

PHIL 168: Philosophy of Law
Winter 2008; David O. Brink
Monday, February 11

PAPER #2

Write a paper on one of the following topics. The paper is to be written in two drafts. The first draft is due Tuesday, February 26. It should be at least 5 pages long. Your draft will be returned with comments by Tuesday, March 4. The revised and final version should be approximately 6-8 pages and is due Tuesday, March 11. 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 their TA 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, what is Law as Integrity, and how are the two related? Dworkin contrasts Law as Integrity with Conventionalism and Pragmatism. Explain and assess Dworkin's defense of Law as Integrity.
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. In Democracy and Distrust John Hart Ely takes seriously the so-called counter-majoritarian worry for judicial review, as such, and for record of the Warren and Burger Courts exercising judicial review to uphold individual rights under Substantive Due Process and Equal Protection analysis. In the process, he criticizes what he calls “value-protecting” models of judicial review and defends his own “representation-reinforcing” model. Reconstruct and assess Ely’s use of the counter-majoritarian worry to defend his representation-reinforcing theory of judicial review. How does Ely’s theory lead to a selective endorsement of Substantive Due Process and Equal Protection? Are his criticisms of the value-protecting model and his defense of the representation-reinforcing model compelling when applied to a constitutionally limited democracy?

6. In the last two decades or so, there has been an effort to get tough on juvenile crime by treating juvenile crime more like adult crime, and much of this rhetoric has invoked retributive ideas about accountability. Does this more punitive trend in juvenile justice fit with a defensible form of retributivism? Why or why not? It would be good to discuss these issues in the context of some particular cases (e.g. the case of Lionel Tate) and/or changes in laws affecting juveniles (e.g. adoption of California’s Proposition 21). You should also read some scholarship specifically on such issues (e.g. Barry Feld’s Bad Kids, Scott and Steinberg, “Blaming Youth,” and/or Brink, “Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes”).

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. He examines a number of offensive nuisances (“A Ride on the Bus”), 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.

8. Early in On Liberty Mill appears to endorse a blanket prohibition on paternalistic interference with individual liberty. Yet later on he qualifies this blanket prohibition to permit restrictions on the liberty to sell oneself into slavery (OL V 11). Why does Mill make this exception? Is he simply being inconsistent or is this a principled exception to his prohibition on paternalism? How does this exception fit with his strongest anti-paternalistic arguments? He also says that the reasons for allowing paternalism in “this extreme” case are “evidently of far wider application” (V 11). What might be some of the wider applications of these reasons, and what does this tell us about his attitudes toward paternalism?

9. Some people have argued that a retributivist conception of punishment commits you to legal moralism and have then rejected retributivism because they reject legal moralism. Explain why this might seem like a good argument against retributivism and then step back and assess it. Does

retributivism imply legal moralism, and, if so, in what form? Is this kind of legal moralism really objectionable? Why or why not?