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ABSTRACT

Few tropes in American law teaching are more firmly entrenched than the criminal law division between Model Penal Code and common law states. Yet, even a cursory look at current state codes indicates that this bifurcation is outmoded. No state continues to cling to ancient English common law, nor does any state adhere fully to the Model Penal Code. In fact, those states that adopted portions of the Code have since produced a substantial body of case law – what this article terms "new common law" – transforming it. Taking the controversial position that criminal law pedagogy is antiquated, this article proposes a radical update, emphasizing two objectives: 1) the need to stress the interplay between individual state cases and codes, and 2) the need to abandon the position that the MPC represents a bold new vision of criminal law reform, particularly since that vision is itself almost half a century old.

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♦ Assistant Professor, Saint Louis University School of Law; Yale University PhD 2003, Duke University JD/MA 1998; Wesleyan University BA 1994. I would like to thank Joshua Dressler and the participants in the 2009 *Ohio State Journal of Criminal Law* symposium organized around my earlier article, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO S. J. CRIM. L. 31 (2009). In particular, I would like to thank Lloyd Weinreb, Cynthia Lee, Angela Harris, Douglas Husak, & Robert Weisberg for collective criticism that sparked this article.

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INTRODUCTION

Few tropes in American law teaching are more firmly entrenched than the criminal law division between Model Penal Code and common law states. Yet, even a cursory look at current state codes indicates that this bifurcation is outmoded. No state continues to cling to ancient English common law, nor does any state adhere fully to the Model Penal Code. In fact, those states that adopted portions of the Code have since produced a substantial body of case law – what this article terms "new common law" – transforming it. Taking the controversial position that criminal law pedagogy is antiquated, this article proposes a radical update, emphasizing two objectives: 1) the need to stress the interplay between individual state codes and cases, and 2) the need to abandon the position that the MPC represents a bold new vision of criminal law reform, particularly since that vision is itself almost half a century old.

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To illustrate, this article will proceed in four parts. Part I interrogates the myth of the "common law" state, showing how few, if any states continue to abide by judicially created law heralding from Elizabethan England. Part II interrogates the myth of the Model Penal Code state, showing how no state adopted the MPC in its entirety nor did any state adopt its most ambitious reforms, making the study of the MPC as a free-standing code misleading. Part III looks even closer at so-called MPC states, showing how every state that did adopt portions of the Model Penal Code has since developed its own, *new* common law interpreting it. Part IV examines the theoretical implications of looking more closely at the new common law, arguing that it leads to a more precise pedagogy, as well as a more empirically-minded, culturally-rooted understanding of how the criminal law actually works.

At its core, American criminal law reflects a sedimentary deposit of localized, state-level, majoritarian politics. While scholars like William J. Stuntz have derided such politics, even criticizing them as "pathological," this paper argues that they are in fact an inevitable symptom of democratic rule.[1] To rail against them, this piece maintains, is at once anti-democratic and futile. Even if the drafting of criminal legislation were handed over to politically insulated experts, as scholars like William Stuntz and Paul Robinson argue it should be, judges would still bend that law to conform to majority will, imposing a new common law onto even the most politically insulated, utilitarian of codes.[2]

Underlying this article's endorsement of a new common law approach to criminal law lies a larger challenge to the political and pedagogical assumptions underlying legal education generally in the United States. Perhaps foremost among these assumptions is the notion that state and local law is somehow less significant, less interesting, and ultimately less worthy of attention than national law.[3] Put simply, whenever national law can be taught, it is, and whenever national law cannot be taught – because it does not exist – then fictional models are used.[4] Though convenient for scholars

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[1] William J. Stuntz, *The Pathological Politics of Criminal Law* 100 MICH. L. REV. 505 (2001).

[2] William J. Stuntz, *The Pathological Politics of Criminal Law* 100 MICH. L. REV. 505 (2001); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 640 (2005).

[3] Russell Covey, "Should We Stop Teaching the Model Penal Code?" July 25, 2006, prawfsblawg.com; Douglas Berman, THE MODEL PENAL CODE SECOND: MIGHT FILM SCHOOLS BE IN NEED OF A REMAKE 1 OHIO ST. J. CRIM. L. 163 (2004).

[4] Russell Covey, "Should We Stop Teaching the Model Penal Code?" July 25, 2006, prawfsblawg.com; Douglas Berman, THE MODEL PENAL CODE SECOND: MIGHT FILM SCHOOLS BE IN NEED OF A REMAKE 1 OHIO ST. J. CRIM. L. 163 (2004).

who look down on state law as inferior, such an approach leads to imprecision and, this article maintains, a false sense of law's very nature.

For example, most casebook authors presume that the fields of psychology and utilitarian philosophy are best suited for explaining criminal law and guiding criminal law reform.[5] Implicit in such an approach, however, is the view that democratic majorities do not, in fact, know what is best for them. Indeed, some criminal law scholars have made this point explicit, arguing for the de-politicization of the criminal law-making process.[6]

While criminal law casebooks reinforce the notion that electoral majorities are inept, few fields of legal practice rely more heavily on a lawyer's ability to understand local majority sentiment than criminal law.[7] Whether experts disprove of average people or not, it is average people who decide the outcome of criminal cases, and consequently it is average people who inform an attorney's decision to proceed to trial or accept a plea bargain.[8] Further, until the moment that criminal law scholars succeed in overturning democratic government, average people retain the power to change the law through the electoral process.[9] Rather than emphasize abstract theory then, law students should be exposed to the methodologies of legal history and legal anthropology, both of which focus on the ascertainment and analysis of local practice, local knowledge, and local, community

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[5] JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 1-2 (5th ed. 2009); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS (2005); MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, COMMENTS (2005); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (2005); JOHN KAPLAN, ROBERT WEISBERG, GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2004); RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW (2nd ed. 2004); LLOYD L WEINREB, CRIMINAL LAW: CASES, COMMENTS, QUESTIONS (7th ed. 2003); GEORGE E. DIX AND M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS (5th ed., 2002); WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS (3rd ed. 2001).

[6] William J. Stuntz, *The Pathological Politics of Criminal Law* 100 MICH. L. REV. 505 (2001); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes,* 56 HASTINGS L.J. 633, 640 (2005).

[7] Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just: Coercive Versus Normative Crime Control* 86 VIRGINIA L. REV. 1839 (2000).

[8] Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just: Coercive Versus Normative Crime Control* 86 VIRGINIA L. REV. 1839 (2000).

[9] Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just: Coercive Versus Normative Crime Control* 86 VIRGINIA L. REV. 1839 (2000).

norms.[10] Unless criminal law scholars accept the relevance of such methodologies to the explication of their field, law students will find themselves increasingly deprived of even a basic understanding of how judicial opinions and legislative actions operate together to construct and reconstruct criminal offenses.

I. THE MYTH OF THE COMMON LAW STATE

One of the most pervasive shibboleths of American criminal law courses is the common law state.[11] Criminal law casebooks, hornbooks, and even commercial outlines all agree that while some states can best be characterized as Model Penal Code states, others are best designated common law.[12] Yet, few agree on what precisely this means. According to criminal law scholar Joshua Dressler, for example, common law states originally followed judge-made crimes deriving from England.[13] Yet, Dressler argues, "most states, often by statute, have abolished common law crimes," meaning that even in so-called common law states, "the legislature is the pre-eminent lawmaking body in the

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[10] *See, e.g.* Henry M. Hart, Jr. *The Aims of the Criminal Law*, in JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 1-2 (5th ed. 2009); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS (2005); MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, COMMENTS (2005); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (2005); JOHN KAPLAN, ROBERT WEISBERG, GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2004); RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW (2nd ed. 2004); LLOYD L WEINREB, CRIMINAL LAW: CASES, COMMENTS, QUESTIONS (7th ed. 2003); GEORGE E. DIX AND M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS (5th ed., 2002); WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS (3rd ed. 2001); RONALD N. BOYCE, DONALD A. DRIPPS AND ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE (9th ed. 2004).

[11] *See, e.g.*, STEVEN L. EMANUEL, CRIMINAL LAW (5th ed. 2003) (noting distinctions between common law and Model Penal Code states on the topics of mistake, proximate cause, duress, necessity, attempt, conspiracy, and accomplice liability); WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 66 (2nd ed. 2010); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 31 (3rd ed. 2001) (considering in detail both the common law and the Model Penal Code).

[12] *See, e.g.*, STEVEN L. EMANUEL, CRIMINAL LAW (5th ed. 2003) (noting distinctions between common law and Model Penal Code states on the topics of mistake, proximate cause, duress, necessity, attempt, conspiracy, and accomplice liability); WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 66 (2nd ed. 2010); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 31 (3rd ed. 2001) (considering in detail both the common law and the Model Penal Code).

[13] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 27 (3rd ed. 2001) (noting that pursuant to English common law "the definitions of crimes and the rules of criminal responsibility were promulgated by courts rather than by Parliament.")

realm of criminal law," and that courts do not originate law so much as interpret it.[14]

If legislatures are the "pre-eminent" lawmaking bodies in America, why bother with the fiction of the common law state? According to some, even though all states boast a criminal code, some have nevertheless "retained" respect for the ancient common law, particularly in cases where common law crimes are not mentioned in state codes.[15] If a state has a "reception" statute, in other words, then prosecutors can successfully charge defendants with crimes that are not enumerated in their state's criminal statutes so long as those crimes are mentioned in Blackstone's *Commentaries* or relate to "an English case directly on point decided before 1607."[16]

How often does this happen? According to Joshua Dressler, such prosecutions are "rare."[17] Criminal law scholar Wayne R. LaFave agrees, noting that prosecutions for common law crimes are not only few and far between, but have tended to involve idiosyncratic, nineteenth century-style offenses, including for example "being a common scold," "maliciously killing a horse," and "burning a body in a cellar furnace."[18]

Given their rarity, do reception statutes warrant the attention of first year criminal law students, whose task it is to gain an introduction to the most important aspects of the criminal law? Probably not, particularly since the vast majority of states reject them. However, there remains one more reason why the pedagogical trope of the common law state may exist. According to Joshua Dressler, some states have rejected reception statutes but still "codified the common law felonies," meaning that they employ common law terms to explicate their criminal statutes.[19] Hence, it is important to retain some memory of the common law, presumably so that one can understand the law in those states that codified the common law.

Is this really true? As this section will demonstrate, most crimes enumerated in American state codes, including classic common law crimes like murder, possess just as many distinguishing American characteristics as English ones, rendering arguments that American students need to understand ancient English common law nonsensical. Indeed, this section posits that the only unifying factor shared by so-called common law states is

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[14] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 28 (3rd ed. 2001).
[15] WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 66 (2nd ed. 2010) (noting that some states continue to accept the ancient common law of England "either by an express 'reception statute' or without the aid of any statute.")
[16] WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 66 (2nd ed. 2010).
[17] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 28 (3rd ed. 2001).
[18] WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 67 (2nd ed. 2010)
[19] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 28 (3rd ed. 2001).

not whether they preserved retention statutes or codified the common law, but that they rejected the MPC. Currently, only fifteen states in the union refused to incorporate any portion of the Model Penal Code into their statutory criminal law, making all but one of them, by default, "common law states."[20] Included are California, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, Wyoming, and Louisiana.[21] The last state, Louisiana, derives its code directly from French civil law, meaning that it is perhaps best described as an indigenous, non-MPC code state than a common law state.[22]

Perhaps ironically, the remaining fourteen states that rejected the MPC are all perhaps better described as indigenous code states than common law states. To illustrate, it is helpful to look at how those fourteen states that did not adopt the MPC treat homicide.[23] Under English common law, murder was not divided into degrees, but rather included simple distinctions between intentional killings done with "malice aforethought," and unintentional killings, or manslaughter.[24] Yet, out of the fifteen

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[20] For a compilation of states that adopted the Model Penal Code, see Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229 n. 2 (1997).

[21] For a compilation of states that adopted the Model Penal Code, see Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229 n. 2 (1997).

[22] *Id.*

[23] Under English common law, murder originally applied to both intentional and unintentional killings. In the 1820s, however, Parliament enacted a statute carving out an exception to murder for cases where defendants claimed benefit of clergy, creating the statutory lesser-included offense of manslaughter. JOHN H. LANGBEIN, RENEE LETTOW LERNER, BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 620 (2009). (Describing 9 Geo. IV c. 31, s.9). WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 216 (Malcom Kerr, ed., 1962). While law professors may say that British statutes should be considered part of the British common law because they come from England, this confuses the notion of what precisely, the common law is. Is it judge-made or is it English? Casebook authors maintain that it was judge-made, but in many cases it was not. This means that it is probably better to think of it simply as English law. Yet, if it is simply English law, then why not distinguish between English law – statutory and judge-made – and American law? Of course, to concede that there may have been an American criminal law that preceded the Model Penal Code would undermine the assumption, implicit in American casebooks, that pre-MPC law was an archaic remnant of the eighteenth century, much in need of an overhaul. However, core aspects of American "common law" regimes are decidedly American innovations, with little antecedent in either English law or judge-made law.

