on the part of the pilot.¹⁷⁵ Absence of negligence also occurs if there is no wrongful result, such as when a car driver runs over a corpse believing that it was a human being.¹⁷⁶ The same applies if there is no determinant relation between the violation of the duty of care and the result, such as if a negligent vessel captain runs over a swimmer who is suicidal.¹⁷⁷ Here, even if the captain was negligent, there is no determinant relation, as the wrongful suicide would have taken place even if the captain had not been negligent.

Additionally, there is an absence of negligent definitional terms if there is no subjective aspect of negligence. This situation includes lack of will to carry out the conduct in the selected manner. This would be the case where an aircraft pilot lands her aircraft negligently due to deliberately wrongful instructions given by terrorists who usurped a

¹⁷¹ ZAFFARONI, *supra* note 110, at 427.

¹⁷² Civil law jurisdictions do not differentiate among degrees of negligence, as some common law states do.

¹⁷³ SANDOVAL, *supra* note 143.

¹⁷⁴ MARIO O. FOLCHI, *LOS DELITOS AERONAUTICOS* 212 (1970).

¹⁷⁵ See, e.g., *CÓDIGO AERONÁUTICO* [CÓD. AERO.] art. 218 (Arg.) (Argentina).

¹⁷⁶ Cuban criminal law permits the conviction of the offender in the case of these so-called impossible crimes if the offender is considered to be dangerous. *CÓDIGO PENAL* [CUBA C.P.] art. 14, Ley No. 62 de 29-12-1987 (Asamblea Nacional del Poder Popular, Gaceta Oficial Especial No. 3 de 30-12-1987, pág. 51) (1987) (Cuba). This is a characteristic of Soviet law rather than civil law.

¹⁷⁷ ZAFFARONI, *supra* note 110, at 431.

control tower, and the pilot believes she is making the right maneuvers to land.¹⁷⁸ The other situation involves the unforeseeability of the possibility that the conduct will cause the result. This would take place, for example, if a person turned his car on and a bomb planted by another person exploded, killing the driver and the passengers.¹⁷⁹

Omissions

Civil law countries distinguish two types of omissions: proper and improper.¹⁸⁰ The proper omission is characterized by the fact that any person can be held criminally liable for conduct that deviates from the one stated in the definitional terms.¹⁸¹ In this respect, action and omission are merely two different legislative techniques to prohibit conduct.¹⁸² While the active definitional terms single out the prohibited conduct, its omissive counterpart defines the due conduct, and thus all other acts remain forbidden.¹⁸³ The Argentine Criminal Code, for example, holds criminally liable whoever fails to help a minor that is lost, or any individual that is injured or threatened by an imminent danger, when assistance can be safely rendered.¹⁸⁴ Here, the due conduct is the obligation to help the lost minor or the injured individual respectively, and any other conduct, such as walking by or driving on, or even just watching the minor or injured person without doing anything, are forbidden behaviors.

The other type of omission is the improper omission. In this case, only those individuals who have special characteristics may be held criminally liable.¹⁸⁵ The main requisite is that the defendant be in a

¹⁷⁸ See LEGISLACION AERONAUTICA Y ESPACIAL 23 (1989) (Section 78 of the Paraguayan Aeronautical Code).

¹⁷⁹ See FRANCISCO CASTILLO GONZALEZ, EL CONCURSO DE DELITOS EN EL DERECHO PENAL COSTARRICENSE 40 (1981).

¹⁸⁰ Raúl Sanjuán López, *La comisión por omisión: el artículo 11 del Código Penal*, 52 BOLETÍN JURÍDICO DERECHO.COM (2002), at <http://www.derecho.com/boletin/articulos/articulo0166.htm> (last accessed October 24, 2004).

¹⁸¹ BOL. C.P. art. 13 (Bol.).

¹⁸² ZAFFARONI, *supra* note 110, at 449.

¹⁸³ *Id.*

¹⁸⁴ CÓD. PEN. art. 108 (Arg.).

¹⁸⁵ See, e.g., § 13 Nr. 1 StGB (F.R.G.). The German Penal Code states that “whoever fails to prevent a harm which is part of the constitutive elements of a

guarantor position that obliges him to protect, or repair, the legal interest protected by the norm.¹⁸⁶ Like in common law,¹⁸⁷ this position emanates from the law¹⁸⁸: the obligation to feed one's children; a contract,¹⁸⁹ such as the case of a nurse hired to take care of a patient; or, from a previous conduct,¹⁹⁰ such as when someone urges another to swim across a river promising that he will follow her in a boat in case she needs help.¹⁹¹ In these cases, there are no express omissive definitional terms, but the court must read into the active definitional terms the due conduct.¹⁹² Thus, for example, if a patient dies because his nurse reads a book instead of watching and taking care of him, the nurse commits murder. The court is obliged to interpret that the due conduct in such a case is to take care of the patient, and any other act, such as reading a book, is considered prohibited.¹⁹³

Absence of omission

In the proper omission, there is absence of omission if the situation described in the definitional terms is not present, such as the absence of danger in the obligation to render assistance to people that are threatened of an imminent danger.¹⁹⁴ There is also absence of omission if there is an impossibility to perform the due conduct. This is the case if the person in question may endanger her own life if she provides help,¹⁹⁵

crime may be punished under this Code only if he was under a legal duty to prevent the harm, and if his failure to act was equivalent to an affirmative act for purposes of establishing the statutorily defined constituent elements of the crime."

¹⁸⁶ See PUIG, *supra* note 156, at 181.

¹⁸⁷ See generally Arthur Leavens, *A Causation Approach To Criminal Omissions*, 76 CALIF. L. REV. 547 (1988) (examining history of causation through omission in common law).

¹⁸⁸ See C.P. art. 11(a) (Spain); § 13 StGB (F.R.G.); CODE PÉNAL [C. PÉN] art. 223-6 (Fr.); BOL. C.P. art. 178 (Bol.).

¹⁸⁹ See C.P. art. 11(a) (Spain).

¹⁹⁰ See *id.* art. 11(b).

¹⁹¹ ZAFFARONI, *supra* note 110, at 450.

¹⁹² See, e.g., BOL. C.P. art. 251 (Bol.).

¹⁹³ Like its active counterpart, the omissive definitional terms may be either willful or negligent.

¹⁹⁴ See López, *supra* note 180.

¹⁹⁵ See C.P.D.F. art. 15(V) (Mex.).

or when there is no causal link, also referred to as avoidance link, i.e., when the wrongful result would have taken place even if the defendant had carried out the due conduct. For example, when a person fails to help a lost minor return to her parent's custody, but it may be proved that the minor would not have accepted help in any case.¹⁹⁶

There is absence of omissive definitional terms in the proper omission type if the defendant is not the guarantor, i.e., it is not legally obliged to act.¹⁹⁷ There may also be absence of omission due to the non-presence of any of the subjective elements of the omission, such as mistake over the person in the proper omission. An example of this is when a person ignores a child that needs feeding, which is her own child or, when there is a mistake on the causal link or the possibility of providing assistance.¹⁹⁸ This would take place if a person is sinking in a pond, and a passerby who does not know how to swim does not think he will be able to provide assistance without himself sinking, but it turns out that the pond was shallow and the passerby never would have sunk.

Wrongfulness

The second analytical component of the criminal action is its wrongfulness.¹⁹⁹ This implies a contradiction of the act with the entire juridical order. The action that falls within the definitional terms of the crime is considered to be anti-normative; but, it is not anti-juridical if it is based on a permissive precept, justification, which may emanate from any part of the juridical order.²⁰⁰ In other words, these conducts have some of the characteristics of the crime but their anti-juridical aspect is missing.²⁰¹ Only when the action that falls within the definitional terms is not excused by any justification is it also considered anti-juridical.

¹⁹⁶ See CÓD. PEN. art. 108 (Arg.).

¹⁹⁷ See C.P.D.F. art. 16 (Mex.).

¹⁹⁸ See ZAFFARONI, *supra* note 110, at 455-57.

¹⁹⁹ WELZEL, *supra* note 93, at 97.

²⁰⁰ ZAFFARONI, *supra* note 110, at 451.

²⁰¹ See generally Eduardo Calderon Ramos, *Estado de Necesidad Como Excluyente de Responsabilidad* (1977) (Unpublished Doctoral Thesis, Universidad de El Salvador), at <http://www.csj.gob.sv/BVirtual.nsf/0/5c8f494e2fac9ae806256b3e00747bdd?OpenDocument> (last accessed October 24, 2004) (discussing the necessity defense).

In civil law, the causes of justifications do not derive only from criminal law, but they may emanate from any aspect of the whole juridical order.²⁰² These causes of justification depend on each jurisdiction. In most civil law jurisdictions, generally, these include self-defense, which may be used for the defense of life, bodily integrity, and both personal and real property;²⁰³ necessity;²⁰⁴ and, legitimate exercise of a right.²⁰⁵

In general, like in common law,²⁰⁶ self-defense always constitutes a justification.²⁰⁷ Certain requirements need to be met for there to be self-defense.²⁰⁸ Generally, these are: the existence of an illegitimate conduct, lack of provocation on the part of the defender, and the use of rational or proportional means to repel the conduct.²⁰⁹ Additionally, since the goal of this justification cause is the defense, it presupposes knowledge of the aggression.²¹⁰ The illegitimate conduct implies a wrongful act on the part of the aggressor.²¹¹ In Spain, the Penal Code differentiates the types of goods that are being attacked to determine the illegitimacy of the attack. In the case of personal goods, an illegitimate attack is only a crime that endangers those goods or a crime that may imply the imminent loss of those goods. In the case of

²⁰² See, e.g., C. PÉN art. 122-4 (Fr.) ('A person is not criminally liable who performs an act prescribed or authorized by legislative or regulatory provisions. A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful') (translated from original French).

²⁰³ See, e.g., § 32 StGB (F.R.G.); C.P. art. 20(4) (Spain); CÓD. PEN. art. 34 (Arg.); C. PÉN art. 122-5 (Fr.).

²⁰⁴ See, e.g., § 34 StGB (F.R.G.); BOL. C.P. art. 11(2) (Bol.); C. PÉN art. 122-7 (Fr.).

²⁰⁵ See, e.g., C.P. art. 20(4) (Spain); CÓD. PEN. art. 34 (Arg.); BOL. C.P. art. 11(3) (Bol.).

²⁰⁶ See generally 21 AM. JUR. 2D *Criminal Law* § 158 (1998) (stating the general requirements for the necessity defense).

²⁰⁷ See George. P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 976 (1985).

²⁰⁸ See, e.g., KRIM. § 29 (Lat.) (listing requirements for self-defense to apply, such as use of force proportionate to the force one is repelling).

²⁰⁹ See, e.g., C.P. art. 20(4) (Spain).

²¹⁰ BACIGALUPO, *supra* note 96, at 359.

²¹¹ See, e.g., CODIGO PENAL COLOMBIANO [COD. PEN. COLOM.] art. 32(6) (Colom.).

one's own dwelling house, the mere illegitimate entrance constitutes an attack, which may be repelled.²¹² The lack of provocation implies that the defender must not have initiated the aggression. If he did, and defends his life by killing the aggressor, his action will not be justified, but may result in a diminution of his blameworthiness.²¹³ The means by which to repel an illegitimate aggression are not generally defined in the codes but are subject to the courts' interpretation. The codes generally limit themselves to enunciate general rules. For example, the French Penal Code determines that the relationship between the means used for the defense and the seriousness of the attack must be proportional.²¹⁴

The defense of third parties is also generally considered another justification. It has the same elements of the self-defense.²¹⁵ However, if the defended has initiated the illegitimate attack, the third party may defend him, provided the third party has not participated in the attack, even if that third party is aware of the fact that he is defending someone that started an illegitimate act of aggression.²¹⁶

Another justification is necessity, where the law justifies a defendant who commits an act that falls within the definitional terms with the intent to avoid a greater evil. Unlike in common law,²¹⁷ this

²¹² See, e.g., C.P. art. 20(4) (Spain).

²¹³ See ZAFFARONI, *supra* note 110, at 477.

²¹⁴ See C. PÉN art. 122-5 (Fr.), which states :

A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the offence. A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanour against property, he performs an act of defence other than wilful murder, where the act is strictly necessary for the intended objective the means used are proportionate to the gravity of the offence

(translated from the original French at http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm).

²¹⁵ See, e.g., C.P. art. 20(4) (Spain).

²¹⁶ See ZAFFARONI, *supra* note 110, at 479.

²¹⁷ See generally 21 AM. JUR. 2D *Criminal Law* § 158 (2004) (listing cases in the United States addressing necessity as a defense).

justification is widely accepted in most civil law jurisdictions.²¹⁸ The analysis of what constitutes a lesser or greater evil depends on the hierarchy of the goods involved, the degree of the harm, and the degree of the proximity of danger. However, in general, when human lives are in conflict, the necessity defense is not available, even if one life is sacrificed to save several others.²¹⁹

Finally, another general cause of justification is the legitimate exercise of a right, i.e., where a person exercises a legitimate action authorized by the legal order.²²⁰ In other words, absence such authorization, the exercise of that action would constitute a crime. For example, the Argentine Civil Code authorizes a creditor to exercise a right of retention to withhold a personal good of his debtor which has been given to the creditor under contract.²²¹ In Dutch law, “under strict conditions a right of retention can be exercised also to withhold immovable property..., [such as when] a building contractor [that] remains unpaid... refuse[s] access to the building.”²²² The exercise of the right of retention does not constitute a crime even when the retention falls within the definitional terms of a crime.

