

Mens Rea in Comparative Perspective

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MENS REA IN COMPARATIVE PERSPECTIVE

LUIS E. CHIESA*

This Essay compares and contrasts the American and civilian approaches to mens rea. The comparative analysis generates two important insights. First, it is preferable to have multiple forms of culpability than to have only two. Common law bipartite distinctions such as general and specific intent fail to fully make sense of our moral intuitions. The same goes for the civilian distinction between dolus (intent) and culpa (negligence). Second, attitudinal mental states should matter for criminalization and grading decisions. Nevertheless, adding attitudinal mental states to our already complicated mens rea framework may end up confusing juries instead of helping them. As a result, jurisdictions without jury trials are better equipped to incorporate attitudinal kinds of mens rea into their criminal laws.

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* Professor of Law and Director of the Buffalo Criminal Law Center, University at Buffalo Law School, The State University of New York. I am grateful to the many friends and colleagues who provided useful feedback when I presented a version of this Essay at the University of Barcelona, Pace Law School, and the University at Buffalo.

I. INTRODUCTION

Nathan Hall made his way down a steep and bump-filled ski slope.¹ The Vail Mountain lift operator and former ski racer was skiing extremely fast with his ski tips in the air and his weight back on his skis.² In order to get an added rush of adrenaline, Hall made his way down the slope without making any turns and with his arms out to his side to maintain balance.³ Unfortunately, he flew off a knoll and collided with a skier, killing him.⁴ Hall was charged with reckless manslaughter.⁵ Before the trial commenced, defense counsel argued that the charges should be dropped because the defendant acted merely negligently.⁶

How much should we punish the defendant in the *Hall* case? While it is clear that the defendant's conduct should trigger the imposition of some criminal liability, it is unclear how much punishment is appropriate. Given that the defendant's conduct undoubtedly caused the victim's harm, the amount of punishment that should be imposed for the homicide will be entirely dependent on his mental state. The more culpable his mental state, the more punishment he should receive.⁷ This, in turn, requires inquiring about what mental states should trigger the imposition of more (or less) criminal liability.

This Essay analyzes the *Hall* case from the perspectives of both American and civilian criminal theory.⁸ The comparative analysis will reveal that these

1. *People v. Hall*, 999 P.2d 207, 211–12 (Colo. 2000).

2. *Id.* at 212.

3. *Id.*

4. *Id.* at 211.

5. *Id.*

6. *Id.*

7. I will assume that this is true both from a retributivist and consequentialist approach to punishment. Note, however, that a consequentialist may have reason to punish harm caused with different mental states equally if doing so maximizes good consequences.

8. See *infra* pp. 578, 583. Civilian criminal law borrows heavily from German criminal law theory. See GÜNTHER JAKOBS, *DERECHO PENAL: PARTE GENERAL: FUNDAMENTOS Y TEORIA DE LA IMPUTACIÓN* (Joaquin Cuello Contreras & Jose Luis Serrano Gonzales de Murillo trans., Marcial Pons 2d ed. 1995). The civilian approach to criminal theory commands broad support throughout continental Europe, Latin America, and parts of Asia, including China and Japan. See, e.g., *id.*; FRANCISCO MUÑOZ CONDE & MERCEDES GARCÍA ARÁN, *DERECHO PENAL: PARTE GENERAL* (Tirant Lo Blanch ed., 8th ed. 2010); DIEGO-MANUEL LUZÓN PEÑA, *LECCIONES DE DERECHO PENAL: PARTE GENERAL* (Tirant Lo Blanch ed., 2d ed. 2012); SANTIAGO MIR PUIG, *DERECHO PENAL: PARTE GENERAL* (7th ed. 2004); CLAUS ROXIN, *DERECHO PENAL: PARTE GENERAL* (Diego Manuel Luzón Peña et al. trans., Civitas 1st ed. 1997); EUGENIO RAÚL ZAFFARONI ET AL., *DERECHO PENAL: PARTE GENERAL* (2nd ed., 2002); Félix A. Cifredo Cancel, *La Intención y Otros Elementos Subjetivos del Injusto Penal en los Sistemas Anglosajón y Civilista: Hacia Una Teoría Unitaria*, 63 REV. JUR. U.P.R. 39 (1994).

two legal traditions approach criminally culpable mental states in different ways. Two particular differences stand out. First, civil law countries distinguish only between *dolus* (intent) and *culpa* (negligence), whereas American criminal law distinguishes between purpose, knowledge, recklessness, and negligence.⁹ By only having recourse to two blameworthy mental states, the civilian approach allows for less flexibility in grading and criminalization decisions than the American approach. Second, culpable mental states in civil law countries place more emphasis on the attitude and volition with which the defendant acts, whereas American criminal law downplays the importance of attitudinal and volitional mental states.

Both of these differences are likely to result in considerable disparities in how much we punish homicide defendants like Nathan Hall. Regarding the first, if we were to try Hall in a civil law jurisdiction, the case would result in a conviction¹⁰ for homicide committed with *dolus*,¹¹ or for homicide committed with *culpa*.¹² This leaves the factfinder with only two potential conviction outcomes. On the other hand, prosecuting Hall in a state like Colorado could lead to convictions for purposeful murder,¹³ knowing murder,¹⁴ reckless manslaughter,¹⁵ or negligent manslaughter.¹⁶ The Colorado approach to grading homicide—which is prevalent in America—allows for more conviction outcomes than the civilian approach.

With regard to the second difference, the American approach to culpable mental states punishes conscious risk creation considerably more than unconscious risk creation. In contrast, civilian criminal theory focuses on whether the defendant approached the risk created with a certain kind of blameworthy attitude. On the other hand, American criminal law downplays

9. See MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985). These forms of culpability originate in the Model Penal Code. See *id.* The older *common law* approach did not neatly define and distinguish between different forms of culpability, instead relying on the conceptually bankrupt distinction between general and specific intent crimes. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 335 (2007).

10. The result could also be an acquittal. For the purposes of this Essay, I only explore possible conviction outcomes, since disparities in these potential outcomes highlight the different ways in which American and civilian criminal law approach culpable mental states.

11. See ROXIN, *supra* note 8, at 423. Civilian criminal law punishes a homicide committed with *dolus* quite severely. *Id.*

12. See ZAFFARONI ET AL., *supra* note 8, at 549. Civilian criminal law punishes a homicide committed with *culpa* way more leniently than one committed with *dolus*. *Id.*

13. COLO. REV. STAT. § 18-3-102 (2015).

14. *Id.* § 18-3-103.

15. *Id.* § 18-3-104.

16. *Id.* § 18-3-105.

the importance of attitudinal mental states, and instead focuses on the awareness of certain facts as the determinant of more or less punishment.

In what follows, I explore the implications of these two competing approaches to punishing culpable mental states. I conclude that it is preferable to have multiple culpable mental states than to have only two. Bipartite distinctions such as that between *dolus* and *culpa* fail to capture the many ways in which blame manifests itself in our rich moral landscape. Furthermore, I suggest that while attitudinal mental states ought to play a more salient role in apportioning and grading punishment, such an approach is difficult to implement in jurisdictions with jury trials.

The Essay proceeds in three parts. Part I discusses how the *Hall* case would be decided in America, with special emphasis on how the defendant would fare under the Model Penal Code approach to culpable mental states. Part II explains how civilian jurisdictions would approach the case and fleshes out the doctrinal distinctions that would prove decisive in those jurisdictions. Part III uses comparative analysis to shed light on the most promising ways of conceptualizing and sorting culpable mental states in homicide law and beyond. A brief conclusion follows.

