

Topics in the Philosophy of Law: Punishment

1. *Tuesday, September 2* OVERVIEW

The syllabus is divided between readings from the seventeenth century and more contemporary sources. The older authors were interested in questions about who had the authority to punish. Can private individuals punish? How does the state get its authority? They were also interested in the relationship between two forms of political violence: punishment and war. The more recent authors are primarily concerned with whether punishment can be just to the person who receives it. Their theories of punishment are meant to address this concern.

Early Modern Theories

2. *Thursday, September 4* GROTIUS'S PROJECT

Grotius lays out his project and his understanding of the terms "war," "right," and "natural law" (Grotius 2005, 75-108, 133-56).

3. *Tuesday, September 9* GROTIUS ON WAR AND AUTHORITY

In chapter 2, Grotius argues that war can be justified. In chapter 3, he discusses a distinction between public and private war; this is where he lays out his account of the authority of the state (Grotius 2005, 180-89, 240-77). These are both relevant to our questions about punishment. Punishment, like war, involves violence. And it is a live question for Grotius whether private individuals as well as public officials have the right to punish.

4. *Thursday, September 11* GROTIUS ON PUNISHMENT

Today we will talk about Grotius on punishment, both within a state and as a cause of war (Grotius 2005, 949-76, 1018-25). I am particularly interested in the way he separates two questions: "why is punishment not unjust to the person who suffers it?" and "why does anyone have the right to inflict punishment?" I am also curious about the relationship between the private right to punish and the public right to punish (see p. 1021, e.g.). This is a topic that will come up again, as Hobbes seems to have held that individuals could not possibly have the right to punish while Locke thought the right of punishment was fundamentally held by private individuals.

5. Tuesday, September 16 HOBBS'S MORAL THEORY

We will go over the fundamental parts of Hobbes's moral theory (Hobbes 1993a, selections). In chapter 13, he claims to show that those who live outside the state would be at war. In chapter 14, he introduces some moral concepts: natural right and the law of nature. We will be especially concerned with the inferences he draws from the right of nature. The right of nature is the right to preserve your life. He argues both that this expands to the right to all things in the dangerous state of nature and also that it cannot contract so far that one would be obliged to submit to punishment. (If you have your own edition of Hobbes's *Leviathan*, you can read chapters 13-14. I am going to post edited versions of those chapters on Sakai.)

6. Thursday, September 18 HOBBS ON AUTHORIZATION

Hobbes's discussion of authorization is maddeningly terse (Hobbes 1993a). We will pull it apart and show just how much he did in only a few pages. (This is *Leviathan*, ch. 16.)

7. Tuesday, September 23 HOBBS'S SOCIAL CONTRACT

The state's power comes from the social contract. We want to know both what powers the state gains in the social contract (ch. 18) as well as what liberties the subjects retain (ch. 21) (Hobbes 1993a, selections).

8. Thursday, September 25 HOBBS ON THE RIGHT TO PUNISH

I want to look very carefully at a few paragraphs in Hobbes (Hobbes 1993a, ch. 28, ¶1-2) and one of his critics (Hyde 1676, 38-41, 86-87, 138-43). I want to pay special attention to the meaning of the term "right" in "right of punishment." Does Clarendon mean the same thing as Hobbes does in using that term? Does Hobbes consistently mean the same thing in his paragraphs? As you might have guessed, I think the answers are "no" and "no." So the trick is to do something neither one of them did: spell out what the term means in their arguments.

9. Tuesday, September 30 GAUTHIER ON HOBBS

Gauthier thinks that Hobbes's account of the right of punishment cannot work; he proposes an alternative that he believes would be more successful and is at least in the spirit of what Hobbes was trying to do (Gauthier 1969, 120-26, 146-49). Gauthier's criticism rests on an understanding of how authorization works for Hobbes, namely, it extends rights from one person to a representative. I do not think that is how it worked for Hobbes, though.

10. *Thursday, October 2* HOBBS ON PUNISHMENT AND HOSTILITY
The rest of Hobbes's chapter on punishment is driven by a pair of distinctions between punishment and hostility and between enemy and subject (Hobbes 1993a, ch. 28, ¶13-end). I want to talk about why this distinction would have been important for Hobbes. Why does it matter whether the sovereign treats someone as an enemy or a subject? That is really two questions: why does it matter for that person and why does it matter for the sovereign? We know that Hobbes did not think individuals have the right to punish: that follows from his definition. I think this material helps to explain why he thought it was important to establish a practice of punishment that followed his definition.
11. *Tuesday, October 7* LOCKE ON THE RIGHT TO PUNISH
We will go through Locke's theories of natural rights and natural law with special attention to what Locke called the executive rights to enforce the laws of nature with force (Locke 1995, selections). These are the source of the individual's right to punish. We want to know how he characterized these rights and why he thought people have them.
12. *Thursday, October 9* LOCKE ON FORFEITURE AND WAR
Locke thought that decent people have the right to punish and that criminals forfeit their rights against being treated with violence (Locke 1995, selections). Indeed, Locke sometimes describes crime as a form of war. A comparison with Hobbes would be especially apt, and surprising, here.
13. *Tuesday, October 14* SIMMONS ON LOCKE
Simmons offers a critical defense of Locke's claim that individuals have a natural right of punishment (Simmons 1992, 121-48).
14. *Thursday, October 16* WALDRON ON LOCKE
Waldron is bothered by Locke's claim that criminals forfeit their rights. He tries to show that this is inconsistent with many of Locke's other points (Waldron 2002, 141-50).

