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The Aristotelian Basis of English Law, 1450-1800

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ARTICLES

THE ARISTOTELIAN BASIS OF ENGLISH LAW

1450-1800

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Throughout the ages, lawyers have conceived of law as a product of reason but have had different notions of what reason means. In this Article, Professor Siegel examines two periods of premodern legal thought, both of which viewed law as consisting primarily of a mosaic of rules rather than as a set of basic principles. The two periods differ in their location of the source of the rules' validity, the "classical" period locating validity in wisdom and the "decadent" period in certainty. Professor Siegel argues that the root of this difference between the two periods lies in the shift from the dominance of Aristotelian epistemology to the rise of the scientific revolution.

INTRODUCTION

The discussions of every age are filled with the issues on which its leading schools of thought differ. But the general intellectual atmosphere of the time is always determined by the views on which the opposing schools agree. They become the unspoken presuppositions of all thought, the common and unquestioningly accepted foundations on which all discussion proceeds.¹

Although the ultimate basis of modern law often is said to be the will of the sovereign,² lawyers tend to approach law as a product of reason.³ By reason, lawyers have meant more than that law is frequently derived by reasoning, or that its substance is permeated by criteria of reasonableness.⁴ By reason, lawyers have meant that the


³ See, e.g., H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 165-68, 665-69 (tent. ed. 1958) (use of "reasoned elaboration allows rational and concrete adaptation of general legal to specific circumstances"); Berman, The Origins of Western Legal Science, 90 Harv. L. Rev. 894, 938-43 (1977) (use of reason to resolve political and social conflict is the hallmark of the nine hundred-year-old Western European legal tradition); Horwitz, Book Review, 17 Am. J. Legal Hist. 275, 278, 280-82 (1973) (the distinction between reason and will and the identification of law with the former and politics with the latter is essential in American legal historians' conception of modern law).

⁴ Defining reasonable behavior, for instance, permeates the field of tort law. W. Prosser, Handbook of the Law of Torts § 1, at 6 (4th ed. 1971). In evaluating appropriate conduct in tort, for example, an individual's acts are measured against the objective community-defined standard of the reasonable person. See W. Prosser, supra, § 32, at 150-52.

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law has, indeed is, a particular structural and methodological system—a body of general principles, standards, rules, and a technique for deriving and applying them. In essence, the rules, which are seemingly infinite in number, are fashioned to fulfill the purposes of, and are applied according to, the general principles, of which there are relatively few. Standards mediate between the extremes of principle and rule and are derived from the former in the process of determining the latter. The core of modern law is thus less the mass of specific rules and indeterminate standards than the general principles upon which the rules' existence and validity depend. The modern jurist's attention is focused accordingly on the general principles and, albeit less frequently, the method of their application to discrete controversies. Indeed, the great differences among the various schools of American legal thought during the past 150 years have characteristically been disputes about the content or nature of the general principles. There has been little if any disagreement concerning the structural schema within which the disputants' principles would function.

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5 Such as compensation, deterrence, efficiency, or risk spreading.
6 Such as due care, natural and probable consequences, or due process. As used here, standards include general legal concepts such as possession or fundamental interests.
7 Such as A is (or is not) liable for tortious injury to a viable fetus that is later stillborn, or that a contract acceptance is (or is not) effective on dispatch.
9 For a general discussion of techniques for deriving and applying law, see, e.g., H. Hart & A. Sacks, supra note 3, at 120-44 ("open-texture" of law allows judge to create law by applying rules as standards in decisionmaking); R. Dworkin, supra, at 110-15 (judge searches underlying argument of principle to shape theory of precedent from which to ascertain the correct decision for the specific case under consideration); Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 476 (1897) (judge considers ends that rules seek to achieve and evaluates them in decisionmaking process).
11 Compare, for example, the content and nature of the principles used by B. Cardozo, The Nature of the Judicial Process 23-31 (1921) (force of principles may be traced to philosophy, historical development, customs, and mores of the community at a given time), R. Posner, Economic Analysis of Law 1-10 (2d ed. 1977) (economic principles of price, quantity, demand, utility, cost, and resource allocation may be used to define law), and J. Rawls, A Theory of Justice 11-17 (1971) (justice to be secured by legal model in which maximum social and economic equality). See generally Stevens, supra note 10, at 440-41; Ackerman, Book Review, 103 Daedalus 119 (Winter 1974). Ackerman points out that even the legal realists' views may be seen as an argument about the true nature of the general principles from which the rules of law derive. Realists viewed them as anthropological or psychological in nature. Id. at 122.
Before 1800, lawyers also approached law as a product of reason, which for them meant that law had a particular structural and methodological schema. Although the substantive elements and methodology resembled those of today, the system was essentially different. In contrast to modern notions of the structural relationship of substantive elements, rules rarely were drawn from general principles. By and large, general principles summarized rather than determined the results of specific cases and frequently were no more than rhetorical ornaments. Instead, the ultimate sources of law were a large array of rules generated for the most part by custom, but also by statute, the Bible, or self-evidence. Analytically, many rules were derivative phenomena; however, they were deduced from other established rules, previous practices, or whatever considerations seemed appropriate to the situation at hand. Rules rather than principles dominated legal thought, and although many rules were drawn from others, the overall structure was an interlocking mosaic rather than a pyramid. Furthermore, the premodern jurist preferred ancient rules


13 Coke uses these rhetorical ornaments throughout his reports. See, e.g., 2 E. Coke, Reports, pt. III, at 13a, 14a, 24a (G. Wilson trans. 1777) (London 1600-1615).


15 See, e.g., Platt v. Sheriffs of London, 75 Eng. Rep. 57, 61-62 (Exch. Ch. 1550) (deriving sheriff’s arrest powers outside of his county from rules of distraint for rent service); T. Littleton, The Tenures § 418, at 199-200 (E. Wambaugh ed. 1903) (London 1481) (whether an entry into one parcel of land in a county is entry into all parcels in the county derived from rules of livery of seisin); C. St. German, Doctor and Student 13-14 (T. Plucknett & J. Barton eds. 1974) (London 1518) (question of distrainor’s liability when the distressed cattle die of starvation deduced from customary rule that distressed cattle are put in an “open pound”).

16 See, e.g., Case of Mines, 75 Eng. Rep. 472, 492-98 (Exch. Ch. 1568) (whether King has title to mines where gold is intermixed with copper is derived from prior royal commissions, charters and patents); 1 E. Coke, The First Part of the Institutes of the Laws of England, bk. I, ch. 1, § 3, at 11a-b (15th ed. F. Hargrave & C. Butler 1794) (London 1628) [hereinafter 1 E. Coke, Upon Littleton].

17 See, e.g., Colthirst v. Bejushin, 75 Eng. Rep. 33, 50 (C.B. 1549) (contingent remainders are assignable because “God has committed all worldly things to the order and disposal of men”); Case of Mines, 75 Eng. Rep. 472, 480-81 (Exch. Ch. 1568) (the King has title to gold and silver ores, no matter where found, because he must have sufficient treasure to defend the realm); 1 E. Coke, Upon Littleton, supra note 16, bk. 1, ch. 1, § 3, at 11a-b (the twenty “places” of legal argument).

18 The description of law as a mosaic is taken from Professor Berman’s description of Roman law: “Roman law consisted of an intricate network of rules which was not presented as an intellectual system but rather as an elaborate mosaic of practical solutions to specific legal
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as a source of law, in contrast to his modern successors who generally prefer that their principles accord with current thinking. In sum, the premodern lawyer conceived of law as ultimately consisting of and deriving from a mass of ancient rules instead of a few current principles.

Yet, premodern legal thought had two distinct periods: the classical (1450-1650) and the decadent (1650-1800). An interlocking mosaic of ancient rules was characteristic of both periods. Nonetheless, subtle differences distinguish the basic conceptions of the two periods. In the classical era the validity of the law lay in its wisdom, and ancient rules were merely the primary source from which jurists debated and derived a case's just disposition. In the decadent era, however, the validity of the law—at least the common law as opposed to statute—lay in its certainty, and ancient rules were seen as more directly determinative regardless of their wisdom.

This Article will elucidate the import of this distinction and present an overall conception of premodern law by arguing that the basic ideas of that law turn upon the dominance and decline of Aristotelian epistemology. Accordingly, this Article first presents a detailed description of the structure of classical premodern law and offers a precis of Aristotelian epistemology. This Article then demonstrates that classical premodern law was founded upon Aristotelian notions. Finally, the consequences of the seventeenth century's break with Aristotelianism upon the lawyer's basic conception of law are explored.

questions.” Berman, supra note 3, at 929. This Article shows, however, that to the premodern English jurist such a mosaic was a system.

See Section I infra.

See, e.g., B. Cardozo, The Growth of the Law, in Selected Writings of Benjamin Nathan Cardozo 246 (M. Hall ed. 1947) (rules must reflect mores of their society and time); Holmes, supra note 8, at 469 (antiquity of rules' pedigree is not valid reason for rule).

Compare Holmes, supra note 8, at 469 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past . . . .") with C. Fearne, An Essay on the Learning of Contingent Remainders and Executory Devises 121 (5th ed. 1974) (London 17722) quoted at text accompanying note 313 infra.

By Blackstone's time statutes were already seen as validated by Parliament's will. Certainty, although desirable, was not a criterion of a statute's validity. See, e.g., 1 W. Blackstone, Commentaries *49-50 (sovereign power of legislation directs all law); id. at *85-91 (discussing nature of statutes).

See Section II infra.

See Section III infra.

See Section IV infra.
Classical Premodern Law

Christian metaphysics prior to the scientific revolution of the seventeenth century taught that God's will is the fundamental ordinance of the universe. All good is in accord with and promotes that will; truth, morals, justice, and wisdom are inherently complementary because they are but different aspects of this will. The function of law is to constrain men to live according to God's will—a function equivalent to the establishment of justice. Accordingly, a lawmaker should ordain rules to constrain men to live justly; a judge should decide cases to do justice between the parties. A basic problem, however, is readily apparent in this conception of law: to ordain or do justice one must know, with particularity, what justice is or requires, and how does one know, rather than will, justice? Western civilization's resolution of this problem has varied over time. After the fall of Rome a nonrational legal system has followed at first, with trials by battle and ordeal that depended on God's direct intervention for justice to be done. But in the thirteenth century, that solution was rejected in favor of a system in which human intelligence rationally attempts to reach the same goal. During the classical premodern period, three prominent lawyers—Sir John Fortescue, Christopher St. German, and Sir Edward Coke—described and conceptualized the legal system that evolved in England with the acceptance of rationality. Although they have differences of opinion and emphasize different aspects of the law and its nature, they share a fundamental

26 See 28 T. Aquinas, Summa Theologica 1a, 2ae, Question 91, Art. 1 (T. Gilby ed. 1966); 8 id. at 1a, Question 44, Art. 3 (T. Gilby ed. 1967).
27 See 28 id. at 1a, 2ae, Question 91, Art. 1, Question 92, Art. 1, Question 93, Art. 2, 3, Question 94, Art. 2, Question 96, Art. 3.
28 See id. at Question 92, Art. 1, Question 95, Art. 3. For a discussion of the various meanings of justice for Aquinas, see id. at Question 95, Art. 1 n.3.
30 See Berman, supra note 3.
31 Fortescue (c. 1400-1476) was a late medieval judge. Despite being a partisan of the Lancastrian cause during the War of the Roses, his prestige was such that he was pardoned and made a member of the King's Council when the House of York acquired the throne. See 2 W. Holdsworth, supra note 29, at 567-68 (1923).
32 St. German (c. 1460-1540) was a Renaissance lawyer who supported Henry VIII's efforts to enforce royal supremacy over the English church. See 5 id. at 266-72 (1924); C. St. German, supra note 15, at xi-xiv.
33 Coke (1552-1634) was an Elizabethan judge, Privy Councilor, and Parliamentarian. He may be regarded as the most eminent common law lawyer, especially for his championship of judicial independence from crown control. See 5 W. Holdsworth, supra note 29, at 425-93.
similarity—a notion of law as drawn largely from and consisting of a mass of ancient rules. Since St. German gives the most sustained and detailed analysis, his thoughts are presented first.

