

Saint Louis University School of Law
Scholarship Commons

All Faculty Scholarship

2010

The One State Solution to Teaching Criminal Law, or Leaving the Common Law and the MPC Behind

Chad Flanders
Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>



Part of the [Criminal Law Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Flanders, Chad, The One State Solution to Teaching Criminal Law, or Leaving the Common Law and the MPC Behind (2010). Ohio State Journal of Criminal Law, Vol. 8, p. 167, 2010; Saint Louis U. Legal Studies Research Paper 2010-37A.

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.



SAINT LOUIS UNIVERSITY SCHOOL OF LAW
Legal Studies Research Paper Series

No. 2010 – 37A

The One State Solution to Teaching Criminal Law, or,
Leaving the Common Law and the MPC Behind

Chad Flanders

8 Ohio St. J. Crim. L. 167 (2010)

This paper can be downloaded without charge from
the Social Science Research Network electronic library at:
<http://ssrn.com/abstract=1903792>

The One-State Solution to Teaching Criminal Law, or, Leaving the Common Law and the MPC Behind

Chad Flanders*

How should criminal law be taught to first-year law students? Professors preparing their classes for the first time, and even veterans of many semesters of criminal law, find themselves facing a dilemma. On the one hand, the common law is no longer good “law” in nearly every state; it has been superseded by statute.¹ Even states that leave a large role for the common law usually have a combination of common law and statutory law or strongly limit the scope of the common law.² On the other hand, there is no uniform code that actually exists as law in all fifty states. While the Model Penal Code (MPC) may serve as a useful stand-in for such a uniform law, few, if any, states have adopted the MPC in its entirety, and most have rung interesting changes on it, accepting some parts and rejecting or modifying others. The result is that, as one wag has put it, criminal law professors are presented with the choice of teaching dead law (the common law) or mythical law (the MPC).³ Or, in a more poetic vein, we might channel

* Ph.D., University of Chicago; J.D., Yale University Law School. Assistant Professor of Law, Saint Louis University School of Law. Thanks to Marcia McCormick, William Baude, John Torbitzky, Christopher Bradley, Jud Matthews, Eric Miller, Russell Convey, Daniel Solove, Brian Gallini, Pat Kelley, Guyora Binder, Markus Dubber, and Orin Kerr for comments and conversations on earlier drafts. Lynn Branham provided me detailed and very wise comments. My colleague Anders Walker has been my indispensable guide in teaching and thinking about criminal law; many of the ideas in this paper began with him. I am also grateful to Uduak Ifon, Terrence Burek, Maggie Eveker, Jennifer Lindeke, Christine Peterson, and David Kullman for timely research assistance. Above all, I thank my students.

It was only after I had completed this article and circulated an early draft that I became aware of Markus Dubber’s wonderful casebook: MARKUS D. DUBBER, *NEW YORK CRIMINAL LAW: CASES AND MATERIALS* (2008). It is nearly the ideal example of a state-centered casebook, and I commend it to those teaching in New York law schools.

¹ For the decline of the common law generally, see *infra* notes 33, 88 and accompanying text.

² See, e.g., MO. REV. STAT. § 1.010 (2000) (stating that the common law is good law in Missouri but only if it is not inconsistent with any statute, and statutes should be “liberally construed, so as to effectuate the true intent and meaning thereof”); see also § 556.026 (“No conduct constitutes an offense unless made so by this code or by other applicable statute.”).

³ “Study common law crimes that haven’t been the law anywhere for more than 100 years. Then, to bring things up to date, study the Model Penal Code, which is not the law anywhere today.” James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991); see also MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE 3* (2002) (calling the MPC a “fantasy jurisdiction”); Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 2 n.3 (calling the MPC an “imaginary code”).

Matthew Arnold, who famously lamented that he was in between two worlds, one dead and one yet waiting to be born.⁴

Yet this “crisis” is also an opportunity to rethink criminal-law pedagogy. Unfortunately, the current approach to teaching criminal law employed by many casebooks—and consequently, by many law professors—simply reproduces the dilemma sketched above. Casebooks compile a hodgepodge of statutes of various states (usually only excerpted in a footnote to the case assigned, or put, in the manner of a laundry list, at the beginning of a chapter) and the Model Penal Code, placed at the back of the book, apparently for “handy” reference (but also just as easily ignored). This “solution” is simply to punt on the dilemma of what law to teach. Casebooks do not end up teaching any of the laws of one state in detail, and create at most the illusion of depth and of learning a “real” code by assigning sections of the Model Penal Code. Our casebooks thus attest to our being in what Orin Kerr has called a “transitional moment” in the criminal law, where “a common-law field became a statutory field,” with the result that “we’re stuck in a weird state of confusion over whether to teach the course as common law or statutory, and if statutory, what statutes should apply.”⁵ What is to be done?

The way out of the muddle, I suggest, is to focus on one state’s criminal code and to read cases from that state interpreting its statutes. Using this approach, students are exposed to a consistent and actual existing body of law to master—not one state’s law for one case, another state’s law for the next, and a discussion about a proposed set of laws (the MPC) and its commentary. Although this approach may raise some objections, my argument will be that it is a sound approach to teaching first year criminal law and that the advantages outweigh the disadvantages. It represents, in short, a more than satisfactory answer to the dilemma of what law to teach. If criminal law is for the most part statutory law, why not expose students early and often to actual statutes?⁶ And why not have the statutes be from the state in which they are actually studying and in which many will go on to practice?⁷ As Russell Covey has rightly noted, “[T]here are plenty of

⁴ See Matthew Arnold, *Stanzas from the Grande Chartreuse*, FRASER’S MAG., Jan.–June 1855, at 437, 438; see also Daniel Solove, *Teaching Criminal Law*, CONCURRING OPINIONS (July 25, 2006, 7:44 PM), http://www.concurringopinions.com/archives/2006/07/teaching_crimin.html (“The common law is for the most part no longer in use. States have replaced the common law of crimes with statutes. Nevertheless, most criminal law courses still focus significantly on the common law.”).

⁵ Orin Kerr, Comment to *Should We Stop Teaching the Model Penal Code?*, PRAWFSBLAWG (July 25, 2006, 6:36:42 PM), http://prawfsblawg.blogs.com/prawfsblawg/2006/07/should_we_stop_.html; see also Kim Ferzan, “*Teachin the MPC and Lovin Every Minute of It*” or “*The Content of a Criminal Law Course*,” PRAWFSBLAWG (July 25, 2006, 4:47 PM), http://prawfsblawg.blogs.com/prawfsblawg/2006/07/teachin_the_mpc.html.

⁶ See Solove, *supra* note 4 (discussing teaching criminal law as a statutory course); see also Orin Kerr, *The Goals of Teaching Criminal Law*, ORIN.KERR.COM (July 26, 2006, 11:15 AM), <http://www.orinkerr.com/2006/07/26/the-goals-of-teaching-criminal-law> (describing a typology of various types of criminal law professors).