Blameworthiness

Blameworthiness, or culpability, is the criminal attribution of the wrongful act to the actor because he did not conform to the norm when, according to the specific circumstances of his action, he was required to do so.²²³ This notion of blameworthiness is based on normative grounds, which determine the reasons for holding people accountable for their deeds.²²⁴ There are two general requirements for the attribution of a wrongful act: first, the fact that the actor was required to comprehend the wrongfulness of his act; and second, that the circumstances of his act

²¹⁸ See BACIGALUPO, *supra* note 96, at 132.

²¹⁹ See ZAFFARONI, *supra* note 110, at 481.

²²⁰ See CÓD. CIV. art. 3245 (Arg.).

²²¹ *Id.*

²²² J.H.M. van Erp and L.P.W. van Vliet, *Real and Personal Security*, 6.4 ELEC. J. OF COMP. L. (2002), at <http://www.ejcl.org/64/art64-7.html> (last accessed November 5, 2004) (addressed under section 5, right of retention).

²²³ See WELZEL, *supra* note 93, at 149.

²²⁴ See FLETCHER, *supra* note 104, at 457.

have not reduced his self-determination capacity below a certain threshold.²²⁵

There is no culpability where there is no possibility of understanding the wrongfulness of the act or when the threshold of self-determination is not met.²²⁶ The former takes place when the actor lacks mental capacity to comprehend the wrongfulness of his action, as well as when there is a prohibition mistake.²²⁷ This comprehension includes both the knowledge of wrongfulness and its internalization; comprehension entails appropriating the norms and making them part of one's own psychological apparatus.²²⁸ To a certain extent, whoever commits a serious crime has not internalized the norms. But criminal law does not demand an actual and effective comprehension of the wrongdoing but rather the possibility of understanding it.²²⁹ The degree of effort the actor used to internalize the legal values and conform to them is inversely proportional to the degree of culpability.²³⁰ The threshold of self-determination is not met when the actor cannot orient his actions according to his understanding of the wrongdoing or when a conduct other than the one contemplated in the norm is not required.²³¹

IV. Criminal Law In Common Law Jurisdiction

Unlike civil law,²³² in common law there is no general theory of the offense;²³³ In common law jurisdictions, courts and scholars are not concerned with the elaboration of a theory that is capable of explaining the existence, or nonexistence, of crimes and their components in a general and comprehensive way.²³⁴ Nonetheless, all crimes have some

²²⁵ BACIGALUPO, *supra* note 96, at 423.

²²⁶ WELZEL, *supra* note 93, at 150.

²²⁷ ZAFFARONI, *supra* note 110, at 509.

²²⁸ BACIGALUPO, *supra* note 96, at 232.

²²⁹ ZAFFARONI, *supra* note 110, at 512.

²³⁰ *Id.*

²³¹ WELZEL, *supra* note 93, at 151.

²³² See Tetley, *supra* note 24, at 702.

²³³ See ARTHUR TAYLOR VON MEHREN, LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW 3 (1988).

²³⁴ L. A. Zeibert asserts:

basic common elements and common doctrinal structures, which permit their description and analysis from a general perspective.²³⁵ The basic common elements of a crime in common law jurisdictions are *actus reus*²³⁶ and *mens rea*,²³⁷ together with the absence of justifications and defenses.²³⁸

However, two opposing schools of thought dominate criminal law policy in common law countries: utilitarianism and retributivism.²³⁹ While these schools are primarily concerned with theories of punishment,²⁴⁰ their main ideas affect most areas of criminal law and criminal justice policy and have shaped many substantive aspects of the theory of offense.²⁴¹ Utilitarianism in criminal law emerges from the

[T]he neglect of philosophical analysis in the Anglo-American criminal legal tradition is apparent at two different levels. The first is at the general level and regards the very definition of crime. Within the Anglo-American legal tradition, systematic attempts to present the set of necessary and sufficient conditions for something to be a crime are rare.

Philosophical Analysis and the Criminal Law, 4 BUFF. CRIM. L. R. 101, 104-105 (2000).

²³⁵ KENT ROACH, CRIMINAL LAW: ESSENTIALS OF CANADIAN LAW 8 (2d ed. 2000).

²³⁶ 21 AM. JUR. 2D *Criminal Law* § 126 (1998).

²³⁷ *Id.* See also *U.S. v. Spy Factory, Inc.*, 960 F. Supp. 684, 687 (S.D.N.Y. 1997) (“mens rea is an essential element of any criminal offense”).

²³⁸ Some common law scholars also include the coincidence between the *mens rea* and the *actus reus*, and the causation of harm as elements. These elements are dealt with here within the three general categories: *actus reus*, *mens rea* and absence of defenses or justifications. ROACH, *supra* note 235, at 8.

²³⁹ See generally Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105 (1999) (discussing why a retributivist approach is better than a utilitarian approach).

²⁴⁰ See *United States v. Blarek*, 7 F. Supp. 2d 192, 200-204 (E.D.N.Y. 1998) (discussing the differing views of punishment under the retribution and utilitarian approach); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 79 (1995).

²⁴¹ See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314-15 (2000).

works of Italian civil law scholar Cesare Beccaria,²⁴² whose ideas changed the existing criminal justice landscape throughout an Enlightened Europe.²⁴³ On the British Isles, Jeremy Bentham enthusiastically embraced his ideas.²⁴⁴ The main tenets of utilitarianism are that criminal and deviant behavior occurs when an offender decides to risk violating the law after balancing the potential value of the criminal enterprise against the potentiality of being apprehended, as well as the severity of the punishment.²⁴⁵ For utilitarians, criminals have control over their behavior, they choose to commit crimes and they can be deterred by the threat of punishment.²⁴⁶ Thus, deterrence becomes the central purpose for punishment, which is conceived as a tool and not an end in itself.²⁴⁷ To help prevent crime, punishment, and adjudication, should be swift, severe and certain.²⁴⁸ A severe punishment, however, is only that which is severe enough, but not more so, to outweigh the personal benefits derived from crime commission. Although widely received in modern common law legislation, utilitarian ideas have been criticized—especially in the academe—for their potential consequences when taken to the extreme.²⁴⁹ Pure utilitarianism can be used “to justify

²⁴² CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963).

²⁴³ See Guyora Binder, *Democracy and Punishment: Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. R. 321, 335 (2002) (discussing Beccaria's views).

²⁴⁴ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-12 (J.H. Burns & H.L.A. Hart eds., 1996) (1823); Jeremy Bentham, *Principles of Penal Law*, in 1 WORKS OF JEREMY BENTHAM 365 (1962).

²⁴⁵ FRANCIS T. CULLEN & ROBERT AGNEW, CRIMINOLOGICAL THEORY: PAST TO PRESENT: ESSENTIAL READINGS 247-48 (1999).

²⁴⁶ *Id.* at 250.

²⁴⁷ See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 60 (2003).

²⁴⁸ See generally Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135 (2003) (examining the need for better crime reduction methods in public policy)..

²⁴⁹ See H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 119, 121-22 (Gertrude Ezorsky ed., 1972).

punishment of the innocent in [those rare instances] where, on balance, greater general deterrence or other social good can be achieved.”²⁵⁰

The retributive criminal justice school puts forward the idea “that punishment is justified when it is deserved.”²⁵¹ They believe that “[r]etribution is essentially the infliction of harm on offenders on the basis that they deserve it as a result of their crimes.”²⁵² For Kant, who together with Hegel pioneered retributive thinking in the criminal justice sphere,²⁵³ civil society has a moral duty to restore the balance of justice when it is affected by a crime. The only way to restore justice is by punishing the criminal by giving him what he deserves. When analyzing the extreme case of this postulate, Kant himself made it very clear that:

even if a Civil Society resolved to dissolve itself with the consent of all its members... [,] the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.²⁵⁴

Unlike utilitarianism, “retributivism looks backward and justifies punishment only on the voluntary commission of a crime.”²⁵⁵ The primordial criticism of retributivism is that it promotes an eye for an eye

²⁵⁰ Don E. Scheid, *Constructing a Theory of Punishment, Desert, and the Distribution of Punishments*, 10 CAN. J.L. & JURIS. 441, 442 (1997).

²⁵¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16 (3d ed. 2001).

²⁵² Deirdre Golash & James P. Lynch, *Public Opinion, Crime Seriousness, and Sentencing Policy*, 22 AM. J. CRIM. L. 703, 710 (1995).

²⁵³ See G. W. F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT (T. M. Knox trans., 1967); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., 1965).

²⁵⁴ IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT, 198 (W. Hastie trans., 1887).

²⁵⁵ DRESSLER, *supra* note 251, at 16.

philosophy and that it advocates punishment even in those situations where there is no social benefit.²⁵⁶

Both schools of thought have greatly influenced criminal jurisprudence in the common law world, particularly in North America,²⁵⁷ and consequently, criminal law does not adhere uniformly to one of these theories,²⁵⁸ but rather "some of [its rules] are [fundamentally] retributive in nature,²⁵⁹ whereas others are utilitarian."²⁶⁰ Thus, for example, "it is [common] to find partially utilitarian justifications" emphasizing the deterrent value of legal sanctions, which are retributive "in their justification of the content" of the prohibition.²⁶¹ This is so because both theories have been "dominant... at [different] times [without winning] the ultimate debate... [and] both... have attracted [the attention of the criminal] lawmakers [and society]."²⁶²

Actus reus

The substantive theory of *actus reus*²⁶³ emerged along similar lines in both civil law and common law. In both systems, it originated in the evidentiary requirement of the presence of *corpus delicti* for the criminal conviction.²⁶⁴ When this procedural rule turned substantive, the

²⁵⁶ Hart advanced the idea that a theory of punishment must incorporate both utilitarian and retributivist principles since pure utilitarian or retributive notions alone are not satisfactory enough to conform an adequate and pluralistic theory of punishment. Hart's ideas shaped contemporary criminal justice debate and greatly influenced modern criminal law in the common law world, particularly in North America. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 234-235 (1968).

²⁵⁷ See Bradley, *supra* note 239, at 113-14.

²⁵⁸ See Cotton, *supra* note 241, at 1314-15. The Model Penal Code fundamentally relies upon a utilitarian understanding of the purposes for the criminal law, but it has not divested itself of retributive elements. *Id.* at 1319, 1324.

²⁵⁹ Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1499 (1974).

²⁶⁰ DRESSLER, *supra* note 251, at 22.

²⁶¹ Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 503 (1992).

²⁶² DRESSLER, *supra* note 251, at 22.

²⁶³ See *People v Shaughnessy*, 319 N.Y.S.2d 626, 628 (N.Y. Dist. Ct. 1971) ("[T]he physical element requirement has been designated as the *Actus Reus*").

²⁶⁴ H. SILVING, CRIMINAL JUSTICE 293 (1971).

issue was expressed “in terms of... whether the concrete occurrence corresponded to an abstract crime description,” with common law and civil law taking separate doctrinal paths.²⁶⁵

Actus reus is defined as “the physical act specified in the crime.”²⁶⁶ The *actus reus* is comprised of “a voluntary act... that causes... social harm”; causation is the nexus between the act and the social harm.²⁶⁷ The act constitutes the physical element of a criminal act.²⁶⁸ It must be voluntary, which excludes reflexes and convulsions, as well as acts performed during a state of unconsciousness.²⁶⁹ Typically, the *actus reus* requirement is met when an agent acts voluntarily.²⁷⁰ Holmes states that “[t]he reason for requiring an act [as a precondition for the existence of an offense] is, that [it] implies a choice, and that it is [considered unfair] to make a [person] answerable for harm, unless he might have chosen otherwise.”²⁷¹ Interestingly, the debate between retributive and utilitarian schools of punishment has not directly influenced the concept of act in the common law. Utilitarian and retributive arguments supporting the concept of voluntary act are nonetheless imaginable.²⁷² Utilitarians would see little social benefit in punishing a person who does not carry out a voluntary act.²⁷³ This

²⁶⁵ *Id.*

²⁶⁶ Lynnette S. Cobun, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J. L. AND MED. 471, 474 (1984).

²⁶⁷ DRESSLER, *supra* note 251, at 81.

²⁶⁸ *Shaughnessy*, 319 N.Y.S.2d. at 628.

²⁶⁹ See *State v. Mishne*, 427 A.2d 450, 458 (Me. 1981) (“[T]o be voluntary an act must be the result of an exercise of a defendant’s conscious choice to perform them, and not the result of reflex, convulsion, or other act over which a person has no control”). However, a self-induced state of involuntariness will deprive the defendant of the “involuntary” defense, for he will be liable of placing himself knowingly put in a position where the act may result. See MODEL PENAL CODE [MPC] § 2.01 note 2 (1985).

²⁷⁰ See *State v. Case*, 672 A.2d 586, 589 (Me. 1996) (“a person commits a crime ‘only if he engages in voluntary conduct’”).

²⁷¹ OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 54 (Little Brown 1949) (1881).

²⁷² See Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1095 (1997).

