

# LS R1B: PUNISHMENT & CAPITAL PUNISHMENT

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UC Berkeley Legal Studies | Spring 2019 | 11:00- 12:30 Tuesday/ Thursday | Evans 81

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## COURSE DESCRIPTION

In this course we will consider three big questions: What is punishment? Why do we punish? And, what, if anything, is distinctive about *capital* punishment (that is, the death penalty)? All three of these questions have a rich history in law and the social sciences. During our semester together we will become acquainted with major thinkers who have asked and attempted to answer these questions. By the end of this course you will be able to discuss, critique and apply theories of punishment put forth by Karl Marx, Émile Durkheim, Michel Foucault and many other intellectuals with hard-to-pronounce names.

Of course, punishment isn't just an academic matter; it is also a pressing policy issue that impacts millions of people every year. The contemporary United States is exceptional in its use of both punishment in general and capital punishment in particular. In the first half of the course will read and discuss examples of punishment from a variety of sources including legal cases, journalism and even fiction. In the second half of the course we will focus on current issues in punishment in contemporary California, particularly as they relate to the 8<sup>th</sup> Amendment. By the end of this course you will have lots of examples of punishment here and elsewhere from which to form your own opinions about what punishment is, why we punish, and what, if anything, sets capital punishment apart.

In this course you will also practice and improve academic skills. You will write a lot, and you will hone your craft of academic writing; you will edit your own writing and the writing of others, and will learn to practice concision; and you will produce a well-researched paper on a topic that interests you.

## COURSE READINGS

All course readings are available on the course website. You do not need to buy any books for this class. Please bring a copy of your reading to class. You may print it out or bring it on a computer or tablet. Your cellphone is not an appropriate device for viewing readings in class (see gadget policy below). Many of our assignments call for reading only a small part of a text. Nonetheless, where the complete text is available, I post it all to Bcourses so that you may read more if it if you choose. *It is your responsibility to*

*make sure you read the portions that are assigned. If you are unsure, refer to your syllabus (this thing you are reading now)! If you are still unsure, ask.*

## **COURSE REQUIREMENTS**

### **Grades and Assignments**

- Attendance, participation and flash responses 25%
- Think pieces 25%
- Final Paper (intermediate steps) 15%
- Final Paper (finished product) 35%

### **Participation and flash responses**

It has been said that most of success in life is showing up. Berkeley is no exception. Attendance and active participation are requirements for success in this class. You may have one unexcused absence per semester. Additional absences will impact your grade. If you know you are going to miss class please let me know beforehand.

Research indicates that short, frequent writing, review and assessment helps us retain information in the long-term. I will give you a short writing prompt at either the beginning or end of each class meeting. These flash responses are intended to engage the day's reading, lecture and, occasionally, a guest speaker. I will read your responses each class and will use them to keep track of attendance.

### **Think pieces**

Over the course of the semester you will write three short think pieces. In each of these think pieces you will take a different approach to our central class questions: What is punishment? Why do we punish? What, if anything, is distinctive about capital punishment? These exercises allow you to track the evolution of your own ideas on the topics of this course over time. Remember: writing is thinking. You are allowed (encouraged!) to change your mind over the arc of these pieces. I will read your think pieces and provide feedback on prose.

### **Research Paper**

Research shows that most of us have a hard time making regular progress on long-term tasks such as paper writing. So, to tackle this paper, we are going to break the big task down into a series of smaller tasks. Over the course of the semester you will formulate a research topic, produce a first draft of the paper and work with a peer to edit that draft. You will be held accountable for each of these steps. At the end of the course you will have a revised, 10-page double-spaced final product that you will submit to me. This paper will stand you in especially good stead when you need a writing sample for jobs, internships or grad school in the future.

