

## A Criminal Law Atheist Teaching in the Seminary

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I am a non-believer when it comes to criminal law. In the context of early twenty-first century America, the traditional legal doctrines of substantive criminal law don't usually make a difference for defendants, for victims, or for society at large. Common Law or Model Penal Code, Objectivist or Subjectivist, Retribution or Incapacitation—take your pick, it doesn't matter. The machinery of criminal justice churns away, giving us eye-popping incarceration rates without much public safety or social cohesion in return. The capacity to constrain the state's power to punish, which I contend is central to any effective body of criminal "law," is nowhere to be found in today's typical criminal code or in the routine operation of the criminal courts. Once a prosecutor identifies an activity that might threaten public safety, it is possible, given enough time and resources, to punish that activity.

I will concede that criminal law doctrine makes a difference in some individual cases. The requirement that the state prove every element of a crime beyond a reasonable doubt may erect some temporary barriers to a prosecution. But if proof of one crime proves inconvenient, legislatures know what to do. They criminalize precursor conduct, such as the possession of "tools" to commit the authentically harmful crime. The real drivers of criminal justice are legislators, who do not give a fig for the insights of the common law or the earnest rationality of code commissions.

Constitutional doctrines—one potential way to limit the legislature's power to create new crimes that bypass the inconveniences of traditional proof—are anemic. Nor do the purposes of criminal law present any realistic boundaries. Any competent practitioner of criminal law can explain how virtually any proposed criminal statute serves at least one of the classic purposes of the criminal law.

My non-belief creates an awkward moment when the Associate Dean knocks on my office door every spring, asking how I can contribute to the core curriculum during the next academic year. How can an atheist agree to teach students in the seminary? Particularly in their first year of legal studies, when students form their beliefs in the rule of law while learning practice-related skills, should they be hearing from me?

I tell the Associate Dean that I can teach Criminal Law to the entering law students, but only if I teach the course with a frank emphasis on the legislative process and the lawyer's use of statutory language. Torts, Contracts, and Property

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teachers will give the students all the necessary skills in reading cases and reflecting on how judges create legal change and shape public policy. Those skills or insights don't matter in the criminal law realm, where judges are ciphers.

Successful law school courses deliver both lawyering skills and larger insights about the law. In criminal law, the key legal skill requires the future lawyer to work well with the raw materials that the legislature provides. More specifically, skillful lawyers can select the best available statute. Lawyers must predict the facts likely to be proven at trial and then must ask which of the potentially relevant statutory sections will likely form the basis for criminal charges.<sup>1</sup> The purposes of the criminal law figure into this selection of the statutory tools. The skillful lawyer should also consider the odds of conviction, the available punishments, and the other cases competing for the prosecutor's limited time.

As for the larger insights that flow from the course, the deepest understanding in criminal law happens when students learn the habits and incentives of the legislators. My greatest hope for the students is to understand how legislators think when they create the raw materials of the criminal law. Maybe they can even sympathize with a legislator's dilemmas.

A distinctive exercise during the semester helps students appreciate the typical influences on legislators. A few weeks into the semester, I divide students into groups of about twenty and convene them for a two-hour meeting (outside of the usual class schedule) as a state legislative committee. In preparation for this committee meeting, the students read a handful of existing statutes on a criminal law subject that I choose, along with some academic commentary in the field. In some years, the topic might involve the substantive coverage of the criminal law, such as a proposed reform of rape laws in the state to address the elements of force, resistance, lack of consent, and *mens rea*. In other years, the topic might involve the authorized punishments for a collection of crimes, such as the penalties for the sale of crack cocaine, powder cocaine, and marijuana.

I assign two students within each group to lead the group discussion. These group leaders do not need any special knowledge of the topic; their task is to promote a respectful discussion, ending in a series of committee votes. Meanwhile, I take the role of staff attorney for the legislative committee. The background reading tells the legislators that they must, at the end of their two-hour discussion, instruct the staff attorney about how to draft the statutory language that will form the basis for the committee's final vote at a later meeting (a meeting that never actually happens). The reading package flags for the students the roughly half-dozen issues that the committee must resolve before any more detailed drafting can go forward.

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<sup>1</sup> Paul Robinson has written a criminal law text that emphasizes the application of typical blameworthy actions to a range of common criminal statutes. It pushes appellate opinions to the periphery, and spotlights the interaction between a lawyer and a collection of statutory tools. See generally PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* (3d ed. 2012).

The actual state statutes that appear in the reading packet frame all of the voting issues. For each issue, I ask the group which aspects of the existing statutes appeal to them and why. I also point out those times when policy trade-offs are involved, or where drafting dilemmas (such as over-inclusiveness versus under-inclusiveness) are present. I also make it a point to ask the legislators where they have obtained the relevant factual information to support their positions. This session prompts the students to reflect on the typical political influences on legislators and the sources that lawmakers use as they describe current reality, and estimate the real-world effects of a new law. The students vote on each issue, and I sum up by describing the outlines of the law they have directed me to write for them. During the next meeting of the entire class, we debrief the work of the committees, with special emphasis on the ways that the groups differed from one another.

This legislative committee meeting pays dividends for the rest of the semester. Suppose that a later discussion of a criminal statute raises the question, "What purposes were the legislators trying to accomplish?" At that point, I can refer back to the committee meeting and ask, "What mattered to you as you revised the drug penalty statutes?" When we talk about the empirical or normative assumptions built into a criminal statute, students now have an educated guess about what occurred in the legislature. The experience of drafting a new law, meant to interact with other statutory sections on a difficult topic, informs all of the students' later discussions about the internal coherence of criminal codes. The exercise brings to life the long-term trends in the criminal law and reveals just how little constitutional law and judicial preferences matter to these trends.

Through an emphasis on the legislative environment, a non-believer in judicial principles of criminal law still has something to teach students. Such a course draws little from moral philosophy and leans more heavily on political science, economics, history, and sociology. These lessons about our life in the law remain true, even for a criminal law atheist.