²⁷³ See John A. Bozza, *“The Devil Made Me Do It”: Legal Implications of the New Treatment Imperative*, 12 S. CAL. INTERDIS. L.J. 55, 81 (2002) (discussing

argument is not based on an idea of intrinsic justice, but on the belief that punishing an involuntary offender would not effectively deter the offender or other members of society who many commit similar involuntary acts.²⁷⁴ Retributivism's major tenet is that the offender deserves punishment when he "freely chooses to violate society's rules."²⁷⁵ An offender who does not act voluntarily— even if he produced social harm— does not deserve to be punished.²⁷⁶

"Social harm" has been "defined as the 'negation, endangering, or destruction of [a socially valuable and legally protected interest, whether] individual, [societal] or state.'"²⁷⁷ It may adopt the form of a wrongful result, wrongful conduct, or "attendant circumstances."²⁷⁸ Social harm is expressed as a wrongful result when the offense is defined in terms of a prohibited result.²⁷⁹ For instance, murder is a result crime because the social harm is the death of another human being.²⁸⁰ Social harm takes the form of wrongful conduct when the offense is described in terms of injurious conduct, and no harmful result is required, such as the case of possession of illegal firearms.²⁸¹ In this case, the social interest— to live peacefully without perils that may be triggered by the

the issue of deterrence). *See also* Vollbaum v. State, 833 S.W.2d 652, 656 (Tex. Crim. App. 1992) (discussing the issue of deterrence).

²⁷⁴ DRESSLER, *supra* note 251, at 14-15.

²⁷⁵ *Id.* at 16. *See also* Golash & Lynch, *supra* note 252, at 710.

²⁷⁶ DRESSLER, *supra* note 251, at 16.

²⁷⁷ *Id.* at 110.

²⁷⁸ MPC § 1.13(9).

²⁷⁹ *See* Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. R. 225, 235 (1997). Paul Robinson asserts:

[T]he Model Penal Code drafters invented a useful system for the precise definition of offenses. [It] distinguishes between (i) conduct, (ii) attendant circumstances, and (iii) a result of conduct. These are the objective building blocks for offense definitions. Each offense definition typically has at least one conduct element, which satisfies the requirement of an act. Most offense definitions include one or more circumstance elements as well, defining the precise nature of the prohibition—for example, having intercourse with a person *under 14 years old*—or the precise nature of a prohibited result . . . Some of the potential benefits of the Model Penal Code's insight on categories of objective elements is lost by its failure to define those categories."

²⁸⁰ 40 AM. JUR. 2D *Homicide* § 1 (1999).

²⁸¹ Robinson, *supra* note 279, at 235.

use of firearms— is endangered by the possession of illegal firearms.²⁸² The definition of an offense may include other elements defined as attendant circumstances. An example of attendant circumstances is common law burglary,²⁸³ which requires “the breaking and entering [in the dwelling house of another at] night.”²⁸⁴ In this case the dwelling house is the attendant circumstance, whose breaking and entering constitutes social harm.²⁸⁵

The causal link requirement implies that for criminal liability to arise, the act must cause the social harm.²⁸⁶ An act can cause harm when the “but for” test is satisfied,²⁸⁷ or when the act is a substantial factor. The former takes place when a particular result would not have occurred but for the act.²⁸⁸ The substantial factor test is satisfied when there are “two [or more] causes, each alone sufficient to bring about the harmful result, operat[ing] together to cause it... [, and the defendant’s] conduct is a substantial factor in bringing about the result.”²⁸⁹

Additionally, the *actus reus* requirement means that there is no criminal liability for an omission²⁹⁰ to act,²⁹¹ save for the exceptional

²⁸² See 20 TEX. JUR. *Criminal Law* § 1460 (discussing prosecution of unlawful firearm possession by a felon).

²⁸³ WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.2(c) (4th ed. 2003).

²⁸⁴ See *Tahir v Lehmann*, 171 F. Supp. 589, 590 (N.D. Ohio 1958).

²⁸⁵ DRESSLER, *supra* note 251, at 111.

²⁸⁶ “[T]he defendant’s act must be the legally responsible cause (“proximate cause”) of the injury, death, or other harm that constitutes the crime.” 1 WITKIN & EPSTEIN, *supra* note 147, at § 35.

²⁸⁷ California Jury Instructions: Criminal No. 3.40 (West 7th ed. 2003).

²⁸⁸ MPC §2.03.

²⁸⁹ Paul H. Robinson, *Criminal Law* 155 (1997). 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 6.4(b) (2d ed. 2003). As in tort law, “the [act] must also be the legal (proximate) cause of the... harm,” *id.* at § 6.4(a) n.10. The criminal courts have borrowed the concept of “proximate cause” from tort law. To find proximate cause a court must find that a person of ordinary prudence could have reasonably foreseen that such a result, or some similarly injurious result, was probable under the facts as they existed, the doctrine of proximate cause was extrapolated to the criminal law context. Under the Model Penal Code, the defendant’s act will usually be the proximate cause of the harmful result if the result is “not too remote or accidental in its occurrence to have only a bearing on the actor’s liability or on the gravity of his offense.” MPC §2.03(2)(b).

²⁹⁰ 21 AM. JUR. 2D *Criminal Law* § 32 (1998).

situations where “a ‘legal duty’ to act” exists.²⁹² Similar to the civil law situations,²⁹³ there is a duty to act when there is a special relationship:²⁹⁴ the relationship between a parent and a child²⁹⁵; a contract which creates a duty to act, such as when a patient hires a nurse for obtaining and rendering care; when the defendant himself caused the danger; or, when the defendant undertook to render assistance to the victim.²⁹⁶

Mens rea

The *mens rea*, or guilty mind, implies that the actor’s mental state coincides with the mental state required by the law for a particular

²⁹¹ See *Nicholson v. State*, 600 So. 2d 1101, 1104 (Fla. 1992) (mother held criminally liable for intentional deprivation of food to her child); *People v. Staniel*, 606 N.E.2d 1201, 1211 (Ill. 1992) (mother held criminally liable for allowing her boyfriend to beat her daughter to death); *People v. Gladden*, 462 N.Y.S.2d 115, 116 (N.Y. Sup. Ct. 1983) (holding that state must show that mother intentionally failed to feed her child).

²⁹² Arthur Leavens, *A Causation Approach To Criminal Omissions*, 76 CALIF. L. REV. 547, 553-54 (1988).

²⁹³ ZAFFARONI, *supra* note 110, at 449.

²⁹⁴ LAFAVE, *supra* note 289, at § 6.2(a)(1); Bryan A. Liang & Wendy L. Macfarlane, *Murder By Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 406-410 (1999) (discussing the legal duty a parent owes to her child and the legal penalties associated with failure to act in the civil and criminal law contexts).

²⁹⁵ 59 AM. JUR. 2D *Parent & Child* § 14 (2002); *Muehe v. State*, 646 N.E.2d 980, 983-84 (Ind. Ct. App. 1995) (“A parent’s failure to take appropriate steps to protect his or her child from the abuse of the other parent is tantamount to neglect of the child”).

²⁹⁶ Wittgenstein, and other authors, criticizes the amalgamation of the concept of voluntary act and intention. For Wittgenstein, “as the general doctrine of the voluntary act posit the existence of acts of willing, then it would be possible to have an act of will for another act of will, [which] is inconsistent,” Zaibert, *supra* note 133, at 483. This inconsistency is solved if, as in civil law doctrine, the act is considered separately from the definitional terms or *actus reus*. In such case, the concept of act is only concerned with voluntariness or its absence. In other words, there is an action when it is the result of a voluntary movement, regardless of the mental state or intention of the agent who performs such voluntary action. See *Id.* at 489-92. In Hart’s words, “[c]onduct is ‘voluntary’... if the muscular contraction which, on the physical side, is the initiating element in what are loosely thought of as simple actions, is caused by a desire for those same contractions,” *id.* at 485.

offense.²⁹⁷ It has been noted that “[t]he [notion] of *mens rea*... expresses the principle that it is not conduct alone but conduct accompanied by certain specific mental states which concerns... the law.”²⁹⁸ In other words, this requirement is met when, at the time the agent committed the crime, she had the legally requisite mental state that the law requires for the existence of criminal liability.²⁹⁹ “Except [for] minor offenses..., [common law jurisdictions generally require] that there be a specified [*mens rea*] for every element of an offense[,]” which includes the act itself, and the social harm.³⁰⁰ The purpose of the inclusion of the *mens rea* component is to describe the mental state in blameworthy, or culpable, conduct that leads to criminal liability, as distinguished from conduct that causes harm but is unaccompanied by the mental state necessary to impose criminal liability.³⁰¹

Both retributivists and utilitarians favor the *mens rea* requirement albeit for different reasons. Utilitarianism embraces the *mens rea* requirement, mainly on deterrence grounds. An offender cannot be deterred from the commission of a criminal act unless he appreciates that his conduct will lead to punishment.³⁰² Furthermore, “the ‘higher’ mental states [such as purposefulness and knowledge] reflect the greater probability that the defendant will [cause social] harm.”³⁰³ Thus, “the severity and certainty of punishment” should also

²⁹⁷ 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 27 (15th ed. 1993). The courts have encountered extreme difficulty in resolving problems of “merger,” “concurrency,” and “multiplicity,” i.e., in determining when acts or transactions give rise to a *single offense*, and when they amount to *several offenses*. There is also a problem in determining when one offense is deemed *included* within another. The different situations in which the problems arise, and the several distinct reasons for making the determination, account for the absence of any single governing principle or test. *See generally id.* at §§ 25-28.

²⁹⁸ 1 WITKIN AND EPSTEIN, *supra* note 147, at § 2.

²⁹⁹ Some crimes admit of only certain mental states. For example, some crimes cannot be committed negligently or recklessly.

³⁰⁰ James B. Jacobs, *Criminal Law, Criminal Procedure and Criminal Justice*, in FUNDAMENTALS OF AMERICAN LAW 296 (Alan B. Morrison ed., 1996).

³⁰¹ The policy purpose underlying the *mens rea* requirement is to filter out those agents who unintentionally engage in bad conduct since they are not considered dangerous to society.

³⁰² DRESSLER, *supra* note 251, at 15.

³⁰³ Simons, *supra* note 261, at 505.

increase as the need to deter the offender, “and others with similar [guilty] mind [,]” is “greater.”³⁰⁴ From this, it is easy to infer “why knowing and intentional killers are punished as murderers, [whereas] those who are ‘reckless’... are punished only for manslaughter.”³⁰⁵ Retributivists also favor the *mens rea* requirement, arguing that persons who are blameworthy deserve to be punished. Those who lack a guilty mental state do not deserve any punishment. The strongest arguments condemning crimes without *mens rea* have come from retributivists, particularly culpability-based retributivists,³⁰⁶ who do not advocate “punishing the blameless.”³⁰⁷ The *mens rea* requirements have been traditionally grouped into two categories. The first category is crimes requiring general intent, whereby the defendant simply desires to commit a criminal act.³⁰⁸ The second category is crimes requiring specific intent, where the defendant, in addition to desiring to bring about the *actus reus*, wants to do something further.³⁰⁹ An example of a specific intent crime is a burglary where the intended breaking and entering of another’s dwelling must be with the intention to commit a felony,³¹⁰ or, where the defendant objectively desired a specific result to follow his act or failure

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ For a discussion of different forms of retributivism, see Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1399 (2002).

³⁰⁷ Simons, *supra* note 272, at 1076.

³⁰⁸ 21 AM. JUR. 2D *Criminal Law* § 127 (1998) (“‘General intent’ is the term used to define the requisite *mens rea* for a crime has no stated *mens rea*... Where a particular crime requires only a showing of general intent,... the criminal intent necessary to sustain a conviction is shown by the very doing of acts which have been declared criminal; the element of intent is presumed from the actions constituting the offense”). *See also* Watson v. Dugger, 945 F.2d 367, 370 (11th Cir. 1991) (“In general intent crimes, the element of intent is presumed from the actions constituting the offense”); Kohler v. Kelly, 890 F. Supp. 207, 212 (W.D.N.Y. 1994), *aff’d*, 58 F.3d 58 (2d Cir. 1995) (“If the crime charged requires only a general intent, intent will be presumed from the intentional completion of the act”); State v. Campos, 921 P.2d 1266 (N.M. 1996) (“[A] general-intent crime is one for which no additional intent to accomplish a further goal is specified”).

³⁰⁹ 21 AM. JUR. 2D *Criminal Law* § 128 (1998).

³¹⁰ *See, e.g.*, Railey v. State, 121 S.W. 1120, 1122-23 (Tex. Crim. App. 1909).

to act.³¹¹ This classification has been considered primitive and confusing, and has marginal utility in practice.³¹²

More importantly, *mens rea* is considered to comprise four distinct states of mind.³¹³ These states are: (i) *purposeful*, when a defendant desires his conduct to cause a particular result;³¹⁴ (ii) *knowing*, when a defendant is aware that his conduct is practically certain to cause a particular result; (iii) *reckless*, when defendant *is* aware of a risk—which for the Model Penal Code,³¹⁵ must be “substantial and unjustifiable”—that his conduct might cause a particular result;³¹⁶ and (iv) *negligent*, when defendant *should be* aware of a risk that his conduct might cause a particular result.³¹⁷

These states of mind are also primitive and confusing, as they are not mutually exclusive and they refer to cognitive aspects in some cases,

³¹¹ See, e.g., *People v. Garland*, 627 N.E.2d 377, 380-81 (Ill. App. Ct. 1993) (“Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result”); *State v. Corley*, 703 So. 2d 653, 659 (La. Ct. App. 1997), *writ denied*, 712 So. 2d 875 (La. 1998) (“Specific intent is the state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act”); *State v. Pierce*, 488 S.E.2d 576 (N.C. 1997) (“Specific-intent crimes are ‘crimes which have as an essential element a specific intent that a result be reached’”); *State v. Esters*, 927 P.2d 1140, 1142 (Wash. Ct. App. 1996), *appeal denied*, 131 Wash. 2d 1024, 937 P.2d 1101 (1997) (“Specific intent is ‘an intent to produce a specific result, as opposed to an intent to do the physical act’ that produces the result”).