As a classical premodern Christian, St. German accepts the premise of an eternal law which is God's will with respect to the design and ordering of His creation. He also accepts the idea that this supreme law is known in its entirety only by God and the blessed in heaven. Consequently, St. German believes God ordained a number of "ground"s of law, ways for men to know and implement as much of the eternal law as is necessary to act righteously and achieve felicity in this life and the next: revelation, right reason (the law of nature), general customs, particular customs, maxims, statutes, and equity.

Analyzing individually these ways to participate in or have knowledge of the eternal law, St. German describes right reason as consisting of "synderesis" and "ratiocination." Synderesis is the mental faculty that recognizes the fundamentals of theoretical and practical speculation by "assenting to self evident truths"; it is the power of the soul that distinguishes between good and evil, between what God

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34 See C. St. German, supra note 15, at 27.
35 Id. at 9-13.
36 Id.
37 Id. at 3. St. German uses the rubric "law of reason" in preference to "right reason" or "law of nature," id. at 31-32, but they are equivalent expressions. Since this Article uses the term "reason" to refer to other distinct concepts, such as the entire legal system of which the law of nature is a part, the latter expressions are used at this point to avoid confusion.

This Article refers to general customs, particular customs, and maxims as "custom," since they are conceptually all but identical. General and particular customs differ mainly in the geographical breadth of territory in which they are observed. Id. at 45 (general customs used throughout the land); id. at 71 (particular customs used in specific geographical locations). Customs and maxims differ only in their accessibility. General customs are immemorial rules of law known throughout the land by everyone; maxims are those immemorial rules of law known mainly in the court of the king and among those who study the law. Id. at 59. In every other respect general customs and maxims are identical and therefore can be taken as "one ground." Id. To illustrate, primogeniture among male heirs and equality among females are general customs, id. at 49, 59; that escuage certain is socage tenure, and that descent bars a right of entry are maxims; id. at 59.

In modern usage, maxim has the connotation of a general aphorism of uncertain application, such as "use your own so as not to injure another" and "equity regards as done that which ought to be done." Nonetheless, St. German's usage accords with other classic premodern jurists. Littleton, for example, says "it is a maxim in law, that he which hath an estate but for term of life shall neither do homage nor take homage." T. Littleton, supra note 15, § 90, at 41. See also 1 E. Coke, Upon Littleton, supra note 16, bk. 1, ch. 1, § 3, at 11a. The connotation of maxim began to shift around the late sixteenth century. See, e.g., F. Bacon, Maxims, supra note 12, at 114. Finally, for an explanation of the propriety of including equity as one of St. German's "grounds," see C. St. German, supra note 15, at 101-03.

38 See C. St. German, supra note 15, at 11.
39 See id. at 81-83.
forbids and what he permits.\textsuperscript{40} Ratiocination, by moving "the intellect \ldots from premise to conclusion," establishes the derivative truths of right reason.\textsuperscript{41} Right reason is, accordingly, an infallible guide to God's eternal law; its conclusions are true at all times and in all places and can neither be put aside nor changed.\textsuperscript{42}

Yet despite its power, right reason is an insufficient guide to God's eternal law. St. German points out that original sin and its progeny of evil passions have darkened the natural light and motive force of synderesis and reason.\textsuperscript{43} Furthermore, although synderesis grasps universally, eternally true propositions, it does not enable man to determine which general truth a specific case or particular thing exemplifies. For instance, right reason can declare that "no evil is to be done," but it cannot say which particular activities are evil.\textsuperscript{44} The conclusions of right reason are frequently too incomplete to be a certain guide to action according to God's will. For example, right reason teaches that one may lawfully defend one's property against unlawful force, but it fails to define adequately notions of "property" and "unlawful force" and does not declare the appropriate penalty for resisting lawful force.\textsuperscript{45}

Thus, according to St. German, God established revelation so that the all-important rules for attaining salvation would be known without any doubt.\textsuperscript{46} Yet St. German notes that revelation, when properly interpreted, also may form the basis for determining rules by which to attain happiness in this world—rules for the governance and protection of the people.\textsuperscript{47} When used for this end, however, it appears that deductions from revelation would be as uncertain and incomplete as those from right reason. To illustrate, revelation provides that "Thou shall not covet thy neighbor's house \ldots" but offers no guidance for determining what is or is not "thy neighbor's house."\textsuperscript{48} Therefore, St. German believes God also ordained the institution of human laws—custom and statute—to solidify the abstract generalities of right reason and revelation, to supply their omissions, and to direct their application in particular situations.\textsuperscript{49} Unlike right reason and

\textsuperscript{40} See id. at 83-87.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 13-15.
\textsuperscript{43} See id. at 15-17, 81.
\textsuperscript{44} See id. at 81-83.
\textsuperscript{45} See id. at 17-19, 81-87.
\textsuperscript{46} See id. at 21-25.
\textsuperscript{47} See id. at 21-25, 39-45.
\textsuperscript{48} Id. at 9-11, 53-57.
\textsuperscript{49} Id. at 27.
revelation, however, human laws are as variable as the situations calling for their creation and application; they are, for St. German, "probable" conclusions about the requirements of eternal law.\(^{50}\) As such they are not only subject to continual revision, correction, and redetermination, but also are controlled by equity and absolutely void if in conflict with the certain truths of right reason and revelation.\(^{51}\)

Nonetheless, despite their subsidiary and tentative characters, custom and statute are still fundamental and binding grounds of English law. They are independent "fountains" of law because the actual customs and statutes were not established or deduced from any other ground.\(^{52}\) Reasons are commonly given for customs, St. German points out, neither to validate nor to establish customary rules, but to determine what necessarily follows from them and to guide in their application.\(^{53}\) And since they are the determinations of wise men they are to be accepted as true reflections of eternal law by the multitude whose own powers of synderesis and rationcination, motives and judgment are weaker.\(^{54}\)

Yet, to St. German, the various grounds of English law essentially are conceptual categories or statements of types of law, and each contains certain fundamental precepts or "first principles."\(^{55}\) Although there are many such precepts,\(^{56}\) most English laws are secondary conclusions—deductions from the original precepts of one or more grounds, or from previously derived secondary conclusions.\(^{57}\) The law embodies such a large number of secondary conclusions, St. German points out, that some equate the law of England with the law of reason,\(^{58}\) but disagrees with this equation because a derivative rule

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\(^{50}\) Id.

\(^{51}\) See, e.g., id. at 15, 41, 45, 57, 59, 75-77. They are limited by equitable principles, since, for St. German, equity prohibits the particular application of generally valid customs and statutes if it would be contrary to right reason or revelation. Id. at 95-99.

\(^{52}\) See id. at 57, 65-67, 75.

\(^{53}\) Id. at 59.

\(^{54}\) See id. at 27-31.

\(^{55}\) Such first principles are essential to judging or reasoning in the law of England. Id. at 17-19, 37-39. For example, right reason teaches it is "unlawful for every man to defende hym self and his goodes agaynst an unlawful power," id. at 19, and it is a maxim that "dyseent taketh awaye an entre." Id. at 59.

\(^{56}\) See, e.g., id. at 59-67 (maxims), 47-57 (customs), 17-20 (immediate conclusions of right reason).

\(^{57}\) See id. at 19, 37-39, 75. St. German gives two illustrations. One is deducing the rule of liability when distrained cattle die of starvation from the customary rule that the distrainor must commit the cattle to a "pounde ouerte." When the Doctor correctly concludes that the distrainor is not liable, the Student says "[T]hou haste gyuen a trewe Jugeement and who hath taughte the to do so/but reason dyryuyed of the sayd general custome." Id. at 35-37.

\(^{58}\) Id. at 37.
has the qualities of the ground or grounds from which it was deduced—and the greater part of English laws are reasoned from England's customs.  

St. German's conception of English law, then, is that of a mosaic largely derived from a mass of ancient rules. Occasionally, laws are determined from right reason by reasoning from principles in the modern sense. But when a law is determined from revelation, statute, or, most typically, from custom, the reasoning, St. German insists, is from rule to rule—and usually from ancient rule. Yet, a fair amount of flexibility and creativity exists in the system. Since the elaboration and application of fundamental rules is a complex matter, especially when the customs of England are involved, St. German indicates that the bench and bar have both a special competence and a creative function in determining the grounds of law for the cases that come before them, insisting that because of lawyers' intellect, the laws of England reflect God's eternal law.

Sir John Fortescue's description of English law, although written earlier and as a less detailed statement, is substantially similar to St. German's. Fortescue, too, posits a divine law, which is God's ordinance establishing and governing the universe and which is manifested to mankind through revelation, the law of nature, and "human laws"—statute and custom. Revelation is the direct word of God and is an undoubtedly true indication of divine law. The same is true of the law of nature, which is that part of the divine law discovered and revealed through a part of the mind infused with God's

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59 See id. at 47.
60 The precepts (primary conclusions) of right reason tend to have the general aphoristic quality of modern principles. St. German gives two examples: "good is to be loved and evil is to be fled" and "a man must live peacefully with other." Id. at 17.
61 Id. at 59.
62 See id. at 37-39, 44-50.
63 See id. at 27-31.
64 This Article's analysis of Fortescue's philosophy is drawn from De Natura Legis Naturae, written to support the House of Lancaster's claim to the English throne and De Laudibus Legum Anglie, written in the mid-fifteenth century, to instruct Edward IV in the laws of his country.
66 J. Fortescue, De Laudibus Legum Anglie 37 (S. Chrimes ed. 1942) [hereinafter J. Fortescue, De Laudibus]. Fortescue does not list revelation itself as a basis for law, but he is aware of it and draws from it. For instance, he analyzes whether the English laws of proof, including the jury system, violate the biblical requirement of two witnesses. See Y.B. 36 Hen. VI, reprinted in 1 The Works of Sir John Fortescue 81 (T. Clermont ed., C. Fortescue trans. 1869) [hereinafter Y.B. 36 Hen. VI]. See also J. Fortescue, De Natura, supra note 65, at 241-43. He also does not mention equity because its separation from law was not clearly established. See id. at 214-15; 2 W. Holdsworth, supra note 29, at 339, 505-66; 5 id. at 215-16.
divine light. Human laws, which are the determinations of wise men and immemorial usage, are rules for further declaring God's "perfect justice." They particularize revelation and the law of nature by responding to the variable circumstances of human life. Nonetheless, human laws are sui generis grounds of law; they are not directly deduced from other laws, and indeed, are not dependent upon reason for their existence. Consequently, statute and custom do not necessarily embody the ultimate truth of divine law. They are, therefore, not only void if against revelation and the law of nature, but also are amendable.

Still, as does St. German, Fortescue believes that in the absence of such conflict, human laws are authoritative and binding, due to the likelihood that such laws manifest justice. In a long and detailed analysis, Fortescue discusses the virtues of England's laws. England's statutes are prudent because, being formulated by Parliament, they arise from the "wisdom . . . of . . . more than three hundred select persons," and England's customary laws are virtuous because of their antiquity. Fortescue asserts that despite successive conquering waves of Romans, Saxons, Danes, and Normans, the same customs have continuously governed England since the beginning of its civil society. Fortescue offers this continuity as proof of the customs' wisdom; any conqueror unimpressed by the wisdom of England's customs would have changed them. Fortescue continues that since England's customary law is the most ancient in the world, it is also "the very best."

