

**PHILOSOPHY 336/636: PHILOSOPHY OF LAW**  
**Spring 2018**  
**TR, 12-1:20pm**  
**Porter Hall 226b**

Danielle Wenner

[dwenner@andrew.cmu.edu](mailto:dwenner@andrew.cmu.edu)

Office Hours: Wednesdays 1-2pm & Tuesdays 4:30-5:30pm  
Baker Hall 155C

***Course Description & Objectives***

In recent years, the U.S. legal system has been beset by claims of overcriminalization, racially discriminatory enforcement, and inadequate or unequal protection of individual civil rights. What should we make of these claims, and what, if anything, would be implied by their truth? In seeking to answer these questions, this course will examine the nature of the law and its enforcement. We will begin by discussing the issue of criminalization and whether the expansion of the criminal law is or is not problematic. From there, we will turn to the more foundational questions of what, precisely, the law is, and what its connection to morality is or should be. Are we obligated to obey the law, and if so, why? Finally, we will ask whether it is possible for the law to remain neutral with regards to morality and politics, and whether the supposed “neutrality” of the law may itself be an instrument of oppression. If the legal system lacks the kind of neutrality that many legal theorists claim for it, what (if anything) does that license us (as citizens) to do?

This course aims to familiarize students with classic and contemporary literature regarding the nature of the law and its enforcement, as well as to introduce students to the disciplines of Critical Legal Studies and Critical Race Theory. Students are expected to come away from the course with a global understanding of some of the major debates in legal theory as well as the tools to analyze ongoing debates within contemporary US politics regarding the appropriate role of the criminal law. This course will be primarily conducted as a seminar (more below) and is intended to be discussion- rather than lecture-based.

***Required Texts***

Michelle Alexander. (2010). *The New Jim Crow*. New York: The New Press. (Available via online retailers)  
All additional readings will be made available via Canvas.

***Important Dates***

Jan. 22: Drop deadline for tuition adjustment

Feb. 8: First exam

Feb. 22: No class, DMW out of town

Mar. 8: Second exam

Mar. 12: Mid-semester grades turned in

Mar. 13 & 15: No classes, Spring Break

Apr. 3: Final drop deadline

Apr. 19: No class, Spring Carnival

May 4: Final withdrawal deadline

May 10: Final exam due

### **Course Requirements**

*The learning curve for reading and writing philosophical materials is steep, and early feedback will be important to you in improving your work. Homework assignments are structured to improve students' reading habits, analytical skills, and writing.*

#### Short Writing Assignments – 40%

*Students will be given 8 short writing assignments over the course of the semester. Writing assignments are exercises in both exposition and analysis. They will be graded based on students' ability to present (in their own words) the arguments from the readings and to construct arguments of their own defending one or another of conflicting positions.*

#### Exams – 50%

*There will be two in-class exams and a take-home final. Students will be provided with all exam questions in advance. All exams will be closed-book. The first exam will be in class on **February 6** and will be worth 15% of your final grade. The second exam will be in class on **March 8** and will be worth 15% of your final grade. Final exams will be take-home and will be due no later than **12pm (noon) on Thursday, May 10**. Final exams will be worth 20% of your final grade.*

#### Attendance & Class Participation – 10%

*10% of your grade consists of participation in in-class discussions of the readings and regular class attendance. You should attend each class ready to engage in discussion and critical assessment of the readings. See below for more details.*

*Students taking this course for graduate credit should see me to discuss course requirements.*

### **Class Policies**

#### Late Assignments

It is the responsibility of the student to have all assignments submitted no later than the assigned deadline, and all readings completed before the beginning of each class meeting. All late assignments will be penalized half a letter grade (5 points) for every day or portion of a day that they are late.

**Writing assignments submitted more than 3 calendar days late will receive a 0. Final exams submitted more than 7 calendar days late will receive a 0.** Requests for reasonable accommodation will be granted but must be made in advance.

#### Communication

Students are not always familiar with the norms governing professional correspondence. Please use the following resource to inform your understanding of what is expected from communications in a professional environment: <https://medium.com/@lportwoodstacer/how-to-email-your-professor-without-being-annoying-af-cf64ae0e4087#gyje2zezg>. **Please note that I do not read or respond to student emails outside of normal business hours (i.e. if you email me in the evening, you will not receive a response until the next weekday morning).**

#### Attendance

Attendance is not taken, but a pattern of missed classes will be noticed and will impact your attendance and class participation grade. Missing a significant number of class meetings is also likely to impact your grade through your performance on class assignments. Students who miss class are responsible for discovering on their own or from classmates any material missed or changes to class assignments. **Email requests from students asking what they missed during unexcused absences will be ignored.**

### Participation

Philosophical inquiry is a joint endeavor, and the quality of the course will depend crucially on your thoughtful, considerate engagement with the readings and with each other. We will be discussing controversial topics about which many of you will have strong feelings. However our purpose in this class is to **move past feelings and opinions**, and to evaluate and provide **reasoned arguments** for and against various positions on these issues. **Disrespectful comments towards other students will not be tolerated.** Students should come to class having closely read and thought about all assigned materials. This requires, at a minimum:

- Determining the key point the author is trying to establish or criticize;
- Understanding why the author considers it to be important;
- Identifying the reasons the author gives in support of the conclusion; and
- Considering whether those reasons both (a) are true or correct, and (b) actually support the author's conclusion.