II. THE *HALL* CASE IN THE UNITED STATES

The defendant in the *Hall* case was tried in Colorado.¹⁷ Since the criminal laws of Colorado are based on the Model Penal Code (MPC), the analysis that follows is based on the framework for mental states and homicide offenses provided in the MPC.¹⁸

A. *The Model Penal Code Approach to Mental States*

Prior to the publication of the MPC in 1962, American law revealed—as the Supreme Court pointed out in *Morissette*—“variety, disparity and confusion” in the “definitions of the requisite but elusive mental element” of the crime.¹⁹ This haphazard approach led “courts of various jurisdictions . . . [to invoke] terms [such] as ‘felonious intent,’ ‘criminal intent,’ ‘malice aforethought,’ ‘guilty knowledge,’ ‘fraudulent intent,’ ‘wilfulness,’ [and] ‘*scienter*,’ to denote [the] guilty knowledge, or ‘*mens rea*,’” of criminal offenses.²⁰ It is unclear what each of these terms mean and how they differ

17. *People v. Hall*, 999 P.2d 207 (Colo. 2000).

18. The approach to the mental state in homicide cases in non-MPC jurisdictions is briefly discussed in Part III(c).

19. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

20. *Id.*

from each other, if they differ at all. At a minimum, these terms denote conscious as opposed to inadvertent wrongdoing.

During the course of the twentieth century, many courts and commentators expressed deep reservations about the coherence of the common law's approach to mental states.²¹ This dissatisfaction eventually blossomed into a desire to overhaul the common law's haphazard approach to *mens rea* in its entirety.²² A fresh start was clearly needed. And that is exactly what the MPC delivered.

The most influential provision of the MPC is arguably section 2.02, which defines subjective offense elements. More than half of the states have adopted mental state provisions modeled on the MPC framework, including Colorado.²³ This provision does away with the myriad common law *mens rea* terms, including notoriously difficult to define mental states like malice and general and specific intent. The Code reduces subjective elements to four kinds of culpability, namely: purpose, knowledge, recklessness, and negligence.²⁴

Furthermore, the MPC approach to mental states is hierarchical, since it suggests that purpose is more blameworthy than knowledge, that knowledge is more blameworthy than recklessness, and that recklessness is more blameworthy than negligence.²⁵ This hierarchical approach to mental states allows for more granularity in the grading of criminal offenses. By allowing offenses to be punished more or less severely depending on the mental state with which the crime is committed, the Code allows for up to four distinct grading schemes for each generic offense. This is most obviously the case in homicide offenses. According to the Code, negligent homicide is punished less severely than reckless homicide.²⁶ In turn, purposeful and knowing homicides are punished more severely than reckless homicide.²⁷

21. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

22. *Id.*

23. *Id.* at 815–16. States that have modeled their criminal codes after the Model Penal Code include: Illinois (1962); Minnesota and New Mexico (1963); New York (1967); Georgia (1969); Kansas (1970); Connecticut (1971); Colorado and Oregon (1972); Delaware, Hawaii, New Hampshire, Pennsylvania, and Utah (1973); Montana, Ohio, and Texas (1974); Florida, Kentucky, North Dakota, and Virginia (1975); Arkansas, Maine, and Washington (1976); South Dakota and Indiana (1977); Arizona and Iowa (1978); Missouri, Nebraska, and New Jersey (1979); Alabama and Alaska (1980); and Wyoming (1983). See Robinson & Dubber, *supra* note 9, at 326. For Colorado's mental state provisions, see COLO. REV. STAT. §§ 18-1-502 to -503 (2012).

24. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985).

25. *See id.*

26. *See id.* § 2.02(2)(c), (d).

27. *See id.* § 210.

Turning to the definitions of the four mental states, a person acts purposely with regard to a result if it is her conscious desire to bring about the result.²⁸ In contrast, a person acts knowingly if she is aware that the result is practically certain to occur as a consequence of her conduct.²⁹ An example may better illustrate the difference between purpose and knowledge under the Code. Suppose that Matt places a bomb inside a commercial aircraft with the desire to kill passenger Jessie. Although Matt does not desire anyone other than Jessie to die, he is aware that all other airplane passengers will die when the bomb explodes. The bomb explodes, killing all passengers instantly. Matt kills passenger Jessie purposely, for it was his conscious desire to bring about her death. However, Matt kills the rest of the passengers knowingly, since it was not his conscious objective to bring about their death (he actually wanted them to miraculously survive), but he knew that they were practically certain to die if the bomb went off.

A person acts recklessly under the MPC if she is aware that her conduct creates a substantial and unjustifiable risk of harm.³⁰ Contrary to what may seem at first glance, a defendant may act recklessly even if her conduct is not more likely than not to result in harm.³¹ More specifically, a defendant may be held liable for a crime of recklessness even if the risk created by her conduct is considerably lower than fifty percent and in spite of the fact that recklessness is defined by law as conduct that creates a “substantial” risk of harm.³² Thus, for example, a person who points a gun at another and spins the cylinder knowing that only one of the six chambers of the gun contains a bullet acts recklessly if she fires the gun and kills the victim, although the probability of harm is “only” seventeen percent.³³ In addition to the creation of a substantial risk, recklessness requires subjective awareness of the risk created.³⁴

A person who lacks awareness of the risk does not act recklessly, although she acts negligently if her conduct creates a substantial and unjustifiable risk of harm.³⁵ The risk created in recklessness and negligence is the same.³⁶ Therefore, the only difference between the two mental states is that the reckless

28. *Id.* § 2.02(2)(a).

29. *Id.* § 2.02(2)(b).

30. *Id.* § 2.02(2)(c).

31. *See, e.g.*, *People v. Hall*, 999 P.2d 207, 217 (Colo. 2000).

32. *Id.*; MODEL PENAL CODE § 2.02(2)(c).

33. *Hall*, 999 P.2d at 217.

34. MODEL PENAL CODE § 2.02(2)(c).

35. *Id.* § 2.02(2)(d).

36. *Id.* § 2.02(2)(c), (d). In both cases the risk needs to be substantial and unjustifiable. *Id.*

actor is aware that her conduct creates a substantial and unjustifiable risk, whereas the negligent actor is not.

Recklessness is a central concept in American criminal law, for it often defines the limits between advertent and inadvertent wrongdoing.³⁷ The distinction is important, given that inadvertent (negligent) wrongdoing is seldom criminalized.³⁸ Moreover, in the few instances in which inadvertent wrongdoing is punished, it is usually punished much less severely than advertent wrongdoing.³⁹ Most state jurisdictions exclude negligent wrongdoing from punishment by prescribing a default culpability level that applies when no mental state is referenced in the definition of the offense. According to section 2.02(3) of the MPC, for example, the default mental state is typically recklessness.⁴⁰ The practical import of this default rule is that criminal offenses may not be committed negligently unless the definition of the offense expressly states that negligence suffices for the imposition of criminal liability.

B. Applying the MPC Framework to the Hall Case

According to the Supreme Court of Colorado, the defendant's conduct in *Hall* created a substantial and unjustifiable risk of death.⁴¹ Furthermore, the court concluded that the "[defendant's] knowledge and training could give rise to the reasonable inference that he was aware of the possibility that by skiing so fast and out of control he might collide with and kill another skier unless he regained control and slowed down."⁴² This, in turn, could lead to reasonable fact finder to believe that the defendant "consciously disregarded a substantial and unjustifiable risk that by skiing exceptionally fast and out of control he might [kill another skier]."⁴³ Given that there was sufficient evidence for a reasonable trier of fact to conclude that the defendant both created an

37. See *id.* § 2.02(2)(c).

38. Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 879 (1998).

39. See MODEL PENAL CODE § 2.02(10).

40. See *id.* § 2.02(3).

41. *People v. Hall*, 999 P.2d 207, 224 (Colo. 2000). The court concluded that the risk created by the defendant was substantial although it is statistically unlikely that an out of control skier will cause the death of a fellow skier. *Id.* at 222–23. The court reasoned that even slight risks are "substantial" if the magnitude of the interest that is put at risk is significant. *Id.* at 224. Given that the interest that the defendant's conduct put at risk of harm (life) was significant, the court concluded that a slight risk of harm to an interest of significant magnitude was "substantial" for the purposes of a finding of recklessness. *Id.*

42. *Id.* at 223.

