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Professor Name: Bobroff
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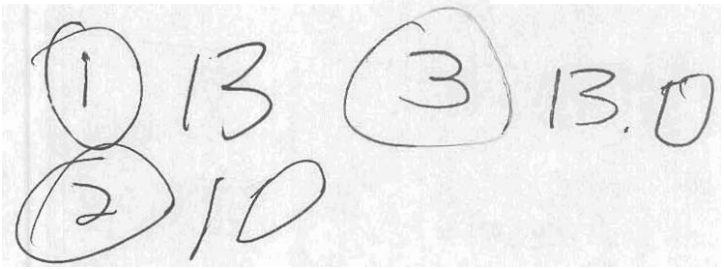

Question 1:

In order to discuss how the concept of "equity" arose, it is necessary to identify and discuss the rise of the Court of Chancery in English Common Law during the 1400s. In this answer I hope to discuss the following points: 1) the rise of Equity (which gave birth to equity); 2) the institutionalization of Court of Chancery and Equity and its subsequent calcification; and 3) the continuing role of "equity" and remnants of Equity in the common law today.

The Court of Chancery arose as a response to the increasingly rigid writ system courts (Common Pleas, Exchequer and King's Bench). Since a litigant did not have a cause of action unless there was a writ that she could proceed on, if her action did not fit into any of these writs she was left without a remedy. Initially the writ court recognized a writ for every right, but as the writs multiplied and became a rigid list, this guiding principle was soon turned on its head to without a writ there is no right. In order to appease some of the dissatisfaction at the increasingly rigid writ system, the Court of Chancery was created. However, one could not simply go to the Court of Chancery and bypass the writ system completely. In order for a litigant to go to the Court of Chancery, she had to first prove that there was no adequate remedy for her problem at law (usually meaning that her particular case either did not fit into a writ, or the writ did not contain the remedy she wanted). The Chancellor only heard cases as a matter of grace so getting a hearing in front of the Court of Chancery was still a matter of discretion. The Court of Chancery was more flexible in terms of both procedure and substance. In the Law Courts, the importance of joinder (single issue pleading) was essential. In the Court of

Chancery, there was a greater flexibility to hear multiple issues within a single case There was also greater flexibility in terms of what remedies were available. The Court of Chancery (Equity court) had the ability to craft specific remedies for a situation, like injunctions or specific performance. It had the ability to provide remedies in personam, meaning against a specific person; whereas the Law Courts could only provide in rem damages, typically taking the form of "relief in iron boxes," meaning monetary damages. In addition, since the Court of Chancery was originally presided over by an ecclesiastic, the maxims that ruled the Court reflected the canon law basis of the Court. For example: He that hath committed Inequity, shall not have Equity. This maxim gives way to the "clean hands doctrine" which still exists in both tort and civil law. Another good example is "Equity prevents multiplicity of suits," once again alluding to the ability of the Court of Chancery to hear multiple issues. The essential advantage that Chancery Court had over the Law Courts was flexibility in terms of how an issue was heard, discretionary remedy, and an interest in the narrative of the parties involved (bill procedure versus the formalized writ required by Law Courts).

However, by the 19th Century, the very aspects that made the Chancery Court attractive, began to look more like the Law Courts. Part of this change in the character of the Chancery Court may be due to the incremental replacement of ecclesiastic authorities with lawyers. It is unclear when exactly this change took place, but eventually attorneys began to be appointed as Chancellors, and as such, began to infuse their own sense of procedure and substantive law into the area of Equity. The Court of Chancery itself began to ossify and appear very much like the rigid Courts of Law. The very

rigidification that the Court of Chancery had been established to mitigate against (the rough edges of formal writs), was being replicated within the Equity Court.

