LAW AND TRUTH:

Evidence from the traditions of the *ius commune*

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My subject is the place of truth in the law of England (and to some extent also Europe) between the late twelfth century and 1600. My particular vantage point on the subject is provided by the medieval *ius commune* and the evidence found in the records preserved from the English ecclesiastical courts, where cases concerning marriage and divorce, last wills and testaments, defamation, usury, tithes, and "spiritual" crimes were heard. For purposes of this inquiry, I think it is fair to say that the English common law also followed the same broad path, though of course there were many differences between them. One used the jury system, the other the law of the European *ius commune*'s system of proof. But in their relation to my subject, they were not greatly different. They shared many characteristics.

This paper has two parts: the first more theoretical and the second more immediately practical. The first deals with the canon law and the writings of the jurists within the traditions of the European *ius commune*, examining their attitude towards law and truth. I then move to evidence from the English court records, asking whether the principles found in the formal law were put into practice in the courts. The first part of the paper is shorter than the second, because it raises fewer questions that are controversial. The points made in the second – being dependent on evidence found in manuscript court records – require fuller demonstration than those in the first.

Current Scholarly Opinions

It seems best to begin by stating what I take the dominant view among historians of the nature of the courts and the purposes of litigation in medieval law. In the opinion of S. F. C. Milsom, the historian of English law, the predominant aim of early law-suits was simply to settle a dispute. That is what mattered. Legal doctrine in the modern sense and rules of evidence designed to establish the facts behind any dispute actually played little role in determining the outcome of cases. As juries assumed greater dominance in the system the questions submitted to them remained the blank "general issue".[1] 'Which party should prevail?' the jurors were asked. That was the question they had to determine, and with minor exceptions the judges left the outcome within their control. A variant of this view, particularly widespread among writers on the history of local and ecclesiastical courts, is that the primary goal of the judges in these courts had nothing to do with the discovery of the underlying facts or with the law on the books. Even though judges, not juries, promulgated the sentences in these courts, they paid more attention to honour, emotion, and private interest than to the application of the written law to facts discovered through evaluation of evidence.[2] Community values set the tone. As with

[1] S. F. C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (London1981), 37-59.

[2] See Daniel Lord Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille,* 1264--1423 (Ithaca, NY, 2003); *Communities and Courts in Britain, 1150-1900,* eds. Christopher Brooks and Michael Lobban (London 1997); *The Moral World of the Law,* ed. Peter Coss (Cambridge 2000); Richard Firth Green, *A Crisis of Truth:* 12 *Literature and Law in Ricardian England* (Philadelphia, PA, 1999); Marjorie K. McIntosh, *Controlling Misbehavior in England,* 13 *70-1600* (Cambridge 1998); *Expectations of the Law in the Middle Ages,* ed. Anthony Musson (Woodbridge 2001); *The Letter of the Law: Legal Practice and Literary Production in Medieval England,* eds. Emily Steiner and Candace Barrington (Ithaca, NY, 2002).

Milsom's view, truth took a back seat to the judgment of laymen and and the needs and assumptions of the community.

Is this so? I will not argue today that these characterizations of the nature of law and litigation in medieval England are wholly mistaken. They come from scholars of experience and erudition. They are based on honest work with the sources, and those sources do provide some support for them. What I will argue, however, is that they have underestimated the extent to which medieval law was a search for the truth. Medieval lawyers and judges sought to settle disputes, no doubt. What sensible lawyer or judge does not? But, at least in my view of the evidence, before all else they also sought to discover the truth of matters that came before them. In criminal cases they used the judicial oath as one tool in that task. In civil cases, they took the same position in evaluating the testimony of witneses. The procedure the courts used was more than a 'throw-back' to a more barbarous age. It was more than a 'relic of barbarism.'[3] It is closer to the mark to say that the goal was to discover the facts and to apply the law to those facts. In looking at the subject, I will argue that simply because the procedure then used in English and European courts differed from our own should not lead us to suppose that the courts were unconcerned with veracity.

The medieval *ius commune*

The Roman and canon laws formed the heart of the *ius commune*. The initial need is to state and analyse what was found in their texts. Of course, no legal system has a single goal. There will always be competing purposes – family stability versus full ventilation

[3] H. C. Lea, *Superstition and Force*, 2d ed. (New York 1870, repr. 1971), 73. .

of the realities of what happens within a family is a familiar example from modern law. There are tensions between the two goals. The same is true of the law of earlier centuries. This being admitted, however, it still is a legitimate question to look for what mattered most. That is what the scholars referred to above who describe social goals as predominant in the courts have done, and I think that is the right – really the only reasonable – approach for historians to take.

General Considerations

The starting point must be the medieval canon law, because it largely controlled practice in the courts. As stated repeatedly by the commentators, the canon law was avowedly spiritual in purpose. Its most important function was to lead men to God and to teach them how to live. Biblical injunctions were not, therefore, irrelevant to the law of the church, and the canonists used them to stress the importance of truth. For instance, God abounded in truth (Exod. 34:6). Jesus came to lead us to the path of truth (John 16:13). We are enjoined to speak nothing but the truth in the name of the Lord (1 Kgs. 22:16; 2 Chr. 18:15). It is of course true that the medieval canon law was not copied from the Scriptures. The Levitical law was not taken whole into the church's legal system. However, that did not mean that what was found in the Bible was irrelevant.[4] The medieval jurists often cited it; indeed they drew conclusions from it, and one of those conclusions was that the truth should not be suppressed (Prov. 18:13; Rom. 1:18). Christian ideals were contained in the canon law, and they proclaimed the regime of

[4] Some evidence on this point is found in R. H. Helmholz, The Bible in the Service of the Canon Law, 70 *Chicago-Kent L. Rev*. 1557 (1995).

truth. 'Men of truth' were to lead the nations (Exod. 18.21). 'Truth will prevail' (a hopeful prediction) that was meant to have an effect on the outcome of litigation.