⁷ As I discuss below, the obvious objection to this proposal is that students will end up learning in detail the laws of a state in which they will not practice.

actual criminal codes out there to use as the basis of interpretation and comparison. Students can get plenty of practice interpreting California's or Illinois's or Texas's code without resorting to the MPC."⁸

No first-year criminal law class can expect to cover everything; let me concede that right away. Choices must be made, both in terms of what material should be covered (some crimes will have to be left untaught) and how the material should be taught.⁹ The only question is: What choice of materials represents the best way for students to first learn about the criminal law? We are lucky to have an embarrassment of riches in our chosen field. Focusing on the criminal law of one state may seem, superficially, to be horribly narrow. But this is mostly an illusion. The choice to teach the laws of one state is not a choice to omit any substantive area of law. It is only a choice to center the teaching on how one state interprets and manages the various substantive areas of the law. By focusing on the laws of one state, we can have depth (by having students engage with the tradition of one state) without sacrificing breadth (by not giving up on teaching traditional substantive areas of the criminal law).

Although my aim in this essay is modest—namely to encourage professors to teach and think about criminal law in a different way and to relate my experiences teaching this way—it is also a move in a larger argument the academy is having about the proper function of criminal law. As one of my colleagues at the Saint Louis University School of Law, Anders Walker, has argued in these pages, there has been a measurable trend toward teaching criminal law more as a philosophy class (especially with regard to theories of punishment¹⁰), or a political science seminar, or a course in the sociology of criminal law.¹¹ This movement involves a turn away from cases and an increasing emphasis on social science and “theory” questions.¹² The legal academy has for a long time been engaged in a serious debate about whether this move away from the case method serves our students well in preparing them to be lawyers.¹³ I do not venture into this debate in any

⁸ Russell Covey, *Should We Stop Teaching the Model Penal Code?*, PRAWFSBLAWG (July 25, 2006, 2:30 PM), http://prawfsblawg.blogs.com/prawfsblawg/2006/07/should_we_stop_.html.

⁹ See Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy*, 48 ST. LOUIS U. L.J. 1143, 1150 (2004) (“There is never enough time in any class, and especially Criminal Law . . . to teach everything that is found in any casebook. Choices must be made . . .”).

¹⁰ Joshua Dressler’s casebook, for instance, includes a substantial section on “Principles of Punishment.” JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 30–91 (5th ed. 2009).

¹¹ Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 220 (2009).

¹² This trend may be present in other areas of law as well, for example in first year torts classes that involve a heavy dollop of baby law-and-economics (or the occasional foray into philosophical questions of “corrective justice”). For a spirited defense of teaching criminal law as (in part) a moral philosophy course, see Marc O. DeGirolami, *The Excitement of Interdictory Ideas: A Response to Professor Anders Walker*, 8 OHIO ST. J. CRIM. L. 155 (2010).

¹³ See, e.g., WILLIAM M. SULLIVAN ET AL., *CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 59–74 (2007).

depth in this essay. It is enough that the approach I advocate represents a sound and more-than-sufficient way of teaching criminal law that I hope others will try. Nonetheless, I do think that the state-centered method advocated here fits better with the law school's duty to familiarize our students with the law as it exists (not the theory of the law or an abstract version of the law) and to prepare them for the real world of lawyering.¹⁴

Even if I do not persuade you to join me in this approach, at the very least I hope my essay encourages you to think again about what materials you use in teaching criminal law and why. I am not asking you to overthrow your current way of teaching criminal law. This is not a plea for a radical pedagogy. It is, however, a plea that we make criminal law teaching more grounded, more relevant, and, in short, more real by teaching the actual statutes of the states in which our students are going to practice. It is a method that, I suspect, might have relevance even beyond criminal law.¹⁵

¹⁴ Of course, no course can fully prepare students for practice; arguably, not even three years in law school can do that (absent a heavy dose of clinical instruction). Nonetheless, law school should at least point students in the right direction and not simply be an extension of a liberal arts course *manqué*, or perhaps a course to showcase the latest developments in behavioral economics and cognitive psychology. *But cf.* Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1172 (2004).

The rift over whether criminal law should teach “real law” may reflect a difference in the approach of differently tiered schools. Higher-ranked schools may think they are not simply training lawyers but training statesmen and women who will go on not merely to argue in court but to actually make the laws and have a hand in deciding how they should be enforced. Or, if they are training lawyers, they are training the kind that will solely be clerking or arguing (or judging) in federal appellate courts. I think this distinction, if it exists, can be overdrawn, and that even statesmen and women can benefit from learning the real law of a particular jurisdiction, even if this may seem to the higher-tier law schools as learning to “speak with the vulgar.”

See generally, Commentary Symposium, *Criminal Law, Casebooks, and Legal Education*, 7 OHIO ST. J. CRIM. L. 215 (2009) (debating how law schools should teach criminal law).

¹⁵ In preparing this article, I discovered that Professor Stephen D. Easton, formerly of the University of Missouri-Columbia School of Law, also used state materials in his criminal law class. With considerable reservations, I am tempted to call the approach to criminal law I advance below the “Missouri school of teaching criminal law.” *See* Stephen D. Easton, *Turning Criminal Law Students into Prosecutors and Defense Attorneys (at Least for One Day)*, 48 ST. LOUIS U. L.J. 1217, 1220–21 (2004) (“We apply the current law of our law school’s home state, Missouri, to [the] fact patterns, with a few exceptions. . . . Because Missouri law applies, the students are required to research Missouri statutes and cases to determine the current law applicable to their case.”). Alas, Professor Easton is now Dean Easton at the University of Wyoming College of Law. Also, Pat Kelley, visiting at Saint Louis University School of Law, has advocated a state-centered approach to teaching tort law. *See, e.g.*, Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 731 (2001) (“We have in this country fifty bodies of state tort law with fifty separate and unique histories, yet we profess to teach our students ‘tort law’—impliedly a single, unified body of law.”).

I. THE STRATEGY

Because this is my first year teaching,¹⁶ it may understandably induce skepticism about what I am about to recommend. How do I know what works and what doesn't when I have only tried one way? My flush of excitement for my approach may simply be the enthusiasm of a young professor teaching anything for the first time. But in teaching my class, and in writing this essay, I have had the benefit of working with a colleague, Anders Walker, who has used a Missouri state-centered focus for several years.¹⁷ Although the examples are mostly from my own teaching, what follows represents a distillation of, and a reflection on, both of our experiences and countless conversations. My hope is that at the end of the day, my experiences with this approach are not merely my experiences but can be used by others with equal or greater success—or at least occasion others to reflect on the way that they teach and why.