This dual system of Courts of Law and Equity Court was transported with the colonists to the United States, despite the fact that the three King's courts were not. By the 19th Century, when Dudley Field began pressing his Field's Code there was increased pressure both within the United States and in Britain(with the Judicial Reform Act) to merge both Law and Equity for judicial efficiency reasons. The heart of the Field's Code was §162 which read in part "[t]he distinction between actions and law and suits and equity, and the form of all such actions and suits heretofore existing are abolished..." Despite the fact that some jurisdictions, particularly the westerns states like California, embraced the merger (likely due to a history of civil law which had no distinction between law and equity), many more jurisdictions were reticent to merge the two. Samuel Seldon declared that "It is possible to abolish one or the other, but it is certainly not possible to abolish the distinction between them." Despite the fact that law and equity's subsequent merger, there are still lasting distinctions that make Seldon's comment of 1856 still seem true. For example, the right to trial by jury in civil matters was only a right for actions at law. In the *Markman v. Westview* case we read which was decided in 1996, the Supreme Court, in deciding whether or not the plaintiff had a right to jury in this particular civil matter, had to do a historical inquiry as to whether or not this action would have been originally at law or at Equity. There have been numerous times during Contracts class this semester where we have discussed the persistent distinguishing characteristics between an action at law (like breach of contract) and an Equity action (like unjust enrichment). Despite the fact that law and Equity have merged

procedurally, here continue to be persistent differences also in substantive areas like remedies. For example, an injunction is still considered an equitable remedy versus paying damages for the violation. There are also Equity Maxims that continue to be held out as exceptions to certain Law doctrines. For example, the unclean hands doctrine as applied in criminal law will preclude a defendant from claiming a necessity defense. Although there is a continuing idea that equity is simply "doing justice" as opposed to law (the various Cardozo decisions we have read this semester seem to come to mind, and when we ask the professors in a perplexed manner where Cardozo got the seemingly contradictory rule he's applying, inevitably we're answered, "Well, he decided it as an equitable manner), there are also places where procedural devices from Equity have merged quite nicely with Law. For example, the use of pre-trial interrogatories is used in many civil cases, whether the action originally be one at law or Equity. Another example is the high premium put on judicial efficiency, "Equity prevents Multiplicity of Suits" and "Equity regards Length of Time." Although there are places of both overlap, merger, and persistent difference between law and Equity, or better put, law doing equity, the sites of distinction as well as the areas of merger continue to retell the legacy that the writ system has on our current legal system here in the United States.

Question 2

The attitude a society has towards the function of law will inform the role that an attorney plays within that society. In this answer I will discuss the "non-Western" traditions, principle the Navajo, Japanese, and West African perspectives and the differences between the views of law and its implications for attorneys within the Civil and Common Law traditions.

Non-Western/Other

The readings in the book would have us believe that Japanese, West African, and Japanese cultures are monolithic and have similar views towards the function of law within their societies. The readings about these various cultures freely use the word "homogenous" and "harmony" repeatedly in order to illustrate the high premium placed on communal harmony and status quo.

For example, Elias article says that the primary function of "African customary law" is the "restoration of the parties to the status quo ante." Elias also points out the confusion that "Africans" face when trying to interact within a colonial system that has been imposed by the British, without really interrogating the colonial and post colonial power implications for why this foreign system that has been imposed by violence would be so intrusive and alien to an "African." Elias does note the general dissatisfaction of the remedies obtained by West African tribal members within British Court. Elias also notes that the most important role within West African customary law is that of the judge, who uses the reconciliation hearing to education both the parties and the community

through a restatement of norms of social behavior expected of individuals within that community.

Both Noda and Minami assert that the Japanese place a high emphasis on communal values due to a history of racial purity and "rice farming culture." Both authors also comment that the Japanese consider litigation an abhorrent and embarrassing thing since it signals the breakdown of communal values that are enforced intracommunally. Both Noda and Minami note that the word for "right" or "kenri" in Japanese is a relatively new word from the Meiji era. The word for duty or "gimu" is also a relatively new word despite the fact that the notion of duty is integral to Japanese society. Both authors also emphasis the nature of giri on the behavior of the Japanese. They both reiterate that giri is the source of behavior normification rather than law. However, as a different author, Yoshida, points out, the role of sekentei is as important if not more important then giri in behavior regulation and norms. However, sekentei can also imply a self-interest in the sense of one's honor. The behavior enforced by sekentei is behavior that protects one's honor. This sense of honor can be seen as more analogous to "right" in the Western context. However, unlike in Western contexts, the reinforcement of behavioral norms or conduct norms is extralegal, meaning the community itself rather than the court. As a result, the role of the bengoshi (Japanese attorney) is minimal since there is an abhorrence of litigation. There are other reasons somewhat touched on such as the extreme harshness and difficulty in passing the equivalent of a bar exam and the financial and procedural hardships of the judicial system, however these realities may further illustrate the different importance law is given in Japan as opposed to the United States. Although it must be noted that Japan has

begun reform movements on its legal system to try and create more legal efficiency and access to law. Does that mean that law is now taking on a greater significance and role in Japan? Is there a greater social pressure for individual members to have access to law? Will the role of the bengoshi change?