[24] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 216 (Malcom Kerr, ed., 1962). Incidentally, the history of the

states that rejected the Model Penal Code, only six employ the English common law term "malice aforethought."[25]

Of those states that continue to employ malice aforethought, all but one (South Carolina), divide the offense into first and second degrees, something the English common law did not do, and subsequently rely on uniquely American language to ascertain what, precisely, constitutes murder.[26] The most common language cited comes from Pennsylvania, which divided murder and manslaughter into degrees in 1794, declaring that any killing done in a "willful, deliberate, or premeditated" manner warranted classification as murder in the first degree.[27]

While criminal law casebooks and hornbooks concede that Pennsylvania has influenced many American states, they continue to cling to the common law divide, omitting any discussion of additional non-judge made criteria that so-called common law states use to determine what precisely constitutes first degree murder.[28] For example, Rhode Island declares that "[t]he unlawful

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crime of murder in England raises questions about the extent to which even English "common law" was court-generated. Prior to the reign of Edward III, for example, murder in England focused primarily on the killing of Danes by English natives, a crime for which entire communities could be punished. Edward changed this policy by statute, introducing the current definition of killing by "malice aforethought." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 217 (Malcom Kerr, ed., 1962).

[25] The six states are California, Rhode Island, Nevada, Oklahoma, Massachusetts, and South Carolina. California actually incorporated malice aforethought after it adopted New York's Penal Code in 1872. *See* Sanford H. Kadish, *The Model Penal Code's Historical Antecedents* 19 RUTGERS L.J. 521, 537 (1988). Wyoming uses its own language, combining the Pennsylvania models premeditation with the English common law's malice aforethought: 6-2-101. Murder in the first degree; penalty.(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape, resisting arrest, kidnapping or abuse of a child under the age of sixteen (16) years, kills any human being is guilty of murder in the first degree.

[26] The only state that does not divide murder into first and second degrees is South Carolina. S.C. CODE ANN. §16-3-10 (2009).

[27] Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder* 97 U. PA. L. REV. 759, 771-72 (1949).

[28] *See, e.g.* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 503-04, 508-11 (2001) JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 1-2 (5th ed. 2009); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS (2005); MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, COMMENTS (2005); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (2005); JOHN KAPLAN, ROBERT WEISBERG, GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2004); RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW (2nd ed. 2004); LLOYD L WEINREB, CRIMINAL LAW: CASES, COMMENTS, QUESTIONS (7th ed. 2003); GEORGE E. DIX AND M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS (5th ed., 2002);

killing of a human being with malice aforethought is murder," a nod to English common law, but then goes on to distinguish first degree murder by including instances where a killing is committed "against any law enforcement officer in the performance of his or her duty or committed against an assistant attorney general or special assistant attorney general in the performance of his or her duty."[29] This last provision, protecting prosecutors and police, is neither a product of the Pennsylvania model nor the English common law, but is a unique consequence of the legislative and political history of Rhode Island.

Nevada is similar. Even while clinging to malice aforethought for murder generally, Nevada distinguishes first degree murder by limiting it to cases where the killing is "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person."[30] While many of the above fall under the doctrine of felony murder, this does not necessarily mean that they therefore derive from the common law of England. Indeed, criminal law scholar Guyora Binder has shown that felony murder does not in fact derive from England at all, meaning that it is just as much an American doctrine as a British one.[31] Further, Nevada's additional provisions for first degree murder are also American. For example, first degree murder includes killings that take place "on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties" are not English either.[32] Such attendant circumstances are not products of English common law, forged in an era long before children rode buses to school – but unique circumstances in Nevada.

Similarly unique circumstances rear their heads in other states as well. In Massachusetts, for example, any killing done with "deliberately premeditated malice aforethought" – an odd combination of the Pennsylvania and common law definitions – is first degree murder, as well as any killing committed "with extreme atrocity or cruelty."[33] In Oklahoma, first degree murder includes any killing done with malice aforethought as well as any

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WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS (3rd ed. 2001).

[29] R. I. GEN. LAWS § 11-23-1 (2009).

[30] NEV. REV. STAT. §200.030 (2009).

[31] Guyora Binder, *The Origins of the American Felony Murder Rule*, 57 STANFORD L. REV. 59 (2004) (recovering the American origins of the felony murder rule).

[32] NEV. REV. STAT. §200.030

[33] MASS. GEN. LAWS. Ch. 265 § 1 (2009).

killing done in conjunction with child abuse, a particularly despicable crime for which a different mens rea term is used: "the willful or malicious injuring, torturing, maiming or using of unreasonable force" on a child.[34]

California also distinguishes between first and second degree murder by attendant circumstances, including whether killing was done "by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death."[35] This statute was enacted in 1993 after a string of drive-by shootings in Los Angeles during the late 1980s and early 1990s.[36] Republican Governor Pete Wilson supported the law, and even gang-members themselves attempted to stop the practice.[37] Only a few months after the statute's enactment, for example, two hundred members of Los Angeles area "warring gangs" called for a stop to drive-by shootings, some threatening shooters with retribution in prison.[38] The Mexican Mafia, known simply as "La EME" or "the letter M," "ordered thousands of Latino gang members to halt drive-by shootings" in the Los Angeles area.[39]

Though California's drive-by statute reflects a particular aspect of local culture in Los Angeles, criminal law casebooks continue to portray California as a common law state, implying that it somehow continues to adhere to English common law. On the contrary, however, California's clear allusion to gang-related violence represents the kind of unique circumstance that distinguishes American from English law. To tell students that murder in each of these states is based simply on ancient English notions of malice aforethought is wrong.

Despite malice aforethought's continued presence in American casebooks, most so-called common law states do not employ the term at all, making its pedagogical relevance even more questionable. To take just a few examples, Idaho, also presumably a common law state, incorporated the Pennsylvania model but, unlike California, rejected the term malice

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[34] OKLA. STAT. §21-701.7 (2009).
[35] CAL. PEN. CODE §189 (2009).
[36] *3 Killed, 6 Injured in 2 Drive-By Shootings,* L.A. TIMES, April 8, 1993; *Drive-By Shootings Raise Police Alarm,* L.A. TIMES, July 23, 1990; *Drive-By Shootings in 2 Cities Leave 3 Men Wounded,* L.A. TIMES, June 11, 1989; *Woman Killed and 6 Injured in Drive-By Shootings,* L.A. TIMES, July 11, 1988; *Drive-by Shootings Wound 4, Including 2 Young Children,* L.A. TIMES, May 26, 1988.
[37] *Issue: Drive-By Shootings,* LOS ANGELES TIMES, Aug. 22, 1993; *Santa Ana Gang Members Step Outside Turf, Call for Peace,* L.A. TIMES, Oct. 2, 1993.
[38] *Santa Ana Gang Members Step Outside Turf, Call for Peace,* L.A. TIMES, Oct. 2, 1993.
[39] *Santa Ana Gang Members Step Outside Turf, Call for Peace,* L.A. TIMES, Oct. 2, 1993.

aforethought, adding instead a series of its own mens rea components, including murder done with the "intent" to "execute vengeance," "extort something from the victim," or "satisfy some sadistic inclination," none of which appeared in the English common law.[40] Vermont, another common law state, also rejected malice aforethought, but included none of the additional mens rea requirements that emerged in California or Idaho, simply relying on "willful, premeditated, and deliberate killing."[41] Mississippi drafted first degree murder to include killing "done with deliberate design," a unique rendition of the Pennsylvania model.[42] In Vermont and Michigan, murder must be committed "by wilful, deliberate and premeditated killing, again direct takes on the Pennsylvania model.[43]

While the tired pedagogical technique of using malice aforethought as a foil for the MPC only applies to six states – and therefore should be brought to an end – defenders of the common law fiction will invariably mention South Carolina, the only state that does not divide murder into degrees, as a living, if lonely, embodiment of England's legacy. Yet, even South Carolina includes within its definition of murder uniquely American language, including "[k]illing by stabbing or thrusting," a capital crime applicable to instances where the victim "has not then any weapon drawn" or "has not then first stricken" the defendant.[44] Of course, there is a statutory exception for anyone who happens to cause death while "chastising or correcting his child," rendering the stabbing manslaughter.[45]

Is murder the only area where so-called "common law states" depart significantly from the ancient English common law? No. While most criminal law casebooks recognize the Pennsylvania innovation when it comes to murder, they fail to discuss similar grading schemes, all uniquely American, that apply to other offenses.[46] For example, American states developed grading schemes for most violent felonies, not just murder, in the nineteenth century. By 1857, for example, the New York

[40] IDAHO STATUTES, TITLE 18: CRIMES AND PUNISHMENTS, CHAPTER 40 HOMICIDE, §14-4003.
[41] VT. STAT. ANN. tit. 13 §2301 (2009).
[42] Miss. Code Ann. § 97-3-19(1) (Rev. 2000).
[43] 13 VERMONT STAT. ANN. §2301 (2009); MICH. COMP. LAWS §750.316 (2009).
[44] S.C. CODE ANN. §16-3-30 (2009).
[45] S.C. CODE ANN. §16-3-30 (2009).
[46] JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 236 (5th ed. 2009).

legislature had graded the offenses of burglary, arson, and robbery, substantially transforming the common law definitions of each.[47]

Interestingly, Pennsylvania did not grade its violent non-homicide felonies until after New York, while New York did not grade murder until 1860, over half a century after Pennsylvania.[48] Therefore, to say that New York followed the Pennsylvania model would not be entirely correct, since it graded its violent felonies prior to the Quaker state. In fact, as regards felonies other than murder, it would probably be more correct to say that Pennsylvania followed New York, for by the time that New York had graded its felonies, Pennsylvania still only graded murder.[49] Just as there was a Pennsylvania model for murder, in other words, so too was there arguably a separate, New York model for burglary, arson, and robbery, one that so-called common law states have all tended to follow.

Other crimes also reflect the failure of so-called common law states to follow English common law, statutory rape perhaps foremost among them.[50] Inspired by a 1576 statute enacted in Elizabethan England, for example, North Carolina established the age of consent for statutory rape at 10 in 1869.[51] By 1917, however, North Carolina raised this age to 12, increasing it again to 16 in 1923.[52] Rather than a faithful representation of ancient English common law, in other words, the Tarheel State's age of consent reflected insecurities about teenage behavior immediately after World War I, the height of the jazz age.[53]

Even states that did not adopt the MPC – what scholars call common law states – participated in the process of codification and transformation.[54] Massachusetts provides an example. By 1857,

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[47] FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OHIO 682-683, 706-707, 716-717 (4th ed. 1857).
[48] Wechsler, *Codification,* 1445.
[49] FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OHIO 682-683, 706-707, 716-717 (4th ed. 1857).
[50] Leigh B. Bienen, *Defining Incest,* 92 NW. U. L. REV. 1547, n. 155 (1998);
[51] Leigh B. Bienen, *Defining Incest,* 92 NW. U. L. REV. 1547, n. 155 (1998).
[52] Leigh B. Bienen, *Defining Incest,* 92 NW. U. L. REV. 1547, n. 155 (1998).
[53] Leigh B. Bienen, *Defining Incest,* 92 NW. U. L. REV. 1547, n. 155 (1998).
[54] States that did not adopt any portion of the MPC – and therefore became known as common law states – include California, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, and Wyoming. Louisiana did not adopt the MPC but is widely recognized as a French civil law state, not an English common law state.

Massachusetts had codified the crime of kidnapping to include "forcibly carrying" persons against their will "out of the state" and, also, "secretly confining or imprisoning" any person "against [their] will."[55] This latter portion, the act of confining, had not been considered by English common law to have been kidnapping, but false imprisonment.[56] Why Massachusetts decided to incorporate false imprisonment into its statute on kidnapping is not clear, though the innovation caught on in other common law states like Idaho, which includes in its statute anyone who "confines" a victim "secretly," even as it follows the non-common law practice of grading.[57]

Perhaps because American kidnapping confuses the English common law concept of false imprisonment, it is not discussed at length in criminal law casebooks. Yet, even crimes that are mentioned in criminal law casebooks have been altered in common law states. To take another example, North Carolina, one of the states commonly cited as a common law state, significantly altered the English common law definition of rape by refusing to require that victims forcibly resist their attackers. In cases where victims suffered from "fear, fright, or coercion," noted North Carolina's Supreme Court in 1946, a showing of actual force by the defendant was not necessary.[58]

Keeping the above examples in mind, why do criminal law professors, and criminal law casebooks, persist in the fiction of the common law state?[59] Part of the story lies in the politics of legal pedagogy. Prior to 1940, criminal law casebooks consisted – as their names suggest – almost entirely of cases. Renowned criminal law teachers like Chicago Professor Joseph Henry Beale included anywhere from six to nine cases per topic in their casebooks, occluding any mention of law review articles, philosophical

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[55] FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OHIO 596 (4th ed. 1857).

[56] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 216 (Malcom Kerr, ed. Boston: Beacon Press, 1962).

