THIS EXAMINATION CONSISTS OF 6 (SIX) PAGES. PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER.

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

FINAL EXAMINATION – APRIL 2022

LAW 300.003
Jurisprudence

Professor Gordon Christie

TOTAL MARKS: 100

WRITING TIME ALLOWED: 3 HOURS
READING TIME ALLOWED: 10 MINUTES (STUDENTS CANNOT BEGIN WRITING OR TYPING DURING THIS 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.

Instructions/guidance:

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

2) It is recommended that you spend roughly half the available time (90 minutes, once the 10-minute reading time is over) to complete Part 1. Once these 90 minutes are over you would then have 90 minutes in which to answer the questions in Part 2.

Part 1 (50 points): Short answer questions.

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

1. It is commonly said about legal realism that 'we are all realists now'. Do you think your legal education at Allard incorporates insights from the legal realist's understanding of the law? Be sure to explain your answer.

2. How does the presence of *principles* in the caselaw in the common law world show, according to Dworkin, that Hart's version of legal positivism is incorrect? Do you agree that the presence of principles undercuts positivism? Why or why not? Explain.

3. What do you take to be a key distinction between liberal feminist theory and more critical (or radical) feminist theories? Does the more critical approach appear to capture insights about the law that liberal feminists miss or ignore? If so, what is one of these critical insights, and how does the fact liberal feminists miss or ignore it impact upon their view of the law? If, on the other hand, you think critical feminist positions do not add to our knowledge of the law say something about why you believe their arguments are weak and/or simply mistaken. Be sure to defend your answer.

4. 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.

5. What, according to Hart, is the key distinction to make between 'being obliged' and 'having an obligation'? How does this distinction feed into building up his version of legal positivism? Explain.

6. What is a good example of an aspect of the law that arguably is *hegemonic*? Be sure to describe the aspect of the law that you choose in such a way as to show how one could argue it is hegemonic in how it functions.

7. Provide an example of how *norms* are used to devalue the lives of disabled people in Canada. What do critical disability scholars recommend as strategies to address this process of devaluation? Do you think these strategies are likely to make headway in moving society toward a time when the lives of the disabled are valued as they should be? Why or why not?

8. In the 'The Case of the Speluncean Explorers' Foster J. holds that:

> Now it is, of course, perfectly clear that these men did an act that violates the literal wording of the statute which declares that he who "shall willfully take the life of another" is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or a judicial

> precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to expatiate on it.

Which sort of legal theory (that we explored this term) does Foster J. seem to be expressing? Do you agree with this approach to understanding how the law functions (or ought to function)? Do you agree or disagree with the notion that it provides a usual insight into how to approach the conundrum faced by the court in the Speluncean explorers case? Be sure to defend your answer.

9. In explaining the nature of human rights within the international sphere, the United Nations holds that (from the UN website):

> Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.
>
> International human rights law lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

What do you take to be the *strongest* form of criticism that TWAIL scholars launch against the present role that international human rights law plays in the global south? Do you agree with this criticism, or do you think that international human rights law is directed toward nothing more than what is captured in these broad statements by the UN, and that therefore it is nothing more than a force for justice in the world? Be sure to defend your answer.

10. One might argue that the presumption in courses in the Faculty of Law is that learning the law is made up of two main tasks: (a) discerning what the relevant rules of law are, and (b) working out how those rules are to apply to factual situations in the world. Does this presuppose a simplistic *formalist* model of the law? Why or why not? Be sure to explain.

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. Section 35 of the *Constitution Act, 1982*, states that the 'existing Aboriginal rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed'. In *R v Sparrow*, (1990) 1 S.C.R. 1075, the Supreme Court of Canada accepted a lower court pronouncement on the claimed right at issue, saying that (at 1099):

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival.

In *R v Van der Peet*, (1996) 2 S.C.R. 507, the Supreme Court of Canada adopted a test to identify what counts as an Aboriginal right: "in order to be an [A]boriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right." [46]

Where does the content of this test seem to come from? Choose two of the legal theories we explored and discuss what they would most likely say about this sort of situation, about how a new rule (or at least what appears to be a new rule) emerges in a legal system.

Between the two theories you have discussed, which seems to make the best sense of this situation? Why is this so? Be sure to defend your answer.

2. All of the theories and positions we explored in the last third of the course ranged from being (a) fairly suspicious of to (b) being highly critical (even dismissive) of 'legal liberalism' (or liberal positivism). And yet we live in a society that is commonly understood to have at its core a paradigmatic example of what a liberal positivist legal system would and should look like. What strikes you as the *strongest* argument supporting the criticisms and attacks launched by critical scholars? Do you agree with the force of this argument (or, do you think it can be undercut or answered in some manner that takes away its strength)? In other words, is it possible there something deeply problematic with the very legal system we all live within? Be sure to defend your answer.