Finally, like St. German, Fortescue regards the law of nature, statute, and custom as generic types of law, each containing various fundamental rules from which a lawyer may reason. He is, however,

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68 J. Fortescue, De Natura, supra note 65, at 194, 224, 229, 233, 240-41, 247.
69 J. Fortescue, De Laudibus, supra note 66, at 11.
70 J. Fortescue, De Natura, supra note 65, at 241; J. Fortescue, De Laudibus, supra note 66, at 7-11.
71 Y.B. 36 Hen. VI, supra note 66, at 81.
72 See J. Fortescue, De Natura, supra note 65, at 224, 332; Y.B. 36 Hen. VI, supra note 66, at 81.
73 See J. Fortescue, De Natura, supra note 65, at 224, 332; Y.B. 36 Hen. VI, supra note 66, at 81.
74 Id. at 41.
75 See id. at 39-41.
76 Id. Prior to the seventeenth century in England, Fortescue's notion that the law was necessarily changed by external forces was not uncommon, even among the educated. See J. Pocock, The Ancient Constitution and the Feudal Law 30-32, 39-42, 91-124 (1957) [hereinafter J. Pocock, Ancient Constitution].
78 J. Fortescue, De Natura, supra note 65, at 39-41.
79 See J. Fortescue, De Laudibus, supra note 66, at 21-23.
not as clear about the quantity of such rules. All Fortescue indicates is that in contrast to more systematic bodies of law, far more time is required to gain a knowledge and mastery of English law. Ten years, he claims, is sufficient to become a learned judge of divine law; but twenty years of experience scarcely is enough to qualify a person to interpret English law.\(^6\) Although he does not describe it explicitly, Fortescue essentially conceives English law as a rather intricate web primarily fashioned from a mass of ancient rules.

The third eminent legal theoretician, Sir Edward Coke, composed no single work that articulates his comprehensive analysis of English law. Scattered throughout his writings, however, are a number of statements from which his views emerge. Despite important differences, Coke’s overall conception is substantially similar to Fortescue’s and St. German’s. Like his predecessors, St. German and Fortescue, Coke sees God as the source of all law\(^8\) and English law as a composite of “diverse laws” grounded in revelation, right reason, statutes, and common law,\(^8\) but subtly shifts the relationship among these grounds. For Coke, the force of revelation and right reason is less immediate. Although on occasion he draws from them, he does so less frequently and often uses them only to reinforce a legal decision supported adequately by the common law.\(^8\) Furthermore, Coke is not as insistent as his predecessors that statutes against revelation or right reason are void,\(^8\) and he believes that the common law occupies a more central position in the legal system than equity.\(^8\) Finally, although Coke observes that statutes can alter the common law, he denigrates the value of such statutory changes. These changes, he states, inevitably cause more problems than the laws they amend.\(^8\)

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\(^6\) See id. at 25.
\(^8\) See 2 E. Coke, Reports, pt. III, at ii-iii (C. Wilson trans. 1777) [hereinafter E. Coke, Reports].
\(^8\) See, e.g., id. at 391-94, 406 (necessary to look to law of nature, the law of God, of which the law of England is part, in deciding issue at hand); Case of Monopolies, 77 Eng. Rep. 1260, 1263 (K.B. 1602) (citing Deuteronomy as support for decision); Slade’s Case, 76 Eng. Rep. 1074, 1076-77 (K.B. 1602) (biblical law plays a role in deciding whether action lies in breach of contract suit). Compare use of divine and natural law in Plowden’s Reports, see, e.g., Reninger v. Fogossa, 75 Eng. Rep. 1, 12, 30 (Exch. Ch. 1548) (frequent citation to divine law and commentary on English law’s relationship to it).
\(^8\) See E. Coke, The Fourth Part of the Institutes of the Laws of England 38-39 (1707) (acknowledging that Parliament can perform actions which appear to conflict with divine law such as condemning someone without a hearing); Thorne, Dr. Bonham’s Case, 54 Law Q. Rev. 543, 548-50 (1938) (pointing out that a violation of common law, rather than divine law, formed the primary ground for Coke’s decision in this case).
\(^8\) See 1 W. Holdsworth, supra note 29, at 481; 5 id. at 236-38.
\(^8\) 2 E. Coke, Reports, supra note 81, pt. IV, at v-vi.
sum, to Coke, the common law is the preeminent source of English law.

Coke's jurisprudential analysis is entirely concerned with the common law. He describes the common law as consisting of an almost limitless number of "particulars"; its "maxims" and "principles" are but well-established rules of law that provide foundations for legal arguments but are not the only source of argument. Coke portrays the common law as a mass of rules, a mass so inherently unsystematic that he despairs of its being capable of reduction to a readily comprehensible schemata.

Coke also views the mass of common law as ancient rules, in use among the Druids before the Roman invasion. Furthermore, Coke clearly regards the common law as ancient, not only in major precept, but also in substantial detail. He is convinced, for instance, that the system of jury trial at assizes not only existed before the Norman conquest but was the same system as in his day; so too with the concept of tenancy in fee simple and its myriad of rules such as forfeiture by attainder for felony or outlawry.

Related to Coke's view of the detail of the ancient rules is his view that the existing mass of rules is fairly complete. The common law's precedents are so voluminous that even complex or novel issues can be resolved using direct or analogical authority. Coke's observation illuminates the preeminence he accords to the common law among the various grounds of English law: there is little need to resort to reasoning from other grounds if one ground, the common law, readily supplies the answer.

Moreover, Coke maintains that the answer supplied by the common law is based entirely on "an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's
natural reason." In brief, for Coke, the common law is essentially the accumulated wisdom of the ages, grounded in and approved by experience rather than synderesis. Consequently, only those who by long study have vicariously acquired its experience are competent to know, debate, apply, and further develop it. As he points out, although Parliament has the authority to alter the common law, its exercise frequently has led to "inconveniences"; the living generation's foresight neither perceives nor resolves problems as fully as the ancient common law does. Similarly, Coke's deemphasis of right reason and equity as sources of English law is supported conceptually by his view that the common law is the wisdom of the ages. It follows logically that if the natural reason of an individual or of an entire generation is inferior to the common law's accumulated wisdom, understanding, and experience, the common law is the preferable source of law.

In sum, since Coke conceives English law as so exclusively rooted in immemorial custom and usage, he, even more than St. German and Fortescue, views English law as consisting of and drawn from an unsystematic mass of ancient rules which, nonetheless, are unfathomably wise.

II

Aristotelian Epistemology

The jurisprudence of St. German, Fortescue, and Coke is obviously in the Judeo-Christian tradition. In the main, it is a conventional restatement of the views of theologians such as St. Thomas Aquinas and John Gerson. However, although it may be less apparent to the modern reader, their jurisprudence is also Aristotelian. Aristotle's philosophy permeated the intellectual milieu of this period and thus provided useful guidance for elucidating the structure and nature of English law. At least before 1700, Aristotle's theory and methodology of knowledge shaped the intellectual presuppositions of

96 2 E. Coke, Upon Littleton, supra note 16, bk. II, ch. 6, § 138, at 97b.
97 Id.; see text accompanying note 39 supra.
98 2 E. Coke, Reports, supra note 81, pt. III, at xix-xxi; id. pt. IV, at xv.
99 Id. pt. III, at xviii; id. pt. IV, at vi.
100 Id. pt. IV, at v-vi.
101 2 E. Coke, Upon Littleton, supra note 16, bk. II, ch. 6, § 138, at 97b.
102 St. German, drawing from Gerson, popularized the canonist's view of conscience as a guiding principle of equity. See 5 W. Holdsworth, supra note 29, at 266-68. Fortescue cites Aquinas with approval. See, e.g., J. Fortescue, De Laudibus, supra note 66, at 27, 82; J. Fortescue, The Governance of England 109, 110 (C. Plummer ed. 1885) [hereinafter J. Fortescue, Governance].
103 Aristotle was particularly authoritative in concepts of epistemological thought. I.e., notions of the purpose, scope, criteria, limits, and method of knowledge. See, e.g., N. Gilbert,
educated men, whether or not they were conscious of his influence. Accordingly, since jurisprudence was considered an epistemological problem, Aristotle, who until the scientific revolution supplied criteria for the rational resolution of such problems, logically would influence the jurisprudence of the period. Of course, Aristotle's epistemology did not reach the seventeenth century unchanged; it was modified by the tradition it spawned and by disparate schools which formed around it. For simplicity, this Article sets forth the basis of the tradition but does not describe its modifications until they are immediately relevant.

A. Metaphysical Foundations

It is generally accepted that Aristotle views the universe teleologically. The universe, Aristotle explains, is marked by flux, by a continuing process in which mutable, transitory matter "strives"
to become the immutable and eternal form that is the reason for existence, its essence, and its ideal end. But matter, because it is not completely malleable, resists change and development in unexpected ways and therefore rarely achieves perfect form. In addition, one development may fortuitously interfere with another. Thus, while the object of the universal flux—the development of matter into its form—is the source of order in the universe, the failure of or interference with this development results in irregularity and disorder.

This metaphysic involves a conception of causation that differs substantially from modern notions. In the modern physical sciences, and frequently in the social sciences, causation is the physical determinant of phenomena explaining how phenomena occur. Aristotelian causation involves not only this concept of efficient cause but also the teleological determinants of phenomena explaining why phenomena occur. Forms are both the ends and beginnings of phenomena in that matter would not develop as it does, indeed would not develop at all, without them. Although everything has a form, i.e., an intrinsic nature or an essence, the fact that form is, with rare exception, incompletely and imperfectly realized by resisting matter means that phenomena occur by chance as well as by necessity; chance is the diversion, the thwarting of nature's purpose, necessity its fruition.

Aristotle's conception of form as the goal for which matter strives has always been a difficult aspect of his thought. See 1 E. Zeller, supra at 378. Nevertheless, the concept of form, and its corollary doctrine that change and motion in the universe are rooted in internal necessity and are part of the intrinsic nature of matter, served as a cornerstone of Western thought until the scientific revolution of the seventeenth century. See, e.g., J. Randall, Aristotle, supra note 108, at 127; J. Randall, Modern Mind, supra note 103, at 235-37, 239-42. In brief, if forms were subject to change, they could not be, as they are for Aristotle, inevitable ends of the process. See Aristotle, Metaphysics, supra note 109, bks. III, XII.

Randall provides a useful example of this process. The end of an acorn, for instance, includes developing into an oak and the form of a squirrel includes seeking nutrition. Some acorns do not become oaks because they are eaten by squirrels. See J. Randall, Aristotle, supra note 108, at 182-84.

For a statement of the modern view and its comparison with Aristotle's, see J. Mill, A System of Logic 213, 240 (1949). For a discussion of Aristotle's four causes, see, e.g., J. Randall, Aristotle, supra note 108, at 123-29, 181-82; 1 E. Zeller, supra note 109, at 355-61. To illustrate, the oak is the cause of the acorn in that matter has temporarily become an acorn in its struggle to become an oak. An acorn is not satisfactorily explained without its end. As Randall observes, Aristotle resolves the chicken and egg problem clearly in favor of the chicken. See J. Randall, Aristotle, supra, at 126.

111 See 1 E. Zeller, supra note 109, at 361-68.
B. Knowledge

In general, Aristotle conceives of knowledge as the cognition of certain and immutable truths. Such knowledge is not innate, but can be attained through two related activities: demonstration and intuition.

Aristotle originated the still-current notion of separate sciences, each concerned with different subject areas but sharing the fundamental conception that science is an art of demonstration and explanation. To know something scientifically is to have proof of its certainty and immutability and also of its causes or reasons for existence. In every science, the demonstration and explanation that is the hallmark of scientific knowledge may be accomplished by the demonstrative or apodictic syllogism, a mode of deductive reasoning formalized by Aristotle to establish the certainty and immutability of a proposition by showing it to be a necessary consequence of accepted truths.

