

Common Law, Civil Law, and Plea Bargaining

* The advantage to Common Law is that it is flexible and allows for application of case holdings, to current cases, that do not have a fact pattern similar to the case being litigated. The **disadvantage** is that a judge often has to interpret the cases presented in order to rule...which can be subjective and not consistent among a pattern of cases.

* Case precedent is a body of case law that has specific fact patterns and holdings. This creates a situation where an attorney may present a case holding, to the court, for a proper ruling. However, a problem is that many attorneys do not research well nor present a controlling case. This could lead to the judge holding the case incorrectly.

* There are similar recoveries for assault, battery, false imprisonment, and wrongful death in civil and criminal law. Another example: O.J. Simpson. He was found not guilty in criminal court yet liable in civil court (wrongful death). Securing a conviction in a criminal case guarantees recovery in a parallel similar suit. Why? The burden of proof, in criminal court, is beyond a reasonable doubt (99 percent). In civil court, it is 'by the preponderance of the evidence' (51 percent).

* Common Law allows for the law to progress with social times. This is the legal theory known as Legal Realism where the judge considers the practical, social, and economic outcomes of the ruling instead of ruling, based upon case precedent, and letting society figure it out. These types of 'progressive' rulings are called 'activist', and this is where we get the term 'activist judge'.

* There are points to the Civil Law system that make it more efficient than our Common Law system.

1. The Civil Law system has a proscribed punishment for every crime; therefore, the punishment is predictable and consistent among offenders.

2. The Civil Law system adjudicates cases quickly because the judge hears the evidence and applies the code. They do not have judicial clogging, that is common to our system, due to lawyer maneuvering and the protracted procedure that is allowed.

* **Plea bargaining** calls for a defendant to accept charges for offenses that were not committed- or to accept a punishment under threat of getting a harsher sentence by the judge. Why would a defendant plea to reckless driving when she or he was arrested for DUI? Why would one accept a plea under the threat of a harsher sentence, especially if one believes that they are innocent? Plea bargaining is not for the benefit of the defendant. It is for the benefit of the Prosecution- and nearly coercive. I am a former Prosecutor and this is how plea bargaining would go: "Okay- I will offer (such and such) a punishment now. If you do not accept it, then I will go to trial and ask the judge to impose the maximum penalty." Why? The courts are backed up. The Prosecutor wants to close as many cases because more are coming in.

