The University of New Mexico

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Exam ID: 285
Course: History
Professor Name: Fritz
Exam Date: Friday, December 10, 2004

Before the emergence of Equity Courts, the Royal Courts were the King's method of ensuring justice in his kingdom and centralizing his royal authority. The writ of the King, which plaintiffs were required to have in hand before bringing suit against a defendant, was the tool used by the Royal Courts. At first, the writ system was flexible, allowing a writ for every wrong. New writs were being drafted continually. Over time, however, due to the sheer abundance of cases being brought to the Royal Courts, there were an abundance of writs, and the system became more rigid as the King was overworked. At that point, you only had a right to a trial at Royal Court if you had a complaint that fit into one or another writ. Otherwise, you were out of luck and had to settle for a trial in the local courts, whose procedures and penalties were barbaric, and who did not offer trial by jury. The King, as the fountain of justice, and in the interest of maintaining centralized power over his kingdom, wished that every case be heard, regardless of whether the law courts offered a remedy or not. The sheer number of claims to the Royal Courts was overwhelming local legal systems (which the King preferred in the interest of his own power). In order to continue to maintain autonomous legal power and deliver a "better brand of justice", the King had to get creative

Thus, the King turned to his Chancellor, who previously had been doling out writs to petitioners who convinced him that their case fit into a writ, to take those cases off his hands which didn't fit into a writ box and thus couldn't be tried at Royal Court. The Chancellor, as conscience of the King, took cases for which plaintiffs had no relief at the Royal Courts, and allowed these plaintiffs to tell their story free of procedural and

technical pleading ("bill procedure") and sat without a jury ("bench trial"). Litigants could be held in contempt of court if unruly, and gave their testimony themselves, without the aid of a lawyer. Furthermore, instead of the art of pleading, which was required in Royal Court to boil the issues down to a single question for the jury to answer, many issues could be handled by the Chancellor at once. The Chancellor ruled through grace and conscience, and took the big picture into account when rendering judgment. Relief was more flexible than in the law courts, could be molded to the facts and circumstances, and tended to be more creative.

This began as an informal, ad hoc process, but soon became institutionalized. It remained a separate system, outside of the law courts, in the common law until the merging of law and equity in 1850 (in England) and around the same time in limited regions of America (mostly Western) due to Mr. Field's Code of 1848. However, equity remains in force in modern common law. The merger, after all, was procedural, not substantive. The creation of courts with general jurisdiction (both law and equity) didn't force equity to merge with law and disappear. The decision as to whether a person gets a jury trial or not is still a matter of whether the suit is in equity or in law. In civil cases, if the suit is considered to be inequity, the defendant receives no jury trial, and the judge decides in a "bench trial." If the suit is in law, a jury will be summoned. A jury trial is often preferable to a claimant because juries tend to be more compassionate, and are not unanimous (as are judges). Damages also tend to be greater when decided by a jury or a judge. Thus, the law/equity distinction still plays an important role in the legal fate of plaintiffs.

Furthermore, a number of relics remain from the Equity Courts. For example, a judge sitting without a jury is called a "bench trial", and judges retain the ability to hold lawyers and others in "contempt of court." Remedies such as injunctive relief and specific performance are rooted in the Courts of Equity. But most importantly, the law/equity distinction remains in whether a person receives trial by jury in a civil case

2.

The Navajo, Hispanic and Japanese conceptions of law are similar in that each holds as its goal community reconciliation and social harmony. Their focus on community causes them to emphasize restoring breach and reintegrating the defendant into the community over defending individual rights and declaring a winner and loser in resolving disputes. These views of law are of course rooted in the cultures from which these beliefs sprang. They are also circumstantial: they require a small community with clearly defined internal standards of conduct.

The Navajo use a Horizontal System, the symbol for which is a circle (symbolizing healing, unity, and people coming together to talk out their problems). Law is peacekeeping. Healing the breach is the priority of the Navajo justice system, which does not possess a word for "guilty" (such a word would imply moral wrongdoing). Equality dominates the Navajo clan structure, and is maintained through peaceable, thoughtful, communal dispute resolution. In a Navajo "trial" parties involved in and peripheral to a dispute gather, everyone has a chance to speak, and there are no fixed rules of procedure.

The process is more of a ceremony than a trial. Feelings are addressed, and apportioning of fault is subsumed by the need to help the victim. No "judgment" is passed on the defendant. This harmonious system is rooted in the Navajo tradition, and children are indoctrinated into this method of dispute resolution from an early age.

The Navajo Horizontal system contrasts with the Western adversarial Vertical System, which creates a hierarchy atop which judges sit, then lawyers, with plaintiff and defendant below, awaiting judgment from on high. The system's lexicon and procedure may be foreign to plaintiff and defendant, and they are merely observers of the process which determines out of their fates. Our concept of self-interest and individual rights contrasts sharply with the community-minded outlook of the Navajo, and creates a need for lawyers, whom the Navajo disdain. Our concept of a clear winner and loser also stands at odds from the goal of reassimilation practiced in the Navajo system. Finally, we believe in a separation between law and religion, whereas the Navajo derive their law from their religion (which is virtually indistinguishable from their culture...this unity of culture/religion/law is striking and impressive).

