

WESTERN PHILOSOPHIES OF LAW: THE COMMON LAW

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Summary

This paper is one depiction of the philosophy of the common law. The paper provides a series of definitions of the common law, which denominates the legal systems of England and its former colonies, particularly the United States of America, and then considers whether there is a philosophy of the common law. Determining the philosophy of the common law by comparing a number of models of what the common law is and of what the common law ought to be or to accomplish, the paper relies primarily on the history of the common law to illuminate these models. This history is presented with an eye toward the development of the procedures and offices of the common law that most distinguish it from other legal systems, particularly the civil law systems that arose in Europe, in which the legislature is thought to be given a more dominant role. The culture of the professionals who employ the common law has considerable influence on the methods by which it operates, and it is the source of the particular forms of reasoning that are applied to determine the manner in which the resolution of an older law case, a precedent, provides authority according to which a new case might or must be resolved. Many philosophers and lawyers have offered theories attempting to describe the law or the goals it ought to pursue, or its success in pursuing goals, and the paper briefly inventories some of the currently influential theories that have been offered by these philosophers, namely black-letter law, positivism, formalism, realism, criticism, nihilism, and outsider criticism (including race-based and gender-based criticism), utilitarianism, economics, normative theory (including natural law), and pragmatism. The fundamental notions of the common law

are to emphasize the significance of the creation of narrow rules in the light of specific disputes rather than general rules formed in the abstract, the role of precedent in applying such rules to later disputes, the role of judges and juries in the resolution of such disputes, and the fairness accorded to disputants before the law, even if one disputant is the state or an official, which has led to a particular protection of individual liberty under the common law.

1. Introduction

The term “common law” is used to describe (1) the rules that are generally applicable to all who are subject to a legal system, as opposed to other rules that apply only to smaller groups; (2) the states that share a common legal heritage from England; (3) the particular means of developing rules of law on a case-by-case basis, deciding cases with reference to precedent and traditions for the application of appropriate precedents to later cases; (4) the specific rules of law that were developed in those states; and most technically (5) the specific rules that were developed in those states only by judges in courts of law and not by legislators (who enact statutes) or by judges sitting in courts that do not apply strictly the common law means of developing rules (such as the English courts that dealt with equity, matters of the Church, matters in admiralty, and so forth). It is perhaps useful to see the common law as an amalgam of all of these descriptions. In its broadest sense, it is a component of every legal system that relies in any manner on prior decisions of legal disputes when considering later disputes.

The common law is more often thought of, still quite broadly, as a synonym for Anglo-American law, a token of the legal system of states that have copied the system of law developed in England, including predominately the states of the British Empire in the nineteenth century, as well as the United States. This sense is often used to contrast this approach and content of law with that of “civil law” states, such as France or Germany. (See chapter *Western Philosophies of Law: The Civil Law*)

In its narrowest sense, “the common law” is the particular body of rules developed by judges and lawyers appearing before the courts of law in England and the US based on the evolution of law from the precedents of earlier decisions. This sense is often used to contrast such rules with other rules within the broader common law system, particularly those that were developed by courts of equity, or through the legislation of modern statutes, or through administrative determination by non-judicial officials. Thus, it is correct to say that the laws of common law systems include both common law rules and other rules. Making this relationship yet more complex, the other rules, particularly statutes, are often applied in any given situation using common law rules in the narrow sense.

The philosophy of the common law, at least in so far as it describes those ideas of the common law that are particular to the amalgam of senses of the common law described above, includes historical and institutional descriptions as well as the arguments that are made in deliberate attempts to describe a philosophy of the common law.

2. Whether there is a Philosophy of the Common Law

In a meaningful sense, there is no single system to the common law. It is a set of too many ideas that are too vaguely or accidentally related to one another. Further, the elements of any one idea of the common law are too disparate, and, often, too conflicting, to allow a coherent or accurate description. Thus, from some views there is unlikely to be a philosophy of the common law.

The possibility that there can be no philosophy of the common law is an idea that must be taken seriously to understand the common law. Its most central ideas – of deciding the rules of law in particular cases on narrow grounds based on a narrowly defined set of precedents – run counter to many ideas of political philosophy, which require decisions to be based on their fit within a broad and coherent social plan. This difference is a point of great disagreement between a common law approach to law and a civilian approach to law.

