Seminar in the Philosophy of Law
Last updated October 3, 2001

SUGGESTED PAPER TOPICS

1. Imagine that you have been asked to conduct a study of the legal practices of an isolated tribe in the tropics. You discover that the tribe has no written language. Are there any features of our legal practices that cannot have counterparts in theirs?

2. Imagine that you have been asked to construct an argument supporting the correctness of *Griswold v. Connecticut* and the "privacy" doctrine that has flowed from it. Your argument must, however, be cast in terms of principles of justice that would be chosen behind a Rawlsian veil of ignorance. What assumptions must be made in order to construct such an argument? Assess the plausibility of these assumptions and the overall prospects of a Rawlsian argument for privacy rights.

3. It has been argued that it makes no sense for a person to make a choice based solely upon her prediction of what she will, herself, do. It has further been argued that, therefore, law cannot be defined in terms of what courts will do, for such a definition cannot (for the reason just given) be applied by a judge. Is this a good argument against the definition?

4. Thoreau believed that he had an obligation to pay his highway tax but an obligation <u>not</u> to pay his poll tax. Is his view defensible? Would your reconstruction of Thoreau's view mean that citizens of Nazi Germany had a duty to pay taxes for autobahns and armaments, but not for concentration camps?

5. "In 'hard' cases judges do not 'make' law. The legitimacy of the judge's decision depends upon her honoring a duty to make the best legal decision, and this duty in turn requires the judge to apply moral principles as well as binding (if inconclusive) legal authority. The decision that is best–in light of the relevant legal materials and moral principles–is the legally correct and therefore the legally *required* one. Judges therefore do not make law, even in hard cases or cases of first impression, because there is a legally correct result, which the judge gets either right or wrong. If she gets it right, she hasn't 'made' law; if she gets it wrong, she has made a mistake, not law." Discuss.

6. Many laypeople view lawyers as persons in the business not of promoting law but of locating "loopholes" that enable their clients to avoid the inconvenience of obeying the law. Is it possible to make the idea of a "legal loophole" precise? Are there any loopholes in the law and, if so, do lawyers dishonor the law by enabling their clients to exploit them?

7. Some have argued that if the "basic structure" of law is just then there is a duty to obey unjust laws generated by or otherwise associated with that structure. Is there any answer to the objector who grants that there is a basic structure but denies that a duty to obey follows whatever

that just structure generates?

8. “Constitutional limits to majority invasions of the rights of minorities are a fraud. If no moral limit would be transgressed by a legislative enactment, the majority must rule. If some moral limit would be transgressed by a legislative enactment, then no supermajority can make that transgression legitimate. The Bill of Rights either duplicates moral limits that no supermajority can create or erase, or it illegitimately fetters majorities. In either case it is a fraud.” Discuss.

9. Some argue that judges illegitimately usurp power in a democracy if they do not strive to identify and give effect to the intentions of the framers of statutory and constitutional provisions. Others argue that the idea of a "group intention" behind a legal text is a muddle. Discuss.

10. Congress, as a fuel conservation measure, conditions a state's receipt of federal highway aid upon its imposing a 55 mph speed limit. Solely in order to qualify for federal highway assistance, your state adopts a 55 mph speed limit. You are, in addition to being a lawyer, an inventor. You have built an auto engine that achieves peak fuel efficiency at 75 mph. Do you have any legal duty not to drive at 75 mph in a car equipped with this engine? Do you have an "all things considered" duty not to do so?

11. Many have argued that the state can legitimately coerce a person only if it does so on the basis of preexisting legal rights and duties applicable to that person. Suppose this view is correct. If it is, and a person is ordered to pay damages as a result of a court's mistake as to what her legal rights and duties are, does she have any duty to pay? Can she legitimately be compelled to pay?

12. The Squamish, a religious sect, have for almost two centuries lived in the isolated, rural Georgia village of Squamishtown. The Squamish are a pious people who tenaciously resist the encroachments of the modern world. They do not believe in automobiles, television or modern dress, and rigorously abstain from alcohol, tobacco and other drugs.
Your client wishes to move to Squamishtown to retire, but is not Squamish. The Squamishtown council, aware of the desire of "strangers" (as the Squamish call nonSquamish) to buy property in Squamishtown, have passed an ordinance imposing a transfer tax on sales of real property to nonSquamish buyers. The transfer tax does not apply to sales to Squamish buyers. Your supervising partner thinks the ordinance is unconstitutional, but wants you to prepare a memo setting out what you think the Squamish's best arguments are.

13. It has been suggested that legal reasoning cannot be explained by classifying it as analogical or deductive. Rather, legal reasoning is a matter of dispassionately weighing all the relevant factors presented by the case, including relevant facts and documentary law. In other words, a legal decision is justified if but only if an "ideal reasoner" --i.e., a perfectly dispassionate judge weighing all the relevant factors-- could reach that decision. Is this "ideal reasoner" explanation of legal reasoning adequate? Could two ideal reasoners reach opposite conclusions in a given case? Can we explain what we mean by "dispassionate weighing" and "relevant factors" without

reference to deduction and analogy?

