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Semester I, 2003

UNM School of Law
Final Examination
Two Credits

Professor Fritz
Friday, December 12, 2003
1:30 p.m. to 3:30 p.m.

Instructions

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 two parts to the exam. Part One consists of two focusing-like questions and Part Two consists of one broader essay question. **Important Tip: Please answer the questions posed in the Exam and *not the focusing questions* to which you think they might refer.**

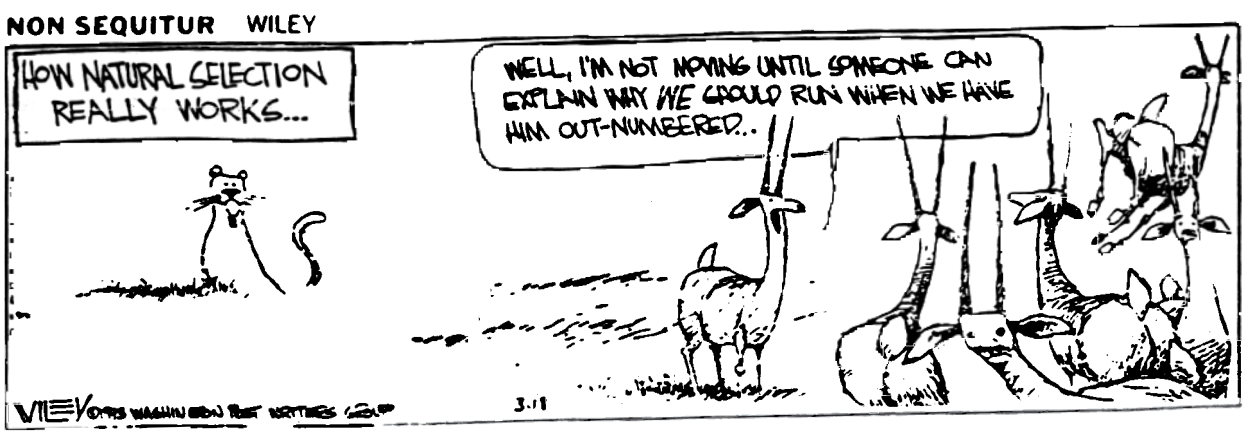
3. **All three questions are equally weighted, so you should allocate approximately forty (40) minutes for each question.**

4. On each blue book, write the subject, professor's name, and your exam number. DO NOT WRITE YOUR NAME ON THE BLUE BOOKS.

5 For students typing their exams: Type or write the information that would appear on the front of the blue book at the top of the first page of your answer. Put your exam number on each typed page.

Good luck and have a Happy Holiday season!

[A footnote to our discussion of Charles Darwin]



Part One (80 minutes: 40 minutes for each question)

1. **It has been said that how societies and communities approach the resolution of conflict provides a window into the values they embrace.**

   Identify what seems important to the Japanese, the Navajo, and modern American society in how disputes are approached, and then, identify the apparent benefits and limitations of the various approaches.

2. **Judges play a significantly different role in the Civil Law tradition than in the Common Law tradition.**

   How would you describe those respective roles and to what extent do those roles reflect the history and experience of each tradition?

Part Two (40 minutes)

3. **The ancient writ system has long been relegated to legal history. Only a few legal historians seem to care about the origins and nature of the writ system.**

   Still, inquiring minds (if not "flying fish") might be curious about the legacy of the writ system. Indeed, despite an initial assumption of the irrelevance of this subject to the study and practice of law in the common law, it turns out that there are significant "pay-offs" in understanding the legacy of the system of writs.

   Assume you are such an individual: What could you tell next year's incoming UNM law students on their first day of class about how the legal system they'll be studying has been shaped and influenced by the writ system?

End of Exam

I. On the surface, there are more similarities between the Japanese and Navajo approaches to the resolution of disputes than differences. In essence, the Japanese and Navajo are closer to each other in their methods of resolving disputes than they are to modern American society. While this may be true, historically Japanese and Navajo had slight (if not significant) differences, while the American system is ironically "converging" with the traditional Navajo and Japanese systems with the advent of "Alternative Dispute Resolution" (ADR).

Japanese society (before the modern technological age of which it is now a part of) was very much dependent on an agrarian rice economy. There was limited land that could be utilised for farming, hence there was a great interdependence amongst the community's members. This is reflected in the way the Japanese historically have moderated their disputes.