In other senses, however, there is quite clearly a philosophy of the common law, or a set of many competing philosophies. At least, there are the analyses of the rationales historically underlying or latterly justifying the methods of the common law system. There are also the analyses of the substance of the rules that resulted from officials' creation and application of these methods. Both of these analyses may include attempts to describe the law as well as arguments for improvement of the law. In other words, descriptive and normative theories are possible within most types of analysis of the common law.

There have, in fact, been many philosophies that have been offered by students of the common law over the centuries. These students, although all working with a view trained according to the common law, approached the descriptive and normative problems of law from a variety of perspectives that have varied in response to changing views of philosophy and society wrought in other fields, such as political and moral philosophy, history, psychology, and sociology.

The particular forms that the common law has taken make its description especially dependent upon its history. While it is possible to make both descriptive and normative ahistorical claims regarding a philosophy of the common law, there is a danger that such claims will be incomplete. For this reason, a very brief summary of the development of the common law provides a useful context for considering its philosophy.

Moreover, the history of the common law is especially important in illustrating its practices and the beliefs held by its practitioners. From these may arise a more telling philosophy that is both descriptive and normative, at least in so far as some few ideals may be identified that have long been cherished as the content of the common law.

3. Origins and Growth of the Common Law

There is no single definitive source of the common law. It grew from Roman roots, absorbing Anglo-Saxon law and custom from a host of imported and local sources, and grafted in Norman law introduced following the invasion of William of Normandy in

1066. The Anglo-Saxon law was based on an effective network of local courts and sheriffs reporting to the king and his council of advisers, which issued and enforced judgments and laws according to royal writs or commands. The Norman law, entwined with vestigial Roman law, brought its burdens of feudal obligations, which placed great power in the king through services demanded from every person who held lands, these persons then demanding further services from those below them, down to the serfs who actually worked the land.

3.1. Roman and Canon Law

Roman law has influenced the growth of every European legal system, either directly, when its books or ideas are copied by the officials of national courts and legislatures, or indirectly, when ideas enter into the culture of a legal system from other systems. (See chapter *Ancient Legal Systems*) Roman lawyers employed a term for common law, *ius commune*, which encompassed several distinct concepts.

The concept of the *ius commune* that most resembled the modern common law described the category of law of universal applicability. Laws that applied to all Roman citizens were *ius commune*. Laws that were not common but that applied only to certain citizens or groups of citizens, such as soldiers, were *ius singulare*.

There was a broader Roman concept of *ius commune*, which was *ius commune omnium hominum*, or the law common to all mankind. This idea related the content of law to natural reason and also formed the basis for laws that applied between Rome and other states as well as between Romans and citizens of other states. It was enshrined in the works of the Roman jurist Gaius in the second century AD as well as in the Digest of Justinian, and it continues to be a source of argument, in that natural reasoning is an interpretative tool in law, although in this sense it is more overtly influential in civil law states than in common law states.

Both concepts of the *ius commune* were important to the lawyers of Europe in the thirteenth century, when its study was revived, first in Bologna, but then in France, Spain, Germany, Holland, Scotland, and elsewhere. It continued to be studied in England in the universities as part of civil law instruction.

The *ius commune* was important also to the medieval canon law, not just in England but throughout the domain of the Church. Canonists defined the principles of law that applied across the whole church as the *ius commune*, as opposed to the canon laws that applied within a particular nation or bishopric, or to a particular order or office, such as the Papacy or a monastic order subject to its own rule.

The term “common law” entered its use in the royal law courts of England, which adapted it to secular purposes from its canon usages. In the thirteenth-century *Dialogue of the Exchequer*, the common law is contrasted to the law of the forest, distinguishing it both because of the limited application of the law of the forest and because, unlike the common law, the law of the forest was the product solely of the king’s will. By that time, the common law was already the product of a complex judicial system that had become effectively independent of the King’s commands.

3.2. The English Courts

The English legal system, much as its government as a whole, resulted from the overlay of the Norman central administration and feudal law upon local customs and traditional views of dispute resolution. The historical record from the first century after the Norman invasion is sketchy, but it suggests that it was rare for most disputes to be brought before the King or the *curia regis*, the king's court. Legal process was more local, and in the method of both the initiation and the resolution of private suits and criminal complaints it varied considerably among the 32 English counties. By the 1180s, the time of *Treatise on the Laws and Customs of England*, the law book attributed to Sir Ranulf de Glanvill, the legal system had become more national, and lawsuits, especially over property, were much more based on pleadings written on paper and decided by judges of the *curia*, who applied not local customs but the laws and customs of the realm. These judges had been ministers representing the king, not merely in deciding disputes by rules enacted by the king's council but in carrying out a broad array of royal polices that we would today describe as including criminal investigation, tax assessment, and administrative oversight of local officials.