43. *Id.* at 224.

unjustifiable risk of death and was aware of the risk, he could be found guilty of reckless manslaughter as the crime is defined in the MPC and Colorado.⁴⁴

In terms of the actual punishment that could be imposed on Hall, the Colorado homicide grading scheme nicely illustrates the MPC hierarchical approach to mental states.⁴⁵ Since purposeful and knowing killings are—all things considered—more blameworthy than reckless killings, the former are punished more than the latter.⁴⁶ Furthermore, given that reckless killings are generally considered to be more worthy of condemnation than negligent killings, recklessly causing death is punished more severely than causing the same harm negligently.⁴⁷ More specifically, purposeful or knowing murder in Colorado could be punished with up to twelve years of imprisonment, whereas reckless manslaughter could be punished with up to four years of imprisonment.⁴⁸ In turn, negligent homicide could be punished with up to two years of imprisonment.⁴⁹

III. THE *HALL* CASE IN CIVIL LAW JURISDICTIONS

In order to determine how much the defendant in the *Hall* case would be punished in a civil law jurisdiction, one must ascertain whether he acted intentionally or negligently. The civilian approach to mental states is binary. That is, it typically recognizes only two mental states for the purposes of

44. *Id.* While the Colorado Supreme Court concluded that the defendant could be properly charged with reckless manslaughter and that a reasonable juror could find that he acted recklessly, the jury that eventually decided his fate convicted him of negligent manslaughter instead. *Colorado Skier Is Convicted in Fatal Collision on Slopes*, N.Y. TIMES, Nov. 18, 2000, at A9. Given that the risk created in reckless and negligent manslaughter is defined in exactly the same manner, the most logical inference that can be drawn from the verdict is that the jury concluded that the defendant was not aware that his conduct created a risk of death. MODEL PENAL CODE § 2.02(2)(c), (d). Had he been aware of the risk of death, the jury should have convicted him of reckless manslaughter, since it clearly found that the objective risk created by his conduct was substantial and unjustified under the criminal laws of Colorado. COLO. REV. STAT. § 18-3-104 (2015). Note that given the preliminary stage of the proceedings when the *Hall* case reached the state high court, the court merely concluded that a reasonable juror *could* find that the defendant was aware of the risk of death he created. *Hall*, 999 P.2d at 224. Eventually, however, the jury could also end up finding that the defendant was not aware of the risk created, which is perhaps what happened in this case. *Id.* Given that the jury does not have to explain the grounds for its verdict, the precise rationale for the verdict will never be known.

45. *See generally* COLO. REV. STAT. §§ 18-3-102 to -105.

46. *See id.* §§ 18-3-102 to -104.

47. *See id.* §§ 18-3-104 to -105.

48. *See id.* §§ 18-3-102 to -104.

49. *See id.* § 18-3-105.

calibrating punishment.⁵⁰ The most blameworthy mental state is that of intent or *dolus*.⁵¹ The less blameworthy mental state is that of negligence or *culpa*.⁵²

There are three kinds of intent or *dolus*, whereas there are two types of negligence or *culpa*.⁵³ Intent can be either direct or indirect.⁵⁴ Furthermore, direct intent or *dolus* can be either of the first or second degree.⁵⁵ A person acts with direct intent of the first degree when it is her goal or conscious objective to bring about the offense.⁵⁶ This is essentially the same as acting “purposely” under the MPC. In contrast, a person acts with direct intent of the second degree when she does not desire the offense to take place, but she knows that bringing about the offense is a necessary consequence of her conduct.⁵⁷ This is coextensive with the MPC’s definition of “knowingly.”⁵⁸ Finally, a person acts with indirect intent when she is aware that her conduct creates an unjustifiable risk of harm.⁵⁹ In addition to this awareness, acting with indirect intent has traditionally required a certain kind of attitude with regard to the risk created.⁶⁰ In civilian jurisdictions, indirect intent is considered the most watered-down form of intentional conduct and is often referred to as “*dolus eventualis*.”⁶¹

There is no consensus regarding the kind of attitude that is relevant for *dolus eventualis*. For some, the actor must convince herself that she would act even if the consequence of the act is producing the proscribed harm.⁶² The actor thus “accepts” the causation of harm as a possible outcome and acts in spite of such awareness. For others, what matters is indifference rather than acceptance. According to this view, a defendant acts with *dolus eventualis* if she is aware that her conduct creates an unjustifiable risk of harm *and* she is indifferent as to whether the harm takes place.⁶³

50. See, e.g., CÓDIGO PENAL § 1 arts. 5, 10 (2015).

51. See ZAFFARONI ET AL., *supra* note 8, at 444.

52. *Id.*

53. ROXIN, *supra* note 8, at 417, 423, 424.

54. *Id.*

55. *Id.*

56. JAKOBS, *supra* note 8, at 321.

57. See ROXIN, *supra* note 8, at 423.

58. MODEL PENAL CODE § 2.02(2)(b) (AM. LAW INST. 1985).

59. See ROXIN, *supra* note 8, at 425.

60. CONDE & ARÁN, *supra* note 8, at 271.

61. *Id.*; ROXIN, *supra* note 8, at 425 n.25.

62. See PEÑA, *supra* note 8, at 246. This is the theory of “acceptance” or “acquiescence” to the harm. *Id.*

63. *Id.* at 250.

In contrast, a defendant who is aware that her conduct creates a risk of harm but is not indifferent to it acts with what civilian scholars call *conscious negligence*.⁶⁴ In such cases, the defendant actually believes that the harm will not transpire because she trusts that she will be able to prevent it by making use of special skills or knowledge.⁶⁵ Therefore, the difference between a defendant who acts with *dolus eventualis* and one who acts with conscious negligence is not whether she is aware of the risks created by her conduct. The difference lies in the attitude that the defendant adopts towards the risk that she creates. In cases of *dolus eventualis*, the actor is not confident that she will be able to prevent the harm from taking place, and she does not care whether it materializes or not. On the other hand, in cases of conscious negligence, the defendant is confident that she will be able to prevent the harm that is risked by her conduct.

The following table illustrates the differences between the civilian mental states of *dolus eventualis* and conscious negligence and the common law mental state of recklessness:

Mental State	Awareness of risk created	Indifference towards harm taking place	Trust in ability to prevent harm from materializing
<i>Recklessness</i>	Yes	Irrelevant	Irrelevant
<i>Dolus Eventualis</i>	Yes	Yes	No
<i>Conscious Negligence</i>	Yes	No	Yes

Differentiating *dolus eventualis* from conscious negligence is essential to discriminating between intentional and negligent conduct in civil law countries, for *dolus eventualis* is considered the most watered-down form of intent, whereas conscious negligence is considered a type of negligence. Consequently, the difference between acting with *dolus eventualis* or conscious negligence is of significant practical import. This is because in civilian jurisdictions, negligent conduct usually remains unpunished.⁶⁶ Furthermore, when negligent wrongdoing is criminalized, it is typically punished significantly less than intentional wrongdoing.⁶⁷

64. *Id.* at 306.

65. *Id.*

66. *See, e.g.,* ZAFFARONI ET AL., *supra* note 8, at 549.

