

Teaching Federal Criminal Law: Survey Says . . . “It’s Hard”

Brian R. Gallini*

Consider my exchange with a professor from another law school back in fall 2009 while we were both attending a conference:

Professor Who Shall Remain Anonymous [PWSRA]: What are you teaching this year?

Me: X, Y, Z, and Federal Criminal Law for the first time.

PWSRA: Oh, Federal Criminal Law . . .

Me: No good?

PWSRA: That’s a really hard class to teach. I tried teaching it for a few semesters, but I don’t any longer.

That about sums it up: federal criminal law is *hard*. It’s hard material to teach and hard for students to learn. Initially, there’s a honeymoon period for students—and why not? After all, depending on your course coverage, the class tells tales of prominent defendants and their fancy attorneys taking on the FBI, DEA, and ATF (sometimes all in the same case!).¹

But even that observation raises the question: what will (or should) you cover? There are “several thousand” federal crimes,² but only 2,100 minutes in a three-credit course.³ Apart from course coverage, the honeymoon period ends; a few classes into the material, students realize that they are in for some humbling challenges. Most prominent in my mind is the statutory interpretation challenge. More basically, though, is the challenge of simply reading the statutes—federal

* Associate Professor of Law, University of Arkansas-Fayetteville School of Law.

¹ *E.g.*, United States v. Savage, No. 07-550-03, 2013 U.S. Dist. LEXIS 14877, at *6 (E.D. Pa. Feb. 4, 2013).

² Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf?”*, 50 SYRACUSE L. REV. 1317, 1319 (2000).

³ 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 25–26, Standard 304, Interpretation 304-4 (2012), http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf.

criminal statutes are *long*, and longer still to students and professors alike when compared to those featured in the first year criminal law course.⁴

In this brief essay, I humbly offer some thoughts to combat these difficulties. I proceed specifically by offering for your consideration some observations on (1) what to cover in the course, (2) how to keep the material interesting, and (3) some closing considerations.

I. WHAT TO COVER?

This is a tough question to answer. Everyone likely has their own approach, but I recently began teaching to my jurisdiction's enforcement priorities. As students come to learn, U.S. Attorney offices are guided by the Administration's enforcement agenda (i.e., nationwide enforcement priorities) followed by their own local enforcement priorities. Sometimes the two undoubtedly coincide; the President's top enforcement priority is international terrorism as it also is, I suspect, for the Southern District of New York. But the same is not true for my home state, Arkansas. Although the Western District of Arkansas has one attorney assigned to terrorism investigations, it is more concerned with stopping domestic terrorism alongside limiting white-collar crimes, drug offenses, and crimes against children. That makes good sense given that commission of an international terror offense is unlikely in Arkansas; federal interest offenses of a more local nature, therefore, demand heightened attention.

My point is this: federal criminal enforcement varies depending on geography. I therefore adjust my syllabus structure to correspond with the enforcement priorities of the jurisdiction where I teach. Doing so has at least three tangible benefits for students. First, it impresses upon all of them that our semester is designed to examine one actual approach to federal criminal enforcement—they learn in doing so that enforcement priorities can change quickly. Second, for those who will enroll in our school's U.S. Attorney externship, it is easier for them to "hit the ground running" on their first day. Finally, in my anecdotal experience, our students who accept federal clerkships have a superior understanding not just of federal criminal issues generally, but of how the precise statute at issue fits in the broader enforcement whole.

Let me close this brief section by asking that, even if I have not persuaded you to teach to your jurisdiction's enforcement priorities, please consider dedicating even a small section of your course to crimmigration.⁵ It is next to

⁴ For example, a commonly taught statute, 21 U.S.C. § 841 (the core federal drug offense) is over 4,000 words in length. Title 18 U.S.C. § 922, governing prohibited firearms, is nearly 9,000 words. By contrast, Model Penal Code § 2.02 addressing mens rea approaches 800 words and § 5.01 criminalizing attempt is just under 600 words.

⁵ By "crimmigration," I mean the immigration consequences of a criminal action or conviction. See generally *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (holding that "counsel must advise her client regarding the risk of deportation"); see also generally Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J.

impossible in modern federal criminal practice to ignore the immigration consequences of a guilty plea or guilty verdict.⁶ Although federal defense attorneys may not realistically grow into immigration law experts, even a cursory awareness of immigration consequences will help raise the quality of the defense bar.⁷ The development of that awareness must start in law school.