[57] IDAHO STATUTES, TITLE 18: CRIMES AND PUNISHMENTS, CHAPTER 45 KIDNAPPING, §18-4501.

[58] *State v. Thompson*, 40 S.E.2d 470. Despite the divergence between so-called common law states and the ancient common law of England, scholars may still argue that certain American states still recognize the common law of England as a formal matter, and even allow for punishment of non-codified, common law crimes. Rhode Island is an example.

[59] See, e.g. JOSHUA DRESSLER, CASES & MATERIALS ON CRIMINAL LAW 4 (5th ed. 2009); Wayne R. Lafave, Criminal Law (5th ed., 2010);

treatises, or sociological studies.[60] This meant that before a student covered a subject, say provocation or self-defense, she – or more likely he – walked through at least six factual scenarios, and six legal conclusions, from which said student could then synthesize a formal legal rule.[61]

Beginning in the 1930s, a young Columbia law professor named Herbert Wechsler began to change this.[62] Convinced that Beale's case method tended to produce overly conservative, narrow-minded attorneys, Wechsler worked with a colleague, Jerome Michael, to produce a new kind of criminal law casebook, one that dramatically reduced the number of cases students had to read, substituting in their place bits of law review articles, paragraphs from major philosophical treatises, and statistical studies.[63]

To Wechsler's mind, substituting outside materials for cases promised to change the way that students thought about law. Rather than learning to revere legal opinions, students would, Wechsler hoped, come to criticize them.[64] Regularly, Wechsler included notes that prompted students to question the normative basis of judicial opinions, at times even mocking judicial deference to precedent and English common law.[65] Though such an iconoclastic approach risked leaving students confused and arguably even unprepared for the criminal bar, Wechsler did not particularly care whether his students entered criminal practice or not. In fact, the administration at Columbia joined him in discouraging students from becoming criminal lawyers, partly because the field tended to be low-paying, but also because defense attorneys tended to be associated with the criminal element and prosecutors tended to become politically compromised.[66]

Enter the modern criminal law casebook. Seizing an opportunity to nudge criminal law away from practitioners and towards future "legislators" Wechsler published his book in 1940 to widespread acclaim, dramatically – perhaps even tragically –

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[60] JOSEPH HENRY BEALE, JR. A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW (1894).
[61] JOSEPH HENRY BEALE, JR. A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW (1894).
[62] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[63] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[64] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[65] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[66] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).

influencing an entire generation of law students.[67] Foremost among such students was a young Navy veteran named Sanford Kadish who took Wechsler's criminal law course in 1946 and, inspired by Wechsler's law and society approach, then went on to produce his own, iconic, Wechsler-inspired text in 1962.[68]

Why are Kadish and Wechsler relevant to understanding the division between "common law" and "Model Penal Code" states? From 1952 to 1962 Herbert Wechsler served as the Reporter for the American Law Institute's Model Penal Code project, overseeing the creation of the code, a production that younger scholars like Kadish reverently emphasized in their casebooks.[69] Completed in 1962, the MPC introduced a series of revisions to criminal law definitions that, presumably, had themselves come directly from the ancient common law of England. In fact, the Model Penal Code's *Commentaries* repeatedly referenced the "Common-Law Background" of American criminal law, using it as a foil for the innovations introduced by the MPC.[70] To anyone unfamiliar with the statutory nuance of American criminal codes, the MPC *Commentaries* themselves made it logical to distinguish between MPC states and common law states, a divide that scholars like Kadish imported into their casebooks. Though much of that law was itself codified, Kadish chose to refer to states that either did not adopt the Model Penal Code, or had yet to adopt it as "common law" – not code states.[71]

II. THE MYTH OF THE MODEL PENAL CODE STATE

While thirty-four states adopted portions of the Model Penal Code, no state adopted all of it.[72] Even states that adopted much of it – New York, Illinois, and Missouri all examples –

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[67] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[68] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[69] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 217 (2009).
[70] *See e.g.,* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES 13, 44, (1980).
[71] Sanford H. Kadish, *The Model Penal Code's Historical Antecedents* 19 RUTGERS L.J. 521, 537 (1988).
[72] For a compilation of states that adopted the Model Penal Code, see Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine,* 27 SW. U. L. REV. 229 n. 2 (1997).

tended to amend MPC definitions with new legislation.[73] Why? A brief look at the archaeology of state codes indicates that those portions of the MPC which challenged local, cultural values tended to fail, while those sections that simply reiterated what many people already felt, tended to succeed, rendering so-called "MPC" states hybrid regimes that enjoyed some of the modern innovations provided by the MPC, yet retained distinctive aspects of older, more local law.[74]

To illustrate, one of the MPC's most-heralded reforms was a recommendation that inchoate offenses, conspiracy, attempt, and so on, be punished just as harshly as completed offenses, a rule that coincided nicely with the instrumentalist view that individuals who attempted to commit crimes were just as dangerous as individuals who completed crimes.[75] Yet, no state adopted the rule, indicating that voters were simply not willing to jettison traditional notions that individuals who completed crimes were more guilty than those who did not.[76] Similarly, no states adopted the MPC's elimination of the overt act requirement in conspiracies chargeable as first or second degree offenses.[77] Traditionally, conspiracy required an agreement to commit a crime and an overt act in furtherance of that crime.[78] However, in an attempt to ramp up controls for future

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[73] *See, e.g.* Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 640 (2005) (describing legislative amendments to Illinois's criminal code that undermined MPC definitions).

[74] Of course, that MPC states actually possess a mélange of old statutory language raises questions about the legitimacy of designating certain states "MPC states" to begin with, particularly since those portions of the MPC that were rejected tended to leave significant areas of law up to prior definition, making the states hybrid regimes, at best.

[75] MARKUS D. DUBBER, THE MODEL PENAL CODE (2004).

[76] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview* 10 NEW CRIM. L. REV. 319, 320 (2007).

[77] *See, e.g.* Ala. Code § 13A-4-3 (year). (statute requires overt act); Alaska. Stat. § 11.31.120 (year). (statute requires overt act); Ariz. Rev. Stat. § 13-1003 (year). (statute requires overt act); Ark. Code Ann. § 5-3-401 (year); Co. Rev. Stat. § 18-2-201 (year) (statute requires overt act) (statute requires overt act); Conn. Gen. Stat. of Connecticut (year). (statute requires overt act); Del. Code Ann. § 513 (year). (statute requires overt act); Fla. Stat. § 777.04 (year). (statute requires overt act); Ga. Code Ann. § 16-4-8 (year). (statute requires overt act); Haw. Rev. Stat. § 705-520 (year). (statute requires overt act); ILCS § Ch. 720, § 5/8-2 (year). (statute requires overt act); Ind. Code § 35-41-5-2 (year). (statute requires overt act); Iowa Code § 706.1 (year). (statute requires overt act); K.S A § 21-3302 (year). (statute requires overt act); Ky. Rev. Statutes Annotated § 506.040 (year). (statute requires overt act); M.R.S.A § 151 (year). (statute requires overt act); Minn. Statutes § 609.175 (year). (statute requires overt act); Mo. Revised Statutes § 564.016 (year). (statute requires overt act); Mo. Revised Statutes § 564.016 (year). (statute requires overt act); Mont. Code Annotated § 45-4-102 (year). (statute requires overt act).

[78] Id.

dangerousness, the MPC eliminated the overt act requirement for serious crimes, transforming the offense into an Orwellian exercise in thought control.[79] While some scholars praised this ultra-aggressive approach, all thirty-four states that adopted portions of the MPC balked.[80] Even New York and Illinois, both of whom suffered longstanding problems with organized crime, rejected the MPC approach and held that an overt act need be proven for every grade of conspiracy, even the most serious.[81]

How can such digressions be rationalized? One likely explanation is that state legislators felt the MPC's innovations outstripped popular notions of how certain crimes should be punished. In the case of inchoate crimes like conspiracy and attempt, for example, the MPC may simply have appeared too harsh. Though the MPC's position was logically consistent with an emphasis on controlling dangerousness, its elevation of mental state above conduct appeared too much for legislators to accept, even for conspiracies that involved organized crime.

Conversely, when crimes involved children, the public seemed more eager for punishment than the MPC. In a remarkable continuation of its emphasis on mental state, for example, the Model Penal Code allowed adults guilty of sleeping with minors to escape strict liability unless the child was ten years old or younger.[82] Unwilling to provide sex offenders such relief, all 34 MPC states rejected the Code's statutory rape provision.[83] As we

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[79] *Comment 5*, MODEL PENAL CODE §5.03(5).

[80] *See, e.g.* Ala. Code § 13A-4-3 (year). (statute requires overt act); Alaska. Stat. § 11.31.120 (year). (statute requires overt act); Ariz. Rev. Stat. § 13-1003 (year). (statute requires overt act); Ark. Code Ann. § 5-3-401 (year); Co. Rev. Stat. § 18-2-201 (year) (statute requires overt act) (statute requires overt act); Conn. Gen. Stat. of Connecticut (year). (statute requires overt act); Del. Code Ann. § 513 (year). (statute requires overt act); Fla. Stat. § 777.04 (year). (statute requires overt act); Ga. Code Ann. § 16-4-8 (year). (statute requires overt act); Haw. Rev. Stat. § 705-520 (year). (statute requires overt act); ILCS § Ch. 720, § 5/8-2 (year). (statute requires overt act); Ind. Code § 35-41-5-2 (year). (statute requires overt act); Iowa Code § 706.1 (year). (statute requires overt act); K.S A § 21-3302 (year). (statute requires overt act); Ky. Rev. Statutes Annotated § 506.040 (year). (statute requires overt act); M.R.S.A § 151 (year). (statute requires overt act); Minn. Statutes § 609.175 (year). (statute requires overt act); Mo. Revised Statutes § 564.016 (year). (statute requires overt act); Mo. Revised Statutes § 564.016 (year). (statute requires overt act); Mont. Code Annotated § 45-4-102 (year). (statute requires overt act).

[81] GENE SCHULTZ, CRIMINAL OFFENSES AND DEFENSES IN MISSOURI 80 (1986).

[82] Michelle Oberman, *Statutory Rape Laws: Does it Make Sense to Enforce Them in an Increasingly Permissive Society?* 82 A.B.A. J. 86 (1996).

[83] Michelle Oberman, *Statutory Rape Laws: Does it Make Sense to Enforce Them in an Increasingly Permissive Society?* 82 A.B.A. J. 86 (1996). Article 213, Sexual Offenses, MODEL PENAL CODE §213.1 (Rape and Related Offenses). While the MPC's statutory rape provision represented an extremely low age, the MPC did not completely absolve defendants who had intercourse with females between the ages of 10 and 16. So long as they were four years

have seen, this very age had been contemplated by English law during the reign of Queen Elizabeth, and rejected by American common law states like North Carolina.[84] Instead, states set the age of victims at 13 in some jurisdictions, and as high as 17 in others.[85] For example, Missouri declared statutory rape chargeable to individuals who had intercourse with minors under fourteen years of age.[86] Yet, a fourteen year old could, with the permission of a judge, enter into marriage and obviate the rule.[87] This "marriage rape exemption" represented a direct reflection not of MPC treatmentism, but "a relic of the past," a type of shotgun wedding provision that presumed "girls are sure to be better off with a husband to look after them rather than be subject to a life on welfare."[88] In fact, Missouri's treatment of sexual offenses like statutory rape reflects precisely the kind of local, cultural specificity that students assigned either the MPC or English common law miss.

What larger lessons can be learned from looking at state rejections of MPC provisions on statutory rape, attempt, and conspiracy? Simply because states adopted portions of the Model Penal Code did not mean that they adopted all of the Code, or even its most distinctive sections. Further, denoting certain states MPC states only obfuscates the fact that even those states most open to the MPC remained, in the final analysis, hybrids. Either they blended the MPC with older state codes, conflated state statutes with ancient English common law rules, or carved out their own, culturally distinct paths.

Another area where the MPC failed to convince state legislatures was murder. Frustrated at state tendencies to reduce premeditation to an instant, the MPC's drafters collapsed first and second degree murder into a single offense, triggered whenever a defendant "causes the death of another human being" purposely, knowingly, or "recklessly under circumstances manifesting extreme indifference to the value of human life."[89] While the drafters retained some exceptions for the death penalty – all 34 states that adopted portions of the MPC rejected the Code's

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older, those individuals could be found guilty of a new crime: "Corruption of Minors," which constituted a third-degree felony, two grades lower than statutory rape, a felony of the first degree. MODEL PENAL CODE §213.3 Corruption of Minors & Seduction (1962).

[84] 1 Hal. P.C. 631 *cited in* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 237 (Robert Malcolm Kerr, ed., 1962).

[85] *See, e.g.* MO. REV. STAT. §566.032 (1994).

[86] MO. REV. STAT. §566.032 (1994).

[87] MO. REV. STAT. §566.023 (1994).

[88] *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by their Statutory Rapists*, 61 ALB. L. REV. 257, 258 (1997). *See also* Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998).