## OTHER BUSINESS

### Getting in touch

If you have questions about course material, the best way to talk to me is to come to office hours. My office hours are Wednesday mornings from 10 to 12 in the Berkeley Law School, room 257. Sign up for my office hours in advance at [www.wejoinin.com/tobiasjsmithgsi@gmail.com](http://www.wejoinin.com/tobiasjsmithgsi@gmail.com). If you have logistical questions, feel free to email me at [tobiasjsmithgsi@gmail.com](mailto:tobiasjsmithgsi@gmail.com). I generally respond to emails within 24 hours on weekdays. I may not check my email on weekends.

### Citation and Academic Integrity

All of the prohibitions against academic dishonesty that apply at Berkeley apply in this class. As a rule of thumb, if you use words that are not your own, they should be within quotation marks and the source should be named. If you use ideas that are not your own, you should signal where the ideas came from and provide appropriate attribution. If you are unsure, ask me.

### Accommodations

See the Berkeley DSP program <https://dsp.berkeley.edu/about/policies-guidelines/accommodations>. Please talk to me about accommodations **within the first two weeks** so I can make arrangements.

### Gadgets

Electronic gadgets pose a collective problem: while many of us prefer to use technology to take notes, the off-topic use of technology by a few creates serious distractions for the class as a whole. I therefore prohibit the use of laptops and cell phones during class, with two exceptions. First, you may use your laptop or tablet (not your cell phone please) to refer to your reading during discussion. You may also use electronics under circumstances of reasonable academic accommodation with prior approval.

### A Note on Respect and Empathy

Punishment is connected to values and justice and also human suffering. It can therefore be a hard topic to discuss with our peers. We all come to this class with different experiences. Many of us have had our lives affected by crime or punishment, and often both. Our class will be a safe and civil space in which to learn and share. If you have a concern about your wellbeing in the space during any of our classes, please come talk to me.

## READING & COURSE SCHEDULE

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You should complete all readings before class on the day listed.

## WEEK 1: INTRODUCTION

*This week we will get to know each other, go over the plan for the semester, and begin our discussion of punishment. I will give you instructions for your preliminary think piece in class on January 22. Please bring your preliminary think piece in hard copy to class on January 24.*

January 22: Introduction (No readings assigned)

January 24: Some preliminary thoughts

- Hart, H.L. (1959) "Prolegomenon to the Principles of Punishment," Proceedings of the Aristotelian Society 60: pp. 1-6 ONLY, \*\*focus on the definition on p. 6.\*\*
- Gonnerman, J. (2014) "Before the Law," *The New Yorker*.
- **Bring preliminary think piece with you to class.**

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## WEEK 2: CLASSICAL THEORIES (INCAPACITATION AND DETERRENCE)

*This week we will become acquainted with two of the classical accounts of the purpose of punishment. Meet with me during office hours in week 2 or 3 (sign up on wejoinin)*

January 29: Utilitarianism

- Beccaria, C. (1746/1995) *On Crimes and Punishments and Other Writings*. Bellamy, R. ed., Davies, R. trans., posted excerpts.
- Ursula Le Guin (1973) "The Ones Who Walk away from Omelas"

January 31: Utilitarianism today

- Watch Mark Kleiman: <https://www.youtube.com/watch?v=G-IDr3DQnHo>
- National Academy of Sciences (2014) *Deterrence and the Death Penalty*. Nagin, D. and Pepper, J. Eds. \*\*READ ONLY THE SUMMARY (pp. 1-8)\*\*

***Meet with me during office hours in week 2 or 3 (sign up on wejoinin)***

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## WEEK 3: CLASSICAL THEORIES II (RETRIBUTIVISM)

*This week we will discuss retribution, another classical theory of punishment. Meet with me during office hours in week 2 or 3 (sign up on wejoinin). Attend a screening *Dead Man Walking* or watch it on your own.*

February 5: Retributivism

- Kant, I. (1887) "The right of punishing and pardoning" in *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*.
- Booth, W. et al. (2008) *The Craft of Research* (University of Chicago Press), pp. 9-15.

