

PHILOSOPHY OF LAW
Philosophy 077
Fall 2015, MW 12:00-12:50pm
Annenberg School Room 111

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Office Hours: Monday 1:30-3:30pm and by appointment

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COURSE DESCRIPTION

This is an introduction to the philosophy of law. No background is assumed—in philosophy or in law.

I. Coercion and the Demand for Legitimacy

Law comes with a price. One of the distinctive things about law is that it is intimately connected to coercion and punishment. Although not all law is immediately connected to coercion and punishment, much of it is, and that which is not is typically in the service of conferring or structuring the powers of people to make or interpret or enforce laws—laws which will then be backed by coercion and punishment. Given that it is usually morally impermissible to coerce or force people to do things that they don't want to do, there is a question of what makes this permissible in the case of legal and political institutions. Accordingly, we will begin with these questions: what is required for law to be legitimate, what makes the State legitimate, why is it morally permissible for legal and political institutions to make and enforce laws backed by coercion?

II. Answering the Demand (What is Law Good For? What Could Justify Law?)

All of the answers to these questions rely, at least at some point, on this idea: law is a tool. Human beings create legal and political institutions, which in turn create law. Sometimes this is done for good. Sometimes it is done for evil. And sometimes, something bad is done, while people were trying to do something they believed was good, or (more rarely) vice versa. One of the questions we will consider is: what is law good for? What are some positive justifications for law? What might we need law for? And are the answers to these questions enough to make the case for the legitimacy of legal and political institutions?

III. The Illegitimacy of Existing Law

Having considered answers to these questions, we will consider some problems that actual legal and political institutions often run into—problems that undermine or threaten to undermine the legitimacy of law and the institutions that create law. Here are some of the potential problems that we will consider: unequal influence, racially discriminatory creation and application of general laws to particular individuals, overcriminalization and overpunishment, tyranny of the majority and powerlessness of political minorities, and inadequate protection of individual rights.

IV. Moving Toward Legitimacy (What Steps Can We Take?)

In the final section, we will consider a number of possible responses to these various problems. We will discuss the use of constitutions and bills of rights, alternatives to electoral democracy and majoritarian democracy, the use of consociational mechanisms, efforts to limit the influence of money in politics and law, and decriminalization and alternatives to incarceration.

REQUIRED BOOKS

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2010): available online: <http://amzn.to/1h1wbvz>

Doug Husak, *Overcriminalization: The Limits of Criminal Law* (Oxford University Press, 2009), available online: <http://amzn.to/1MIMUKP>

COURSE REQUIREMENTS

Two Papers (55% of grade)

First Paper, 1500 words (25% of course grade; due 10/16)

Second Paper, 2000 words (30% of course grade; due 11/16)

- Please double-space papers and include the word count.
- Do not exceed the word count, but do come close to it.
- Except in extreme circumstances (as judged by us), extensions on papers must be granted well before the due date and only at our discretion.
- Late papers will be downgraded 1/3 letter grade per day late.
- Failure to submit a paper may result in a failing grade for the course.

Final Examination (30% of grade)

- Sometime in December (details to follow)

Attendance and Participation in Lecture and Section (15% of grade)

- You must attend every lecture and section.
- If you cannot attend lecture or section:
 - (1) email Professor Guerrero and TA Pierce Randall in advance of the lecture or section that you will miss;
 - (2) provide the reason that you cannot attend; and
 - (3) submit a 250 word short response to one of the readings assigned for the class that you will miss (do this within 1 week of your absence).
- When in attendance, participate in an informed and thoughtful way, having done the reading before class.
- I will call on students who volunteer and, occasionally, students who do not (employing “cold-calling,” as law students refer to it).