The Justice Yazzie reading presents a different view of law then the above readings assert about Japanese and African cultures. Justice Yazzie speaks of behaz'aani as being law that is absolute and comes form the beginning of time. Behaz'aani was given to the Navajo people by the Holy People and for guidance. As the article is titled, "life comes from "[behaz'aani]." However, Yazzie does illustrate the difference between Navajo law and Anglo law. He describes Anglo law as a verticle system based on replicating hierarchy. When litigants finish their suit in court, one comes out "tails up" while another comes out "tails down." Justice Yazzie describes Navajo Peacemaking Court as one where everyone comes out "tails up." In addition, he describes the difference of the role of litigants themselves within the Navajo legal system. The litigants are encouraged to participate in the resolution of the problem, indeed the whole community is injured by the problem, so the whole community should participate to remedy it. Unlike the dependence in the Anglo legal system on attorneys who "vindicate rights" by taking away from others with the potential harmful use of words, the Navajo Peacemaking Court is dependent upon k'e. The k'e, in a general sense, would be the relationships of all those within the community, these relationshps implicate both duties and solidarity. Justice Yazzie describes the visual conception of Navajo Law as a circle (unlike the pyramid of Anglo law). As such, the litigants themselves are as much a part of the process as the attorney. Everyone on eqaul footing within the circle. The

naat'aanii (the peacemaker) has the most important role in the Navajo Peacemaking Court. The naat'aanii's role is not to use rhetoric to win a zero-sum game. The role of the naat'aanii is to facilitate a healing of the problem, so that the community itself may heal. This is a very different sense of law that implicates an entirely different role for attorneys than that in Common Law and Civil Law

Common Law and Civil Law

In Common Law, the role of the attorney is that of the common law man as articulated by Aiken. It is a positivist view of law in which every individual is acting in a self-interested way, therefore the role of law is to impose an order so that the inherent chaos that insues from ultimate selfishness will not subsume society. The role of the attorney, as related by Simon, encompasses contradictory impulses. On the one hand an attorney must be neutral so that she may best predict the resolutions that a client would need for his case, but the attorney must also be a zealous advocate who is partisan to her client's cause. The attorney must simultaenously act as a zealous/partisan to further the client's own self-interests, while at the same time maintain the integrity of the nature of law as a whole which is to maintain order through neutrality. Inherent in the embracing of these contradictions is the notion that flexability of law is most valuable in order to help regulate pluralist self-interests while maintaining order. The readings in the book regarding West African customary law and Japanese law would assert that the balancing between individual and selfish needs with the need for social coherence and stability is unnecessary in communities where the community will trumps any self-interest.

In the Civil Law, there is a founding principle that the law can be rationally and coherently made by man. The role of the attorney then is not to insure the flexability of

the law to these various pluralist demands, but rather to insure the continued certainty of legal principles embodied within the code that allow clients to count on the code. The controlling metaphor we were given of the difference between common law and civil law at the beginning of the semester was that while the civil law attorney is given an entire house as the body of law, and simply need find the correct room that corresponds to the argument for his client, the common law attorney is given a pile of various materials, bricks, mortar, sand, and must reconstruct the house anew each time he makes an argument for a client. In the civil law where the emphasis is put on certainty through the continued refinement of the codes by the legislators, the role of the attorney is simply to find the code provision that best fits.

Of course, both the civil law and common law are changing. In civil law with the rise of constitutional courts, microcodes, and the increasing indexing of prior case decisions, there seems to be more flexability and mobility for civil law attorneys. In common law where an attorney must have expensive memberships to access LexisNexis and WestLaw to try and continue to keep a handle on the ever growing number of cases and precedent, there may be less flexability, and more time invested in simply trying to find the proper set of cases to arm one's self with before going to court.