Students are encouraged to take notes while reading, and to come to class with questions about and criticisms of the readings.

### Grading

Grades are assigned on the following scale:

A	90-100	D	60-69.9
B	80-89.9	R/F	0-59.9
C	70-79.9		

While I recognize that grade inflation has generated the expectation that a "B" should be fairly easy to achieve, and an "A" not too hard, it is not the case that instructors are obligated to inflate grades. I also recognize that receiving a lower grade than one has come to expect can be traumatic. However, in this class grades mean what they are intended to mean. A "C" represents a satisfactory or average performance, and is nothing to be ashamed of. A "B" is a good performance, and something to be proud of. An "A" indicates outstanding or truly exemplary work. There is a steep learning curve to reading and writing philosophy effectively, which should provide you with strong incentives to work hard at the beginning of the semester and receive the kind of feedback you will need to excel in your paper assignments.

### Academic Integrity & Plagiarism

Plagiarism refers to the use of any ideas or words from another person or source without appropriate citation. All sources used for course assignments should be appropriately cited, including information found on the internet, in course readings, or from class discussions. If you are unsure about whether or not to cite something, err on the side of caution. I have a zero-tolerance policy for cheating: **Any student found to have plagiarized on any assignment will receive a failing grade for the assignment, and at my discretion, for the entire course.** Additionally, all institutional penalties will be sought.

### Technology in the Classroom

I and your classmates put a great deal of time and effort into preparing for an interesting class discussion, and you are expected to do the same. When entering the classroom, please place your phone on "silent" and put it away for the duration of our meeting. If there is an urgent need to keep your phone on during a particular class period, please inform me at the beginning of class, sit where you can leave the room without distracting others, and keep your phone on vibrate. Students are permitted but strongly discouraged from using laptops during class. While typing is faster than writing for many of us, using a computer during discussion significantly distracts from what is going on and leads to disengagement from those around you. While some users can successfully use a computer without multitasking, most cannot – it is hard not to take a down moment to check your email or look at your calendar. But studies have shown that this kind of multitasking during class not only causes the computer user's learning to suffer, but also that of the students sitting nearby who can see the screen.<sup>1</sup> Moreover, recent research has shown that students take better notes, and learn more, when they take notes via longhand instead of on a computer.<sup>2</sup>

### Videotaping and Audio Recording

Videotaping and audio recording are prohibited without the express written permission of the instructor.

*If you wish to request an accommodation due to a documented disability, please see me and contact Disability Resources at [access@andrew.cmu.edu](mailto:access@andrew.cmu.edu) or 412-268-2013 as soon as possible.*

---

<sup>1</sup> Sana, F., T. Weston and N. J. Cepeda (2013). "Laptop multitasking hinders classroom learning for both users and nearby peers." Computers & Education **62**: 24-31.

<sup>2</sup> Mueller, P. A. and D. M. Oppenheimer (2014). "The Pen is Mightier Than the Keyboard: Advantages of Longhand over Laptop Note Taking." Psychological Science **25**: 1159-1168.

## **Outline of Topics & Tentative Schedule of Readings**

*(All dates and readings are subject to change. You will always be informed of what to read for the next class at the end of the previous meeting.)*

### **Jan. 16: Course introduction and overview**

Please read before class the following two articles:

The Bail Trap: <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>

Innocence is Irrelevant: <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>

## **Part I: The U.S. Criminal Law: Discrimination & Overcriminalization**

### **Jan. 18: "The Racial Caste System"**

Alexander chs. 1 & 3

Bauer, Shane, "My Four Months as a Private Prison Guard", chapter 1:

<http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/>

### **Jan. 23: Discrimination and Criminalization**

Murakawa, N. and K. Beckett. (2010). "The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment." *Law & Society Review* 44(3/4): 695-730.

"My four months as a private prison guard", Chapters 2 & 3

### **Jan. 25: The Structure of Mass Incarceration**

Alexander Intro & ch. 2

"My four months as a private prison guard", Chapters 4 & 5

### **Jan. 30 – Feb. 1: Overcriminalization**

Husak, D. (2008). "The Amount of Criminal Law." *Overcriminalization*. Oxford, Oxford University Press, ch. 1

## **FEB. 6: EXAM #1**

## **Part II: Liberal Conceptions of the Law**

### **Feb. 8: Austin's Legal Positivism**

Selections from Austin, J. (1832). *The Providence of Jurisprudence Determined*. London: John Murray.

### **Feb. 13: Hart's Criticism of Austin**

Hart, H.L.A. (1961). "Law as the Union of Primary and Secondary Rules." *The Concept of Law*. Oxford: Oxford University Press, ch. 5.

### **Feb. 15: Hart's Positivism**

Hart, H.L.A. (1961). "The Foundations of a Legal System." *The Concept of Law*. Oxford: Oxford University Press, ch. 6.