II. HOW TO KEEP THINGS INTERESTING (FOR YOU TOO!)?

When material is challenging, the semester can get long—for the students, and you too. Here are some brief suggestions to help you beat back the possibility of doldrums. First, consider a speaker series. In the past, I have invited, and our class has heard from, the U.S. Attorney for the Western District of Arkansas, the Arkansas Federal Public Defender, members of the FBI, and agents from the Immigration and Customs Enforcement—among other engaging speakers.⁸ These accomplished professionals command the students' attention, break up the semester, and help place the world of federal law enforcement squarely before the students. If you have organized your syllabus around your jurisdiction's enforcement priorities, I suspect you will find that students are particularly enamored with these speakers.

Second, consider offering the students additional opportunities to participate in class. Several years ago, I began a "student presentation series" in an effort to reduce student stresses associated with having their grade solely determined by the final exam. The presentation series, which is wholly optional, provides a pair of students per presentation with the opportunity to lead the class in a review-like discussion after we complete blocks of material. In leading the discussion, students are encouraged to present relevant newspaper articles detailing cases wherein the defendant was charged with the same crime we just covered in class.

Finally, consider time for "the news." At the beginning of the semester, I make this offer: email me any news article you encounter that addresses a class-related topic and I will make time for us to discuss it in class. I have found this offer beneficial for a number of reasons. To begin with, it enhances student buy-in. But it also helps to keep *me* current. Students invariably encounter fascinating

665, 667 (2008) (defining "crimmigration" in part to mean "the confluence of immigration and criminal law").

⁶ *Padilla*, at 376 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.").

⁷ *Cf.* Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1415 (2011) (asserting that *Padilla* will at least "modestly improve the legal representation" that defendants receive).

⁸ We have also enjoyed hearing from speakers who work as agents with the ATF and the DEA. Although I do not discuss it above, I might also suggest a field trip to your local federal courthouse; students tremendously enjoy seeing how what they are learning works inside the courthouse walls.

federal investigations that I am not familiar with. Moreover, it helps consistently illustrate to students how relevant the materials we study are on a day-to-day basis.

III. ANY OTHER THOUGHTS?

Yes, I am glad you asked. This class *moves*. What I mean is that the state of the federal criminal law is constantly changing—more so than any other course I teach. That can understandably make things difficult on casebook authors. When that happens, supplements to the casebook are published and a revised casebook is sure to follow shortly thereafter. In my experience, students hate supplements. Casebooks are, in their defense, expensive enough already.

I therefore do two things each time I teach the course. First, I provide the students a statutory supplement that includes every crime we will study that semester. In it, I highlight language in the statutes for the students in an effort not only to draw their attention to the relevant buzzwords, but also to get them wondering why *that* language gets highlighted. After the statute's text, I also provide to students a list of the elements of the crime—something I spend a lot of time on in class. Trial courts of course always instruct juries that the prosecution bears the burden to prove each *element* of a crime beyond a reasonable doubt.⁹ Given that students are often justifiably confused about what constitutes an “element” of a crime, this seems to be time well spent.

Second, I provide students a readings supplement. I never ask them to purchase a casebook's supplement. I prefer to do the work myself excerpting the new relevant cases or statutes, rather than to ask them to spend additional money. Students appreciate this effort but, more importantly, putting that extra work in allows me to make choices that perhaps the casebook authors did not make. Leaving in or deleting a case later becomes that much easier.

CONCLUSION

The federal criminal law course is simultaneously a pleasure and a challenge to teach. Throughout the semester, I still find myself astonished by the power of the federal government and amused by the wide array of colorful defendants. For their part, students often are shocked by the reach of federal jurisdiction alongside the power of federal drug mandatory minimum sentences. Collectively, the experience of teaching a federal criminal course differs from so many other law school courses that focus on the criminal law. I hope my musings on teaching this subject help you in some small measure to enhance your course.

⁹ See, e.g., *Burden of Proof, Connecticut Criminal Jury Instructions 2.2-2*, JUD.CT.GOV, <http://www.jud.ct.gov/JJ/criminal/part2/2.2-2.htm>; *Information, Plea and Burden of Proof, Utah Criminal Jury Instructions CR102*, UTCOURTS.GOV, http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=all_crim (last visited July 30, 2013); *Standard Criminal 5(b)1: Burden of Proof*, ARIZ. CRIM. JURY INSTRUCTIONS 16-17, http://www.azbar.org/media/58832/2-standard_criminal_revised_2013.pdf.