

**PHIL 168: Philosophy of Law  
Winter 2008; David O. Brink  
Final Exam Study Questions**

The final exam will be held on Tuesday, March 18 from 8-11am in our normal classroom, CSB 005. The exam questions will be drawn from these study questions; there will be no "surprise" questions. You will notice there is overlap among some of the study questions in different categories. The exam itself will be closed book, though you will be allowed to consult two pages (= two sides of paper) of notes during the exam (small fonts are ok). You can study together, but you must write your own notes; answers to essay questions cannot regurgitate material from the handouts verbatim (points will be deducted if they do). Please bring two empty blue books to the exam. We will hold an optional review session on Monday, March 17 from 10:30-11:30am in H&SS 7077.

SHORT ANSWER (approximately 20-50 words each; usually 2-4 sentences)

1. Explain the claims of legal positivism and natural law about the relationship between law and morality.
2. What is Austin's command theory of law, and what is his account of sovereignty?
3. What is the bad man's point of view, and how does it support Holmes's predictive theory of the law?
4. What does Hart mean by the "open texture" of language, and how does open texture play a role in his argument for judicial discretion?
5. What happened in Riggs v. Palmer, and how does Dworkin use this case to support his view of law?
6. What are abstract and specific intent, and what difference does it make to the interpretive process which conception of framer's intent should guide interpretation?
7. What are strict scrutiny and rational basis review, and what roles do these two standards of review play in substantive due process jurisprudence?
8. Explain the difference between interpretive and non-interpretive judicial review.
9. What is selective incorporation, and how does it affect the scope of substantive due process?
10. What is the difference between specific and general deterrence?
11. What makes a theory of punishment retributive?
12. When are restrictions on liberty paternalistic, when are they applications of the harm principle, and what (in general terms) is Mill's attitude toward these two kinds of restrictions?
13. Does Mill believe that all other-regarding conduct can be regulated by the state? Why or why not?

MEDIUM ANSWER (approximately 50-125 words each; usually a substantial paragraph)

1. Explain Hart's distinction between primary and secondary rules and its importance, in his view, to ascertaining the nature of law.
2. Explain Dworkin's three senses of "judicial discretion" and the role of this distinction in the debate about whether judges must sometimes exercise a quasi-legislative capacity and make new law.
3. What, if anything, is wrong with pure textualism as a theory of legal interpretation? Give an example and explain your view.

4. What is the justification of judicial review, which both Marshall (Marbury v. Madison) and Hamilton (Federalist #78) employ, that relies upon the institutional role of the judiciary? Explain briefly whether or not this justification of judicial review is compatible with the separation of powers doctrine.
5. Choose one pure theory of punishment – rehabilitation, consequentialism, or retributivism. Explain its leading ideas and assess its adequacy.
6. Explain Mill's categorical approach to restricting liberty. What are his categories and what does he say about the permissibility of different kinds of restrictions on liberties? Does Mill follow these categories consistently?
7. At one point, Mill appears to accept a blanket prohibition on paternalism. Why does he oppose paternalism? Does he recognize any exceptions to this ban on paternalism? If so, why?
8. What is Mill's view about the permissibility of offense legislation? Does Feinberg agree? Why or why not? What principles does Feinberg think should govern the permissibility of offense (nuisance) regulation?
9. The majority in Bowers v. Hardwick claimed that moral legislation prohibiting homosexual sodomy does not violate the right to privacy, because previous privacy cases concerned intimacy in heterosexual relationships. Was this appeal to previous case law to define the scope of privacy legitimate? Does this restriction on the scope of privacy square with the Court's reason for recognizing privacy in the first place, in Griswold?

LONG ANSWER (approximately 175-300 words each; usually 2-4 blue book pages).

1. Hart thinks that Austin's command theory cannot explain the continuity of authority or the continuity of law. Explain and assess Hart's worries.
2. The Legal Realists appear skeptical about the existence of legal rules that judges apply to particular cases; they tend to identify law, in some way, with the decisions of courts. How might this sort of rule-skepticism be defended by appeal to judicial finality? Assess this defense in light of Hart's discussion of the role of umpires in the game of baseball.
3. Hart believes that hard cases are legally indeterminate and concludes that judges must exercise a quasi-legislative capacity when deciding such cases. How does Hart's argument for judicial discretion rely on claims about the open texture of legal language? Are Hart's limited skepticism and his defense of judicial discretion convincing? Why or why not?
4. It is sometimes said that interpreters should be guided by the intentions of the framers of the provision under interpretation. Why should we pay attention to the intentions of the framers? Why not just determine the meaning of the words in which the provision is formulated? If we are to heed the intentions of the framers, how should we understand them? Should we appeal to the specific activities that they sought to regulate (specific intent) or to their general aims and values and our own views about how to understand and apply these aims and values (abstract intent)? Is either of these options defensible? Explain what difference this choice makes and defend your own view. Illustrate with an example.
5. What does Dworkin mean when he likens the process of legal interpretation to that of someone contributing to a chain novel? How does this analogy draw on his account of constructive interpretation? How good an analogy is it?
6. Brown v. Board of Education is usually regarded as a good exercise of interpretive judicial review. Is this reasonable? How must we conceive of constitutional interpretation to see Brown as good interpretive review? How should this affect our view of debates about the legitimacy of so-called non-interpretive review?

7. Griswold v. Connecticut first recognized a constitutional right to privacy. Critics of Griswold often cite it as a prime example of non-interpretive review in which the Court has exceeded its legitimate role. Explain and assess this criticism. What assumptions do the critics make about constitutional interpretation, and are these assumptions plausible? What sort of interpretive assumptions underlie Douglas's opinion, and are these assumptions defensible?
8. Describe the consequentialist conception of punishment. Why might someone think its account of whom to punish is over-inclusive? Illustrate with an example. Is this a good objection to the consequentialist conception? If so, what adequacy condition does it suggest for a theory of punishment?
9. Explain Morris's criticism of the rehabilitative conception of punishment and his version of retributivism. How plausible do you find his own justification of punishment?
10. Mill thinks that freedom of expression is important not only in its own right but also for what its defense can show us about the importance of other liberties. Reconstruct and assess Mill's defense of expressive liberties. What arguments does he offer, and which are the strongest? What light might his attack on censorship and defense of freedom of expression shed on his more general defense of liberties in On Liberty?
11. Lord Devlin says that it is permissible for a society to undertake the legislative enforcement of morality -- such as prohibitions on homosexual sodomy. What reasons does he offer? How good is Devlin's defense of legal moralism? Must we reject legal moralism to disagree with Devlin?
12. Some think that retributivism implies legal moralism and then reject retributivism because they find legal moralism repugnant. Does retributivism imply legal moralism? Why or why not? Are all forms of legal moralism equally objectionable? Explain.
13. In Lawrence v. Texas the Court over-ruled Bowers v. Hardwick, claiming that a right to privacy protects an adult's decision to engage in consensual homosexual sex in one's own home. Compare Kennedy's majority opinion with Scalia's dissent. Which represents a better conception of privacy as a substantive due process right, and why?