Report:

Theme: “Common law”
Description and History of Common Law

Common law is rooted in centuries of English history. It emphasizes the centrality of the judge in the gradual development of law and the idea that law is found in the distillation and continual restatement of legal doctrine through the decision of the courts.

The history of the English law did not go in one straight line, just as much as England was invaded over the centuries, the system of law received many changes. The Common Law as it is known today was built up in Plantagenet times by the professional lawyers of the kings courts, but in Anglo - Saxon times there was no such body of men and no body of case law for the whole nation. Certain written laws were sometimes issued by the king with the help of his bishops, perhaps for the general guidance of all courts. But it is sure, that all the courts had own laws which developed in their region based on the local custom as well. After the Danes had invaded England law received changes again, the word law it self is Danish; the Scandinavians had no professional lawyers, but many of their farmer - warriors were learned in folk custom and its practical procedure. The Danes maybe made the ground for a jury system in England as they introduced the habit of making committees among the freeman in the court.

The concept of justice in the Anglo - Danish period consists out of of three different concepts first the old idea, common to Saxon and Scandinavian was the compensation for a crime, to be paid to the injured party or his family to prevent a feud, the new doctrine of the church that crimes also had the aspect of sin or moral wrong. And thirdly the special Scandinavian view that certain acts were dishonourable, to be punished as unworthy to the free warrior. From King Alfred on we find special penalties and a special procedure for the crime of treason to the king or to a man’s lord. In the communal courts of Shire and Hundred the law of the district was administered by the freeman suitors of the court as judges, presided over by the Ealdorman. There was yet no common law of all England, no courts, no judges as we know it today.

In the years after the Norman Conquest England was influenced by the Roman Law as well, as the time went by, the native, common law was developed not longer by the communal courts, instead the Inns of Court in London men acquired admission to practice before royal courts. This system faced many changes, and from the 17thcentury on the division between advocate and attorney became rigid. The common law was preferred to statute law and its system of application by locally appointed part-time magistrates or justices of the peace, locally chosen juries and travelling judges. The Anglo - Saxon system was retained but formalised; for example by the recording of case law to provide uniform precedents. In modern times there has been a greater reliance upon the statute law contained in about 3000 acts of parliament; but there are over 300 000 recorded cases to turn for precedent. Other aspects of the English law are the fundamental assumption that an accused person is deemed innocent until proved guilty and the independence of the judiciary from intervention by crown or government in the judicial process. Most law is generated, however, from the state and federal legislatures and common law is subjugated to federal and state legislative enactments. That is, common law can be overruled by legislative law (e.g. state legislatures can declare fornication between unmarried couples as legal even though the
state's common law states that is illegal. Once the state passes the law, it vacates the history of the common law. However, a new common law tradition could be created around the enforcement of new legislative laws as they are enforced and brought to the attention of the court.

However, although state and federal legislatures have power over state and federal common law, the Supreme Court has the final say in interpreting the constitutionality of all state and federal legislative law and the constitutionality of state common law. Additionally, every state has a constitution and the state courts can interpret state legislative law in relation to whether it is constitutional within the constraints of that particular state's constitution. The hierarchy among the different forms of law therefore looks like:

- State common law
- State legislatures
- State constitution
- Federal constitution/Supreme Court.

Common law consists of the rules and other doctrine developed gradually by the judges of the English royal courts as the foundation of their decision, and added to over time by judges of those various jurisdictions recognizing the authority of this accumulating doctrine. Law of common jurisdiction applied by these courts. It was during the period between the Norman Conquest of England and the settlement of the American colonies that many of the basic principles that eventually became part of the American system of justice were established. English common law emerged as an integral part of the transformation of England from a loose collection of what were essentially tribal chiefdoms or proto-states to a centrally governed civilization. Over a 400-year period, from the eighth to the eleventh centuries, this cultural system of settling disputes through local custom became increasingly formalized as the hierarchical organization of Feudalism began to slowly replace the collective and egalitarian organization of the early tribal peoples in England. Wars between various tribal groups brought growing political consolidation and increasing individual ownership or land by powerful lords. As the once collectively owned tribal lands came under the private ownership and control of feudal lords, the responsibility of an individual to his kinsmen was replaced by the responsibility of a person to his lord. Where the collective responsibility of kin-groups had once served as the basis of dispute settlement, it now became the responsibility and the prerogative or feudal lords to see that justice was done. As a means of consolidating power, feudal lords began requiring that dispute be submitted to a local "court" for settlement. By the time of the Norman conquest- in 1066, England was organized into approximately eight large kingdoms, which were at best loosely knit collections of relatively independent feudal landholdings. The basic units of social and political organization were the counties and "hundred." The hundreds were subdivisions of counties, somewhat obscure in their origin but often privately owned and independently governed, it is estimated that at the time of the Conquest approximately half of all the hundreds were owned either by individual lords or by abbeys. The large number of hundreds owned by the church indicates the economic and political power of the Catholic Church, a situation that would bring it into direct conflict with a growing secular government in later years. The hundreds courts were essentially meetings of important hundred residents at which all manner of local problems were discussed, among them the resolution of local disputes. The right to hold court and to profit from it was the essential hallmark of a feudal ruler. Early feudal rulers required that compensatory damages he paid not to the offended party but to the lord of the hundred.
The right of a lord to collect the profits resulting from the administration or Justice eventually became an essential force in the development of common law after the conquest.