Lastly, I would just like to note that although, from an academic point of view, it is sometimes necessary to make broad sweeping generalizations about what a society's view is of the role of law, or what a culture is based on assumptions regarding why litigation is not encouraged, ultimately is the slipperier areas where the nice generalizations don't fit, and the realities of why litigation may not be persued, where we

might find the real sources for comparision and analysis of what the common law means or doesn't mean in contrast to the "other."

Question 3

Legal Realism was a direct reaction, in some ways, against the Langellian idea that law is a science. The legal realists asserted that law was a social science. The rise of Legal Realism was in the 1920s and 1930s and critiqued the basic assumption that law was made up of abstract concepts that were not imbued with social, economic, or racial contexts. The Legal Realists challenged the "objectivity of the law" by noting that 1) the decision makers themselves were human beings motivated by interests (typically called policy) that were not objective; 2) there are broad and fundamental social interests at play in the law, although there may be disagreements about how these values should be weighed or promoted, these social interests were far more valuable to the law then abstract legal concepts; 3) legal decisions are always a matter of balancing interests.

The CLS movement that began in what Gilmore calls "The Age of Anxiety (1970s and beyond)" built on the fundamental principles of the legal realists, but challenged the ability and functioning of balancing interests. The CLS movement questioned the idea of fundamental social values by noting that the values themselves are reinforced and constructed because a society wants to promote them. CLS also attacked the law-and-economics analysis that the legal realists thought would bring justice to the law. CLS noted that in the economic analysis there is inherent within it classism, that is, the distribution of wealth is assumed to be done when in fact disparities within class belie this assumption. Finally CLS notes that the regal rules do not merely reflect value preferences but also create and reinforce them.

In order to discuss where the relevant insights of legal realism today, I will forage beyond both the legal realists and the CLS movement, to look at what has been done

more recently with the Crits and other movements that come from this "policy" based approach.

Laura Nader criticizes the ADR movement by using Antonio Gramsci's discussion of hegemonic control through "consent." Gramsci's basic premise is that authoritarian instruments of the state are given a great deal of power and control over individuals through the illusion that individuals are "consenting" to this control. The legal system is a perfect example of what Gramsci's consent model is really talking about. The legal system purports to protect and promote our individual rights. At the heart of this principle is the illustration John Stuart Mill gave of what the limits of individual right is. Mill once wrote that "My right to swing my arm around ends at your head." There is an assumption that law is there (in a positivist sense) to protect the invasion of our own individual rights by others. Also implicit within this principle is the Rousseau's social contract, whereby we contract away some of our individual liberties for the privilege of living in "civilized society." The state presents us with this deal: give up some of your rights and you will be granted the protection of collective society. As such, we "consent" to subordination and power. The Crits recognize this dynamic within the legal system, and also recognize that the consent we give is not really an informed consent. For example, as was pointed out numerous times within both our Criminal law class and Torts law class, the classic reasonable person test which is supposed to be the very paradigm of objectivity, also can have very implicit characteristics which are white, male and privileged. However, the altering of a this reasonable person to say a reasonable woman, or reasonable Asian American woman, begins to look very much like a continuation of marginalization that subjectivization of this standard was supposed to

prevent. Is a reasonable Asian woman not a reasonable person? Is the reasonable person always presumed to be a privileged, white, male or is it a privileged, rich, straight, white, male? These questions are ones that began with the CLS movement, but continue to be pushed beyond mere economic questions by the Crits.

Professor Scales notes the anguish that woman and people of color go through during the law school experience. She urges us to practice what she calls guerilla tactics to interrogate the acculturation (and the very narrow line to assimilation) that begins with 1L. She notes the insidious power of false dichotomies: law versus policy, public versus private, consent versus coercion, etc. She also notes that the real effect of these false dichotomies is to render any experience beyond these binaries invisible. This urge to see beyond binaries, to reach beyond a 1 or a 0, is a very present and continuing battle outside the legal arena as well. Critical race theory with writers like Gloria Anzaldúa note the violence that comes with false bifurcation. Although Professor Scales' article is from 1990, almost fourteen years later this dictomization of social realities continues within legal education. As I was preparing for some of my other exams (not this one), I consulted a very good book called *Getting to Maybe*. A great deal of this book had tactics regarding what the author called "forks." There were "legal forks" and "fact forks" and multiforks that contained both legal and factual. However, as I was rereading Professor Scales over the weekend, I realized how entrenched this notion of binaries is within the law. We are taught to use these binaries to our advantages to flesh out arguments (why an email is a written document OR not), and to persuade imaginary senior partners of our logic (why a covenant is enforceable OR not). The law seems to abhor the idea of an email is a written document and not kind of logic. So although I do

think that the breaking down and interrogation of binaries is essential to real analysis (why it is not always the center versus the other), I wonder if these binaries will ever really lose currency within the legal system.

