

**THIS EXAMINATION CONSISTS OF 5 PAGES
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**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

FINAL EXAMINATION – DECEMBER 2021

**LAW 300
JURISPRUDENCE AND CRITICAL PERSPECTIVES**

Section 2

Professor Goold

TOTAL MARKS: 100

TIME ALLOWED: 180 MINUTES

- NOTE:**
1. This is an **open book examination**, meaning that you can refer to class notes, articles, textbooks, and other class readings. The use of library books and communications devices such as mobile phones is not permitted.
 2. All candidates must answer **three questions**.
 3. Each question is worth **equal marks**.
 4. No additional marks will be awarded for answering more than three questions, and **only the first three answers will be graded**.

THIS EXAMINATION CONSISTS OF 12 QUESTIONS

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1. “Legal theory is not nearly as unified or as clearly identifiable as it once was. The disciplinary boundaries of law are being policed less stringently, and the theoretical enterprise is the beneficiary of a flood of ideas from the social sciences and the humanities.”

(Margaret Davies)

Do you agree with Davies about the current state of legal theory? Do you think that legal theory would benefit from having clearer disciplinary boundaries? Explain your answer with reference to materials you have studied in this course.

2. What are the core claims of natural law theory? How might an understanding of natural law theory help us to better understand some of the key debates in law in 2021? Explain your answer with reference to materials you have studied in this course.
3. “Indigenous legal theorising is essential in bringing out ... oppositional understandings of the nature of legal phenomena, and of what constitutes the sorts of legal issues that need study. Looking at the world via different cultural and experiential groundings, Indigenous peoples will not only be able to articulate how their own systems are structured and understood, but also to cast new light on dominant legal orders. The existence of multiple spheres of law pre-supposed in this general picture yields ripe questions as to how different legal systems can meaningfully interact, raising further theoretical issues in need of further exploration. How do we measure legitimacy, for example, when two alternative systems meet and conflict? Do we search for meta-legal rules, rules within one or the other system, or rules that seem to lie in or emerge from an area of overlap between the systems?”

(Gordon Christie)

Discuss with reference to the materials you have studied in this course.

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4. “The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due. A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. Accordingly, positivism’s critics maintain that the most important features of law are not to be found in its source-based character, but in law’s capacity to advance the common good, to secure human rights, or to govern with integrity.”

(Leslie Green)

Do you agree with these criticisms of legal positivism? Is there value in studying legal positivism – and particularly the work of theorists like John Austin and H.L.A. Hart – in 2021? Explain your answer with reference to the materials you have studied in this course.

5. According to Ronald Dworkin, discretion is a “relative concept.” What does Dworkin mean by this, and do you find his account of judicial discretion – and the role played by judges in the legal system – convincing? Explain with reference to the materials you have studied in this course.
6. According to Horwitz, the most important legacy of legal realism is its “challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse.” Do you agree that legal realism fundamentally changed the way in which we think about law and legal decision-making? To what extent did legal realism – and its rejection of legal formalism – lay the foundations for the critical theories that followed it? Explain your answer with reference to the materials you have studied in this course.

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7. What are the central claims of critical legal studies? Do you find these claims convincing, and to what extent do you think critical legal studies furthers our understanding of how the law works in practice? Explain your answer with reference to the materials you have studied in this course.

8. “Feminist theory seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually patterned lines: in doing so, it questions law's claims to autonomy and represents it as a practice which is continuous with deeper social, political and economic forces which constantly seep through its supposed boundaries.”

(Nicola Lacey)

Discuss with reference to materials you have studied in this course.

9. According to Sharon Cowan, “[t]he roots of queer theory are in social construction theory... particularly the deconstruction of identity and subjectivity.” What would mean for law to take the central claims of queer theory – and its critique of sexual essentialism – seriously? Explain your answer with reference to the materials you have studied in this course.

10. Under what circumstances should the law seek to enforce moral standards? Whose moral standards should we refer to when attempting to answer this question, and are there areas of individual morality the law should never intrude upon? Explain your answer with reference to materials you have studied in this course.

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11. “[Critical race theory] is a way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced ... the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.”

(Kimberlé Williams Crenshaw)

How does critical race theory seek to shed light on the relationship between law and racism? To what extent does critical race theory – in its effort to expose how the law contributes to racial inequality – reject the liberal focus on rights and formal equality? Explain your answer with reference to the materials you have studied in this course.

12. Do you agree with John Braithwaite that “we should try restorative justice, perhaps again and again; when restorative justice fails, try deterrence, and when deterrence fails, try incapacitation”? Does a commitment to the principles of restorative justice leave any space for retributive approaches to punishment? Explain your answer with reference to the materials you have studied in this course.

END OF EXAMINATION