[89] Article 210, *Criminal Homicide*, MODEL PENAL CODE §210.2 (1962).

recommendations, choosing instead to preserve the distinction between first and second degree.

Often, the decision to preserve and/or expand first degree murder reflected local politics. New York provides an example. Out of all the states in the union that adopted portions of the Model Penal Code, New York should arguably have been the most pro-MPC, if for no other reason than that New York Governor Nelson Rockefeller assigned Herbert Wechsler, the American Law Institute's Reporter for the MPC, to serve on its Temporary Commission to Revise New York's Penal Law.[90] Though a supporter of the Model Penal Code, particularly reduction of murder to one degree, Wechsler remained acutely aware of the political pressures that voters exerted in New York, and subsequently tailored the code to local conditions.[91]

To illustrate, by 1961, New York was the last state in the Union to impose a mandatory death penalty for all cases of first degree murder. While Wechsler opposed the death penalty as a matter of principle, he insisted that any move to alter first degree murder in New York required holding "public hearings" in order to build popular support for legal change.[92] Wechsler's interest in holding hearings reflected a democratic strain that ran through much of New York's adoption of the Model Penal Code. For example, at a Commission meeting on December 8, 1961, Wechsler warned that the "controversial" issue of the death penalty presented the Commission with a unique "problem" in that public attention to it far outweighed public interest in other aspects of the criminal law, notions of culpability, justification, and excuse for example.[93] To avoid jeopardizing important reforms of the entire code, in other words, Wechsler advocated catering to popular opinion on the question of the death penalty "so as not to impede the progress of a lot of other work that will not be controversial."[94] "My own view," continued Wechsler, "is that a careful effort should be made to separate these issues to which the public and the legislature are to be really divided."[95]

One issue that Wechsler feared might divide the public was the death penalty. To avoid a political backlash on the penalty, he recommended that the Commission "educate the legislature and the

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[90] Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors* 78 COLUM. L. REV. 1098 (1978).

[91] Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WISCONSIN L. REV. 1017 (2009).

[92] Minutes of the Temporary Commission, Sept. 22, 1961, Records of the Temporary Commission, New York Criminal Courts Library, New York City, New York [hereinafter RTC], Box 2, Folder 1, 6.

[93] Minutes of the Temporary Comm., Dec. 8, 1961, RTC, Box 2, Folder 1, 4.

[94] Minutes of the Temporary Comm., Dec. 8, 1961, RTC, Box 2, Folder 1, 4.

[95] Minutes of the Temporary Comm., Dec. 8, 1961, RTC, Box 2, Folder 1, 4.

public," particularly on issues of sentencing.[96] He also lobbied in favor of retaining the death penalty, but only in two limited circumstances: 1) where a defendant killed a police officer "acting in the line of duty," and 2) where the defendant murdered a prison guard.[97]

For the most part, such attention to moderate reform and popular reception worked, engendering little political resistance. "From both sides of the aisle today," reported the *New York Times* on June 4, 1965, "were applause and lavish praise for the commission chairman, Republican Assemblyman Richard J. Bartlett."[98] Precisely because the Committee had been careful not to offend the public, even granting concessions to avoid backlash, it had been able to achieve substantive reform.

Yet, the vagaries of popular opinion remained. Despite Wechsler's careful attention to popular caprice, the Commission's attempt to restrict the death penalty failed to withstand popular anger at criminals, particularly as crime rates began rising in the late 1960s. In October 1968, for example, a legislative committee met in New York to decide whether to expand the scope of capital punishment.[99] Senator Edward J. Speno, the committee chair, announced that "many legislators" in New York had received "heavy mail" urging an expansion of cases where the penalty applied.[100] Much of this mail had been triggered by rising crime.[101] When New York City Controller Mario Procaccino called for a "get tough" policy on crime during a public hearing in Manhattan, including reinstatement of the electric chair for murderers, audience members cheered.[102] Conversely, "groans and cat-calls" inundated psychiatrist Henry Peckstein when he warned that "too much repressive legislation" could lead to a "fascist state."[103]

In 1971, state legislators extended capital punishment to anyone who killed a corrections officer "while he is performing his official duties."[104] In 1973, New York City mayoral candidate Mario Biaggi called for the execution of "hired assassins," "those responsible for the killing of a witness to a serious crime," and

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[96] Minutes of the Temporary Comm., Dec. 8, 1961, RTC, Box 2, Folder 1, 4.
[97] *Rockefeller Gets Bill on Abolition of the Death Penalty*, N.Y. TIMES, May 20, 1965, n. 1.
[98] *Assembly Passes a Total Revision of the Penal Law*, N.Y. TIMES, June 4, 1965, at 1.
[99] *Witnesses Clash on the Death Penalty*, N.Y. TIMES, Oct. 4, 1968, at 21.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Summary of Bills Passed and Killed in Albany During the 1971 Legislative Session*, N.Y. TIMES, June 10, 1971, at 34.

those who committed murder during a "rape, robbery, or kidnapping."[105] In 1977, such a law passed both the House and Senate, only to be vetoed by New York Governor Hugh Carey.[106] Four years, and four vetoes later, the issue remained electric, this time with New York Mayor and gubernatorial candidate Ed Koch declaring that whether the death penalty deterred or not, it "is vital that society be allowed to express its moral outrage at wanton killing."[107] In 1984, the New York Court of Appeals entered the fray and overturned the state's statute requiring capital punishment for offenders who killed while incarcerated, arguing that the mandatory death penalty was unconstitutional.[108]

Despite the court's ruling, popular initiatives to expand the death penalty continued into the 1980s. In 1989, a democratic led assembly voted to restore the penalty in cases of murder-for-hire, murder of police officers, murder of witnesses, or murder in the course of a violent crime.[109] Governor Cuomo vetoed the law, declaring that even though life had become "ugly and violent" in New York, capital punishment constituted little more than an "act of vengeance."[110] Frustration with Cuomo's anti-death penalty stance contributed to the 1994 election of George Elmer Pataki, the first Republican Governor in twenty years.[111] Pataki campaigned on a promise to expand the death penalty, something that no New York governor had done since 1977.[112] On March 7, 1995, he finally succeeded in reinstating the electric chair – three decades after the Temporary Commission had tried to eliminate it – with a new law creating ten separate instances where death was appropriate. [113]

Just as the political battle seemed over, the courts intervened. In 2004, New York's highest court invalidated Pataki's law on the grounds that it unconstitutionally pressured jurors into choosing the death penalty by warning them that offenders who did not get executed might be paroled.[114] Though Pataki moved quickly to amend the statute, he met stiff resistance in the State Assembly, now controlled by Democrats who were

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[105] *Biaggi Asks Death for Some Crimes,* N.Y. TIMES, Sept. 16, 1973, at 53.
[106] *Death-Penalty Bill is Vetoed by Carey,* N.Y. TIMES, July 13, 1977, at 18.
[107] *The Politics of Death Still Thrive,* N.Y. TIMES, June 6, 1982, at E6.
[108] *Court Overturns Death Sentence in New York Law,* N.Y. TIMES, July 3, 1984 at A1.
[109] *Assembly Backs Death Penalty by Wide Margin,* N.Y. TIMES, March 7, 1989, at B2.
[110] *Cuomo Vetoes Death Penalty Seventh Time,* N.Y. TIMES, March 21, 1989, at B1.
[111] *New York Voters End a Democratic Era,* N.Y. TIMES, Nov. 9, 1994, at A1.
[112] *Id.*
[113] *A Vow Fulfilled,* N.Y. TIMES, March 8, 1995, at A1.
[114] *Across New York a Death Penalty Stuck in Limbo,* N.Y. TIMES, Aug. 21, 2004, at 1.

softening on the issue.[115] According to Democratic Assemblywoman Helene E. Weinstein, initially a supporter of capital punishment, "[m]y vote 10 years ago was 10 years ago."[116] Since then, argued Weinstein, "new information, important information, about DNA testing" and "about innocent people being convicted" had emerged, changing her mind.[117] Though she did not mention the program by name, Weinstein's allusion to DNA testing referred to the Innocence Project, a program founded by law professors Barry Scheck and Peter Neufeld to show that a surprising number of death row inmates were innocent of their crimes.[118]

As the above section indicates, battles over the death penalty in New York provide a glimpse into just how closely popular politics, statutory law, and judicial opinions operate to influence criminal law reform. Though support for the Model Penal Code remained high in the state, popular politics won out, influencing the state's treatment of first degree murder. Recovering some of the political wrangling that went into the reform of these offenses helps complicate the notion of the Model Penal Code state, showing how the Code was itself altered by local norms and legislative decree.

Another area of the Model Penal Code roundly rejected by states, but also related to homicide, was the elimination of felony murder. The Model Penal Code rejected the concept of felony murder, replacing it with homicide "committed recklessly under circumstances manifesting extreme indifference to the value of human life," a condition that was "presumed" if the actor was engaged in robbery, rape, arson, burglary, or kidnapping.[119] Most states refused to follow the MPC on this point, preserving the separate crime of felony murder.[120]

Some states even went so far as to preserve felony murder in cases where a non-violent felony was at issue.[121] This was the case in Missouri – an MPC state – where literally "any felony" might trigger the state's felony murder provision. In 1926, a court found the illegal manufacture of whiskey to be a sufficient predicate for felony murder, and in 1975 the Supreme Court of

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[115] *Death Penalty Seems Unlikely to be Revived,* N.Y. TIMES, Feb. 11, 2005, at 1.
[116] *Id.*
[117] *Id.*
[118] BARRY SCHECK & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).
[119] MODEL PENAL CODE, §210.2
[120] *See, e.g.* GENE SCHULTZ, CRIMINAL OFFENSES AND DEFENSES IN MISSOURI 166 (1986).
[121] *State v. Robinett,* 279 S.W. 696 (1926); *Missouri v. Chambers,* 524 S.W.2d 826 (1975).

Missouri found stealing to be a sufficient predicate felony.[122] Also, Missouri considers felonies that actually cause the death of victims – and are therefore barred from being predicate felonies in other states due to what is known as the "merger doctrine" – legitimate triggers for felony murder.[123] An example occurred in 2001, when a defendant was successfully charged with felony murder for unlawfully using a firearm against a victim, the unlawful use of a firearm qualifying as the underlying felony.[124] The State Court of Appeals literally "abrogated" the merger doctrine, holding that in cases where defendants' "assaultive acts" resulted in death, those assaultive acts could themselves be considered predicate felonies.[125] Even though this led to an arguably "absurd result" namely the possibility that someone could be convicted of "both murder and the assault giving rise to the murder, as a separate felony" Missouri courts held fast to their new common law rule.[126]

Almost as unpopular as the MPC's elimination of felony murder was its modification of the necessity defense.[127] At common law, necessity could be invoked in rare cases where a defendant committed a crime to prevent the occurrence of a greater harm that the defendant did not herself cause.[128] The MPC expanded this defense, allowing defendants to take it even if they had inadvertently caused the greater harm.[129] The MPC also allowed the defense to apply to a broad, relatively undefined number of "harm[s] or evil[s]," opening the door to myriad scenarios that most courts and legislatures would ultimately reject, including for example allowing for the theft of food in cases where a defendant's children were hungry.[130] Partly for these reasons, only two of the total 34 MPC states adopted its version.[131]

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[122] *State v. Robinett,* 279 S.W. 696 (1926); *Missouri v. Chambers,* 524 S.W.2d 826 (1975).
[123] *Missouri v. Gheen,* 41 S.W.3d 598 (2001).
[124] *Missouri v. Gheen,* 41 S.W.3d 598 (2001).
[125] Robert H. Dierker, Missouri Criminal Law, Missouri Practice Series TM.
[126] Robert H. Dierker, Missouri Criminal Law, Missouri Practice Series TM.
[127] Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability* 82 TULANE L. REV. 191, 196 (2007).
[128] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 289 (3rd ed. 2001).
[129] MODEL PENAL CODE §3.02 (1962); 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, 3-4, 8-13, 17-20 (1985).
[130] *People v. Fontes,* 89 P.3d 484 (Colo. App. 2003); JOSHUA DRESSLER, CRIMINAL LAW: CASES & MATERIALS 565 (5th ed. 2009).
[131] Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability* 82 TULANE L. REV. 191, 196 (2007).

Sometimes states adopted the MPC but changed it, adding provisions that ultimately undermined its strength.[132] This was the case in Illinois, where the state legislature gradually added mental states to the MPC's purpose, knowledge, recklessness, negligence formula. By 2007, it had added "having reason to know," "reasonably should know," "willfully," "maliciously," "fraudulently," and "designedly."[133] Though trivial, such modifications ultimately reflected a much larger trend, namely a tendency on the part of state legislatures across the country to alter key provisions of the MPC once it had been adopted. As we have seen, this emerged in the context not simply of mental states, but inchoate offenses, accomplice liability, statutory rape, felony murder, first degree murder, and necessity. In the next section, we will see how even those aspects of the MPC faithfully preserved by state legislators became manipulated by courts.

