

UNM School of Law
Final Examination

Examination No. _____

Professor Ruth Kovnat
Monday through Thursday
May 9, 10, 11, or 12, 2005

526 CONSTITUTIONAL RIGHTS INSTRUCTIONS

This is an eight-hour, open-book final examination.

Your eight hours begin when you open or download this question for the first time. You should not open or download the question until you are ready to begin, or as close to that time as practical. Similarly, you should upload or return your answer to the staff no later than eight hours after you have opened or downloaded the examination. Download and upload in accordance with instructions previously sent to you by Pat Trainor. If you have any problems with this, see Pat Trainor before looking at the question. Working on the examination for more than eight hours will constitute a violation of the Honor Code. The examination question will be available starting on Monday, May 9. It may also be taken on Tuesday, May 10, Wednesday, May 11 or Thursday, May 12.

In preparing your answer, you may consult your casebook, the photocopied supplement, and any notes or outlines prepared by you (either alone or in conjunction with your classmates) and any other materials that you may find helpful. Please note that this examination is not a research project and you may waste valuable time if you consult secondary sources. It is my belief and anticipation that you can prepare a successful answer based solely on the course materials and notes alone, but I have no objection if you wish to consult the full text of a relevant case or check your understanding against a secondary source. You may not discuss any aspect of this examination or your answer with any other student or any other individual.

Your answer is limited to 3,750 words. Please do a word count and write the total on the first page of your exam answer. No credit will be awarded for anything past the first 3,750 words of your answer.

As you can see from the word limitation, you have eight hours to write an exam answer that is no longer than that expected of a four-hour, in-class exam. This should give you the opportunity to re-read a case or two and consult any notes or materials that you deem relevant to the question. It should also give you a chance to read over what you have written to be sure that you have presented a thoughtful answer that contains arguments and counter-arguments. A word of caution. Please confine yourself to constitutional arguments. In particular, refrain from making arguments based on any knowledge that you might have of Title VI or VII of the Civil Rights Act of 1964.

GOOD LUCK!

QUESTION

In 1905, the Catholic Church established a hospital in the city of Enchantment, in the State of Bliss. The hospital, named St. Luke's, was run by an order of nursing nuns and was the only full service hospital serving the town. The Church generously supported the hospital, and after a very successful fund-raising effort, constructed a beautiful, cathedral-like building to serve as the permanent home of the hospital. A very large cross was erected on the roof of the building. The hospital served all persons in Enchantment who needed hospitalization, charging those patients who had the means to pay and offering free services to the indigent.

In 1990, St. Luke's was still the only hospital serving Enchantment, a city that had quadrupled in population in the years since the establishment of the hospital. The increasing demand for medical services caused the Church to decide that it was no longer financially feasible for it to maintain the hospital. Consequently, the Church entered into discussions with the City of Enchantment for the purpose of turning over the hospital to the municipality. After several years and bond issues, the transfer of the hospital from the Church to the City was accomplished. The hospital was to be sustained by a combination of public money derived from local tax revenues and fees for services to be paid by individuals who received those services or their insurers. The hospital could also receive payment through both Medicare and the federal-state Medicaid programs. Although the hospital retained the name, St. Luke's Hospital, it was governed by an elected board and by 1995, all of its board members were lay people.

The board of the hospital made two early decisions. The first concerned hiring practices. Because most of the existing hospital staff was composed of people of the Catholic faith and since most of the nursing staff were women, for the sake of achieving diversity, the board decided to give preference to the hiring of men to fill vacancies in the nursing staff and to non-Catholics in general. The second decision focused on the cross. The Board looked into removing the cross from its prominent place on the roof, but learned that it would be very costly to do so because the entire roof would have to be replaced. Moreover, the Board decided that it would be desirable to honor the hospital's founders. Therefore it decided to leave the cross where it was and to place a large sign at the entrance of the hospital describing St. Luke's as Enchantment's municipal hospital.

St. Luke's Hospital employed four pharmacists. They worked in shifts such that there was only one pharmacist on duty at any one time. Their primary duties were to analyze, approve and fill prescription requests from physicians treating St. Luke's hospital patients. These pharmacists, like all others practicing in the State of Bliss were regulated by The Pharmacy Law which requires all pharmacists to fill all prescriptions tendered to them in accordance with professional standards. Professional standards include conformity to pharmacological standards, accurate labeling, and preparation of necessary documentation.

In January, 2004, St. Luke's hired Peter Pfiser, a well-qualified professional pharmacist. Pfiser's contract with St. Luke's provided for a two-year renewable term of employment, terminable only for cause. In February of 2004, Pfiser started to wear a large button that he continuously displayed prominently on his white coat. The button said "Choose Life or go to Hell." Pfiser's button caused great consternation among other members of St. Luke's staff, as well as among some patients who had contact with the hospital pharmacy. The Board received many complaints about Pfiser's button and asked him to desist from wearing it. He refused to comply with the board's request.

At the time, the legislature of Bliss was debating The Child Protection Act (CPA) which it ultimately enacted. CPA requires physicians to give 48 hours notice to a minor's parent before performing an abortion unless the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice, or unless a judge determines that the minor is mature and either capable of giving consent or that abortion without parental notice would be in her best interests. Congress was also debating a bill that touches on abortion rights of minors. It was enacted in late 2004. The federal law, the Teenage Mothers Protection Act (TMPA) makes it a federal crime for anyone other than a parent to transport a minor across state lines for an abortion if she has not already satisfied her home state's parental involvement laws.

In January, 2005, several police officers brought Sarah Smith, age 14, to St. Luke's emergency room. She was the victim of a vicious rape that had happened 24 hours earlier. Phyllis Farmer, the emergency room physician employed by St. Luke's, treated Sarah's injuries and immediately wrote a prescription for the "morning-after" pill, a treatment she thought necessary to prevent implantation of a fetus. Pfiser was the pharmacist on duty. He refused to fill the prescription on the grounds that to do so would conflict with his sincerely held religious beliefs that are central to the doctrines of his faith and would cause his religious community to ostracize him. Wasting no time and with Sarah Smith's consent, Farmer ordered an ambulance and accompanied Sarah Smith to a nearby clinic in an adjoining state, where she knew that Smith could obtain the morning-after pill and if that didn't prove to be an effective way to terminate a pregnancy, to obtain an abortion. Neither Farmer or Sarah notified Sarah's parents. Nor did they resort to the judicial by-pass procedure.

A few days later, the board was informed of the events involving Sarah Smith and it unanimously voted to terminate Pfiser's employment immediately because of his violation of Bliss's Pharmacy Law.

A great deal of litigation ensued.

1. Pfiser filed an action against St. Luke's board challenging their action on the grounds that it violated his rights to procedural due process, free speech and free exercise of religion.
2. Sarah Smith's parents filed an action against Farmer alleging that her actions interfered with their constitutional rights and were contrary to their deeply

held religious and cultural views. (Assume that Farmer was a state actor throughout.)

3. Farmer was prosecuted by the state for her violation of the CPA and by the federal government for her violation of the TMPA. She defends by challenging the constitutionality of each statute.
4. Alice Ames, a Catholic woman, who is a well-qualified, experienced nurse, with impeccable references, sues the board for failing to hire her while hiring a well-qualified, but less experienced, non-Catholic man to fill a vacancy in St. Luke's nursing staff.
5. And finally, the ACLU sues the board for displaying the cross so prominently on the roof of the hospital. (Assume that the ACLU has standing.)

Assume that you are the hapless clerk who is asked to draft memos on the constitutional issues raised by each of these cases. Do so.