Broadly speaking, the Japanese community was concerned much more with social cohesion than it was the vindication of human rights. This speaks to its conception of law – that it was internal and self-set instead of being external and imposed from the outside. This concept is that of "Giri" – which placed much emphasis on the idea of honor. One did or not do things because of "Giri". When a member stepped outside of the bounds of this internal, community based law, the community stepped in to moderate the dispute. As mentioned, the idea was to maintain the social harmony. Here, the concern was with a "rounding of the edges" as opposed to there being a "winner" of a dispute. The fable about the judge who puts a coin into the pot to split with the two disputants speaks to this "rounding of the edges' The result? There were no losers – and – there were no winners. Everyone gets something, yet everyone loses something.

The concept of "Kenri" – the law of "rights" is slowly making its way into modern Japanese society. Today, being a lawyer is not looked down upon as much as it was 50 or 100 years ago While this is true, "Giri" still has a strong pull on the Japanese civilization as witnessed by the following. First is the idea of "pounding down a peg that sticks up". Japanese society is still very conformist. Secondly, bringing a lawyer to the signing of a contract is still considered in bad taste. This is a reflection of how much emphasis is still put on one's personal honor and integrity. Essentially, bringing a lawyer to such a meeting would be a slap in the face to the other party.

The Navajo community is as well concerned more with the community cohesion than it is on the vindication of individual rights - perhaps even more so than in the Japanese society. For in the traditional Navajo method of dispute resolution, the entire community (if it wished) would gather to discuss the matter. This is known as *k'e*. Here, a dispute tore at the fabric of the society. Much more was at stake than a rupture – the entire Navajo way of life was at stake. This is because "law" was internalized to a high degree, maybe even more so than the Japanese. "Law", for the Navajo's, comes from the ancient Holy People. Hence, due to the mixture of religion and superstition, if a member of its society broke the "law", the entire community was at risk. Therefore, the entire community should be involved in making things right.

To contrast the Navajo's disdain for American style lawyers and dispute resolution. one only has to look at the Navajo's idea that the American lawyer "takes away with words." He is known as a "pushy bossyboots" (I love that term). This makes sense when one considers the historical context of how Navajo's have interacted with

American lawyers and government. The trickery and duplicity of the American government in dealing with native peoples can easily lead one believe that, indeed, an American lawyer "takes away with words".

The Navajo's are similar to the Japanese in that (1) they were/are geographically contained/isolated; (2) there was one monolithic culture; and (3) their methods of dealing with disputes can broadly be deemed a "harmony" model. However, it can be argued that this system is eroding (for better or worse) in that many Navajo are being educated in typical American fashion. My hope, for what it's worth, is that the Navajo may retain the portions of their dispute resolution model that works for them, while incorporating those of the American system that are beneficial.

Typcially, one thinks of the modern American legal system as being "vertical" (as opposed to the "horizontal" systems of harmony models). This means the system is "adversarial" in that the thrust of the American system is to find a winner and a loser. In America, one disputant leaves court with his tail up and the other leaves with his tail down. There is no concern for the community – only in vindicating individual rights. It's interesting to note that this is how "law" developed. What I mean is that, when there is a winner, this sets precedent for future judges to rule on. In essence, whenever a person "wins" (at least at the appellate level), they are either reinforcing current law or helping to make new law.

When an individual retains a lawyer in American society, the lawyer is expected to be a "zealous advocate" Here the lawyer need not concern himself with his own morals, or what is right for society. This is allowed because law is external as opposed to

internal – law does not come from within – it comes from without. If it comes from without, then the individual (or lawyer) need not be necessarily concerned whether an act is "immoral" since all that matters is whether it is right (or legal).

While the American system is largely based on the adversarial model, we ironically seem to be moving to a "harmony" model of dispute resolution. Witness the proliferation of ADR. One might think this is great - but on a deeper look our version of "mediation" only reinforces what has come before

Here, the concern is not of vindicating rights, but in coming to a *less costly* resolution than going to court. It has less to do with maintaing social cohesion than it does with keeping costs low Also, if there is any social cohesion to maintain and reinforce, it is the "capitalistic hegemony" of modern society. A credit card company mediating a dispute with a consumer bears little resemblence to the ancient Japanese and Navajo methods.