One consequence of Aristotle's correlation of scientific knowledge with the apodictic syllogism is the importance of each science's "first principles." Since the apodictic syllogism depends upon premises previously established as knowledge, each science is ultimately derived from some set of initial beliefs, its first principles, accepted as certain and immutable. Not only is the content and validity of each science dependent upon the content and validity of its first principles, but scientific discourse is impossible unless the participants agree on them.

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117 See Aristotle, Metaphysics, supra note 109, bk. VII, ch. 15; Aristotle, Posterior Analytics, bk. I, ch. 1, bk. II, ch. 9, in Basic Works of Aristotle 110 (R. McKeon ed. 1941) [hereinafter Aristotle, Posterior Analytics]; 1 E. Zeller, supra note 109, at 194-95. This view was standard in Greek thought and had been shared by Plato. See R. Ackerman, Theories of Knowledge 57-68 (1965); 1 E. Zeller, supra, at 163-71. For the important extent to which Aristotle departed from this conception, see R. Ackerman, supra, at 61-62; text accompanying notes 135-54 infra.


119 As understood in the Aristotelian sense, causes include the forms. See text accompanying notes 108-16 supra.

120 See Aristotle, Posterior Analytics, supra note 117, bk. II, chs. 14-16; Aristotle, Prior Analytics, bk. I, in Basic Works of Aristotle 62 (R. McKeon ed. 1941). See also R. Ackerman, supra note 117, at 63-68; J. Randall, Aristotle, supra note 108, at 40-42; W. Ross, supra note 108, at 41-49. Aristotle conceived of logic as the methodology of philosophic investigation, a role analogous to the modern conception of the scientific method. 1 E. Zeller, supra note 109, at 191-94. Later commentators, in the first millennium A.D., captured Aristotle's meaning when they compiled his various treatises on logic under the general title The Organon, which is Latin for "instrument." See W. Ross, supra, at 29-38.

121 See Aristotle, Metaphysics, supra note 109, bk. V, ch. 5; Aristotle, Posterior Analytics, supra note 117, bk. II, ch. 9.
Nevertheless, first principles are, by nature, incapable of demonstration; if their validity could be proven, they in turn would rest on some other truths.  

But how can first principles be established, if not by syllogism? Aristotle finds the answer in the capacity of the human mind for intuitive reason or "nous." Through sense, perception, and memory, nous abstracts the immutable essence of things. Nous "sees," "grasps," "recognizes" the insensible, eternal, universal in sensible, transitory, particular phenomena. The determinations of nous are not scientific knowledge in that they cannot be syllogistically demonstrated, but because they are certain and immutable truths, they are nevertheless knowledge. Indeed, Aristotle declares intuitive knowledge to be more accurate than scientific knowledge, to be the origina-
tive source of scientific knowledge.

Aristotle articulates a mode of conscious reasoning, dialectic, to aid intuitive knowledge. In dialectical reasoning the search for first principles begins with generally accepted opinions, the best readily available abstractions from experience. Such opinions are then clar-
ified by critical debate. Dialectical reasoning cannot conclusively establish first principles with certainty, but the process does aid nous's "sight." The ability to raise difficulties on both sides makes it easier to detect truth and falsehood about the points that arise.

In sum, Aristotle conceived the notion that although the various sciences explore different subjects, they are structurally and methodologically similar. A science is composed of first principles of the particular subject matter, established by intuition aided by dialectical reasoning, and of conclusions about the subject deduced from the first principles through apodictic syllogizing. To be learned in a particular field requires mastery of these tools.

C. The Limits of Knowledge

Aristotle also held that the knowledge available through science is limited. Since nous "sees" the form or the immutable essence of things, and demonstration seeks to elaborate upon what nous sees, knowledge is involved with the cognition of forms and statements about them. Sensible phenomena, therefore, are not knowable. Because they are subject to chance, statements about them cannot be certain. Because they are imperfect realizations of form, some of their attributes have no essence that can be known; thus, there is no knowable cause to account for their existence. In other words, types, classes of events, and things are knowable; actual, perceptible phenomena are not. To Aristotle, knowledge is of universals, not of particulars.

The scope of scientific knowledge is also limited by the fact that nous "sees" the universal only after repeated exposure to the particulars in which it may be partially apparent. When development

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128 The Topics, in general, is a statement of the rules and techniques of this kind of debate. See, e.g., Aristotle, Topics, supra note 122, bk. I, chs. 10, 14.
129 Aristotle, Topics, supra note 122, bk. I, ch. 2; see R. Ackerman, supra note 117, at 59; J. Randall, Aristotle, supra note 108, at 43-44; J. E. Zeller, supra note 109, at 235-58. Dialectical reasoning had other important uses. See text accompanying note 151 infra.
130 See text accompanying notes 117-29 supra. Randall provides a brief, useful summary of Aristotle's concept of science. See J. Randall, Aristotle, supra note 108, at 35-36. Randall explains that, although first principles have logical priority, they are the last step in actual inquiry. Syllogisms, therefore, are not methods of investigation but of proof. See id. at 41-42.
131 Geometry, the most successful science of Aristotle's day, is his model of a mature body of knowledge. See, e.g., J. Randall, Aristotle, supra note 108, at 34-35; J. E. Zeller, supra note 109, at 211-12.
133 See id. bk. III, ch. 6, bk. VII, ch. 15.
134 Id. bk. II, ch. 6. See also R. Ackerman, supra note 117, at 71-72; J. E. Zeller, supra note 109, at 221, 334-36.
towards nature’s ends is seriously and continuously hampered, *nous* cannot “see.” Consequently, first principles may not be able to be established, demonstration may proceed from uncertainty, and an entire subject may be unknowable. To illustrate, geometry, which involves concepts without matter to resist their forms, is completely knowable; ethics, a subject of change and variety, is knowable only “roughly and in outlines”; but history, in which chance intrudes mercilessly, is wholly unknowable. Thus, a life devoted solely to knowledge is a contemplative life devoted to understanding the immutable. Knowledge, for Aristotle, is an insufficient basis for decisions and actions in the world of unknowable particulars.

**D. Practical Knowledge**

Aristotle’s conclusions concerning the nature and limits of knowledge are not unique in Greek philosophy; however, his response is original and important. After reaching conclusions similar to Aristotle’s, some philosophers had confined philosophical speculation to the pursuit of knowledge. In contrast, others, such as I. socrates, had excluded knowledge from philosophy on the ground that it was useless except for such things as occupying the young and keeping them from mischief. For Aristotle, philosophy encompassed both the pursuit of knowledge and activity. Accordingly, Aristotle distinguished between theoretical philosophy, which seeks truth and understanding that result in theoretical knowledge, and practical philosophy, which seeks to determine correct actions that result in practical knowledge. Like theoretical knowledge, a body of practical knowledge, when fully developed, forms a practical science structurally comprised of first principles determined by *nous* aided by dialectic

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139 Id. at 179-80.

140 See, e.g., Aristotle, Metaphysics, supra note 109, bk. II, ch. 1.

141 Aristotle described three branches of philosophy: theoretical, practical, and productive. See, e.g., Aristotle, Metaphysics, supra note 109, bk. VI, ch. 1, bk. XI, ch. 7. An analysis of the productive branch is not essential to the thesis of this Article and will not be pursued. Aristotle apparently considered logic to be an introduction to the study of these branches of philosophy. See id. bk. IV, ch. 3.

142 Aristotle, it has been suggested, describes the practical branch of philosophy as knowledge only because he uses the term “knowledge” less rigorously than his predecessors. See 1 E. Zeller, supra note 109, at 165-69.
and subsidiary conclusions drawn from the first principles. Theoretical knowledge, however, involves cognition of forms and statements about them; practical knowledge, although frequently involving that, also always involves cognition of particulars and statements about them. For Aristotle, practical knowledge, therefore, is at best comprised of probable truths. In determining correct actions, certainty is impossible because the complex fluctuation of particulars in human affairs precludes intuiting precise first principles. Moreover, actions can always miscarry because particulars are subject to chance.

Since Aristotle thought it foolish to demand exact reasoning about subjects which admit of only inexact conclusions, he recognizes that reasoning in practical inquiries must be less rigorous than in theoretical inquiries. In practical inquiry, for instance, first principles are sufficient even if nous "recognizes" them as only probable truths; subsidiary conclusions are not only derived by looser modes of syllogism than the apodictic, but even reasoning by example or analogy is acceptable. Indeed, since the apodictic syllogism can be applied solely to universals, and since the conclusions of practical knowledge concern particulars, the conclusions of practical knowledge can never be demonstrated. Accordingly, for Aristotle, practical knowledge and practical science are a matter of persuasion, not proof. Dialectic is, as a result, the sole organon of practical knowledge, and intuitive reason (nous) establishes its subsidiary conclusions as well as its first principles.

Practical knowledge is further distinguished from theoretical knowledge by its greater dependence on experience. Experience is, according to Aristotle, necessary to theoretical knowledge because all

143 See text accompanying notes 117-31 supra.
144 Aristotle often distinguishes between inquiries directed toward theoretical reason and those directed toward practical reason. See, e.g., Aristotle, De Anima, bk. III, ch. 3, in Basic Works of Aristotle 533 (R. McKeon ed. 1941); Aristotle, Ethics, supra note 137, bk. VI, ch. 2. For general discussions of this distinction, see J. Cooper, Reason and Human Good in Aristotle 1-89 (1975); R. Milo, Aristotle on Practical Knowledge and Weakness of the Will (1969); E. Zeller, supra note 109, at 181; 2 id. at 136. Practical knowledge might, for example, involve no more than the application of precise theoretical knowledge to particular situations, but frequently theoretical knowledge is imprecise and the task of determining correct action is more difficult.
145 See Aristotle, Ethics, supra note 137, bk. I, ch. 3.
147 Aristotle, Ethics, supra note 137, bk. I, ch. 3.
148 Aristotle often permits the use of possibility and probability arguments. See, e.g., Aristotle, Metaphysics, supra note 109, bk. XII, ch. 8; E. Zeller, supra note 109, at 167-69.
149 See text accompanying notes 121-22 supra.
knowledge ultimately is derived from sense perception. Nonetheless, practical knowledge is more continuously dependent upon experience. As Aristotle explains, since life is forever presenting new particulars, experience is continually called upon to establish, through nous, a “familiarity” with them. Furthermore, experience plays yet another prominent role in practical knowledge because practical knowledge incorporates the pursuit of correct ends as well as the selection of correct means. Since for Aristotle the pursuit of ends flows from both desire and reasoning, practical knowledge is as dependent on correct desire as on correct reasoning. Correct desire, however, is not innate, and experience, in the form of education and communal praise or censure, has the most influence on channeling desire toward correct ends. In sum, Aristotle demonstrates the augmented value of experience to practical inquiry in a number of ways, but none more tellingly than when he observes: “[w]hile young men become geometricians or mathematicians, . . . a young man of practical wisdom cannot be found. The cause is that wisdom is concerned not only with universals but with particulars, which become familiar from experience . . . [and] it is length of time that gives experience. . . .”