ACCESSIBILITY

I want this class to be a great and educational experience for all of you, and all of you are entitled to equal access to educational opportunities at Penn. People learn in different ways. I encourage students to discuss their learning styles and comprehension requirements with me during my office hours or, if necessary, at another arranged time. Disabled students are also strongly encouraged to avail themselves of the services provided by the Office of Student Disability Services: <http://www.vpul.upenn.edu/lrc/sds/>

PLAGIARISM AND ACADEMIC INTEGRITY

You are expected to be familiar with and to abide by Penn’s policy on academic and intellectual integrity: <http://www.upenn.edu/academicintegrity/index.html>

PLAN FOR COURSE AND READINGS

All readings will be (1) linked from the syllabus or (2) posted on the course website under the relevant course meeting folder, except for (3) those readings from the required texts.

Day	Topic	Reading
1 8/26	Law: The Good, The Bad, The Ugly	<ul style="list-style-type: none"> ▪North Carolina v. Mann (1829): http://www.learnnc.org/lp/editions/nchist-antebellum/4492 (read the side margin notes, too) ▪Tape v. Hurley (1885): http://bit.ly/1hQtsWm ▪Chinese Exclusion Cases summary: http://bit.ly/1WJPpqn ▪Chae Chan Ping v. United States (1889) (skim): http://bit.ly/1hxUm5I ▪Lara Bazelon, “Scalia’s Embarrassing Question—Innocence is Not Enough to Get You Out of Prison,” <i>Slate</i> (2015): http://slate.me/1JsZZyd ▪Matthew Yglesias, “Some Good Things George W. Bush Did,” <i>Slate</i> (2013): http://slate.me/1J7H8TN ▪Douglas McGray, “The Abolitionist: Bush’s homelessness czar has some new ideas. Will liberals listen?,” <i>The Atlantic</i> (2004): http://theatlantic.com/1WGXs77 ▪Housing First (look around the webpage): http://www.endhomelessness.org/pages/housing_first
I. Coercion and The Demand for Legitimacy		
2 8/31	Law and Coercion	<ul style="list-style-type: none"> •Ekow Yankah, “The Force of Law: The Role of Coercion in Legal Norms,” <i>Richmond Law Review</i> (2007)
3 9/2	Legal Positivism	<ul style="list-style-type: none"> ▪Leslie Green, “Legal Positivism,” in <i>Stanford Encyclopedia of Philosophy</i> (2003): http://plato.stanford.edu/entries/legal-positivism/ ▪H.L.A. Hart, <i>The Concept of Law</i> (1961), excerpt
4 9/9	The Need to Justify Law: Coercion and Legitimacy	<ul style="list-style-type: none"> •Allen Buchanan, “Political Legitimacy and Democracy,” <i>Ethics</i> (2001) (first 24 pages only)

II. Answering the Demand (What is Law Good For? What Could Justify Law?)		
5 9/14	Welfare (negative role): Avoiding the State of Nature	<ul style="list-style-type: none"> •Thomas Hobbes, <i>Leviathan</i> (1651), excerpts •Kent Nerburn, excerpts from <i>Neither Wolf Nor Dog: On Forgotten Roads with an Indian Elder</i> (pp. 153-159)
6 9/16	Welfare (negative role): Preventing Harm	<ul style="list-style-type: none"> •John Stuart Mill, <i>On Liberty</i> (1859), excerpts from Chapter 1 & Chapter 4
7 9/18	Welfare: Promoting General Utility and Happiness	<ul style="list-style-type: none"> •Jeremy Bentham, <i>An Introduction to the Principles of Morals and Legislation</i> (1781), excerpts •United States Declaration of Independence: http://www.archives.gov/exhibits/charters/declaration_transcript.html •Preamble to the US Constitution: http://constitutioncenter.org/constitution/preamble/preamble •Preamble to Constitution of the Republic of Korea: http://bit.ly/1v8Jxrv •Constitution of the Republic of South Africa, Preamble and Sections 26-29: http://www.gov.za/documents/constitution/1996/a108-96.pdf
8 9/21	Welfare: Promoting Cooperation and Exchange through Law	<ul style="list-style-type: none"> •Richard Posner, “The Economic Approach to Law” (Reader 10) •Mariana Mota Prado, “What is Law and Development?” (2010), SSRN Version: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907298
9 9/23	Welfare: Providing Public Goods and Solving Collective Action Problems through Law	<ul style="list-style-type: none"> •Tyler Cowen, “Public Goods,” <i>Concise Encyclopedia of Economics</i>: http://www.econlib.org/library/Enc/PublicGoods.html •Andrew Popper, Gwendolyn McKee, Anthony Varona, Philip Harter, “An Introduction to Administrative Law,” <i>Administrative Law: A Contemporary Approach</i> (2013), skip the cases •Russell Hardin, entry on “The Free Rider Problem” from the <i>Stanford Encyclopedia of Philosophy</i>
10 9/25	Justice: The Nussbaum and Sen Capabilities Approach	<ul style="list-style-type: none"> •Martha Nussbaum, <i>Creating Capabilities: The Human Development Approach</i> (2011), excerpts •Ingrid Robeyns, “The Capability Approach,” <i>Stanford Encyclopedia of Philosophy</i>: http://plato.stanford.edu/entries/capability-approach/

