# Bill Watson

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**Seminars**

I have three seminars that I’m prepared to teach (sample syllabi are appended below):

* *Current Issues in Legal Interpretation.* This seminar introduces students to issues in legal interpretation that legal academics are actively debating today. Questions that we will ask include: What are debates over legal interpretation about? What does textualism hold and when, if ever, is it useful? What should courts consider in deciding whether statutory meaning is “plain” or “unambiguous”? What grounds canons of statutory interpretation? Should judges rely on corpus linguistics as evidence of “ordinary meaning”? How should statutory interpretation differ from constitutional interpretation (or regulatory interpretation)? What distinguishes originalism from nonoriginalism? Is originalism part of our law? What is the interpretation-construction distinction and is it helpful? How should judges account for empirical and normative uncertainty or peer disagreement? Readings will include cases and law-review articles. Grading will be based on a final paper (in two drafts), a peer-review exercise, and class participation. No prerequisites.
* *Law, Language, and Indeterminacy.*  When does the law fail to conclusively settle what a court must decide?  In other words, when is the law indeterminate?  How often does this occur? How should judges respond?  This seminar addresses these and other related questions.  We will use ideas from the philosophy of law and of language to identify different sources of legal indeterminacy. We will interrogate claims that the law is pervasively indeterminate. And we will consider how legal indeterminacy relates to the rule of law and to debates over legal interpretation. Readings will include work from the American Legal Realists, the Critical Legal Studies movement, and contemporary philosophers, as well as cases.  Grading will be based on three short papers responding to the readings, a final paper, and class participation. No prior knowledge of philosophy is required.
* *Moral Philosophy for Legal Policy and Theory.*This seminar uses the tools of moral philosophy to analyze pressing questions of legal policy and theory.  The topics that we will cover include: moral responsibility and criminal sentencing, especially capital sentencing; the problem of moral luck and its import for tort liability; promising and the moral foundations of contract law; the justification, or lack thereof, for judicial review; theories of rights in general and of the rights to free speech and privacy in particular; different views of what makes discrimination morally wrongful when it is; the ethics of large-scale social problems and environmental policy; and how judges should proceed in the face of moral uncertainty. Readings will include philosophical articles and cases.  Grading will be based on three short papers responding to the readings, a final paper, and class participation. No prior knowledge of philosophy is required.

# Current Issues in Legal Interpretation

*Course Description*

This seminar introduces students to issues in legal interpretation that legal academics are actively debating today. Questions that we will ask include: What are debates over legal interpretation about? What does textualism hold and when, if ever, is it useful? What should courts consider in deciding whether statutory meaning is “plain” or “unambiguous”? What grounds canons of statutory interpretation? Should judges rely on corpus linguistics as evidence of “ordinary meaning”? How should statutory interpretation differ from constitutional interpretation (or regulatory interpretation)? What distinguishes originalism from nonoriginalism? Is originalism part of our law? What is the interpretation-construction distinction and is it helpful? How should judges account for empirical and normative uncertainty or peer disagreement? Readings will include cases and law-review articles. Grading will be based on a final paper (in two drafts), a peer-review exercise, and class participation. No prerequisites.

*Learning Objectives*

1. Gain familiarity with current issues in legal interpretation.
2. Appreciate the distinct normative stakes involved in interpreting different types of legal texts.
3. Improve analytic reasoning skills.
4. Practice clear, concise, and effective writing.

*Course Requirements*

First-Draft of Final Paper

Students will write one final paper in two drafts. The first draft of the paper should be 3,000 to 4,000 words and is due by the start of class on Week 12 (email it to me in a Word document; your name should not appear anywhere in the document itself). This is a firm deadline; no late drafts will be accepted, absent extraordinary circumstances. Failure to turn in a draft on time will result in a 0 for this portion of your final grade. The first-draft of the final paper will be graded for completion and account for 10% of your final grade.

You may write on a topic of your choosing, so long as it’s relevant to the course. I encourage you to choose one of the questions listed next to the readings for each week below. It’s better to focus on one narrow question rather than trying to bite off too much. You must email me the topic of your paper no later than Week 10 for my approval. I’m happy to meet with you to discuss your ideas about paper topics or the paper itself, but I will not review outlines or drafts.

Peer Review & Presentation

Students will be assigned partners and asked to review each other’s drafts. The review will be double blind: you won’t know whose paper you’re reviewing, nor will they know who you are. You must email me detailed feedback on your partner’s draft before the beginning of class on Week 13. I will then forward the feedback to your partner. I suggest using tracked changes and comment bubbles in Word to give your feedback. I will give further instructions on this in class.

We will devote Weeks 13 and 14 to lightning-fast workshops of each other’s papers. Each student will take roughly five minutes to present the main argument of their paper, followed by roughly ten minutes of Q&A (I may shorten or lengthen these times, depending on the size of the class). Your peer review of your partner’s paper and your presentation of your own paper will be graded for completion and will, together, account for 10% of your final grade.

Final Draft of Final Paper

Students will submit a revised draft of their final paper, which should be 6,000 to 8,000 words, inclusive of footnotes. This should be a revision and extension of the first draft. (If your first draft runs into a dead end, you may write on a new topic; but you must get my approval to do so first.) The final draft of your final paper will account for 70% of your final grade.

Class Attendance and Participation

Students are expected to attend class and participate in discussion. Up to two unexcused absences will not count against your attendance grade. Class attendance and participation will account for 10% of your final grade.

*Invitation to Office Hours*

I’m available to meet during my scheduled office hours or by appointment. There is no need to make an appointment to come to office hours; you can just show up. If you’d like to make an appointment outside of office hours, shoot me an email with some suggested dates and times. I’m happy to talk not just about the course material and assignments but also about other aspects of legal philosophy or legal theory, your experience at law school, or your career goals.