Opinion also occupies a more prominent position in the conception of practical than theoretical knowledge. In classical Greek thought, opinions are beliefs which are not sufficiently certain or immutable to be entitled to the appellation “knowledge.” Although opinions run the gamut from ignorant fancy to probability, Aristotle deeply respected opinions that were widely held or held by experienced and intelligent people, and he treated them as generally reliable intuitive abstractions from experience. Indeed, it is this respect that accounts for their role as starting points in dialectic’s search for first principles of theoretical science. While theoretical inquiry moves beyond opinion to absolute truth, practical inquiry does not. Consequently, practical knowledge is merely systematically scrutinized informed opinion. Moreover, in practical inquiry, the continuous role of

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152 See Aristotle, Ethics, supra note 137, bk. VI, ch. 8; R. Milo, supra note 144, at 62.
153 See Aristotle, Ethics, supra note 137, bk. VI; J. Cooper, supra note 144, at 60-64; R. Milo, supra note 144, at 36-37, 64-65, 82-83; J. Randall, Aristotle, supra note 108, at 72-73, 267-68.
154 Aristotle, Ethics, supra note 137, bk. VI, ch. 8. See also Aristotle, Metaphysics, supra note 109, bk. I, ch. 1. Similarly, the differing need for experience accounts for the difference in age at which people are adept in the various theoretical sciences. Aristotle, Ethics, supra, bk. VI, ch. 8.
156 See Aristotle, Topics, supra note 122, bk. I, ch. 1. Modern commentators consider Aristotle’s respect for these opinions as one of the fundamental flaws of his epistemology. See, e.g., J. Randall, Aristotle, supra note 108, at 56-58.
157 See text accompanying notes 127-28 supra.
intuitive insight into experience further tends to minimize the benefits of systematic inquiry. Thus, informed opinion and practical knowledge are often conflated, and Aristotle suggests their near equivalence as well as their mutual underpinning in experience when he advises "attend[ing] to the undemonstrated sayings and opinions of experience and older people . . . not less than to demonstrations; for because experience has given them an eye they see aright."\(^{15}\)

III

THE ARISTOTELIAN BASIS OF CLASSICAL PREMODERN LAW

A close examination of the precepts and theories put forth by St. German, Fortescue, and Coke\(^{16}\) will demonstrate that classical premodern jurisprudence is rooted firmly in Aristotelian concepts.\(^{16}\) The grounds from which most English laws were derived, i.e., right reason, custom, and the concomitant principle, equity, are unmistakably Aristotelian.\(^{16}\)

The concept of right reason\(^ {16}\) as expressed in classical premodern jurisprudence resembles an Aristotelian theoretical science; it is theoretical knowledge of the subject of justice. Like theoretical science, right reason's starting point is a mental faculty that intuitively recognizes the essence of the subject under consideration; therefore, its determinations are immutably true. But neither Aristotelian theoretical science nor right reason can determine actual, particular instances, and given the diversity of human affairs, their dictates are frequently mere generalities.\(^{16}\)

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\(^{15}\) Aristotle, Ethics, supra note 137, bk. VI, ch. 11.

\(^{16}\) See Section I supra.

\(^{16}\) Aristotelian epistemology did not strictly predetermine its content but rather provided a common base of authority from which jurists could develop and defend certain conclusions they wished to reach for political ends.

Fortescue, for instance, feared that civil law would replace England's common law system. See J. Dawson, The Oracles of the Law 143-47, 183-89 (1968). De Laudibus was his response to that threat. See Fortescue, De Laudibus, supra note 66, at 39-43. St. German wanted to assist Henry VIII's goal of establishing secular authority over the temporal rights and privileges of the church and clergy. Thus, he emphasized law could only be established or changed by he who had received such authority from God—the King and his Parliament. C. St. German, supra note 15, at 73. Finally, Coke faced the Stuart monarchy's claim to absolute power. Thus, he exalted common law's artificial reason to the natural reason of any individual group. See text accompanying notes 96-101 supra.

\(^{16}\) Most laws are derivative of these grounds. Revelation was, of course, a non-Aristotelian conception. Still, rules that were given by revelation were elaborated and reasoned from by Aristotelian modes of argument. For discussion of statutes, see note 197 infra.

\(^{16}\) For a succinct analysis of the basic concept of right reason, see R. Hoopes, supra note 103, at 1-6.

\(^{16}\) Compare text accompanying notes 132-37 supra (limits of knowledge for Aristotle) with text accompanying notes 43-45 supra (St. German's description of limits of right reason).
These similarities are not accidental. Admittedly, Aristotle has not, in the main, found justice suitable for theoretical inquiry. To Aristotle, justice is a practical science studied for activity, not understanding. Furthermore, social arrangements exhibit such variety and fluctuation that Aristotle finds it is generally beyond the power of *nous* to determine the truth about them. Accordingly, although Aristotle recognizes that some things are by nature just and therefore immutable, he treats justice as a variable, relative notion. Aristotle lived in a society comprised of numerous city-states with diverse mores and ethics, and, as a result, his conclusions were attuned to a culture that was not concerned with designating one set of social arrangements as correct and all others as wrong.

The rise of large Western empires and the attendant problems of cohesion resulted in philosophical doctrines teaching the unity of man and uniform modes of conduct. Stoic philosophy, in response, broadened the power of *nous* when applied to human affairs, and thus for the Stoics portions of justice and law, as well as other aspects of man's moral life, could be determined absolutely and universally. Due to the assimilation by the major church and scholastic philosophers of the notion that justice and law could be traced to a universal source, this more powerful *nous*, first termed synderesis by the Stoics, became a staple of Western epistemology. It underlay medieval moral philosophy, of which natural law thinking was but a part.

While right reason is a theoretical science, the common law is an Aristotelian practical science. The premodern lawyers' view of the common law as void if contrary to revelation or right reason, and as subject to judicial, legislative, or equitable redetermination, accords with the nature of the conclusions of practical science as probable or usual truths. Indeed, St. German expressly describes human laws as conclusions which, while merely probable, seem to be true, and

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164 Aristotle's treatment of justice is mainly contained in Aristotle, Ethics, supra note 137, bk. V.
166 See J. Owens, supra note 138, at 390-91; B. Russell, supra note 126, at 253-54.
167 See H. Cairns, supra note 106, at 135-50 (discussing development of Stoic conception of law and justice).
172 C. St. German, supra note 15, at 27.
Fortescue quaintly states that customary law is not "as great as truth." The jurists not only characterize the common law's fundamental customary rules and maxims as first principles which, as in every Aristotelian science, should be accepted without question, but also then praise them as the "conclusions of reason." In other words, as the first principles of a practical science, they are the conclusions of intuitive practical reason.

The concept of intuitive reason and its importance in practical science clarify other aspects of the classical premodern common law. Since practical science is dependent upon intuitive reason not only for its first principles but also for the elaboration and application of those principles in actual controversies, demonstration, with its consequent systemization, is not necessary. Thus, systemization is irrelevant to a practical science's validity. Accordingly, the jurists are not concerned by, and Coke nearly glorifies, the common law's unsystematic structure. So, too, the jurists stress the long experience required to learn the common law because experience is the basis of intuitive reason. As Aristotle had written, experience, the product of time, is the "eye" that enables the practical scientist to see aright.

Aristotle's thought, as changed through centuries of commentary and interpretation, underlies the important consequences Fortescue and Coke draw from the common law's immemorial antiquity. Aristotle believed that most laws are matters of convention and opinion rather than immutable truth. Consequently, general assent and obedience to a community's laws, necessary for the stability of a lasting form of government, are primarily due to habit. New laws lack this psychological basis; thus, old laws are preferable.

Stoic philosophy, with its preference for grounding laws in premises other than habit, modified Aristotelian thought and developed

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173 J. Fortescue, De Natura, supra note 65, at 224.
175 See text accompanying notes 147-51 supra.
176 See, e.g., J. Fortescue, De Laudibus, supra note 66, at 39, 41.
177 See 2 E. Coke, Reports, supra note 81, pt. IV, at ix-xi.
179 See text accompanying notes 152-58 supra.
180 See text accompanying notes 164-67 supra.
181 See Aristotle, Politics, bk. II, ch. 8, in Basic Works of Aristotle 1127 (R. McKeon ed. 1941) [hereinafter Aristotle, Politics].
182 See id. bk. III, ch. 16; H. Cairns, supra note 106, at 114 (discussing custom's superiority). For similar reasons, custom is preferable to statutes as a basis of law.
another rationale for preferring old laws:183 the wisdom contained in laws not established by synderesis—and most laws were not so established—grows by the accretion of experience.184 Thus, old laws are wiser and closer to immutability than new laws. Conversely, longevity is a measure of the law's wisdom, for, as Professor Pocock states, "more men, in more years and more situations, have testified silently in their favor; there is a greater weight of experience, a greater weight of presumption, impelling us to believe them satisfactory."185 The premodern era not only inherited this mode of thought but also generalized it; the past seemed a matchless aggregate of experience and wisdom in many areas of learning.186

This intellectual milieu, of which Fortescue was clearly aware,187 directly explains his remark that the customary laws of England were the best because they were the most ancient.188 It also illuminates Coke's description of the common law as an "artificial perfection of reason"189 which has through long experience achieved such perfection that no living man or group of men could improve upon it through, for example, statutory amendment.190 In general, the common law's congruence with Aristotelian practical science also explains how educated men such as Coke could praise the common law's

185 J. Pocock, The Machiavellian Moment 16 (1975) (discussing whether laws of England were older than laws of Venice) [hereinafter J. Pocock, Machiavellian]. Professor Pocock discusses at length the Aristotelian mode of thought within which English customary law functioned. Id. at 9-30. He, however, neither addresses the entire system of English laws nor draws upon Aristotle's distinction between theoretical and practical science. Nevertheless, I am indebted to Professor Pocock's analysis, and it deserves careful attention.
186 Professor Howell's study of logic and rhetoric in sixteenth and seventeenth century England aptly illustrates the importance the wisdom of the past held for men of the period. See W. Howell, supra note 103 (discussing imitation and influence of classical, scholastic, and Ramistic modes, among others, on logic and rhetoric during the English Renaissance). In his study of premodern logic, he describes invention in scholastic logic as occurring when a learned individual "[connects] his mind with the traditional wisdom of his race... [and draws] a flow of ideas from the general store into himself." Id. at 24.
187 Fortescue uses the concept aggregation of wisdom. See, e.g., J. Fortescue, De Laudibus, supra note 66, at 15-17, 41.
188 Id. at 39-41; see text accompanying note 78 supra. See also J. Pocock, Machiavellian, supra note 185, at 9-30.
189 E. Coke, Upon Littleton, supra note 16, bk. II, ch. 6, § 138, at 97b. Coke may use the term "artificial," suggesting that one's intellect can acquire but not create legal reason, but because Aristotle conceived the natural as an entity's movement from within itself and the artificial as movement imposed from without. See T. Gilbey, The Political Thought of Thomas Aquinas 109 (1958).
190 See 2 E. Coke, Reports, supra note 81, pt. III at v-vi.
unsystematic, amendable mass of ancient rules as "summa ratio," "nothing else but reason," and "wise."¹⁹¹

Equity, too, rests upon an Aristotelian foundation. To both St. German and his contemporaries, the purpose of a legal system is to do justice between the parties.¹⁹² Accordingly, St. German defines the basis of equity:

[T]hat syth the dedes and actes of men, for whiche lawes ben ordayned happen in dyvers maners insynytlye. It is not possyble to make any generall rewle of the lawe but that it shall fayle in some case. And therfore makers of lawes take hede to suche thynges as may often come and not to euerie particuler case for they coulde not though they wolde And therfore to folowe the wordes of the lawe were in some case both agaynst Iustyce & the commonwelth: wherefore in some cases it is good and even necessary to leue the wordes of the lawe, & to followe that reason and Iustyce requyreth & to that intent equytie is ordayned.¹⁹³

These remarks are not only premised upon Aristotle’s view that absolutely correct statements could be made only about forms and not about actual occurrences, but they are also little more than a restatement of Aristotle’s description of equity in his Nicomachean Ethics:

[A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start . . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.¹⁹⁴

St. German is not unique in his adoption of Aristotle’s conception. Even before St. German wrote his treatise, Aristotle’s notion of equity had passed into Western legal thought through the work of St. Thomas Aquinas.¹⁹⁵ St. German’s treatise enjoyed ready accep-

¹⁹¹ See E. Coke, Upon Littleton, supra note 16, bk. II, ch. 6, § 138, at 97b. For a related, but essentially different, analysis of Coke’s jurisprudence, see Professor Gray’s thoughtful analysis in Gray, Reason Authority and Imagination: The Jurisprudence of Sir Edward Coke, in From Puritanism to the Enlightenment 25 (P. Zagorin ed. 1979).