9/25	First Paper Topic Distributed	
11 9/28	Promoting Equality	<ul style="list-style-type: none"> •Mary Wollstonecraft, <i>Vindication of the Rights of Woman</i> (1792), Chapter 9: http://bit.ly/X7qge4 •Elizabeth Anderson, “What is the Point of Equality,” (1999): http://bit.ly/1wwt3x3
12 10/5	Positive Freedom and Autonomy	<ul style="list-style-type: none"> •Arthur Ripstein, <i>Force and Freedom: Kant’s Legal and Political Philosophy</i> (2008), excerpt •Isaiah Berlin, “Two Concepts of Liberty” (1958), excerpt
13 10/7	Democracy: Dealing with Disagreement	<ul style="list-style-type: none"> •Jeremy Waldron, <i>Law and Disagreement</i> (1999), excerpt
III. The Illegitimacy of Existing Law		
14 10/12	Legal Discrimination & Unequal Treatment Under the Law	<ul style="list-style-type: none"> •Elizabeth Anderson, <i>The Imperative of Integration</i> (2010), Chapters 2 & 4 •Michelle Alexander, <i>The New Jim Crow</i> (2010), Chapters 1 & 3
15 10/14	Overcriminalization & Overpunishment	<ul style="list-style-type: none"> •Douglas Husak, <i>Overcriminalization</i> (2008), p. 3-54 •“The Crisis of Violence in Georgia’s Prisons,” <i>Southern Center for Human Rights Report</i> (2014): http://bit.ly/11BZMX4
10/16	First Paper Due	
16 10/19	Overcriminalization & Criminal Injustice (Racialized)	<ul style="list-style-type: none"> •Michelle Alexander, <i>The New Jim Crow</i> (2010), Intro & Chapter 2 •Department of Justice Investigation of the Ferguson Police Department (2015), p. 1-15, 62-78, and skim 15-42: http://1.usa.gov/1B26Xnu
17 10/21	Unequal Financial Influence	<ul style="list-style-type: none"> •Martin Gilens, <i>Affluence and Influence</i> (2012), excerpts •Alexander Guerrero, “Against Elections: The Lottocratic Alternative,” <i>Philosophy and Public Affairs</i> (2014), pp. 135-154 •Matt Taibbi, “Eric Holder, Wall Street Double Agent, Comes in From the Cold,” <i>Rolling Stone</i> (2015): http://rol.st/1J6ASet •Alexander Guerrero, “Democracy and Death,” excerpts on lobbying
18 10/26	The Problems of Political Minorities	<ul style="list-style-type: none"> •Lani Guinier, <i>The Tyranny of the Majority</i> (1994), excerpt •Alexander Guerrero, “Equality, Legitimacy, and the Problem of Political Minorities” pp. 1-7