*Accessibility*

Your access to this course is important to me. If you have, or think you may have a disability, please contact the relevant university office at [contact information]. Please follow up with me to discuss the necessary logistics of your accommodations. It is important to request accommodations as early as practically possible in the semester to allow sufficient time to arrange them. If you need an immediate accommodation, please speak with me after class or email me. If you experience any access barriers in this course, such as with printed content, graphics, online materials, or any communication barriers, please reach out to me right away.

*Diversity and Inclusion*

It is my intent that students with different identities, backgrounds, and perspectives benefit from this course. It is also my intent that class materials and discussion be respectful of diversity in race, ethnicity, nationality, sexual orientation, gender identity, disability, class, age, and religion. Your suggestions on how to promote these goals are encouraged and appreciated. Please let me know if I can improve the effectiveness of the course either for you or for other students.

Given the nature of the material discussed in class, it is imperative that there be an atmosphere of trust and safety in the classroom, where every student can hear and respect each other. To that end, it is critical that we all attempt in good faith to understand each other’s points of view. Please be charitable to one another. Although I do not anticipate any problems, please let me know if something said or done in class, by either myself or other students, causes discomfort or offense. I’m always happy to talk after class, during office hours, or by appointment.

*Tentative Schedule*

All readings will be made available online. They require close study and must be read before each class meeting, since our discussion will presuppose familiarity with the texts. I highly recommend annotating the texts or otherwise taking notes. The “Further readings” are optional. The literature on legal interpretation is vast—this is only the tip of the iceberg!

I. Introduction

Week 1: Introduction to the Course / Background Debates

What is interpretation? What are debates over legal interpretation about? What sort of arguments must one give to defend a theory of legal interpretation? How do jurisprudential debates over the nature of law relate to debates over legal interpretation? Can getting clear on the nature of law resolve debates over legal interpretation or can it, at best, clarify them?

Mark Greenberg, [*Legal Interpretation*](https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021) [only §§ 1, 2, and 5 are required]

Andrei Marmor & Alexander Sarch, [*The Nature of Law*](https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/), *in* Stanford Encyclopedia Of Philosophy (Edward N. Zalta et al. eds., 2019) [only § 1 is required]

Further reading: Ronald Dworkin, Law’s Empire chs. 2, 7 (1986); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 Neb. L. Rev. 431 (1989); Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special about the Law*, *in* Philosophical Essays: Natural Language—What It Means and How We Use It 403 (2008); Joseph Raz, *Why Interpret*?, *in* Between Authority and Interpretation 223 (2009); Andrei Marmor, Philosophy of Law ch. 6 (2011); Scott J. Shapiro, Legality ch. 13 (2011); Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 Const. Comment. 193 (2015); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079 (2017); Richard H. Fallon Jr., *The Statutory Interpretation Muddle*, 114 Nw. Univ. L. Rev. 269 (2019); Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 Cornell L. Rev. 1395 (2020). *See also* readings on the interpretation-construction distinction below.

I. Statutory Interpretation

Week 2: Textualism

What is textualism? How does textualism differ from literalism? Is textualism useful (does it provide an answer to vagueness in statutory language)? Does disagreement among textualists over what textualism requires in specific cases pose a problem for the theory? How should textualists account for prior precedential interpretations of statutes? Why be a textualist? Were all, or any, of the opinions in *Bostock v. Clayton County* genuinely textualist opinions?

Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis*, 70 Case W. Res. 855 (2020)

Andrei Marmor, The Language of Law ch. 5 (2014)

*Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020)

Further reading (on textualism generally): Frank H. Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533 (1983); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 3 (Amy Gutman ed., 1997); Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347 (2005); John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419 (2005); Victoria Nourse, *Textualism 3.0: Statutory Interpretation after Justice Scalia*, 70 Ala. L. Rev. 667 (2019); Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. Ill. L. Rev. Online 218 (2021)

Further reading (on textualism in *Bostock*): Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265 (2020); Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 Calif. L. Rev. Online 463 (2020); Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 Notre Dame L. Rev. 67 (2021); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 Mich. L. Rev. 1503 (2021); Bill Watson, *Textualism, Dynamism, and the Meaning of “Sex*,*”* 2022 Cardozo L. Rev. de novo 41 (2022); Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. Cal. L. Rev. (forthcoming); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Penn. L. Rev. (forthcoming)

Week 3: Purposivism / Pragmatism

How do purposivism and pragmatism differ from textualism? How do they differ each other? With respect to purposivism, whose purposes matter? Does pragmatism mean that “anything goes”? How should purposivists or pragmatists account for prior precedential interpretations of statutes? Why be a purposivist or pragmatist? Why doesn’t a court’s use of one interpretive theory or another bind future courts when that theory is necessary to the court’s reasoning?

John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70 (2006)

Stephen Breyer, Making Our Democracy Work: A Judge’s View chs. 7–8 (2010)

*Badgerow v. Walters*, No. 20-1143 (2022)

Further reading: Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Richard A. Posner, *Legal Pragmatism Defended*, 71 U. Chi. L. Rev. 683, 683 (2004); Richard A. Posner, How Judges Think ch. 9 (2008); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 Duke L.J. 1275 (2020); Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967 (2021)

Week 4: Plain Meaning

When is statutory meaning “plain” or “unambiguous”? How high or low should judges set the threshold for plainness (and do judges set different thresholds)? What should courts consider in deciding whether statutory meaning is “plain”—words, syntax, context, canons of interpretation, legislative history, the purpose for which the statute was (or should have been) enacted, …? If a statute’s meaning is “plain,” why should courts turn a blind eye to other relevant information? Should courts rely on ambiguity-dependent canons, like the rule of lenity or *Chevron* deference?

Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016)

William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. Chi. L. Rev. 539 (2017)

*Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004)

Further reading: Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. Legal Analysis 257 (2010); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 Md. L. Rev. 791 (2010); Richard H. Jr. Fallon, *The Meaning of Legal Meaning and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235 (2015); Adam M. Samaha, *If the Text Is Clear - Lexical Ordering in Statutory Interpretation*, 94 Notre Dame L. Rev. 155 (2018); Ryan D. Doerfler, *The “Ambiguity” Fallacy*, 88 Geo. Wash. L. Rev. 1110 (2020)

Week 5: Canons of Interpretation

Are canons of interpretation legal norms? If so, what grounds them as such (custom, cases, long strings of cases)? How do canons evolve or go extinct? How should courts formulate the canons (how precise should those formulations be)? Is there a linguistic basis for some of the canons? If so, which ones? What happens when canons of interpretation conflict with each other?

Selections from Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)

William N. Eskridge Jr., Book Review, *The New Textualism*, 113 Colum. L. Rev. 531 (2013)

*Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021)

Further reading: Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950); John F. Manning, *Legal Realism & the Canons’ Revival*, 5 Green Bag 2d 283 (2002); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909 (2016); Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. Chi. L. Rev. 81 (2017); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 Mich. L. Rev. 71 (2018); Ryan D. Doerfler, *Late-Stage Textualism*, 2022 Sup. Ct. Rev. (forthcoming)

Week 6: Scrivener’s Errors and Absurd Results

How should courts respond to putative scrivener’s errors in statutes? How should they respond when enforcing a statute’s “plain meaning” would yield an absurd result? How clear must a putative scrivener’s error or absurd result be to warrant judicial action? Is textualism consistent with the scrivener’s error and absurdity doctrines? Is there a linguistic basis for these doctrines?

Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us about Statutory Interpretation*, 69 Geo. Wash. L. Rev. 309 (2001)

Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. Cin. L. Rev. 25 (2006)

*Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services*, 435 F.3d 1140 (9th Cir. 2006)

Further reading (on textualism and the scrivener’s error and absurdity doctrines): Michael S. Fried, *A Theory of Scrivener’s Error*, 52 Rutgers L. Rev. 589 (2000); John David Ohlendorf, *Textualism and the Problem of Scrivener’s Error*, 64 Me. L. Rev. 119 (2011); John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387 (2005); Ryan D. Doerfler, *The Scrivener's Error*, 110 Nw. U. L. Rev. 811 (2016)

Further reading (on pragmatic indeterminacy): Andrei Marmor, *Defeasibility and Pragmatic Indeterminacy in Law*, *in* Pragmatics and Law 15 (Alessandro Capone & Francesca Poggi eds., 2016); Andrei Marmor, *The Pragmatics of Legal Language*, 21 Ratio Juris 423 (2008); Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. Rev. 1 (1990)

Further cases (absurdity): *United States v. Kirby*, 74 U.S. 482 (1868); *Riggs v. Palmer*, 115 N.Y. 506 (1889); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *Smith v. Zachary*, 255 F.3d 446 (7th Cir. 2001); *Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005)

Further cases (scrivener’s errors): *Cernauskas v. Fletcher*, 211 Ark. 678 (1947); *Johnson v. United States Gypsum Co.*, 229 S.W.2d 671, 673 (Ark. 1950); *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Warren*, 149 F.3d 825 (8th Cir. 1998); *API v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013); *United States v. Bhutani*, 266 F.3d 661 (7th Cir. 2001); *King v. Burwell*, 576 U.S. 473 (2015)

Week 7: Corpus Linguistics

What does “ordinary meaning” mean? How can corpus linguistics provide evidence of a word or phrase’s ordinary meaning? Is corpus linguistics very likely to resolve uncertainty over a word or phrase’s ordinary meaning? Should judges rely on corpus linguistics to interpret statutes? What, if any, are the drawbacks or risks of doing so?

Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788 (2018)

Kevin P. Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726 (2020)

*Taniguchi v. Kan Pacific Saipan*, 566 U.S. 560 (2012)

Further reading: Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 94 S. Cal. L. Rev. Postscript 13 (2021); Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 Cornell L. Rev. 1397 (2021); Kevin Tobia, *The Corpus and the Courts*, U. Chi. L. Rev. Online (2021); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 Mich. L. Rev. 1503 (2021); Bill Watson, *Textualism, Dynamism, and the Meaning of “Sex*,*”* 2022 Cardozo L. Rev. de novo 41 (2022)

III. Constitutional Interpretation

Week 8: Originalism / Nonoriginalism

What is originalism? How does “originalism” in academic discourse compare to “originalism” in judicial practice or political discourse? How should the word be used? Is originalism useful (does it provide an answer to vagueness in constitutional language)? How should originalists account for precedent? Why be an originalist? Is originalism part of our law? Must textualists about statutory interpretation be originalists about constitutional interpretation? What is the most plausible original meaning of [pick a constitutional provision]? On what do originalists and nonoriginalists disagree? Are they, at least some of the time, merely talking past one another?

Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243 (2019)

Larry Alexander, *Originalism, the Why and the What*, 82 Fordham L. Rev. 539 (2013)

*District of Columbia v. Heller*, 554 U.S. 570 (2008)

Further reading (background on originalism): Antonin Scalia, Originalism: *The Lesser Evil*, 57 U. Cinn. L. Rev. 849 (1989); Gary Lawson, *On Reading Recipes … and Constitutions*, 85 GEO. L.J. 1823 (1997); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. Rev. 1 (2009); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham L. Rev. 375 (2013); Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269 (2017); Cass R. Sunstein, *Originalism*, 93 Notre Dame L. Rev. 1671 (2018)

Further reading (on different versions of originalism): John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 Nw. U. L. Rev. 751 (2009); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 Fordham L. Rev. 597 (2013); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub. Pol’y 817 (2015); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1 (2018)

Further reading (on originalism and precedent): Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 Const. Comment. 271 (2005); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803 (2009); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 Const. Comment. 451 (2018)

Further reading (on whether originalism is part of our law): Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw. U. L. Rev. 857 (2009); William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 Nw. L. Rev. 1455 (2019); Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 Va. L. Rev. Online 128 (2019); Emad H. Atiq & Jud Mathews, *The Uncertain Foundations of Public Law Theory*, Cornell J. L. & Pub. Pol’y (forthcoming)

Further reading (on textualism versus originalism): Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. Colo. L. Rev. 1 (2004); Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 Cornell L. Rev. 591 (2021)

Further reading (on nonorginalism and anti-theory): James B. Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1894); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review ch. 4 (1980); Philip Bobbitt, Constitutional Fate ch. 1 (1982); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996); Richard A. Primus, *When Should Original Meanings Matter?*, 107 Mich. L. Rev. 165 (2008); James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 Am. J. Comp. L. 515 (2014); Andrew Jordan, *Constitutional Anti-Theory*, 107 Georgetown L. J. 1515 (2019); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 Vand. L. Rev. (forthcoming)

Week 9: The Interpretation-Construction Distinction / Living Originalism

What is the interpretation-construction distinction? Is it a useful distinction for constitutional theory? Does anyone disagree over how to interpret the Constitution (as Solum defines “interpret”)? Do originalists have an answer to what judges ought to do in the “construction zone”? How large is this zone? What is the difference between originalism and living originalism? How does the concept-conception distinction fit in here?

Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453 (2013)

Jack M. Balkin, Living Originalism chs. 1–2 (2011)

Further reading (on the interpretation/construction distinction): Keith E. Whittington, *Constructing a New American Constitution*, 27 Const. Comment. 119 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 Harv. J. L. & Pub. Pol’y 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453 (2013); John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 Notre Dame L. Rev. 919 (2021)

Further reading (on living originalism): Ronald Dworkin, *Comment*, *in* A Matter of Interpretation: Federal Courts and the Law 3 (Amy Gutman ed., 1997); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239 (2009); Gary Lawson, *Dead Document Walking*, 92 B.U. L. Rev. 1225 (2012); James E. Fleming, *The Balkinization of Originalism*, 2012 U. Ill. L. Rev. 660 (2012); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. Ill. L. Rev. 737 (2012)

Further reading (on concepts and conceptions): W.B. Gallie, *Essentially Contested Concepts*, 56 Proc. of the Aristotelian Soc’y 167 (1956); Ronald Dworkin, Taking Rights Seriously ch. 5 (1977); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 L. & Phil. 137 (2002); Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 Fordham L. Rev. 577 (2013)

Week 10: Empirical Uncertainty / Normative Uncertainty / Peer Disagreement

How should judges proceed in face of empirical uncertainty over the consequences of their decisions? How should they proceed in face of normative uncertainty over which approach to legal interpretation is normatively best? Are judges epistemic peers? If so, what are they rationally required to conclude when they find out that they disagree over a constitutional provision’s meaning or over what the content of the law is?

Adrian Vermeule, Judging under Uncertainty: An Institutional Theory of Legal Interpretation ch. 8 (2006)

Courtney M. Cox, [*The Uncertain Judge*](https://ssrn.com/abstract%3D3794982) (Feb. 28, 2021)

William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 Mich. L. Rev. 319 (2018)

Further reading (on normative uncertainty): Ted Lockhart, Moral Uncertainty and Its Consequences chs. 1–2 (2000);William MacAskill, Krister Bykvist & Toby Ord, Moral Uncertainty ch. 1 (2020)

Further reading (on peer disagreement): Thomas Kelly, The Epistemic Significance of Disagreement, *in* 1 Oxford Studies in Epistemology (John Hawthorne & Tamar Gendler eds., 2005); Richard Feldman, *Epistemological Puzzles about Disagreement*, *in* Epistemology Futures (Stephen Hetherington ed., 2006); Bryan Frances & Jonathan Matheson, [*Disagreement*](https://plato.stanford.edu/archives/win2019/entries/disagreement/), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2019)

IV. Regulatory Interpretation

Week 11: Interpreting Regulations

How should interpreting regulations differ, if at all, from interpreting statutes or constitutions? What features of regulations make them distinctive from other sorts of legal texts, and what is the normative significance of those features for regulatory interpretation? Should courts defer to agencies’ interpretations of their own regulations (*Auer* deference)? Notice that many of the questions that we asked above with respect to statutes can be asked again with respect to regulations, e.g., what should courts consider in deciding whether regulatory meaning is “plain”?

*Kevin M. Stack*, *Interpreting Regulations*, 111 Mich. L. Rev. 355 (2012)

*Kisor v. Wilkie*, No. 18-15 (2019)

Further reading (on interpreting regulations): John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996)

V. Contractual Interpretation

Week 12: Interpreting Contracts

How should interpreting contracts differ, if at all, from interpreting statutes, constitutions, or regulations? What features of contracts make them distinctive from other sorts of legal texts, and what is the normative significance of those features for contractual interpretation? When should courts consider extrinsic evidence? What extrinsic evidence? Notice that many of the questions that we asked above with respect to statutes can be asked again with respect to contracts, e.g., should judges rely on corpus linguistics to interpret contracts?

