

PHIL 168: Philosophy of Law
Spring 2005; David O. Brink
Tuesday, April 5

PAPER #2

Write a paper, approximately 5-7 pages, on one of the following topics. The paper is due in class on Tuesday, May 31. Late papers (for which an extension was not approved in advance) will be penalized as described on the Course Description. **Before starting, consult the Writing Guidelines handout on the course website.** Students are welcome to discuss their topics and drafts with Luke or me.

1. In Law's Empire Dworkin defends his own interpretive conception of law – Law as Integrity – as part of applying the method of constructive interpretation to the law. What is constructive interpretation, and what does Dworkin think it implies about the law? What does his interpretive conception of law imply about traditional debates between legal positivism and natural law? Explain and assess Dworkin's commitments here.
2. Sometimes natural lawyers criticize court decisions that enforce morally problematic statutes as positivist. Explain, first, the debate between legal positivism and natural law and, second, the natural law criticism of positivism. What do you make of this criticism of legal positivism and of the natural law claims? What should we say about the legal status of, and judicial obligations toward, immoral statutes? Explain and defend your answer. Illustrate your claims with an example (e.g. the Fugitive Slave Laws or the Grudge Informer).
3. Lochner v. New York epitomizes the doctrine of economic substantive due process. That decision and doctrine are now widely regarded as mistaken. But there are two quite different views about what was wrong with Lochner. On one view, what was wrong with Lochner was substantive due process. The courts should not be making substantive judgments about which rights are fundamental and second-guessing democratic legislation. On another view, there is nothing wrong with substantive due process. What was wrong with Lochner was that the court chose the wrong liberties to treat and protect as fundamental. Explain the rise and fall of Lochner and these different readings of Lochner's lessons. Which reading better fits subsequent constitutional history and why? Which reading makes more jurisprudential sense to you and why?
4. Despite the rejection of the doctrine of economic substantive due process, epitomized by Lochner v. New York, the Warren and Burger Courts extended protection of individual rights under both due process and equal protection analysis. This legacy, especially the recognition of a constitutional right to privacy, has proven controversial. Sometimes the debate is characterized as one between judicial restraint and judicial activism. In scholarly circles the debate is sometimes understood as one between interpretive and noninterpretive review. Some critics of this legacy, such as Robert Bork, claim that Brown v. Board of Education is legitimate interpretive review, whereas Griswold v. Connecticut is illegitimate noninterpretive review. Explain and assess this criticism of Griswold. Is there a plausible set of interpretive assumptions that vindicate Brown while condemning Griswold?
5. Griswold v. Connecticut first recognized a constitutional right to privacy, and Bowers v. Hardwick and Lawrence v. Texas raise an important issue about the scope of a right to privacy. Should a right to privacy be understood to extend to the decision to engage in consensual homosexual sex in one's own home? What

do the grounds for recognizing a right to privacy in Griswold imply about the scope of that right and the decisions in Bowers and Lawrence?

6. In On Liberty Mill criticizes censorship and defends freedom of speech. Explain Mill's grounds for defending free speech. Should Mill regard all speech as equally valuable and equally worthy of protection? What might Mill claim about the permissibility of regulating hate speech? Explain and defend your answer.

7. In On Liberty Mill appears to defend the harm principle as the sole legitimate basis for restricting someone's liberty. In the process, he distinguishes mere offense and harm and appears to argue that mere offense is an inadequate justification for restricting liberty. Feinberg appears to disagree, arguing that the harm principle should be supplemented with an offense principle. After describing Mill's position, explain Feinberg's reasons for wanting to modify the Millian view. Explain whether you think Mill or Feinberg is right and why.