67. *See, e.g., id.*

As a result, the actual punishment that would be imposed in the *Hall* case would depend on whether the defendant's conduct is deemed intentional or negligent. He would receive more punishment if he is found to have acted with *dolus eventualis* (a type of intentional conduct) than if he is found to have acted with conscious negligence (a kind of negligence). Note that whether the defendant will be punished more or less severely does not entirely depend on whether he was aware of the risk or not. Even if he was aware that his conduct created a risk of death, he may be found guilty of negligent homicide under a conscious negligence theory if he was not indifferent to causing death.⁶⁸

Although it is unclear whether the defendant in *Hall* was indifferent to the victim's death, there are a couple of facts that suggest that he was not. First, the defendant seemed fairly confident in his skiing ability and, therefore, in his ability to prevent the harm from taking place.⁶⁹ Second, skier-on-skier collisions that result in death are extremely rare.⁷⁰ Therefore, it is very likely that the defendant felt quite confident that a death would not result in spite of the risky nature of his conduct. As a result, the evidence probably supports an inference that the defendant trusted that he would not kill a person while he was making his way down the slope. This suggests that the defendant acted with conscious negligence rather than *dolus eventualis*. If so, the defendant could be convicted of negligent homicide even if the trier of fact is convinced that he was aware that his conduct created an unjustifiable risk of death.⁷¹

IV. THE *HALL* CASE IN COMPARATIVE PERSPECTIVE

Placing the *Hall* case in comparative perspective yields at least two interesting insights. First, the MPC approach to mental states allows for more granularity in the grading of criminal offenses than the civilian approach to subjective offense elements. The hierarchical or tiered MPC approach (purpose, knowledge, recklessness, and negligence) affords more flexibility in gradating punishment than the binary (intent or negligence) civil law approach. Second, the MPC approach to mental states places more emphasis on cognitive mental states, whereas the civil law approach emphasizes volitional or attitudinal mental states. As we will see, however, the MPC approach to mental states is sometimes supplemented by more attitudinal or volitional mental states, especially in the context of homicide. In contrast, an increasing number of courts and scholars in civilian jurisdictions are downplaying the attitudinal

68. See PEÑA, *supra* note 8, at 306.

69. See *People v. Hall*, 999 P.2d 207, 223 (Colo. 2000).

70. *Id.* at 212.

71. PEÑA, *supra* note 8, at 306.

features of mental states and redefining them in mostly cognitive terms.⁷² Both legal systems may thus be moving in different directions. While American scholars sometimes flirt with giving more prominence to attitudinal mental states, civil law scholars increasingly highlight the importance of cognitive mental states.⁷³

A. Binary vs. Multinary Approaches to Mental States

As I point out in the previous section, the civilian approach to mental states is binary, allowing only for convictions based on either intent or negligence.⁷⁴ Although the scholarly literature in civil law countries recognizes up to three types of intent (direct intent in the first and second degree and indirect intent or *dolus eventualis*) and two kinds of negligence (conscious and unconscious), only two grading scales are typically applied. Therefore, if a defendant acts with any of the three kinds of intent or *dolus*, she may be convicted of intentional homicide. If she acted with one of the two kinds of *culpa*, she may be convicted of negligent homicide. The difference in punishment between these two crimes is significant. Note that there is no third option. The conduct is either intentional and severely punished, or negligent and punished considerably less.

In contrast, the MPC approach to mental states is, for lack of a better word, “multinary.”⁷⁵ Instead of forcing the conduct into one of two categories (intent vs. negligence), the MPC allows for up to four different grading scales based on whether the defendant acted purposely, knowingly, recklessly, or negligently.⁷⁶ In principle, then, the defendant in the *Hall* case could be convicted of purposeful homicide, knowing homicide, reckless homicide, or negligent homicide. Punishment would decrease as one moves from purpose

72. See CONDE & ARÁN, *supra* note 8, at 267; see also ROXIN, *supra* note 8, at 439.

73. ROXIN, *supra* note 8, at 439.

74. Thomas Weigend, *Subjective Elements of Criminal Liability*, in OXFORD HANDBOOK OF CRIMINAL LAW 490, 499–500 (Markus D. Dubber & Tatjana Hörnle eds., 2016).

75. Weigend calls the MPC approach to mental states “tripartite” because it lumps purpose and knowledge together for the purposes of punishment and recognizes two additional categories of punishment based on recklessness and negligence, respectively. *Id.* at 499. He does so in contrast to the civilian system, which he describes as being based on the intent/negligence “dichotomy.” *Id.* at 499–500. While Weigend is right to point out that the MPC approach to *mens rea* is not based on a “dichotomy” similar to the intent/negligence distinction, it is not entirely accurate to describe the MPC approach as “tripartite.” *Id.* The description is inaccurate because the MPC does not always lump purpose and punishment together for the purposes of punishment. MODEL PENAL CODE § 2.02(10). As a result, it sometimes functions as a “quadripartite” system. *Id.* § 2.02. Furthermore, the MPC quite often lumps purpose, knowledge, and recklessness together, thus creating a “bipartite system.” *Id.*

76. MODEL PENAL CODE § 2.02.

to knowledge to recklessness to negligence. Of course, jurisdictions are free to lump two or more of these mental states together, thus creating three or fewer grading scales. Thus, for example, the MPC generally discriminates between negligent homicide, reckless homicide, and purposeful/knowing homicide.⁷⁷ Negligent homicide is punished less than all other forms of homicide, whereas reckless homicide is typically punished less than purposeful or knowing homicide.⁷⁸ The result is the creation of three basic grading scales for homicide based on mental states (purpose/knowledge, recklessness, and negligence).⁷⁹

The upshot of this approach is that it allows for better calibration of the appropriate punishment in cases like *Hall*. While in the binary civil law approach to mental states the defendant can only be convicted of intentional (more punishment) or negligent (less punishment) homicide, in the multinary approach to mental states adopted in the MPC, the defendant can be convicted of purposeful, knowing, reckless, or negligent homicide, with punishment decreasing as you move from purpose to negligence.

It is important to distinguish between binary and multinary for both conceptual and pragmatic reasons. From a conceptual point of view, overlooking the distinction between binary and multinary approaches to mental states may generate a mistake commonly made by those who try to compare the MPC mental states with the general framework for mental states in civil law jurisdictions. The common mistake is to lump the MPC mental states into the civilian binary intent/negligence distinction.⁸⁰ More specifically, one could claim that what civil law scholars define as *dolus* (intent) is essentially the same as lumping the MPC's mental states of purpose, knowledge, and recklessness into one category. The remaining MPC mental state—negligence—would then comprise the mental state of *culpa*. While this seems to work at first glance, trying to group the MPC mental states in a way that reflects the civil law's intent/negligence distinction is inappropriate because it transforms the MPC's multinary approach into a binary framework that lumps together purpose, knowledge, and recklessness and contrasts it with a residual category of

77. *Id.* §§ 210.2–.4.

78. *Id.*

79. *Id.* § 210.2. The MPC also punishes reckless killings that reveal gross indifference to the value of human life as severely as purposeful/knowing killings. *See* MODEL PENAL CODE AND COMMENTARIES, Part II, vol. 1, § 210.2 comment 4 at 21–22 (1980). Furthermore, it mitigates purposeful/knowing murders to manslaughter if the killing takes place as a result of extreme emotional disturbance (EED). EED amounts to a partial excuse that mitigates murder to manslaughter without actually negating the existence of the basic mental state of purpose or knowledge. *See id.*

80. *See, e.g.,* Cifredo Cancel, *supra* note 8, at 44.

negligence. This turns the MPC's hierarchical approach to *mens rea* on its head.

For similar reasons, it may also be misleading to equate the civil law mental states of direct intent of the first- and second-degree with purpose and knowledge and the mental state of *dolus eventualis* with recklessness. Doing so is problematic because both first- and second-degree direct intent and *dolus eventualis* are simply different versions of the same mental element—intent.⁸¹ In contrast, purpose, knowledge, and recklessness are not three versions of a more general mental element, but rather three distinct mental states, each with potentially different implications for grading criminal offenses.⁸²

Distinguishing between binary and multinary approaches to mental states may also generate important practical differences in how cases are dealt with. Since civilian jurisdictions think about mental states in binary fashion, dealing with difficult fact patterns like the one presented by the *Hall* case is tricky. The two options presented by the binary system are likely to prove unattractive to many. Viewing the defendant as acting intentionally would arguably lead to punishing him too much. In contrast, labeling the defendant's conduct as merely negligent could arguably generate too little punishment. As a result, the binary approach may end up either over punishing or under punishing the defendant in the *Hall* case. In contrast, a multinary approach to *mens rea* like the one adopted in the MPC may be better at avoiding over and under punishing, since it allows for three or more grading scales depending on the mental state that the defendant is found to have acted with.

B. Attitudinal v. Cognitive Approaches to Mental States

The MPC and civilian approaches to *mens rea* also differ in how much they emphasize attitudinal or cognitive mental states. Mental states in civil law countries have a very strong attitudinal component. In contrast, the MPC emphasizes cognitive mental states more than attitudinal ones.