In 1166, Henry II appointed the first traveling justices, eventually a permanent cadre of 20 to 30 errant justices, or justices *in eyre*, each of whom visited major towns each year to hold assizes, named for the new legislation concerning criminal law and property ownership, although a wide range of other matters were there enforced. By 1300, a central bench had developed with three arms. The Court of Common Pleas met regularly in Westminster and heard pleas based on the common law that were not criminal. The Court of King's Bench would both sit in Westminster and have its justices travel, hearing cases of criminal law and other matters of particular interest to the crown. The Court of Exchequer sat in Westminster, hearing initially only cases involving debts to the Crown. The records of these courts were kept in the Year Books, the official manuscripts.

3.3. Juries and Legal Fact Finding

The jury developed in England in the twelfth-century royal courts. Facts in legal disputes had long been determined by forms of trial, in criminal causes by ordeal and in civil (and some criminal) causes by combat. In 1215, the Church ordered an end to trial by ordeal, although the increasingly rare trial by combat would occur until the seventeenth century, ending forever by statute in 1819. Their replacement was the jury, an assembly of men from a county, which had long been employed by the King for surveys and inquests. From the later 1100s the jury became increasingly available to litigants who paid a fee to have their cause heard before a group of people sworn to tell a true answer to the questions put to them. This practice, resonant with similar institutions in Sweden, France, and the Low Countries, grew in scope in England, and even as the practice faded in the face of continental practices based increasingly on the echoes of Roman law, the practice grew more important in England. Initially, jurors judged the truthfulness of the litigants arguing before them, who were likely to be from the jurors' own communities. They were called upon from their earliest times to determine whether a crime had occurred, and to accuse people of the crime. By the later 1300s, they were routinely being used as a body to ascertain the facts from evidence

brought before them, first in criminal causes and then in a wide variety of causes in Royal courts. The jury was by then nearly always of twelve and was required to give its verdict based on a unanimous vote. The jury was never utterly independent, and it is often still given instructions limiting its role to narrow questions presented to it.

The implications for the common law of the increasingly central role of these lay judges who ascertained facts would be broad-reaching. Among them were that the common law would be increasingly focused on the presentation of questions of law that could be resolved by ascertaining facts, one reason for the common law to emphasize rules of a very narrow scope that could be applied with greater precision in factual disputes. Also, there would be a popular safeguard on the sovereign, which could interfere with a king, or later prosecutor or governor, who sought to use the criminal law for political or private purposes. This became most visible with attempts to bind the sovereign to act according to the legal process, and the jury became an integral element of the common law restriction on the sovereign to arrest subjects or seize their goods only according to the law of the land.

The ratification of Magna Carta was a signal moment in the development of the common law, although its significance, other than to encourage the development of the two royal courts, was not immediately felt. The barons of England forced King John to agree to it in 1215, and indeed forced him and his successors to do so repeatedly after he and they recurrently renounced it, a practice that only ended when Edward I confirmed it in 1297. Initially a compact between the nobles and the king as their overlord, the charter was described as a statute in 1225. It was not until the writings and arguments of Sir Edward Coke in the early 1600s that its terms were read as broadly as they are written, to encompass rights held not only by the nobility but by every subject.

3.4. Pleadings and Writs

From the thirteenth century through the twentieth, the dominant procedural device of the common law was the pleading, and in particular, until the early twentieth century, the writ. Although local courts might act on oral complaints, the royal courts demanded papers from the plaintiff, who brings the case into the court, detailing what the plaintiff seeks the law to order the defendant to do.

The origin of the writ is almost certainly the Anglo-Saxon royal command to the king's sheriff in a county, ordering the sheriff to seize or transfer a person or property in order to do justice. The plaintiff who sought a remedy that was only available from the royal courts would require a lawyer to determine which writ the plaintiff should pursue. The writ, a parchment sheet sealed with the King's Great Seal, would be purchased from the King's Chancery, which amounted, at least in the thirteenth century, to a royal vetting of those cases fit for the royal courts, although through the years the practice amounted to little more than a tax upon litigation. The writ would be directed to the proper court, either Common Pleas, the King's Bench, or the Exchequer, which would hear the evidence and determine whether the writ should be issued. Despite this early opportunity for the creation of novel writs, by the mid-thirteenth century, few new writs were authorized, and plaintiffs had to fit their causes within the scope of the writs that had by then been granted.