On the other hand, there is a similarity. The similarity exists in that the all forms of ADR or "harmony" models act as coercive agents. The goal is to bend the parties to the will of the cultural norm – whether that norm be what the Holy People say it is, what the Japanese ancestors say it is, or what "big business" say it is. The problem with harmony models is that an individual may have truly been wronged and not fully compensated – all in the name of not rocking the boat. In these systems, individual liberties are curtailed

The benefits of an adversarial system are that individual rights (and that of groups such as minorities) may be vindicated – even if it takes a long time. The downside is the risk of splitting and atomizing a community. One distrusts nearly everyone else in this type of system

***Question 1**

The manner in which societies and communities approach conflict resolution provides a window into the values each community embraces. **The Japanese, Navajo** and American societies all approach conflict resolution in differing ways. An examination of how each of these societies deals with conflicts illustrates the key values that each society finds important. Although the Japanese, Navajo and American approaches to conflict resolution differ, each presents its benefits and limitations for both **its own community and for others.**

One of the key components of Japanese society is the idea of giri (an old concept **that survives today).** Giri is a system of non-legal social rules that govern behavior. The Japanese adhere to giri by following various duties and norms concerning behavior. Giri is closely connected to the Japanese system of law in that people believe that others will perform their promises on their own volition, not because the law tells them too. The Western concept of law arrived late on the island of Japan, with the concept of a "right" lacking a Japanese translation until the late 19th century. **When Western law came to** Japan, the Japanese already had in place a system of norms and values by which people **acted.** Japan did not fully adopt Western law, but rather, incorporated parts of it into its existing system of duty as proscribed by the notion of giri

An example of how the Japanese deal with disputes can be described by looking **at Japanese contract law. Instead of the formal legal document most Americans are**

familiar with, a contract in Japan is considered a tentative agreement that can be changed. Clauses are written into the agreement (called good-faith clauses), that specify how disputes will be resolved. Rather than taking a breaching party to court (the Japanese feel ashamed of going to, or taking someone to court), the parties will discuss the matter and try to come to a resolution. In this way, dispute resolution in Japanese society can be considered conciliatory rather than adversarial. A similar approach to legal issues can be seen in the Navajo community as well.

The traditional Navajo system of justice has been called horizontal (as opposed to the vertical system of justice known by most of the Western world). In a horizontal justice system, all parties are considered equal. When dealing with a dispute, everyone is brought together, not merely the primary parties involved, but families and concerned friends. Everyone works together to come to an agreement. The goal is not to punish wrongdoers or obtain large monetary settlements, but to heal the community. In a same, homogeneous society such as the Navajo, this system of law is incredibly important. It is imperative to the Navajo that the community stays united and harmonious – especially in light of the outside pressures placed upon them by both modern society and the U.S. government. Because the community is small and everyone knows one another, it makes sense that the Navajo system of justice would be conciliatory like the Japanese system (which, although larger, is still very homogeneous).

An example of the Navajo system of law in action can be observed when one looks at the reception of American legal structures in the Navajo community. American courts were created in Navajo country during the late 19th and early 20th centuries. The Navajo, like the Japanese, adapted these courts to fit their societal needs and values.

These courts nonetheless proved to be a poor fit and a "peacemaker" court emerged in 1982 to focus on the traditional Navajo legal values.

After focusing on two societies in which adversarial law does not play a central role, a description of the American legal system shows how much differently law and society have developed in the Western world The system of law in the U.S. has been called a vertical or adversarial system of justice With the American value of individualism at the heart of the society, it is easy to see how such a system developed After breaking away from British rule (though not abandoning British ideas of law), Americans began to create a new society. Borrowing from emerging European ideas of individual rights (and indeed, influencing Europe as well), the growing United States developed a system of law vastly different from both the Japanese and the Navajo Early American communities actually appeared quite similar to the Japanese and Navajo systems of justice in that all were norm-based, small and somewhat homogeneous (17th century settlers wanted more equitable modes of social control than in their homelands). In small U.S. communities, a restorative model of law made sense As the country grew, however, such a system did not meet the emerging needs of a business and commercial class. Criticizing restorative legal values (as seen in Mexican California) as inefficient and contrary to ideas of commerce and individualism, American businessmen pushed for a system of law that better suited a capitalist economy. The system of law that emerged was adversarial and expounded ideas of the common law man, an individual within his own private sphere

All three communities and their respective systems of law have negative and positive aspects to them. The Japanese and Navajo models work well in their own

societies in large part because these societies are homogeneous. A normative system of law fits because much of the population shares similar values. Such a system would not work the United States because there are so many different values and interests at play. In a heterogeneous society, various groups lack power and the ability to voice their concerns. An adversarial system of justice has been an important tool in providing power and an opportunity to speak to various groups (for example, the Civil Rights Movement). The Navajo model of law is extremely attractive in the sense that it considers the entire community as part of a dispute – this would be impossible to do in the U.S., but reminds us that many people are affected by an issue or dispute than the names to a lawsuit would suggest.