Over the course of the fall 2009 semester, Professor Walker and I employed the same general teaching strategy. In addition to using Joshua Dressler's criminal law casebook,¹⁸ we both assigned the Missouri criminal code as a separate text.¹⁹ Also, throughout the course we would have students read Missouri cases which, we believed, provided good examples of the law in action in our state. For each class, students would read a couple of cases in Dressler as well as the Missouri statute for the particular crime or the particular defense. This strategy—of using Dressler along with having students read from the Missouri criminal code—was in some ways less than ideal. Students still were learning a patchwork of laws by reading cases from states other than Missouri (in Dressler) and then turning to the Missouri statutes for the real “law” governing that crime or that defense. Sometimes when the laws were different, this would lead to confusion—other times, it led to interesting discussions.²⁰ Still, when it came near to the midterm or the final, students would ask which law they were supposed to “know” and which law would govern in the hypotheticals or the multiple choice questions. This was a source of some consternation for my students.²¹

Moreover, Dressler's heavily theoretical approach (especially the length of time spent on the philosophy of punishment) detracted somewhat from the point of

¹⁶ I had taught before but as a teaching assistant in various classes in graduate school. This year has been my first time taking full responsibility for classes.

¹⁷ A third professor, SpearIt, has since joined us in our state-centered approach.

¹⁸ JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (4th ed. 2007).

¹⁹ MISSOURI CRIMINAL AND TRAFFIC LAW MANUAL: 2008–2009 EDITION (LexisNexis 2009).

²⁰ For example, the Dressler casebook discusses a case where voluntary intoxication was a defense. Missouri disallows such a defense. Compare DRESSLER, *supra* note 18, at 606, with MO. REV. STAT. § 562.076 (2000).

²¹ See Brian R. Gallini, *From Philly to Fayetteville: Reflections on Teaching Criminal Law in the First Year*, 83 TEMP. L. REV. (forthcoming 2010) (manuscript at 10), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348627 (noting the “classroom concern” that arises when students ask what body of law they are supposed to know).

teaching the Missouri statutes, namely that in this class we would be getting into the application and interpretation of actual law and not engaging in abstract theoretical discussions. However, both Walker and I—especially I, being a first year professor—felt more comfortable having Dressler’s book structure the class. It was easier for me, starting out, to rely on an established and well-respected casebook to provide the outline of the class. My plan for future years is to use mainly Missouri cases and not to use a casebook at all, having students instead read the relevant chapters of Dressler’s extremely useful criminal law hornbook²² alongside the cases and the statutes for that unit. Walker also plans on eventually abandoning a traditional casebook in favor of assembling his own materials, which will be more heavily slanted towards Missouri cases than in previous years.

Beyond this basic plan of having students read the Missouri criminal code, Walker and I diverged a little in how we integrated Missouri case law. Walker would assign only a few Missouri cases during the semester, assigning, say, a vivid Missouri case applying proximate-cause analysis or a particularly gruesome first-degree-murder case. Walker’s main use of Missouri cases came at the end of his course, when he had students read only Missouri cases because they covered a number of crimes not included in the Dressler casebook, like “armed criminal action”²³ (a crime that is charged in addition to nearly every crime involving force that is committed in Missouri), kidnapping, arson, child endangerment, and assault. Students read several cases on each crime and became skilled at identifying the various degrees of crimes, in addition to learning how to read entire cases (Walker has the students look up the cases on Westlaw to read them) and finding the parts to focus on for class discussion. Having sat in on several of Walker’s classes near the end of the semester, I can testify that students responded enthusiastically to this approach. It helped that nearly all the cases had extremely interesting facts involving locations which many of our students had heard of, or been to. Students also were taught to read deep into the statutes, to see which parts of the statute (and which statutes) would apply to the variations Walker would make on each of the cases.

I, by contrast, tried to assign at least one or two Missouri cases for each class in addition to the Dressler assignment for that day. To avoid an overload of reading, the cases were edited—some heavily so.²⁴ (I also gave many handouts of Missouri cases, in part due to the fact that I would find some good cases only the night before class!) The goal was to give students a good idea of how a Missouri court would look at a particular crime and resolve it given the Missouri statutory scheme.

For instance, with first-degree murder, students were introduced to the four-factor test Missouri courts use in analyzing circumstantial evidence to prove

²² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (5th ed. 2009).

²³ § 571.015.

²⁴ In the process, I learned how very difficult it is to edit cases and how casebook authors do professors an incredible favor in editing out not only irrelevant but distracting facts and issues.

deliberation, given the facts of several Missouri cases, and asked to apply the method to the case. Was there evidence of prior planning? Bad blood? A complicated design in the murder or a failure to act in a way a non-guilty person would after the murder?²⁵ Or, to take another example, in the class on attempt, students read the case of *Bates v. State*, in which a prisoner wrote sexually explicit “love” letters to a young girl and was charged with attempted statutory rape.²⁶ The class was asked to think along with the Missouri court about whether the letters could have constituted a “substantial step” necessary for the crime of attempt (the Missouri court held that they didn’t²⁷). In a third example, instead of reading Dressler’s case on the battered spouse syndrome, we read the Missouri statute²⁸ and then read a Missouri case applying the statute.²⁹ One question in that case was whether the battered spouse syndrome could only apply to parties who were married.³⁰

I did not spend as much time on specific crimes at the end of my course as Walker did, opting to spend my time on class presentations on various “hot topics” in criminal law: the abuse scandal in the Roman Catholic Church, corporate criminality, and hate crime legislation. This was not entirely successful in my mind because we could only spend one day on each topic, but the students seemed to enjoy it. In any event, next year I plan to structure the end of my course much like Walker’s, spending the last two or three weeks on specific crimes and using only Missouri cases. Both of us plan, in future years, to spend additional class time on drug crimes, which, as one commentator notes, “have become the meat and potatoes of our criminal justice system” and which most casebooks do not even touch.³¹

I should add, given how kind Dressler has been to both Walker and me, that our decision to move to a nearly all-Missouri approach is not because we love Dressler less, but because we love the state-centered approach more. Dressler’s casebook has been indispensable to both of us in providing the general, skeletal outline of our classes, and we both plan to use the same structure when we shift to mainly Missouri cases. Again, we have nothing against Dressler’s casebook and think it is an excellent casebook to use, although it is perhaps too theory-heavy in

²⁵ My class came to refer to these as the “*Miller* factors” based on a case which gave an especially succinct summary of them. *State v. Miller*, 220 S.W.3d 862, 868–69 (Mo. Ct. App. 2007).

²⁶ *State v. Bates*, 70 S.W.3d 532, 533 (Mo. Ct. App. 2002).

²⁷ *Id.* at 539.

²⁸ § 563.033.

²⁹ *State v. Williams*, 787 S.W.2d 308, 310 (Mo. Ct. App. 1990).

³⁰ *Id.* at 311.

³¹ Douglas Husak, *Criminal Law Textbooks and Human Betterment*, 7 OHIO ST. J. CRIM. L. 267, 272 (2009); see also Douglas A. Berman, *The Model Penal Code Second: Might “Film Schools” Be in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 163, 166 (2003) (noting how “modern criminal dockets are clogged with 60 times more felony drug and property cases than homicide cases”). Thanks to Eric Miller for pressing this point in conversation.

parts. (Dressler has also been unfailingly generous to both of us, personally, in mentoring us and in answering our questions about teaching from his book.) Rather, our experience in teaching Missouri cases has shown us that they are more than sufficient for students to “get” criminal law and that there are considerable advantages to focusing on just one state’s criminal law—advantages to which I now turn.

