

# PHILOSOPHY OF PUNISHMENT

SPRING SEMESTER 2023-2024

ROCHESTER INSTITUTE OF TECHNOLOGY

Dr. John Capps  
john.capps@rit.edu  
johncapps.net

Office Hours: MWF 12:00-1:00 @ LBR 1309

---

## Course Description

This seminar is about punishment, what it is, and what it's supposed to do. Punishment raises a lot of philosophical issues and some are pretty ugly, and the ones that aren't ugly can be confusing. We generally think that it's a good thing to punish lawbreakers—we expect any legal system to hold people responsible—but punishing means causing pain, and pain is not a good thing. So maybe we tell ourselves that the punishment is actually a good thing for the person being punished, and we make punishment take place out of public view, and we make it scientific and clinical, and we pay other people mediocre wages to do it, and then we congratulate ourselves on being so humane and civilized. Plus, out of sight, out of mind.

But that doesn't seem quite right. People can do some pretty horrible things, and it's natural to think they should be punished for doing these things. Because punishment can be a dirty business we need to make sure that it's being done right, and that the right people are punished in the right ways, and in the right amounts. In short, we want to be clear on what we hope to get from punishing other people. Plus, not everyone deserves to be punished to the same degree, even for horrible things: if someone is insane, or young, or a first-time offender, then we tend to be more lenient.

It's also possible that punishment is more central to our legal and social systems than we realize. It might be like this: the reason we have laws is because, in a state of nature, we can't expect everyone to always play fair. Laws are a good thing. But laws are meaningless if there is no punishment for breaking them. So, without punishment there's little advantage to living in civil society over a state of nature where (as Hobbes put it) our lives would be brutish, short, and nasty. A civil society without punishment is no longer a civil society. That there are consequences for our actions—that there be *punishment*—is a crucial ingredient for keeping our society together.

There may be more to it than that. It's probably no coincidence that philosophers started paying attention to punishment around the same time that modern nation-states came into existence. The reason is that, before this, crimes were crimes against a monarch's authority (an authority which may have come directly from God) and so punishment was the monarch's responsibility (possibly acting in place of God). But now punishment is something that the *state* administers and we constitute that state. And this means that punishment is something that is done in *our* name and by *us*. That's another reason to get clear on what punishment is, who deserves it, and what it's meant to do. It's not something we can ignore. We are the punishers and sometimes we are the punished.

So what *is* punishment meant to do? Some of the typical answers—and we'll examine all of these—involve retribution, deterrence, rehabilitation, restoration, or maybe some combination of these. But to make sense of punishment it's helpful to get a grasp on the law in general. That's why we'll first do some preliminary reading in the philosophy of law that will sharpen our intuitions about the law, jurisprudence, the connection between law and morality, and why breaking a law is a cause for punishment.

Finally, I'm aware that one of the pleasures *and* hazards of philosophy is getting to talk about things in very abstract terms. Here we need to be a *little* more grounded in the real world, so every now and then we'll look at some actual cases of legal punishment. Not only that, but we'll also work—deliberately, methodically, intentionally—on writing a term paper that applies different theories of punishment to a real-world case of your choice.

---

## Texts

I've assigned two books. They can be found just about anywhere.

Michel Foucault: *Discipline & Punish*

H.L.A. Hart: *Law, Liberty, and Morality*

Everything else—articles, magazine pieces, book chapters, court documents— is on myCourses.

---

## Expectations

### Discussion-Oriented

1. I firmly believe that philosophy is a group activity that depends on conversation and discussion. We can't tell if we're covering all our bases if we're not checking in with each other. That's why my classes are normally discussion-intensive. In order for this class to function well I need to be confident that everyone's doing the reading: no free-riding, please. I don't expect everyone to fully understand the reading: that's what class and our discussions are for. But I do expect everyone to make a good faith effort to do the reading, get at least some idea of what it's about, and come up with a couple questions or interesting points to share. I expect regular attendance (let me know if you'll be absent, though please don't come to class if you're feeling unwell!) and I will do everything possible so that everyone feels comfortable participating in our conversations.