February 7: Retribution and the death penalty

- Dead Man Walking (1995) – Movie Screening time tbd
- **\*\*Optional:** LaChance, D. (2016) Executing Freedom: The Cultural Lives of Capital Punishment in the United States, Chapter 4\*\*

***Meet with me during office hours in week 2 or 3 (sign up on wejoinin)***

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## **WEEK 4: CONSENSUS THEORY**

*This week we will discuss a sociological account of punishment first proposed by the sociologist Émile Durkheim (1858-1917).*

February 12: Durkheim

- Durkheim, E. (1895/1964) "The normal and the pathological" in *Criminological Perspectives: Essential Readings*, McLaughlin et al. eds, pp. 65–68.
- Garland, D. (2013) "Punishment and Social Solidarity" in the *Sage Handbook of Punishment and Society*.

February 14: Durkheim (continued)

- Jackson, S. (1948) The Lottery
  - Booth, W. et al. (2008) *The Craft of Research*, pp. 35-47.
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## **WEEK 5: CONFLICT THEORY I – CONFLICT AND CAPITAL**

*This is the first of three weeks in which we will consider accounts that root punishment in social conflict. We begin with Karl Marx (1818-1883) and Marxist theory and look at a structural account of California's prison boom.*

February 19: Marx and Marxism

- Marx, K. (1867) *Capital*, posted excerpt.
- De Giorgi, A. (2018) "Punishment, Marxism and Political Economy," in *Oxford Research Encyclopedia of Criminology*, **\*\*READ ONLY** pp. 1-6\*\*
- Chambliss, W. (1964) "A Sociological Analysis of the Laws of Vagrancy," *Social Problems*, 12:1.

February 21: Golden Gulag

- Gilmore, RW. (2007) *Golden Gulag: Prisons, Surplus, Crisis and Opposition in Globalizing California*. **READ ONLY THE Introduction**.
  - **\*\*The entire book is available online. Consider skimming chapters 1 and 2\*\***
  - **\*\*Optional additional reading:** Hay, D. (1975) Property, Authority and the Criminal Law, in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, Hay et al., eds. **\*\***
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## **WEEK 6: CONFLICT THEORY II – CONFLICT AND POLITICS**

*This is our second of three weeks in which we consider conflict accounts of punishment. We will look at how punishment may be used to either repress political dissent or consolidate power following political upheaval.*

February 26: Imprisonment and Dissent

- Berger, D. (2014) *The Struggle Within: Prisons, Political Prisoners and Mass Movements in the United States*, Introduction and Chapter One.

February 28: Soledad Brother

- Jackson, G. (1971/ 1994), *Soledad Brother: The Prison Letters of George Jackson*, posted excerpts.

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## **WEEK 7: CONFLICT THEORY III – CONFLICT AND RACE**

*In this third week on conflict theories we will look at accounts that focus explicitly on the role of race in punishment in the United States. **We will also workshop our paper proposals. Please bring your one page proposal to class on March 7.***

March 5: The New Jim Crow

- Alexander, M (2010) *The New Jim Crow: Mass Incarceration in the Age of Color Blindness* (New Press New York). Chapters 1 and 5.
- **\*\*Optional:** Forman, J. (2017) *Locking Up Our Own: Crime and Punishment in Black America*. Introduction and Chapter 5. **\*\***

March 7: Punishment and Black Lives Matter

- Coates, T (2015). "The Black Family in the Age of Mass Incarceration." *The Atlantic Monthly*, October issue. or read online at: <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>
- **\*\*Optional:** Zimring, F. (2017) *When Police Kill* (introduction) **\*\***
- ***We will also workshop our paper proposals. Please bring your one page proposal to class on March 7.***

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## **WEEK 8: POSTMODERN PUNISHMENT**

*This week we consider the work of Michel Foucault (1926-1984). Foucault is the most influential theorist of punishment of the 20<sup>th</sup> century. He's also difficult to read.*

March 12: Discipline and Punish

- Foucault, M (1980) Discipline and Punish, Part I: Torture. Pp. 1-69.