II. THE ADVANTAGES

In this section, I briefly try to sketch the advantages of teaching criminal law with a focus on the laws of a particular state—in my case, Missouri. My basis for these conclusions is what I have seen in my teaching and in the reactions of my students.

A. *One Set of Laws*

The first, and I think nearly overwhelming, advantage of the state-centered approach is that it gives students experience digging into the statutes of one state. In the introduction to the class, I am able to say that we will be looking at the “real law on the books in Missouri” and that, to a large extent, the book of statutes will be their “answer key” for the class (although it is certainly not a self-interpreting answer key, and sometimes the answers it gives will be puzzling—students have to learn how to “crack the code”³²). Students are expected to know, even to master, the statutes assigned to them for each class and to bring their copy of the criminal code to class every day (when they forget, they can easily look up the statutes online). Moreover, students are able to gain familiarity with the laws of one state rather than just jumping around and learning bits and pieces of the laws of several states. Proceeding in this way has a number of subsidiary benefits.

First, it hammers home the point that criminal law in the modern state today is, to a great extent, statutory law and the cases interpreting those statutes.³³ If

³² Thanks to Anders Walker for this turn of phrase.

³³ See Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285, 1285 (2004) (discussing how criminal law “has not been a true common law subject for many years. . . . As a result of the nineteenth century codification movement, every American state has for decades accepted the notion of legislative supremacy in Criminal Law—the idea that legislators rather than judges should create and define criminal offenses.”). Some states, including Missouri, have “reception” statutes which “receive” the common law as part of their criminal code. See MATTHEW LIPPMAN, *CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES* 8 (2007) (noting that Missouri, Arizona, and Florida have reception statutes that receive the common law “as an unwritten part of their criminal law” and distinguish them from “code” states). But even in so-called common law states, statutes dominate (indeed, I was only dimly aware—and my students were blissfully unaware—that Missouri could be categorized as a “common law” state!). As noted earlier, statutes in all cases trump the common law, and statutes are to be construed broadly. See, e.g., MO. REV. STAT. § 1.010 (2000); see also WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 63 (2d ed. 2010) (noting that criminal law is “mostly in statutes”).

something is not made a crime by statute (that is, if it is not in the Missouri criminal code), then it will not be prosecuted as a crime.³⁴ I began my class with the facts of the Lori Drew cyberstalking case. Drew wrote taunting MySpace posts under a false identity to a young girl who eventually committed suicide. Most of my students thought Drew should be guilty of a crime. We then looked at the various statutes that might be relevant, assigning a group of students to think about each one. Was she guilty of harassment?³⁵ Impersonation?³⁶ Stalking?³⁷ Murder?³⁸ Although the harassment statute as it currently reads fits Drew's crime almost perfectly, the changes in the statute to fit her crime were only passed after the facts of the case came to light—an item which was helpfully discussed in the preface to the 2009 criminal code listing the major changes in the law.³⁹ Students were understandably frustrated to find that Missouri state and federal attorneys decided not to charge Drew with any crime.⁴⁰ The Drew exercise also proved helpful when, a few weeks later in the class, we discussed principles of legality, including the prohibition on *ex post facto* laws.⁴¹

A second and related advantage of focusing on one code is that it teaches students to look at the entire architecture of a statute.⁴² For example, my students had the entire first-degree murder statute in front of them on the page of the criminal code, including the punishment for the crime and various cross-references to other statutes. Students also had in front of them, on the same page or the next, the statutes for second-degree murder and voluntary manslaughter and, on the page before, the definitions of various terms in the criminal statutes.⁴³ With the relevant materials right there, students learn to see both how various parts of a statute interact and also how statutes interact with one another. In the lesson on kidnapping, for instance, students were able to look across the page at false

³⁴ A good example of this is how Missouri used to have a law against ticket scalping which has been repealed. MO. REV. STAT. § 578.395 (2000) (repealed 2007).

³⁵ MO. REV. STAT. § 565.090 (2000 & Supp. 2009).

³⁶ § 575.120.

³⁷ § 565.225.

³⁸ MO. REV. STAT. § 565.020 (2000).

³⁹ MISSOURI CRIMINAL AND TRAFFIC LAW MANUAL: 2008–2009 EDITION xii (LexisNexis 2009).

⁴⁰ Drew was convicted in the District Court for the Central District of California under a controversial reading of an online fraud statute, but ultimately the court granted Drew's motion for acquittal. *United States v. Drew*, 259 F.R.D. 449, 468 (C.D. Cal. 2009).

⁴¹ For my experience in teaching the *Drew* case, see Chad Flanders, *When Is Something Morally Offensive a Crime?*, ST. LOUIS BEACON (Aug. 24, 2009, 6:00 AM), <http://www.stlbeacon.org/content/view/11061/74>.

⁴² I owe the phrase “architecture of the statute” to Michael McConnell.

⁴³ MO. REV. STAT. § 565.020 (2000) (first-degree murder); § 565.021 (second-degree murder); § 565.023 (voluntary manslaughter); § 565.002 (definitions).

imprisonment and analyze how the two crimes are both similar and different.⁴⁴ Students further see patterns in how statutes are constructed and can refer back to statutes which use the same language that they are currently studying (does “unlawful remaining” have the same meaning in the self-defense statute as it does in the statute defining burglary?). This is something a casebook cannot do for the laws of a particular state, which again will usually, at best, be excerpted at the bottom of the page—a perfect place for students to skip over them. There is no reason why students should be introduced to “intratextualism” only when it comes to interpreting constitutions.⁴⁵

Third, by reading the Missouri criminal code along with Missouri case law, students are more fully exposed to the history of the changes in the code and how case law and the code interact. In teaching felony-murder, I assigned *Bouser*, a case which looks at the fascinating evolution of Missouri’s felony-murder statute, including the shift from making only so-called inherently dangerous felonies, such as arson and burglary, predicate felonies, to making *any* felony sufficient for felony murder.⁴⁶ (This led to a discussion of whether this was the right move and also to a somewhat convoluted discussion of the “merger” doctrine.) In addition, when I taught particular crimes near the end of the course, I handed out the legislative comments that Missouri appended to many of its criminal statutes when it undertook a comprehensive statutory reform in 1973. Such comments are helpful in showing why Missouri went in one direction rather than another and why it differs or agrees with the Model Penal Code. The comments also give students an insight into the use of legislative history in interpreting statutes. Finally, in my unit on rape, I had the class read several nineteenth century Missouri opinions to show how the presumption used to be very strongly against the veracity of victim testimony—to see both how far we have come from the common law to our modern-day statutes and how far we have left to go in changing our attitudes and our laws regarding rape.⁴⁷

⁴⁴ MO. REV. STAT. § 565.110 (2000 & Supp. 2009) (kidnapping); MO. REV. STAT. § 565.130 (2000) (false imprisonment).