Attendance and participation are worth 20% of your final grade.

2. This class is a seminar, obviously. That means, among other things, that I'll try to keep the lecturing to an absolute minimum. That way we can work out our own thoughts and exercise some self-control over the topics we discuss. Every once in a while I'll probably lecture because a) I can't help myself or b) there's some crucial background information that I want everyone to have or c) you demand that I do it. But I want to limit my lecturing so we can all participate and not just spectate. If you'd be more comfortable with a more lecture-oriented course I'll be happy to recommend some. They're not hard to find.

### Typed Questions

3. In order to guide our discussions I am asking everyone to bring a typed question to the class meetings marked with an "\*" on the following schedule of readings. This question may be a specific request for clarification or reflect a more critical engagement with the reading. In any case, it should a) be specific, perhaps by referring to a particular passage in the reading, and b) reflect some real thought about the issues raised by the day's reading. Your question should reflect your judgment as to the most important issue that needs clarification or discussion. A few sentences are usually enough. I will collect these in class: I do not accept late questions and you must be present to hand in your question. The typed questions will count toward 20% of the final grade.

## Term Paper

4. As far as specific assignments, the idea is to write, by the end of the semester, a really nice 10-12 page term paper. This is old school! My sense, which may be inaccurate for all I know, is that old-school term-papers can be a source of anxiety. But that won't happen here: we'll build up to the term paper in a steady and deliberate and intentional way so that, before you know it, you'll have something really solid and substantial by the end of the semester. I'll have more to say about this as the semester unfolds but here are some general thoughts:

- You might consider submitting your term paper to an undergraduate philosophy conference or undergraduate philosophy journal. These all have specific guidelines for submissions which can provide you with an overall target as far as length and style.
- I plan to be as hands-on as you need: so, if you have any questions about content or style, at any point in the process, let me know and we can talk it through.
- To get to our final destination—a term paper—there will be a few shorter assignments along the way. These will take the form of a proposal, an outline, and an introductory section, that will help get us from Point A to Point B. I'll return all of these with comments; you'll have the option of revising and resubmitting, if you wish; a complete draft will be due by April 22; and a final, final paper will be due May 8th.
- I'll have a lot more to say as we go along, so don't be worried if you have some questions at the outset. That's natural and good. Again, if you have concerns at any point in the process feel free to talk to or e-mail me.
- The proposal, outline, introductory section, and draft will each be worth 5% of the final grade (so, 20% total). The final, complete, term paper will be worth 40% of the final grade.

## General Policies and Additional Information

6. I think philosophy in general is sort of wonderful and often important so I'm always eager to talk about our class. Feel free to drop by office hours or speak to me after class. I've found it's usually a lot more efficient to talk in person than over e-mail.

7. In the interest of good communication please ask if you ever have a question about where you stand grade-wise. While I expect you can keep track of this, too, I'm happy to give you an up-to-date calculation. myCourses sometimes calculates grades in strange and alarming ways, so I can give you a more accurate picture if you need it.