March 14: The problem of the body

- Garland, D. (2011) The Problem of the Body in Modern State Punishment, Social Research, Vol. 78, No. 3, The Body and the State: How the State Controls and Protects the Body, Part II, pp. 767-798

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## **WEEK 9: PUNISHMENT BEYOND PERSONHOOD?**

*This week we will think about punishment beyond people. Can you punish a pig? What about a car? Can punishment create personhood? Can it take away personhood? **Your second think piece is due in class on March 21.***

March 19: Animals, objects and the undead

- Dayan, C. (2011) The Law is a White Dog: How Legal Rituals Make and Unmake Persons. Chapter 2.

March 21: Corporations

- Ciepley, D. (2013) "Neither persons nor associations: Against constitutional rights for corporations. *Journal of Law and Courts*. \*\*JUST PAGES 221-225\*\*
- Alschuler, A. (2009) "Two ways to think about the punishment of corporations" 46 Am. Crim. L. Rev. 1359-1367 \*\*READ ONLY UP TO PART B: PUNISHING THE INNOCENT\*\*
- **Think piece due in class**

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## **WEEK 10: SPRING BREAK!**

March 26: Have fun. Don't read about punishment.

March 28: Have fun. Don't read about punishment.

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## **WEEK 11: WHAT IS CRUEL AND UNUSUAL PUNISHMENT?**

*In the second half of the class we will focus our discussion on contemporary California. This week we begin by determining what legal limits exist on punishment. What exactly is cruel and unusual punishment?*

April 2: Punishment and the constitution

- The Bill of Rights
- Dayan, C. (2007) The Story of Cruel and Unusual, Chapters 1 through 6.

April 4: Punishment and the constitution

- Kerr, O. (2007) How to read a legal opinion: A guide for new law students.

- *McCleskey v. Kemp* (1987)
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## **WEEK 12: CRUEL AND UNUSUAL CALIFORNIA—OVERCROWDING**

*Is overcrowding cruel and unusual punishment?*

### April 9: **Guest Lecture by Caitlin Henry**

- Review website for Prison Advocacy Network (<https://www.prisoneradvocacynetwork.org>)
- Review website for Caitlin Henry (<https://caitlinkellyhenry.com/>)

### April 11: Mass Incarceration on Trial

- Simon, J. (2014) *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America*, posted excerpts.
- *Brown v. Plata* (2011)

## **WEEK 13: CRUEL AND UNUSUAL CALIFORNIA—PERPETUAL PRISON**

*How long is a long enough sentence? Are some types of confinement different than others? **Bring your draft paper body to class for peer review on April 18.***

### April 16: Three Strikes

- Zimring, F. et al. (2001), *Punishment and Democracy: Three Strikes and You're Out in California*, chapter 1.
- *Ewing v. California* (2003)

### April 18: The Supermax

- Reiter, K. (2016) *23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement*. Posted excerpts.
  - Struab, R. (1999) "Responding—really responding—to other students' writing"
  - ***Bring draft paper body for peer review***
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## **WEEK 14: CRUEL AND UNUSUAL CALIFORNIA—WAITING AND DYING**

*California has the country's largest death row population. Our state hasn't executed anyone in a decade. Why is this the case? Is waiting to be executed a form of punishment? **You will return a colleague's paper body with feedback on April 25.***

### April 23: Why the long wait?

- *Jones v. Chappell* (2014)
- Stone, D. and Heen, S. (2014), *Thanks for the Feedback*. Introduction and Chapter 9.



April 25: The death penalty and life without parole

- Simon, J. (2014) "The Cruelty of the Abolitionists" *Journal of Human Rights Practice*. 6:3.
- Proposition 62 materials.
- Proposition 66 materials.
- ***Return paper body with comments***

### **WEEK 15: CRUEL AND UNUSUAL CALIFORNIA—EMERGING ISSUES**

*This will be our last week together. We will discuss a current event in California punishment. **Your final think piece will be due on the last day of class and your paper will be due on the day the final exam is scheduled.***

April 30: TBD

- Erens, P. (2014), The Joys of Trimming, *The New York Times*.

May 2: Wrap-up

- ***Final think piece due***

**May 16: Final paper due in hard copy by noon at the Legal Studies Department at 2240 Piedmont Ave.**