⁴⁵ See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (describing how “intratextualists” compare and contrast words and phrases in the Constitution).

⁴⁶ *State v. Bouser*, 17 S.W.3d 130, 135–38 (Mo. Ct. App. 2000).

⁴⁷ I had my students read *State v. Burgdorf*, 53 Mo. 65, 67 (1873) (quoting Lord Hale’s dictum that rape is a crime easily accused but hard to prove). This case is singled out by Susan Estrich in her book, *REAL RAPE*, as an example of the bad, old way of looking at rape. SUSAN ESTRICH, *REAL RAPE* 31 & 118 n.10 (1987).

A further note on rape: Neither of us spends too much time teaching rape, for reasons that may be of interest given our state-centered approach. Missouri has both a forcible rape statute as well as a sexual assault statute. Both are felonies. Sexual assault is simply sex without the consent of the other person. We find that once this latter crime is included in the picture, some of the puzzles associated with rape being forcible sex or rape being sex without consent may become less pressing. Compare MO. REV. STAT. § 566.030 (2000 & Supp. 2009) (rape if a person has sexual intercourse with another by use of forcible compulsion), with MO. REV. STAT. § 566.040 (2000) (sexual assault if

There is also a deeper, historical point to be made about reading the statutes of one state and then reading how state courts have interpreted those statutes. The history of the case law on these statutes makes up what Walker has recently called the “new common law.”⁴⁸ After the Model Penal Code was promulgated, states—to a greater or lesser extent—adopted it for their own, and indeed “[t]he fact that there is a significant degree of agreement in the definition of crimes in state codes is due to a large extent to the Model Penal Code.”⁴⁹ But it was still left to courts to puzzle out how to interpret various ambiguities in the MPC as adopted in their state. This is what state courts have been doing for a while now and will continue to do.

Almost half a century of judicial interpretation, not to mention legislative tweaking, makes teaching the MPC at once both redundant and antiquated.⁵⁰ As two commentators have noted, “now that the Model Penal Code has been absorbed into the penal code of many states, it is no longer a bold ‘policy’ alternative to existing law, but simply a different model of existing law.”⁵¹ When students learn the laws of a state, they are to a greater or lesser extent already learning the Model Penal Code. But the MPC as adopted by the states has also been changed by those states—by legislatures, which take some parts of the MPC and not others, and by courts, which make their own interpretation of various MPC terms.⁵² It seems no longer true to say, as one esteemed commentator has said, that the MPC is “where

sexual intercourse occurs without consent). However, there still remain puzzles as to what constitutes “forcible compulsion” in Missouri rape law.

⁴⁸ Anders Walker, *Response to Readers of “The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course,”* 7 OHIO ST. J. CRIM. L. 303, 305 (2009) [hereinafter Walker, *Response to Readers*]; Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 HASTINGS L.J. (forthcoming 2011) (manuscript at 1) (on file with author); see also 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 statutes strewn throughout other codes).”).

⁴⁹ LIPPMAN, *supra* note 33, at 9.

⁵⁰ For a strong statement of the antiquarian nature of the MPC, see Berman, *supra* note 31, at 163:

[B]ecause the fundamental issues and concerns of criminal law doctrine and practice have shifted so dramatically in the last 40 years, the original MPC’s continued use as a criminal law textbook operates, in my view, as a considerable disservice to criminal law academics and students, and ultimately to the entire field of criminal justice.

⁵¹ Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 265 (2009).

⁵² This makes the Model Penal Code also less useful as a contrast to the laws on the books. See Walker, *Response to Readers*, *supra* note 48, at 305 (“[E]ven though many casebooks continue to treat the MPC as a refreshing alternative to the common law, there is now in fact almost fifty years of common law interpreting the MPC in most states.”).

modern law is moving.”⁵³ The MPC is where modern law has been—the movement now is provided by the interpretations of state courts.⁵⁴

When I took criminal law at Yale, the Model Penal Code was assigned as a sort of afterthought—something we were supposed to be looking at and thinking about but not something we discussed. Usually, it was skipped: Why should we read it when it wasn’t doing the work in the case we were reading (that work was being done by the state statute or federal law)?⁵⁵ We all knew, vaguely, that we were supposed to hail the MPC as a great moment in legal reform and that it certainly was. But perhaps the best compliment we can pay to the MPC is to leave it behind. I would not go so far as Russell Covey to say that “the MPC-era is as yesterday as tie-dye and the VW van. Peel off those bumper stickers and put away the MPC.”⁵⁶ But I would say that the success of the MPC has yielded an ironic result: Precisely because of its success, we can be more confident in leaving it behind.⁵⁷ If we teach the laws of one state, we are teaching the MPC, if only indirectly. And we can still refer students to the MPC as a template for our laws.⁵⁸ But at the end of the day, real law is the law on the books, not the laws drafted by the American Law Institute, which is now clearly starting to show its age.⁵⁹ The

⁵³ Dressler, *supra* note 9, at 1150.

⁵⁴ Covey, *supra* note 8 (“Nobody is pouring over the MPC as inspiration for penal code reform.”).

⁵⁵ Here I endorse what Russell Covey has said:

I can recall as a law student my own instinctive distaste for studying “model codes” that aren’t really “the law” anywhere. Thus I have an intuitive sympathy for the inevitable student complaints and queries regarding what “law” they should know for the exam, and whether that law includes the MPC, and if so, how much of the MPC, etc. In fact, I am fully on board with those dissenters.

Id. An analogous story can be found in DUBBER, *supra* note 3, at 3 (“Very quickly the Model Code turned from a beacon of hope into a source of annoyance. Rather than making sense of the mess, it added to it. Now we were responsible not only for the law of fifty-two jurisdictions . . . but fifty-three.”).

⁵⁶ Covey, *supra* note 8.

⁵⁷ See Sanford H. Kadish, *The Model Penal Code’s Historical Antecedents*, 19 RUTGERS L.J. 521, 538 (1988):

The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes, creating a veritable renaissance of criminal law reform unparalleled in history. In fact, the influence of the Model Penal Code has been so great that it has now permeated and transformed the substantive criminal law of this country.

See also Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 948 (1999) (“The success of the [Model Penal] Code in stimulating American jurisdictions to codify or recodify their criminal law was unprecedented.”).

⁵⁸ See Daniel J. Solove, Comment to *Should We Stop Teaching the Model Penal Code?*, PrawfsBlawg (July 25, 2006, 3:46:42 PM), http://prawfsblawg.blogspot.com/prawfsblawg/2006/07/should_we_stop_.html (“Although the MPC is a bit dated, it still forms the backbone of many state criminal codes.”).