³¹² See FLETCHER, *supra* note 104, at 23 (looking at the subject of larceny)

³¹³ MPC §2.02 (2)

³¹⁴ TEX. PEN. CODE ANN. § 6.03(a) (Vernon 2003).

³¹⁵ MPC § 2.02(2)(c).

³¹⁶ See, e.g., *People v. Deskins*, 927 P.2d 368, 371 (Colo. 1996) (“[A] person acts recklessly ‘when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists’”); *People v. Figueroa*, 625 N.Y.S.2d 839, 842 (N.Y. Crim. Ct. 1995) (“A person is chargeable with ‘recklessness’ when he is aware of designated risk and consciously disregards it”).

³¹⁷ See, e.g., *Green v. State*, 887 S.W.2d 230, 233 (Tex. Ct. App. 1994) (“A person acts with criminal negligence when he should be aware of a substantial and unjustifiable risk he has created”); *State v. Brooks*, 658 A.2d 22, 26 (Vt. 1995) (“[C]riminal negligence occurs when the actor should be aware that a substantial and unjustifiable risk exists or will result from his conduct”).

and to volitional ones in others. Thus, "intention" and "knowledge" make reference to different categories, and although they have been artificially assigned some differences, they still refer to different aspects of the mental process. More importantly, these categories cannot account for all types of situations. For example, under the doctrine of transferred intent, the actor is artificially assigned intent for a result he causes where there is obviously no such intent.³¹⁸ However, both courts and legal scholars have widely accepted these mental states without much criticism.³¹⁹ Similarly imprecise is the *mens rea* fiction created for the felony-murder rule.³²⁰ With felony-murder, criminal liability is assigned to the defendant when he engages in certain dangerous felonies, (such as bank robbery), and certain deaths occur, even if they are not intended or even caused by the defendant.³²¹ Therefore, whenever a defendant carries out a certain felony, such as kidnapping or aircraft hijacking, and a death occurs— even if that death is caused by an unrelated third person or by the victim herself— that death is attributed to the perpetrator of the felony who is considered to have intended it.³²²

The purposeful or intentional mental state implies a purpose or willingness to commit the act, or the omission referred to. A person acts intentionally "when it is [the person's] conscious objective or desire to engage in the conduct or cause the result."³²³ Further, "willingness . . .

³¹⁸ 21 AM. JUR. 2D *Criminal Law* § 135 (1998).

³¹⁹ See Susan L. Pilcher, *Ignorance, Discretion, and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 9 (1995) (noting that these categories are the "modern American approach").

³²⁰ See, e.g., *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) ("The felony-murder rule has been criticized on the grounds on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability").

³²¹ In Texas, for example, a person commits the offense of felony murder if the person "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, [the person] commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003).

³²² Furthermore, there are an increasing number of crimes, particularly those created by legislation, where the actor's mental state cannot be explained by one of these traditional four categories of mental state.

³²³ TEX. PEN. CODE ANN. § 6.03(a) (Vernon 2003).

implies that the person knows what he is doing, intends to do what he is doing, and is a free agent.”³²⁴ It does not require any intent to violate law. The U.S. Supreme Court held in *Morrisette* that:

[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.³²⁵

As a way of illustration, mischief requires intention to destroy or damage property.³²⁶ If, for instance, defendant wanted to damage someone else’s goods, he would be acting with the required mental state, intention of mischief.

For Holmes, intent revolves around two aspects: the “foresight that certain consequences will follow from an act[;] and[,] the wish for those consequences working as a motive which induces the act.”³²⁷ An exceptional application of this requirement, which is unheard of in civil law jurisdictions, is the aforementioned doctrine of the transferred intent,³²⁸ which essentially applies to murders. It often occurs in bad aim cases when a defendant intends to kill one victim, but in fact, accidentally or unintentionally,³²⁹ kills another one.³³⁰ In this case, the

³²⁴ *Ex Parte Trombley*, 193 P.2d 734, 739 (Cal. 1948).

³²⁵ *Morrisette v. United States*, 342 U.S. 246, 249 (1952).

³²⁶ *See, e.g.*, Criminal Code, R.S.C., ch. C-46, Part XI § 430(1)(a) (1985) (Can.) (hereinafter R.S.C.).

³²⁷ HOLMES, *supra* note 271, at 53.

³²⁸ 21 AM. JUR. 2D *Criminal Law* § 135 (1998).

³²⁹ *See, e.g.*, *State v. Fekete*, 901 P.2d 708, 714 (N.M. 1995) (“the transferred intent theory has been applied in so-called ‘bad aim’ situations where a defendant, while intending to kill one person, accidentally kills an innocent bystander or another unintended victim”).

³³⁰ *See, e.g.*, *Miller v. State*, 636 So. 2d 144, (Fla. Dist. Ct. App. 1994) (“The doctrine of transferred intent operates to transfer the defendant’s intent with respect to the intended victim to the unintended victim”); *Crawley v. Com.*, 492 S.E.2d 503, 505 (Va. Ct. App. 1997) (“Under the common law doctrine of transferred intent, if an accused attempts to injure one person and an unintended victim is injured because of the act, the accused’s intent to injure the intended

defendant is culpable, and bears criminal liability for the murder of the unintended victim to the same extent as if he had killed his intended victim. In civil law, bad aim cases have a more reasonable solution. They are considered attempted murders with respect to the intended victim, in conjunction with a negligent homicide with regard to the unintended one.³³¹

The concept of knowledge entails an awareness that defendant is committing an act that is considered an offense.³³² Again, "it does not require any knowledge of the unlawfulness of such act or omission."³³³ The Texas Penal Code states that "[a] person acts knowingly... when the person is aware of the nature of his conduct or that the circumstances then surrounding the conduct exist [; or,]... when he is aware that the conduct is reasonably certain to cause the result."³³⁴ As the New York Penal Code explains, "[t]he main distinction between [intentionally and knowingly] is that the [former] entails a conscious desire to cause a particular result by one's conduct and the [latter] entails an awareness that the result is 'practically certain' to follow from such conduct."³³⁵ "A 'knowingly' *mens rea* is a lesser standard than 'willfully'; if awareness of conduct can be proven, it is permissible for a jury to infer knowledge on the part of the actor."³³⁶ For example, in *Liparota v. U.S.*, the defendant was prosecuted for violation of a federal food stamp statute, which prohibited fraud through improper use and transfer of food stamp

victim is transferred to the injury of the unintended victim, even though the wounding was accidental or unintentional"); *State v. VanValkenburgh*, 856 P.2d 407, (Wash. Ct. App. 1993) ("Intent against any person generally may be transferred to another if that other is injured").

³³¹ See HENDLER, *supra* note 7, at 143.

³³² See, e.g., *State v. Williams*, 503 N.W.2d 561, 566 (Neb. 1993) ("[K]nowingly... commonly imports a perception of the facts requisite to make up the crime").

³³³ *People v. Taylor*, 9 Cal. Rptr. 2d 227, 235 (Cal. Ct. App. 1992).

³³⁴ TEX. PENAL CODE ANN. § 6.03(b) (Vernon 2003).

³³⁵ N.Y. PENAL LAW § 15.15 commission staff notes; N.Y. PENAL LAW § 15.05 (1), (2) (McKinney 2003).

³³⁶ Jonathan Snyder, *Back to Reality: What "Knowingly" Really Means and the Inherently Subjective Nature of the Mental State Requirement in Environmental Criminal Law*, 8 MO. ENVTL. L. & POL'Y REV 1, 3 (2001).

cards or coupons. This is a regulatory offense which requires proof that defendant acted knowingly.³³⁷

The “reckless” mental state occurs when a person is aware of a “substantial and unjustifiable risk” that his or her act will cause, and “consciously disregards” it.³³⁸ Intent to cause serious bodily harm murder requires that recklessness on the part of the defendant, who intends to cause his victim bodily harm that he knows is likely to cause death.³³⁹ A defendant is acting recklessly if he is aware- under a subjective test³⁴⁰- that death may ensue and consciously disregards this possibility.³⁴¹ In other words, “reckless” *mens rea* cannot be asserted on an objective consideration of what a defendant should have known,³⁴² but rather on defendant’s perceived and consciously disregarded risk.³⁴³

A “negligent” state of mind implies that the defendant should be aware of a substantial and unjustified risk. Under Pennsylvania’s definition, for the person to be negligent, “[t]he risk must be of such a nature and degree that the actor’s failure to perceive it... involves a gross deviation from the standard of care that a reasonable person³⁴⁴ would observe in the actor’s situation.”³⁴⁵ The difference between a “reckless” and a “negligent” *mens rea* is that in the latter, defendant fails to perceive a risk associated with conduct, while in the former, defendant perceives and consciously disregards the risk.³⁴⁶ The test to determine the

³³⁷ *Liparota v. United States*, 471 U.S. 419, 434 (1985).

³³⁸ MPC § 2.02(2)(c).

³³⁹ *See, e.g.*, R.S.C. Part VIII § 229(a)(ii) (Can.).

³⁴⁰ *See Rutledge v. Springborn*, 836 F. Supp. 531, 537-538 (N.D. Ill. 1993); *State v. Jupin*, 602 A.2d 12, 18 (Conn. App. Ct. 1992).

³⁴¹ Sarah D. Himmelhoch, Comment, *Environmental Crimes: Recent Efforts to Develop a Role for Traditional Criminal Law in the Environmental Protection Effort*, 22 ENVTL. L. 1469, 1477-1478 (1992).

³⁴² *See Rutledge*, 836 F. Supp. at 537-538.

³⁴³ 21 AM. JUR. 2D *Criminal Law* § 139 (1998).

³⁴⁴ The rationale of the reasonable person standard is to ensure that there is a fixed, non-fluctuating parameter but rather a uniformed, objective standard against which all accused are measured. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 Am. J. Crim. L. 1, 8 (1998).

³⁴⁵ 18 PA. CONS. STAT. ANN. § 302(b)(4) (West 2004). *See also* MPC § 2.02 .

³⁴⁶ *Conroy v. State*, 843 S.W.2d 67, 71 (Tex. Ct. App. 1992).

existence of negligence is that of reasonableness. Conduct that reveals "a marked and significant departure from the standard" which would be expected of a "reasonably prudent" person under the circumstances indicates negligence.³⁴⁷ Ordinary negligence, sufficient for recovery in a civil action, will not suffice in a criminal context.³⁴⁸ The defendant's conduct must go beyond that required by the unreasonable risk test for tort liability; it must amount to a gross, criminal, or culpable departure from the standard of due care.³⁴⁹

Justifications and excuses

The third component of the offense in common law jurisdictions is the absence of justification or excuse.³⁵⁰ In other words, the presence of an excuse or justification may lead to the absence, or even inexistence, of a crime. Justifications and excuses permit the exclusion, or reduction, of criminal liability in conduct that would otherwise constitute an offense.³⁵¹ Although different in origin, justification and excuse are generally treated together, as both have a similar effect. They generally include: (i) duress,³⁵² (ii) necessity,³⁵³ (iii) self-defense,³⁵⁴ (iv) defense of

³⁴⁷ See *Regina v. Tutton and Tutton*, [1989] S.C.R. 1392, 1395 (holding that jury should have considered parents belief in faith healing in case where child died from the parents' depriving him of insulin).

³⁴⁸ See *Letchworth v. Gay*, 874 F. Supp. 107, 109-110 (E.D.N.C. 1995) (holding that there must be criminal intent).

³⁴⁹ See *People v. Penny*, 285 P.2d 926, 937 (Ca. 1955)(jury should have been instructed regarding criminal negligence, not civil negligence); *People v. Rodriguez*, 8 Cal.Rptr. 863, 879 (Cal. Ct. App. 1960) ("In order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue"); *Somers v. Superior Court*, 108 Cal. Rptr. 961, 967-968 (Cal. Ct. App. 1973) ("[C]riminal liability is premised on intentional violations of the law").

³⁵⁰ See 21 AM. JUR. 2D *Criminal Law* §§ 216, 217 (1998).

³⁵¹ See *U. S. v. Parr*, 516 F.2d 458 (5th Cir. 1975) (justification and excuse are affirmative defenses); *Hightower v. State*, 481 S.E.2d 867, 869-870 (Ga. Ct. App. 1997) ("[T]he defendant [must] admit the crime before he can raise such defense"); *People v. Lemons*, 562 N.W.2d 447, 453-454 (Mich. 1997) (defendant has burden to prove duress).

³⁵² 21 AM. JUR. 2D, *Criminal Law* § 160 (1998).

³⁵³ MPC, § 3.02.

³⁵⁴ *Id.* § 3.04(1).

others,³⁵⁵ (v) defense of property,³⁵⁶ (vi) parental disciplinary rights,³⁵⁷ (vii) law enforcement privileges,³⁵⁸ (viii) entrapment,³⁵⁹ (ix) mental defenses negating responsibility, and (x) a very limited defense of error of law. From a comparative law perspective, these defenses are of little interest. Even though there are certain differences in the treatment of each of these defenses, they are very similar in civil law and common law, which is reflected in both the analysis of courts and authors.³⁶⁰

Duress arises when the defendant is coerced to commit a crime by the use of unlawful force against his person or another's person. The threat must be "present, imminent, and impending"³⁶¹; and, it must induce a well-grounded apprehension of death or serious personal bodily injury if the crime is not carried out. Duress also includes the threat of use of force.³⁶² Unlike civil law, this defense is not available for homicide, but in some U.S. states, duress may reduce the degree of homicide.³⁶³

Like in civil law,³⁶⁴ the necessity defense entails choosing the lesser evil.³⁶⁵ As a result of some force or condition, the defendant must choose between committing a relatively minor offense or allowing himself or others to suffer substantial harm to person or property. However, there is a significant difference here between civil law and common law. The necessity defense is considerably limited in Anglo-

³⁵⁵ 19 TEX. JUR. *Criminal Law* § 435 (2001).