III. The New Common Law

While legislative modifications to the MPC are well-known, less studied are efforts that courts have made to alter MPC definitions. Yet, most states that adopted portions of the MPC have almost half a century of case law interpreting model penal code provisions. This new common law remains one of the least studied aspects of criminal law today, even though it impacts both the general and special parts of most state criminal codes.

For example, one of the Model Penal Code's greatest contributions to criminal law is often considered to be the culpability provisions enumerated in its general part.[134] Prior to the drafting of the Code, states employed a variety of poorly defined terms to denote mental state, including malice, mens rea,

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[132] *See, e.g.* Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes,* 56 HASTINGS L.J. 633, 640 (2005) (describing legislative amendments to Illinois's criminal code that undermined MPC definitions).

[133] *See, e.g.* Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes,* 56 HASTINGS L.J. 633, 640 (2005) (describing legislative amendments to Illinois's criminal code that undermined MPC definitions).

[134] Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980); Dannye Holly, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 230 (1997); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 269 (2002).

willfulness, scienter and "general intent."[135] To clarify what, precisely, such terms meant, the MPC divided mental state into four presumably straightforward categories: purpose, knowledge, recklessness, and negligence.[136] Whether a defendant possesses one particular mental state over another could have significant consequences. For example, if a defendant "unlawfully confines" a victim with the purpose of facilitating the commission of a felony, then that defendant could be charged with kidnapping, a "felony of the first degree," while if they simply restrain someone the appropriate charge would be false imprisonment, a misdemeanor.[137]

Yet, as precise as the MPC's delineations of mens rea are, state courts across the country have done much to muddy them, allowing jurors to impose culpability on defendants regardless of their actual thoughts. The primary vehicle for this has been a common law rule that a defendant's mental state can be imputed through "the natural and probable consequences" of her actions.[138] While MPC architect Herbert Wechsler recognized that such a doctrine may be "the only way of proving intent" in some cases, he bridled at judicial overuse of the theory, particularly in cases where jurors were given a choice of possible mental states.[139] "Since a particular crime must actually be intended," warned Wechsler, "the charge must be precise and must not permit the jury to convict the actor on one of several mental states."[140] Yet, this is precisely what courts across the country have done; reducing the Model Penal Code's narrow tailoring of mental states to a loose menu of options that jurors can pick and choose from to get a conviction.[141]

New York provides an example. After an "all-night St. Patrick's Day Celebration" on Long Island in 1987, a former New York City Police officer shot and killed one of his colleagues.[142]

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[135] JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 161 (5th ed. 2009).

[136] MODEL PENAL CODE, §2.02 General Requirements of Culpability (1962).

[137] MODEL PENAL CODE §212.1 Kidnapping & §212.2 Felonious Restraint (1962).

[138] *State v. Wheeler,* 141 Wis. 2d 973 (1987); *Jennings v. State,* 2009 Tenn. Crim. App. LEXIS 880; *State v. Michaud,* 473 A.2d 399 (Supreme Judicial Court of Maine recognizing natural and probable consequences doctrine); *People v. Coolidge,* 26 Ill. 2d 533 (1963).

[139] Herbert Wechsler, et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy,* 61 COLUM. L. REV. 571, 576 (1961).

[140] Herbert Wechsler, et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy,* 61 COLUM. L. REV. 571, 576 (1961).

[141] See e.g., *People v. Gallagher,* 516 N.Y.S.2d 174 (1987); *Sandstrom v. Montana,* 442 U.S. 510 (1978) (declaring the constitutionality of presumption that persons intend natural and probable consequences of their actions).

[142] *People v. Gallagher,* 516 N.Y.S.2d 174 (1987).

Though the officer could not explain or even remember why he killed his victim, he was charged with intentional murder (second degree in New York), depraved heart murder (requiring the lower mental state of extreme recklessness), and, at the judge's request, manslaughter in the first degree as a lesser included offense of intentional murder and manslaughter in the second degree as a lesser included offense of depraved heart murder.[143] Just as Wechsler warned, jurors found themselves suddenly able to choose from a smorgasbord of mental states, undermining the Model Penal Code's imperative that a defendant's state of mind be matched with a single crime.[144]

Accomplice liability marks another area where courts have tended to veer away from the MPC's culpability provisions. While the MPC made it clear that an accomplice needed the mental state of purpose, thereby rejecting the natural and probable consequences rule, courts in several states have gone the other way, allowing mental states to be imputed based on the natural and probable consequences of the accomplice's actions.[145] Even states that initially came out against applying the natural and probable consequences doctrine to accomplices have since developed new, judicially-created parallel theories that accomplish the same end.[146] For example, just as Missouri courts declared that they would not impute mental state based on the natural and probable consequences of an accomplice's actions, so did new courts hold that a defendant is responsible for "those crimes which he could reasonably anticipate would be a part of that conduct."[147]

Other common law rules survived in so-called MPC states as well, dramatically altering many of the MPC's provisions. Again, murder in New York provides an example. At common law, defendants who intentionally killed their victims could assert a partial defense if they suffered from a "heat of blood or passion" or were "greatly provoked."[148] Classic common law examples of such provocation included mutual combat brought on by a "sudden quarrel," catching "another in the act of adultery with [one's]

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[143] *People v. Gallagher*, 516 N.Y.S.2d 174 (1987).

[144] Herbert Wechsler, et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 576 (1961).

[145] *People v. Houston*, 629 N.E.2d 774, 779 (Ill. App. Ct. 1994); *State v. Linscott*, 520 A.2d 1067, 1069 n.2 (Me. 1987); See also, Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 617, n. 24 (1984) (describing how some courts allow jurors to impute mental states onto aiders and abettors).

[146] *State v. Mills*, 809 S.W.2d 3 (Mo. App. 1990); *State v. Anderson*, 953 S.W.2d 646 (Mo. App. 1997).

[147] *State v. Mills*, 809 S.W.2d 3 (Mo. App. 1990); *State v. Anderson*, 953 S.W.2d 646 (Mo. App. 1997).

[148] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 207, 213 (Malcom Kerr, ed. Boston: Beacon Press, 1962).

wife," and retaliation for having one's "nose pulled."[149] The defense could be claimed so long as the defendant did not have "sufficient cooling time for passion to subside and reason to interpose."[150]

To distinguish itself from the common law, the MPC rejected the language of sudden passion, opting instead for "extreme mental or emotional disturbance."[151] Pursuant to this language, the Code did not require "that the actor's emotional distress" come from "some injury, affront, or other provocative act perpetrated upon him by the deceased."[152] Instead, it did away with "a host of more or less hard and fast common law rules defining the scope of the provocation defense."[153] As it did away with such rules, however, the MPC also failed to provide clear guidance on what, precisely, constituted extreme emotional disturbance. This left a considerable amount of interpretation, if not outright law-creation, up to New York courts.

In 1976, the New York Court of Appeals decided an early case, *New York v. Patterson*, involving the extreme emotional disturbance offense, noting that "[t]he opportunity opened for mitigation differs significantly from the traditional heat of passion defense."[154] Citing the Model Penal Code *Commentaries*, the court asserted that the new emotional disturbance language did not limit the defense to instances where "a defendant, provoked, acts 'under the influence of some sudden and uncontrollable emotion.'"[155] To elaborate, the court abandoned the old requirement that no cooling time could pass between the provocation and the act, holding instead that precisely because "a significant mental trauma" might have influenced the defendant's thought processes "for a substantial period of time," any length of time could pass and the defendant could still claim the defense.[156]

Precisely because New York's Penal Code made no mention of cooling time, *Patterson* quickly became legal doctrine in the Empire State. Four years later, for example, the New York Court of Appeals again dealt with an emotional disturbance case, citing *Patterson* as evidence of the "distinction between the past and present law of mitigation."[157] "In Patterson," asserted the

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[149] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 207, 214 (Malcom Kerr, ed. Boston: Beacon Press, 1962).
[150] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 214 (Malcom Kerr, ed. Boston: Beacon Press, 1962).
[151] MODEL PENAL CODE, §210.3.
[152] MODEL PENAL CODE COMMENTARIES §210.3, at 60-61.
[153] MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 269 (2002).
[154] *New York v. Patterson*, 347 N.E.2d 898, 907 (1976).
[155] *New York v. Patterson*, 347 N.E.2d 898, 907 (1976).
[156] *New York v. Patterson*, 347 N.E.2d 898, 908 (1976).
[157] *People v. Casassa*, 404 N.E.2d 1310, 1315 (1980).

court in *People v. Casassa*, an act arising from extreme emotional disturbance did not have to be "spontaneously undertaken."[158] On the contrary, "it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore."[159]

Even as *Casassa* cited *Patterson* for the new common law rule that cooling time did not apply, so too did *Casassa* develop a rule of its own, namely that the emotional disturbance in question had to have an objectively reasonable explanation. This holding settled an ambiguity in the statutory language of the MPC which provided a mitigating defense so long as the "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."[160] Though the statute's call to focus on circumstances "as the defendant believed them to be" could be read as a subjective standard, the court found an equally plausible, objective reading. "Whether the language of this statute requires a completely subjective evaluation of reasonableness," mused Judge Jasen, "is a question that has never been decided by this court."[161] Conceding that the MPC hoped to do away with "the rigid rules that have developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be enough," the court held firm to the view that "[t]he ultimate test, however, is objective."[162]

Over the course of the next two decades, the New York Court of Appeals assembled a collection of cases illustrating precisely how and when the defense of extreme emotional disturbance might apply – all arguably necessary reading for students interested in comprehending the doctrine. To take just a few examples, the court held that an instruction was not warranted in a case where a victim put his hand on a defendant's plate of food, but was warranted when a victim mocked a defendant's inability to get an erection, overturning the traditional rule that words alone could not constitute provocation.[163] Indeed, judicial interpretations of what did and did not constitute sufficient provocation provided something of a triptych into community

[158] *People v. Casassa*, 404 N.E.2d 1310, 1315 (1980).
[159] *People v. Cassassa*, 404 N.E.2d 1310, 1314 (1980).
[160] N.Y. PENAL LAW §125.25.
[161] *People v. Casassa*, 404 N.E.2d 1310, 1316 (1980).
[162] *People v. Casassa*, 404 N.E.2d 1310, 1316 (1980).
[163] *People v. Walker*, 475 N.E.2d 445 (1984); *People v. Moye*, 489 N.E.2d 736 (1985).

norms in New York, distinguishing actions that impugned cultural artifices like masculinity from mere annoyances.

Though criminal law casebooks often cite classic common law examples of provocation – mutual combat, catching spouses in bed with others, and so on – none discuss the manner in which courts have created new categories of voluntary manslaughter that coincide with the MPC. Nor, for that matter, do casebooks explain how courts in MPC states have actually resurrected older categories that undermine the Code.[164] For example, even though the Arkansas legislature adopted the MPC's "extreme emotional disturbance" language, Arkansas courts quickly took the doctrine in a very different direction from the Empire State, returning it to its pre-MPC guise.[165] Rather than follow New York's abandonment of old, common law terms like provocation, Arkansas judges re-inserted provocation into its new defense.[166] "We have held repeatedly," noted the Arkansas Supreme Court in 2005, "that in order for a jury to be instructed on extreme-emotional disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as 'physical fighting, a threat, or brandishing a weapon.'"[167]

Further, Arkansas adopted the long-standing rule that the killing had to occur before a significant cooling time could pass, a point rejected by the MPC.[168] Even though Arkansas continued to use the term "extreme emotional disturbance," in other words, state courts had effectively resurrected the old common law provocation defense. This, ironically, was the new common law rediscovering old forms.

Other examples of judicial law creation emerged in Pennsylvania. After joining the Model Penal Code in eliminating the language of consent from its rape statute, for example, Pennsylvania reduced rape to instances where defendants engaged in sexual intercourse "by forcible compulsion."[169] State courts then proceeded to enumerate a variety of circumstances not anticipated by the MPC in which forcible compulsion might apply.[170] To take just a few examples, Pennsylvania courts found forcible

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[164] *See e.g.* MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS 174 (2d ed. 2009) ("While the judiciary today retains a 'common law' power of adjudication; that discretion is limited to the interpretation of legislatures' criminal codes (and criminal statues strewn throughout other codes").

[165] ARK. CODE ANN. §5-10-104(a)(1) (1993).

[166] *Boyle v. State*, 363 ark. 356; 214 S.W.3d 250 (2005).

[167] *Boyle v. State*, 363 ark. 356; 214 S.W.3d 250 (2005).

[168] *Kail v. State*, 341 Ark. 89, 14 S.W. 3d 878 (2002).

[169] PENN. CONSOLIDATED STATUTES §3121.