Gideon Rosen, *Textualism, Intentionalism, and the Law of the Contract*, *in* Philosophical Foundations of Language in the Law 130 (Andrei Marmor & Scott Soames eds., 2011);

*In re Soper’s Estate*, 196 Minn. 60 (1935)

Further reading: Kent Greenawalt, *Pluralist Approach to Interpretation: Wills and Contracts*, 42 San Diego L. Rev. 533 (2005); Brian H. Bix, Contract Law: Rules, Theory, and Context ch. 4 (2012); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 Harv. L. Rev. 1135 (2019); Lawrence B. Solum, *Contractual Communication*, 133 Harv. L. Rev. F. 23 (2019); Stephen C. Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 Wash. L. Rev. 1337 (2019); Daniel Markovits & Emad Atiq, [*Philosophy of Contract Law*](https://plato.stanford.edu/archives/win2021/entries/contract-law/), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021)

VI. Final Paper Workshop

Week 13: Workshop I

No new readings for this week. I encourage you to use the extra time to continue researching and revising your final papers.

Week 14: Workshop II

No new readings for this week. I encourage you to use the extra time to continue researching and revising your final papers.

# Law, Language, and Indeterminacy

*Course Description*

When does the law fail to conclusively settle what a court must decide?  In other words, when is the law indeterminate?  How often does this occur? How should judges respond?  This seminar addresses these and other related questions.  We will use ideas from the philosophy of law and of language to identify different sources of legal indeterminacy. We will interrogate claims that the law is pervasively indeterminate. And we will consider how legal indeterminacy relates to the rule of law and to debates over legal interpretation. Readings will include work from the American Legal Realists, the Critical Legal Studies movement, and contemporary philosophers, as well as cases.  Grading will be based on three short papers responding to the readings, a final paper, and class participation. No prior knowledge of philosophy is required.

*Learning Objectives*

1. Learn to distinguish sources of legal indeterminacy.
2. Improve analytic reasoning skills.
3. Practice clear, concise, and effective writing.
4. Analyze legal issues from an interdisciplinary perspective.

*Course Requirements*

Short Papers

Students will write three short papers over the course of the semester (800 to 1,200 words). Each paper must respond to an assigned reading. Papers are due by 5 p.m. the day *before* we meet to discuss the relevant reading. This is a hard deadline; late papers will not be graded, absent unusual circumstances. Students should expect to take a leading role in the class’s discussion of the readings that they write on. Each paper accounts for 10% of your final grade.

Each paper should be roughly half summary and half critique/analysis. The summary portion should charitably lay out one of the author’s arguments. Avoid excessive quotation; better to paraphrase the author’s argument in your own words. The critique/analysis portion should pose an objection to the author, raise questions that the author failed to address, or use the author’s ideas to analyze a case (either a case assigned for this class or one that you’ve read elsewhere).

Students may choose which week to submit short papers, so long as they abide by the following deadlines: the first paper must be submitted on or before Week 4; the second paper must be submitted on or before Week 8; and the third paper must be submitted on or before Week 12. No more than three papers will be accepted (you cannot submit extra papers to boost your grade). Email your short papers to me in Word documents (no PDFs).

Final Paper

Students will write one final paper (6,000 to 8,000 words, inclusive of footnotes). Students may write their final paper either in response to one of the prompts that I will circulate no later than Week 9 *or* students may write on a topic of their own choosing (providing that it is relevant to the course and receives my approval). If you choose the latter option, you must propose your paper topic to me no later than Week 11. I’m happy to meet with you to discuss your ideas about paper topics or the paper itself, but I will not review outlines or drafts. Submit your final paper as a Word document (no PDFs). The final paper accounts for 60% of your final grade.

Class Attendance and Participation

Students are expected to attend class and participate in discussion. Up to two unexcused absences will not count against your attendance grade. Class attendance and participation accounts for 10% of your final grade.

*Invitation to Office Hours*

I’m available to meet during my scheduled office hours or by appointment. There is no need to make an appointment to come to office hours; you can just show up. If you’d like to make an appointment outside of office hours, shoot me an email with some suggested dates and times. I’m happy to talk not just about the course material and assignments but also about other aspects of legal philosophy and legal theory, your experience at law school, or your career goals.

*Accessibility*

Your access to this course is important to me. If you have, or think you may have a disability, please contact the relevant university office at [contact information]. Please follow up with me to discuss the necessary logistics of your accommodations. It is important to request accommodations as early as practically possible in the semester to allow sufficient time to arrange them. If you need an immediate accommodation, please speak with me after class or email me. If you experience any access barriers in this course, such as with printed content, graphics, online materials, or any communication barriers, please reach out to me right away.

*Diversity and Inclusion*

It is my intent that students with different identities, backgrounds, and perspectives benefit from this course. It is also my intent that class materials and discussion be respectful of diversity in race, ethnicity, nationality, sexual orientation, gender identity, disability, class, age, and religion. Your suggestions on how to promote these goals are encouraged and appreciated. Please let me know if I can improve the effectiveness of the course either for you or for other students.

Given the nature of the material discussed in class, it is imperative that there be an atmosphere of trust and safety in the classroom, where every student can hear and respect each other. To that end, it is critical that we all attempt in good faith to understand each other’s points of view. Please be charitable to one another. Although I do not anticipate any problems, please let me know if something said or done in class, by either myself or other students, causes discomfort or offense. I’m always happy to talk after class, during office hours, or by appointment.

*Tentative Schedule*

All readings will be made available online. They require close study and must be read before each class meeting, since our discussion will presuppose familiarity with the texts. I highly recommend annotating the texts or otherwise taking notes. Optional readings are indicated by an asterisk (\*).