**Feb. 20: Legal Realism**

Holmes, O.W. (1897). "The Path of the Law." Harvard Law Review. **10**(8): 457-478 (read only the first 10 pages)

Frank, J. (1930). "Legal Realism." Law and the Modern Mind. New York: Coward-McMann, ch. 5 (available for free on Google books; read pp. 46-52).

**Feb. 22: NO CLASS**

**Feb. 27: Hart on Judicial Interpretation**

Hart, H.L.A. (1958). "Positivism and the Separation of Law and Morals." Harvard Law Review. **71**(4): 593-629, sections 1 & 3.

**Mar. 1: Dworkin on Hart**

Dworkin, R. (1977). "The Model of Rules I." Taking Rights Seriously. Cambridge: Harvard University Press, ch. 2.

**Mar. 6: Dworkin's Rights Thesis**

Dworkin, R. (1977). "Hard Cases." Taking Rights Seriously. Cambridge: Harvard University Press, ch. 4.

Kelleher, J. Paul. (2017). "Neil Gorsuch's "natural law" philosophy is a long way from Justice Scalia's originalism." Vox 2017-03-20: <https://www.vox.com/the-big-idea/2017/3/20/14976926/gorsuch-natural-law-supreme-court-hearings>

**MAR. 8: EXAM #2**

**\*\*\* Mar. 13 & 15: No Class Meetings, Spring Break\*\*\***

**Part III: Coercion, Justification, and the Obligation to Obey the Law**

**Mar. 20: Optimism about Political Obligation**

Raz, J. (1985). "Authority and Justification." Philosophy & Public Affairs. **14**(1): 3-29.

**Mar 22: Skepticism about Political Obligation**

Wolff, R.P. (1970). "The Conflict Between Authority and Autonomy," ch. 1 of In Defense of Anarchism, available online at <http://www.ditext.com/wolff/anarchy1.html>

**Mar. 27: More Skepticism**

Smith, M.B.E. (1973). "Is There a Prima Facie Obligation to Obey the Law?" Yale Law Journal. **82**(5): 950-976.

**Mar. 29: More Optimism**

Raz, J. (1985). "The Obligation to Obey: Revision and Tradition." Notre Dame Journal of Ethics & Public Policy. **1**(1): 139-155.

## **Part IV: Critical Legal Studies**

### ***Apr. 3: Introduction to Critical Legal Studies***

Excerpts from Unger, R. (1986). The Critical Legal Studies Movement. Cambridge: Harvard University Press.

Altman, A. (1990). "Critical Legal Studies v. Liberalism." Critical Legal Studies: A Liberal Critique. Princeton, Princeton University Press, ch. 1.

### ***Apr. 5: The Internal and External Critiques***

Tushnet, M. (1989). "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles." Critical Legal Studies. A.C. Hutchinson. Totowa, New Jersey, Rowman & Littlefield: 157-178.

### ***Apr. 10: Antidiscrimination Law***

Freeman, A.D. (1995). "Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine." Critical Race Theory: The Key Writings that Formed the Movement. K.W. Crenshaw, N. Gotanda, P. Geller, & K. Thomas. New York: The New Press: 29-46.

## **Part V: Critical Race Theory**

### ***Apr. 12: Introduction to Critical Race Theory***

Crenshaw, K.W. (1995). "Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law." Critical Race Theory: The Key Writings that Formed the Movement. K.W. Crenshaw, N. Gotanda, P. Geller, & K. Thomas. New York: The New Press: 103-122.

### ***Apr. 17: The Davis Doctrine***

Lawrence, C.R. (1995). "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism." Critical Race Theory: The Key Writings that Formed the Movement. K.W. Crenshaw, N. Gotanda, P. Geller, & K. Thomas. New York: The New Press: 235-256.

**\*\*\* Apr. 19: No Class Meetings, Spring Carnival\*\*\***

### ***Apr. 24: The Color-Blind Constitution***

Gotanda, N. (1995). "A Critique of 'Our Constitution is Color-Blind'." Critical Race Theory: The Key Writings that Formed the Movement. K.W. Crenshaw, N. Gotanda, P. Geller, & K. Thomas. New York: The New Press: 257-275.

### ***Apr. 26: Racial Realism***

Bell, D.A. (1995). "Racial Realism." Critical Race Theory: The Key Writings that Formed the Movement. K.W. Crenshaw, N. Gotanda, P. Geller, & K. Thomas. New York: The New Press: 302-312.

**Part VI: Revisiting the Obligation to Obey the Law**

***May 1: Civil Disobedience***

Rawls, J. ([1969] 1999). "The Justification of Civil Disobedience." John Rawls: The Collected Papers. S. Freeman. Cambridge: Harvard University Press: 176-189

King, M.L. (1963). "Letter from Birmingham Jail."

***May 3: The Duty of Resistance***

Delmas, C. (2014). "Political Resistance: A Matter of Fairness." Law and Philosophy **33**(4): 465-488.

**MAY 10: EXAM #3 DUE**