³⁵⁶ MPC § 3.06(1); 21 TEX. JUR. *Criminal Law* § 1946 (2001).

³⁵⁷ See IOWA CODE § 234.40 (1994); N.Y. FAM. CT. ACT § 1012 (1995); MICH. COMP. LAWS ANN. § 380.1312(1) (West 1994); MINN. STAT. ANN. § 121A.58 (West 2000); N.D. CENT. CODE § 15.1-19-02 (1999).

³⁵⁸ See Mitchell N. Berman, *Justification And Excuse, Law And Morality*, 53 DUKE L. J. 1, 25 (2003).

³⁵⁹ 25 OHIO JUR. *Criminal Law* § 711 (2000).

³⁶⁰ See HENDLER, *supra* note 7, at 66.

³⁶¹ 1 AM. JUR. 2D *Abduction And Kidnapping* § 56 (2004).

³⁶² Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse - And Why It Matters*, 6 BUFF. CRIM. L. R. 833, 859 (2003).

³⁶³ See 21 AM. JUR. 2D, *Homicide* § 115 (2004).

³⁶⁴ See C.P. art. 20(4) (Spain).

³⁶⁵ 21 AM. JUR. 2D *Criminal Law* § 158 (1998).

American jurisdictions, as it is not available in common law.³⁶⁶ Thus, in common law jurisdictions, its existence is dependent on an express statutory enactment. The Model Penal Code contemplates the necessity defense for those situations in which the harm or evil to be avoided is greater than that sought to be prevented by the law defining the offense charged.³⁶⁷ In Canada, however, the courts may not balance the social utility of breaking the law against obeying the law. The defense is available in Canada only when the accused has no realistic choice but to violate the law, and there is no other "safe avenue."³⁶⁸ Like in most civil law jurisdictions,³⁶⁹ the necessity defense is generally not available for homicides under the common law.³⁷⁰

The self-defense justification also presents remarkable similarities in both civil law and common law.³⁷¹ In common law, a person may use whatever force reasonably necessary, except for deadly force, to prevent the immediate unlawful imposition of harm to himself.³⁷² The person resorting to self-defense may not use deadly force unless the danger that is being resisted is also deadly force.³⁷³ The Canadian Criminal Code states that "[e]very one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself."³⁷⁴

³⁶⁶ See *The Queen v. Dudley & Stephens*, 14 Eng. Rep. 273, 288 (Q.B. 1884) (necessity is not a legal justification to murder).

³⁶⁷ MPC § 3.02(1)(a).

³⁶⁸ *R. v. Hibbert*, [2001] 2 R.C.S. 973, 979.

³⁶⁹ ZAFFARONI, *supra* note 110, at 481.

³⁷⁰ See *People v. Trippet*, 66 Cal. Rptr. 2d 559, 563 (Cal. Ct. App. 1997) ("The defense may be available where a defendant is charged with committing any criminal act except the taking of an innocent human life").

³⁷¹ BACIGALUPO, *supra* note 96, at 359.

³⁷² John F. Wagner Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, that Physical Force is Necessary—Modern Cases*, 73 A.L.R. 4TH 993, 996 (1989).

³⁷³ See R.S.C. Part I § 34 (Can.).

³⁷⁴ *Id.* at 34(1). Further, "every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if [:] (a) he causes it under reasonable apprehension of death or grievous bodily harm from

As in civil law jurisdictions,³⁷⁵ the requirements for self-defense³⁷⁶ include the repression of only present or imminent³⁷⁷ use of unlawful force by another, and the use of only reasonable means to repress that force.³⁷⁸ Like in civil law,³⁷⁹ the person resorting to self-defense may not have been the aggressor.³⁸⁰ However, if he was a non-deadly aggressor he may defend himself against deadly force with deadly force, but only if he completely withdrew after his initial aggression.³⁸¹

In some common law jurisdictions, courts extend the benefits of self-defense to cases that fall within the classification of battered spouse syndrome. In these cases, when a woman kills her partner after being physically abused, or kills to prevent another attack, she may avail herself of the benefits of self-defense,³⁸² even if the killing in self defense

the violence with which the assault was originally made or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm," *id.* at 34(2).

³⁷⁵ See CÓD. PEN. art. 34 (Arg.); C.P. art. 20(4) (Spain); COD. PEN. COLOM. art. 32 (Colom.)

³⁷⁶ See *State v. Urbano*, 589 N.W.2d 144, 151 (Neb. 1999) ("To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances").

³⁷⁷ See *McGarity v. State*, 5 S.W.2d 223, 227 (Tex. Ct. App. 1999) ("‘imminent’ means something that is impending, not pending; something that is on the point of happening, not about to happen"); *Darty v. State*, 994 S.W.2d 215, 218 (Tex. Ct. App. 1999) ("An ‘imminent harm’ occurs when there is an emergency situation, and it is ‘immediately necessary’ to avoid that harm when a split-second decision is required without time to consider the law").

³⁷⁸ Jeremy Horder, *Self-Defence, Necessity and Duress: Understanding the Relationship*, 11 CAN. J.L. & JURIS. 143, 144 (1998).

³⁷⁹ See C.P. art. 20(4) (Spain).

³⁸⁰ Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 6-8 (1985); Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification* 2 BUFF. CRIM. L. R. 191, 207 (1998).

³⁸¹ John S. Baker, Jr., *Definition of Crime-Vagueness; Proof of "Unlawful Purpose"*, 45 La. L. Rev. 251, 259-260 (1984).

³⁸² *Commonwealth v. Rodriguez*, 633 N.E.2d 1039, 1041-1042 (1994) (woman fatally stabbed her boyfriend who had been abusing her) ("There can be no

is not the consequence of an imminent peril.³⁸³ In these circumstances, the courts have tended to relax some of the requirements of self-defense.³⁸⁴ In order to avail herself of this defense, a woman who kills or attacks her abusive spouse or partner must prove that she has been through the battered woman cycle at least once.³⁸⁵ This cycle includes the tension-building phase, followed by the explosion or acute battering incident, culminating in a contrition phase - often referred to, as the "honeymoon" phase.³⁸⁶ Additionally, she must prove, usually through expert opinion,³⁸⁷ that she has experienced learned helplessness and that she suffers from a series of symptoms by which the syndrome can be diagnosed.³⁸⁸ These requirements make the defense quite narrow as they exclude those women who opt to defend themselves without experiencing the whole syndrome cycle. Even worse, the courts impose the burden of being assaulted and reconciled in order to be able to use this defense.

The right to defend others³⁸⁹ and the right to defend property³⁹⁰ are quite similar in both civil law and common law jurisdictions.³⁹¹

bright line: in one circumstance, an act of two weeks earlier might be too remote, while in another, an act of two years before may not").

³⁸³ Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 381 (1993).

³⁸⁴ Erin M. Masson, Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R.5th 749, 763 (2004).

³⁸⁵ Jimmie E. Tinsley, *Criminal Law: The Battered Woman Defense*, 34 AM. JUR. POF 2D 1, 24 (1983).

³⁸⁶ LENORE WALKER, *THE BATTERED WOMAN* 55-70 (1979).

³⁸⁷ Cynthia Lynn Barnes, Annotation, *Admissibility Of Expert Testimony Concerning Domestic-Violence Syndromes To Assist Jury In Evaluating Victim's Testimony Or Behavior*, 57 A.L.R.5th 315, 337 (2004).

³⁸⁸ See Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, Applied Research Forum, National Electronic Network on Violence Against Women,(1996), at

http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_bws.pdf (last accessed October 26, 2004).

³⁸⁹ See *Daniels v. State*, 215 S.W.2d 624, 625 (Tex. Crim. App. 1948) (allowing right to defend third person); *Rylee v. State*, 117 S.W.2d 85, 87 (Tex. Crim. App. 1938) (allowing protection of third person as a defense); *Valadez v. State*, 408 S.W.2d 109, 111 (Tex. Crim. App. 1966) (allowing jury to decide if defendant was justified in protecting third person); *Townsend v. State*, 93

Basically, “a person is justified in using force to protect a third person when the [latter] is threatened [under] circumstances [which] would [allow the third person] to protect himself and, the actor reasonably believes that intervention is immediately necessary.”³⁹² A person may also use force—even deadly force in some jurisdictions³⁹³—“to prevent or terminate an unlawful entry upon land;” the use of force is necessary, as it affects property in the actor’s possession, to prevent confiscation, or to recapture personal property when the other person’s interference with the property is unlawful.³⁹⁴

The limited right of parents to use force to discipline their children³⁹⁵—whereby parents are allowed to cause physical pain by hitting, paddling, spanking, slapping, or any other physical force against their children—is similar in civil law countries and has generated agitated debates in the last few years.³⁹⁶ Law enforcement agents are entitled to violate the law when it is reasonable to do so.³⁹⁷ In other words, these acts would be criminal if not performed by law enforcement agents, such as applying force, entering into property or depriving people of liberty.³⁹⁸ Unlike common law,³⁹⁹ these privileges are not treated as special

S.W.2d 156, 157 (Tex. Crim. App. 1936) (allowing jury to consider defense of protecting third person).

³⁹⁰ MPC § 3.06.(1).

³⁹¹ See HENDLER, *supra* note 7, at 141.

³⁹² Hamel v. State, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996).

³⁹³ See Phoenix v. State, 640 S.W.2d 306, 306-307 (Tex. Crim. App. 1982) (deadly force can be used only in self-defense, when “immediately necessary,” and where no lesser force is possible or would place the person at a greater risk of substantial harm); 22A AM. JUR. 2D *Death* § 135 (2004) (can only use deadly force to protect property where there is “an element of danger to the person” or “to prevent a felony”).

³⁹⁴ MPC § 3.06.(1) .

³⁹⁵ See note 357.

³⁹⁶ See generally Mary Kate Kearney, *Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child*, 32 SAN DIEGO L. REV. 1 (1995) (discussing whether parents should have the right to corporally punish their child).

³⁹⁷ Berman, *supra* note 358, at 24-25.

³⁹⁸ DRESSLER, *supra* note 251, at 273.

³⁹⁹ SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 111 (1987).

defenses in civil law countries, but are considered within the general causes of justification that would not trigger criminal liability.⁴⁰⁰

Entrapment,⁴⁰¹ which arises when a law enforcement agent induces a defendant to commit the crime,⁴⁰² is the only defense that is unknown in the civil law world.⁴⁰³ For the defense to be available, the government's conduct must create the predisposition to commit the crime.⁴⁰⁴ Otherwise, when the law enforcement agent merely provides someone who is already willing and ready to violate the law with the opportunity to commit a crime, the entrapment defense will not be available.⁴⁰⁵ Entrapment is aimed strictly at governmental misconduct and its objective is to prevent the government from manufacturing crime. The rationale is to protect those who commit a crime at the initiative of the government, when law enforcement agents implant in their minds the predisposition to commit a crime, and actively induce its commission.⁴⁰⁶

Responsibility

Common law has developed a fairly sophisticated set of rules dealing with the defenses excluding blameworthiness.⁴⁰⁷ The most important one— and the one that has received the most consideration from authors and the courts— is the insanity defense.⁴⁰⁸ The prevailing test to determine whether a defendant may be responsible for the act performed is the *M'Naghten* right-wrong test which arose in a 19th century English

⁴⁰⁰ WELZEL, *supra* note 93, at 70.

⁴⁰¹ Annotation, *Entrapment as Defense to Charge of Selling or Supplying Narcotics Where Government Agents Supplied Narcotics to Defendant and Purchased them from Him*, 9 A.L.R.5th 464 (1993).

⁴⁰² 25 OHIO JUR. 3D *Criminal Law* § 711 (2000).

⁴⁰³ HENDLER, *supra* note 7, at 66.

⁴⁰⁴ 15B FLA JUR 2D *Criminal Law* § 3051 (2001).

⁴⁰⁵ *State v. Dickinson*, 370 So. 2d 762 (Fla. 1979) (“There is clearly no constitutional prohibition against a law enforcement officer providing the opportunity for a person who has the willingness and readiness to break the law”).

⁴⁰⁶ 15B FLA JUR 2D *Criminal Law* § 3051 (2001).

⁴⁰⁷ See Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant after Penry v. Johnson*, 35 AKRON L. REV. 327, 329 (2002) (examining how mental status of the defendant influences whether the death penalty will be applied)..