All three systems of law greatly illustrate the societies from which these legal systems emerged. Homogeneous societies, with strong normative values, believe that individuals should be responsible for keeping their own promises. Likewise, the Navajo system, in which law is considered something fundamental and almost spiritual, seeks restoration and harmony. The American system of law, although it may appear cruel and power hungry to those on the outside, celebrates individual rights and provides tools by which individuals can gain and keep rights. Although there are positives and negatives to each system, it is important to note that they fit within the society in which they operate, suggesting that they serve to fulfill the differing needs of very different communities.

2.

The role of judges is significantly different in the Civil Law tradition than in the Common Law tradition. First, judges in the civil tradition are often described as administrator or managers of the law, while judges in the common law are often described as interpreters and makers of the law. This, however, is an unfair characterization of the civilian judges. While civilian judges do not make law and they are civil functionaries, they do have a critical role in interpreting the law. As Alan Hubbard noted in his essay (redacted in one of the Random Thoughts), civilian judges evaluate each case on its merits, and since they cannot refer to precedent set by other cases, they need to have a high-degree of fluency with the law and legal principles in order to interpret the facts of each case and its place within the legal framework. As Alan pointed out, civilian judges may in fact have *more freedom* in interpreting the law than **their common law counterparts.**

Ultimately, both common law and civil law judges interpret the law in significant but different ways. Furthermore, the changing jurisprudential landscape in both traditions is bringing the two traditions together, as noted by Butte. **Precedent** is gaining increased currency in civil law systems as the means of cataloguing prior decisions come available,

while precedent is becoming a nearly paralyzing feature of the common law in the U.S. Additionally, common law systems are moving in the direction of codification as there are increasing efforts at statury reform. Therefore, perhaps the freedom of common law judges is diminishing while the freedom of civilian judges is increasing. The rise of constitutionalization in civilian countries may also be affecting this.

Another significant difference between common law and civil law judges is in their role in the development of the law outside the court. While the opinions of judges in the common law tradition certainly have a lot of weigth, as discussed above, their treatises and writings outside the court also have that kind of weight. In many respects, the status attributed to judges in the common law is the status attributed to scholars in the civil law. Judges in the common law are regarded as heroes within that tradition for their anti-feudal activism, too, while judges in the civilian tradition do not enjoy this prestige.

The differences in the roles of judges in each tradition has historical roots. Perhaps most striking is the conscious restrictions put on the judiciary after the French Revolution. In France, as well as most of Europe (with the important exception of England), judges were seen as allies of the landed aristocracy. Not only were judgships historically passed down as inheritance, but the judiciary was the political ally of the feudal lords. Therefore, following the revolution and with the general anti-feudalistic sentiment of the Age of Reason, the legislature was endowed with ALL of the law-making power (legislative positivism) while the power of the judiciary was severely circumscribed.

The limitations placed upon the judiciary converged well with the general ideological tone of the civil law. The tendency towards systematic, taxonomic,

comprehensive codification in the civil law blended well with a relatively powerless judiciary. After all, the law is something that is designed and written according to principles that have a kind of timeless character (dating back to the XII Tables of 450 B.C.), therefore law-making is a task best left to the legislature, and not the "managers' or "adminstrators" of the law. Additionally, if the practice of judges is primarily that of deducing the law from laws and greater principles and ideas, then it would make sense for them not to be able to create or generate the very laws and principles they should be applying deductively

In contrast, the common law developed much later and very differently in England. At first, it was for resolving the king's issues in England. The Royal Courts developed to manage land claims and the administration of justice. There was no drive for generating comprehensive codes that could be applied deductively – it was a more pragmatic enterprise. It is probably accurate to say that it was in the king's interest not to develop a comprehensive and systematic articulation of rights and defenses, since the kingdom was still nascent and vulnerable. Therefore, the common law developed incremetally, case-by-case, writ-by-writ. At each turn in this evolutionary gradualism rights became more entrenched until they became an "ancient constitution." Ultimately, this system that the king had set in motion to protect his own interests was used against him by the lords to expand their interests and rights. In this process, the judges allied with the transformative powers and were therefore seen as progressive social forces. Historically, this added to their social status as a kind of progressive heroes

It makes sense, therefore, that judges in the common law were given and continue to be given powers to make, interpret, and shape the law. It also makes historical sense

that judges in the civil law tradition are not given these powers. However, Alan Hubbard's comments have given me much cause for thought, as it does seem that civilian law judges, in spite of historical and ideological constraints placed upon the judiciary, may have more freedom to interpret and apply the law.

