

**Syllabus**  
**Philosophy of Criminal Law (202-388)**  
Fall 2011  
Tue & Fri 10:20-11:40

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**Primary Texts:**

- H.L.A. Hart, *Punishment and Responsibility* (Oxford University Press, 2d ed., 2008) (1968).
- R.A. Duff, *Punishment, Communication, and Community* (Oxford University Press, 2003)
- Douglas Husak, *Overcriminalization* (Oxford University Press, 2008)

**Course Description:**

This course is offered as an introduction to the philosophy of criminal law. This introduction is meant to serve as a gateway to the reading you might choose to do for the rest of your life. To serve that purpose we will read substantial parts of three books in the philosophy of criminal law. One is a classic work by H.L.A. Hart, first published in 1968. The other two are more contemporary works, from the past 10 years. My hope is that by working your way through substantial portions of these three books you will (a) become acquainted with some of the major philosophical themes that arise in the context of criminal law, and (b) become comfortable reading extended discussions of such themes. This can then serve as a foundation for you, allowing you to follow, or perhaps even contribute to, such discussions for as long as you remain interested in the broad topic of criminal law.

Since my aim is to prepare you for what will *follow* your formal education, I want to structure the course to emphasize the skills that you will need to practice when your formal education is over, namely talking and writing intelligently about the things you have read. Thus this class will be run, as much as possible, like a seminar in which I am the facilitator, and you are all *active* participants. And you will be judged on your ability to present and comment on the materials we read, both in class and in writing.

However, to ensure that you are doing the readings, I will have a quiz each week which should be easy to pass if you've done the readings, and hard if you have not. This will take some of the pressure off your having to participate all the time to show that you are always prepared, but will allow me to know whether you are always prepared. Given that life has busy periods, I'll make the following accommodation: you can drop the lowest two quiz grades, including quizzes you miss altogether. It's up to you to ensure that you conserve these drops for times when you are most likely to need them.

On the related theme of attendance, it is a prerequisite for doing well in this class. If you miss more than five classes, you will be removed from the class. Please make every effort to attend, be prepared, and be on time. If you are late, that will count as half a miss. I will send around a sign-up sheet each day to see who is there. Additionally, if you

expect to miss class, please use the University absence reporting website <https://sims.rutgers.edu/ssra> to indicate the date and reason for your absence. An email is automatically sent to me.

Now a few words about the themes we will be dealing with in this course: One of the major themes of the course is the tension between the aim of promoting the general welfare going forward and the retributive aim of doing justice by punishing for past wrongful acts. This is one of the central concerns of Hart, but it also sets a backdrop for Anthony Duff's book. Another theme, one particularly tied to retributivism, is that of responsibility for criminal acts. This occupies much of Hart's writing, especially as he wrestles with doubts, rooted in a modern scientific view of humanity, about our capacity to be responsible. Related concerns with the justifiability of punishment are also central to Duff's work, as he struggles to propose a theory of criminal punishment that will respond to doubts raised by Hart and others, especially radical skeptics known as abolitionists, who argue that state-based punishment is fundamentally unjustifiable. Duff tries to respond to these skeptical concerns by framing criminal punishment in terms of the role it can serve in sustaining a political community. Finally, Husak wrestles with a set of less radical but equally profound doubts, as he takes on the thought that we make far too many acts criminal, and therefore unjustly engage in too much punishment.

These are not the only themes that will come up in this set of readings, nor are they the only themes relevant to the philosophy of criminal law. But these themes are timely and these writers are engaging and influential. I hope they will provide you with enough of a basis to feel like you're ready to read anything else you want to read in this area.

Finally, to put this description in context, I direct you to the Resources section of the course website, where you will find a statement of the official Learning Goals for Criminal Justice Majors with two additions by me.

<https://sakai.rutgers.edu/access/content/group/76b829f5-dc61-4340-96ac-1d87f78bed6d/Learning%20Goals%20for%20Criminal%20Justice%20Majors>.

### **Bases of Your Grade:**

Your grade will be based on three elements.

- First, as I mentioned, there will be a weekly quiz. All told, the quizzes will count for 20% of your grade.
- Second, you will have to write three papers.
  - You will write a short paper, between 900 and 1200 words, on Hart. This will count for 10% of your grade.
  - You will then write a longer paper, between 1500 and 1800 words on Duff. This will count for 20% of your grade.
  - Finally, you will write a third paper between 2000 and 2500 words on Husak. This will count for 30% of your grade.
- Third, you will have to participate in two ways.
  - You will comment on the written work of others, which will count for another 10% of your grade.
  - General participation in classroom discussion, especially the seminar phase, will cover the last 10% of your grade.

## **Explanation of Different Assignments**

Written assignments: The first written assignment is meant to help you practice describing an argument. You will write on a chapter of your choice, from among those that we read, in the Hart book. Your task will be to summarize (a) the (or a major) problem Hart identifies, (b) the position he comes to, and (c) his reasons for his position. This is a purely descriptive project; I am not asking you to *evaluate* his argument, but simply to describe it.

The second written assignment requires you to take the next step and engage the argument critically. That means that you will focus on either a chapter or the whole of Duff's book, and in addition to describing the argument, you will have to raise a critical response to the argument, and, to the best of your ability, say how you think Duff would or should respond.

The third written assignment requires you to take the last step in the evaluation of an argument: after taking the same steps as in the previous two papers, you must add your own assessment of the argument, the criticism, and the response. Explain why you think that Husak is either right or wrong, or some combination of the two, with regard to some chapter or theme in his book.

All three of these assignments are to be posted on the course website so that everyone in the class can see them.

Commenting on the written work of others: Commenting on the work of others may be new to you, so I will write a few words about the process here—I will provide more guidance on it later.