⁵⁹ In his introduction to a symposium on *Model Penal Code Second: Good or Bad Idea?*, Dressler lists several ways in which the MPC is now dated, among them: 1. Its backwardness on rape

MPC taken by itself—and not as revitalized by state courts and legislatures—has an almost ghostly and even antiquarian quality. State criminal law is where the action is and where the law is moving.⁶⁰

B. *The Local Connection*

The second advantage of focusing on state criminal law contrasts nicely with the sometimes spectral quality of the MPC. While the MPC is not law in any jurisdiction, the criminal code of Missouri indisputably is. This gives the criminal law—already an intrinsically interesting and popular topic—an additional appeal to students. When students are studying crimes that took place near them or in the town next door,⁶¹ and are dealing with the law as it is actually practiced in the jurisdiction where they currently reside, the law takes on an immediacy that older cases from foreign jurisdictions cannot give.⁶² I can do no better than to quote my colleague Anders Walker on this particular benefit of teaching the law of only one state:

[C]ases provide a window into the lives of average people, allowing students to see distinctions between rural and urban, religious and secular, liberal and conservative. . . . This is particularly true if cases are drawn from the same jurisdiction. In my course, I augment readings from a traditional casebook with cases drawn from Missouri, using them to illustrate not only the nuance of legal rules, but also the peculiar behavior of local juries and the regional nature of certain types of crime.

law, 2. Its silence on hate crime legislation, 3. Its void in discussion of the war on drugs, 4. Its absence of internet crimes, and 5. Its focus on rehabilitation rather than retribution. Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 157, 158–59 (2003). Nonetheless, Dressler cautions against producing a “sequel.” *Id.* at 160.

⁶⁰ Orin Kerr makes the interesting argument that because the MPC is an “ideal” code it is neater and cleaner than real-world codes and is thus an “ideal” teaching tool. Kerr, *supra* note 6. This may exaggerate the neatness of the MPC and the messiness of state codes. Still, if given the choice, I would rather expose my students to a messy real code than a neat ideal one. See Berman, *supra* note 31, at 165–66 (“[T]he frontline realities of modern criminal law doctrine and practice have become quite grim and messy, and yet study of the original MPC can suggest that criminal law doctrine and practice is quite enlightened and orderly.”).

⁶¹ In one case, *State v. Kruger*, 926 S.W.2d 486, 487 (Mo. Ct. App. 1996), students quickly googled to check if the place where the assault was committed was the grocery store many of them frequented. After some debate, they concluded that it probably was not.

⁶² It also makes reading the local newspaper and paying attention to legislative debates a must. Both of us spent time in class discussing the recent reform of Missouri’s self-defense law, MO. REV. STAT. § 563.036 (2000 & Supp. 2009), which allows citizens to use deadly force if someone enters their property unlawfully. We showed news clips reporting on the change, and I handed out newspaper articles critiquing the new law, which provoked student debate on the wisdom of the change. The law has since been changed since I taught it. For a criticism of the latest change, see Sarah Pohlman & Chad Flanders, *A Strange New Law*, ST. LOUIS POST-DISPATCH, Oct. 12, 2010, at A13.

Such an approach lends itself, in my opinion, to a Geertzian “thick description” of criminal life, one that appears to interest both the theoretical and practical-minded.⁶³

I can testify to the different feel teaching Missouri cases gives my class: We become more interested in where the crime occurred, who was arguing the cases, and who the judges were. There is a strange sort of thrill in knowing that the facts of the crime are not just a strange backdrop but descriptions of a place nearby, where perhaps we have lived. Let me try, however, to be more concrete and less rhetorical in drawing out the benefits of the local connection when teaching state criminal law. There are several.

First, teaching local law is invaluable for anyone teaching at a regional school. A simple fact about my school, for example, is that most of my students will go on to practice law in Missouri. This will likely remain true at Saint Louis University for some years to come.⁶⁴ I can advertise our use of the Missouri criminal code as giving them a head start if they choose to practice criminal law in Missouri, either as a summer job or as a career.⁶⁵

Second, on our faculty—both in the clinical faculty and the teaching faculty—are attorneys who argued some of the cases we read or, in the case of one of our faculty members, decided several of them. In one class, I had my students read and discuss the Missouri Supreme Court’s decision in *Roper v. Simmons*, where the court engaged in its own independent review of the “evolving standards of decency” regarding the execution of juvenile offenders.⁶⁶ Students in my class (by lucky coincidence) also had Missouri Supreme Court Judge Michael Wolff for their civil procedure course. Judge Wolff had written a concurring opinion in *Roper* suggesting a narrower, state-law ground for invalidating the death sentence.⁶⁷ I was able to get a little bit of insider’s insight into the case by talking to the judge before teaching the case (he expressed his surprise that the Supreme

⁶³ Walker, *Response to Readers*, *supra* note 48, at 305; *see also* Harris & Lee, *supra* note 51, at 265 (“[S]ubstantive criminal law is inevitably entwined with culture . . .”).

⁶⁴ The school down the road from Saint Louis University, Washington University in Saint Louis School of Law, attracts a more national student body, with fewer of its students going on to take the Missouri bar. *See Where Do Students Go?*, WASH. U. L., http://law.wustl.edu/career_services/pages.aspx?id=459 (last visited Sept. 15, 2010) (noting that “the Class of 2008 relocated to 30 different states, the District of Columbia and 4 foreign countries. Less than one-third of our graduates remain in the St. Louis area”). I suspect that at most law schools not in the top twenty, the student body will be more “local.”

⁶⁵ Indeed, one major benefit of a state-centered focus is that professors can focus on the major crimes in the students’ home state—the ones they will most likely be prosecuting or defending. Thus, for example, in Missouri, we might focus on crimes relating to the production of methamphetamines. *See, e.g.*, MO. REV. STAT. § 569.040.1(2) (Supp. 2009) (separate first degree arson provision for a fire started “in an attempt to produce methamphetamine”).

⁶⁶ *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401–03 (Mo. 2003), *aff’d*, 543 U.S. 551 (2005).

⁶⁷ *Id.* at 415.

Court affirmed the Missouri court without so much as rebuking it for getting ahead of the Court in declaring a national consensus against the juvenile death penalty). There is also more than a little fun in noting who is arguing the cases, even if they aren't members of the Saint Louis University faculty (who had, in fact, argued several of the cases I assigned). All too often, the attorney general listed on the side of the prosecution will turn out to be a future senator or governor (John Danforth, Jay Nixon) whose name the students will immediately recognize. One case involved a judge who shared the name of a nearby street, but a little googling yielded the result that the street probably was not named after him.⁶⁸

This relates to one of the more gratifying aspects of teaching recent, local cases: If one has questions, one can always seek out the attorneys who argued the cases in order to get their perspective on why the case came out as it did. In the *Bates* case, discussed above, students had questions about whether Bates could be convicted of a conspiracy to commit attempted statutory rape for writing pornographic love letters to an underage girl and why he wasn't also convicted of child enticement. An e-mail to the defense attorney (who had won the case) yielded, a few days later, an eloquent, page-long response.⁶⁹ The response illuminated the ins and outs of conspiracy in cases involving the seduction of young children (prosecutors are, understandably, reluctant to make the child's letters and actions part of the case) and, most interestingly, informed us that Missouri's child-enticement law⁷⁰ was actually passed partly in response to the failure to get Bates on attempted statutory rape. Were the child enticement law in place when Bates wrote his obscene letters to the young girl, there would be no question that he could have (and would have) been charged under it. Reading the defense attorney's letter out loud to the class was an especially nice teaching moment: It vindicated the students' excellent and probing questions and gave a perfect example of how law evolves in response to the outcome of particular cases.⁷¹

III. THE DISADVANTAGES

Given the pluses of teaching a one-state, code-based, criminal law class, what are the drawbacks? I would be remiss if I didn't admit that there are at least two or

⁶⁸ *State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953). This case is a quite-underappreciated gem in the literature of impossible attempts.

