

PHI 513 Spring 2021: Philosophy of Criminal Law: Non-Ideal Theory

Gideon Rosen

Thurs. 10:00 – 12:50,

In person: Louis Simpson A71

Via Zoom: <https://princeton.zoom.us/j/97147597454>

Unlike most agencies of the state, the criminal justice system does what it does by harming and threatening harm to citizens, and so calls for special justification.

The standard approach to this problem in the philosophy of law is of a piece with general political philosophy in the grand tradition. It abstracts from the real history and sociology of the criminal justice system in (say) the United States in 2021 in order to ask how a coercive practice of this sort can be justified *in principle*, as if we were starting from scratch.

This approach is potentially powerful, both for theoretical purposes and as a guide to reform. The standard theory aims to articulate the moral constraints on criminal justice in any liberal state, and has no trouble recognizing illegitimate criminalization, police brutality, procedural unfairness and barbaric punishment as the wrongs they are, since these would be wrong under any circumstances.

The question for the class is whether this approach is adequate to the present moment. It is one thing to show how a system of criminal justice might be justified in principle; something else to show how what a fully justifiable system would be for us, given our history. The standard approach focuses on the moral constraints on law enforcement and punishment *as such*, regardless of background conditions. But in a society with a history of state-sponsored racial subordination and its lingering effects, law enforcement and punishment have features that they would not have in other circumstances. (In a society with no history of racial injustice, there might be nothing wrong with racial profiling, since police with limited resources need to restrict their searches somehow; in our world, racial profiling has a social meaning and social consequences that make it harder to justify.) The organizing question is whether our story about the justification of the criminal justice system needs to change when we take these aspects of the real world into account.

The plan for the class is first to sketch the standard approach and then to ask about its blind spots. We'll focus on issues of pressing concern: the use of force in policing, racial profiling, mass incarceration and the prison abolition movement, and also on more abstract questions about whether historical and ongoing injustice undermine the standing of the state to punish. One persistent theme will be the idea of social meaning. Punishment and other law enforcement practices convey a message, and their justifiability depends in part on the message they convey. But what is it for a sprawling social practice to have a "meaning", and how does the meaning of a practice bear on its justifiability? Another (related) theme will be tensions in the progressive critique of the standard theory. It's a familiar point that a political movement that calls for prison abolition and defunding the police also calls for the arrest (presumably by the police) and punishment (presumably in prison) of cops who kill. This points to a deep ambivalence about punishment and law enforcement on the left. Another aim for the class will be to ask how this sort of tension might be resolved.

What follows is a provisional partial syllabus. The content of the class will be shaped in large part by student interest, so expect significant revisions as we go along. Most readings are on-line; I'll make pdfs available of those that aren't.

Princeton philosophy students who wish to receive a unit for the class should plan on doing a brief presentation and writing a term paper by June 1. Students from other departments who need a grade should talk to me.

Philosophy of Criminal Law (PHI 513) Syllabus

Part 1: Ideal Theory

Session 1: Problems for a theory of criminal law

Hart, "Prolegomenon to the Principles of Punishment"

Tadros, *Ends of Harm*, chapters 1-2.

Session 2: Retributive Justice and the social meaning of punishment

Hampton, "Righting wrongs: the goal of retribution"

Tadros, *Ends of Harm*, chapters 3-5

Optional: Berman, "Rehabilitating Retributivism"

Dagger, "Jean Hampton's Theory of Punishment"

Session 3: The right to punish and the self-defense analogy

Tadros, *Ends of Harm*, Chs. 12-13

Optional: Bronsther, "The Corrective Justice Theory of Punishment"

Thomson, "Self-Defense"

Bolinger, "The Case for Conventional Defensive Permissions"

Part II: Non-Ideal Theory

Session 4: Racial injustice in the criminal justice system: history and sociology.

Alexander, *The New Jim Crow* (chapters)

Western, *Punishment and Inequality in America* (chapters)

Ralph, *The Torture Letters* (chapters)

Young, “Political Responsibility and Structural Justice”

Session 5: Political Legitimacy and Standing to Punish

Shelby, *Dark Ghettos*, chapters 6-7

Lacey and Pickard, “Why Standing to Blame May be Lost but Authority to Hold
Accountable Retained: Criminal Law as a Regulative Public Institution”

Optional: Murphy, “Marxism and Retribution”

Session 6: Justice in Policing

Kennedy, *Race, Crime and the Law*, chapter 4

Husak, “Policing and Racial Discrimination: Throwing the Baby out with the
Bath Water”

Session 7: Justice in Sentencing

Bronsther, “Long-Term Incarceration and the Moral Limits of Punishment”

Session 8: Mass Incarceration

Ciao, “Mass Incarceration and the Theory of Punishment”

Darwall and Darwall, “Criminal Process as Mutual Accountability: Mass
Incarceration, Carcerality and Abolition”

Session 9: Prison Abolition and Alternatives to Incarceration

Davis, *Are Prisons Obsolete?*

Macleod, “Prison Abolition and Grounded Justice”

Optional: Shelby, new ms.

Sessions 10 – 12 TBD