⁴⁰⁸ See 2 TORCIA, *supra* note 297, at §105 (addressing insanity defense).

case.⁴⁰⁹ This test probes whether, at the time of committing the act, the accused party was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know, that he did not know that what he was doing was wrong.⁴¹⁰ The *M'Naghten* test focuses exclusively on cognitive disability and does not take into account volitional disability.⁴¹¹

The Model Penal Code adopted a somewhat different test.⁴¹² Under this test, "a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."⁴¹³ Unlike the traditional *M'Naghten* test, the Model Penal Code test does not require total lack of capacity but substantial lack of capacity.⁴¹⁴

At the federal level, in 1984, the U.S. Congress adopted another test, which rests heavily on the original *M'Naghten* test and rejects the lower standards of the Model Penal Code.⁴¹⁵ Under the federal test, the defendant is not responsible if "as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts."⁴¹⁶ In many common law jurisdictions, the burden of proof of the inability to appreciate the wrongfulness of the act falls on the defendant.⁴¹⁷ In *Medina v. California*, the U.S. Supreme Court held that this reverse burden of proof is not unconstitutional.⁴¹⁸

⁴⁰⁹ Daniel M'Naghten's Case, 8 Eng. Rep. 718, 721 (H.L. 1843).

⁴¹⁰ *Id.*

⁴¹¹ *United States v. Freeman*, 357 F.2d 606, 617 (2d Cir. 1966) (applying "wrongfulness" standard).

⁴¹² MPC § 4.01.

⁴¹³ *Id.*

⁴¹⁴ *Id.*; *United States v. Massa*, 804 F.2d 1020, 1022-23 (8th Cir. 1986) (applying the Model Penal Code insanity test).

⁴¹⁵ Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 401-06 1984 U.S.C.C.A.N. (98 Stat.) 2057., 2057.

⁴¹⁶ 18 U.S.C.A. § 17(a) (West Supp. 2004).

⁴¹⁷ *See, e.g., State v. Rullo*, 412 A2d 1009, 1011 (N.H. 1980) ("the defendant bears the burden of establishing, by a preponderance of the evidence, the affirmative defense of insanity"); 21 AM JUR 2d, *Criminal Law*, § 50 (2004) (defendant has burden of showing "insanity as defined by law"); Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility-State*

Common law has only recently delved into the temporary mental defects of intoxication⁴¹⁹ and automatism.⁴²⁰ The intoxication phenomenon, which includes problems caused by alcohol or drugs, has a different treatment depending on whether the intoxication has been provoked voluntarily⁴²¹ or involuntarily.⁴²² The Model Penal Code states that “if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been had he been sober, such unawareness is immaterial.”⁴²³ However, the courts have admitted that when voluntarily provoked, intoxication can negate specific intent,⁴²⁴ but not general intent.⁴²⁵ Most common law jurisdictions treat involuntary intoxication as insanity.⁴²⁶ Thus, an involuntarily intoxicated defendant, who “at the time of his conduct lacks substantial capacity to appreciate its criminality or to conform his conduct to the requirements of the law,” has a valid affirmative defense.⁴²⁷ In general, a defendant is considered involuntarily intoxicated “when he has become intoxicated through the fault of another, by accident, inadvertence, or mistake on his own part, or because of a physiological or psychological condition beyond his

Cases, 9 A.L.R.4th 526, 542-43 (1981) (listing cases where the burden is on the defendant to show insanity).

⁴¹⁸ *Medina v. California*, 505 U.S. 437, 453 (1992).

⁴¹⁹ See generally R.W. Gascoyne, Annotation, *Modern Status of the Rules as to Voluntary Intoxication as a Defense to Criminal Charge*, 8 A.L.R. 3d 1236 (1966); Phillip E. Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R. 3d 16 (1976).

⁴²⁰ See generally Eunice A. Eichelberger, Annotation, *Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R. 4th 1067 (1984).

⁴²¹ TEX. PENAL CODE ANN. § 8.04(a) (Vernon 2004) (“Voluntary intoxication does not constitute a defense to the commission of crime”).

⁴²² Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute A Defense to Criminal Charge*, 73 A.L.R. 3d 195 (1976) (“Generally speaking, an accused may be completely relieved of criminal responsibility if, because of involuntary intoxication, he was temporarily rendered legally insane at the time he committed the offense”).

⁴²³ MPC § 2.08(2).

⁴²⁴ See 21 AM. JUR. 2D *Criminal Law* § 128 (1998) (defining “specific intent”).

⁴²⁵ *State v. Davis*, 612 N.E.2d 343, 347 (Ohio Ct. App. 1992) (voluntary intoxication was held to be capable of negating specific intent).

⁴²⁶ See 21 AM. JUR. 2D *Criminal Law* §§ 55, 171 (1998) (stating that involuntary intoxication is a basis for the insanity defense).

⁴²⁷ MPC § 2.08(4).

control.”⁴²⁸ U.S. courts expressly rejected the doctrine of *actio libera in causa*,⁴²⁹ which has had an ample reception in civil law countries.⁴³⁰

The automatism defense, which is triggered, for example, as a consequence of epilepsy attacks,⁴³¹ negates responsibility when there is a mental or physical condition that deprives the act of its voluntary character.⁴³² Defendant is “reliev[ed] [from] criminal responsibility... because [he] has not engaged in an act... [, i.e.], in a voluntary bodily movement.”⁴³³ The Model Penal Code permits this defense.⁴³⁴ However, this should not be considered a defense,⁴³⁵ but instead, as in civil law, simply an absence of *actus reus*.

The law of error encompasses “mistake,” or “a false conception of [the object of cognition]”, and “ignorance,” or “absence of any perception of the potential object of cognition.”⁴³⁶ The law of error in common law jurisdictions is not considered a separate defense, but rather a circumstance that negates the required mental state. The Model Penal

⁴²⁸ Hassman, *supra* note 422, at 199.

⁴²⁹ *Sabens v. United States*, 40 App. D.C. 440, 443 (D.C. 1913). “[A] man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, *and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime.... If the mental status required by law to constitute crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not in fact been committed.*” *Id.*; See J. Perez Diaz, *Ponencia del Secretario de Justicia sobre la Reforma delCodigo Penal De Puerto Rico*, 62 REV. JUR. U.P.R. 159, 253 (1993) (discussing “*actio libera in causa*”).

⁴³⁰ See, e.g., Cecilia Sanchez Romero, *Jurisprudencia Penal Reciente*, 15 CIENCIAS PENALES: REVISTA ASOCIACION DE CIENCIAS PENALES DE COSTA RICA 98, 100-102 (1998), available at <http://www.cienciaspenales.org/revista15f.htm> (last accessed October 22, 2004).

⁴³¹ LAFAVE, *supra* note 283, at § 4.9.

⁴³² Eichelberger, *supra* note 420, at 1072.

⁴³³ *Id.*

⁴³⁴ MPC § 2.01(1).

⁴³⁵ Some courts and authors consider it as a defense, even negating *mens rea*. See LAFAVE, *supra* note 283, at §§ 6.1-6.2.

⁴³⁶ 2 HELEN SILVING, CRIMINAL JUSTICE 760 (1971).

Code expressly treats it as a defense, however, which operates when: (i) “the ignorance or mistake negates the purpose, knowledge, recklessness or negligence required to establish a material element of the offense”: or, (ii) “the law provides that the state of mind established by the ignorance or mistake constitutes a defense.”⁴³⁷ The classic example is the case of “an individual [who takes] a [coat] from a coat rack in a [restaurant] believing it to be [his] own... [when it actually] belongs to [someone else].”⁴³⁸ In this case, there is no larceny because this crime requires a specific intent of taking another’s property; because of the mistake, intent is not present. The distinction between crimes requiring general intent⁴³⁹ and specific intent⁴⁴⁰ find little application in the law of error in common law jurisdictions since the law of error generally applies to crimes requiring specific intent. In crimes of general intent, the mistake is a defense only if the mistake is reasonable, and the act was not morally or legally wrong had the facts been as the defendant believed them to be. In strict liability offenses, mistake is not a defense.⁴⁴¹ The Model Penal Code does not require that the mistake be reasonable; the defense may be successful even if the mistake is considered unreasonable, so long as it prevents the defendant from having the requisite intent or knowledge.⁴⁴² In most jurisdictions, the error defense will not be available when “the defendant would be guilty of another offense had the situation been as he supposed.... [However, under the Model Penal Code,] the ignorance or mistake of the defendant reduces the grade and degree of the offense... to those of the offense of which he would be guilty had the situation been as he supposed.”⁴⁴³

⁴³⁷ MPC § 2.04(1).

⁴³⁸ Elizabeth Phillips Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 995 (1989).

⁴³⁹ 21 AM. JUR. 2D *Criminal Law* § 127 (1998).

⁴⁴⁰ *Id.* § 128.

⁴⁴¹ See *Garnett v. State*, 632 A.2d 797, 804 (Md. 1993). In *Garnett*, a retarded man was deemed guilty of statutory rape even though his mistake was reasonable.

⁴⁴² MPC § 2.04(2).

⁴⁴³ *Id.*

As a general rule, ignorance of the law is not an excuse, so mistake of law is not considered a defense.⁴⁴⁴ Ordinarily, knowledge that the crime exists is not an element of the crime itself and does not negate the *mens rea* of the offense.⁴⁴⁵ However, in the Model Penal Code, there are two general exceptions when mistake of law can act as a defense.⁴⁴⁶ The first exception is the “reasonable reliance” doctrine.⁴⁴⁷ This takes place when the defendant relies on “an official [interpretation] of the law, now determined to be wrong, contained in [a statute, a judicial decision, or an administrative order by a public officer responsible] for the interpretation [, administration,] or enforcement of the law defining the offense.”⁴⁴⁸ The second exception is when “the statute... defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to [his] conduct.”⁴⁴⁹

V. Crimes Against Life

Common law

Homicide⁴⁵⁰ is the most salient crime against the person. In some common law jurisdictions, a distinction is made between culpable and non-culpable homicides.⁴⁵¹ Non-culpable homicides are those that are justifiable⁴⁵² or excusable,⁴⁵³ and thus causing a death is “not

⁴⁴⁴ Bruce R. Grace, *Ignorance of the Law as an Excuse* 86 COLUM. L. REV. 1392, 1395 (1986).

⁴⁴⁵ *Id.*

⁴⁴⁶ MPC § 2.04.

⁴⁴⁷ See Annotation, *Criminal Law: “Official Statement” Mistake of Law Defense*, 89 A.L.R. 4th 1026, 1030 (1991) (discussing the “reasonable reliance” doctrine).

⁴⁴⁸ *Commonwealth v. Twitchell*, 617 N.E.2d 609, 619 (Mass. 1993).

⁴⁴⁹ MPC § 2.04(3).

⁴⁵⁰ 40 AM. JUR. 2D *Homicide* § 1 (2004).

⁴⁵¹ See R.S.C. Part VIII § 222(2)-(4) (Can.); 40 AM. JUR. 2D *Homicide* § 1 (2004).

⁴⁵² See 15B FLA JUR 2D *Criminal Law* § 3424 (2001) (“By statute, a homicide is justifiable when committed in resistance to an attempt to murder or to commit any felony on a person”).

⁴⁵³ See, e.g., *Hopson v. State*, 168 So. 810, 811 (Fla. 1936) (“[w]here homicide is committed by accident or misfortune, the homicide is excusable”).

necessarily” unlawful.⁴⁵⁴ These include the execution of a person sentenced to capital punishment, a soldier’s killing of an enemy during wartime— provided that he respects the *jus in bello* rules, such as those contained in the Geneva Conventions⁴⁵⁵— or a law enforcement agent’s killing of a person in the line of duty.⁴⁵⁶ Culpable homicides have been characterized as the unlawful causing of the death of another.⁴⁵⁷ They include murder and manslaughter. In Canada, there is a third category, “infanticide,” defined as a mother’s killing of her “newly-born child,” either willfully or through omission, when the mother is mentally disturbed as a result of the birth.⁴⁵⁸ Some jurisdictions also include the categories of negligent or vehicular homicide.⁴⁵⁹

Murder

Murder is considered the unlawful killing of a human being⁴⁶⁰ with malice aforethought.⁴⁶¹ “Malice”⁴⁶² consists of “an unjustified

⁴⁵⁴ *People v. Mahon*, 395 N.E.2d 950, 958 (Ill. App. Ct. 1979). *See also Whiteside v. State*, 12 S.W.2d 218, 221 (Tex. Crim. App. 1928) (stating that the term “homicide” covers both lawful and unlawful acts).

⁴⁵⁵ *See* The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁴⁵⁶ *See* 40 AM. JUR. 2D *Homicide* § 1 (2004) (“[The term ‘homicide’] does not necessarily import a crime, since one’s act in taking another’s life may be excusable or justifiable”).

⁴⁵⁷ *Id.*

⁴⁵⁸ R.S.C. Part VIII § 233 (Can.).

⁴⁵⁹ *See, e.g., Randy R. Koenders, Annotation, Alcohol-Related Vehicular Homicide: Nature and Elements of the Offense*, 64 A.L.R. 4th 166, 174 (1988) (discussing alcohol-related vehicular homicide statutes).

⁴⁶⁰ 40 AM. JUR. 2D *Homicide* § 1 (2004). With respect to the concept of “human being,” common law and civil law courts and authors have debated the criminal law consequences of taking the life of fetuses and embryos with similar arguments. *See Kayhan Parsi, Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703 (1999) (overview of views on fetuses and embryos in law); *Keeler v. Superior Ct. of*

disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life.”⁴⁶³ Despite its name, malice does not require any special malicious *mens rea* or even premeditation.⁴⁶⁴ Criminal homicides that are committed intentionally,⁴⁶⁵ whether purposely or knowingly; recklessly, manifesting extreme indifference to the value of human life with a depraved heart,⁴⁶⁶ or arising out of the perpetration of particular felonies,⁴⁶⁷ are considered murder.⁴⁶⁸ There is also murder when defendant does not have the intention to kill but to inflict serious bodily harm, as a result of which death occurs.⁴⁶⁹ The Model Penal Code, however, has abandoned this last category as an independent subcategory of murder, and includes it within the category of reckless murder.⁴⁷⁰

Amador County, 470 P.2d 617 (Cal. 1970) (court found that unborn but viable fetus was not a human being under state statute).