[170] Title 18 Pennsylvania Consolidated Statutes §3121.

compulsion when a defendant who enjoyed his victim's trust and confidence employed "emotional exploitation" and when a father employed "psychological coercion" by engaging in sexual intercourse with his daughter after showing her sexually explicit photographs.[171] Neither case involved either the use or threat of force, indicating that courts were pushing the law of rape in new directions, away from MPC and common law rules rooted in resistance, and towards standards more sensitive to disparate power relations. Along these lines, Pennsylvania courts also found forcible compulsion when a therapist abused his authority over a patient and an employer abused his authority over an employee.[172]

Even as Pennsylvania courts exploded the force rule, other states developed judicial innovations in the law of rape as well, including a doctrine that obviated the force requirement in cases where accomplices were involved.[173] This rule manifest itself most clearly in Missouri, where a court encountered a case involving two men, A & B, who burglarized a house.[174] While A (the defendant) searched a portion of the house, B discovered a female and warned her not to make any trouble on pain of instant death.[175] B then left the victim alone in a room and went to tell A of her presence, at which point A went to the room where the victim was and had sexual intercourse with her – without using either force or threats.[176] Though A did not employ forcible compulsion, a Missouri appellate court held that he could be convicted nevertheless because he had, ultimately, been responsible for B terrifying the victim.[177]

Just as Missouri and Pennsylvania courts altered the MPC's law of rape, so too did other states alter the MPC's approach to accomplice liability. Across the river from Missouri, for example, Illinois courts retained the merger doctrine but revised the MPC's accomplice liability language. While the MPC made it clear that the natural and probable consequences of one party's actions could not be used to implicate others, Illinois courts found an alternate rule that achieved a similar end. Rather than natural and probable consequences, Illinois judges turned to a judicially constructed doctrine known as the "common design rule" that held "where two or more persons engage in a common criminal design," then "any acts in furtherance thereof committed by one party are considered

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[171] *Commonwealth v. Ables*, 590 A.2d 334 (1991); *Commonwealth v. Ruppert*, 579 A.2d 966 (1990).
[172] *Commonwealth v. Frank*, 577 A.2d 609 (1990); *Commonwealth v. Dorman*, 547 A.2d 757 (1988).
[173] *State v. Gray*, 497 S.W.2d 545, 549 (Mo. App. 1973).
[174] *State v. Gray*, 497 S.W.2d 545, 549 (Mo. App. 1973).
[175] *State v. Gray*, 497 S.W.2d 545, 549 (Mo. App. 1973).
[176] *State v. Gray*, 497 S.W.2d 545, 549 (Mo. App. 1973).
[177] *State v. Gray*, 497 S.W.2d 545, 549 (Mo. App. 1973).

to be the acts of all parties to the common design."[178] Though reminiscent of the MPC's conspiracy language, the doctrine actually lent itself to a dramatic reformulation of accomplice liability, particularly since "the State need only prove the accused had the specific intent to promote or facilitate a crime."[179] For example, in a case styled *People v. Reid,* the defendant agreed to participate in a robbery only to discover that one of his accomplices secretly intended to shoot the victim.[180] While under the MPC the defendant would not have been held responsible for a crime he did not anticipate, the Illinois appellate court held explicitly that it was not "necessary" for the prosecution "to prove the accused had the specific intent to promote or facilitate the crime with which he is charged."[181] Instead, all the state had to show was that the accomplices had agreed to commit "a crime," meaning any crime that might be framed as part of a common plan.[182]

While Illinois adopted the common design rule, Maine courts modified the MPC in another way, by resurrecting natural and probable consequences as a way of establishing accomplice liability. The Supreme Judicial Court of Maine sanctioned this approach in *State v. Linscott,* a 1987 case involving the conviction of an accomplice who claimed to lack the requisite mental state for murder.[183] According to the defendant, he joined three other men in what he believed was going to be the robbery of a local cocaine dealer, only to learn that one of his accomplices secretly planned to murder the victim.[184] Though the court believed defendant lacked the requisite intent for murder, it nevertheless invoked the doctrine of "foreseeable consequence[s]," holding that mental state could be imputed based on the natural and probable consequences of defendant's actions, and a probable consequence of an armed robbery was murder.[185] While the MPC expressly rejected such an approach, and Maine otherwise adopted much of the MPC, this particular provision marked a departure from the code by state courts.

Missouri courts performed a similar revision on the Model Penal Code's definition of conspiracy. While the Missouri legislature adopted the MPC requirement that overt acts be required to establish all but the most serious of conspiracies, Missouri courts quickly loosened this requirement to include the

[178] *People v. Houston* 629 N.E.2d 774, 779 (Ill. App. 4 Dist. 1994).
[179] *People v. Houston* 629 N.E.2d 774, 779 (Ill. App. 4 Dist. 1994).
[180] *People v. Reid,* 554 N.E.2d 174 (1990).
[181] *People v. Houston,* 629 N.E.2d 774, 779 (Ill. App. 4 Dist. 1994).
[182] *People v. Houston,* 629 N.E.2d 774, 779 (Ill. App. 4 Dist. 1994).
[183] *State v. Linscott,* 520 A.2d 1067 (Me. 1987).
[184] *State v. Linscott,* 520 A.2d 1067, 1069, n. 1 (Me. 1987).
[185] *State v. Linscott,* 520 A.2d 1067 (Me. 1987).

absence of action. For example, in a 1984 case styled *State v. Mace*, the Missouri Court of Appeals for the Western District held that while "proof must be adduced that an overt act" occurred, there was actually "no requirement" that such an act be "a physical act."[186] Indeed, the court even went so far as to hold that "mere silence" counted as an overt act, rendering the rule near meaningless.[187]

Missouri courts performed a similar revision on the Model Penal Code's definition of knowledge. While the Model Penal Code limited knowledge to instances where a defendant is "practically certain" that his conduct will produce a certain result, the appellate court for the Western District of Missouri expanded this definition to include a defendant who shot his "best friend" after pointing and firing what he believed to be an empty handgun at him.[188] Prior to the killing, defendant welcomed victim to his home, "talked, joked, and laughed" with him, and then accepted victim's offer to inspect a handgun that victim had concealed under his shirt.[189] Defendant emptied several rounds from the gun's chamber and, believing the gun to be empty, pointed it in jest at his friend and pulled the trigger three times, killing him on the third.[190] Though defendant's conduct indicated that he did not actually know the gun was loaded, and therefore was negligent, the Missouri court presumed that the defendant and the victim were engaged in a game of "Chicken" and that the defendant therefore knew he would kill his friend when he pulled the trigger.[191] However, even if the defendant had been engaged in a game of chicken, this does not necessarily mean that he knew he was going to kill his friend. At best, he knew there was a substantial risk that he might kill his friend, rendering his mental state one of recklessness. After all, while the Model Penal Code provides for a finding of knowledge where a defendant "is aware of a high probability" that something exists, this expansion is obviated in cases where a defendant "actually believes that it does not exist," as the defendant in Johnston likely did when firing a gun at his best friend.[192] Perhaps eager to deter citizens of Missouri from engaging in similar games in the future, however, the appellate court sanctioned a substantial departure from the MPC's definition of knowledge, allowing the jury to find knowledge in cases where defendants at best were aware of a risk.[193]

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[186] *State v. Mace*, 682 S.W.2d 163, 166 (Mo. App. 1984).
[187] *State v. Mace*, 682 S.W.2d 163, 166 (Mo. App. 1984.
[188] *State v. Johnston*, 868 S.W.2d 226 (1994).
[189] *State v. Johnston*, 868 S.W.2d 226 (1994).
[190] *State v. Johnston*, 868 S.W.2d 226 (1994).
[191] *State v. Johnston*, 868 S.W.2d 226 (1994).
[192] MODEL PENAL CODE §2.02 (7) (1962).
[193] *State v. Johnston*, 868 S.W.2d 226 (1994).

In a manner that only highlights the extent to which courts employed "new" common law rules to transform the MPC, Missouri courts took a very different – but arguably equally heretical – tack in cases that involved defendants who implausibly maintained that they were not aware of the age of certain minors who joined them in criminal activity.[194] For example, in *State v. Hopkins*, a Missouri appellate court ignored the Model Penal Code's definition of knowledge and concluded that a defendant who purchased alcohol for a twelve year old and proceeded to drink alcohol with that twelve year old in his car was not guilty of second degree child endangerment.[195] Though the MPC's definition of knowledge – which the Missouri legislature adopted – clearly allowed for a conviction in such a case where a defendant was at the very least "aware of a high probability" that a certain attendant circumstance was true, the Court of Appeals for the Eastern District of Missouri held that the state had to prove that the defendant "actually knew the victim was under 17."[196] In arriving at this holding, the Eastern District relied on an earlier case that also let a defendant go free for not checking the age of a minor.[197] In that case, *State v. Nations*, the defendant hired a sixteen year old to dance at a nightclub without checking her age.[198] Though convicted at the trial level for "knowingly" endangering the welfare of a child "less than seventeen years old," the appellate court reversed, marking a dramatic departure from the Western District's holding in the Russian roulette case that the defendant knew he had shot his best friend even though he had emptied several rounds from the chamber. Obviously, both the shooter and the endangerers knew there was some probability their conduct might lead to a criminal result, yet the new common law treated the two types of defendant differently. Why? Perhaps Missouri courts wanted to send a stronger signal to those who toyed with lethal weapons than those who drank alcohol with children. Or, perhaps Missouri courts wanted to signal to parents that they, and not the law, were ultimately responsible for supervising their progeny. Regardless of the precise reason, Missouri's new common law dramatically complicated the Model Penal Code's otherwise straightforward definition of knowledge.

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[194] *See e.g.*, *State v. Hopkins*, 873 S.W.2d 911 (1994) (holding that a defendant did not have actual knowledge that victim was under seventeen even though victim was twelve); *State v. Nations*, 676 S.W.2d 282 (1984) (holding that defendant did not have actual knowledge that night club dancer was under eighteen when victim was sixteen and had not produced proof of age).
[195] *State v. Hopkins*, 873 S.W.2d 911 (1994).
[196] *State v. Hopkins*, 873 S.W.2d 911 (1994).
[197] *State v. Nations*, 676 S.W.2d 282 (1984).
[198] *State v. Nations*, 676 S.W.2d 282 (1984).

Rather than an outlier, Missouri proved representative of nearly all thirty-four states that adopted the MPC.[199] In each of these states, courts stepped in after the Code was adopted and altered key provisions.[200] Such alterations – or what this article calls new common law – are largely ignored in the literature but, as we shall see in the next section, theoretically significant.

IV. THEORETICAL IMPLICATIONS

Criminal law scholars tend to downplay the significance of cases to understanding criminal law.[201] Such animosity is nothing new, and in fact dates back to a surge of frustration with the common law that peaked in the 1930s.[202] At the forefront of such critiques were legal realist scholars like Karl Llewellyn who believed that law should reflect social realities – not ancient doctrines – and should rely on empirical studies in social science for guidance.[203] Though Llewellyn concentrated his reform efforts on rationalizing commercial law, his general animosity towards the common law was shared by scholars in the criminal law realm as

[199] *See, e.g.* Ala. Code § 13A-4-3; Alaska. Stat. § 11.31; Ariz. Rev. Stat. § 13-1003; Ark. Code Ann. § 5-3-401; Co. Rev. Stat. § 18-2-; Conn. Gen. Stat. of Connecticut; Del. Code Ann. § 513; Fla. Stat. § 777.04; Ga. Code Ann. § 16-4-8; Haw. Rev. Stat. § 705-520; ILCS § Ch. 720, § 5/8-2; Ind. Code § 35-41-5-2; Iowa Code § 706.1; K.S A § 21-3302; Ky. Rev. Statutes Annotated § 506.040; M.R.S.A § 151; Minn. Statutes § 609.175; Mo. Revised Statutes § 564.016; Mo. Revised Statutes § 564.016; Mont. Code Annotated § 45-4-102.

[200] *See, e.g.* Ala. Code § 13A-4-3; Alaska. Stat. § 11.31; Ariz. Rev. Stat. § 13-1003; Ark. Code Ann. § 5-3-401; Co. Rev. Stat. § 18-2-; Conn. Gen. Stat. of Connecticut; Del. Code Ann. § 513; Fla. Stat. § 777.04; Ga. Code Ann. § 16-4-8; Haw. Rev. Stat. § 705-520; ILCS § Ch. 720, § 5/8-2; Ind. Code § 35-41-5-2; Iowa Code § 706.1; K.S A § 21-3302; Ky. Rev. Statutes Annotated § 506.040; M.R.S.A § 151; Minn. Statutes § 609.175; Mo. Revised Statutes § 564.016; Mo. Revised Statutes § 564.016; Mont. Code Annotated § 45-4-102.

[201] Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 OHIO ST. J. CRIM. L. 257 (2009); Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 263 (2009); Douglas Husak, *Criminal Law Textbooks and Human Betterment*, 7 OHIO ST. J. CRIM. L. 267 (2009); Lloyd L Weinreb, *Teaching Criminal Law*, 7 OHIO ST. J. CRIM. L. 282 (2009); Robert Weisberg, *Did Legal Realism Engage the Real World of Criminal Law?* 7 OHIO ST. J. CRIM. L. 299 (2009).

[202] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO STATE JOURNAL OF CRIMINAL LAW 31 (2009).