# Readings and Assignments

	01.17.24	Overview and Introductory Remarks
	01.19.24	Sarah Stillman, "What Makes a Murder?" ( <i>The New Yorker</i> , December 18, 2023) Michel Foucault, <i>Discipline and Punish</i> pp.1-8—note: this is <i>extremely</i> unpleasant to read.
General Philosophy of Law	01.22.24	*Antony Duff, "How Not to Define Punishment"
	01.24.24	Robert Canton, "Theories of Punishment" The Code of Hammurabi
	01.26.24	Lon Fuller, "The Case of the Speluncean Explorers" pp. 617-631
	01.29.24	*Lon Fuller, "The Case of the Speluncean Explorers" pp. 631-645
	01.31.24	Selections from <i>The Model Penal Code</i> (1984) Michel Foucault, <i>Discipline and Punish</i> pp. 16-19, 23-24
	02.02.24	Patrick Devlin, "The Enforcement of Morals" pp. 129-139
	02.05.24	Patrick Devlin, "The Enforcement of Morals" pp. 139-151
	02.07.24	*Michel Foucault, <i>Discipline and Punish</i> pp. 47-50, 54-57, 73-75, 82-89, 101-103
	02.09.24	H.L.A. Hart, <i>Law, Liberty, and Morality</i> Section I
	02.12.24	*H.L.A. Hart, <i>Law, Liberty, and Morality</i> Section II
Retributivism	02.14.24	H.L.A. Hart, <i>Law, Liberty, and Morality</i> Section III, pp. 53-69
	02.16.24	H.L.A. Hart, <i>Law, Liberty, and Morality</i> Section III, pp. 69-83
	02.19.24	Elizabeth Holmes: Defense and Prosecution Sentencing Memos; Sentencing Order (3 documents total)
	02.21.24	*Kant, <i>Metaphysical Elements of Justice</i> (selections)
	02.23.24	Michel Foucault, <i>Discipline and Punish</i> pp. 104-110, 126-131, 135-141
	02.26.24	Morris, "Persons and Punishment" pp. 476-490
	02.28.24	Morris, "Persons and Punishment" pp. 490-501
Deterrence	03.01.24	*Erin Kelly, "The Retributive Sentiments"
	03.04.24	Thom Brooks, "Beyond Retribution" Michel Foucault, <i>Discipline and Punish</i> , pp. 170-177, 195-209
	03.06.24	*Jeremy Bentham, <i>Principles of Morals and Legislation</i> (selections)
	03.08.24	Mirko Bagaric, "The Contours of a Utilitarian Theory of Punishment"
	03.11.24- 03.15.25	<b>Spring Break</b>

	03.18.24	Michel Foucault, <i>Discipline and Punish</i> , pp. 209-228
	03.20.24	*Michel Foucault, <i>Discipline and Punish</i> , pp. 257-277, 307-308
	03.22.24	<b>No Class:</b> Get a feel for the <i>United State Sentencing Commission Guidelines Manual 2023</i> . It's easy to get lost in this document (which is sort of the point) but look especially at pp. 1-17, 413-415.
Alternatives	03.25.24	William Kelly, "Punishment and Its Alternatives"
	03.27.24	Jean Hampton, "The Moral Education Theory of Punishment" pp. 208-223
	03.29.24	<b>No class:</b> Insterad, watch Werner Herzog's documentary <i>Into the Abyss</i> .
	04.01.24	Jean Hampton, "The Moral Education Theory of Punishment" pp. 224-238
	04.03.24	*H.L.A. Hart, "Prolegomenon to the Principles of Punishment" pp. 1-13
	04.05.24	H.L.A. Hart, "Prolegomenon to the Principles of Punishment" pp. 13-27
	04.08.24	Robert Bowers: Verdict Form and Judgment (2 documents)
	04.10.24	Nathan Hanna, "Against Legal Punishment"
	04.12.24	*Lode Walgrave, "Restorative Justice, Punishment, and the Law"
	04.15.24	Thom Brooks, "The Unified Theory of Punishment" pp. 1-17.
	04.17.24	*Thom Brooks, "The Unified Theory of Punishment" pp. 17-34
	04.19.24	Enrique Tarrío: Defense and Prosecution Sentencing Memos; Judgment (3 documents total)
	04.22.24	H.L.A. Hart "Legal Responsibility and Excuses" pp. 28-40 <b>COMPLETE DRAFT DUE</b>
	04.24.24	H.L.A. Hart "Legal Responsibility and Excuses" pp. 40-53
	04.26.24	Hadassa Noorda, "Regulation as Punishment"
	04.29.24	*John Dewey, "Force and Coercion"
	05.08.24	<b>TERM PAPER DUE</b>