The taxonomy of the ancient writs was intricate. The essential division was between writs based on the protection or recognition of a right and writs based on compensation for, or termination of, a wrong. Each of the forms of action was specific and required the pleading of a list of facts to establish a sufficient basis for the writ to be issued. A defendant would, therefore, attempt to show that a necessary requirement of the writ brought against him was not satisfied.

Eventually, the arguments from the writs established a considerable body of precedent. The judges of the royal courts would determine whether a fact that the plaintiff had alleged could satisfy the pleading requirement if it was found to be true. Only lawyers with a great knowledge of the precedents would know what facts were likely to satisfy the pleading requirements of a writ.

The common law was thus developed by the combination of the creation of writs and the argument of the facts necessary to establish a sufficient basis to grant the writ. This led to a series of extremely narrow questions posed by the law, answerable by even narrower definitions of fact. Whether a person was entitled to take possession of land on the death of a parent would turn not on general principles of inheritance but on very technical and narrow grounds related to the exact relationship between that person, the decedent, and other claimants to the land.

The resolution of such technical disputes was based upon a host of factors, but it was often summarized as the technique of “reason.” This form of reason, discussed in detail below, can briefly be seen by the modern observer as an amalgam of comparison of the case at hand to precedent, which although not absolutely binding on later courts, would likely be applied to the case at hand unless there was some reason to ignore it. The application employed elementary forms of linguistics and logic to yield a series of possible outcomes, and then these outcomes would be evaluated, sometimes by not only the practical result each outcome would have upon the narrow questions of law before the court but also the fit the result would have with the customs of the law and the overall system of the rules.

Over time, a wealth of such decisions was made, the new cases being compared to the earlier decisions for resolution with varying degrees of exactitude. It is excessively rare for a case to come before a court that is precisely like earlier cases, and these tools of reason were offered to explain judicial extrapolation of new rules from old cases.

The whole of the law that evolved in this way, despite its development as a series of very particular inquiries, was capable of resolving a contrastingly general set of questions. This set of questions was limited generally by the nature of the disputes brought to the law, which in medieval England was most likely to involve disputes over property, particularly the complicated obligations and rights that made up the feudal obligations from king to lord baron to tenant. Other matters recurred, such as criminal liability and private injury, but property was the basis of not only the economy but nearly all of society, and the common law developed its protection most richly.

The rigidity of the writ system began to decline in the 1600s. Neither the writ system nor the seemingly coherent pattern of rules based on it could survive the changes of the

economy and politics that accompanied the growth of the early modern state. Particularly, the changes to government and law wrought by the English civil war and the Glorious Revolution in the seventeenth century established the primacy of the English Parliament over both courts and crown in the creation of forms of action.

Still, the system by which the common law arose, generating a comprehensive system of rules from narrowly-framed questions, themselves refined through the practical argument in the face of specific facts, lent the common law an immense utility. It solved people's problems in a manner that they, or at least half of them at any given moment, desired. These desires were presented to the courts by professional interpreters, lawyers, who converted the conflicting desires of the litigants into the clash of legal arguments.

3.5. The Lawyer's Profession and Education

The growth and the independence of the law depended, perhaps more than on any other factor, upon the development of a cadre of professional lawyers, who shared a distinct, common educational and professional experience and from whom judges were selected. (See chapter *The Professional Practice of Law*). This became possible with the permanent location of the royal courts at Westminster.

The particular form that the bench and bar took in England was also the result of a series of accidents. The monarchs from about 1200 onward left the bench to its own devices in the selection of personnel, and new judges were selected from among clerks working for sitting or former judges, rather than from among a wider circle of royal or noble retainers. As professional lawyers became more numerous and more skilled, the judges oversaw appointments not only from among their clerks but also from the ranks of lawyers who appeared before them.

And the lawyers were becoming more skilled. Early medieval litigants almost certainly pled their own cases in local courts and probably relied on their own wits and clerks or on favors with royal retainers in royal courts. By the thirteenth century, however, lawyers had become common in London, serving both as drafters of pleadings and pleaders of cases, although these two tasks divided quickly enough as the technical expertise necessary to perform each task grew more complex. This complexity was furthered, and its mastery was promoted, by the new institutions for legal education.