In addition to the hundreds courts, feudal justice was also administered in the county courts held by the overlords of counties. These overlords could command attendance at their courts by the lords of the hundreds and other representatives. These early county courts prefigured the later bicameral (two-house) legislatures of England house of commons and house of the lords and the U.S. Senate and House of Representatives. It also established the relationship between the lower and higher courts in the U.S. Because the overlords of the counties were more powerful than lords of hundreds, it was possible for county courts to review and even overrule decisions rendered by lords in hundred courts, much the same way as higher courts now can overrule the decisions of the lower courts.

By 1066, England was halfway between tribalism and feudalism, between rule by custom and rule by state law.

The Norman Conquest

By virtue of having conquered England, William the First was able to proclaim that all land and land-based rights, including those of keeping court, were now vested in the king. Through this redistribution of land and the consolidation of all rights and relationships associated with land tenure under the crown, local courts eventually came under the administration of Norman rule. Court keeping rights were still granted concerning land tenure. However, all courts had to be conducted in accordance with the king's interests, particularly his monetary interests. Thus, judicial decision-making was slowly being transformed into the function of an increasingly bureaucratic system of justice. The king's interest in assuring a proper flow of justice-profits into the royal treasury brought about the institution of the eyre. Developed in the twelfth century as a powerful force for centralizing control over local courts, the eyre provided the structural basis for the development of a common law for England. It consisted of four itinerant judges representing the king who would periodically examine the activities of the county and hundred courts.

One of the focuses of this king's court was to enforce forfeiture laws. This concept stemmed from the feudal doctrine that a man's right to hold property was based upon a relationship of good faith between that man and his lord. The term felony originally meant an offense "so fundamental as to break the relationship between them and to cause the holding to be forfeited to the lord." It was the duty of the judges in Pyre to insure that the king received his portion of forfeited property resulting from any such offenses occurring in the various county and hundred jurisdictions. "Law and order on the national scale were first expressed in terms of revenue." It was the decisions made by the judges in eyre concerning the common pleas brought before them that produced the body of legal precedent that became known as common law, that is, the rules of dispute settlement common to all England. As the itinerant judges in eyre, settled common-plea cases they established precedents to be followed in
similar cases. Because common law was built on a case-by-case basis the terms "common law" and "case law" are sometimes used synonymously.

The development of English common law was not merely the institutionalization of traditional English customs. The rules of law established by the king's courts were often unprecedented. Thus, the common law of England was "the by-product of an administrative triumph: the way in which the government of England came to be centralized and specialized during the centuries after the conquest."

By seeking to eliminate variations in settlements arising from differences in local custom, the establishment of common law gave rise to a concept of justice the emphasized the uniform application of standardized laws and procedures. This concept was embodied in the doctrine of stare decisis that emphasized the importance of legal precedents established in previously settled cases.

Common law was primarily oriented not toward protecting individuals from ordinary threats to person and property - but toward maintaining social peace by regulating the economic arrangements characteristic of feudal land tenure and consolidating royal power under this system.

**English Law and the Emergence of Capital**

By capturing a greater share of the wealth of England, the growing mercantile class also captured a greater influence over the law of England. A common law designed primarily to protect the rights of feudal land ownership was wholly inadequate to the needs of a class whose goal was the accumulation or profit through trade rather than the protection of hereditary lands. What was needed were laws that would protect capital and the rights to its accumulation, insure a steady flow of profitable trade goods, and control the problems posed by a growing class of mobile urbanized laborers and artisans, no longer bound to the land, whose livelihoods were dependent upon the vagaries of both national and international trade. By the middle of the fifteenth century the English nobility, and even the crown, was firmly in debt to the mercantile class, and laws that would meet the needs of the powerful mercantile class began to emerge. As capital became more central, it increasingly enjoyed state protection in the form of criminal laws designed to punish those who interfered with what had come to be acceptable forms of capital accumulation.

