THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2020

LAW 300.003
Jurisprudence

Professor Gordon Christie

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 100

WRITING TIME ALLOWED: 3 HOURS
READING TIME ALLOWED: 10 MINUTES
PREPARATION TIME ALLOWED: 10 MINUTES

Preparation Time has been given to download/print/set up for your exam once the exam has been made available online through Canvas. This time cannot be used for writing exam answers. All exam answer uploads will be monitored to ensure that typing of answers only occurred for the allotted Writing Time.

This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings. The use of library books is not permitted.

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

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INFORMATION AND INSTRUCTIONS

For those taking the full 3-hour exam:

1) This examination (Parts 1 and 2 combined) counts for 100% of your final grade in this course

2) You have 90 minutes (once the 10-minute reading time is over) to complete Part 1. Once these 90 minutes are over you can begin answering the questions in Part 2.

For those choosing to write an essay for 50% of your grade:

1) You have 10 minutes to read through the questions from Part 1. You then have 90 minutes to answer the questions from Part 1.

2) At that point, you must stop and upload your exam.

Part 1 (50 points): Short answer questions

You must answer all 10 (ten) questions. Each answer is worth 5 (five) points.

1. Under the Hohfeldian categorization of kinds of rights, what would be an example, in Canada, of a specific 'power' right? Explain how this example fits into the category.

2. What is the difference Hart sets out between 'being obliged' to do x and 'having an obligation' to do x? How is this distinction important in developing the theory of law he proposes?

3. In the mid-twentieth century some critical legal theorists incorporated new forms of Marxist analysis into legal theorizing, what Tushnet characterized as 'humanist Marxism'. Why were these theorists unsatisfied with 'classic' Marxist analysis and its explanations for how the law is 'tilted'?

4. Critical legal theorists developed a number of arguments designed to show the dangers in pushing for legal reform using rights and rights-talk. Why did critical race theorists, by and large, disagree with this approach to rights and rights-talk?

5. Tushnet notes that some critical legal theorists argued that within any field of legal discourse there were always paired-concepts, with one dominant and the other subordinate. So, for example, one might argue that generally within the field of tort law the dominate concept was that of fault, while the subordinate concept was that of consent. The argument around indeterminacy these theorists developed rested on the idea that any competent lawyer could frame a reasonable argument that rested its weight on either the dominant or subordinate concept. How, though, would one then explain the sort of outcome we see in *Norberg v Wynrib* [(1992) 2 SCR 226], where the Supreme Court of Canada used the concept of 'unconscionability' to find there was lack of 'genuine' consent between a doctor (Norberg) and a patient (Wynrib)? The doctor used his position of power (being the person who could provide prescriptions for the pain medication Wynrib was addicted to) to get Wynrib to agree to an arrangement where sex was exchanged for access to drugs. Bear in mind that generally the law of torts adopts a relatively conservative approach to consent, using an objective test (presuming lack of consent, requiring the defendant to argue – with objective evidence – that there were relatively clear signs of consent signaling agreement with the situation in which the tort was committed).

6. Human rights law rests on the notion that all humans enjoy certain rights in virtue of their being human. Is human rights law necessarily based on a form of natural law theory? Be sure to explain your answer.

7. In most standard first-year law courses students are expected to learn how to read cases (usually appellate cases) in order to discern the rules that define how specific sorts of legal problems are approached and resolved, with the goal of being able to apply some of these rules properly to a hypothetical fact-pattern on a final exam. Do you think first-year legal education rests on a model of legal formalism? Be sure to explain your answer.

8. Rosen notes that the notion of socio-cultural evolution – that societies inevitably pass through stages of evolution – is one that many legal scholars continue to rely upon. Why does he think the use of evolutionary theory applied to legal systems as components of cultures is almost certainly mistaken?

9. In the 1970s critical legal theorists had advanced numerous arguments meant to show law's indeterminacy, with some saying that this undercut the 'rule of law'. How does Dworkin's theory of constructive interpretation work to challenge these arguments and the threat these seem to pose to the rule of law?

10. Critical race theorists challenge the narrow visions (or lack of vision) of critical legal theorists.

a. What sort of vision do critical race theorists tend to want to present to respond to this shortcoming?
b. Does this seem like an adequate response to the sorts of racism they argue infect the law? Be sure to defend your answer.

Part II (50 points): Essay Questions

Choose 2 (two) of the following 6 (six) questions to answer in essay form. You have 90 minutes to work within. Each answer is worth 25 points.

1. Article 32.2 of the *United Nations Declaration on the Rights of Indigenous Peoples* holds that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources ...

Some have interpreted this as holding that states ***must obtain*** the free, prior and informed consent of an Indigenous people before approving projects that would affect their lands or territories, while others have said that this provision only requires states to ***attempt to obtain*** such consent.

- Do you think there is a ***right answer*** as to which ***interpretation*** is correct?
- If so, how do you think such a right answer is to be obtained?
- If not, explain why you think this is the case, and describe what do you think are the primary implications of this being the case.

Be sure to defend your answers.

2. How, according to some critical legal theorists, does the law function to legitimate the class divide that marks the modern nation-state (for example, Canada)?

- Do you think the law in Canada does fundamentally operate in this manner? Why or why not?
- If you think the law does have this function, what do you think could be done about this situation?
- If you think the law in Canada does not (at least significantly) function in this way, why do you think critical legal theorists might think it does? What do you think might motivate them?

Be sure to defend your answers.

3. Why, according to Kennedy, do law schools in the West teach the law in a mystifying fashion? In your answer be sure to detail what this 'mystifying' fashion encompasses, and show how Kennedy ties this to certain objectives that are being advanced.

- Does it seem Allard law continues in this vein, teaching law in a mystifying fashion in order to further these objectives?

Whether you agree or disagree with this claim, explain and defend your answer.

4. What might a critical scholar (someone applying, for example, postcolonial analysis, or critical Indigenous feminist theory, or some other critical approach) say about those mainstream arguments that support the notion that all citizens are under moral obligations to obey the law of the state?

- How might a mainstream legal theorist reply to these sorts of arguments?
- Which side do you think has the more reasonable position and supporting arguments?
- Why?

Be sure to defend your answers.

5. In *Mikisew Cree First Nation v Canada* (2018 SCC 40), four judges of the Supreme Court of Canada based their reasons for holding that no duty to consult applies to the development of legislation on what they take to be the proper roles of the branches of the state – that is, the executive, legislative and judicial branches. For example, Rowe J. held that a "serious consequence to the appellant's suggested course of action would be the interventionist role that the courts would be called upon to play …".

- What kind of view of law is Rowe J. (and the other 3 judges) espousing?
- Which legal theory we looked at in this course does this best fit within or under?
- What do you think of the position taken on this point? Is it necessary (and if so, why) that the branches of the state remain entirely within well-defined and separated roles?

Be sure to defend your answers.

6. Why is it difficult in a liberal democracy to make sense of the notion of a 'group right' (that is, a right *held* specifically by a group of people)?

- How are group rights accommodated in Canada?
- Does this seem adequate to you?
- Why or why not?

Be sure to defend your answers.

END OF EXAM