

## UVA LAW | Criminal Justice at UVA Law

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JOSH BOWERS: Welcome to the Criminal Justice Panel. Welcome to law school. Congratulations on your success.

My name is Josh Bowers. I am a professor here. I teach mainly criminal law and criminal procedure classes. I also teach them other courses as well, occasionally constitutional law. Every year I teach a seminar with my colleague Charles Barzun called Rule of Law and Threats to It.

In my former life, I was a public defender at the Bronx Defenders-- Holistic Defender Office, obviously in Bronx County, New York. Sounds a little bit like a superhero outfit, but we kind of thought of ourselves that way. And before that I was a white collar defense attorney for a year at a boutique white collar defense firm in Midtown Manhattan. So, you know, I'm happy to talk to you guys about private side defense work, indigent defender work, and criminal justice more generally.

And actually that's what we're going to talk about today, obviously, is criminal justice-- oh, also I should mention I am formerly co-director and still faculty advisor of the program in Law and Public Service. I don't know if any of you guys just came from Crystal Shin's panel, but I've worked for a long time with the public interest program, the Law and Public Service program, and, informally, with other public interest efforts at the law school. So I want to talk to you today about what it's like and what you can expect when it comes to studying criminal law and criminal justice at UVA law school.

So what you're definitely going to study, almost no matter where you go to law school, because it's pretty much a core requirement for 1Ls at any law school in the country, is what's called substantive criminal law. This is the 1L criminal law course, the required 1L criminal law course. And what you can think of it as is the what of criminal law. What do we punish? The substance of crimes, that's why it's called substantive criminal law.

And to some degree it's how we go about making criminal law. And to put that simply, criminal law is somewhat special when it comes to first year courses, because it's your one opportunity to engage in the legal skill of statutory interpretation. And there's good reason for that.

So contracts and torts and property may be dictated by what's called common law, by judicial decisions, by kind of reading the judicial tea leaves. Criminal law is not like that-- or it's not entirely like that. There's still a common law element to it, there's still interpretive elements, but interpretation of what? Of written statutes.

And the reason for that is we want to be especially careful before bringing down the hammer of the state. Bringing down this-- all law has effect on people's lives, but only one body of law carries the stigma and the hard treatment of criminal punishment. So at least ostensibly we're supposed to be careful with that.

Now what statutes are we looking at when it comes to substantive criminal law? At pretty much any so-called national law school, what you are looking at is not exclusively the body of law local to that particular law school. So yes, we will touch on Virginia statutes, but we will not look exclusively at or even predominantly at Virginia statutes. We'll look for national trends, minority trends, majority trends, and that's to prepare you to practice criminal law just about anywhere.

The other big box of crim law related courses, beyond substantive criminal law, is what's called criminal procedure. Really, the how of how crim law actors, how the stakeholders, how the professionals do their work. The police officers, the prosecutors, the defense attorneys, and the judges. And this class in turn separates-- not class-- this box in turn separates into kind of two halves of classes.

Criminal procedure classes that focus on investigations, pejoratively called, cynically called Cops and Robbers-- how police officers do their work. And the other half is called Adjudication, pejoratively called Bail to Jail, as if those are the only two things that can happen, right? And Adjudication what we're really talking about is principally constitutional regulation of the work of defense attorneys, prosecutors, judges, whether at trial, the lead up to trial, or plea bargaining. We look at the constitutional regulation of plea bargaining. And for that matter, I teach an upper level seminar called Plea Bargaining, which focuses exclusively on that practice.

The normative dimensions of it, its problems, and the practical implications. And then Investigation's really interesting class. Focuses also on constitutional regulation, [? in care ?] of the police. Fourth Amendment, searches and seizures, unreasonable searches and seizures. It's fascinating material and extremely meaningful and important, because it has real world consequences that you guys are well aware of.

Look no further than a debate about Black Lives Matter movement. These are the cases that bubble up into the public consciousness. Likewise, Fifth Amendment regulates the conduct of police officers. Think about Miranda, which you guys are probably already familiar with the Miranda warnings, right? OK.

When you're taking criminal procedure, you can either take-- the doctrinal course as opposed to the upper level seminars, which you can also take-- you can either take the three credit Investigation class all by itself, dealing with the constitutional regulation of the police, the three credit Adjudication class all by itself, dealing with what happens after arrest, really from charge all the way up to adjudication to disposition, or you can take both of these three credit classes for six credits, or you can take a class that I teach, the four credit Criminal Procedure Survey, which includes some of both sides. Some of both halves.