Modern Theories

15. *Thursday, October 23* CONSEQUENTIALISM AND RETRIBUTIVISM
 Kant gives a classic statement of the retributivist view that punishment is justified if and only if it is deserved (Kant 1991, 140–45). Bentham articulates the consequentialist position that punishment is justified if and only if it augments the total happiness of the community (Bentham 1993). Feinberg offers his assessment of the strengths and weaknesses of each position (Feinberg 2010). There are especially significant problems with each view's sufficient condition for justified punishment: retributivists think we should punish the deserving even at great cost and consequentialists have trouble explaining what is wrong with punishing the innocent.
16. *Tuesday, October 28* HART'S COMBINED THEORY
 Neither consequentialism nor retributivism seems capable of standing on its own. So it is tempting to try to combine them. That is what Hart proposes (Hart 1959).
17. *Thursday, October 30* CRITICISM OF COMBINED VIEWS
 The problem with combining very different philosophical views is usually that you wind up with an incoherent mess. Goldman argues that attempts to combine retributivism and consequentialism face this problem. In particular, he believes, the goal of deterrence can only be met by inflicting penalties that are out of proportion to the offense (Goldman 1979).
18. *Tuesday, November 4* A PATERNALIST THEORY OF PUNISHMENT
 Morris argues that we should think of punishment in the criminal justice system by analogy with the way parents use punishment to raise their children (Morris 1981). Punishment is, in an indirect way, good for the person being punished.
19. *Thursday, November 6* HAMPTON'S EDUCATIVE THEORY
 Hampton thinks Morris did not go far enough. She tries to show that the educative function of punishment is the only rationale that is needed (Hampton 1984).
20. *Tuesday, November 11* PUNISHMENT AS THE ENFORCEMENT OF DUTIES
 Tadros thinks that the problems afflicting the consequentialist and retributivist theories of punishment can be avoided if punishment is seen as

the enforcement of duties (Tadros 2011, ch. 12). This brings back an old idea, that there is a duty to suffer punishment.

Punishment and War

21. *Thursday, November 13* PUNISHMENT AS A JUSTIFICATION FOR WAR

Grotius proposed punishment as a possible justification of war. Luban describes how this idea fell into neglect in intellectual discussions of war, even as it obviously retained its appeal in real politics (Luban 2012). Then he argues against punishment as a justifiable cause of war. I will ask whether punishment is obviously worse than any of the other justifications of war.

22. *Tuesday, November 18* MCMAHAN ON WAR

McMahan argues against the traditional doctrine that everyone in war is permitted to use force. He thinks it depends on whether your side is justified or not (McMahan 1994). If he is right, then Grotius, Hobbes, and perhaps even Locke were mistaken to give self-preservation the place that they did.

Responsibility

23. *Thursday, November 20* DETERMINISM AND COMPATIBILISM

It is generally accepted that punishment presupposes liberty: the person who is punished had to have freely committed the crime. But crimes are actions, actions are physical events, and physical events are determined by a chain of cause and effect that stretches well beyond the human scale. If our actions are caused, how could they be free enough for punishment to make sense? Hobbes and Bramhall's seventeenth-century debate remains fresh (Hobbes 1993b). Bramhall took the position that free will and determinism are incompatible: punishment makes sense, according to Bramhall, only if human actions are free from causal determination. Hobbes, on the other hand, maintained that freedom of action is compatible with causal determination.

24. *Tuesday, November 25* NO CLASS

I can't be here on Tuesday, November 25.

25. Tuesday, December 2 MODERN INCOMPATIBILISM

Greene and Cohen maintain that developments in neuroscience will force us to abandon the understanding of responsibility necessary for retributive theories of punishment (Greene and Cohen 2004). In essence, they are modern versions of Bramhall.

26. Thursday, December 4 MODERN COMPATIBILISM

Morse doubts that advances in neuroscience require any new thinking about the criminal law (Morse 2010). He has basically two arguments. First, he maintains that the law does not require freedom from causal determination. It only requires the rational ability to control one's actions. Second, he denies that neuroscience has undermined any commonsense ideas about responsibility.