The textbook definition of intent in civil law countries includes two components. The first is to “want” to engage in the conduct or bring about a result.⁸³ The second is to “know” that your conduct satisfies the elements of the offense.⁸⁴ To “want” something is to make use of volitional capabilities in order to achieve a desired end.⁸⁵ As discussed previously, civil law jurisdictions

81. See ROXIN, *supra* note 8, at 425.

82. See MODEL PENAL CODE § 2.02(2)(a)–(c) (AM. LAW INST. 1985).

83. CONDE & ARÁN, *supra* note 8, at 267.

84. *Id.*

85. *Id.* at 269.

distinguish between three different kinds of intent. The volitional component of the first kind of intent—direct *dolus* of the first degree—is clear, given that acting with this mental state implies having the purpose of committing the offense.⁸⁶ It is more difficult to find a volitional component in the other two kinds of intent. Acting with direct *dolus* of the second degree implies being aware that the offense is practically certain to occur.⁸⁷ As defined, volition is absent in this kind of mental state.⁸⁸ Awareness of the practical certainty of the existence of a given state of affairs is a cognitive rather than a conative mental state. However, the majority of civil law commentators construe this mental state as a kind of intent that has a volitional component. The views of Claus Roxin—one of Germany’s leading criminal law scholars—are representative:

Acting with *dolus directus* of the second degree implies “wanting” to commit the offense even if the commission of the offense is unpleasant to the actor. The consequences of the conduct that the actor believes are practically certain to occur are considered part of the agent’s volition, even when he has absolutely no interest in those consequences.⁸⁹

The idea underlying the inference of volition in these cases is that one incidentally assumes the natural consequences of one’s conduct as part of what one wants or desires. Whether this assumption is warranted is discussed later.⁹⁰ At this stage, however, what matters is that civil law courts and scholars go out of their way to find volition in this mental state.⁹¹

If finding volition in *dolus directus* of the second degree is tricky, finding it in *dolus eventualis* is even trickier. It is clear from the civilian scholarly literature that—at least in theory—the three types of intent or *dolus* imply “wanting” to engage in the criminal conduct.⁹² This, of course, includes *dolus eventualis*. But how can an actor “want” to bring about a criminal offense when she is only aware that her conduct creates a substantial risk that the offense may take place? Cognition does not imply volition.⁹³ The way in which civil law courts and scholars get around this is by supplementing the cognitive element of *dolus eventualis* with an additional attitudinal element.

86. See *supra* p. 583.

87. See *supra* p. 583.

88. See *supra* p. 583.

89. ROXIN, *supra* note 8, at 424.

90. See *infra* p. 591.

91. ROXIN, *supra* note 8, at 424.

92. See *infra* pp. 590–91.

93. PUIG, *supra* note 8, at 261, 268.

The result is that acting with *dolus eventualis* requires not only awareness of the risk created by the conduct, but also evincing a certain kind of attitude toward the possible commission of the offense.⁹⁴ As was discussed previously, there is no consensus regarding the kind of attitude that the defendant must display in order to act with *dolus eventualis*. Some courts and commentators assert that the additional mental element is satisfied if the actor would have engaged in the conduct even if she knew that the act was going to result in the commission of the offense.⁹⁵ This version of *dolus eventualis* is frequently dubbed the “acquiescence” or “acceptance” theory, for it requires that the defendant “accept” that she would proceed in the same way had she known that her conduct would result in the offense.⁹⁶

Supplementing the cognitive element of *dolus eventualis* with a mental state such as “acceptance” brings this kind of *dolus* closer to having a volitional component. By acquiescing to the commission of the offense, the actor reveals that she would be willing to commit an offense if that is what achieving her goal requires.⁹⁷ Admittedly, this mental state is not volitional in the same kind of way that acting “purposely” or with “direct *dolus* of the first degree.” However, the mental state of acceptance is not purely cognitive either, as it implies something more than mere knowledge or awareness of the risk. At the very least, acquiescence to the risk in the sense required by the acceptance theory of *dolus eventualis* adds an attitudinal mental state that can be contrasted with the purely cognitive mental state of awareness of the risk.

Some courts and scholars believe that the acceptance theory goes too far, for few defendants who engage in risky conduct would accept that they would engage in such conduct if they knew that the conduct would result in an offense.⁹⁸ Instead of acceptance, they argue that the cognitive element of *dolus eventualis* should be supplemented by a mental state of indifference.⁹⁹ Under this theory, acting with *dolus eventualis* would entail both being aware of the risk created by the conduct *and* being indifferent to whether the conduct brings about the commission of an offense.¹⁰⁰ The mental state of indifference seems even more removed from volition than the mental state of acceptance. To be indifferent to an outcome is not the same as desiring that outcome. Nevertheless, the mental state of indifference is not purely cognitive either, as

94. See *infra* p. 591–92.

95. See ROXIN, *supra* note 8, at 425.

96. *Id.* at 430.

97. *Id.* at 431.

98. See *infra* p. 591–92.

99. *Id.*

100. *Id.*

it demonstrates that the defendant has a certain kind of attitude towards the risk that she is creating.

In sum, supplementing the cognitive mental state of awareness of the risk with a mental state such as acceptance or indifference adds a non-cognitive dimension to *dolus eventualis*. Although it is a stretch to state—as civil law scholars often do—that mental states like acceptance and indifference reflect volition, it is accurate to assert that such mental states add an attitudinal component to *dolus eventualis* that is generally absent in the imperfect Anglo-American analogue to *dolus eventualis* (recklessness).

This emphasis on attitudes constitutes one of the distinguishing features of the civilian approach to mental states. To act “intentionally” is to act with a certain non-cognitive mental state, whether it be purpose (direct *dolus* of the first degree), assumption of the consequences (direct *dolus* of the second degree), or indifference (*dolus eventualis*).¹⁰¹ In contrast, to act with *culpa* is to act with a different, non-cognitive mental state such as “trusting in one’s ability to prevent the harm” (conscious negligence) or simply a failure to perceive the harm (unconscious negligence).¹⁰² The civilian approach leads to different grading scales based on the defendant’s attitude rather than the defendant’s awareness of the risk. If the defendant is indifferent to the harm, she will be punished quite severely.¹⁰³ However, if she is merely aware of the harm but not indifferent to it, she will be punished considerably less severely *even if she is aware of the risk*.¹⁰⁴

The “attitudinal” approach to mental states prevalent in civil law countries can be contrasted with the more cognitive approach to mental states that was adopted in many American states after the publication of the MPC. According to the MPC, actors who are aware of the risk that their conduct creates are generally punished much more than actors who are unaware of the risk that their conduct creates.¹⁰⁵ Awareness and non-awareness marks the difference between recklessness and negligence.¹⁰⁶ The latter is punished often and considerably, while the former is punished infrequently and more leniently. Contrary to what is the case in civil law countries, as long as the actor is aware of the risk she creates, it is generally irrelevant to liability whether she is

101. *Id.* at 417, 423, 425.

102. ZAFFARONI ET AL., *supra* note 8, at 549.

103. Defendant in this case would be punished for an “intentional” offense based on *dolus eventualis*.

104. Defendant in this case would be punished for a “negligent” offense based on a theory of conscious negligence.

105. See MODEL PENAL CODE §§ 210.2–210.4 (AM. LAW INST. 1962).

106. *Id.* § 2.02(c), (d).

indifferent to the risk or not.¹⁰⁷ The emphasis is on cognitive mental states rather than on attitudinal ones.

Comparison of the civilian and MPC views of mental states raises an important question for criminal punishment. Should we focus on cognitive or attitudinal mental states when making basic punishment decisions on the basis of culpability? By and large, civil law countries make basic punishment distinctions based on attitudinal mental states such as indifference or lack of indifference. In contrast, the MPC generally makes such punishment decisions based on cognitive criteria such as awareness or lack of awareness of a risk.