Although the Church held a near monopoly on education, it would not be the source either of the professional bar or of its training. The Church would not allow its clergy to appear in the law courts, or at least not for fees. Thus universities, which were creatures of the Church, taught only canon law or Roman law rather than the national law, leaving both the selection and the education and training of new lawyers in the hands of older lawyers. And the language of the English law judges was not Latin but the peculiar creole, Law French, a vestige of William of Normandy's success, which owed less to France and more to local, professional dialect as the centuries passed. Latin remained, of course, the language of pleadings as well as the tongue of the more generally literate, particularly the tongue of those scholastically trained in universities, but it and its continental sources were relegated to ornaments of the technical language of law pleading and argument. Thus the lawyers were left to their own devices not only for

substance but also for institutions in which to train their successors.

The manner by which they did so was to create colleges of their own, the Inns of Court. The process by which the Inns evolved is not now fully known, although it appears to have quite resembled the development of the colleges and halls that became Oxford University. Communities of lawyers and their apprentices formed around various Inns in which the clerks and apprentices lived and they all ate and discussed their cases. Twenty or more of these Inns were the basis of the legal community, near the site of the old buildings of the Knights Templar, by then long banished in England. In time, the routines of the Inns became more formalized, and in the late 1300s and early 1400s, four societies had become dominant: Inner Temple, Middle Temple, Gray's Inn, and Lincoln's Inn, although many others rose and fell around them. Within the walls of the Inns, particularly the four large ones, senior lawyers oversaw the education of apprentices, and readers were appointed to give lectures on pleading and the substance of the rules of law. Students would be expected to undergo their preliminary training in one of the lesser Inns and then spend seven years in a community of students and lawyers in one of the four Inns, attending readings and arguing mock cases, or "moots." By the eve of the English Civil War, which effectively destroyed the system of education there, the Inns were rightly called the "Third University of England." Indeed, education in the Inns was likely to be at least as rigorous as it was in the colleges of Oxford or Cambridge, which they rivaled in size.

Even as the system of the Inns came to an end, the community it had spawned had reached a size and sophistication in its culture that made possible the transmission of its customs and techniques without relying as much upon participation in that single community. This was achieved, particularly, through the wealth of law books that developed at exactly this time.

3.6. The Lawbooks

The law, like every other endeavor in Europe, was recorded entirely by hand until the fifteenth century. Every book and every record was in manuscript, and manuscripts by their nature were expensive, rare, prone to error, and, as a frequent result, short.

The most important of these early manuscripts to the common law were the records of the arguments and decisions in various cases. These were collected in great rolls, from the 1200s onward recording the cases of each term of the law courts, both from the central courts and the hearings held in the sessions in *eyre*. The original purpose of these Year Books is unknown, but they served as a record both of the nature of the arguments and their resolution and as a device for later consultation and teaching.

These rolls were not indexed except chronologically, and collections of briefs soon developed, which organized Year Book references and illustrated different forms of action with model language from various writs. This practice has continued unabated, although with numerous variations, through abridgements, books of entries, form books, and digests, down to the computer age.

Several attempts were made to summarize the rules of the law in the narrative fashion of

a treatise, the first – the books of the twelfth century attributed to Glanville and the thirteenth century attributed to Bracton – being as much digests of briefs as they were narratives. The first real treatises were, unsurprisingly, tracts and books on pleading and property law – the most important being Sir Thomas Littleton's *Tenures*, written in the mid 1400s.

Thus was the written common law when the first English printing press opened, at Westminster in 1477. In short order, lawyers began to publish books of their own notes of cases. The earliest known of these reporters, such as Roger Townshend and John Caryll, published within a few years, and a slow growth of the practice through the sixteenth century, with a few, particularly Edmund Plowden, moving from mere journalistic transcription of the opinions delivered from the bench to include glosses of Plowden's own views of the law, including cross-references and precedents. One of Plowden's protégés, Sir Edward Coke, an English judge discussed further in sections 5, 6, and 10.2, took this approach to a high art, and it is his transcriptions and reports of cases, published from 1600 to 1615, which set a standard for both utility and scholarship.