¹⁹² See A Discourse Upon the Exposition & Understanding of Statutes 3, 8-9, 54-55 (S. Thorne ed. 1942) (collection of remarks of judges and serjeants on statutory interpretation).

¹⁹³ C. St. German, supra note 15, at 97.

¹⁹⁴ Aristotle, Ethics, supra note 137, bk. V., ch. 10.

tance, in part, because it expressed familiar and conventional notions concerning the relationship between law and equity.

Finally, the legal system as a whole was conceived as an Aristotelian science. Fortescue, the only jurist to comment on the whole system as well as on its parts, describes English law by analogy to Aristotle’s notions of physics. According to Fortescue, the grounds of the law are the elements from which the laws originate, a process similar to the manner in which natural things result from form and matter. Each of the grounds contains fundamental rules, principles, which:

[a]re not known by force of argument nor by logical demonstrations, but, they are acquired, as it is taught in the second book of the [Aristotle’s] Posteriora, by induction through the senses and the memory. Wherefore, Aristotle says in the first book of the Physics that Principles do not proceed out of other things nor out of one another, but other things proceed out of them. Hence in the first book of the Topica, it is written that Any principle is its own ground for holding it. For that reason, Aristotle says, There is no arguing with those who deny principles, because, as it is written in the sixth book of the Ethics, There is no rational ground for principles. Therefore, whosoever are anxious to understand any branch of knowledge must learn thoroughly its principles. For out of them are discovered the final causes, to which one is brought by process of reasoning upon a knowledge of principles.

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106 See 5 W. Holdsworth, supra note 29, at 266-69.
107 See text accompanying notes 60-63 supra. It should be noted that the jurisprudential underpinnings of statutes have not been discussed in the text, because the common law jurists directed such minimal discussion to statutes that one cannot determine their jurisprudential conceptions of statutes. Professor Pocock, however, discusses the medieval view of statutes and their relationship to customary law in a manner that makes them seem but another way to determine law by Aristotelian practical science: statutes applied to situations in which insufficient experience prevented the crystallization of custom. See J. Pocock, Machiavellian, supra note 185, at 17-20, 23-28. It may be added that, perhaps, statutes corrected the judges' deductions from customs—and not the customs themselves—when it was felt that the judges had reasoned incorrectly. Note that Fortescue describes statutes as manifesting “wisdom,” see text accompanying note 74 supra, and not as reflecting consent of the governed or will of the sovereign. In this regard, the sixteenth century movement to ground statutes in consent is a significant and early departure from Aristotelian-based jurisprudence. See, e.g., Wimbish v. Tailbois, 75 Eng. Rep. 63, 94-95 (C.B. 1547) (“when a gift is made by Parliament, . . . every person in the realm is privy to it, and assents to it.”); C. Friedrich, supra note 106, at 67-76 (arguing law rested on popular consent).
109 Id. at 21-23.
THE DECLINE OF ARISTOTELIAN EPISTEMOLOGY
AND ITS EFFECT ON COMMON LAW THOUGHT

During the seventeenth century the Western intellectual tradition made a break with its Aristotelian foundations that is today described as the scientific revolution, a revolution that changed conceptions about the purpose, possibility, criteria, scope, and method of knowledge. The new conceptions transformed all branches of inquiry, the moral sciences as well as the physical. Changes in methodology were some of the most important facets of this epistemological transformation. Seventeenth century savants presumed to overturn fundamental conclusions accumulated and agreed upon by their predecessors. They argued that the philosophers in the previous two millennia had accomplished so little because they had followed a deficient method. Accordingly, philosophers at the time of the scientific revolution repeatedly and at length decried their inherited Aristotelian organon and elaborated its replacement. These discussions were given preeminent position because the validity of all subsequent speculation depended upon method.

During the seventeenth century, philosophers elaborated a variety of new methodologies. But despite fundamentally disparate facets and implications, they had a common core: analysis and synthesis. In brief, the new method was to resolve the subject under investigation

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500 For a discussion of the dominance of the Aristotelian tradition up to the seventeenth century, see N. Gilbert, supra note 103, at 3-38, 178-79, 221; W. Howell, supra note 103, at 233-37; J. Randall, Modern Mind, supra note 103, at 211-17. For a consideration of the scientific revolution as an epistemological transformation, see T. Kuhn, The Copernican Revolution (1957); J. Randall, Modern Mind, supra note 103, at 218-71; B. Russell, supra note 126, at 525-40. The dominance and decline of Aristotelianism may be illustrated by comparing medieval references to Aristotle as "the Philosopher" with Bacon's claim that "Aristotle corrupted natural philosophy by logic," F. Bacon, The Advancement of Learning and Novum Organon 327 (1900) (London 1605), and Hobbes' remark that Aristotle was "the worst teacher that ever was," see L. Strauss, The Political Philosophy of Hobbes 35 (E. Sinclair trans. 1936) (quoting Hobbes).

501 "Moral sciences" was the term traditionally used for such studies as ethics, politics, and law that are today regarded as part of the social sciences.

502 For a succinct discussion of changes in methods of inquiry, see B. Wiley, The Seventeenth Century Background 1-30 (1933).

503 See J. Randall, Modern Mind, supra note 103, at 219-24, 227-44.

504 See id. at 219-23.

505 See id. at 216-17.

into its parts and then show how the parts composed the whole. Stated another way, phenomena were reduced to first principles from which new phenomena were then deduced. Obviously, the validity of results obtained by this method entirely depended upon the validity of the first principles. Significantly, empirical research was not the basis of first principles. Experiments might suggest hypotheses and test conclusions, but, ironically, the most famous discoveries of the early scientific revolution, e.g., that the earth orbited the sun and that a body in motion tends to stay in motion, illustrated the fallibility of the senses and experience. Even in the physical sciences, acceptance of the notion that inferences from a properly conducted course of empirical research were truths rather than hypotheses dates from the mid-eighteenth century, and a full presentation of the validity of experimental science did not appear until John Stuart Mill’s Logic in 1848. Rather, intuition remained the guarantor of the certainty of first principles, and the model body of knowledge remained geometry wherein the entire science was deduced from a few axioms. Geometric axioms were obviously suggested by experience, but experience did not establish their certainty since points and lines were entirely nonsensory. Geometric axioms were still known to be true by intuition. Hence, scientists turned to mathematics and not experiment to establish knowledge, rather than hypotheses, about nature. In turn, Newton’s mathematical proof that Kepler’s inductive laws of planetary motion resulted from universal gravitation—the paradigmatic scientific achievement of the era—gave great force to this conception. Indeed, no experimental law was considered valid until it fit into the general deductive system. Thus, as for Aristotle, the ideal body of knowledge was universal, infallible, deductive, and ultimately derived from a few intuitively valid axioms.

207 For a brief discussion of Galileo’s use of this method, see J. Randall, Modern Mind, supra note 103, at 221.
208 See id. at 219-22, 262-66; J. Watkins, supra note 206, at 32-42. The moral sciences remained nonempirical even longer. See J. Randall, Modern Mind, supra note 103, at 310-11, 463-64 (excepting the work of Montesquieu); Stein, Adam Smith’s Jurisprudence—Between Morality and Economics, 64 Cornell L. Rev. 621, 625-26 (1979).
209 See J. Randall, Modern Mind, supra note 103, at 262.
210 See id. at 337-42.
211 See id. at 257-62, 266-73.
212 See id. at 255-57.
213 See B. Russell, supra note 126, at 539. For a discussion of Newton’s contribution, see J. Randall, Modern Mind, supra note 103, at 253-62.
214 J. Randall, Modern Mind, supra note 103, at 261.
215 See B. Russell, supra note 126, at 195-202; J. Watkins, supra note 206, at 33-34, 39-40. An illustration that intuition was still the ultimate validating principle of knowledge was renewed
Yet despite its apparent similarities to Aristotelian concepts, the analytical-synthetical method fashioned during the seventeenth century was fundamentally different, and its application to the moral sciences substantially transformed not only their content but also their quality and structure. Differences followed, for example, from the different metaphysical context within which the two methods functioned. Aristotle's teleology led him to divide substance into matter and form, to believe that matter resisted its change into form, and, therefore, to conclude that while the theoretical sciences could determine truth, the practical sciences could determine only probabilities. This meant that the moral sciences, as a branch of practical science, were inherently variable, fallible, and inexact. In contrast, seventeenth century philosophers viewed the universe mechanically, did not oppose matter and form, and consequently, lacking any reason to distinguish between them, held all subjects equally knowable. Henceforth, truths about the planets and about man were equally accessible; the moral sciences were inherently as universal, infallible, and exact as the physical sciences. Thus, the quality of the moral sciences was transformed.

The structure of the moral sciences was also altered. Aristotle permitted inexact modes of reasoning in the practical sciences because certainty could not be attained. Practical science began with opinion, proceeded by techniques of persuasion, and reached conclusions by intuition. Consequently, the practical sciences were not expected to attain the systematic, hierarchical structure of geometry. But if moral sciences were inherently as exact as physical science, there was no reason not to impose the same standards of exactness on its modes of reasoning. Accordingly, seventeenth century philosophers began...
approaching moral inquiries like geometry. Spinoza, for example, even entitled his treatise *Ethics demonstrated in the Geometrical Manner* and declared: “I shall consider human actions and desires in exactly the same manner as though I were concerned with lines, planes and solids.” And Hobbes, who was the first to employ this mathematical method in moral philosophy, regarded his contribution to that field as the origin of a science and as the equivalent of Copernicus’s contributions in astronomy, Galileo’s in physics, and Harvey’s in medicine. Thus, moral philosophy assumed the structure of geometry: a few intuitively true axioms were demonstratively elaborated to a multitude of conclusions.

Obviously, the common law as described by Fortescue, St. German, and Coke did not conform to the new criteria of rational inquiry. That it did not was forcefully and repeatedly pointed out by Hobbes. Hobbes’ critique, however, had political as well as methodological bases. For the common law theoretician, law is a practical science; it is ultimately opinion rather than knowledge, and opinions which withstand the test of time are more likely to be inherently wise than even the present King’s opinion. For instance, Coke’s description of the common law as artificial reason cognizable only after long study and experience not only summarizes this approach but also is used to justify the maxim that the King rules under God and law. In other words, using Aristotelian epistemology, common law thought concluded that England was a constitutional monarchy. Hobbes, in contrast, uses his geometrical (analytical-synthetical) method to demonstrate that the English sovereign should be absolute, entirely unlimited by law. Law to Hobbes is reason, but it is the reason of the sovereign, i.e., his will.