What else do I want to say about Criminal Procedure-- I mean, at the end of the day when you're talking about criminal procedure you're talking about the rules of what makes a fair process, or at least what's supposed to make a fair process. But even that turns into this debate about what is fairness? Is it right treatment, or is it accuracy?

Is it OK that you had a sleeping lawyer because you were guilty anyway? Or do we say no, there's just something wrong, something ineffective. It's a right to counsel doctrine, and ineffective assistance of counsel. There's something ineffective about not having that advocate zealously advocating on your behalf throughout the trial, independent of whether you're actually guilty of the crime or not.

And at a higher level of abstraction, whether we're talking about criminal procedure or we're talking about substantive criminal law, for that matter-- any public law course, what we're ultimately talking about is the balance between individual liberties, whether that's liberty, whether it's right to self-determination, autonomy, whether it's equality, whether it's dignity, and public safety and order. And the state's claim, if it has that claim, to that particular regime of social order it's pursuing. That is to say, when is the state our friend, giving us benefits and subsidies, versus when is the state a threat to us. This is core to all public law courses, but it's especially profound when we talk about criminal law and criminal procedure.

What do our enforcement and punishment practices have to say about us, about who we are as a people? With that grand charge behind us, I just-- a little more on the nitty gritty, the nuts and bolts. So you've got Substantive Criminal Law during your 1L year. You've got Criminal Procedure which you can take as an elective at any point throughout your time here, or not at all, if you if you decide that criminal law was enough, but especially Investigations, very rich, very interesting materials. Beyond that there are lots of upper level seminars on crim theory seminars, crim procedure seminars, substantive criminal law seminars, seminars on affirmative defenses, seminars on social science and the law.

Professor Harman's class, Law of the Police, which has become something of a novel-- sorry, national model. Kim Ferzan is one of the foremost crim theorists in the country. You take a practical class, like my Plea Bargaining class, or you can take an experiential class, like the Prosecution Clinic, the Defense Clinic, the Criminal Defense Clinic, or for that matter, the Innocence Clinic. And there are ways to get involved in criminal justice even without-- or even before you get up to 2L and 3L year where you're doing clinical work.

So for instance, you can become a part of a pro bono project during your 1L year. In addition to a bail reform project which I've been involved in-- bail reform is extremely topical issue in criminal justice right now. I'm also a member of the civilian review board for the city of Charlottesville. And in both capacities I've sort of set up my own mini pro bono projects and brought 1L students into those efforts.

And there's lots of opportunities like that. There's the externship program. I don't know if you guys are going to go to the externship panel, but a number of the externships are in the criminal law domain.

Even our Supreme Court clinic, it's not exclusively about crim cases. But more often than not it seems like when cert is granted to the Supreme Court clinic, when they get to argue and briefs their cases before the Supreme Court, it is for crim law cases. They get cert granted on crim law cases, and we just got a really exceptional crim law faculty at this law school. I mean, my colleagues are really my heroes because they're not just exceptional in the sense of scholarship, they're really excellent teachers who care about their teaching a lot.

And I don't mean to badmouth any law school in particular, but I've been affiliated with several law schools, some of which care more about teaching, some of which care less. This is a law school that cares a lot about teaching. It doesn't mean that every teacher you have while you're here is going to be a great or an exceptional teacher, but everyone's going to bring it. Everyone's going to try.

And that's really valuable. That's really valuable. I mean, that's what helps build a community.

So people like Anne Coughlin. I co-teach with her sometimes, and I'm just in awe. She's an amazing teacher. I'll give you a list of the names of people working in the crim law domain here, and I'm sure many leave some people out, but John Monahan, social science and criminal law.

Barb Armacost, John Jeffries, who's currently working on [? Main ?] Grounds, but will come over, I'm sure, to teach a class or two every now and then. Richard Bonnie, who just about wrote the book on insanity. Daryl Brown, a public defender like myself. Rachel Harmon, a leading scholar when it comes to regulation of police practices, and Coughlin who I just mentioned. Likewise, Kim Ferzan, who I also mentioned, as a really prominent crim theorist.