In sum, during the 300 years preceding the establishment of English colonies in North America, three important innovations were introduced into English law and English legal thought. First, law became an important ally of those seeking to maximize profit through capitalist market relations by defining many acts that disrupted the predictability of market relations as crimes, that is, as harms against the state, rather than as civil violations of contracts between individuals. Second, criminal law came to be seen as an appropriate tool for insuring an adequate supply of cheap labor, first for the agrarian economy and later for the developing industrial-mercantile economy of early capitalist England. Third, and perhaps
most importantly for contemporary criminal law, members of the laboring class who turned to theft, violence, idleness, or other forms of deviance as an adaptation to the brutal conditions of their lives were defined as criminals. In so doing the English State absolved the emerging capitalists who profited greatly from the brutal conditions of working class life of all responsibility for the consequences of these conditions.

**Characterizations of common law**

Common law's unity has been attributed to the fact that law is grounded in and logically derived from a handful of general principles and that whole subject-areas such as contract or torts are distinguished by some common principles or elements which fix the boundaries of the subject. The expositions of these general principles and the techniques required to find and to apply them and the rules that they under-pin are largely what legal education and scholarship in the common law tradition are all about. The heart of common law is not in specific decisions or in rules distilled from them but in broad notions which are difficult to unify or systematize but which may indeed in some way be 'he woven into the fabric of life.'

Judges interpret and apply the law but do not create it for the law has no individual authors. It is the product of the community grounded in history. Common law follows the doctrine of precedent - the doctrine that judges are hound to treat as binding on them the essential legal grounds of decisions adopted in similar cases previously determined in courts of higher or perhaps equal status. The judge must attach great weight to previous decisions, not only for practical and political reasons (maintaining sufficient certainty in legal doctrine, avoiding usurpation of the legislative function) but also for theoretical reasons. Those decisions provide, in general, the best available evidence of the collective wisdom of the common law. The judge is the privileged representative of the community, entrusted with its collective legal wisdom, which he is authorized to draw upon constructively in order to produce solutions to novel issues raised before the court. The legitimacy of common law resides not in the political system but in the community. The authority of the judge is not as a political decision-maker certainly not as delegate of the king or parliament) but as representative of the community. Hence, he has authority only to state the community's law, not to impose law upon the community as if he were a political ruler. The community is to be thought of here as something uniting past and present, extending back through innumerable past generations as well as encompassing the present one.

**Transition to the Colonies: An Example the Due Process Clause**

For the English-speaking peoples it may be that Article 39 of Magna Carta (June 15, 1215) and its subsequent interpretation settled any doubts as to preferment of the accusatorial-adversary procedures. Its language eventually safeguarded the "free man" from being "in any way ruined ... except by the lawful judgement of his peers or by the law of the land." In
addition to this general clause, the Great Charter contained other specific procedural ones. However, as James Madison remarked in 1789 when proposing the future Bill of Rights: "Magna Carta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed." Magna Carter nevertheless became a sacred text in England and famous as the precursor of the phrase, "due process of law," first used by Edward III in a statute of 1354. It was, however, Sir Edward Coke's Second Institute which emphasized the concept and insisted that "law of the land" meant "due process of law" it thus became a part of the common law and was given a natural-law interpretation and flavor.

The American colonial reception and modification of the ideal of due process of law is disclosed in the early charters granted by the Crown, the laws of the colonists, the documents preceding and following the American Revolution, and the various state and federal constitutions. Colonial statues and documents continued the Crown charters; general references but also became more specific. For example, acting under the grant by Charles I in 1629 the Massachusetts colonists agreed "to frame a body or grounds of laws in resemblance to a Magna Carta," and their 1641 Body of Liberties provided somewhat detailed procedures. The New England Confederation of 1643, the Dutch provisions for New Amsterdam in 1663, and the New York "Charter of Libertyes and Priviledges" of 1683, all provided for a form of due process, and due process was claimed as right by the congress of the Colonies held in New York in 1765. Similarly, the First Continental congress of 1774 resolved that the colonists "are entitled to life, liberty and property ... (and) to the common law of England," and following its suggestion, the colonies promulgated their own Constitutions. The famous Declaration of Rights adopted by Virginia in 1776 included the guarantee "that no man be deprived of his liberty, except by the law of the land, or the judgment of this peers," and with minor changes in language this was the general type of clause used. It was also found in the famous Northwest Ordinance of 1787.

