

CAPITAL UNIVERSITY  
LAW SCHOOL

JURISPRUDENCE  
FALL SEMESTER, 1998  
FINAL EXAMINATION

PROFESSOR STRASSER  
NOV. 30, 1998  
TAKE HOME

INSTRUCTIONS

1. **THIS EXAM IS DUE NO LATER THAN 5:00 P.M. ON THURSDAY, DEC. 17 IN MY OFFICE (606).** As a matter of convenience, the exam may be turned in earlier. **LATE EXAMS WILL HAVE ONE TENTH (1/10) OF THE TOTAL POSSIBLE NUMBER OF POINTS DEDUCTED FOR EACH TWENTY-FOUR HOUR PERIOD THAT THEY ARE LATE. THUS, AN EXAM TURNED IN AT 5:01 P.M. ON THURSDAY, DEC. 17, WILL HAVE ONE TENTH (1/10) OF THE TOTAL POSSIBLE NUMBER OF POINTS DEDUCTED. AN EXAM TURNED IN AT 5:01 P.M. ON FRIDAY, DEC. 18, WILL HAVE ONE FIFTH (1/5) OF THE TOTAL POSSIBLE NUMBER OF POINTS DEDUCTED. ETC.** If your exam is late, please put the date and time that you are turning it in on the first page.

2. Please make sure that you **LABEL YOUR EXAM ON THE FIRST PAGE -- "Jurisprudence"**

3. a. The exam must be **TYPED** (wordprocessing output is acceptable) and **DOUBLESPOCED** on 8 1/2" by 11" paper.

b. There should be **1 INCH MARGINS**, and the print should be no smaller than **TWELVE** characters per inch (**12 cpi**). (For illustration purposes, the print of this exam is 12 cpi.) **NOTE:** In doubtful cases, I have been known to use a ruler to determine whether the directions had been followed.

c. **THE NUMBER OF LINES OF PRINT PER PAGE SHOULD NOT EXCEED TWENTY-SEVEN (27).**

d. **THE EXAM MUST NOT EXCEED SIXTEEN (16) PAGES.**

e. **Number your pages.** You may allocate the pages as you see fit but you may only write on one side of each page.

f. **THERE MUST BE A BLANK PAGE BETWEEN THE END OF YOUR FIRST ANSWER AND THE BEGINNING OF YOUR SECOND ANSWER.** (The blank page should not be numbered and does not count toward the 16-page limit.)

g. **STAPLE (do not clip) the pages of your answer together.**

h. Do not use footnotes.

**THE FAILURE TO FOLLOW THESE DIRECTIONS MAY RESULT IN A SIGNIFICANT LOSS OF POINTS.**

4. The questions are of **EQUAL WEIGHT.**

5. **YOU ARE NOT PERMITTED TO CONSULT WITH ANYONE** about the questions or answers until all papers have been submitted. **YOU SHOULD BE ABLE TO DO VERY WELL ON THIS EXAM WITHOUT DOING ANY OUTSIDE RESEARCH.**

6. **AMBIGUITIES:** If you find the facts given to be insufficient to answer a question, state any additional factual assumptions you deem necessary and answer the questions as though your assumptions were part of it. **WARNING: DO NOT MAKE THE MISTAKE OF CHANGING THE QUESTION BY CHANGING THE FACTS.**

7. **IDENTIFICATION:** Write your exam number on the first page and on every succeeding page. Neither your name nor any other identifying mark, other than your exam number, should appear anywhere on your answer.

8. **REPETITION.** When I grade these, I will look at Question One in ALL of the exams and then look at Question Two in ALL of the exams. Merely because you have said something in Question One does not mean that you will get credit for it in Question Two. **DO NOT CROSS-REFERENCE.** (I don't want my judgment of how you are doing in Question Two to be affected by my judgment of how well you did on Question One.)

9. **CITATION** When citing to a case we discussed in class, it will suffice to use the name of the case, e.g., the Eisenstadt Court or the Moe court.