Since Criminal Law is the course you are all going to take, and you're going to take it soon, almost wherever you go to law school, I thought I'd talk a little bit about that course in particular and what you can expect from it. I mentioned that it is a statutory course in orientation. One of the things you take up almost immediately when it comes to criminal law is the purposes of punishment itself. Why do we punish?

And these purposes often break in two different conceptual frameworks, but typically break into four categories: retribution, deterrence, incapacitation, and rehabilitation. In a nutshell, retribution is-- some people frame it as an eye for an eye. But what do you deserve? Let's get even with this person for doing this bad thing, the socially costly thing that he or she did.

Deterrence is not so retrospective, it's more prospective. Retribution's looking back at the conduct you did and saying that conduct was blameworthy, for X, Y, or Z reason. Deterrence is saying well, let's look forward and try to minimize the chance that this happens again, by teaching that person a lesson and by expressing that lesson to the rest of the community. To say if other people behave like this, you are going to face the same sets of consequences.

Incapacitation-- I'll give you a cartoonish version of it. It's actually more sophisticated than this, but sort of says, well, OK, we can try to teach people lessons, but the best way to make sure people don't do something again is just to lock them up. And it's more sophisticated than that-- and then rehabilitation is saying wait, no-- it's both looking backwards and forwards, saying there's a reason why this happened and we can sort of fix what ails this person to make sure it doesn't happen again. So it's something closer to a public health approach than a blame and shame approach. Drug courts might be a modern instantiation of a rehabilitative criminal justice model.

We talk about the different purposes of punishment, and we also talk about the crime definition process a lot, which I already sketched out to you. Statutory in nature. You might say-- again, we touched a little bit on why, but it's basically that the touchstone of the principle of legality. The rule of law as applied to criminal justice.

The touchstone is publicity and precision, what's sometimes called notice and standards. This idea that the stigma and hard treatment of criminal justice demand that we make especially clear to you at the front end what is prescribed so you can plan your life accordingly, and that we rein in-- we limit-- the ability-- now, discretion still exists in our criminal justice system, but to the extent possible, we rein in that discretion by putting in place criteria or standards for enforcement and punishment. The rules of the game for the police, the prosecutors, the defense attorneys, and the judges.

And then we move on to the basic elements of any crime. When we talk about the basic elements of any crime, you may have some familiarity with this where you say, OK, well, the elements of burglary are breaking or entering a building with intent to commit a crime therein. Yes, those are the specific elements of burglary. But at core the elements of crime-- crime must contain elements that fall into two camps, and we kind of need both of these camps.

So I think you guys already intuit the answer to this, so let me just ask you a question. My 15-year-old daughter used to be a very neurotic kid, and when I first got here she was about five years old. I'd sort of watch her express some of her anxieties, and one of her anxieties was she would say something like this to me. She's rule bound kid, too. She'd say-- less so now as a 15-year-old, but that's just that's the passage of time-- but she would say, "I'm worried I've done something wrong, because I was thinking about hitting my brother."

And what do you think our question for her-- what do you think the follow up to that was? What do you think we said? She said I'm just thinking about hitting my brother.

Yes! Did you? Did you do it? Did you do it? Did you engage in conduct?

This is core to criminal law. We don't-- or at least we're not supposed to-- punish people for just their bad thoughts. Even their bad resolutions. It's their bad actions. We need to have some amount of activity. You might say, well what about attempt, what about uncompleted crimes?

Significantly, even for an uncompleted crime, we demand that you took steps in the direct-- what some have called substantial step, or an overt action in furtherance of the crime. It's not enough that you just said I am set on doing. It's not enough that you wrote it in your diary and said I'm going to do this. Conduct is required for criminal punishment in a small liberal criminal justice system, a criminal justice system that hews to the rule of law.

Now something else she would sometimes say is-- she'd get troubled by the differences between-- or she didn't see the differences between a lie, and a joke or a story. She's sort of saying but these things didn't happen, and I'm saying they did. Aren't I lying? What would you say to her there? How has she not?

Yeah, exactly. Now you're actually taking one of the mens rea terms of criminal justice, which is malice. But yeah, it's enough to say in colloquial terms the intent is different as between the two. Your mind state is different as between the two.

What's called your mens rea is different as between the two. In one instance, you have an intent to deceive. That's what makes it a lie. In the other instance, you have an intent to make someone laugh or entertain them. That's a different form of intent, and one intent is worthy of criminal punishment, and one intent is-- or may be worthy of criminal punishment, and one intent is not.