⁶⁹ E-mail from Emmet D. Queener, Assistant Pub. Defender, Mo. State Pub. Defender Sys., to author (Nov. 12, 2009, 5:27 PM) (on file with author).

⁷⁰ MO. REV. STAT. § 566.151 (Supp. 2009).

⁷¹ In another case, I was able to answer a puzzle about why the prosecution charged negligence rather than recklessness. The e-mail from the defense attorney also included a colorful story from the trial of when the attorney for the prosecution depicted himself as Christopher Columbus because he "had the courage to try something for the first time." E-mail from Melinda K. Pendergraph, Assistant Pub. Defender, Mo. State Pub. Defender Sys., to author (Sept. 23, 2009, 12:00 PM) (on file with author).

three. At the same time, I think that these disadvantages pale in comparison to the advantages.

A. *Time Commitment*

Obviously, there is an added cost to faculty who must look for appropriate cases to teach from the state's various appellate courts, a cost that many junior faculty may be unwilling or unable to pay. That being said, I was able to benefit from Walker's research and use some of the cases he used, but I also spent many hours staring at Westlaw trying to find appropriate cases. Many cases are simply too cut and dried to be any use in teaching (one has to find a balance between giving students cases that are clear and cases that are simply boring because they are so straightforward). In addition, one comes to appreciate the art of editing; cases that include extraneous issues can only lead to confusion, especially early in the semester and especially when first-year students are involved. A class may become lost trying to deal with questions about procedure or evidence that are covered in a cursory way in the case without ever getting to the substance of the crime—which was the real point of assigning the case. In sum, working on finding the right Missouri cases, even if one is using them only as a supplement, can amount to the work of constructing a casebook.

At the same time, reading a lot of Missouri cases was a good way to get a sense of Missouri law, and the bizarre facts made for interesting reading. As much drudgery as there is in trying to find the right case, there is a compensating joy in finding a case that really conveys the point well or illustrates the tension in the law in an especially clear way.⁷² Even straightforward cases have their pedagogical usefulness. I would hand out excerpts from these cases in class, and many times, giving students a clear Missouri case in contrast to the "tough" casebook case proved pedagogically useful by showing that law isn't all gray areas. Sometimes an obvious case of a person acting as an accomplice is a better teaching tool than one in which it is unclear exactly what the "accomplice" was doing to aid the crime. That being said, there is no gainsaying that teaching state cases involves a lot of time spent looking up cases.⁷³

B. *Narrow Focus*

⁷² There is also the joy of finding a recent case where most casebooks have an old case. For example, students in my class read a contemporary case on marijuana possession to examine the act requirement. *State v. Winsor*, 110 S.W.3d 882 (Mo. Ct. App. 2003); see also Gallini, *supra* note 21, at 4 ("[T]here must be something more relevant to this century than *Martin v. State* to teach the voluntary act requirement." (citing *Martin v. State*, 17 So. 2d 427 (Ala. Ct. App. 1944))).

⁷³ Sadly, one of the rewards of preparing your own state materials will not be monetary unless you teach in a large state. Nonetheless, I hope that criminal law professors will be inspired to prepare their own state materials, which could be offered at low or no cost on the internet. I have recently begun preparing materials for a Missouri state supplement that relies on the basic outline of Dressler's criminal law text.

Work aside, there is also the worry that a focus on a particular state's law is too narrow. What about the student who won't be practicing in Missouri but who will go on to work in Illinois, or Kansas, or clerk for a judge in Mississippi? How will teaching them Missouri law prepare them for those jobs? And how will teaching students about Missouri legislative history prepare them for the odd mix of common law and Model Penal Code law that pervades the multistate portion of the bar exam?⁷⁴ Indeed, teaching students only the Missouri criminal code may simply confuse students when they turn to bar studying, leaving them unprepared in areas where Missouri has gone a different way than other states (such as not having a depraved-heart murder statute).

I admit that the one-state method may not be the most appropriate for law schools which, unlike ours, attract primarily a national student body.⁷⁵ But even here, the regionalism of top ten law schools should not be underestimated; students who go to Berkeley or NYU will probably tend to practice more in California and New York respectively.⁷⁶ Will professors who focus on one state's law disadvantage a class of students who will be going on to practice in a variety of different states? As Daniel Solove has commented:

If we agree that criminal law should be taught as primarily a statutory course, then the question turns to what is the best body of law to focus on. If you're teaching at a small local law school, you can simply focus on that state's criminal code, but if you're teaching at a law school with students from across the nation, this strategy becomes more difficult.⁷⁷

There is some force to this worry, but I think not too much. Even with the traditional casebook, students will get a mish-mash of state criminal law, not a uniform, one-size-fits-all analysis of the criminal law. Even the Model Penal Code only imperfectly fills this gap. And we should be wary of exaggerating how truly different each state's criminal law is—again, we have the Model Penal Code to thank for this uniformity. States will differ at the margins, but for the most part, if

⁷⁴ A practice some have condemned. Solove laments:

True, the common law is on the Bar Exam, but this is one of the (many) unfortunate stupidities of the Bar Exam. The common law definitions of crimes have been replaced by statutes, and many of the traditional common law elements no longer exist in the majority of states. As I've said before, if you practice the criminal law on the Bar Exam, you'll be disbarred.

Solove, *supra* note 4.

⁷⁵ My colleague, Lynn Branham, informed me that when she attended the University of Chicago Law School, she learned both national norms and the Illinois Criminal Code. E-mail from Lynn Branham, Visiting Professor of Law, Saint Louis Univ. Sch. of Law, to author (Feb. 5, 2010, 1:50 PM) (on file with author).

⁷⁶ The statistics I have been able to find about University of California-Berkeley School of Law indicate that a clear majority of students there take the California bar. I suspect something similar happens at New York University.

⁷⁷ Solove, *supra* note 58.

a student knows well, for example, the law in Missouri, he or she will have more than a good enough start on mastering the criminal law of another state. Once again, I can only state my preference for teaching the real law of one state rather than a patchwork of laws from other states supplemented by that Platonic ideal of a criminal code: the Model Penal Code.⁷⁸ It is better to immerse students in one system and let them learn the tools of statutory interpretation with that one code than to give them a superficial knowledge of the laws of many states. It is properly the role of the bar exam prep course to give them just this superficial knowledge, which they can then go on promptly to forget as they begin to practice in a particular jurisdiction. On this final point, should not the state bar, of all things, test state criminal law? Though this is beyond the scope of this article, the case for multi-state testing of criminal law seems to me to be even weaker than the case for multi-state teaching.⁷⁹

C. What About the Common Law?

Finally, what about the hallowed, ancient English common law? Don't students need to have some familiarity with the common law on its own terms (a familiarity which will be lost if only state law and state cases are taught)? Common law, it may be thought, has left an indelible impact on the criminal law, so that the very terms in which it conducts itself are shaped by it. How can students interpret contemporary statutes if they don't know the history of how those statutes came to take the form they do? I think this point has an evident force, but it too can be overstated.