C. *Convergence in MPC and Civilian Approaches to Mental States*

While the trend in the United States is to emphasize cognitive mental states, there are some instances in which attitudinal mental states are emphasized. By the same token, while most civil law courts and scholars generally focus on attitudinal mental states in order to make basic punishment decisions, some commentators and courts are advocating for a more cognitive approach to mental states.¹⁰⁸

The most glaring instance in which American criminal law makes use of attitudinal mental states to make basic grading distinctions in criminal offenses is in the law of murder. The common law definition of murder is “the unlawful killing of a human being with malice aforethought.”¹⁰⁹ In the context of the common law definition of murder, a prosecutor may prove malice by showing that the defendant had:

- (1) intent to kill;
- (2) intent to cause serious bodily injury;
- (3) a “depraved heart” or extreme indifference to the value of human life; or by proving
- (4) felony murder.¹¹⁰

The most problematic kind of malice is that of so-called depraved heart murder. The problem arises because it is difficult to distinguish between reckless killings that do not evince a depraved heart and reckless killings that do. While the latter would be classified as murder, the former would only give rise to liability for manslaughter.¹¹¹ As one court observed, the kind of recklessness that triggers liability for depraved heart murder is frequently

107. Indifference does seem to be relevant to a murder charge under the MPC. *See supra* p. 588.

108. *See generally* PUIG, *supra* note 8, at 259–70.

109. *Simpkins v. State*, 596 A.2d 655, 661 n.1 (Md. Ct. Spec. App. 1991).

110. *Id.* at 657.

111. *See, e.g.*, MODEL PENAL CODE §§ 210.2(1)(b), 210.3(1)(b).

described as conduct that reveals extreme indifference to human life.¹¹² Therefore, the court pointed out that “[t]he perpetrator must [or reasonably should] realize the risk his behavior has created to the extent that his conduct may be termed willful.”¹¹³ Furthermore, “the conduct must contain an element of viciousness or contemptuous disregard for the value of human life which conduct characterizes that behavior as wanton.”¹¹⁴ The issue has vexed courts for decades.

One court explained that the difference between depraved heart recklessness and standard recklessness is that depraved heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied.¹¹⁵ Ultimately, it appears that depraved heart murders are simply killings in which the defendant’s recklessness is so culpable that it can be equated with purposeful killings in terms of blameworthiness. A more specific definition is, however, elusive.

Even if a precise definition of depraved heart murder eludes us, it is clear that this mental state may allow for attitudinal considerations that are otherwise irrelevant under the purely cognitive mental state of recklessness. Depraved heart may thus be conceived as a kind of “recklessness *plus*” that supplements the basic awareness of risk that characterizes simple recklessness with an attitudinal mental state of indifference. The similarities between the common law mental state of depraved heart and the civil law mental state of *dolus eventualis* are undeniable.

Although the MPC eschews malice from its definition of murder, the kinds of killings that may give rise to murder liability under the Code are quite similar to those that would give rise to murder liability at common law. The MPC defines murder as purposely or knowingly killing a human being.¹¹⁶ Interestingly, it is also murder to recklessly kill a human being in circumstances that manifest “extreme indifference to the value of human life.”¹¹⁷ The MPC’s inclusion of this mental state (recklessness plus gross indifference) stands out, as section 2.02 only recognizes four mental states (purposely, knowingly, recklessly, and negligently).¹¹⁸

112. *Simpkins*, 596 A.2d at 657.

113. *Id.*

114. *Id.*

115. *Id.*

116. MODEL PENAL CODE § 210.2.

117. *Id.*

118. *See id.* § 2.02.

The line between standard recklessness and recklessness with gross indifference to human life is fuzzy. That the line is difficult to draw in this context is worrying, given that purely reckless killings amount to the lesser offense of manslaughter, whereas reckless killings with gross indifference amount to the much more serious offense of murder.¹¹⁹ The drafters of the MPC suggest that the difference between these two mental states is normative.¹²⁰ Reckless killings should trigger murder liability if the circumstances surrounding the act suggest that the killing is as worthy of condemnation as a purposeful or knowing killing. In contrast, the killing should be considered manslaughter if the circumstances surrounding the act reveal that it is not as blameworthy as purposeful and knowing killings.¹²¹

Like its common law analogue of depraved heart murder, the MPC's mental state of recklessness supplemented by gross indifference to the value of human life shares many features of the civil law mental state of *dolus eventualis*. More specifically, it reveals an openness to give more weight to attitudinal mental states than what section 2.02 of the Code would suggest, at least in the context of very serious offenses such as murder.¹²² Some scholars celebrate this attitudinal component of depraved heart murder and suggest that the element of indifference should be the cornerstone of homicide offenses.¹²³ Others argue that the attitudinal model that is highlighted by depraved heart murder should be extended to other contexts.¹²⁴ It is unclear whether this emphasis on attitudinal mental states will spread to offenses other than murder. If it does, it will bring the Anglo-American and civilian approaches to mental states closer together.

Interestingly, while some American criminal theorists call for a more widespread use of the attitudinal approach to mental states that lies at the heart of depraved murder, a growing number of civil law scholars are arguing for a rejection of attitudinal mental states.¹²⁵ In recent years the civil law distinction between *dolus eventualis* and conscious negligence is being called into

119. See *id.* §§ 210.2–210.3.

120. See MODEL PENAL CODE AND COMMENTARIES, Part II, vol. 1 § 210.2 comment 4 at 21–22 (1980).

121. See *id.* at 22.

122. The Code also makes reference to recklessness with gross indifference in the crime of assault and battery. See MODEL PENAL CODE § 211.1(2)(a).

123. See, e.g., Joshua Dressler, *Rethinking Criminal Homicide Statutes: Giving Juries More Discretion*, 47 TEXAS TECH L. REV. 89, 97–98 (2014).

124. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 961 (1998).

125. See ROXIN, *supra* note 8, at 435.

question.¹²⁶ The charge is led mostly by the civilian courts and scholars that defend the so-called probability theory of *dolus eventualis*.¹²⁷ According to this theory, a defendant acts with *dolus eventualis* when she accurately perceives the danger created by her conduct and acts in spite of having such awareness.¹²⁸ In contrast, a defendant acts with conscious negligence when she fails to correctly assess the danger created by her conduct.¹²⁹ In its most extreme version, the theory leads to a finding of intent whenever the actor is aware that her conduct creates an unreasonable risk of harm. Many scholars throughout the civil law realm have endorsed a version of this theory of *dolus eventualis*.¹³⁰ Some courts are starting to follow suit.¹³¹ If this trend continues, the differences between the civil law mental state of *dolus eventualis* and the MPC's mental state of recklessness will become less meaningful.

D. *Competing Approaches to Mental States: Expressing Autonomy vs. Controlling Risk*

Why do civilian legal traditions focus more on attitudinal mental states than the Anglo-American jurisdictions influenced by the more cognitive MPC approach? Why do civil law countries approach mental states in binary fashion, whereas the MPC prefers a multinary approach to subjective offense elements?

One way of answering these questions is by positing that the civil law approach to mental states is primarily concerned with expressing autonomy, while the MPC approach is primarily concerned with controlling or minimizing risk. It is difficult to make sense of civilian criminal law theory without taking into account the significant role that autonomy plays in the system. As a result, it is often stated in civil law jurisdictions that the legitimacy of criminal law is to a significant extent dependent on whether doctrines of criminal law respect individual autonomy.¹³² Take, for example, the civil law approach to criminalization. Most civilian scholars argue that it is legitimate to criminalize conduct only if doing so is necessary to protect so-called legal goods.¹³³ Legal

126. See, e.g., *id.*

127. See, e.g., *id.*

128. See PUIG, *supra* note 8, at 267–68.

129. *Id.*

130. In Spain, see for example, *id.* at 267–68, 267 n.75, 268 nn.76–77. In Germany, see for example JAKOBS, *supra* note 8, at 329.

131. Spanish courts, for example, seem to be slowly moving in this direction. See PUIG, *supra* note 8, at 278, 278 n.104.

