Law 851: Criminal Law at the Margins

Spring, 2016

Instructor: Gary Watson

Office: Law 308

Office hours: Tues: 11:15-12:45; Fri: 11:30-1

Criminal law purports to be about a certain kind of injustice or wrongdoing, namely crime. Its distinctive response to that wrongdoing is public prosecution (trial) and punishment. In contrast, tort offenses (for example) trigger calls for compensation or for injunctions of restraint. It is widely thought that criminal wrongs warrant punishment because they involve culpability. This raises the questions of what culpability is and, equally importantly, why the political community should concern itself to keep track of it by means of the institutions of criminal law. Should law be in the business of ‘retribution’, or should we prefer some alternative systems of social control and conflict resolution?

This course will begin with a review and discussion of some standard philosophical and jurisprudential accounts of crime, culpability and punishment and then examine some areas in which the law has conspicuously struggled in its attempts to do criminal justice. These include the response to actors who are in dire straits or at the margins of moral competence:, sufferers of duress and situational stress, and age-related immaturity (that is, youth!). We then turn to issues raised by a different kind of agent, who is marginalized by class and/or racial injustice. Can the criminal law do justice in contexts of severe economic inequalities and racial and other discrimination? Here we look at analyses of the American criminal justice system as deeply corrupted and compromised by racial and economic inequality. And we consider proposals to take poverty and hardship into account as defenses or as pleas of mitigation (such as the “rotten background defense”).

Requirements: This course will meet once weekly, Wednesdays, 2-4:50. (1) A 15-20 page term paper *except for those writing Journal Notes.* (See below). By the 11th week, students should discuss their paper topics with the instructor. *Whatever its topic, the paper must make significant use of some of the course material..* First drafts are encouraged but not required. (2) In addition, students (a) must write an approximately one-page comment critically reacting to one of the readings assigned for each seminar, beginning in the 2nd week. (You will have two passes. Thus, you are responsible for a total of 12 weeklies.) You should be prepared to discuss your weekly reaction in the relevant seminar. Hard copies of these weeklies should be turned in to me in three installments: The first 4 comments after the 5th seminar, the next 4 after the 10th seminar, and the remainder after the final seminar. (b) Students will be asked to make a 10-15 minute presentation on one of the readings for that week.

Grades The term paper will be 85% of your course grade. The remaining 15% will be for your weekly comments, and your attendance and participation. The course may be taken CR/D/F only with the permission of the instructor.

Readings: Members of the seminar will read and discuss a variety of historical, philosophical and jurisprudential material, as well as central legal cases and statutes, as they bear on the forgoing topics. Course readings will be available on the website for the course (Blackboard).

*Schedule of Topics and Readings*

Week 1 (Jan. 13) Introduction

R. A. Duff, “Theories of Criminal Law” (PDF)

Part I Crime, Punishment, and Culpability

Week 2 (Jan. 20) Punishment, Deterrence and Retribution

Hart, “Prolegomenon to a Theory of Punishment” (PDF)

Feinberg, “The Expressive Function of Punishment” (PDF)

Robinson: “Three conceptions of Desert” (PDF)

Week 3 (Jan. 27) Punishment, Deterrence and Retribution

Erin Kelly: “Criminal Justice without Retribution” (PDF)

Benjamin Ewing, “The Legitimacy of Retribution” (PDF)

Week 4 (Feb.3) Punishment or Preventive detention

US. V. Comstock

Robinson, “Punishing Dangerousness” (PDF);

Ferzan, “Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible” (PDF);

Preventive detention, APA Symposium (PDF)

Week 5 (Feb. 10) Excusing , Exempting and Justifying

Baron, “Justifications and Excuses” (PDF)

Regina v. Dudley and Stephens

Joshua Dressler, “Duress” (PDF);

Week 6 (Feb. 17) Self-Defense, Necessity and Battering

Background: State of New Jersey v. Kelly, NJ 178; State v. Norman 378 S.E.2d 8 (N.C. 1989); People v. Garcia; R. v. Eyapaise.

Joshua Dressler, Battered Women and Sleeping Abusers: Some Reflections, (PDF)

Week 7 (Feb. 24) Self-Defense, Necessity and Battering (cont.)

Ripstein, “Self-Defense and Equal Protection” (PDF)

Jane Maslow Cohen: “Regimes of Private Tyranny”. (PDF)

Baron: “Self-Defense: the imminence requirement” (PDF)

Week 8 (Mar.2) Juvenile Justice

Graham v. Florida; Roper v. Simmons; APA Amicus Brief in Graham v. Florida, pp. 1-34;

Scott and Steinberg, “Blaming Youth” (PDF)

JE Carroll, “Brain Science and Juvenile *Mens Rea*” (PDF)

Bonnie and Scott: “The Teenage Brain: Adolescent Brain Research and the Law” (PDF)

Week 9 (Mar. 9) Juvenile Justice (cont.)

Barry Feld, “Abolish the Juvenile Court” (PDF)

Butts, “Can we do without juvenile justice?” (PDF)

David Brink, “Immaturity, Normative Competence, and Juvenile Transfer”. (PDF)

Duff, “Punishing the Young” (PDF)

SPRING BREAK March 14-18

Week 10 (Mar. 23) Criminal justice, Race, and disadvantaged background

William J. Stuntz, “The Collapse of the American Criminal Justice System” (PDF)

Garland, Review of Stuntz (PDF)

Brian Barry, “The Making of the Black Gulag”, (PDF)

Michelle Alexander, “The New Jim Crow” (PDF)

Week 11 (Mar. 30) Punishing victims of social injustice (i)

David Barzelon, “The Morality of the Criminal Law” (PDF)

Justice Bazelon’s dissent in US v. Alexander (PDF)

Stephen Morse, Reply to Bazelon (PDF)

Week 12 (April 6) Punishing victims of social injustice (ii)

Delgado, “The Rotten Social Background Defense” (PDF).

Paul Robinson, “Are we Responsible for Who We Are?” (PDF)

Week 13 (April 13) Punishing victims of social injustice (iii)

Tommie Shelby, “Justice, Deviance, and the Dark Ghetto,” (PDF).

Antony Duff, TBA

Victor Tadros, “Poverty and criminal responsibility” (PDF)

Week 14 (April 20) Concluding Discussion