The constitutional convention of 1787 discussed briefly and adopted a few procedural rights. In some of the state ratifying conventions, bare majorities were obtained only because of promised amendments.....Of the ten amendments to the American Constitution ratified in 1791, the first eight are generally termed the Bill of Rights.

Without the guidance of precedent based an the accumulated wisdom of the past and declared as the basis of decision by the authorized oracle, whether judge or jurist, men, it is said, would have no certainty of the law or confidence in quality before an evenhanded justice. Precedent assists the litigant or his advisor to assess the extent of his rights and duties and restricts the scope of litigation. Nor is it the Party litigant or accused alone that rejects the idea of arbitrary justice. The judge or other law give, unless he claims to speak as the medium of the gods with access to supernatural revelation or as an autocrat, prefers as a rule to show preexisting legal justification for the decision or sentence which he pronounces. Judges of lesser ability and experience may be fortified by the opinions of the most eminent. Moreover, the busiest courts where most justice is administered the machinery would break down if all judges took it on themselves to reexamine, in disregard or precedent, each aspect of every case before them. It is not indolence alone that suggests conformity to established practice. If justice requires that like cases by decided alike, this implies equality before the law. Yet, no more than two men's fingerprints are identical, are all the facts of two legal proceedings. The
law itself selects either by general rules or by the individuation of equity what facts are
relevant to exclude precedent. Unfortunately as lawyers have come to see, the question
whether an earlier is a precedent for the present situation depends on an assessment of
essential similarities and differences between the two.

Today Judges in the United Kingdom are irremovable and appointed, the courts alone
declare the law, but any act of parliament is accepted by the courts as part of the law; no court
can declare a statute invalid. An accused person is presumed to be innocent until proved
guilty; about 90 percent of criminal cases are tried and determined by justices of the peace,
who act as unpaid magistrates, or in towns and some other places by stipendiary magistrates
who are trained lawyers. Magistrates courts sit in about 700 places in England and Wales the
remaining 10 percent of more serious crimes also come in the first place before a magistrates
court, there the criminal is committed after the trial by the jury and a judge.

The majority of civil actions are tried in local county courts before paid judges their
jurisdiction is limited by the nature of action and by the amount of money at stake. In 1971
the higher courts were reorganised, the Supreme court of Judicature now consist of the
Appeal court, the High court of justice with civil jurisdiction, and the crown court for
criminal work above the level handled by the magistrates’s courts. The High court hears the
most important and difficult criminal and civil cases; criminal cases of less importance are
tried by the crown court.

Common law (also known as case law or precedent) is law developed
by judges through decisions of courts and similar tribunals rather than through legislative
statutes or executive branch action. A "common law system" is a legal system that gives
great precedential weight to common law, on the principle that it is unfair to treat similar
facts differently on different occasions. The body of precedent is called "common law" and it
binds future decisions. In cases where the parties disagree on what the law is, a common law
court looks to past precedent decisions of relevant courts. If a similar dispute has been
resolved in the past, the court is bound to follow the reasoning used in the prior decision (this
principle is known as stare decisis). If, however, the court finds that the current dispute is
fundamentally distinct from all previous cases (called a "matter of first impression"), judges
have the authority and duty to make law by creating precedent. Thereafter, the new decision
becomes precedent, and will bind future courts.

In practice, common law systems are considerably more complicated than the
simplified system described above. The decisions of a court are binding only in a
particular jurisdiction, and even within a given jurisdiction, some courts have more power
than others. For example, in most jurisdictions, decisions by appellate courts are binding on
lower courts in the same jurisdiction and on future decisions of the same appellate court, but
decisions of lower courts are only non-binding persuasive authority. Interactions between
common law, constitutional law, statutory law and regulatory law also give rise to
considerable complexity. However, stare decisis, the principle that similar cases should be
decided according to consistent principled rules so that they will reach similar results, lies at
the heart of all common law systems.
A third of the world’s population (2.3 billion people) live in common law jurisdictions, particularly in England where it originated in the Middle Ages, and countries that trace their legal heritage to England as former colonies of the British Empire, including India, the United States, Pakistan, Nigeria, Bangladesh, Canada, Malaysia, Ghana, Australia, Sri Lanka, Hong Kong, Singapore, Ireland, New Zealand, Jamaica, Trinidad & Tobago, Cyprus and Barbados. South Africa, Zimbabwe, Cameroon, Namibia, Botswana, Guyana and Israel have mixed systems with significant admixtures of civil law.