II.

A. Judges in Common Law

A judge in the common law tradition can be a cultural hero. He / she has the power to make law, to interpret legislative law, and to even overrule legislative law on the grounds of constitutionality When a judge forms an "opinion", we know why the opinion was formed and whether other judges hearing the case feel the same way or not in concurring and dissenting opinions. Common law judges are rooted for and rooted against. One might speak of "those damn activist judges" and another might bemoan the strict conservatism of another. ("That damn Ginsberg" or "Scalia wants to take us back to the dark ages.") This type of transparency, exposure and politicalization is unheard of in the civil law tradition.

As mentioned, common law judges make law. That is what they have always done, and (hopefully) that is what they will always do. It has only been recently that legislatures have become actively envolved in making law in the form of stautes alongside their judicial counterparts. Even with the "statufication" of the law, judges play a large part in interpreting the legislative law.

This "law-making" function has been given to judges from the beginning. Unlike our civilian counterparts, the English judges sided with the individuals against the feudal lords. Hence, there was no "revolution" like there was in Continental Europe and no

strict separation of powers between the legislative and judicial branches The common law judge was able to retain it's function of making and interpreting law.

The role and methods of common law judges speaks to our history. Words are "the coin of the realm" for common law judges and lawyers. In rendering a judicial opinion, a common law judge uses words to rhetorically persuade. This persuasion rests on the fact that, what they rule becomes law that others must follow due to the doctrine of *stare decisis*. If a judge makes law, he/she wants to persuade future judges and lawyers that his/her reasoning is correct. (Well, if not "correct", than at least "valid").

Further, common law judges come from lawyers. It is an elevated position and he/she is speaking to the same people, in the same method that he/she was doing as a lawyer.

B. Judges in Civil law

Broadly speaking, judges in civil law seem to have a mechanistic function (at least in comparison to common law judges). On the surface, it might look a little bit like the civilian judges are engaging in "plug and play" The civilian judges are relegated to determining which rule in the codebook is applicable to the situation at hand and then applying that rule This is witnessed in the brevity of the "decisions" that we read at the beginning of the class. Here, the civilian judges look "up" to the code to determine the outcome, while the common law judge looks "down" to precedent

There is no need for a civilian judge to rhetorically persuade its audience. Judges are more like civil beaurecrats than they are cultural heros. If they aren't making law for future generations, if they aren't balancing a morass of precedent, there is no need to go

into lengthy dissertation on why they ruled in a certain way. Of course these analogies are extreme, but they point to the function and history of the respective judges.

The civilian judge was stripped of his power at the time of the European revolution. The European judge was seen as a hindrance to progress – they were pawns of the aristocracy and feudal lords. They were so entwined in fact that they were often referred to as the "Aristocracy of the Robe". While it's uncertain to me (at least what I got out of class) how much "law-making" ability a European judge had in the *jus commune*, it is clear that, after the Revolution, there was a strict separation of powers.

The legislature became the law-maker. The judges were relegated to applying the law. The formation of the Napoleanic (and similar) code, speaks to the main ideological difference that remains between civilian lawyers and common lawyers. That is, the civilians believe that a "code" can exist that embodies the totality of "law". The common lawyer on the other hand thinks such a belief is nonsense. The law, to them, might look like a jerry-rigged contraption that keeps getting added to. The civilian, on the other hand, might look at the code as a sort of modern slick skyscraper – self contained and complete.

The reality of course is somewhere in the middle. Today, the common law judge is becoming more like its civilian counterpart, whereas the civilian judge is looking more like that scrappy old man across the river. While the foundational and ideological differences remain, it's arguable that the judges, at least functionally, are more similar today then different. Common law judges are finding themselves more bound by statutes, guidelines and regulations. They are also wallowing in the musty dank morass

of precedential history. Civilians, meanwhile, are looking more and more to "precedent" (in the form of *jurisprudence*) in order to fill in the "cracks" of the code. Likewise, the civilians have now created constitutional courts.

