

Criminal Confusion: Addressing the Tension Between Bar Preparation & Practical Skills

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Most bar exams divide criminal law into distinct halves: the common law and the Model Penal Code (MPC). Yet, no state has adopted the entire MPC nor has any state survived simply on common law principles.¹ Further, the MPC's age makes it a relatively old model, one that can hardly be said to convey the complex interaction between statutory drafting and judicial interpretation that has taken place in so-called MPC states over the past fifty years.

How, if at all, can the teaching of criminal law be made more practical while still serving the interest of bar preparation? One possibility is the selective incorporation of state codes and cases into the criminal law curriculum. For example, Missouri adopted much of the Model Penal Code in the 1970s, meaning that instead of assigning the draft version of the MPC, one could assign actual Missouri code sections in class. Some of these sections have remained virtually identical to the original MPC, particularly the general part. To illustrate, just as the MPC divided mental state into four distinct categories of purpose, knowledge, recklessness and negligence, so too did Missouri.² Further, just as the MPC adopted a specific act requirement holding that all conduct be voluntary, so too did the state of Missouri.³

More complicated is the special part. While Missouri adopted many aspects of the MPC's inventory of specific offenses, it retained key distinctions. For example, Missouri rejected the Model Penal Code's decision to end the division of murder into degrees. For the MPC's drafters, first and second degree murder had become redundant.⁴ Though first degree murder traditionally connoted premeditation, courts in the United States had gradually come to hold that premeditation could be forged in an instant, leading the MPC's drafters to retain murder as a specific offense but eliminate its degrees.

However, even as the Missouri legislature adopted the Model Penal Code's general part, it rejected its consolidation of murder, voting instead to preserve the

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¹ Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 HASTINGS L.J. 1633, 1634 (2011).

² MO. REV. STAT. § 562.016 (2012).

³ *Id.*

⁴ Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 238 (2009).

degree structure.⁵ Why is a topic worth addressing, if for no other reason than to illustrate that most MPC states have in fact retained key common law provisions. For example, though murder-one in Missouri is technically defined as the killing of another with knowledge and deliberation, courts in the state have held that deliberation can be formed in an instant, essentially recreating the very redundancy that bothered the Model Penal Code's drafters in the first place.⁶ However, the retention of degrees has provided prosecutors with a set of options that—even if redundant—better enable them to satisfy community condemnation. For example, if prosecutors face a particularly heinous situation, then they can charge first degree murder. Conversely, in cases where the defendant may be sympathetic, prosecutors can take evidence of the same mental state and charge second degree. To illustrate how this works, I assign Missouri cases.

Linking the casebook to local cases and codes opens the door not only to show students how the classic common law definition of murder differs from the MPC definition of murder, but why that common law definition has lived on in a so-called MPC state. Put simply, the pervasive tendency to pigeon-hole states as either common law or MPC is technically inaccurate in Missouri. There, as in most American states, criminal law remains a largely local subject, guided by local particularities, whether its state legislature adopted the MPC half a century ago or not. Yet, most state bar associations continue to test students as if criminal law could easily be broken down into MPC/common law categories. While this will not likely change, class can be made more practical by balancing the theoretical bent of the bar with actual cases and codes.

⁵ MO. REV. STAT. §§ 565.020–565.021 (2012).

⁶ *State v. Miller*, 220 S.W.3d 862, 868 (Mo. Ct. App. W.D. 2007); *State v. Goforth*, 881 S.W.2d 256, 263–64 (Mo. Ct. App. S.D. 1994).