The Hispanic system is similar to the Navajo system in that a community code of honor governs the people rather than an authoritative system of self-interested parties. Again, people are accountable to the integrity of their community, and law is peacekeeping. A good man is defined as one having shame ("verguenza"), who does not try to get ahead of others, but who is considered a community leader and healers. The law, on the other hand, is considered without shame ("sin verguenza"), and takes from people and

apportions blame without cognizance of the damage to the community. The men who take leading roles in conflict resolution are men with verguenza, men who have stature in the community, but are not professional lawyers. They are not zealous advocates, but consciences of the community. Even their judges are not professional adjudicators. They are men whose conscience lies with community harmony. Their "trials" are, like the Navajo's, conversational, forward-thinking, and communal. Also like the Navajo, they emphasize healing the breach between the parties, and minimizing shame and the threat of creating outcasts and criminals

The Japanese also have a distaste for adversarial law. They have historically believed those involved in the legal system to be disgraceful, and the root of society's ills. To take another to court is a shameful act, at odds with community harmony. They believe themselves better off without law, and seek harmonious solutions over winner-takes-all adjudication. They believe that the concept of "giri" (a sense of honor and duty to others) should drive the activities of man, and feel that racial and societal unity is critical to the success of their people. Vindictive relief is considered immoral ("kenri"). The notion of individual rights is associated with greed and selfishness, and the assertion of those rights is considered an immoral act. The law stands outside the sphere of social responsibility and communal harmony.

Furthermore, Japanese business culture greatly influences their contract law, which is based in honor, image, friendship and goodwill, not trickery. Attorneys have long been frowned upon in Japanese culture, and today the number of attorneys is limited by the

high cost and low passage rate of their bar exam. The dearth of Japanese lawyers helps ensure that litigation remains the exception, and conciliation remains the norm.

Our system of individual rights, and the need to have lawyers to aid us in defending these rights, has created a system of laws instead of community morality, which stands in stark contrast with the Navajo, Hispanic and Japanese notions of justice. Our men of the law are professionals, who work less for the community and more for their clients (or their own pocketbooks). While the Hispanic and Japanese legal traditions look differently upon law, they do so for the same reason. In the Hispanic tradition, law is respected, partly because the men who work within it ("hombres buenos") bring respectability to the system by not being legal professionals, but by developing community respect in other fields. They only "moonlight" as lawyers, and in doing so retain the law's dignity. With that dignity intact, the process of maintaining community harmony can continue unabated. The Japanese of course despise the law, and consider it a last resort, but for the same reason: community harmony. They consider taking someone to court (or being summoned to court) a shameful thing, and avoid it at all costs. While the law governs our behavior in the West, the Japanese believe in an inner governance, one that blends the honor of the individual with the propagation of the community and the race.

Of course, the cross-cultural concepts of justice described above rely on a small, tight-knit community which holds community unity as its supreme value. If Western culture ever had such communities (i.e. the Biblical communities of the Colonial period), they are no longer as prevalent as they once were, and our supreme value of individual rights

has taken precedence. Although ADR is explored in some percentage of disputes, we still prefer, as is rooted in our culture, to call out a wrongdoer and assign damages. While this may not intrinsically support a strong community, it does satisfy our Western right/wrong conception of justice.

3

Legal realism arose in the 1930s as a response to the Langdellian method of thinking of law as a science, and of structuring legal education as a matter of reading carefully selected cases and drawing general rules from them in order to learn fundamental pseudo-scientific principles of law. The Age of Faith that had allowed for the ascendance of a scientific model of legal study had passed, and an Age of Anxiety had risen between the two World Wars. The legal realists expanded the walls of the laboratory beyond the law library.

Philosophically, the legal realists believed that the immutable scientific truths sought by the Langdellians were fictions (of course, most scientists worth their salt believe in few, if any, "immutable scientific truths", but that's another story). They felt that law was, at best, a social science, a tool to be used to resolve disputes, but not a set of truths distinct from circumstances and context. They believed that the economic and sociological impact of decisions and decision-making is necessary to truly understand the law and its role in society, because law is a means to achieve a social end, not an insular scientific process.

Langdellian law schools isolated students for their studies and created an environment of Socratic dialogue and casebook study. They considered such study "stuffed dog" study: you need to engage with a living dog to know anything about dogs. To the legal realists, the casebooks seemed like a taxidermied version of the living, breathing law. Legal realists found Langdellian law schools to be an unrealistic preparation for legal practice, and felt that law students required a broader context to understand the law. They need to study law in action, and understand the ramifications and sociopolitical justifications for legal decisions. The laboratory of the law library, the legal realists believed, did not give the students adequate preparation. They needed to get out into the world (or at least allow plenty of figurative fresh air into the law library) lest they never develop a holistic sense of the law's role in society.

As real-world experience gained favor while Langdell's book-bound conceptualism waned, the legal realists gave root to the theory of clinical legal study (an important part of UNM's curriculum, of course), in which students would get a sense of real-world legal problems and see face-to-face those involved in them, and those who would be deciding the fate of real people (judges). This, along with the (partial) dismantling of Langdellian legal science, is an important legacy of the legal realists.

In America, the legal realists influenced the Critical Legal Studies movement, which posited that all of law is politics, not science, thus expanding the legal realists' notion of the importance of context in understanding and studying law in society. Law, they say is neither science nor social science. They expanded the legal realists' belief that

immutable scientific truths do not exist, positing that there are no neutral legal principles, all law is malleable and readily manipulated. Typically those doing the manipulating are judges, whose authority is not truly constrained by *stare decisis*, but instead is used to perpetuate hierarchy, racism, misogyny, and any number of society's ills. While some see such a view as cranky and overzealously deconstructive, the insights of the CLS movement are basically expansions of the legal realists' anti-Landgellian views considered in a post-modern (post-feminist, post-everything?) context.

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Exam No. 285

500-001 Comparative & Historical Legal Perspectives
Fall Semester 2004

UNM School of Law
Final Examination
Two Credits

Professor Fritz
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