So it's not just-- and this is a term often used in old criminal law-- it's not just the evil doing hand, it's also the guilty mind. Oliver Wendell Holmes said-- I'm paraphrasing here, something along the lines of even a dog can tell the difference between being kicked and stumbled over. The conduct ultimately may be the same, and even the harm may be the same. The dog may be just as physically injured by the stumble as opposed to the kick, but the kick is intentional. What old criminal would call malicious, right?

Now it could be that there is room to criminally punish even the stumble. Perhaps the person-- this is the dog's domain, and the person is recklessly running about this domain in a dangerous manner. We might say that that kind of mind state, recklessness, is also worthy of criminal punishment, but that's exactly the point. And that's what we drill down to.

There's lots of different types of mind states that could be coupled with lots of different types of conduct. The intention or purpose, knowledge, recklessness, negligence-- is negligence sufficient for criminal culpability? This is a big point of controversy. Then we also explore these weird, kind of idiosyncratic corners, major points of controversy-- where, notwithstanding everything I just said, the criminal law says in certain small circumstances we're going to have what's called strict liability crimes, or strict liability elements. We're going to remove this typical core requirement, and that's what these typical core requirements are, conduct and mens rea.

So one more in that vein. I remember my daughter once, who wandered through the

neighbor's yard. Allowed to do so, not trespass, the neighbor had given permission. But it was a summer day, dewy grass, grass stuck to her shoes.

And I saw her swatting at the grass on her shoes. And I said, "What's the matter?" And she said, "I stole their grass." And-- you know-- one might-- so OK, play defense attorney before you've even gone to law school. What would your defenses be?

What does she lack? Why is this almost comical to our ears? Yeah!

**SUBJECT 1:** She was just walking.

**JOSH BOWERS:** Yeah, how do we-- yeah!

How do we define larceny? Larceny, stealing, is typically defined as taking property of another-- that's the conduct, yeah, she did it, you might say. She'd have a de minimis defense, because the conduct was such a trivial nature, whatever. There are diminished-- but the better defense is on the mens rea front.

Taking property of another-- larceny's taking property of another with an intent to permanently deprive. She had no intent to do so. In fact, she was trying to make up for it, even though I'm sure the neighbors are like just go, we didn't want the grass clippings anyway. So don't worry, you're performing a service.

Then toward the back half of Substantive Crime-- Substantive Criminal Law, different professors do it differently, but for me it's the back half, we start taking up defenses. And some of these defenses have to do with just the inverse of the mens rea requirement, saying certain defenses that demonstrate that mens rea, that the guilty mind, is lacking. So a famous case, a Green case out of Texas. Green goes out on the range, and he brings home a bunch of hogs, and the police arrest him because they say those weren't your hogs.

And he said, yeah, you're right, they're not my hogs, but I thought they were. So he's offering what's called a mistake defense, right? Now one question is, is his mistake genuinely held-- that is to say is it honest-- but let's assume that it was honest-- then we say, when is a mistake sufficient?

Well, sometimes if it's merely honest, sometimes it has to be honest and reasonable. From there we move on to affirmative defenses. These are things you might be familiar with from movies and TV and from popular accounts in the media.



Affirmative defense of excuse is insanity. In affirmative defense of justification, one of them is self-defense. So we take up those questions as well.

All right, so that is Substantive Criminal Law. We are now pretty deep in. So I could talk more about Criminal Procedure, but I think I'll just open it up to questions instead. These can be questions about anything. It don't have to be about Substantive Criminal Law. It can distributed by publicly interest opportunities having to do with criminal justice at the law school.

**SUBJECT 2:** So back to the pro bono thing you were talking about earlier. I kind of have this problem [INAUDIBLE] I live in a big city, and I think pro bono for big city schools-- it's easy to find [INAUDIBLE].

**JOSH BOWERS:** Yeah, so-- I was actually talking about this with a student at the end of the last session as well. So there's trade offs, right. So the obvious plus at a big city is that there-- a place like New York-- lots of different public interest organizations within a stone's throw. But the law school may not have a deep or meaningful relationship with any of those civil or criminal legal service offices.

By contrast, we've got the Legal Aid Justice Center in Charlottesville, which is one of the premier civil legal services offices in the country. Does some criminal related stuff as well. And they're all-- well, not all-- a great number of the lawyers there our former graduates. They help us run our clinics. I'm on their board, my wife works there. We've got an intimate connection with not just LAJC but some of the other offices in the city, because it's a smaller pond but all the fish know each other.