I. Introduction

Week 1: Introduction to the Course / Background Debates

Andrei Marmor & Alexander Sarch, [*The Nature of Law*](https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/), *in* Stanford Encyclopedia Of Philosophy (Edward N. Zalta et al. eds., 2019) [only § 1 is required]

Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex. L. Rev. 267 (1998)

\*Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging chs. 5–6 (2010)

Week 2: What Is Legal Indeterminacy and Why Does It Matter?

Ronald Dworkin, *The Model of Rules I*, *in* Taking Rights Seriously 14 (1977)

Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481 (1995)

\*Matthew H. Kramer, Objectivity and the Rule of Law ch. 1 (2007)

Week 3: Taxonomizing Sources of Legal Indeterminacy

Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special about the Law*, *in* Philosophical Essays: The Philosophical Significance of Language 403 (2009)

Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479 (2013)

*Andrus v. Charlestone Stone Products Company*, 436 U.S. 604 (1978)

*Taniguchi v. Kan Pacific Saipan*, 566 U.S. 560 (2012)

II. The Sources of Legal Indeterminacy

Week 4: Ambiguity and Polysemy

Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. Jefferson L. Rev. 167 (2002)

Andrei Marmor, The Language of Law ch. 5 (2014)

*State v. Partlow*, 91 N.C. 550 (1884)

*Young v. Community Nutrition Institute*, 476 U.S. 974 (1986)

\*Adam Sennet, [Ambiguity](https://plato.stanford.edu/archives/fall2021/entries/ambiguity/), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021)

Week 5: First-Order and Higher-Order Vagueness

H.L.A. Hart, *The Concept of Law* ch. 7 (3d ed. 2012)

Andrei Marmor, The Language of Law ch. 4 (2014)

*McBoyle v. United States*, 283 U.S. 25 (1931)

*Wooden v. United States*, No. 20-5279 (2022)

\*Scott Soames, *Higher-Order Vagueness for Partially Defined Predicates*, *in* Philosophical Essays: The Philosophical Significance of Language 340 (2009)

Week 6: Essentially Contested Concepts and Metalinguistic Negotiation

W.B. Gallie, *Essentially Contested Concepts*, 56 Proc. of the Aristotelian Soc’y 167 (1956)

Bill Watson, Metalinguistic Negotiation in Legal Speech (manuscript)

*Roper v. Simmons*, 543 U.S. 551 (2005)

\*Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 L. & Phil. 137 (2002)

Week 7: Incommensurability and Closure Rules

Joseph Raz, The Morality of Freedom ch. 13 (1986)

William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079 (2017)

*Navarette v. California*, 572 U.S. 393 (2014)

*Cirillo v. Arco Chemical Co., Div. of Atlantic Richfield Co.*, 862 F.2d 448 (3d Cir. 1988)

\*Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467 (1996)

\*Richard Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1497 (2019)

Week 8: Pragmatic Indeterminacy and Defeasibility

Kent Bach, *Context ex Machina*, *in* Semantics versus Pragmatics 15 (Zoltán Gendler Szabó ed., 2005)

Andrei Marmor, *Defeasibility and Pragmatic Indeterminacy in Law*, *in* Pragmatics and Law 15 (Alessandro Capone & Francesca Poggi eds., 2016)

*TVA v. Hill*, 437 U.S. 153 (1978)

*Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 448 F.3d 1092 (9th Cir. 2006)

\*Andrei Marmor, *The Pragmatics of Legal Language*, 21 Ratio Juris 423 (2008)

\*Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. Rev. 1 (1990)

Week 9: Conflicting Legal Norms and Problems of Precedent

Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950)

Karl Llewellyn, The Bramble Bush ch. 4 (1930)

*Morton v. Mancari*, 417 U.S. 535 (1974)

*Seila Law LLC v. Consumer Fin. Prot. Bureau*, 207 L. Ed. 2d 494 (2020)

*Jones v. Mississippi*, 141 S. Ct. 1307 (2021)

III. Global Legal Indeterminacy?

Week 10: The Indeterminacy Thesis

Anthony D’Amato, *Aspects of Deconstruction: The Easy Case of the Under-Aged President*, 84 Nw. U. L. Rev. 250 (1990)

Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 Quinnipiac L. Rev. 339 (1996)

Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987)

\*Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985)

Week 11: Kripkenstein and Rule Following

Selections from Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans., Wiley-Blackwell 4th ed. 2009)

Selections from Saul Kripke, Wittgenstein on Rules and Private Language (1982)

Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life ch. 4 (1993)

\*Charles M. Yablon, Book Review, *Law and Metaphysics*, 96 Yale L.J. 613 (1987)

\*Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Pa. L. Rev. 549 (1993)

\*Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law chs. 4–5 (2001)

\*Andrei Marmor, Interpretation and Legal Theory ch. 7 (2d ed., 2005)

IV. Legal Indeterminacy and the Rule of Law

Week 12: The Value of Vagueness

Timothy Endicott, *The Value of Vagueness*, *in* Language in the Law 14 (Andrei Marmor & Scott Soames eds., 2013)

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)

*State v. Stanko*, 292 Mont. 192 (1998)

\*Hrafn Asgeirsson, The Nature and Value of Vagueness in the Law chs. 2–3 (2020)

V. From Indeterminacy to Interpretation

Week 13: Textualism/Originalism and Their Rivals

Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & Liberty 231 (2011)

Stephen Breyer, Making Our Democracy Work: A Judge’s View chs. 7–8 (2010)

\*Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849 (1989)

\*John F. Manning, *What Divides Textualists from Purposivists*, 106 Colum. L. Rev. 70 (2006)

\*John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 Notre Dame L. Rev. 919 (2021)

Week 14: Legal Indeterminacy and the Judicial Role

Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 Const. Comment. 271 (2005)

William N. Eskridge Jr., *Spinning Legislative Supremacy*, 78 Geo. L. J. 319 (1989)