⁴⁶¹ 40 AM. JUR. 2D *Homicide* § 37 (2004). Courts continue to use the common law concept of malice aforethought to define murders. *See State v. Galloway*, 275 NW2d 736, 738 (Iowa 1979) (court states that “malice aforethought is a necessary element to murder”).

⁴⁶² 40 AM. JUR. 2D *Homicide* § 37 (2004).

⁴⁶³ *State v. Lambert*, 705 A.2d 957, 964 (R.I. 1997); *State v. McGranahan*, 415 A.2d 1298, 1302 (R.I. 1980).

⁴⁶⁴ DRESSLER, *supra* note 251, at 503.

⁴⁶⁵ *See* N.Y. PENAL LAW § 125.27 (McKinney 2004) (murder in the first degree requires intent); *People v. Mateo*, 664 N.Y.S.2d 981, 988 (N.Y. Co.Ct. 1997) (felony murder statute requires that killing during a felony being intentional).

⁴⁶⁶ *See People v. Jefferson*, 748 P.2d 1223, 1226-27 (Colo. 1988), (“depraved-heart murder... derive[s] from decisions and statutes condemning as murder unintentional homicide under circumstances evincing a ‘depraved mind’ or an abandoned and malignant heart”).

⁴⁶⁷ *See* 40 AM. JUR. 2D *Homicide* § 40 (2004) (felony murder).

⁴⁶⁸ *See also* MPC § 210.1 (stating that “[a] person is guilty of criminal homicide if he **purposely, knowingly, recklessly** or **negligently** causes the death of another human being”).

⁴⁶⁹ *See Glenn v. State*, 511 A.2d 1110, 1116 (Md. Ct. Spec. App. 1986) (“The critical distinction that needs to be made, however, is between *the results specifically intended*, not *between the presence or absence of a specific intent*... [T]he inchoate form of intent-to-kill murder is assault with intent to murder, whereas the inchoate form of intent-to-commit-grievous-bodily-harm murder is assault with intent to maim, disfigure, or disable”).

⁴⁷⁰ MPC § 210.1.

Under intent-to-kill murder, there is an express intent to kill. All the necessary deliberation is involved in the formation of the purpose to kill before the perpetration of the fatal act.⁴⁷¹ A typical example of this type of murder is when defendant purposefully shoots a victim, causing the victim's death without any justification or excuse.⁴⁷²

Another type of murder is that "committed recklessly under circumstances manifesting extreme indifference to the value of human life."⁴⁷³ A classic illustration of this depraved heart murder is the case of a workman who drops a brick from the top of a large building to a crowded street, killing a passerby.⁴⁷⁴ The Model Penal Code provides that such recklessness and indifference are presumed if the actor is engaged as the perpetrator or participant of a "robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape."⁴⁷⁵

There are common law jurisdictions that consider a crime those homicides committed in the perpetration of all or certain specified felonies.⁴⁷⁶ Here, defendant does not intend to cause death,⁴⁷⁷ which may be casual and unintentional.⁴⁷⁸ The law supplies or presumes intent to kill

⁴⁷¹ 40 AM. JUR. 2D *Homicide* § 39 (2004).

⁴⁷² See *Cupps v. State*, 97 N.W. 210, 213-214 (Wis. 1903) (stating that "under our statute every intentional taking of human life not excusable or justifiable is murder in the first degree").

⁴⁷³ Jeffrey F. Ghent, Annotation, *Validity and Construction of Extreme Indifference Murder Statute*, 7 A.L.R.5th 758, 772 (1992).

⁴⁷⁴ LAFAVE, *supra* note 283, at § 14.4(a). Other examples, as illustrated by LaFave, are: "firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into the caboose of a passing train or into a moving automobile, necessarily occupied by human beings; throwing a beer glass at one who is carrying a lighted oil lamp; playing a game of "Russian roulette" with another person; shooting at a point near, but not aiming directly at, another person; driving a car at very high speeds along a main street; shaking an infant so long and so vigorously that it cannot breathe; selling 'pure' (i.e., undiluted) heroin," *Id.*

⁴⁷⁵ MPC § 210.2(1)(b).

⁴⁷⁶ 40 AM JUR 2D *Homicide* § 40 (2004) (felony murder).

⁴⁷⁷ See *Adams v. State*, 341 So. 2d 765, 767-768 (Fla. 1976) ("Even an accidental killing during a felony is murder").

⁴⁷⁸ See *Frady v. People*, 40 P.2d 606, 608 (Colo. 1934) (stating that "malice, deliberation, premeditation and intent" do not need to be proven in felony murder); *Stansbury v. State*, 146 A.2d 17, 20 (Md. 1958) (the fact that a weapon

by attaching the intent to commit the other felony to the homicide.⁴⁷⁹ Despite ample criticism against the felony murder rule,⁴⁸⁰ the United States Supreme Court has upheld the constitutionality of felony murder statutes in presuming intent.⁴⁸¹ Thus, it becomes essential to prove the existence of a direct causal link between the homicide and the commission of the other felony.⁴⁸² For example, if defendant committed arson,⁴⁸³ and a firefighter died in the resulting fire, because the homicide resulted from defendant's act of arson, and the homicide was an ordinary and probable effect of the felony, there is felony murder whether the death was intended or not.⁴⁸⁴

Intent to cause grievous bodily harm which results in death requires: "the intent to inflict the wound which produces a homicide,"⁴⁸⁵ and a finding that the defendant "knew or should have known that his acts created a strong probability of death or great bodily harm."⁴⁸⁶ For

was used in a robbery was enough to support murder, even if defendant did not intend to discharge weapon); *State v. Glover*, 50 S.W.2d 1049, 1053 (Mo. 1932) (defendant should reasonably foresee death where his felony is "dangerous and betokens a reckless disregard of human life").

⁴⁷⁹ See *Stansbury*, 146 A.2d at 20; *State v. King*, 68 P. 418, 420 (Utah 1902) ("the implied malice involved in the felonious intent to rob being... sufficient to establish the malicious intent").

⁴⁸⁰ See *People v. Washington*, 62 Cal.2d 777, 783, (Cal. 1965) (noting several treatises, articles, and cases criticizing the felony murder rule).

⁴⁸¹ *Hopkins v. Reeves*, 524 U.S. 88, 101 (1998) (holding that Nebraska's felony murder law presuming intent was constitutional).

⁴⁸² See *Jenkins v. State*, 230 A.2d 262, 269 (Del. 1967) (stating that "the felony murder rule... should be limited to homicides proximately caused by the perpetrator or attempted perpetration of felonies which are... foreseeably dangerous to human life").

⁴⁸³ See *U.S. v. Tham*, 118 F.3d 1501, 1508 (11th Cir. 1997) (malice in committing arson supplies malice for felony murder); *People v. Chavez*, 329 P.2d 907, 914 (Cal. 1958), *cert. denied*, 358 U.S. 946, (1959), *cert. denied*, 359 U.S. 993 (1959) (felony murder where defendants committed arson and knew people were inside building).

⁴⁸⁴ See *Glover*, 50 S.W.2d at 1052,

⁴⁸⁵ *State v. McNeill*, 485 S.E.2d 284, 287 (N.C. 1997).

⁴⁸⁶ *State v. Baca*, 950 P.2d 776, 784 (N.M. 1997) (second degree murder becomes first degree "when the murder is committed in the course of a dangerous felony").

example, in *State v. McNeill*⁴⁸⁷ defendant took a knife to the victim's apartment to "scare off" a man he believed was there "so he could talk to the victim alone." When defendant entered the apartment, "he and the victim began arguing and shoving one another;" then, defendant "stabbed her in the chest, back, arms, abdomen, and breast before [he was restrained from] wounding the victim further," but she died after several hours.⁴⁸⁸

As can be appreciated from this classification, the common law concept of murder equates to all cases of willful homicide, whether aggravated or simple, in civil law.⁴⁸⁹ For example, intent-to-kill murder corresponds to direct willful homicide, and depraved heart murder, as well as murders where defendant's intent is to seriously cause bodily injury, coincides with eventual willful homicide.⁴⁹⁰

In some jurisdictions, murder is divided into degrees according to its gravity and seriousness.⁴⁹¹ The most common divisions are first and second degree.⁴⁹² In general, first degree murder includes premeditated⁴⁹³ and deliberate⁴⁹⁴ murder. Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act."⁴⁹⁵ Similarly, "deliberation requires that the defendant considered the

⁴⁸⁷ *McNeill*, 485 S.E.2d 284 at 286.

⁴⁸⁸ *Id.*

⁴⁸⁹ HENDLER, *supra* note 7, at 142. However, as clearly put forward by Hendler, not all these cases have an exact correspondence in civil law.

⁴⁹⁰ *Id.*

⁴⁹¹ See 35 N.Y. JUR. 2D *Criminal Law* §§ 3783, 3787 (2004) (first and second degree murder).

⁴⁹² See *Id.*

⁴⁹³ 21 AM. JUR. 2D *Criminal Law* § 133 (2004) (premeditation). See also, e.g., *State v. Ruff*, 492 S.E.2d 374, 376 (N.C.App. 1997), *rev'd on other grounds*, 505 S.E.2d 579 (N.C. 1998) (premeditation is a factor that trial court may consider in evaluating an offense).

⁴⁹⁴ 21 AM. JUR. 2D *Criminal Law* § 133 (2004) (deliberation). See also, e.g., *People v. Osband*, 919 P.2d 640, 688 (Cal. 1996) ("We have defined 'deliberate' as 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action'").

⁴⁹⁵ *Kirkland v. State*, 684 So. 2d 732, 734 (Fla. 1996).

probable consequences of his act before doing the act.”⁴⁹⁶ Additionally, felony murders, or crimes committed in the course of certain enumerated and highly dangerous felonies, such as “arson, burglary, kidnapping, rape [and] robbery,” are also considered first degree.⁴⁹⁷ Second degree murders include murders committed with an intent to cause serious bodily injury, killings resulting from “outrageously reckless” conduct (depraved heart), and felony murders that are not considered first degree murders.⁴⁹⁸ This classification of first and second degree murder generally coincides with the civil law distinctions of aggravated (first degree) and simple (second degree) homicides.⁴⁹⁹

Manslaughter

As opposed to murder, manslaughter can be conceptualized as the unlawful killing of a human being without malice aforethought, or premeditation.⁵⁰⁰ Manslaughter has traditionally been classified as voluntary or involuntary.⁵⁰¹ Voluntary manslaughter includes killings in the heat of passion.⁵⁰² This crime originated the belief that killing on the spur of the moment⁵⁰³— such as when a person killed another in a village brawl, or a husband who found his wife in bed with another man and killed either or both of them— was less blameworthy than killing with malice aforethought, with premeditation and deliberation.⁵⁰⁴ It was

⁴⁹⁶ State v. Marks, 537 N.W.2d 339, 343 (Neb. 1995),

⁴⁹⁷ ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 46 (4th ed. 2003).

⁴⁹⁸ *Id.* at 33, 44-45

⁴⁹⁹ HENDLER, *supra* note 7, at 143.

⁵⁰⁰ 40 AM. JUR. 2D *Homicide* §§ 54, 60, -61 (2004)

⁵⁰¹ See 18 TEX. JUR. 3D *Criminal Law* § 194 (2004). “Although [in some jurisdictions, this] distinction... is no longer applicable under statutory law,” the courts continue to use these concepts to “differentiate between [the different types of] manslaughter,” *id.*

⁵⁰² See *Comber v. United States*, 584 A.2d 26, 42-43 (D.C. 1990) (“[v]oluntary manslaughter is an *intentional killing* in the heat of passion as the result of severe provocation”).

⁵⁰³ See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminology 421, 426 (1982) (“[b]y the sixteenth century in England... intentional killings as a result of drunken brawls and breaches of honor had become all too common”).

⁵⁰⁴ See *Glenn*, 511 A.2d at 1114, 1122-1123. The court discusses the rise of the distinction between murder and manslaughter in common law.

believed that in these cases, defendant did not deserve capital punishment,⁵⁰⁵ which was the prevalent punishment in the United Kingdom for centuries.⁵⁰⁶ Consequently, the courts carved out the manslaughter crime for those cases in which the defendant was provoked and thus killed in the heat of passion before he “cooled off.”⁵⁰⁷ Provocation, in order to be adequate, must be such as might naturally cause a reasonable person in the passion of the moment to lose self-control and act on impulse without reflection.⁵⁰⁸ A two-tiered test has been created with which courts analyze: (i) whether the wrongful act was of sufficient nature to deprive an ordinary person of self-control,⁵⁰⁹ and (ii) whether the provoked person acted all of a sudden before his or her passion had time to cool off.⁵¹⁰

Involuntary manslaughter may be caused by reckless conduct,⁵¹¹ such as when a person is aware of a substantial and unjustifiable risk and

⁵⁰⁵ See *Holmes v. D.P.P.*, 2 All E.R. 124, 128 (H.L. 1946) (“the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important, is because the sentence for murder is fixed and automatic”); *Regina v. Cunningham*, 1 Q.B. 288 (Crim App. 1958) (stating that “provocation may reduce murder to manslaughter”); Ashworth, *Sentencing in Provocation Cases*, 1975 CRIM. L.R. 553, 553 (1975) (“[m]urder is the only crime to which provocation may afford a defence, and this is traditionally justified by reference to the fixed penalty for murder”); Royal Commission on Capital Punishment 1949-1953 Report (1953), [Cmd. 8932], at para. 144 (addressing the provocation defense as “an attempt to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness”).