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224 Id. at 247 (quoting Spinoza).
226 See J. Watkins, supra note 206, at 42-54.
227 See section 1 supra.
229 Coke established this by concluding that the king’s or anyone’s natural reason was inferior to the common law’s artificial reason. Prohibition Del Roi, 77 Eng. Rep. 1342 (1609).
230 Id. at 1343.
231 J. Pocock, Ancient Constitution, supra note 76, at 30-56.
To Hobbes, this disparity of conclusions is crucial. He had turned to political philosophy as England was dissolving into civil war, and his goal was to determine the ideal political order, one in which such evils as civil conflict would not occur.233 Given that men relentlessly strive for power,234 argues Hobbes, the only way to prevent continual civil strife—indeed, the only way to maintain civilized society—is to institute a power sufficient to compel peace: the absolute sovereign.235

To Hobbes, the conception of law as artificial reason acquired through experience and study could lead to conflicting and erroneous laws, thus resulting in discord within the commonwealth.236 Accordingly, Hobbes attacks this conception.237 First, Hobbes describes reason as a technique, common to all people, used to determine the consequences of ideas directly from a few basic axioms.238 Since reason is common to all, Hobbes argues, Coke’s claim that by long study judges acquire an artificial reason does not mean that they acquired a different reason because a judge’s process of reasoning is subject to the same strengths and infirmities as other men’s.239 Furthermore, due to its methodology, the common law is not knowledge but opinion, and opinion is at best probable truth.240 Consequently, as would be true in any other case of reasoning from opinion, Hobbes warns that the judge’s “long study may encrease and confirm erroneous Sentences: and where men build on false grounds, the more they build, the greater is the ruine.”241

Hobbes concludes that if the judges’ artificial reason were the law, the law would be incapable of fulfilling its most basic purpose, to resolve controversy and maintain civil peace.242 Coke’s method sought to determine the rules of right and wrong solely by rational discourse.243 Yet, according to Hobbes, men’s self-interest is so complete,
especially in matters of "right and profit," that "as oft as reason is against a man, so oft will a man be against reason." Therefore, since opinions about the rules of right and wrong, even among the judges, are and would continue to be in conflict, interminable strife is inevitable, and, because rational discourse must fail, physical force will succeed. However, recognizing the sovereign as the prime authority and interpreter of law in the commonwealth, Hobbes argues, would establish definite rules. Furthermore, the sovereign could both impose rules and settle subsequent controversies with respect to their meaning or application and could compel acquiescence through threat of punishment. As Hobbes points out, some might assume that unjust consequences could flow from such unlimited power, but the consequence of not placing such power in the Sovereign is the much greater evil of civil war. Hobbes finds that a concept of law based on authority with the legal certainty it promises is preferable to a concept of law grounded on accumulated wisdom, experience, and diverse opinions.

Thus, Hobbes maintains that the common law is not wise, and, in any event, that wisdom is not the law. To be sure, as Professor Hexter has observed Hobbes’ writing on this subject is more polemical than thorough. Yet though Hobbes writes with greater concern for the specific political implications of his analysis than for their theoretical completeness, the larger issues would be readily apparent to one familiar with Hobbes’ general philosophy—and Hobbes was much read by his contemporaries. That Hobbes’ analysis was understood in its true depth is evidenced by the response it drew from Matthew Hale, the Chief Justice of England.

245 T. Hobbes, Leviathan, supra note 228, at 316.
246 Id. at 316-29.
247 See id. at 216-17, 234, 322-23.
248 See id. at 353-63.
249 Id. at 260.
252 Hexter, supra note 225, at 471-73.
In that response, Hale rejects both Hobbes' general methodology and his specific conclusions about the common law. Hale, structuring a thoroughly traditional Aristotelian argument, states that due to the variety and complexity of human affairs a method of analysis based on experience, rather than Hobbes' geometric method, is appropriate to the moral sciences. He also argues the traditional position that, due to its methodology, the common law is both wise and certain. Yet when compared with the jurisprudence of his predecessors, Hale's response illustrates Professor Mintz's dictum that "Hobbes exerted a subtle but powerful influence on his critics."

Hale's argument that the common law is both wise and certain involves two departures from tradition that mark a turning point in common law thought. First, Hale shifts the source of the common law's certainty. Previously, certainty arose from judges' unique studies and experience, their long deliberation and debate about disputed points, and their divinely "open and enlarged" understanding which gave them an "artificial reason" with which they could determine the correct result from the mass of sources that evidenced the law. To Hale, however, the judges' special competence, though necessary for legal certainty, does not fully account for it. Accepting Hobbes' analysis, Hale states that even after long study, judicial reasoning processes are subject to human frailties; judges are as likely as anyone else to reason erroneously on difficult or emotional subjects. Legal certainty arises, therefore, from the common law's rules being so numerous and concrete that they are readily applicable to most situations. Long study, Hale notes, is necessary to acquire knowledge of the multitude of rules, but once learned, their application is straightforward. Thus, for Hale, the nature of the common law's rules, not a special process of judicial reasoning, creates certainty.

Hale's altered conception of the source of legal certainty is important because it forms the conceptual basis of his other departure from

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255 M. Hale, supra note 254, at 503-05. On the Aristotelian nature of Hale's argument, note that he even refers to the disjunction between "forms" or "essences" and the "consequences of Properties." See id. at 501.
256 Id. at 504-06.
257 S. Mintz, supra note 253, at 149.
258 See 1 E. Coke, Reports, supra note 81, pt. I, at ii-v; id. pt. II, at x-xiii; 2 id. pt. IV, at ii-xvi. To Coke, given the numerous sources and complexity of premodern law, the agreement on certain legal results by so many judges throughout such a great period of time seemed nothing less than miraculous. See 2 id. pt. IV, at xiv.
259 M. Hale, supra note 254, at 503, 505-06.
260 Id. at 503-04.
261 Id. at 505-06.
262 Id. at 503, 506.
tradition. Whether affected by Hobbes or not, Hale, like Hobbes, gives certainty a more prominent position in his conception of law. In the jurisprudence of Fortescue, St. German, and Coke, wisdom is the chief merit and value of the common law; they mention certainty, if at all, only in passing. Hale, in contrast, emphasizes the importance of certainty. He observes that a set of “particular and Certaine” rules both allows citizens to know how to live and possess, and reduces judges’ opportunity to disguise honestly mistaken judgments or corrupt decisions with rationalization. Indeed, Hale places so high a value on the element of certainty in a legal system that, ironically, he refuses to apply Hobbes’ geometric method to law because reasoning from common notions of justice to particular cases is subject to great “instability, uncertaintie and varietie” of opinion. Furthermore, for Hale, the need for certainty not only justifies the occasional, seemingly inequitable results reached under certain rules of law, but also explains the authoritativeness of ancient rules. Fortescue, in sharp contrast to Hale, had attempted to solve the problem of the authority of ancient rules by declaring that a reason for them might be discovered through study and diligence. St. German indicated merely that such rules were authoritative if they were immemorially old.

Yet Hale does not conclude that legal certainty is preferable to wisdom. He expresses no preference between them because the best legal system is the common law which is both certain and wise. Indeed, for Hale, the common law achieves these goals in a way that eliminates the chance of their conflict; the same numerous, concrete rules that generate the common law’s certainty are also ancient rules that, by traditional arguments, contain its wisdom. Thus Hale’s
common law is uniquely able to serve two masters: certainty and wisdom.

Hale's thought, however, does not precisely foreshadow the conception of law that developed after him. During the next century the value of certainty gained increasing importance because later seventeenth century society demanded predictable impartial justice. The increased importance of legal certainty, however, does not explain the decline of wisdom as a central component of a system of law. In essence, the value of wisdom was displaced because the continuing epistemological revolution made it increasingly difficult to claim that the common law, operating as an Aristotelian practical science, was wise. Hale, for instance, was able to maintain that the old methodology was proper only because the new method had not yet been firmly established in the moral sciences.

Within a generation, this was to change. In 1690, John Locke joined Hobbes in founding moral science on the geometric method. In his *Essay Concerning Human Understanding*, Locke observes that ideas are the sole object of the mind's reasoning. Since a physical object could always have undiscovered qualities, the correspondence between a physical object and the idea of it is never guaranteed. Accordingly, there is no certainty that the determinations of physical science accurately correspond to the objects themselves. The objects of mathematical science, however, have no physical reality, but are ideas. In mathematics, therefore, there is identity of the object and the idea of the object. Consequently, the conclusions of mathematics are unquestionable truths about its subject matter. Moral science is like mathematics in that its subject matter is ideas. Adultery, for example, is not a physical object; neither is parricide. They are terms corresponding to particular ideas. Consequently, the moral

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273 Although Hobbes had been the first to apply the geometric (analytical-synthetic) method to the moral sciences, the conclusions he reached reflected badly on its validity. See C. MacPherson, supra note 235, at 9-97; S. Mintz, supra note 253, at 63-79; Hexter, supra note 22.5, at 489-90. Even in the physical sciences, acceptance of "geometric" methodology was incomplete until publication of Newton's *Principia*.
274 1 J. Locke, supra note 215, at 404-05.
275 See id. at 217-18.
276 Id. at 231-32.
277 To illustrate, a triangle is whatever it is defined to be.
278 See J. Locke, supra note 215, at 43-55. That the subject of moral science is ideas does not mean moral science has no valid application to the real world. Locke wrote "If it be true in speculation, i.e. in idea, that murder deserves death, it will also be true in reality of any action that exists conformable to that idea of murder." 2 J. Locke, supra note 215, at 233-34. See also J. Danford, supra note 241, at 57-65. Nor does it mean moral science could prove that "war is
sciences are potentially as exact, infallible, and universal as mathematics, and more exact than the physical sciences.279

Nevertheless, the moral sciences could only be exact sciences if they adopted the methodology of mathematics; that is, clear definition of terms, proper selection of self-evident propositions, and correct reasoning from defined terms and initial premises.280 This is harder to achieve in the moral sciences than in mathematics. Mathematical ideas are simpler and less likely to trench on man’s self-interest. Consequently, mathematical ideas are easier to define clearly, to remember, to reason about properly, and to communicate accurately.281 Yet if moral science were pursued with the same “indifference and attention” as mathematics, “the measures of right and wrong might be made out” as incontestibly.282 The only ambiguity would be the characterization of, and therefore, application of the system to, real world actions, which are as imperfectly knowable as all external objects.283

Locke, however, declined to compose a complete, demonstrable system of ethics.284 Still, the year before the publication of the Essay, Locke used Hobbes’s method and applied his ideas to political philosophy. In Two Treatises of Civil Government, Locke posited axioms about the nature of man and deduced from them the ideal frame of civil government—a government limited in power and dedicated to the “preservation of [citizens’] lives, liberties and estates.”285 The governmental system he describes accorded with, and justified, the principles for which the Glorious Revolution had been fought. Thus, Locke used his method to reach immensely popular conclusions, thereby gaining support for the validity of his methods.286

peace” or “love is hate” by adjusting definitions. For if a man calls stealing “justice,” upon study “the same things will agree to it as if you called it ‘injustice.’” Id. at 234. It does mean, however, that clear and complete definitions are crucially important. See Fortescue-Aland, Preface to J. Fortescue, The Difference Between an Absolute and Limited Monarchy at v-xv, xxxvii-xxxviii (1719) [hereinafter J. Fortescue, Difference].

279 See Fraser, Prolegomena to 1 J. Locke, supra note 215, at xcii-c, cvii-cxi; 2 Id. at 208-12, 233-34, 347, 350-51; H. Cairns, supra note 106, at 349; J. Danford, supra note 241, at 57-69. Locke’s conclusions here not only are substantially different from Aristotle’s but are premised on one of the most significant differences between modern and Aristotelian philosophy. Although Aristotle would have agreed that ideas are inherently incomplete representations of physical objects, he held that ideas could be perfect reflections of their forms. Nous was a perfect “receptable” which could “see” forms without distortion. Modern philosophy, in contrast, finds knowledge affected and limited by the organs through which human intelligence operates. See J. Randall, Aristotle, supra note 108, at 5-6, 91-93.