3. In *Nevsun Resources Ltd v Araya*, 2020 SCC 5, the four claimants were refugees and former Eritrean nationals attempting to sue in the BC supreme court a Canadian mining company that they argue had (amongst other things) enslaved them and subjected them to cruel, degrading and inhuman conditions while working in a mine in Eritrea owned by the company. Much of their legal argument rests on the use of customary international law.

The SCC decision in 2020 concerns the ability to carry out such an action within the Canadian legal system while making substantial use of international law. One deep concern of the dissent was with what they saw to be an attack on the primacy of Canadian law in Canadian courts. They repeatedly sought to reaffirm the supremacy of Canadian law over international law. For instance, they argued that within Canadian law "Canadian courts will apply the law of Canada, including the supreme law of our Constitution. And it is that law — Canadian law — which defines the limits of the role international law plays within the Canadian legal system." The dissent insisted that the very legitimacy of Canadian courts was at stake: "The courts' role within this country is, primarily, to adjudicate on disputes within Canada, and between Canadian residents. […] Our courts' legitimacy depends on our place within the constitutional architecture of this country."

Consider how (a) a legal positivist and (b) a TWAIL scholar would respond to the sorts of positions taken by the dissent. Would you agree (more or less) with either of these theorists (or, do you think some other theory might better explain why the dissent reasons as they do)? Be sure to defend your answer.

4. To the extent that Marxist scholars present a theory of law, they hold that one cannot meaningfully understand the law (why it has the form and content it does, why it functions the way that it does, etc.) without seeing the law in relation to the economic structures that determine fundamental aspects of human life and society. What are the economic structures that they argue are fundamental in our modern world (say, in contemporary Canada), what (in their estimation) is problematic about them, and what do they suggest needs to be done to rectify this situation? Do you agree with this picture of the problems of the modern world, or do you think that we can productively analyze the law without bringing these sorts of economic considerations into our models and theories? Be sure to defend your answer.

5. We noted, in our discussion of Chambers' article on the judgment in *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, that Chambers argues [323-24] that the BCCA:

> … determined that while [the BCSC judge] had erred in finding that discrimination had not been established (thereby at least recognizing the personal pain and suffering endured by Kimberly Nixon), exclusion was allowable under section 41 of the *Human Rights Code*

We saw that Chambers holds that:

> … [a]lthough the decision explicitly acknowledged that failure to recognize Nixon as a woman constituted discrimination, it simultaneously, and I believe ironically, awarded to protected groups the right to make essentialist distinctions ...

Chambers concludes that:

> Nixon can say she is a woman, and, in most contexts, the law will support her self-definition. Yet other women, and women's groups, are under no legal obligation to accept her as the woman she claims to be.

What do theories of justice that we looked say about the justice (or injustice) of this sort of result? Which principles of justice would you hope would be applied to the sort of situation in *VRRS v Nixon*? To add to your answer to this, imagine that the Supreme Court of Canada had agreed to hear the appeal from this case, and that they then had applied the principles of justice you have in mind: how, then, might they have ruled in order to achieve a just outcome? Be sure to make it clear how this would be the most just outcome possible in the circumstances.

6. In *Secwepemc Nation v British Columbia (AG), KGHM AJAX Mining Inc., and Canada (AG),* (15 January 2016), Kamloops Registry, BCSC 051952 (Response to Notice of Civil Claim), the province of British Columbia argues in response to a claim for Aboriginal title launched by the Secwepemc Nation that the claim is unsupported as the Secwepemc, at the time of the assertion of Crown sovereignty (1846), were not 'an organized society'.

How might such an argument be *supported* within (a) a legal positivist model of law, and (b) a natural law theory of law? Note, it may be that you do not agree with either (or even both) of these theories – the question, though, is asking you to put yourself in the position of someone who *does* hold to positivism (and then later in the shoes of someone who *does* hold to a natural law position), such that you can then work out, from the perspective of each of these theories, how each might *try* to make sense of the sort of argument made by the province.

Now, consider the situation from an opposite angle – that is, how might a legal positivist (and then a natural law theorist) *try* to argue that from their perspective it does *not* make much sense for the province to argue as they do?

With these sorts of efforts in hand (as legal positivists and natural law theorists struggle to make sense of the sort of argument made in this response to a civil claim), does either sort of theory seem to be better able to make sense of this sort of legal mess?

END OF EXAMINATION