Coke is, moreover, the author of the books that moved the common law into the modern age. His *Reports* give a comprehensive collection of then-modern case law – covering both traditional arenas of the transfer and obligations of property and newer concerns for private wrongs, leases, contracts, administrative law, municipal law, trusts, and criminal law. His great collection of treatises, the *Institutes*, not only updated the ancient laws of property, providing a modern gloss on both Littleton's *Tenures* and on the ancient statutes such as Magna Carta, but also provided a practical schematic treatise for the structure of the criminal law and the judicial system. Together, these *Reports* and *Institutes* provided a foundation of rules and legal techniques, written into books that were peppered with Coke's observations of legal study and professionalism, which allowed the law to survive the destruction of the Inns of Court and to travel to the new English colonies in America.

New treatises would follow, employing both the narrative structure and the glossator's style, each in their way taken from classical models. There were many new monographs and collections, which, following a statute in 1650, were printed in English rather than the old Law French, allowing a wider circulation of them among non-lawyers. The most important of these, a new commentary written by eighteenth-century judge Sir William Blackstone, incorporated many of Coke's innovations and observations, albeit amending Coke's view of the law to accommodate the new world of Parliamentary supremacy, and served as the template of the common law through the nineteenth century.

Still, the treatises – proliferating, increasingly thorough, massively annotated, and progressively narrowed in scope – while important to the student have never been the central tool of the practitioners of the common law. The primary books of the common law remain the reports, the collections of cases accessed through references in the treatises and digests, and now through the computer, which provide the collections of case law on any question.

3.7. The Effects of Statutes

Statutes, which in England from the twelfth century onward were enactments of Parliament made with royal assent, were only one of the many forms of Parliamentary action. Parliament, developing its own character and independence as an outgrowth of the King's Council, acted at times as a court of law, passing judgments on its members, particularly for treason and other serious crimes. It passed constitutions, created charters, and passed assizes, although the term in this sense was not the same as when used for a session of court, as described above.

The pattern of the modern bicameral Parliament appears to have developed by 1275 but had not been settled for some time. Certain statutes enacted later that century enshrining fundamental rules of the constitution and the common law, such as the confirmation of Magna Carta in 1225 and the Statutes of Merton, Marlborough, and Westminster, were clearly settlements between the King and Parliament, whether in one body or two. In the 1300s separate houses were established for the peers of the realm and for the Commons, which included the representatives of cities and counties. Only in 1407 did Henry IV decree that legislation must result from the consent of the commons, lords, and the crown.

3.7.1. Supremacy and Interpretation

From the thirteenth century to the end of the seventeenth, the effect of English legislation upon the common law was not always clear. As a general rule, a statute was to be applied as the highest source of rules of law, and other rules contrary to it were overruled. As a practical matter, it was occasionally much more muddled. To begin with, the statutes were not well recorded, and some manuscripts of statutes were lost over the centuries. Statutes were construed as early as 1312 according to what the judges believed the scrivener should have written, rather than what the text specified. Statutes would often conflict, and in an age in which the antiquity of rules provided authority, it was not certain that a newer statute should supplant an older one.

A far greater problem than these, however, arose from the difficulty of interpretation and construction, especially in the few instances when the bench was opposed to a statutory outcome. Although statutes were written in broader terms than the opinions of case law, the same difficulties of applying general rules from them to specific questions arose. The question of the extent to which a statute should govern a dispute, particularly when the rule in a statute would dictate a different outcome than a rule of the court-made common law was a matter for the bench to decide, and many statutes were constrained by judicial interpretation.

One reason for this judicial approach to statutes was that many statutes were designed merely to correct, abridge, and explain the common law, making its rules more coherent and reliable. Another was that, Parliament still being considered a court, albeit a very powerful one, its decisions were to be integrated by later courts with all the others; it was how the common law worked.

Because of the interweaving of the common law as a reason for statutes, and statutes as

a basis for common law rulings from the bench, there is not a perfect demarcation between rules that originated in the Courts of Common Pleas or King's Bench and those that originated in the Court of Parliament. Although certain rules that had been enshrined in statute were referred to them by that name, it would be quite difficult to say that the rule persisted in its validity because of its statutory origin, as opposed to consistent, or at least recurrent, application in the law courts.

So it would be the case that the idea of the "common law" took on a wider meaning than merely the rules that originated from the bench. The common law became the law of antiquity applied by the bench, and some recognition was paid to a few of those rules that still were most identified with legislation, particularly statutes passed more recently.

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