Lastly, Duncan Kennedy also laments the inevitable assimilation, replication of hierarchy that takes place within all of our brains during legal education. He asserts that we are taught to replicate the hierarchy of the legal system and the legal community. Our professors are training for senior partners, the grades are training for judicial decisions Kennedy asserts that there is a "double surrender" consisting of passivizing classroom experience (through humiliation and terror) and a passive attitude towards the content of the legal system (law is not policy. policy is external to law). Apparently some of my classmates really believe that what Kennedy described is happening to them despite awareness of it. I think there is a difference between what Fritz calls acculturation to law school (learning the lingo, learning how to respond to seemingly simplistic factual situations with a plethora of complications and ambiguities) and assimilation to law (meaning the hierarchical, patriarchal, where the other is rendered invisible). Is it possible to learn to think like a lawyer without becoming assimilated? Can one learn how to work within the system without inevitably becoming a cog within it? Many of us came to law school with ideas about changing the law, making the silenced have a voice again, or fighting injustices within our communities. Although some of us are a little worn around the edges in the midst of this first gauntlet, most of us continue to believe that we can still maintain these goals. Although we may find ourselves a little alien within our families when we get excited about the Supreme Court hearing cases regarding liquor licensing and interstate commerce, or arguing about who is going to pay

a restaurant bill with words like detriment and consideration, obligation and waiver, we are still concerned and motivated by these reactions against hierarchy.

However, I am unsure about how far these criticisms and approaches will go outside of academia. When I see that the Supreme Court has once again refused cert. to hear same-sex marriage cases, and when I see people being detained seemingly due to nationality in Guantanamo, I begin to think that perhaps these critical views of the law and what it is actually doing only exist in academia. Do these critiques ever have any real effect on the way law is interpreted and applied in court? Perhaps the point is that if these concerns that began with the Legal Realists and continue today with the Crits, and then the subsets of different Crits like: Chicano Crits, Queer Crits, etc., at least infiltrate into law school education, then perhaps a few of our classmates who eventually do become judges will begin to put them into practice.

Nicely done!!

ZLP

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500-001 Comparative & Historical Legal Perspectives
Fall Semester 2004

UNM School of Law
Final Examination
Two Credits

Professor Bobroff
Friday, December 10, 2004
1:30 – 3:30 p.m. (2 hours)

Examination Format

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, & date of exam. Make sure to number each bluebook in order. DO NOT WRITE YOUR NAME ON BLUEBOOK.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

1. This is a **LIMITED OPEN BOOK EXAMINATION.** You may use the course materials, handouts distributed during the course, or any notes or outlines that you have participated in creating.

2. There are three questions to this exam. **Important Tip: Please answer the questions posed in the Exam and *not the focusing questions* to which you think they might refer.**

3. **All three questions are equally weighted, so you should allocate approximately forty (40) minutes for each question.**

Good luck and have a Happy Holiday season!

Question One (40 minutes)

1. **How did "equity" emerge in the common law tradition, became institutionalized, and what role does it continue to play in the common law today?**

Question Two (40 minutes)

2. **The role of a lawyer and "law" obviously varies with the cultural context. For example, in the article by Robert Yazzie, we learn that the Navajo word for lawyer, ´agha ´diit ´aahii, can be translated as "one who takes away with words." Both in the Navajo and other "non-western" traditions the role of the lawyer rests on how those traditions view "law." How does the attitude towards "law" differ among the Navajo and other cultural traditions on the one hand and the common law and civil law traditions on the other hand?**

Question Three (40 minutes)

3. **It has been said that, jurisprudentially speaking, we in America are living in a "post-realist" era. How and why did legal realism emerge and what, in your view, are its relevant insights today?**

End of Exam