**Law as opposed to equity**

Connotation have 3 differentiates "common law" (or just "law") from "equity". Before 1873, England had two parallel court systems: courts of "law" that could only award money damages and recognized only the legal owner of property, and courts of "equity" (courts of chancery) that could issue injunctive relief (that is, a court order to a party to do something, give something to someone, or stop doing something) and recognized trusts of property. This split propagated to many of the colonies, including the United States. For most purposes, most jurisdictions, including the U.S. federal system and most states, have merged the two courts. Additionally, even before the separate courts were merged together, most courts were permitted to apply both law and equity, though under potentially different procedural law. Nonetheless, the historical distinction between "law" and "equity" remains important today when the case involves issues such as the following:

- categorizing and prioritizing rights to property—for example, the same article of property often has a "legal title" and an "equitable title," and these two groups of ownership rights may be held by different people.
- in the United States, determining whether the Seventh Amendment’s right to a jury trial applies (a determination of a fact necessary to resolution of a "common law" claim) or whether the issue will be decided by a judge (issues of what the law is, and all issues relating to equity).
- the standard of review and degree of deference given by an appellate tribunal to the decision of the lower tribunal under review (issues of law are reviewed de novo, that is, "as if new" from scratch by the appellate tribunal, while most issues of equity are reviewed for "abuse of discretion," that is, with great deference to the tribunal below).
- the remedies available and rules of procedure to be applied.

**Interaction of constitutional, statutory and common law**

In common law legal systems, the common law is crucial to understanding almost all important areas of law. For example, in England and Wales and in most states of the United States, the basic law of contracts, torts and property do not exist in statute, but only in common law (though there may be isolated modifications enacted by statute). As another example, the Supreme Court of the United States in 1877, held that a Michigan statute that established rules for solemnization of marriages did not abolish pre-existing common-law marriage, because the statute did not affirmatively require statutory solemnization and was
silent as to preexisting common law. In almost all areas of the law (even those where there is a statutory framework, such as contracts for the sale of goods, or the criminal law), legislature-enacted statutes generally give only terse statements of general principle, and the fine boundaries and definitions exist only in the common law. To find out what the precise law is that applies to a particular set of facts, one has to locate precedential decisions on the topic, and reason from those decisions by analogy. To consider but one example, the First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—but interpretation (that is, determining the fine boundaries, and resolving the tension between the "establishment" and "free exercise" clauses) of each of the important terms was delegated by Article III of the Constitution to the judicial branch, so that the current legal boundaries of the Constitutional text can only be determined by consulting the common law.

In common law jurisdictions, legislatures operate under the assumption that statutes will be interpreted against the backdrop of the pre-existing common law and custom. For example, in most U.S. states, the criminal statutes are primarily codification of pre-existing common law. (Codification is the process of enacting a statute that collects and restates pre-existing law in a single document—when that pre-existing law is common law, the common law remains relevant to the interpretation of these statutes.) In reliance on this assumption, modern statutes often leave a number of terms and fine distinctions unstated—for example, a statute might be very brief, leaving the precise definition of terms unstated, under the assumption that these fine distinctions will be inherited from pre-existing common law. (For this reason, many modern American law schools teach the common law of crime as it stood in England in 1789, because that centuries-old English common law is a necessary foundation to interpreting modern criminal statutes.)

With the transition from English law, which had common law crimes, to the new legal system under the U.S. Constitution, which prohibited ex post facto laws at both the federal and state level, the question was raised whether there could be common law crimes in the United States. It was settled in the case of United States v. Hudson and Goodwin, 11 U.S. 32 (1812), which decided that federal courts had no jurisdiction to define new common law crimes, and that there must always be a (constitutional) statute defining the offense and the penalty for it.

Still, many states retain selected common law crimes. For example, in Virginia, the definition of the conduct that constitutes the crime of robbery exists only in the common law, and the robbery statute only sets the punishment. Virginia Code section 1-200 establishes the continued existence and vitality of common law principles and provides that "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

By contrast to statutory codification of common law, some statutes displace common law, for example to create a new cause of action that did not exist in the common law, or to legislatively overrule the common law. An example is the tort of wrongful death, which allows certain persons, usually a spouse, child or estate, to sue for damages on behalf of the deceased. There is no such tort in English common law; thus, any jurisdiction that lacks a
wrongful death statute will not allow a lawsuit for the wrongful death of a loved one. Where a wrongful death statute exists, the compensation or other remedy available is limited to the remedy specified in the statute (typically, an upper limit on the amount of damages). Courts generally interpret statutes that create new causes of action narrowly—that is, limited to their precise terms—because the courts generally recognize the legislature as being supreme in deciding the reach of judge-made law unless such statute should violate some "second order" constitutional law provision (cf. judicial activism).