You are to post drafts of your papers on the web. I will not grade these, but your classmates will comment on them. The length of these comments should grow as the papers grow. The first comments should be short, a few sentences up to the equivalent of a half a page of double-spaced text. The second can reasonably be a bit longer, and the last set should have a length equivalent to one half to two pages of double-spaced text. You, the author, will grade the usefulness of these comments on a four point scale, and will revise your paper and submit a final draft for me to grade.

Comments must be substantive and constructive. They should help the author think about something he or she overlooked, or reconsider something he or she wrote. This is a crucial skill to develop, on both ends. No one who publishes books or articles goes off on their own and writes complete masterpieces. They always have others look at what they write and give them critical suggestions. No matter how good one is, it is very hard to see one's own blind spots, so critical response and revision is crucial to making one's work good. Accordingly, it is crucial to be able to *take* constructive criticism. But to be a valuable member of a community of people working on a project, it is also crucial to be able to *give* it.

Since there are too many people in the class to expect each of you to read the work of everyone else, I will divide you into groups, and you will be responsible only for giving critical comments to those in your group. (You will be in different groups for each of the papers.) You are nonetheless invited to give critical comments to anyone whose paper catches your eye.

Late assignments drafts and late comments put an unfair burden on others. If you are late with your draft, others will be free from their obligation to comment, and their comment grade will be an average based on the other papers on which they comment.

You will get only the comments that others *voluntarily*, out of the goodness of their hearts, give you. Late comments are still useful, but less so than prompt ones, so they will be docked one point for each day late. Late final paper drafts will lose a grade step (e.g. an A- becomes a B+) for each day late.

Early assignments are a different matter. Since all papers will be shared, there is a danger that some who do their work at the last minute will poach on the work of those who post their work early. Of course, anyone who poaches that way may get called out by commentators, and if anyone poaches on the work of another without citing it, he or she is guilty of plagiarism. Nonetheless, to minimize the temptation to poach, please do not post your drafts more than 24 hours before they are due.

Comments, can, however, profitably build on the comments that have gone before. Therefore you are encouraged to post your comments as soon as you like. You may even post more than once if you want to comment on another who has commented on your earlier comments or who has simply taken a different view. It is up to the author who receives comments to see whether later comments are adding value. Depending on how you like to work, you might then want to post your comments early, later, or often; however you think you can best be of value to the persons receiving your comments. Just one caution: don't go over the equivalent of two pages of double-spaced text in the total length of your comments on any one paper; you don't want to drown the author in a flood of comments.

Lastly, a few words on academic integrity: All work in this course must be your own. That means that if you copy text from any source, even if you change a word or two, you must quote it and provide a citation. If you take an argument from someone, even if you put it in your own words, you must acknowledge your intellectual debt—this includes comments you get from your fellow students. And if you claim to have knowledge of facts that are not common knowledge, you must provide a source for that too. *Any* form of cheating or plagiarism will result in automatic failure for the *class*, not just the assignment, and will be reported to the appropriate university committee which may result in suspension or expulsion from the university. If you are unclear what this means, it is your responsibility to ask for clarification.

#### Seminar phase discussion

In order to leave time for feedback on the last paper, we will cease reading new material after 11/29. But my hope is that you will have developed your own interests in the philosophical issues in criminal law by then, so the last three periods will be a forum for open discussion. To provide some structure to that discussion, I will again divide you into groups, and I will ask two groups each day to meet before class and prepare a discussion question relating to the material we have read and discussed. The question should be framed with some background for the problem, and some ideas of how to resolve it. Once the question has been posed, the floor will be open for discussion.

#### ***Tentative Course Schedule*** (readings to be done *before* the class date listed below)

9/2: Introduction

H.L.A. Hart, Punishment and Responsibility

9/6: Chap. 1, Prolegomenon

9/9: Chap. 1 continued

9/13: Chap. 5, Intention and Punishment

9/16: Chap. 5 continued  
 9/20: Chap. 6, Negligence, *Mens Rea*, and Criminal Responsibility  
 9/23: Chap. 6 continued  
 9/27: Chap. 7, Punishment and the Elimination of Responsibility  
 9/30: **NO CLASS—professor at conference**  
 10/4: Chap. 7 continued  
 10/7: Chap. 9, Postscript: Responsibility and Retribution  
 10/11: Chap. 9 continued  
R.A. Duff, Punishment, Communication, and Community  
 10/14: Introduction and Chap. 1, Consequentialists, Retributivists, and Abolitionists  
     *First paper draft must be posted before the start of class on 10/14*  
 10/18: Chap. 1 continued  
 10/21: Chap. 2, Liberal Legal Community  
     *Comments on first papers must be posted before the start of class on 10/21*  
 10/25: Chap. 3, Punishment, Communication, and Community  
 10/28: Chap. 3 continued  
     *First paper due to be posted in final form on 10/28*  
 11/1: Chap. 4, Communicative Sentencing  
 11/4: Chap. 4 continued  
Doug Husak, Overcriminalization  
 11/8: Chap. 1, The Amount of Criminal Law  
 11/11: Chap. 1 continued  
     *Second paper draft must be posted before the start of class on 11/11*  
 11/15: Chap. 2, Internal Constraints on Criminalization  
 11/18: Chap. 2 continued  
     *Comments on second papers must be posted before the start of class on 11/18*  
 11/29: Chap. 3, External Constraints on Criminalization  
     *Second paper due to be posted in final form on 11/29*  
 12/2: Chap. 3 continued  
 12/6: Seminar discussion  
     *Third paper draft must be posted before the start of class on 12/6*  
 12/9: Seminar discussion  
     *Comments on third papers must be posted before the start of class on 12/9*  
 12/13: Seminar discussion  
 12/16: *Final draft of third paper due before the end of the day*