10. Make an extra copy of your exam and keep it.

11. **DO NOT CALL TO ASK ME QUESTIONS ABOUT THE EXAM ONCE THIS CLASS HAS ENDED. AS A MATTER OF FAIRNESS, I DO NOT WANT TO GIVE ANSWERS TO SOME STUDENTS THAT OTHERS DO NOT HAVE THE BENEFIT (OR DETRIMENT) OF HEARING. YOU WILL SIMPLY HAVE TO USE YOUR OWN JUDGMENT ABOUT HOW TO HANDLE ANY POSSIBLE DIFFICULTIES, WHICH YOU HAVE DISCOVERED ONCE THE TIME FOR ASKING QUESTIONS HAS PASSED.**

**QUESTION 1**

Cap. Stat. Ann. 980.34(d)(1998) reads:

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a felony and shall be punished within the discretion of the circuit court

Ms. Yee, a member of a racial minority, delivered an eight-month-old fetus in Capital State University Hospital. Pursuant to law, both she and her infant had their blood tested. Neither tested positive for the presence of cocaine or cocaine metabolites. However, the child was suffering from conditions, which are often caused by exposure to cocaine during the first three months of fetal life.

Ms. Yee has been charged with and convicted of violating Cap. Stat. Ann. Sec. 980.34(d). She admits that she used cocaine but claims not to have had any during the last four months of her pregnancy. Ms. Yee appeals her conviction in Capital Supreme Court.

A statute in the state of Osu incorporating the identical language as is contained in Cap. Stat. Ann. Sec. 980.34(d) was used to convict a woman who had ingested cocaine one day before she had delivered. That conviction was upheld in *Bartles v. James*, 203 Osu.2d 192 (1997). That case received national attention and spurred the Capital Legislature to pass its own statute.

This is a case of first impression in Capital--no court in the state of Capital has addressed whether the statute could be applied in this kind of case. The Supreme Court of Capital has held that a woman could not be convicted of delivering drugs to a minor while the fetus was in utero (i.e., before birth) in *Bush v. Quale*, 101 Cap.3d 602 (1994). The Bush court reasoned that the Legislature had not intended to criminalize the conduct at issue. One of the concurring judges in Bush pointed out that empirical data suggested that minorities were disproportionately impacted by statutes like Cap. Stat. Ann. Sec. 980.34(d), even though the proportion of minorities abusing drugs is equal to the proportion of the nonminority population abusing drugs.

It should not be thought that the state of Capital takes fetal harm lightly. For example, in *Rodham v. Jones*, 100 Cap.3d 602 (1993), the Capital Supreme Court upheld a \$100,000 wrongful death judgment against Jones, who had intentionally killed Rodham's four-month-old fetus by stabbing Rodham in the stomach.

You are a clerk working for the Justice on the Capital Supreme Court who has been assigned the opinion. She has asked you to write a description of the positions some of the other Justices on the State Supreme Court will likely take. Several of them fancy themselves as incarnations of current or past legal theorists. Your essay should address the views probably held by the incarnations of:

Derrick Bell  
Catherine MacKinnon  
H. L. A. Hart  
Oliver Wendell Holmes

You should include both a relatively brief description of each judge's legal approach and an analysis of what each will say in this particular case.

## QUESTION 2

Adam and Evan (two males who are first cousins) apply for a marriage license at the Town Clerk's office in Freeville, a city in the state of Capital. The clerk refuses to issue the license.

The state statute, Cap. Stat. Ann. 670.3(d), reads, in relevant part:

In order to make valid the marriage contract, which shall be only between a man and a woman . . .

- (c) the parties shall not be closer than second cousins. However, if the parties are first cousins, they may marry as long as at least one can establish that he or she is unable to reproduce.

Adam goes to court to compel the Town Clerk to issue the license. The lower court refuses to order the Clerk to do so. Adam appeals to the Capital Supreme Court.

The Capital State Constitution does **not** have a provision, which specifically prohibits discrimination on the basis of sex. Capital must of course adhere to federal practices and (where implicated) subject sex-based discriminatory laws to heightened scrutiny.

You are a clerk working for the Justice on the Capital Supreme Court who has been assigned the opinion. She has asked you to write a memo analyzing this case in which you address **all** relevant issues raised by the facts. Give the Justice a recommendation as to how this case should be decided, justifying your recommendation.

The only **potentially** relevant cases to be considered here include the following:

Bowers v. Hardwick, 478 U.S. 186 (1986)  
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)  
Loving v. Virginia, 388 U.S. 1 (1967)  
Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971)  
Turner v. Safley, 482 U.S. 78 (1987)  
Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)