Where a tort is rooted in common law, all traditionally recognized damages for that tort may be sued for, whether or not there is mention of those damages in the current statutory law. For instance, a person who sustains bodily injury through the negligence of another may sue for medical costs, pain, suffering, loss of earnings or earning capacity, mental and/or emotional distress, loss of quality of life, disfigurement and more. These damages need not be set forth in statute as they already exist in the tradition of common law. However, without a wrongful death statute, most of them are extinguished upon death.

In the United States, the power of the federal judiciary to review and invalidate unconstitutional acts of the federal executive branch is stated in the constitution, Article III sections 1 and 2: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." The first famous statement of "the judicial power" was Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Later cases interpreted the "judicial power" of Article III to establish the power of federal courts to consider or overturn any action of Congress or of any state that conflicts with the Constitution.

**Common law as a foundation for commercial economies**

The reliance on judicial opinion is a strength of common law systems, and is a significant contributor to the robust commercial systems in the United Kingdom and United States. Because there is common law to give reasonably precise guidance on almost every issue, parties (especially commercial parties) can predict whether a proposed course of action is likely to be lawful or unlawful. This ability to predict gives more freedom to come close to the boundaries of the law. For example, many commercial contracts are more economically efficient, and create greater wealth, because the parties know ahead of time that the proposed arrangement, though perhaps close to the line, is almost certainly legal. Newspapers, taxpayer-funded entities with some religious affiliation, and political parties can obtain fairly clear guidance on the boundaries within which their freedom of expression rights apply.

In contrast, in non-common-law countries, and jurisdictions with very weak respect for precedent (example, the U.S. Patent Office), fine questions of law are redetermined anew each time they arise, making consistency and prediction more difficult, and procedures far more protracted than necessary because parties cannot rely on written statements of law as reliable guides. In jurisdictions that do not have a strong allegiance to a large body of precedent, parties have less a priori guidance and must often leave a bigger "safety margin"
of unexploited opportunities, and final determinations are reached only after far larger expenditures on legal fees by the parties.

This is the reason for the frequent choice of the law of the State of New York in commercial contracts. Commercial contracts almost always include a "choice of law clause" to reduce uncertainty. Somewhat surprisingly, contracts throughout the world (for example, contracts involving parties in Japan, France and Germany, and from most of the other states of the United States) often choose the law of New York, even where the relationship of the parties and transaction to New York is quite attenuated. Because of its history as the nation's commercial center, New York common law has a depth and predictability not (yet) available in any other jurisdiction. Similarly, corporations are often formed under Delaware corporate law, and contracts relating to corporate law issues (merger and acquisitions of companies, rights of shareholders, and so on.) include a Delaware choice of law clause, because of the deep body of law in Delaware on these issues. On the other hand, some other jurisdictions have sufficiently developed bodies of law so that parties have no real motivation to choose the law of a foreign jurisdiction (for example, England and Wales, and the state of California), but not yet so fully developed that parties with no relationship to the jurisdiction choose that law. The common theme in each case is that commercial parties seek predictability and simplicity in their contractual relations, and frequently choose the law of a common law jurisdiction with a well-developed body of common law to achieve that result.

Likewise, for litigation of commercial disputes arising out of unpredictable torts (as opposed to the prospective choice of law clauses in contracts discussed in the previous paragraph), certain jurisdictions attract an unusually high fraction of cases, because of the predictability afforded by the depth of decided cases. For example, London is considered the pre-eminent centre for litigation of admiralty cases.

This is not to say that common law is better in every situation. For example, civil law can be clearer than case law when the legislature has had the foresight and diligence to address the precise set of facts applicable to a particular situation. For that reason, civil law statutes tend to be somewhat more detailed than statutes written by common law legislatures – but, conversely, that tends to make the statute more difficult to read (the United States tax code is an example). Nonetheless, as a practical matter, no civil law legislature can ever address the full spectrum of factual possibilities in the breadth, depth and detail of the case law of the common law courts of even a smaller jurisdiction, and that deeper, more complete body of law provides additional predictability that promotes commerce.