And so that actually leads to-- I almost feel like it leads to the ability to have this kind of pro bono experiences right away without getting lost in the crowd. And frankly, we also have an externship program, full time and part time externships and other metropolitan areas nearby. So lots of people do a part time externship with a office in DC or in Richmond, and they're still coming back to do their classes here.

I'll just say this. For a college town we have an outsized number of two professions, and I'm looking at Warren when I say this because we're mutual friends with one group of these people. I feel like there are a lot of architects here, because everyone's like oh, the Jeffersonian vision. You know, Jefferson was an architect, I'll be one, too, and I'm going to stay here.

And there's lots of lawyers here. There are a lot of lawyers working locally here. All of whom we are intimately familiar with and we have good relationships with.

Just a couple days ago, I was sitting in the office of Joe Pletena, our commonwealth attorney. He helps run our prosecution clinic, and he was talking to me about a number of my students, and he was talking about the pro bono project I was running through the civilian review board and ways he could set up more pro bono opportunities at the commonwealth attorney's office. It works out well for us, but there is that tension which any law student should think about. More offices but less of a relationship, or fewer offices and more of a relationship.

**SUBJECT 3:** Is the [? Hunton-Andrews ?] current partnership in Richmond or Charlottesville?

**JOSH BOWERS:** I don't know, because Hunton-Williams has offices in both places, and so I don't know if it's local to one or it could be either. Likewise, LAJC has an office in Richmond, Charlottesville, and northern Virginia.

**SUBJECT 3:** So-- sorry, do you guys interface at all with SARA or the Shelter for Health and Emergency here?

**JOSH BOWERS:** I'm sorry, can you say--

**SUBJECT 3:** Do you guys interface with SARA or the Shelter for Health and Emergency here?

**JOSH BOWERS:** Oh, yes! At first I thought you were saying Sarah, as in a person named Sarah. I was like, I know lots of Sarahs. Yeah, yeah.

**SUBJECT 3:** That's Sexual Assault Resource Agency.

**JOSH BOWERS:** Yeah, and CASA nearby. It's not just LAJC, so thank you for supplementing that. The Public Service Center and Kimberly Emery is our pro bono coordinator can give you has a wealth of information about-- I know some of the crim related stuff that I have helped students-- I've been a liaison for students. Those organizations, or those opportunities. But Kimberly Emery and Annie Kim-- or for that matter, Crystal Shin can give you a more whole picture.

**SUBJECT 4:** How many crime law students would you say are you some aspect of experiential learning, whether it's clinics or externships. How many law students are given that opportunity?

**JOSH BOWERS:** Everyone's given the opportunity. Which opportunity-- you know, it may be my wife runs special ed pro bono project year after year. And some years she'll get 10 applicants for six or

seven spots, and she'll have to make some hard decisions. But there are other pro bono opportunities for those three or four students. Other times she'll get six applicants for seven spots.

So there's lots of opportunities. In terms of how many students take advantage of those opportunities, I think students who are interested in crim practice, whether it's prosecution or defense, have a good sense that they really should do that kind of work right away. And I think that's the right approach, so I feel like every student I talk to who's interested at least in being a prosecutor or a public defender or otherwise doing criminal justice reform or something criminal law related straight out of graduation or a clerkship, they're seizing those experiential opportunities, whether it's extracurricular pro bono project, or curricular, like clinical offering, they're seizing those opportunities while they're here, and they should.

And this is actually something I said during the last [INAUDIBLE]. I think it's especially important if you're interested in criminal law and you think you may end up going to a firm for a couple of years, you want to build that crim law resume now. Because you do not want when you're essentially transitioning away from a firm into the job that-- this has been my dream job since I went to law school, whether it's prosecution or public defense, what have you-- you don't want it to look to an employer like you're just sick of your firm. You want to convey through your resume the idea that this has always been my plan, this has always been my goal.

Are there other hands? Have we run-- yeah, we're over. Yeah, you're like of course we have no more questions, we want to go eat lunch.

Thank you, guys. Welcome to UVA. I hope you choose it. If you have any questions, follow up with me. You can contact me also about just the Law and Public Service program if you want, because like I said, I've been a part of that program for a very long time. Thank you.