280 2 J. Locke, supra note 215, at 157-58, 208, 211, 347.
281 Id. at 209-10.
282 Id. at 208.
283 See id. at 232-33, 235-36.
284 Spinoza and Leibnitz did make the attempt. See B. Russell, supra note 126, at 569-98.
286 See J. Randall, Modern Mind, supra note 103, at 339-45.
In other words, although between 1650 and 1690 Descartes, Spinoza, and Leibnitz had all argued for and employed some variant of Hobbes's method in moral philosophy, Locke's immense influence secured its acceptance in England. Yet this acceptance was incomplete. Unlike Aristotelian methodology, the analytical-synthetical method neither necessarily draws first principles from widely held opinions nor allows undemonstrated conclusions. Accepted beliefs and social arrangements are thus not necessarily in accord with, or provable by, the new method; traditional mores do not necessarily withstand its "devouring gaze." Consequently, while such reformers as Jeremy Bentham embraced the new methodology, conservatives were more reserved. Conservatives tended to emphasize the infirmities of man's reasoning abilities and sought "to study [tradition] until we know how and what we ought to admire; and if we cannot arrive at this combination of admiration with knowledge, rather to believe that we are dull, than that the rest of the world has been imposed upon."

Eighteenth century common law, dominated by conservative men, began to associate legal method with the geometric model. Thus in an early eighteenth century edition of one of Fortescue's treatises, his descendant, Sir John Fortescue-Aland, judge of the King's Bench, wrote that he agreed with Locke. Like Locke, he observes that since mathematics and law concern ideas and not physical substances, they are both exact and demonstrable sciences. From "intuitive knowledge of ourselves" and clearly defined terms, he states, a complete system of "moral law" can be deduced which can serve as "a foundation for all Municipal laws." But Fortescue-Aland went on to point

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287 For a discussion of other philosophers' use of the new method, see H. Cairns, supra note 106, at 272-334. On Locke's popularity and influence, see, e.g., D. Boorstin, supra note 12, at 13-15; W. Howell, Eighteenth Century British Logic and Rhetoric 7 (1971); J. Randall, Modern Mind, supra note 103, at 310. The influence that Newton's work in physics had on acceptance of the new methodology in the moral sciences should be noted. As Boorstin writes: "In light of the discoveries of Newton and Locke, there no longer seemed a great disproportion between the complexity of the world and man's feeble understanding. . . . While Newton had been showing how man could methodize the physical world, Locke demonstrated man's ability to understand himself." D. Boorstin, supra note 12, at 13-14. See also J. Randall, Modern Mind, supra note 103, at 261-62.


289 See D. Boorstin, supra note 12, at 190.

290 See id. at 11-19.

291 Id. at 13 (quoting Edmund Burke).

292 Fortescue-Aland, Preface to J. Fortescue, Difference, supra note 278.

293 Id.

294 Id.
out that the common law already precisely defined its terms, and its
"known customs and express statutes take the place of axioms" that,
by "use and experience" had been "found good and servicable."\textsuperscript{295}
Consequently, "we have the Happiness . . . to live in a Kingdom
where our lives are not spun out of Mens Brains."\textsuperscript{296}

Some fifty years later, Blackstone's massive Commentaries off-
ered a more elaborate and sophisticated version of the same argu-
ment. The Commentaries are full of express and implied claims that
law is a "rational science," that every rule has an intelligible reason,
and that the law of England is based upon general and extensive
principles.\textsuperscript{297} Nevertheless, Blackstone notes, since Adam's transgres-
sion "reason is corrupt, and his understanding full of ignorance and
error."\textsuperscript{298} Consequently, the reasons and principles supporting a rule
could not "be always precisely assigned."\textsuperscript{299} Presumptively, however,
there was a reason similar to the reason Coke had advanced: when-
ever an ancient rule had been altered "the wisdom of the rule . . . in
the end appeared from the inconveniences that have followed the
innovation."\textsuperscript{300} Therefore, according to Blackstone, unless a rule or
precedent was "evidently" or "clearly" contrary to the law of nature
or divine law it must be followed and "though a modern judge . . . might wish it had been otherwise settled, yet it is not in his
power to alter it."\textsuperscript{301}

Although the common law jurists were unwilling to base the
law's wisdom in the geometric reasoning of the present, their ability to
ground it in past doctrines was steadily eroding. This erosion had
many causes. One, for example, was the recognition that physical
science had proven the past wrong about so many things.\textsuperscript{302} Another
was the growth of the "idea of progress" which viewed the past
neither as civilized nor as enlightened as the present.\textsuperscript{303} Furthermore,
the introduction of modern historiography in England especially af-
fected their conception of law. Beginning with the works of Spelman
and Selden, it became generally accepted that Fortescue's and Coke's
views of English law as a continuum extending from before the Druids

\textsuperscript{295} Id.
\textsuperscript{296} Id. at v-xv, xxxvii-xxxviii.
\textsuperscript{297} See 1 W. Blackstone, supra note 22, at *62-71,76-81, 86.
\textsuperscript{298} Id. at *41.
\textsuperscript{299} Id. at *70.
\textsuperscript{300} Id.
\textsuperscript{301} Id. at *71; see id. at *69-71; D. Boorstin, supra note 12, at 12-30; Kennedy, The Structure
\textsuperscript{302} See J. Randall, Modern Mind, supra note 103, at 255-62.
\textsuperscript{303} See D. Boorstin, supra note 12, at 74-81.
to the present was incorrect; indeed, most rules were introduced after the Norman conquest. Yet, the consequent reduction in the amount of experience which the rules represented was ultimately unimportant to legal writers. In contrast, the new historiography’s revelation that many current legal conceptions were products of unacceptable or outmoded medieval or feudal notions had a significant effect on the notion of law.

The controversy in the 1770s over one such rule, the Rule in Shelley’s Case, is illustrative of the impact of the new history on jurisprudence. Eighteenth century lawyers generally believed the Rule had developed by the fourteenth century as a means of preventing landowners from avoiding tenurial obligations known as the “incidents” of tenure. These incidents, however, were abolished by legislation in 1660. Yet, the Rule continued, and property therefore did not always go to a donor’s intended beneficiary. Nonetheless, a furor erupted in 1770 when Lord Mansfield changed the Rule from a rule of law to a rule of construction, thus rendering the Rule inapplicable if the donor so intended. In protest, Charles Fearne composed a long essay in which he acknowledges that the reason for the Rule had long since vanished, but after pointing out that this was true of “most of our laws of property” and many other rules as well, he continued:

[I]f the old rule of law were to cease with the circumstance or state of things which gave it birth, the subject would remain at large, unregulated by any law and exposed to the arbitrary direction of ignorance, partiality, or caprice, until the legislature should interfere and make a new law respecting it. This would be opening a door perpetually to all that uncertainty, confusion, and inconvenience, which laws and rules were intended to obviate and prevent.

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304 See J. Pocock, Ancient Constitution, supra note 76, at 42, 57, 91-123.
305 Hale, for example, had no trouble finding that four hundred year old laws, like those which are immemorially old, are likely to be preferable to laws concocted by the current generation. See text accompanying notes 270-71 supra. See also J. Pocock, Politics, Language and Time 202-32 (1971).
306 See J. Pocock, Ancient Constitution, supra note 76, at 47-55.
307 The Rule is stated and discussed in, e.g., A. Casner & W. Leach, Cases and Text on Property 335-38 (2d ed. 1969); C. Moynihan, Introduction to the Law of Real Property 133-49 (1962).
308 Modern scholars have traced the Rule at least as far back as Abel’s Case, Y.B. 18 Edw. II, 577 (1324). E.g., A. Casner & W. Leach, supra note 307, at 338.
309 The reasons for this change are discussed in C. Moynihan, supra note 307, at 24-25.
310 Statutes of Tenures, 1660, 12 Car. II, c. 24.
311 See 3 W. Holdsworth, supra note 29, at 107-11.
313 C. Fearne, supra note 21, at 121.
Mansfield's decision was reversed on appeal. In the leading opinion, Blackstone asserted that the Rule had rationales, such as increasing the alienability of land, that were still operative. At one point, however, he argued that even if it were wholly a product of feudal policy,

Still it would not shake the authority of the rule . . . . The law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connections and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.

Thus, Blackstone used the nascent systematic conception of law neither to prove nor to promote the law's wisdom but to preserve its certainty by adhering to its ancient rules.

Chancellor Eldon spoke for his times when he said about another ancient precedent that "Dumpor's case always struck me as extraordinary: but if you depart from Dumpor's case, what is there to prevent a departure in every direction?" Adherence to ancient rules was justified as necessary for legal certainty. Yet until the rise of modern epistemology, regard for ancient rules had been part of the accepted scientific method, and the authority of ancient rules had then been justified as necessary for legal wisdom.

CONCLUSION

Western legal culture has long associated, even identified, law with reason. Coke's paen that "Reason is the life of the law, nay the common law itself is nothing else but reason" seems a timeless truth of Anglo-American jurisprudence. Nevertheless, this Article, by studying legal thinking and jurisprudence between 1450 and 1800, has argued that what lawyers have meant by reason has varied dramatically over time. The continuity between 1450 and 1800 of the notion that most English law was grounded in a multitude of ancient, customary rules masks substantial differences in the meaning of this conception of law. Furthermore, it has been argued that these differences were rooted in

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316 Id. at 498.
317 J. Watkins, supra note 206, at 39 n.3 (quoting Eldon). Dumpor's Case, 76 Eng. Rep. 1110 (K.B. 1603), which held that a covenant prohibiting assignment of a lease is rendered void by a lessor's consent to one assignment, is discussed in 7 W. Holdsworth, supra note 29, at 282-84; 1 The American Law of Property § 3.58, at 304-05 (A. Casner ed. 1952).
fundamental shifts in Western epistemology associated with the scientific revolution. Beginning in the late sixteenth century, changes occurred not only in the content of knowledge, but also in its methods, purposes, limits, and structure; since law is a body of knowledge, its history mirrors this transformation.

The shift discussed in this Article is, however, but a preliminary to a larger transformation in legal thought; the beginning of the nineteenth century marks the watershed between premodern and modern notions of law. By clarifying the history and conception of premodern law, especially the relation between God's will, common law, and Aristotelian practical science, this Article further clarifies this latter transformation. Finally, this Article indicates that the period from 1640 to 1840 also witnessed the fall of Aristotelian and rise of modern epistemology in law.

This Article, unlike previous works that have focused on the economic, political, and social determinants of legal change, has explored its intellectual determinants. Law has intellectual determinants if only because those who use law for their economic, political, or social ends normally express their claims within existing criteria of intellectual legitimacy. Moreover, even if law is ultimately established by control of a "barrel of a gun" or the "factors of production," this usually is masked. Normally, law seems to be established by the intellectual assent not only of the lawmaker but of the society at large. Thus epistemology, too, shapes law, especially as the professional lawyer experiences it.

318 See text accompanying notes 12-21 supra.
319 This Article does not discuss the final step in the common law's transformation from premodern to modern law, that is, the ascent to dominance of the idea of law as based on a few current principles. See text accompanying notes 11-21 supra. The following suggestive facts should be noted about this transition: (1) it occurred more thoroughly in America where, as compared to England, the past was less likely to be viewed as wiser than the present; (2) it occurred when the common law was challenged by the codification movement, one goal of which was to modernize law by enacting substantive rules that effectuated current notions of wise policy, as reflected by the legislature. Also, when the transition did occur, one of its earliest proponents claimed that although a hierarchical system based on principles "would be too vague and uncertain for practical purposes... yet the rules of the common law... are rendered... precise and certain, for practical purposes, by usage and judicial precedent." Norway Plains Co. v. Boston & Maine R.R., 67 Mass. (6 Gray) 263, 267 (1854) (Shaw, C.J.). Thus, since once again the common law was both wise and certain, what need was there for a legislative code?
320 See, e.g., J. Hurst, Law and the Conditions of Freedom in Nineteenth-Century United States (1964). For writing emphasizing the intellectual determinants of law since the nineteenth century, see E. Purcell, The Crisis of Democratic Theory (1973); G. White, Patterns of American Thought (1978).
321 See Kennedy, supra note 301, at 209.