27. Tuesday, December 9 REVIEW

We will spend this session wrapping things up and reviewing for the exam.

Goals

We will discuss philosophical theories of punishment from two eras: the seventeenth century and our own. The reason why is that the early modern philosophers were interested in some questions about punishment that have only recently been picked up again. They were interested in questions about why the state has the right to punish, whether private individuals could have the right to punish, whether individuals have a duty to submit to punishment, whether punishment is a justification for war, and whether there is a difference between war and punishment. During the twentieth century, by contrast, the debate between consequentialist and retributive theories of punishment has held center stage. Here, the focus has been on the person suffering from punishment rather than on those who are inflicting it. Recently, however, some of the old questions have been coming back. And, of course, the topic of free will and responsibility has remains the same in both periods; we just have much better science now.

The course is addressed to students who have some background in philosophy. Given the mix of historical and contemporary materials, it will draw heavily on interpretive and analytical skills. We will spend a lot of time isolating and evaluating arguments in

texts that are very difficult to read because they were written in a different era. Grades will be assigned based on written work.

Materials

All readings will be available in the Resources section of the Sakai website for this course: <https://sakai.claremont.edu>

Instructor

My name is Michael Green. My office is 207 Pearsons. My office hours are posted on the Sakai site. My office phone number is 607-0906.

Assignments

Grades will be based on four assignments: one short test (worth 16% of the final grade), two papers and a final exam (worth 28% each). The short test will be distributed on Thursday, October 2 and due on Saturday, October 4. The papers will be limited to 1800 words which is about five or six pages. They will be due on Friday, October 31 and Wednesday, November 26. The Final Exam is scheduled for Tuesday, December 16 at 2 pm.

Grading policies

I am committed to seeing that my students are able to do very high quality work and that high quality work will be recognized. I do not employ a curve and there is nothing competitive about grading in my courses.

Grades apply to papers, not to people. They have no bearing on whether I like or respect you. Nor do they measure improvement or hard work: one may put a lot of effort into trying to make a bad idea work or produce a very good paper with ease. Grades communicate where written work stands on as objective a scale as we can devise. That is all that they involve, so don't make too much of them.

What the grades mean

- A Work that is accurate, elegantly written, and innovative. It adds something original, creative, or imaginative to the problem under discussion. The grade of A is given to work that is exceptional.
- B Work that is accurate, well written, and has no significant problems. The grade of B is given to very good work. There is less of a difference between A and B work than you might think. Generally speaking, B papers are less innovative than A papers. This may be because the paper does not attempt to add much or because the attempt made is not fully successful.
- C Work that has problems with accuracy, reasoning, or quality of writing. The grade of C means that the paper has significant problems but is otherwise acceptable.
- D Work that has severe problems with accuracy, reasoning, relevance, or the quality of writing. Papers with these problems are not acceptable college-level work. A paper that is fine on its own may nonetheless be irrelevant. A paper is not relevant to my evaluation of work for this particular course if it does not address the question asked or if it does not display knowledge of our discussions. This sometimes trips up those taking a course pass/no credit.
- F Work that has not been completed, cannot be understood, or is irrelevant.

Final grades will be calculated using the College's 12 point scale.¹ The numerical average must be greater than half the distance between two grades in order to earn the higher grade.

¹ Search for "Letter Grades" here: <http://catalog.pomona.edu/>

Letter	Number	Range
A	12	$11.5 < A \leq 12$
A-	11	$10.5 < A- \leq 11.5$
B+	10	$9.5 < B+ \leq 10.5$
B	9	$8.5 < B \leq 9.5$
B-	8	$7.5 < B- \leq 8.5$
C+	7	$6.5 < C+ \leq 7.5$
C	6	$5.5 < C \leq 6.5$
C-	5	$4.5 < C- \leq 5.5$
D+	4	$3.5 < D+ \leq 4.5$
D	3	$2.5 < D \leq 3.5$
D-	2	$1.0 < D- \leq 2.5$
F	0	$0.0 < F \leq 1.0$

Letter and number grades

Late papers and academic accommodations

Late papers will be accepted *without question*. They will be penalized at the rate of one-quarter of a point per day, including weekends and holidays. Exceptions will be made in extremely unusual circumstances. Please be mindful of the fact that maturity involves taking steps to ensure that the extremely unusual is genuinely extremely unusual.

To request academic accommodations of a disability, please speak with me and Dean Collin-Eaglin at 621-8017. This is never a problem, but it is best taken care of in advance.

Sources

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- Gauthier, David P. 1969. *The Logic of Leviathan*. Oxford: Oxford University Press.
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- Morse, Stephen J. 2010. "Scientific Challenges to Criminal Responsibility." In *Philosophy of Law*, edited by Joel Feinberg, Jules Coleman, and Christopher Kutz, 9th ed., 839-53. Wadsworth.
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