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The Common Law
Tradition

Origins

- Developed in England
- Existed side by side with customary, canon (ecclesiastical), and elements of Roman law
- Exported by England to its colonies

Antecedents

- Local customary law
  - Enforced by local notables
  - Substantial variation around the country
  - Landholding and succession
  - Criminal and civil wrongs
- Canon law
  - Roman Catholic Church came to England in seventh century
  - Enforced by church officials
  - Marriage and personal status (legitimacy, status of women and children, etc.)
Emergence of Common Law

- William the Conquerer, 1066
  - Need for centralized administration
  - Control of Saxon population
- Early Common Law courts
  - Curia Regis
  - Exchequer
  - Court of Common Pleas
  - Kings Bench
- Writ system

Resistance to Centralization

- Diminished role of local (rural) courts
- Loss of revenue by barons
- Litigants preferred the King’s courts to the local courts
- Magna Carta, 1215

Local versus Central Justice

- Justices of the Peace
- County Quarter Sessions
  - Slightly more serious cases
- Court of Assize
  - King’s judges on circuit
- Court of Common Pleas
  - Also on circuit but not county-based
- King’s bench
  - London only
- Ecclesiastical (Canon law) courts
- Admiralty (Roman law) courts
Equity

- Rigidity of writ system
- Petitions for equitable relief
- Chancellor
- Courts of Chancery
- Inquisitorial vs. adversarial
- Law and Equity merged in 19th century
- Remnants today
  - injunctions

Other Legal Forms

- Canon Law
  - Marriage
  - Parentage/Legitimacy
- Roman law
  - Admiralty cases

Common Law in London

- Centered around legal institutions in London
- Seat of government
- Inns of Court & Inns of Chancery
  - Residence
  - Training
  - Law Libraries
- Courts sat frequently in London
Law Workers
- Began evolving as the separate courts emerged in 12th-14th Century
- Highly specialized
- Centered around specific courts or tasks
- Advocates in particular courts
- Case preparers for particular courts
- Document (deed) preparers

Advocates
- Serjeants-at-law
  - Court of Common Pleas
  - London and regional
- Barristers
  - King’s Bench
  - London only
  - King’s Council (17th Century)
- Doctors-at-law
  - Admiralty
  - Ecclesiastical courts

Case Preparers
- Began to emerge in 13th Century
- Also specialized around courts
- Attorneys
  - Common law courts
- Solicitors
  - Chancery (equity) courts
- Proctors
  - Admiralty court
  - Ecclesiastical courts
Deed Preparers
- Conveyances
- Scriveners
  - City of London only

Nature of Common Law
- Judge-made
- Rooted in custom or customary law
- Concept of "precedent"
  - *stare decisis*
- Absence of codification
  - Civil law systems

Areas Covered by Common Law
- Public vs. private law
- Criminal vs. civil
  - Battery
  - Conspiracy
- Areas of common law
  - Torts
  - Contracts
  - Property
  - Succession
Common Law vs. Other Law
Within Common Law Countries

- Constitutional law
  - Written vs. unwritten
  - Structure and powers of government
  - Relationships among levels of government
- Statutory law
  - Acts of legislative bodies
- Administrative law
  - Regulations of administrative agencies

Precedent

- *Stare decisis*: “let the decision stand”
- Precedent as determinative?
- Here a precedent, there a precedent, everywhere a precedent
- Determine vs. constrain vs. guide
- Precedent as relatively recent development
- Not limited to common law

Precedent and Trouble Cases

- What cases get to court?
  - Many cases *must* go to court
  - Criminal matters
  - Divorce
  - Probate
  - Disputes vs. "ministerial" functions of courts
- What cases *never* get to court?
- What disputes *never* arise?
Should Precedent Bind Courts?

- Is a court bound by its own precedent?
  - Horizontal *stare decisis*
  - "Distinguishing cases"
- Explicitly reversing precedent
  - Wrong
    - "Separate but Equal"?
    - Roe v. Wade?
  - Outdated
- House of Lords
  - "Practice Statement" 1966

What Do We Expect of Law?

- Predictability
- Flexibility
  - Change with changing circumstances
- Fairness
  - Process
  - Outcomes
- Representativeness
  - Will of the people

What role does precedent play in achieving those goals?