A significant remaining difference is the use of juries. (We have them, they don't). It's interesting to note that a jury has historically been seen as a check on governmental abuse of power. Perhaps the civilians have never found a need for a jury since, by limiting the discretion of a judge, they have already limited power. In the common law, the people speak in juries, whereas in civilian countries, the people speak in parliament.

As a final note, I am struck that, although we have inherent historical and functional differences in the operation of the courts, we seem to get to the same conclusion. For instance, all three judicial opinions we read reached the same result. Further, it seems that changes or advancement in law in the two respective genres generally track each other. Hence, inherently our belief about the operation of law in society (the positivistic sense of law) greatly outweighs any structural differences we may still have.

***Question 3**

The legal system as we know it has been largely shaped and influenced by the ancient writ system. Although this system may seem archaic (or even silly) at times, its vestiges have laid the foundation our modern legal system. The key dichotomies of our modern system – law versus equity, substantive versus procedural law – as well as important legal fields (contracts, torts), all come out of the writ system.

The writ system came into being after the Norman invasion of England in 1066. The Normans did not bring a legal system from France, but built on existing tribal/local systems of law. The Norman kings saw the law as a tool by which to gain control and power over the populace (in other words, to create a strong centralized government). The earliest forms of intervention by the kings was known as a writ. The writ was a directive that told individuals what to do (or refrain from doing). Gradually, these writs were directed at local sheriffs, telling them that they needed to deal with a dispute. As the nature of writs changed, so did the legal system in England. Three royal courts slowly emerged (as a way for the king to more efficiently deal with issues). These courts theoretically had focused on separate issues (through the use of fictions, this would change).

In order to get into a royal court to settle an issue, an individual had to obtain a writ from the king (issued by his chancellor). At first, these writs were issued to nearly everyone (where there is a writ, there is a wrong), as Parliament became jealous of the power and discretion of the royal courts this soon changed and there were a limited number of actions available through the writs (where there is no writ, there is no wrong). A key aspect of the writ system was that individuals needed to find the correct writ to fit their problem. Each writ contained its own rules of procedural law and was a key into a specific court (the vestiges of these technicalities are still seen in common law procedure). The plaintiff's choice in writs was irrevocable. As the writ system and royal courts became more rigid and formalistic, another court emerged known as the Court of Chancery. The jurisdiction of the king's chancellor was a matter of grace and conscience. If an individual was unable to find an adequate remedy at law (no writ fit), he could ask the chancellor to hear his cases. Whether the chancellor heard the case or not was a matter of his own discretion. Likewise, the remedies fashioned by the chancellor showed much more discretion than the law courts could. The rise of the Court of Chancery (also known as equity court), provided an alternative avenue through which to settle a dispute. These dual courts were brought to American by settlers and remained separate courts until the 19th century (when they merged).

An examination of the history of the writ system thus brings rise to many important remnants of it in our modern system. One of the first vestiges is the separation of procedural and substantive law (and the emergence of various modern fields of law). In the writ system, a writ represented the procedure and substance of the law all in of itself, there was no distinction made. Indeed, as the writs became formalized (and no

more new ones were issue), there were many gaps in the legal system. From these gaps (via the court of equity) emerged substantive law. Procedural law (as created by the rigid writ system), is still seen in our modern system in civil procedural and its various rules. Substantive law (notions of justice, rules, rights, etc.), has emerged slowly through the work of creative lawyering (through fictions) within the writ system and the role of the court of equity (which allowed more discretion and afforded the chancellor the ability to shape remedies and evaluate multiple issues at once).

Another remnant of the writ system is the distinction between law and equity. Although these courts have merged into a court of general jurisdiction, aspects of each still remain strong within our system. There is a general disparity in the American legal system in regard to the procedure for trying civil cases on equitable or legal cases of actions. If the case is considered one of equity (determined by the judge by looking at history, precedent and other sources if there is no English counterpart), the disputed facts are decided by a trial judge rather than a jury (in the writ system, cases in the equity court was decided by the chancellor, not a jury as in the law courts). If there are both law and equity components in a civil proceeding, one only gets a jury for the legal matters.