[203] Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 327 (1995). For scholars who influenced Llewellyn, see Monica Eppinger, Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography in Living Law: Reconsidering Eugen Ehrlich 21 (Marc Hertogh, ed., 2009).

well, including Columbia law professor Herbert Wechsler.[204] To Wechsler's mind, the common law actually contributed to a narrow judicial mindset that threatened Roosevelt's early, ambitious New Deal programs.[205]

Wechsler's pro-New Deal sentiment inspired him to join Columbia colleague Jerome Michael in drafting a new kind of criminal law casebook in 1940.[206] Unlike older books, Joseph Henry Beale's classic 1890s text among them, Wechsler and Michael deliberately reduced the number of cases in their book, substituting in their place extensive notes that drew from law review articles, philosophical treatises, and social science studies.[207] To Wechsler's mind, such an approach helped to produce a new kind of student, one liberated from the "closed-system" approach of the common law, and eager to think critically of the manner in which social science could contribute to racial legal reform.[208]

In part because of the success of his casebook, Wechsler received an invitation from the American law Institute to serve as Reporter for a new, model criminal code that would draw heavily from advances in social science to reform ancient common law doctrines.[209] Wechsler and Michael had already sought ways to improve such doctrines, particularly in the law of homicide, hoping to rationalize redundancies, tailor sentencing, and clarify confusing common law rules.[210] Over the course of the next decade, from 1952 to 1962, the American Law Institute relied on a series of experts to reform almost every area of criminal law, substituting the common law's traditional emphasis on retribution and community conscience with a more scientific emphasis on treatmentism and the reduction of criminal harm.[211] Though Wechsler himself retained an interest in the utility of desert, many of the Code's new provisions reflected a very different approach,

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[204] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 31 (2009).
[205] Anders Walker, The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course," 7 OHIO ST. J. CRIM. L. 31 (2009).
[206] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 31 (2009).
[207] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 31 (2009).
[208] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 31 (2009).
[209] Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,* 7 OHIO ST. J. CRIM. L. 31 (2009).
[210] Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I,* 37 COL. L. REV. 701, 707-708 (1937).
[211] MARKUS D. DUBBER, THE MODEL PENAL CODE (2004).

located far from local community sentiment, usages, and customs.[212]

Though at first glance similar to Llewellyn's UCC, the Model Penal Code's rejection of local custom made it and the Uniform Commercial Code profoundly different. Despite his interest in modernism, for example, Karl Llewellyn kept local custom at the center of his mind, staying true to the realist maxim that legal reform should draw inspiration not from abstract principles but "the trials of experience."[213] Though just as opposed to the common law as Wechsler, in other words, Llewellyn retained an appreciation for the fact that judge-made law also included within it significant "folk artifacts," and useful "working rules" that had "proven their worth over time."[214] This led him to articulate a distinction between the "grand" or valuable portions of the common law, from the less valuable "formal" aspects.[215] To Llewellyn's mind, it was the legislator's job to "take the good, practical folkways" of the common law, meanwhile rejecting its "outmoded" facets.[216]

Central to Llewellyn's belief in the value of folkways was the discipline of anthropology, a field that inspired one of his best known works, *The Cheyenne Way*.[217] In that book, Llewellyn extolled those aspects of tribal behavior that reflected sensible practices developed from the ground-up, arguing that written law worked best when it tracked local custom.[218] To Llewellyn's mind, the business community reflected another type of tribe, like the Cheyenne, that had established its own customs governing commercial transactions, an insight that guided his preparation of the Uniform Commercial Code.[219]

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[212] Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WISCONSIN L. REV. 1017 (2009).

[213] Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 332 (1995).

[214] Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 335 (1995).

[215] Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 335 (1995).

[216] Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 335-36 (1995).

[217] Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 335-36 (1995).

[218] KARL LLEWELLYN, THE COMMON LAW TRADITION (1960).

[219] Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622-27 (1975); Bruce Frier, *Interpreting Codes* 89 MICH. L. REV. 2201 (1991). In thinking about codifying

By contrast, the drafters of the MPC downplayed the significance of folkways to criminal law reform.[220] Rather than presume that criminal law should be "what judges do" – a Realist maxim – the ALI drafters spent considerable amounts of time focused on what judges had done wrong, and what real, expert-driven reform should look like.[221] Though ALI Reporter Herbert Wechsler kept custom in mind, the inspiration for much of the MPC lay not in local practice but behavioral science – psychological and sociological work done on treatmentist goals like rehabilitation and deterrence.[222]

The MPC's break from the common law sparked a sea-change in criminal law pedagogy as scholars moved to present the MPC not as an evolved form of the common law, or even a repository for the best of common law rules, but a rational, ultimately superior alternative.[223] Not long after the MPC was completed, for example, a new generation of criminal law scholars led by Sanford H. Kadish began drafting casebooks heavily influenced by Wechsler and Michael, even to the point that they included the MPC at the end of their books as an example of a rational code that could be compared to archaic common law.[224]

Once states began to actually adopt portions of the MPC, criminal law scholars then began to divide the country into two kinds of states: those that adopted the MPC, and the rest.[225] Underlying this practice was, of course, a larger set of normative, even political assumptions about the nature of criminal law generally. To the younger, reform-minded generation, MPC states were in fact more progressive, more scientific, and less likely to cave to popular demands for retribution and revenge.[226] Such

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commercial law, Llewellyn drew inspiration from turn-of-the-century anthropologist William Graham Sumner, who posited that "folkways," or local practices, were always more powerful than "law ways," or written rules. WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 261 (1940).

[220] Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge,* 2009 WISCONSIN LAW REVIEW 1017 (2009).

[221] LAURA KALMAN, LEGAL REALISM AT YALE, 1-44 (1986); Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context,* 59 ALB. L. REV. 325, 355 (1995); MARKUS D. DUBBER, THE MODEL PENAL CODE (2003).

[222] MARKUS D. DUBBER, THE MODEL PENAL CODE (2003).

[223] Sanford H. Kadish, *The Model Penal Code's Historical Antecedents,* 19 RUTGERS L. J. 521 (1988).

[224] MONRAD PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES (1962).

[225] MONRAD PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES (2d ed. 1965).

[226] Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (And Five Best) American Criminal Codes,* 95 NW. U. L. REV. 1 (2000).

states inspired the hope that a rational criminal code could be implemented across the country, one that ignored irrational calls for increased punishment, execution, and redundant offenses.[227]

Yet, between innovations in behavioral science and legal change rested an entire strata of thought far removed from the realm of rational inquiry, a realm that Lawrence Friedman has since called "popular legal culture" inhabited by "popular ideas, attitudes, values, and opinions" regarding law what the law is.[228] Acknowledging the importance of popular legal culture was not something that devotees of the MPC considered central, to their own detriment.[229] One of the best examples of this was the failure of MPC proponents Sanford Kadish and Herbert Packer to reform California's penal code.[230] Asked by California's Joint Legislative Committee to improve criminal law in the golden state, Kadish and Packer spent several years on the drafting of a new criminal code, importing many of the innovations recommended by the MPC.[231] Though many such reforms would likely have passed legislative muster, Kadish and Packer endorsed several changes that flew in the face of customary criminal law in California, including the decriminalization of certain sexual behaviors, the expansion of the insanity defense, and the liberalization of marijuana laws.[232] When state Republicans read the commission's recommendation that possession and sale of less than one pound of marijuana be considered a misdemeanor, for example, they reacted "with such emotional indignation that all avenues for a thoughtful interchange of points of view were quickly closed."[233] Not long thereafter, "the acting project director was informed by telephone that the chairman of the Joint Legislative Committee had discharged all of

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[227] Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (And Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000).

[228] Lawrence M. Friedman, *Total Justice: Law, Culture, and Society* 40 BULLETIN OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES 24, 28 (1986); Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L. J. 1579, 1597 (1989).

[229] *Id.*

[230] Arthur H. Sherry, *Criminal Law Revision in California* 4 U. MICH. J. L. REFORM 429, 434-35 (1971); Interview with Sanford H. Kadish, Alexander F. and May T. Morrison Professor of Law, Emeritus, University of California, Berkeley, in Berkeley, California (May 19, 2008)(on file with the author).

[231] Arthur H. Sherry, *Criminal Law Revision in California* 4 U. MICH. J. L. REFORM 429, 434-35 (1971); Interview with Sanford H. Kadish, Alexander F. and May T. Morrison Professor of Law, Emeritus, University of California, Berkeley, in Berkeley, California (May 19, 2008)(on file with the author).

[232] Arthur H. Sherry, *Criminal Law Revision in California* 4 U. MICH. J. L. REFORM 429, 439 (1971).

[233] Arthur H. Sherry, *Criminal Law Revision in California* 4 U. MICH. J. L. REFORM 429, 439-40 (1971).

the members of the staff and ordered the project halted at once."[234] Though Kadish and Packer wrote a letter protesting the decision, no new commission was appointed and California's criminal code remained largely unchanged for the remainder of the twentieth century. [235]

Though Kadish later blamed "conservatives" for killing criminal reform in California, he himself did little to make sure that the committee's suggestions were in line with what most voters believed, even confessing that the academic members of the staff ran the committee meetings as "post-graduate seminars."[236] Had Kadish and his colleagues approached such seminars in a more anthropological way, focusing on the local norms of California voters, they might have been able to develop strategic concessions – much like Wechsler did in New York – saving reform.[237]

Sanford Kadish's failure in California underscores the importance of conveying the link between culture and criminal law to students. Though liberalizing marijuana laws may have appeared non-controversial at the time, code reformers failed to accurately assess the power of conservative politics in California in the 1960s, undoubtedly substituting liberal positions on marijuana use common in Berkeley and Palo Alto for more conservative positions in rural, working class demographics across the state.[238] Further, code reformers may have fared better had they remained more closely attuned to trends in state politics, particularly a pronounced shift towards conservatism mid-decade, as voters recoiled at urban rioting, anti-war protest, and Berkeley's filthy, free-speech movement.[239]

While criminal law courses can probably never incorporate the full scope of state and local politics into their syllabi, methods of emphasizing the link between criminal law and culture nevertheless remain.[240] For example, one way to convey the link between law and culture is to delve into the particulars of state law,

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[234] Arthur H. Sherry, *Criminal Law Revision in California* 4 U. MICH. J. L. REFORM 441 (1971).

[235] Sanford Kadish & Herbert Packer to Senator Donald L. Grunsky, Sept. 24, 1969, *Letters*, 22 STANFORD L. REV. 160 (1969).

[236] Interview with Sanford H. Kadish, Alexander F. and May T. Morrison Professor of Law, Emeritus, University of California, Berkeley, in Berkeley, California (May 19, 2008)(on file with the author).

[237] Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WISCONSIN LAW REVIEW 1017 (2009).

[238] JAMES T. CAREY, THE COLLEGE DRUG SCENE (1968); JAY STEVENS, STORMING HEAVEN: LSD AND THE AMERICAN DREAM (1988).

[239] ANTHONY J. LUKAS, DON'T SHOOT – WE ARE YOUR CHILDREN! (1971); GEOFFREY HODGSON, AMERICA IN OUR TIME (1978).

[240] Chad Flanders, *The One-State Solution to Teaching Criminal Law*, OHIO STATE J. OF CRIM. L. (forthcoming 2010).

showing how certain states adopted portions of the MPC, but rejected others.[241] Another is to look at courts, focusing on how judicial opinions modified those sections of the Model Penal Code that were adopted. True to its anthropological bent, the drafters of the UCC did just this, setting apart a special organ for publishing judicial modifications of the Code.[242] However, nothing similar exists for the MPC, leaving most students blind to the manner in which it has interacted with local state cultures. This has led to a problem that anthropologist Clifford Geertz identified with top-down, philosophical approaches to studying society generally, namely the problem with extracting "the general from the particular" and then setting the particular "aside as detail, illustration, background, or qualification."[243] To Geertz, such moves yield a relatively narrow understanding of "the very difference we need to explore."[244]

Geertz's attention to local difference warrants closer thought by criminal law scholars and teachers. This is because students suffer at least two distinct harms when they are not provided with a clear view of how local culture impacts criminal law, including the MPC. First, failing to instruct students on judicial modifications of the MPC, or what this article calls the new common law, renders them less prone to understanding what, precisely the law forbids, a problem that scholars like Paul H. Robinson have argued is a serous concern.[245] Two, failing to instruct students on the new common law prevents them from seeing the critical role that criminal lawmaking can play in quieting community outrage, a phenomenon that criminal law scholars call the utility of desert.[246] Though scholars revile redundant criminal provisions, for example, such provisions are often important responses to particular moments of community outrage.[247] As scholars Paul Robinson and Michael T. Cahill note, for example, "[i]f there is a series of drive-by shootings, or a particularly scary home invasion case, or some carjackings, a common response is to create special offenses for each of these

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[241] Chad Flanders, *The One-State Solution to Teaching Criminal Law*, OHIO STATE J. OF CRIM. L. (forthcoming 2010).
[242] Bruce Frier, *Interpreting Codes* 89 MICH. L. REV. 2201 (1991).
[243] CLIFFORD GEERTZ, AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST 40 (1995).
[244] CLIFFORD GEERTZ, AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST 40 (1995).
[245] Paul H. Robinson, *Rules of Conduct and Principles of Adjudication* 57 U. CHI. L. REV. 729 (1990).
[246] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 359 (1983).
[247] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

particular kinds of conduct, even though they are already fully criminalized and, where possible, prosecuted."[248] While both Robinson and Cahill find such behavior reprehensible, even they agree that the public are affected by such moves, arguably precluding average voters from doing even more serious damage.