10/26	Second Paper Assignment Distributed	
IV. Moving Toward Legitimacy (What Steps Can We Take?)		
19 10/28	Constitutional Reform, Amendment, Interpretation	<ul style="list-style-type: none"> ▪ Ian Millhiser, <i>Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted</i> (2015), Introduction ▪ Thomas Jefferson, "Letter to James Madison, 6 Sept. 1789," http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html ▪ Article V of the U.S. Constitution and surrounding explanation at: http://bit.ly/1hOBFKE ▪ Emma Roller and David Weigel, "Give Me Amendments or Give Me Death," <i>Slate</i> (2013): http://slate.me/1U0S22E ▪ Ronald Dworkin, <i>Taking Rights Seriously</i> (1978), pp. 165-173: http://bit.ly/1rtoD2j
20 11/2	Constitutions and Reform: Process Theory	<ul style="list-style-type: none"> ▪ John Hart Ely, "Toward a Representation-reinforcing Mode of Judicial Review," <i>Maryland Law Review</i> (1978): http://bit.ly/1t9aZXJ ▪ Alden Whitman, New York Times obituary for Chief Justice Earl Warren (1974): http://www.nytimes.com/learning/general/onthisday/bday/0319.html
21 11/4	Constitutions and Reform: Thinking Systematically about Dismantling Racial Hierarchy	<ul style="list-style-type: none"> ▪ John A. Powell, "White Innocence and the Courts," <i>in</i> <i>Racing to Justice</i> (2012) ▪ Ta-Nehisi Coates, "The Case for Reparations," <i>The Atlantic</i> (2014): http://theatlantic.com/1ha12zO
11/9	No class: rescheduled to 9/18, 9/25, and 12/4	
11/11		
11/16		
11/16	Second Paper Due	
22 11/18	Criminal Law Reform: Principled Decriminalization	<ul style="list-style-type: none"> ▪ Douglas Husak, <i>Overcriminalization</i> (2008), excerpts from p. 55-177

<p>23 11/30</p>	<p>Criminal Law Reform: Alternatives to Incarceration</p>	<ul style="list-style-type: none"> •Heather Strang and Lawrence Sherman, “Repairing the Harm: Victims and Restorative Justice” ▪Angela Davis, <i>Are Prisons Obsolete?</i> (2003), Chapter 6: “Abolitionist Alternatives” •Alternatives to Incarceration Fact Sheet: http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf •Introduction to Restorative Justice Processes: http://www.restorativejustice.org/press-room/05rjprocesses •Michelle Jackson, “I wanted revenge but found compassion,” (2014): http://sycamorevoices.org/i-wanted-revenge/ •Melissa Hutton, “Sycamore Tree Project is ‘Tougher on Crime’” (2014): http://sycamorevoices.org/sycamore-tree-project-is-tougher-on-crime/ •Heather Strang and Lawrence Sherman, “Restorative Justice: The Evidence” (2007): http://www.restorativejustice.org/10fulltext/restorative-justice-the-evidence •Kathleen Daly, “Revisiting the Relationship Between Retributive and Restorative Justice” (1999): http://www.griffith.edu.au/__data/assets/pdf_file/0014/50342/kdpaper6.pdf
<p>24 12/2</p>	<p>Political Change: Against financial influence</p>	<ul style="list-style-type: none"> ▪Alexander Guerrero, “Against Elections: The Lottocratic Alternative,” <i>Philosophy and Public Affairs</i> (2014), pp. 154-178 ▪Readings on Porto Alegre Participatory Budgeting
<p>25 12/4</p>	<p>Political Change: Minority Political Power</p>	<ul style="list-style-type: none"> ▪Alexander Guerrero, “Equality, Legitimacy, and Problem of Political Minorities” pp. 7-41
<p>26 12/7</p>	<p>Reform or Transform, Here to There</p>	<ul style="list-style-type: none"> •Michelle Alexander, <i>The New Jim Crow</i> (2010), Chapter Six •Frantz Fanon, <i>The Wretched of the Earth</i>, “On Violence,” pp. 35-56 (first 20 pages, depending on version): http://bit.ly/Ug5kQy
<p>Final Examination</p>		