A final legacy of the writ system are constitutional ideas. Through the Magna Carta, English barons did not take away the power of the king, but rather, suggested that he follow the processes of courts before exerting his authority. In other words, the king's authority was still absolute, but no longer arbitrary. As with the dichotomy between procedural and substantive law, various rights became associated with processes. The groundwork laid by the English barons through the Magna Carta gave authority to procedure and bound even the highest power to it. The writ system, which was instituted

by Norman kings to consolidate power was later used against them to control the use of their power (in the sense that the writ system and its processes had gained substantial weight through immemorial custom that it was impossible to ignore, even by the kings). American colonists would use these same ideas to overthrow the English Parliament and gain independence.

"The forms of action we have buried, but they still govern us

writ system is evident in the following places

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quity (e.g., the hearing of appeals is still discretionary, as it was

Equity)

still determines today whether you have a **right to a trial by**

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areas of TORTS and CONTRACTS developed out of the same

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/stem influenced many **constitutional conceptions** we have

- If you accept that writs were a means of vindicating rights, then writs form the basis for the concept of defending individual rights against arbitrary or wrongful intervention
- The Magna Carta, which was forced out of the king in 1215 A.D. following the revolt of the lords with the progressive support of judges, built on the the "ancient constitution" of rights established by the writ system. For example, Clause 39 states that "no free man [sic] shall be proceeded against except by the law of the land." In other words, the Magan Carta established that the king has absolute power but not arbitrary power, thus laying the foundation for many constitutional conceptions about the relationship between government and governed.

- Finally, we still must plead actions according to procedural restrictions. It has often been said during this semester that in order to argue and win a case, you must first be able to **get into court** and **stay** in court. Procedural rules are the means to do this. Therefore, a strong emphasis on procedure is still with us today.

What does this legacy mean?

I am particularly intrigued by the continuing relevance of the distinction between law and equity, as well as the continued relevance of procedure.

Certainly, the learning of formal rules and procedures is with us today in legal education. I what other ways is an emphasis on procedure or formalism still exerting its

force from the grave? What modern legal relationship reflect the elevation of procedure over substance?

I am reminded of Karl Johnson's complaint about contract law today. Johnson points out what seems to me an obvious "wrong" in the breach of an agreement between two parties in the *Smith* case. However, the court focuses on the written evidence and decides, in strict accordance with the writing evidence, that there was nothing prohibiting the other party from canceling the agreement at any time. The decision resonates with the kind of inflexibility that is generally associated with the writ system, and with the formalism of the rules governing the enforcement of **covenants** in the 1200s. The decision suggests that an identifiable wrong can be disregarded due to technical interpretations of a rule. In short, it elevates form over substance in a way that is much reminiscent of the procedural emphasis of the writ system.

Similarly, it could be argued that the common law in general elevates ideology over substance. That is, there are inequities and injustices in our society that are not addressed becasue of ideological constraints on the justice system. In fact, these injustices or "wrongs" are nearly invisible becasue it is generally understood or assumed that these are wrongs for which there is no legal remedy. Examples of these injustice are extreme poverty, gross inequalities in the distribution of wealth, and a general lack of an ability to vindicate or have access to one's rights because of a lack of resources, be these human resources such as a decent education or materal resources such as money. These wrongs are often relegated to the category of "social injustices" – a name that seems to indicate that it refers to a kind of injustice that is outside the real of "normal" or "real" justice. Why?

Perhaps saying that the legacy of the writ system applies here is extending the discussion too far. However, if I have learned anything from this course it is that the significance of this course is not in the answers that the materials provide, rather it is in the questions that the material generate. Therefore, I will push the writ discussion a bit further. In doing so, I think I am coming dangerously close to echoing the arguments of the CLS folks, and some of the points made by Tushnet.

I argue that unregulated market competition inheres winners and losers, that this competition is unequal from the start (i.e., no level playing field), that it becomes more unequal as the process of winning and losing (zero-sum competition) repeats itself, and results in foreseeable patterns of inequality. These patterns are reflected in the social injustice we can identify today. So, why are these not addressed by the justice system? Why, for instance, is it so counterintuitive to suggest that inner-city populations initiate a class-action suit against local government for some variant of negligence (perhaps a new class of tort called macro-economic negligence)? It is because the law elevates the ideology of individual competition in a faceless market over the substance of wrongs generated by this competition (the pull-yourself-up-by-your-bootstraps mentality). It is not my intention to sound flippant about this. It is my intention to find a significant analogy between the procedure/substance dichotomy of the writ system and the ideology/substance dichotomy of the modern American legal system. In the form of a question, are formal, procedural or ideological rights still elevated over the substance of real social wrongs?