\*Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179 (1986)

\*Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989)

\*Stephen Breyer, The Authority of the Court and the Peril of Politics ch. 3 (2021)

# Moral Philosophy for Legal Policy and Theory

*Course Description*

This seminar uses the tools of moral philosophy to analyze pressing questions of legal policy and theory.  The topics that we will cover include: moral responsibility and criminal sentencing, especially capital sentencing; the problem of moral luck and its import for tort liability; promising and the moral foundations of contract law; the justification, or lack thereof, for judicial review; theories of rights in general and of the rights to free speech and privacy in particular; different views of what makes discrimination morally wrongful when it is; the ethics of large-scale social problems and environmental policy; and how judges should proceed in the face of moral uncertainty. Readings will include philosophical articles and cases.  Grading will be based on three short papers responding to the readings, a final paper, and class participation. No prior knowledge of philosophy is required.

*Learning Objectives*

1. Learn new tools for answering questions of legal policy and theory.
2. Improve analytic reasoning skills.
3. Practice clear, concise, and effective writing.
4. Analyze legal issues from an interdisciplinary perspective.

*Course Requirements*

Short Papers

Students will write three short papers over the course of the semester (800 to 1,200 words). Each paper must respond to an assigned reading. Papers are due by 5 p.m. the day *before* we meet to discuss the relevant reading. This is a hard deadline; late papers will not be graded, absent unusual circumstances. Students should expect to take a leading role in the class’s discussion of the readings that they write on. Each paper accounts for 10% of your final grade.

Each paper should be roughly half summary and half critique/analysis. The summary portion should charitably lay out one of the author’s arguments. Avoid excessive quotation; better to paraphrase the author’s argument in your own words. The critique/analysis portion should pose an objection to the author, raise questions that the author failed to address, or use the author’s ideas to analyze a case (either a case assigned for this class or one that you’ve read elsewhere).

Students may choose which week to submit short papers, so long as they abide by the following deadlines: the first paper must be submitted on or before Week 4; the second paper must be submitted on or before Week 8; and the third paper must be submitted on or before Week 12. No more than three papers will be accepted (you cannot submit extra papers to boost your grade). Email your short papers to me in Word documents (no PDFs).

Final Paper

Students will write one final paper (6,000 to 8,000 words, inclusive of footnotes). Students may write their final paper either in response to one of the prompts that I will circulate no later than Week 9 *or* students may write on a topic of their own choosing (providing that it is relevant to the course and receives my approval). If you choose the latter option, you must propose your paper topic to me no later than Week 11. I’m happy to meet with you to discuss your ideas about paper topics or the paper itself, but I will not review outlines or drafts. Submit your final paper as a Word document (no PDFs). The final paper accounts for 60% of your final grade.

Class Attendance and Participation

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*Invitation to Office Hours*

I’m available to meet during my scheduled office hours or by appointment. There is no need to make an appointment to come to office hours; you can just show up. If you’d like to make an appointment outside of office hours, shoot me an email with some suggested dates and times. I’m happy to talk not just about the course material and assignments but also about other aspects of legal philosophy and legal theory, your experience at law school, or your career goals.

*Accessibility*

Your access to this course is important to me. If you have, or think you may have a disability, please contact the relevant university office at [contact information]. Please follow up with me to discuss the necessary logistics of your accommodations. It is important to request accommodations as early as practically possible in the semester to allow sufficient time to arrange them. If you need an immediate accommodation, please speak with me after class or email me. If you experience any access barriers in this course, such as with printed content, graphics, online materials, or any communication barriers, please reach out to me right away.

*Diversity and Inclusion*

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*Tentative Schedule*

All readings will be made available online. They require close study and must be read before each class meeting, since our discussion will presuppose familiarity with the texts. I highly recommend annotating the texts or otherwise taking notes. Optional readings are indicated by an asterisk (\*).

I. Introduction

Week 1: Introduction / Background on Normative Ethics and Justifications of Punishment

David Copp, *Introduction: Metaethics and Normative Ethics*, *in* The Oxford Handbook of Ethical Theory (David Copp ed., 2005)

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* Punishment and Responsibility: Essays in the Philosophy of Law 1 (1968)

18 U.S.C. § 3553(a)

[Federal Sentencing Guidelines Manual](https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated) § 1A.1–3, § 5H1.12

Model Penal Code §§ 1.02, 2.01, 2.02

II. Criminal Law

Week 2: Free-Will Skepticism and Criminal Punishment

Robert Kane, A Contemporary Introduction to Free Will chs. 1–3 (2005)

*Powell v. Texas*, 392 U.S. 514 (1968)

*United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973) (en banc)

\*Gregg D. Caruso, Elizabeth Shaw & Derk Pereboom, *Free Will Skepticism in Law and Society: An Overview*, *in* Free Will Skepticism in Law and Society: Challenging Retributive Justice 1 (Gregg D. Caruso, Elizabeth Shaw & Derk Pereboom eds., 2019)

\*Derk Pereboom, Free Will, Agency, and Meaning in Life ch. 7 (2014)

\*Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 Behav. Sci. L. 203 (2007)

Week 3: Mitigation and Capital Sentencing

Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, *in* Agency and Responsibility: Selected Essays (2004)

Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 Am. J. Crim. L. 167 (2018)

18 U.S.C. §§ 3592–93

*Lockett v. Ohio*, 438 U.S. 586 (1978)

*Tennard v. Dretke*, 542 U.S. 274 (2004)

III. Tort Law

Week 4: Moral Luck and Tort Liability

Dana K. Nelkin, [*Moral Luck*](https://plato.stanford.edu/archives/sum2019/entries/moral-luck/), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2019)

Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* Philosophical Foundations of Tort Law (David Owen ed., 1997)

*Vosburg v. Putney*, 80 Wis. 523 (1891)

\*B.A.O. Williams & T. Nagel, *Moral Luck*, 50 Proceedings of Aristotelian Society Supp. 115 (1976)

\*David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 Law & Phil. 405 (2007)

Week 5: Moral Dilemmas and Cost-Benefit Analysis

Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost‐Benefit Analysis*, 29 J. L. Stud. 1005 (2000)

Richard A. Posner, The Economic Analysis of Law ch. 6 (9th ed., 2014)

*McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554 (7th Cir. 1987)

\*Lisa Tessman, Moral Failure: On the Impossible Demands of Morality ch. 1 (2015)

IV. Contract Law

Week 6: Promising and Contracts

Seana Valentine Schiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708 (2007)

Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1603 (2009)

*Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683 (1965)

*N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265 (7th Cir. 1986)

\*Joseph Raz, *Is There a Reason to Keep a Promise?*, *in* The Philosophical Foundations of Contract Law (Gregory Klass, George Letsas & Prince Sapraid eds., 2014)

\*Daniel Markovits & Emad Atiq, [*Philosophy of Contract Law*](https://plato.stanford.edu/archives/win2021/entries/contract-law/), *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021)

Week 7: Distributive Justice and Contracts

Aditi Bagchi, *Distributive Justice and Contract*, *in* The Philosophical Foundations of Contract Law (Gregory Klass, George Letsas & Prince Sapraid eds., 2014)

Aditi Bagchi, *Lying and Cheating, Or Self-Help and Civil Disobedience?*, 85 Brook. L. Rev. 355 (2020)

*Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)

*Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. 2002)

V. Constitutional Law

Week 8: Justifying Judicial Review

Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & Phil. 327 (1991)

Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L. J. 1346 (2006)

*Plessy v. Ferguson*, 163 U.S. 537 (1896)

*Lochner v. New York*, 198 U.S. 45 (1905)

\*James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893)

\*John Hart Ely, Democracy and Distrust: A Theory of Judicial Review ch. 4 (1980)

Week 9: Theories of Rights / The Right to Free Speech

Joseph Raz, *The Nature of Rights*, *in* The Morality of Freedom 165 (1986)

Alon Harel, *Freedom of Speech*, *in* The Routledge Companion to Philosophy of Law 599 (Andrei Marmor ed., 2015)

*National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977)

*Snyder v. Phelps*, 562 U.S. 443 (2011)

\*Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917)

\*John Stuart Mill, [On Liberty](https://www.gutenberg.org/files/34901/34901-h/34901-h.htm) chs. 1–2 (1859)

Week 10: The Right to Privacy

Judith Wagner DeCew, *Privacy*, *in* The Routledge Companion to Philosophy of Law 584 (Andrei Marmor ed., 2015)

Andrei Marmor, *What is the Right to Privacy?*, 43 Phil. & Pub. Affairs 3 (2015)

*Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998)

*Griswold v. Connecticut*, 381 U.S. 479 (1965)

\*Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)

\*Judith Jarvis Thomson, *The Right to Privacy*, 4 Phil. & Pub. Affairs 295 (1975)

VI. Antidiscrimination Law & Environmental Law

Week 11: What Makes Discrimination Wrongful When It Is?

Sophia Moreau, Faces of Inequality: A Theory of Wrongful Discrimination chs. 1–2 (2020)

*Wilson v. Southwest Airlines*, 517 F. Supp. 292 (1981)

*Brnovich v. Democratic National Committee*, 594 U.S. \_ (2021)

\*Larry Alexander, *What Makes Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. Penn. L. Rev. 149 (1992)

\*Deborah Helleman, When Is Discrimination Wrong? ch. 1 (2008)

Week 12: Collective Harm

Julia Nefsky, *Collective Harm and the Inefficacy Problem*, Phil. Compass (2019)

Shelly Kagan, *Do I Make a Difference?*, 39 Phil. & Pub. Affairs 105 (2011)

*Juliana v. United States*, 947 F.3d 1159 (2020)

\*Derek Parfit, *Five Mistakes in Moral Mathematics*, *in* Reasons and Persons (1986)

\*Jonathon Glover, *It Makes No Difference Whether or Not I Do It*, 49 Proceedings of the Aristotelian Society Supplement 171 (1975)

\*Marion Smiley, [*Collective Responsibility*](https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility/), The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2017)

VII. Judging

Week 13: Judging under Normative Uncertainty / Moral Judgment and Standards of Proof

Courtney M. Cox, [*The Uncertain Judge*](https://ssrn.com/abstract%3D3794982) (Feb. 28, 2021)

Emad H. Atiq, [*Reasonable Moral Doubt*](https://ssrn.com/abstract%3D4056223), 97 N.Y.U. L. Rev. (forthcoming)

\*William MacAskill, Krister Bykvist & Toby Ord, Moral Uncertainty ch. 1 (2020)

\*David Enoch, *Why I am an Objectivist about Ethics (And Why You Are, Too)*, *in* The Ethical Life (Russ Shafer Landau (ed., 2014)

Week 14: Conceptual Ethics and Metalinguistic Negotiation

Herman Cappelen & David Plunkett, *Introduction: A Guided Tour of Conceptual Engineering and Conceptual Ethics*, *in* Conceptual Engineering and Conceptual Ethics 1 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020)

Bill Watson, Metalinguistic Negotiation in Legal Speech (manuscript)

\*Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34 Nous 31 (2000)

\*David Plunkett & Timothy Sundell, *Dworkin’s Interpretivism and the Pragmatics of Legal Disputes*, 19 Legal Theory 242 (2013)