14. Many Supreme Court decisions–including *Dred Scott*, *Roe v. Wade*, and *Bowers v. Hardwick*–involve discussions of historical attitudes toward, e.g., blacks, fetuses, homosexuals. What legitimate purposes are served by these considerations, if any?

15. "Government is legitimate only if it is capable of imposing a general duty of obedience on its citizens. But there is no general duty to obey the law. Therefore, government is illegitimate." Discuss.

16. Model Penal Code §3.02 ("Justification Generally: Choice of Evils") has been interpreted not to allow a "necessity" defense to politically motivated defendants. Is there any principled basis for singling out this class of defendant?

17. "Legal materials, such as constitutions, statutes, and cases, can be interpreted in so many ways that the outcomes of concrete disputes would be wholly indeterminate if legal materials were all that mattered. But the habits of officials, especially judges, are highly predictable <u>and</u> they matter. Because law = legal materials + habits of officials, law is highly determinate. The Crits (i.e. Critical Legal Studies scholars) overstate the indeterminacy of law because they arbitrarily define law too narrowly." Discuss.

18. "Some immoral things can and should be made illegal; murder or rape, for instance. Some things are perfectly moral, and so should never be illegal, like using contraceptives. And some things may be very wrong, morally, but can never legitimately be made illegal." Can anything fall into this third category? If so, what do you think belongs there?

19. A trolley conductor is suddenly confronted by a terrible situation. She cannot stop the trolley in time to avoid hitting five people who are on the tracks. But if she switches onto a side-track, she can avoid the five but will run over one other person. Her choice is to do nothing and kill five people or switch and kill only one. The situation she faces is not her fault. Should she be punished for what she does in either case? Decide on the basis of a principle that will also apply to the case of a physician, who has sacrificed a healthy patient in order to save the lives of five others. [from Judith Thomson]

20. Susy and Kirk don't know each other, but they each know and detest Claude. Susy finds out that Claude is about to hike across Death Valley; she secretly pokes a hole in Claude's canteen, hoping that he will die. Kirk also finds out about Claude's plan. Kirk puts a poison in Claude's canteen, hoping that he will be killed. Neither Susy nor Kirk know of the other's action. Claude sets out on his hike and dies of thirst. Can anyone be prosecuted? [from Leo Katz]

21. "How can you defend people you know are guilty?" This is a question that criminal defense lawyers will have to field in their social lives. Their standard answer admits that this is in fact what they do, but goes on to assert that doing this is justified. Is it possible, instead, to

deny the premiss that lawyers can know their clients are guilty?

22. Condorcet's Jury Theorem asserts that if *n* persons are asked to determine a matter of fact *p*, and if for each person the likelihood of his or her making that determination correctly is better than chance (i.e., >.5), then the probability that the *majority* makes a correct determination approaches certainty (i.e., 1) as *n* increases. Condorcet's result suggests a justification for majority rule: majorities are always likelier to get facts right than dictators, unless the dictator is infallible, the electorate is too small, or the typical voter is just as likely to be mistaken than not. This justification obviously assumes a lot, but one further assumption it must make is that legislation determines a matter of fact *p*. Some skeptics say that voters merely register preferences rather than determine matters of fact. If that is so, then Condorcet's result is inapplicable, because there is no objective matter of fact *p* that voters try to determine. But how can majority rule be justified if voters aren't voting on an objective matter of fact?

23. Judges sometimes make decisions that have the effect of filling gaps or resolving ambiguities in the law. In other words, sometimes judges make go ahead and make decisions beyond where "the rules run out." Ronald Dworkin has argued that legal positivism cannot legitimate decisions in these "hard" cases–for the positivist admits that the losing party must suffer despite that absence of any antecedent legal right or duty justifying that suffering. If the judge is not applying the law, then she seems to be coercively enforcing her personal opinion about what is the morally better outcome. Dworkin's solution to the problem is to define law as whatever is included in the morally best theory of the entire body of "black letter" legal materials. Even in a hard case, the conscientious judge is applying and enforcing the law, not some merely personal moral judgment. But, as John Mackie has argued, this solution seems to make the law itself nonobjective because, in Mackie's view, morality itself is a subjective matter. Hence, the legitimacy of adjudication seems to be held hostage to a difficult metaethical dispute about the objectivity of morals. Is this entanglement avoidable? Jeremy Waldron argues that the debate about the objectivity of morals is irrelevant to the question of the legitimacy of adjudication. If morals are subjective, then judges who decide hard cases have no choice but to enforce a subjective moral view. But, Waldron argues, even if morals were objective, judges would have to enforce their *views* of what morality objectively required. Either way, there is subjectivity in judging, and so the debate about the objectivity of morals is irrelevant. Is Waldron right about this, if majority legislation can be justified by appeal to Condorcet's Jury Theorem?