132. See, e.g., Thomas Weigend, *Societas Delinquere Non Potest? A German Perspective*, 6 J. INT'L CRIM. JUST. 927, 937 (2008).

133. CONDE & ARÁN, *supra* note 8, at 59.

goods are often defined as those interests that are necessary for human beings to “freely develop their personality.”¹³⁴ That is, conduct should be criminalized if doing so furthers an individual’s capacity for freedom or autonomy.¹³⁵ Similarly, most civil law courts and scholars hold that the victim’s voluntary assumption of risk severs the causal link between the defendant’s act and the harm suffered by the victim because by doing so we recognize the victim as an autonomous agent who is free to decide whether to engage in risky conduct.¹³⁶ The civilian approach to the necessity or lesser evils defense also significantly emphasizes autonomy. Therefore, it is typically considered unlawful in civil law jurisdictions to sacrifice the interests of an individual in order to increase the welfare of an even greater number of people because doing so obliterates the autonomy of the sacrificed individual.¹³⁷ In doing so, we objectify the individual by treating her as a means to an end rather than as an end in itself. This is considered illegitimate because it negates individual autonomy. A final example is the general skepticism with which corporate criminal liability is met in civil law jurisdictions. Imposing criminal liability on corporate actors is often viewed as inappropriate because corporations are not capable of behaving culpably since they are not moral agents endowed with the capacity for making autonomous choices.¹³⁸

In contrast to the civil law autonomy-centered approach to criminal justice, the MPC emphasizes control and mitigation of risky conduct over the protection of autonomy.¹³⁹ Therefore, it is often viewed as legitimate to criminalize risk creation even if an individual’s autonomy is not compromised by the conduct.¹⁴⁰ Similarly, the victim’s voluntary decision to engage in risky conduct is often ignored in the proximate causation analysis in order to hold the defendant liable. Although this approach to causation downplays the importance of the victim’s autonomous choice, it discourages future defendants from proposing risky endeavors that are of little social value.¹⁴¹ Anglo-American criminal law is also much more open to sacrificing an individual in order to maximize the welfare of many others.¹⁴² Once again, the emphasis in

134. *Id.*

135. *Id.*

136. *Id.*

137. See CONDE & ARÁN, *supra* note 8, at 59.

138. Weigend, *supra* note 132, at 936.

139. See, e.g., MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

140. See, e.g., *id.*

141. This is what we do when we criminalize risky conduct such as playing Russian roulette.

142. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 49 (1881) (stating that law “is ready to sacrifice the individual so far as necessary in order to accomplish [its purpose]).

these cases is placed on minimizing risks to others rather than on protecting autonomy. Finally, corporate criminal liability is readily accepted in common law jurisdictions as the driving force behind punishing corporate actors is to deter corporations from engaging in risky conduct rather than expressing condemnation for the autonomous choices of the corporation.¹⁴³

It is in this context that the differences between the civil and common law approaches to mental states can best be explained. The civilian model of *mens rea* is primarily concerned with expressing condemnation for autonomously and voluntarily choosing to do wrong. As a result, punishment is primarily imposed for choosing to do wrong rather than for consciously risking wrong. This explains the binary nature of the civil law approach to mental states. An individual either chooses to do wrong or not. When it comes to choosing, there is no middle ground. I can choose to drive to work, get married, or buy a gun. What I can't do, however, is to "partially choose" to drive, get married, or buy a gun. In conventional language, choice is binary. Either you choose to do something, or you do not.¹⁴⁴ This, in turn, explains why punishment in civil law jurisdictions is meted out solely on the basis of the binary intent/negligence distinction. Intentional wrongdoing is punished more because it reveals freely chosen wrongdoing.¹⁴⁵ On the other hand, negligent wrongdoing is punished less because the negligent actor has not chosen to do harm.¹⁴⁶

The conceptual structure of choice also explains the attitudinal nature of the civil law approach to mental states. To choose X is not merely to know or be aware of X. In addition of awareness of the thing that one is choosing, to choose entails to exercise one's will in a certain kind of way. I choose to eat a cheeseburger not only because I am aware of the cheeseburger. In addition to such awareness, choosing to eat the burger entails exercising my will so as to make the affirmative decision of eating it. Similarly, an actor who is aware that a person may die has not necessarily chosen to kill that person. In addition, the actor must exercise her will in a certain kind of way in order for it to be said that she "chose" to kill the person. Given that the civil law approach to mental states punishes actors for choosing wrongdoing and that the conceptual

143. Weigend, *supra* note 132, at 928, 943.

144. I define choice in Aristotelian terms. If the actor can do more than one thing, the actor has a choice even if the choice is unattractive or is the product of duress. Thus, a coerced actor who kills an innocent person in order to avoid being killed *chooses* to kill in spite of the coercion. That is, she could have chosen to die instead of saving herself by killing an innocent person. The problem in these cases is not that the actor lacks choice. Instead, the problem is that the coercer has unjustifiably and unattractively reduced the actor's choices.

145. See MODEL PENAL CODE § 210.2 (AM. LAW INST. 1962).

146. See *id.* § 210.4.

structure of choosing entails the presence of non-cognitive mental states, the civil law approach to mental states is appropriately described as attitudinal.

On the other hand, the MPC's approach to *mens rea* focuses on cognitive mental states because it strives primarily to punish culpable risk creation rather than defective choice making.¹⁴⁷ The logic of choice plays little to no role in the MPC model of mental states for the same reason that the MPC generally favors rules that foster risk control and minimization over victim or offender autonomy.¹⁴⁸ The chief aims of the drafters of the Code were to identify and incapacitate dangerous offenders and to deter would-be offenders from engaging in future wrongdoing.¹⁴⁹ Punishing primarily for conscious risk creation advances both of these aims. On one hand, those who consciously create risks of harm reveal themselves as dangerous and in need of correction. On the other hand, the criminal law ought to be designed in a way that deters people from engaging in conduct that consciously creates risks of harm. Whether such risk-creating actors "autonomously choose" to cause harm is not really relevant under this model. Their dangerousness is revealed by their conscious risk-taking regardless of their attitude toward the risk. As a result, the MPC approach to *mens rea* emphasizes cognitive mental states such as awareness over non-cognitive or attitudinal mental states such as indifference or acceptance.

The MPC's multinary approach to *mens rea* can also be explained by the Code's emphasis on risk-minimization.¹⁵⁰ Actors can be aware of many different risks. Furthermore, actors who are aware of a certain type of risk are sometimes more dangerous or in need of more deterrence than those who are aware of a different kind of risk. As a result, the MPC approach to *mens rea* punishes different kinds of awareness in different ways, thus giving rise to a multinary approach to *mens rea*. Being aware that conduct creates a substantial risk of death (recklessness) is different than being aware that conduct will certainly cause death (knowledge). The different awareness in these cases is sometimes the basis for imposing differential punishment.¹⁵¹

In sum, the civil law approach to *mens rea* revolves around the idea of autonomous choice. Choosing to engage in wrongdoing is deserving of more punishment than not choosing to engage in wrongdoing. The civilian preference for punishing choice is the product of a system of criminal justice that prizes respecting autonomy over minimizing or controlling risk. This view

147. *See id.* § 2.02.

148. *See id.*

149. *Id.*

150. *See, e.g., id.* § 2.02(2)(c), (d).

151. *See, e.g., id.* §§ 210.3–210.4.

of criminal law as a vehicle for expressing and respecting autonomous choice explains why civil law approaches to mental states are generally both binary and attitudinal.

Contrarily, the MPC approach to mental states prioritizes risk minimization over reaffirming the autonomy of the victim or offender. This view is the product of a criminal justice system that aims primarily to maximize deterrence of dangerous activities. This preference for maximizing deterrence and incapacitation explains why the MPC's *mens rea* model is primarily cognitive and multinary.