The common law usually comes into casebooks in two ways, and, because I am more familiar with Dressler's casebook, I will focus on how it enters into the way he structures his book. Students have their first, real encounter with the common law when learning about the principles of legality. With the common law, they are told, judges can "make up" new crimes, crimes which haven't been specifically laid out anywhere and which haven't even really been prosecuted before.⁸⁰ People can be convicted, for instance, of intent to debauch and corrupt, even if a precedent for charging for that crime could not be "found in the books."⁸¹

⁷⁸ See Walker, *Response to Readers*, *supra* note 48, at 305 (contrasting Aristotelian and Platonic methods in legal teaching).

⁷⁹ Recently Missouri has decided to switch to a uniform bar exam. This means that there will be *no* state-specific subjects tested on the bar exam (criminal law was never tested as a state-specific subject). However, Missouri will now require students to attend a seminar and take a quiz in order to learn (some) state law. My hope is that having a class in law school that teaches state criminal law will also satisfy the new "local knowledge" requirement. See Chad Flanders, *Local Knowledge Lost with Uniform Bar*, MO. LAW. WKLY., May 24, 2010, at 14.

⁸⁰ See ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 304 (5th ed. 2009) ("The major problem with common law crimes is notice").

⁸¹ Commonwealth v. Mochan, 110 A.2d 788, 790 (Pa. Super. Ct. 1955), *in* DRESSLER, *supra* note 10, at 92, 93.

I find using the common law to teach this sort of lesson is almost entirely dispensable. For one, the idea of *ex post facto* laws is usually clear enough to students already. For another, the real doctrine of legality—that is, the doctrine of legality that has any bite nowadays—is rooted in concerns with vagueness and overbreadth. And these are quintessentially problems with the framing and drafting of statutes, not with the common law definition of crimes.⁸² It is, in my opinion, far better to teach students about legality problems that still occur in contemporary cases than to use common law cases to teach them about a largely dead worry about judicial crime creation.⁸³

But there is still a second way that the common law seems to be necessary to the understanding of even a contemporary, statutory scheme: The crimes we have now, down to the very details of the elements of many of those crimes, have been formed out of the common law. Shouldn't students know the history of the common law, if only to better understand contemporary statutes?⁸⁴ Yes and no. Certainly, students should know the history of the statutes they now have before them: how the common law carved up murder differently than many statutory schemes do now or how the definition of larceny has evolved to its present form (in Missouri, it is now called simply “stealing”⁸⁵). Of course, students should know this, and any teacher worth his or her salt will introduce students to it. But is more needed here beyond an introduction? I don't think so. Again, the Model Penal Code has done a wonderful job cleaning up and clarifying the various mental states involved in crimes and making uniform the basic elements of common crimes. The states have been the beneficiary of this reform. And at the end of the day, it is the statutory definitions of the crimes students should learn and puzzle their way through, not the often confusing and bewildering array of mental states and criminal elements from the common law.⁸⁶ The Model Penal Code is, in this respect, simply better, and states have followed the Model Penal Code.⁸⁷

We should not have to reinvent the wheel by confusing our students with the common law and then asking them, in addition, to learn the statutory terms. If and

⁸² See, e.g., *City of Chicago v. Morales*, 527 U.S. 413 (1999) (striking down a loitering statute for being vague).

⁸³ *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (“[T]he notion of a common-law crime is utterly anathema today . . .”).

⁸⁴ The “nutshell” on criminal law says that even in states that do not recognize common law crimes, “it is necessary to resort to the common law to ascertain the meaning of statutory crimes.” LOEWY, *supra* note 80, at 304. This seems to me to be a rather gross exaggeration.

⁸⁵ MO. REV. STAT. § 570.010 (2000 & Supp. 2009).

⁸⁶ Here I agree with Daniel Solove: “The common law definitions of crimes have been replaced by statutes, and many of the traditional common law elements no longer exist in the majority of states.” Solove, *supra* note 4.

⁸⁷ Solove hits exactly the right note: “Although the MPC is a bit dated, its great strength is its *mens rea* provisions, which are a big advance from the common law’s cacaphony [sic] of *mens rea* (mental state) terms (there are hundreds of *mens rea* terms in the common law which the MPC simplifies to four).” *Id.*

when the common law background is vital to understanding a statute, usually the cases we read will touch on it. If not, then I think the common law should be used as a ladder: one that we can climb up to get to the statutes, but once we're there, one that we can safely toss away. Let's face it: The common law is no longer that relevant to the *practice* of criminal law.⁸⁸

IV. CONCLUSION

Should law professors teach criminal law by focusing on the laws of one state? The answer to this question will depend on where one is teaching and on whether it will be palatable to one's students to focus just on Missouri law or just on Nevada law.⁸⁹ If the demands of your students are truly heterogeneous, then perhaps it is best to teach a mutt-like selection of laws from various states as can be found in most casebooks. But I urge that, even in a situation like this, law professors should at least consider the advantages of selecting one state (most likely the state in which the law school is located) for a pedagogical emphasis. Indeed, the best approach at first may be simply to try adding some state-specific cases to the usual casebook assignments to gauge students' reactions and to see how the abstractions of the Model Penal Code become real in the criminal code of an individual state. Eventually, you may wish to move, as Professor Walker and I are, in the direction of simply teaching the criminal law of one state. Such an approach, I have suggested, has the benefit both of being more pedagogically fruitful as well as more practical and "real-world." It has worked for me, and I commend it to you.

⁸⁸ See Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433, 436 (2006):

More than four decades after the completion of the Model Penal Code, and the reform of criminal codes throughout the United States . . . criminal law in the United States can no longer be regarded as a common law subject. The monolith of 'common law' . . . has been thoroughly and irrevocably replaced by a set of fifty-two independent and comprehensive systems of criminal law, with their own criminal codes and corresponding bodies of jurisprudence interpreting these codes.

See also Gallini, *supra* note 21, at 10 ("[S]trictly from a practical standpoint, I am skeptical that any court would ask an attorney to distinguish current precedent from the common law.").

⁸⁹ This will be an especially pressing worry at places like the George Washington University Law School or the Georgetown University Law Center—schools that aren't even in a state! Professors at these schools may prefer the MPC. But still, I would urge them to consider in what states their students go on to practice and think about teaching the law of those states. (At George Washington University, for instance, a majority of its students take the New York bar.) I thank Orin Kerr and Dan Solove for discussions on this point.