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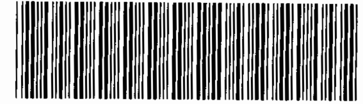
Terrell
Jurisprudence Final Exam
Spring 1999


EMORY UNIVERSITY
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JURISPRUDENCE

Spring, 1999 Professor Terrell

FINAL EXAMINATION

Time allowed: 3 hours, 30 minutes

Instructions:

1. This is an open book examination.

2. You have a maximum of three hours and thirty minutes to complete the examination.

3. The examination consists of this page of general instructions and then four questions. Be certain that your copy of the examination contains all four questions.

4. The questions will be weighted according to the raw score points and suggested amounts of time allotted to each. **Please pay attention to the suggested times. Avoid getting bogged down in any particular part of the exam.**

5. The raw score points for the questions total 125.

6. **Bear in mind that your examination answers will be the only basis available to me to give you a grade in the course. Be certain to allow those answers to display primarily your mastery of the assigned reading materials, and only secondarily your ability to be a creative thinker and writer. You are welcome to move beyond the course's readings after you have discussed them adequately.**

7. Although you may take the examination anywhere, any announcements concerning the examination will be made only in the room assigned for the examination and any designated typing room.

8. Your examination answers must be turned in in the room assigned for the examination. You may keep your copy of the examination itself.

9. Good luck.

Question One
(50 raw score points; 1 hour, 10 minutes)

Consider the following portion of an article by Prof. Owen Fiss of Yale Law School:

Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained. To explain the source of constraint in the law, it is necessary to introduce two further concepts: One is the idea of disciplining rules, which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged; the other is the idea of an interpretive community, which recognizes these rules as authoritative.

The idea of objective interpretation accommodates the creative role of the reader. It recognizes that the meaning of a text does not reside in the text, as an object might reside in physical space or as an element might be said to be present in a chemical compound, ready to be extracted if only one knows the correct process; it recognizes a role for the subjective. Indeed, interpretation is defined as the process by which the meaning of a text is understood and expressed, and the acts of understanding and expression necessarily entail strong personal elements. At the same time, the freedom of the interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence), as well as by those that define basic concepts and that established the procedural circumstances under which the interpretation must occur.

The disciplining rules may vary from text to text. The rules for the interpretation of a poem differ from those governing the interpretation of legal material; and even within the law, there may be different rules depending on the text—those for contractual interpretation vary from statutory interpretation, and both vary from those used in constitutional interpretation. Though the particular content of disciplining rules varies, their function is the same. They constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged. These rules are not simply standards or principles held by individual judges, but instead constitute the institution (the profession) in which judges find themselves and through which they act. The disciplining rules operate similarly to the rules of language, which constrain the users of the language, furnish the standards for judging the uses of language, and constitute the language. The disciplining rules of the law may be understood, as my colleague Bruce Ackerman has suggested, as a professional grammar.

Rules are not rules unless they are authoritative, and that authority can only be conferred

by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative. This means, above all else, that the objective quality of interpretation is bounded, limited, or relative. It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules.

To what extent, and in what ways, is this passage consistent or inconsistent with

(a) the approach to linguistics with which we began the course (set theory, central cases, and so on)?

(b) the development of the concepts of "law" and "legal system" proposed by H. L. A. Hart in *The Concept of Law*?

(c) the theory of adjudication presented by Ronald Dworkin in the portions of his work assigned as reading this semester?

Question Two

(25 raw score points; 40 minutes)

(a) How would John Rawls analyze the case of the Speluncean Explorers (Problem 3), if he were required to write the tie-breaking opinion?

(b) How would Terrell, based on the anaylsis presented in the "Flatlaw" article?

Question Three

(50 raw score points; 1 hour, 15 minutes)

Professors Prosser and Keeton in their famous treatise, *The Law of Torts*, make the following observation about Anglo-American law:

> [T]he law has persistently refused to impose on a stranger the moral obligation of common humanity, to go to the aid of another human being who is in danger, even if the other is in danger of losing his life.

Assuming that a general "duty to rescue" is indeed absent from our law:

(a) Is this absence consistent with Hart's concept of "justice"?

(b) Is this absence consistent with John Rawls' theory of justice, or is it more consistent with the philosophy of Robert Nozick?

(c) Based on her article "Justice For Women!" how do you think Martha Nussbaum would assess this piece of the law?