⁵⁰⁶ See *Glenn*, 511 A.2d at 1123 (“[a]ll murder had become theoretically unmitigated and, therefore, capital”).

⁵⁰⁷ DRESSLER, *supra* note 251, at 529.

⁵⁰⁸ See *Comber*, 584 A.2d at 42-43 (“an *intentional killing* committed in ‘sudden heat of passion’ as the result of adequate provocation constitutes voluntary manslaughter”).

⁵⁰⁹ *State v. King*, 181 A.2d 158, 166 (N.J. 1962). See also *Griffin v. State*, 644 N.E.2d 561, 562 (Ind. 1994) (there must be “appreciable evidence of sudden heat” for a voluntary manslaughter jury instruction).

⁵¹⁰ *King*, 181 A.2d at 166.

⁵¹¹ See *Tompkins v. State*, 774 S.W.2d 195, 212 (Tex. Crim. App. 1987), *aff’d*, 490 U.S. 754 (1989) (“[o]ne of the ways that... involuntary manslaughter might be committed is if the defendant *recklessly* causes the death of another individual”); *Mendez v. State*, 575 S.W.2d 36, 37-38 (Tex. Crim. App. 1979)

chooses to take it anyway.⁵¹² An example of this type of manslaughter would be a pharmacist that sells an expired medicine trusting that it will serve its purpose and will not cause the death of the patient, when in fact, it does. Additionally, involuntary manslaughter may take place when a person acts with a grossly negligent conduct.⁵¹³ This would be the case in the above example if the pharmacist gave the patient the expired medicine without even looking at the expiration date. Involuntary manslaughter may also occur in the course of the commission of certain offenses,⁵¹⁴ such as when a person procured an illicit drug for herself, and another person who consumes it with her dies of an overdose.⁵¹⁵

Civil law

In civil law jurisdictions, modern criminal codes generally contain two parts. The first part delineates the general aspects of the theory of the offense, as well as sentencing principles and crime participation. The second part, called “special part,” or *lex specialis*, contains the definitional terms and sentencing penalties for each crime.⁵¹⁶ Unlike common law, the definitions of crimes in the special part of the codes are quite abstract, and formulated in somewhat more vague terms. The premise behind this lies in the belief that the general theory of offense should suffice to explain all vicissitudes of each particular crime.

(“[t]he gist of our involuntary manslaughter offense is reckless conduct”); *Dillon v. State*, 574 S.W.2d 92, 93 (Tex. Crim. App. 1978) (“[t]he culpable mental state for involuntary manslaughter is to *recklessly* cause the death of an individual”).

⁵¹² See DRESSLER, *supra* note 251, at 541 (if risk-taking was “not extreme enough to merit treatment as murder”).

⁵¹³ See 40 AM. JUR. 2D *Homicide* § 61 (2004) (there must be “absence of the intention to cause death”).

⁵¹⁴ See 25 AM. JUR. 2D *Drugs And Controlled Substances* § 144 (2004) (stating that the “furnishing of... drugs” where there is a death is best supported by manslaughter).

⁵¹⁵ See *People v Meyer*, 208 NW2d 230, 235 (Mich.Ct.App. 1973) (holding defendant committed manslaughter by providing heroin in “reckless disregard for the safety of others”); *State v Randolph*, 676 S.W.2d 943, 947 (Tenn. 1984) (courts finds involuntary manslaughter or second degree murder could be found where defendant provides drugs to another who then dies).

⁵¹⁶ The Italian Criminal Code contains a third part dealing with misdemeanors and contraventions, as does the Swiss Criminal Code, which refers to competence, jurisdiction, and other applicability issues.

In the civil law world, there is usually only one general category of crime against life, namely, homicide (also referred to as simple homicide). Most civil law jurisdictions recognize three subcategories of homicide: simple homicide,⁵¹⁷ aggravated homicide,⁵¹⁸ and negligent homicide.⁵¹⁹ Simple homicide is defined as killing another human being.⁵²⁰ It is a general category that encompasses all homicides committed willfully with both direct and eventual *dolus*, unless they fit into one of the special subcategories.

Aggravated homicide is the killing of a human being where there exist special circumstances that render the crime more inhumane and cruel. These circumstances vary in different jurisdictions. In Spain, for example, some of these aggravating circumstances are: malice; the receipt of a price, reward or other promise; and brutality in order to increase the victim's suffering.⁵²¹ In Italy and Argentina, among other states, the criminal code also includes the existence of a family link as an aggravating circumstance. Thus, the homicide of a parent, grandparent, child, grandchild or spouse turns simple homicide into aggravated homicide.⁵²² In Argentina, another aggravating circumstance is killing due to racial or religious hate.⁵²³ Interestingly, in France, the profession of the victim may be an aggravating factor—such as the case of judges, lawyers, jurors, public officers, military and police officers.⁵²⁴ In a small minority of civil law jurisdictions, there is a general category of aggravated homicides that more closely resembles the common law concept of murder and malice aforethought. These jurisdictions include Germany, which considers a murderer “whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise

⁵¹⁷ See C.P. art.138 (Spain) (simple homicide is referred to as murder); CÓD. PEN. art. 79 (Arg.); C. PÉN. art. 221-1 (Fr.); C.P. art. 575 (Italy) (where simple homicide is merely called homicide).

⁵¹⁸ See C.P. art. 139 (Spain); C. PÉN. art. 221-2 (Fr.); CÓD. PEN. art. 80 (Arg.); C.P. art. 576 (Italy).

⁵¹⁹ See C.P. art. 142 (Spain); C. PÉN. art. 221-3 (Fr.); CÓD. PEN. art. 84 (Arg.); C.P. art. 589 (Italy).

⁵²⁰ See C.P. art. 138 (Spain); C. PÉN. art. 221-1 (Fr.); CÓD. PEN. art. 70 (Arg.); C.P. art. 575 (Italy).

⁵²¹ See C.P. art. 139 (Spain).

⁵²² CÓD. PEN. art. 80 (Arg.); C.P. art. 576 (Italy)..

⁵²³ CÓD. PEN. art. 80 (Arg.).

⁵²⁴ C. PÉN. art. 221-4 (Fr.).

base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up;”⁵²⁵ and Switzerland, whose criminal code conceptualizes murder as different from simple homicide, when the defendant acted without scruples, with malice, and in a perverse fashion.⁵²⁶ Negligent homicide is generally defined as causing the death of another human being due to imprudence,⁵²⁷ negligence,⁵²⁸ inattention,⁵²⁹ or non-observance of rules or a professional standard.⁵³⁰

Some jurisdictions also contemplate another subcategory for crimes committed under mitigating circumstances. One such subcategory is unpremeditated (“preterintentional”) homicide, which takes place when greater harm than that intended or planned occurs. In the Italian Criminal Code, criminal liability is attached to anyone who, with the intention of committing certain grave crimes, causes the death of a human being.⁵³¹ The unpremeditated homicide usually carries a sentence that is lower than that foreseen for simple homicide.

In some jurisdictions, the codes contemplate the crime of passionate homicide, which carries a reduced sentence, and applies to those cases where the defendant killed as a consequence of a violent mood commotion.⁵³² This resembles voluntary manslaughter committed in the heat of passion.⁵³³ Other civil law jurisdictions have adopted mitigating factors, i.e., situations where the penalty for simple homicide is reduced due to the existence of special circumstances. These

⁵²⁵ § 211 Nr. 2 StGB (F.R.G.).

⁵²⁶ SCHWEIZERISCHES STRAFGESETZBUCH [STGB] art. 112 (Switz.).

⁵²⁷ See C.P. art. 142 (Spain).

⁵²⁸ See C.P. art. 589 (Italy); CÓD. PEN. art. 84 (Arg.).

⁵²⁹ See C. PÉN. art. 221-6 (Fr.).

⁵³⁰ See *Id.*; CÓD. PEN. art. 84 (Arg.).

⁵³¹ C.P. art. 584 (Italy).

⁵³² See STGB art. 113 (Switz.); § 213 StGB (F.R.G) (“If the person committing manslaughter was provoked to rage by maltreatment inflicted on him or a relative or a serious insult by the person killed and was thereby immediately torn to commit the act, or in the event of an otherwise less serious case, the punishment shall be imprisonment from one year to ten years”).

⁵³³ See MPC § 210.3(1)(b) (manslaughter is homicide committed “under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”).

mitigating factors generally include a violent state of emotion,⁵³⁴ which again can be equated to the common law form of manslaughter committed in the heat of passion. As in common law, some jurisdictions also expressly include the crimes of infanticide⁵³⁵ and motor vehicular homicide⁵³⁶ as separate crimes.

Some criminal law comparativists, perhaps betrayed by the apparent similarities, particularly in terminology, have held that simple homicide can be equated with manslaughter and that murder compares to the civil law concept of murder adopted in Spain or, aggravated homicide, as adopted in Italy, France or Argentina, to name but a few.⁵³⁷ In actuality, murder in common law jurisdictions encompasses all cases of civil law willful homicide, whether simple or aggravated. Although U.S. precedents and doctrine refer to certain situations that do not always find an exact correlation in civil law, both systems have normally given reasonably similar solutions.⁵³⁸ For example, intent-to-kill murder shares many similarities with direct *dolus*, and intent to cause serious bodily harm murder -despite superficially appearing to correspond to unpremeditated homicide- actually equates to homicide committed with eventual *dolus*.⁵³⁹

Similarly, voluntary manslaughter committed in the heat of passion equates to civil law's homicide committed in a violent state of emotion, as contemplated in the criminal codes of Switzerland and Argentina, among others.⁵⁴⁰ Involuntary manslaughter committed by a negligent act, referred to by the Model Penal Code as negligent homicide, can be equated to civil law's negligent homicide. When involuntary manslaughter is caused by a reckless act, its counterparts in

⁵³⁴ See, e.g., CÓD. PEN. art. 81 (Arg.).

⁵³⁵ See, e.g., STGB art. 116 (Switz.).

⁵³⁶ See, e.g., C.P. art. 152 (Spain).

⁵³⁷ See Barney Sneiderman, *PERSPECTIVES ON THE LATIMER TRIAL: Latimer in the Supreme Court: Necessity, Compassionate Homicide, and Mandatory Sentencing*, 64 SASK. L. REV. 511, 535 (2001) (noting that many civil law countries apply a lesser degree of homicide depending on the motive for the killing).

⁵³⁸ See HENDLER, *supra* note 7, at 148.

⁵³⁹ See *id.* at 149.

⁵⁴⁰ STGB art. 113 (Switz.); CÓD. PEN. art. 81 (Arg.).

civil law are homicides committed with eventual *dolus* and conscious negligence.⁵⁴¹

Conclusions

Common law and civil law have been traditionally seen as distinctive and fairly diverse. Each belongs to a tradition that has been regarded as quite different. However, in several areas, common law and civil law have been increasingly moving toward natural convergence. This process toward convergence does not mean that civil law and common law are one and the same. On the contrary, as demonstrated, there are still important differences in virtually every area of law in these two systems. However, these differences derive from a different order of priority in sources, a different style of judicial decisions and doctrinal analysis, and a slightly different interpretation method.

Civil law tends to proclaim sets of principles of general and more abstract applicability to govern most areas of offense. In contrast, in common law jurisdictions there is a tendency to articulate rules of more precise and specific applicability through the courts' adjudication functions.

In the present stage of development toward convergence in the theory of offense, common law and civil law have arrived at practically analogous solutions in the vast majority of criminal law problems, despite differences in style, methodology and terminology. For example, the conception of *actus reus* resembles the more elaborate notion of act. Civil law, especially through the lens of the Goal-oriented school, places more emphasis on the voluntary nature of the act than common law. However, in practice, the situations where an act exists –and therefore, the cases of inexistence of an act- are essentially the same in both common law and civil law. Similarly, the four mental states of common law find acceptable equivalents in civil law for most crimes. Also, in the area of defenses and justifications, despite certain differences in their treatment, are very similar –with the sole exception of entrapment- in both civil law and common law. Additionally, the conception of crimes against life and the criminal law solutions adopted – albeit clothed in different terminology are very similar in civil law and common law. For example, murder in common law jurisdictions encompasses all cases of civil law willful homicide, whether simple or aggravated. Similarly,

⁵⁴¹ See HENDLER, *supra* note 7, at 149.

intent-to-kill murder shares many similarities with direct *dolus*, and the intent to cause serious bodily harm murder equates to homicide committed with eventual *dolus*. Likewise, voluntary manslaughter committed in the heat of passion equates to civil law's homicide committed in a violent state of emotion; involuntary manslaughter committed by a negligent act can be equated to civil law's negligent homicide; and, involuntary manslaughter caused by a reckless act finds its civil law counterpart in homicides committed with eventual *dolus* and conscious negligence.

The reasons for the similarity in treatment, structure, and analysis between civil law and common law offense theory and practice are twofold. First, common law and civil law present common features: a highly compatible nature derived from their common Western philosophy and secular objectives, and a history of evolution toward convergence. Second, common law and civil law jurisdictions generally pursue similar criminal justice objectives, which translate into related criminal law solutions and instruments.