E. *Mental States in Comparative Perspective: Moving Forward*

As the previous discussion shows, MPC and civil law approaches to mental states differ significantly in at least two ways. First, civil law jurisdictions favor a binary approach to mental states that allows for only two basic grading scales based on *mens rea*. So-called intentional crimes are punished considerably, whereas so-called negligent crimes are punished significantly less. In contrast, the United States is moving toward what I have called a multinary approach that allows for up to four basic grading scales based on *mens rea*. Second, civil law jurisdictions tend to focus more on attitudinal mental states that discriminate between more and less severe grading scales based on whether the defendant displayed certain attitudes towards the risks that she created. In contrast, the MPC focuses more on cognitive mental states in order to make basic grading distinctions. What can be learned from these divergent approaches to mental states? Does one model work better in some circumstances but not in others? This concluding section addresses these questions.

F. *In Defense of a Multinary Approach to Mental States*

A multinary approach to mental states is preferable to a binary approach. There are both conceptual and normative reasons for preferring the multinary approach.

From a descriptive perspective, the binary distinction of intent (*dolus*) and negligence (*culpa*) describes certain mental states as intentional when doing so is conceptually confusing. Intentional conduct is purposive conduct. While what civil law scholars call *dolus directus* of the first degree entails purposive conduct, the other two kinds of *dolus* do not.¹⁵² This is especially the case with *dolus eventualis*, as being aware of a risk of harm or being indifferent to its consummation is simply not the same as wanting its consummation. Claiming

152. See ROXIN, *supra* note 8, at 417, 423, 424.

otherwise—as most civil law courts and scholars do—is confusing. Furthermore—and more importantly—nothing is gained by calling *dolus eventualis* a kind of intentional conduct other than forcing this mental state into one of the two mental states in the binary intent/*culpa* distinction. As the MPC approach to mental states illustrates, there is conceptual breathing space for mental states other than intent and negligence. As a result, it would be better to simply recognize that *dolus eventualis* is neither a kind of intent nor a kind of negligence. It is its own mental state that is conceptually distinct from both intent and negligence.

Normatively, the multinary approach is also preferable to the binary approach. All things being equal, purpose, knowledge, recklessness, and negligence lie on a continuum of blameworthiness ranging from the most blameworthy mental state (purpose) to the mental state worthy of less condemnation (negligence).¹⁵³ If these mental states lie on a continuum of blameworthiness, it would be preferable to allow for differential punishment depending on which mental state best describes the defendant’s conduct instead of lumping two or more of these mental states together to create a binary approach to mental states that affords less flexibility in making basic grading distinctions.

The *Hall* case illustrates this quite nicely. In terms of describing the defendant’s conduct, it is strange to describe him as “intentionally” killing the victim. The defendant obviously did not have the purpose of killing anyone when he was schussing down the ski slope. Even if the defendant was aware that his conduct created a risk of death or serious bodily injury, it would be a stretch to describe this mental state as intentional. Other than needless confusion, nothing is gained by claiming—as could plausibly be claimed in civilian jurisdictions—that the defendant intentionally killed the victim when the defendant collided with the victim.

The normative appeal of the multinary approach to mental states may also be illustrated by the *Hall* case. While the defendant’s killing of the victim is clearly worthy of significant condemnation, it would be odd to punish this killing as severely as a purposeful killing. On the other hand, it seems unfair to punish actors who are aware of the risk created by their conduct in the same way as actors who are unaware of the risks that their conduct creates. As a result, it is appropriate to punish those who are aware of the risk of harm created by their conduct less than those who want to cause the harm but more than those who are unaware of the risk of harm they create. This can easily be achieved under a multinary approach to mental states, such as the one adopted in the

153. See MODEL PENAL CODE §§ 210.2–210.4.

MPC. Thus, the defendant in *Hall* was charged with “reckless manslaughter,” which is punished less severely than purposeful or knowing murder but more harshly than negligent homicide.¹⁵⁴

This sensible outcome is difficult to achieve if one follows a binary approach to mental states. If the *Hall* case were tried in Spain, for example, the trier of fact would have only two options. She could either convict the defendant of homicide committed with *dolus* (intent) or of negligent homicide.¹⁵⁵ Since the unitary mental state of *dolus* encompasses both purposeful killings and killings with *dolus eventualis*, if the defendant is found to have acted with *dolus eventualis*, he will be punished as severely as if he had killed purposely.¹⁵⁶ Furthermore, since the unitary mental state of *culpa* includes both conscious negligence (without indifference) and unconscious negligence, if the defendant is found to have acted with *culpa*, he will be punished equally regardless of whether he was aware or unaware of the risks that his conduct created.¹⁵⁷ These solutions to the *Hall* case are objectionable. If the defendant in *Hall* was aware that his irresponsible skiing created a risk of death, he should be punished more severely than a skier who was unaware that her conduct created such risks but less severely than a skier who wanted to cause the death of a fellow skier. That the binary approach to mental states adopted in the Spanish Penal Code—and in most civilian jurisdictions—does not allow for such an intuitive conclusion reveals a significant flaw in the approach.

G. Attitudinal v. Cognitive Mental States in Jury and Bench Cases

The question of whether we ought to prefer an attitudinal or a cognitive approach to mental states is more difficult to answer than whether we should favor a binary or multinary approach to *mens rea*. In principle, it seems that the attitudinal approach is more normatively attractive. It is plausible to argue that someone who is aware of the harm created by her conduct and also indifferent to it is more worthy of condemnation than someone who is aware of the risk but is not indifferent to it.¹⁵⁸

154. *People v. Hall*, 999 P.2d 207, 210 (Colo. 2000); MODEL PENAL CODE § 2.02.

155. CÓDIGO PENAL § 1 arts. 138–142 (2015).

156. See ROXIN, *supra* note 8, at 423, 424.

157. *Id.* at 1018, 1019.

158. It is plausible to argue, however, that an actor who is aware that her conduct creates a risk of harm but is indifferent towards whether it takes place is not significantly more worthy of blame than the actor who is similarly aware of the risk but trusts that she will be able to prevent it. Why should the law favor those who consciously engage in risky undertakings while foolishly believing that harm will not result?

In spite of the prima facie normative appeal of the attitudinal approach, at least two serious pragmatic objections can be leveled against it. First, it will often be very difficult to prove whether someone was aware of a risk but indifferent to it or whether she was aware but thought that she could prevent it and was therefore not indifferent to it. Requiring prosecutors to prove indifference/acceptance in addition to awareness imposes a probative burden in circumstances in which it is unclear whether the benefits of doing so outweigh the evidentiary costs that requiring such proof creates.

Second, jurisdictions that have jury trials may be particularly disserved by adopting an attitudinal approach to mental states along the lines of the framework that is in place in civilian countries. If the distinction between *dolus eventualis* and conscious negligence has baffled judges and scholars for decades, it is difficult to imagine how much added confusion it would sow in the minds of juries. These reservations are buttressed by a recently published study that showed that laypeople are incapable of non-arbitrarily distinguishing between recklessness and knowledge.¹⁵⁹ If laypeople are unable to consistently and fairly distinguish knowledge from recklessness, it is fair to infer that they will be unable to coherently distinguish between recklessness and recklessness with gross indifference to the value of human life.

For these reasons, adoption of a cognitive approach to mental states is generally preferable in countries with jury trials. This includes all of Anglo-America and now includes several civil law countries that have recently adopted a jury trial system. In contrast, jurisdictions that only have bench trials may be better served by an attitudinal approach to mental states, given that this approach is arguably more normatively appealing than a purely cognitive one and that the pragmatic difficulties inherent in its implementation are easier to overcome if experienced lawyers are called to apply the framework as opposed to inexperienced laypeople.

V. CONCLUSION

This Essay compared and contrasted the American and civilian approaches to punishing culpable mental states. Two important insights emerge from this comparative analysis. First, it is preferable to have multiple forms of culpability than to have only two. The bipartite distinction between *dolus* and *culpa* fails to fully make sense of our moral universe. Second, the criminal law ought to take attitudinal mental states into account when making grading distinctions. Nevertheless, there are significant obstacles to doing so in

159. Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1338 (2011).

jurisdictions with jury trials, as the addition of attitudinal mental states may confuse laypeople rather than help them.

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