What, skeptics might ask, might voters do? Citizens deprived of immediate responses to gruesome crimes may retaliate by electing tough-on-crime representatives who end up imposing harsher penalties on all offenders.[249] Outraged citizens may also refuse to channel public funds into the defense of the accused, a serious problem for public defenders across the United States.[250] Though downplayed by criminal law scholars, in other words, the problem of voter outrage might actually be one of the most serious – yet underestimated – forces acting on America's criminal justice system, even today.

VI. CONCLUSION

Though criminal law scholars continue to divide American jurisdictions into Model Penal Code and common law states, it is not clear that such divisions retain any real pedagogical value. As this article has shown, no state in the Union continues to follow the ancient common law of England, nor does any state exist without a criminal code. Indeed, out of the sixteen states that did not adopt the Model Penal Code – a move that has since relegated them into the common law category – none adhere to anything that might remotely be called English common law.

As we have seen, all common law states have long since codified their criminal law, reserving the enforcement of ancient common law crimes to "reception statutes."[251] Yet, the use of such statutes is exceedingly rare, confined to idiosyncratic, nineteenth-century-era offenses like "being a common scold," and "burning a

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[248] Paul H. Robinson & Michael T. Cahill, *Can A Model Penal Code Second Save the States from Themselves* 1 OHIO STATE J. CRIM. L. 169, 171 (2003).

[249] Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 21, 22 (2007).

[250] *Limping Along*, ST. LOUIS POST-DISPATCH, Feb. 16, 2007, at C10; *Rights on the Verge of Collapse*, ST. LOUIS POST-DISPATCH, March 19, 2006, at B2. Redundant codes may also provide opportunities to do justice. For example, prosecutors in Missouri have the opportunity to charge defendants suspected of attempted killing with one of two crimes, either attempted murder or first degree assault. Here, an attempted murder charge actually brings with it a lower penalty, meaning that prosecutors could satisfy community outrage by mentioning murder meanwhile reducing the penalty to sympathetic defendants by charging attempted murder.

[251] *See supra* Part I.

body in a cellar furnace."[252] Archaic at best, these types of offenses hardly warrant the sustained attention of first year law students.[253]

Even the argument that certain states codified common law terms is hardly a justification for continuing the common law divide.[254] As this article illustrates, most states have legislatively altered what might once have been considered common law offenses, creating an entirely new form of American criminal law.[255] To take just a few of the most glaring examples, all American states save one (South Carolina) unanimously rejected British rules of homicide by dividing murder into degrees.[256] All American states (including South Carolina), then went on to grade forcible felonies, independent of British sources.[257] Such grading alone sets American criminal law apart, even making it a model for reforms later enacted in the United Kingdom.[258]

Further, classic common law terms like malice aforethought – the bane of first year criminal law students – suffered a dramatic decline in use in the United States over the course of the Twentieth Century, as states enacted their own, unique requirements of mental state.[259] To date, only six states out of fifty continue to employ malice aforethought as an indicator of first degree murder, hardly enough to warrant sustained attention in criminal law courses, even at national schools.[260]

The same can be said of conduct and attendant circumstance rules. To take just a few examples, conduct rules in classic common law crimes such as rape have been fundamentally altered in the United States, pushing them away from their English roots. [261] North Carolina – often considered one of the most traditional common law states – actually pioneered the liberalization of force requirements, allowing juries to infer force where only a threat existed. [262]

The occlusion of cultural influences on criminal law is perhaps one of the greatest reasons for ending the mythology of the common law state.[263] Perhaps no better example of this exists than California's drive-by-shooting statute, designating anyone who

[252] See *supra* Part I.
[253] *See supra* Part I.
[254] *See supra* Part I.
[255] *See supra* Part I.
[256] *See supra* Part I.
[257] *See supra* Part I.
[258] *See supra* Part I.
[259] *See supra* Part I.
[260] *See supra* Part I.
[261] *See supra* Part I.
[262] *See supra* Part I.
[263] *See supra* Part I.

discharges a "firearm from a motor vehicle intentionally at another person outside of the vehicle" guilty of first degree murder.[264] Rather than a reflection of ancient common law doctrine, this statute represents a direct product of local criminal culture in California.[265] Understanding the manner in which such local cultures impact criminal law is considerably more important to students than regurgitations of lost common law doctrines.

Just as the notion of the common law state has become increasingly anachronistic, so too has the conceit of the Model Penal Code jurisdiction.[266] Though thirty four states adopted portions of the MPC, no state adopted all of it.[267] Further, even those states that adopted significant sections of the Code still retained key aspects of their old laws.[268] For example, the MPC's recommendation that inchoate crimes be punished the same as completed crimes won no supporters.[269] Neither did the MPC's elimination of felony murder, nor its elimination of the overt act requirement for conspiracies to commit violent felonies.[270]

Much of the MPC's failure to be adopted in toto was its incongruity with local, cultural values.[271] One of the most glaring examples of this was the MPC's treatment of statutory rape.[272] While MPC drafters felt comfortable reducing the age of victims to ten, state legislatures balked, refusing to let go of traditional attitudes regarding sex and children.[273]

The same held true for murder. Convinced that qualifiers like premeditation and deliberation had been rendered meaningless by courts, MPC drafters de-graded the crime, only to find that first degree murder enjoyed a strong cultural currency.[274] In state after state, legislatures rejected the Code's mono-murder rule, retaining first degree murder for instances where the public demanded retribution, but second degree where defendants proved sympathetic.[275] That no ostensible difference existed between the two, especially after premeditation and deliberation could be formed in an instant, proved, in the end, irrelevant.

Another locus of cultural resistance emerged around the death penalty. Though personally opposed to capital punishment,

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[264] *See supra* Part I.
[265] *See supra* Part I.
[266] *See supra* Part II.
[267] *See supra* Part II.
[268] *See supra* Part II.
[269] *See supra* Part II.
[270] *See supra* Part II.
[271] *See supra* Part II.
[272] *See supra* Part II.
[273] *See supra* Part II.
[274] *See supra* Part II.
[275] *See supra* Part II.

MPC Reporter Herbert Wechsler struggled to remain sensitive to popular support for the penalty while implementing the MPC in New York.[276] As a result, New York's Temporary Commission did away with the mandatory death penalty for all forms of first degree murder, but retained capital punishment for the rare cases where a defendant murdered a police officer or prison guard.[277] Though such concessions helped the revisions get through in 1972, state legislators proved unable to resist the temptation to add more exceptions to the rule every year after that, ultimately resulting in a triptych of local panics over contract killings, witness eliminations, judicial assassinations, and serial killer scares.[278]

Even as state legislatures proceeded to alter the Model Penal Code – as happened in New York – so too did state courts intervene, engendering nothing less than a new common law.[279] Perhaps the most devastating example of such law was the judicial elimination of the MPC's expectation that prosecutors choose only one mental state per offense.[280] As Herbert Wechsler put it, "[s]ince a particular crime must actually be intended, the charge must be precise and must not permit the jury to convict the actor on one of several mental states."[281] Judges disagreed. In all thirty-four states that adopted the Code, judges made a mockery of its MPC provisions by allowing prosecutors to proceed on a string of alternate possible mental states for the same offense.[282]

Judges also tinkered with the offenses themselves.[283] In some MPC states, judges ignored the MPC's order that accomplice liability not be ascribed based on the natural and probable consequences of an accomplice's actions.[284] In other states, judges simply created new rules that replaced natural and probable consequences, holding for example that accomplices could be found guilty for "those crimes which [they] could reasonably anticipate would be a part of that conduct."[285]

When new rules did not work, judges returned to old ones, infusing the MPC with local law. For example, even though Arkansas adopted the MPC's notion of extreme emotional disturbance – a defense that replaced the heat of passion defense to

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[276] *See supra* Part II.
[277] *See supra* Part II.
[278] *See supra* Part II.
[279] *See supra* Part III.
[280] *See supra* Part III.
[281] Herbert Wechsler, et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 576 (1961).
[282] *See supra* Part III.
[283] *See supra* Part III.
[284] *See supra* Part III.
[285] *See supra* Part III.

first degree murder – state judges quickly read old rules into the new law, requiring that there be no cooling off time between the provocation and the criminal act.[286] Likewise, Illinois judges avoided the MPC's order that accomplices not be held liable based on the natural and probable consequences of their actions, holding instead that "any acts in furtherance" of a "common criminal design," constituted grounds for prosecution.[287]

Secreted over almost a fifty year period from 1962 to 2010, judicial modifications of Model Penal Code rules embody nothing less than a new common law.[288] That casebooks and treatises do not focus on this law is mystifying. However, even the most pro-MPC criminal law theorists have begun to doubt the continued relevance of the code.[289] According to criminal law scholar Markus Dubber, an ALI enthusiast, the Model Penal Code "belongs to a bygone era of American penal law."[290] Built on the twin theories of deterrence and treatment, Dubber continues, the Code "no longer enjoys the broad consensus it might have had in the 1950s."[291]

Indeed it does not. Though criminal law casebooks continue to present the MPC as an innovative, recent reform, it is rapidly approaching its fiftieth birthday. At its inception half a century ago, it dovetailed nicely with prevailing trends towards modernism in law – a Benthamite moment during which rationality and science eclipsed history and anthropology.[292] However, the devolution of the Model Penal Code in the latter half of the twentieth suggests that history and culture may be regaining lost ground.[293] Indeed, the very criticisms of state codes advanced by scholars – that they are incoherent, sedimentary, even redundant – only confirms the Burkean critique of Bentham, namely that law itself cannot be understood by logical principles and scientific rules, but requires a close study of the history and culture of a particular society.[294]

Judicial opinions and state statutes provide just such a study. Though criminal law scholar Markus Dubber has declared that "[t]he age of the common penal law is over," and that "[p]enal

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[286] *See supra* Part III.
[287] *See supra* Part III.
[288] *See supra* Part III.
[289] *See supra* Part III.
[290] Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code* 4 BUFF. CRIM. L. REV. 53, 54 (2000).
[291] Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code* 4 BUFF. CRIM. L. REV. 53, 54 (2000).
[292] MARKUS D. DUBBER, THE MODEL PENAL CODE (2004).
[293] Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 CHICAGO LAW REVIEW 450 (1988).
[294] Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 CHICAGO LAW REVIEW 450 (1988).

law is now made in codes by legislators, not in court opinions by judges," even a cursory look at the manner in which courts have modified Model Penal Code provisions, or what this article calls the "new common law," suggests this is incorrect.[295] In fact, criminal law may be enjoying a renascence of new common law principles. How? While the mid-point of the Twentieth century witnessed a spike in modernist thought, of which the MPC was a product, the 21st Century looks to be a much different era, marked by a return to "historical and prescriptive modes of thought."[296] Perhaps the biggest example of this is the recent surge of interest in empirical legal studies, an anti-philosophical inquiry bent on understanding the law as it is, not as it might, or even should be.

Some of the MPC's most fervent supporters understood this. As much as Wechsler resisted the common law, for example, he never lost sight of local community norms and local, cultural values. While serving on New York's Temporary Commission to revise its Penal Law in 1963, for example, Wechsler consistently prodded the Committee to consider local attitudes. Wechsler's concern that criminal law coincide with community values is often lost in criminal law courses, particularly as teachers struggle to maintain the false dichotomy between common law and Model Penal Code states. Setting aside this dichotomy is vital if criminal law scholars want to bring the course back to earth for their students. Currently, simple comparisons between MPC and common law states obscure the manner in which statutory law and case law intertwine, even as they leave students missing the close relationship between criminal codes and local norms. By contrast, focusing on the New Common Law enables students to see how even the most scientific of codes ultimately finds itself bending, and being bent, to suit judicial will.

One final point is worth mentioning. Though the impact of popular will on criminal statutes has been criticized by law scholars like Paul Robinson and William J. Stuntz, criminal law's close tie to popular democracy remains unavoidable.[297] Not emphasizing this to students can lead to dire results, among them a recurrent tendency to downplay the significance of local voters, and also to miss important cultural formations that may or may not make certain litigation strategies, or reform attempts, unworkable. Perhaps no better example of this exists than the failure of Model Penal Code enthusiasts like Sanford Kadish to successfully reform

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[295] Markus D. Dubber, *Reforming American Penal Law* 90 J. CRIM. L. & CRIMINOLOGY 49, 50 (1999).

[296] Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 CHICAGO LAW REVIEW 450 (1988).

[297] Paul H. Robinson, *Why Does Criminal Law Care What the Layperson Thinks is Just – Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839 (2000).

California's criminal code in the 1960s – a burden the state bears to this day.