Texts of the canon (and even Roman) laws found in the *Corpora iuris* echoed these sentiments. The *Decretum Gratiani*, for example, proclaimed that arriving at the truth was the overriding goal of the law; the truth must 'shine forth in the light'.[5] Famously, Christ had said that he was the truth, not that he was custom. This proclamation should be taken seriously and carried over into the law of the Church.[6] The Gregorian Decretals appropriately contained a text affirming the place of truth in litigation. Its import was that the truth should be revealed and prevail in our lives. Even though its revelation might have unfortunate consequences, it was to be preferred to falsehood.[7] As the *glossa ordinaria* to the Decretals stated in another place, truth was to be preferred to opinion.[8] Roman law as transmitted to medieval Europe taught the same lesson.[9] A text in the Digest put this modestly – in matters of proof, whatever the procedural obstacles, there should always be a place for the truth.[10]

The jurists themselves repeated this opinion found in these texts – for example, William Durantis (d. 1296), the most popular thirteenth century proceduralist. He wrote that attempts to hide the truth should always fail. The goal of the law was that in the end the truth 'should shine forth in the light. The truth will prevail.'[11] Similarly, a text proclaimed that men should not fear to speak what they knew to be the truth; indeed they

[5] C. 35 qu. 9 c. 7: 'magis splendescit in luce'.
[6] Dist. 8 c. 5.
[7] X 5.41.3.
[8] Gl. ord. ad X 1.21.4: 'cum opinioni sit veritas praeferenda'.
[9] Auth. Coll. 6, tit. 3, and gl. ad id. v. *imitatio*.
[10] Dig. 22.3.29.
[11] William Durantis (d. 1296), *Speculum iuris* (Basel 1574, repr. Aalen 1975), Lib. I, Pt. 4, tit. *De advocatis* § 6, nos. 16-17: 'quod in fine luce clarius apparebit; veritas vincit'. 'Nec stare potest, quod caret praesido veritatis'.

had an obligation to do so. Justice depended upon it.[12] The great canonist Cardinal Hostiensis, similarly held that those who spoke the truth were to be protected, for 'truth lives and prevails in strength and will remain world without end'.[13] In courts, not subtleties but the path of truth was to be followed.[14] Of course, exceptions existed. No one, for instance, was to be required to testify against himself as to his secret thoughts. Priests were not to be required to give evidence about what had been told to them in confessing one's sins. But these were exceptions; the rule was that truth was to be sought.[15]

Statements like these, at least when recited out of context, do sound somewhat platitudinous. I admit that. Who prefers falsehood to truth? However, the preference for truth had real consequences in the procedural law of the medieval church. For example, the doctrine of *res judicata* had little place in the church's law of marriage.[16] If the true state of affairs came out after a formal sentence had been promulgated – as in declaring that A. and B. were validly married – if, in other words, it later appeared that A. and B. were in fact related according to the prohibited degees of consanguinty and affinity, the court's prior sentence was no bar to their divorce. Similarly, commentators sought to remove procedural hurdles in litigation when they stood in the way of discovery of the truth. For instance, odinary procedural rules required that after the *conclusio in causa*, no new witnesses or evidence was to be introduced in a case being heard by a court, but this rule gave way when no evidence came to light before the sentence was given. Witnesses would still be heard and their testimony evaluated. Perhaps most striking example of this

[12] See C. 11 q. 3 c. 86 and *gl. ord*. ad id.

[13] Henricus de Segusio, *In decretalium libros Lectura* (Venice 1581), ad X I.29.21, no. 27: 'name veritas vivit et invalescit et permanet in saecula saeculorum'.

[14] Ibid. ad X 2.22.00, no. 13: 'non subtilitas sed veritas est sequenda'.

[15] See, e.g., Nicholaus de Tudeschis (Panormitanus), *Commentaria super Decretalium libros* (Venice 1615), ad X 1.21.4, no. 3.

attitude occurred in the law of prescription. In the U.S.A. we know this as adverse possession. It means that if one person holds another's property for long enough and the number of years set by the statute of limitation runs out, the wrongful holder gains title to the property. This doctrine was known to Roman law and to canon law alike, but the latter held that if the wrongful holder was aware of the true state of the title – that is if he was in bad faith – he could not acquire title. Only if he honestly believed the property belonged to him could he gain title by prescription. This became the rule of the ius commune, and as I see it, the preference for truth lay behind it. The wrongful possessor could not take refuge behind a knowing falsehood. These examples show, therefore, that the texts of the canon law had consequences for the formal law. The medieval law itself placed a premium on the discovery of the truth.

The Use of Oaths

This statement proved true even in the use of oaths. As a means of deciding quarrels the use of oaths was, of course, very old – antiquated some say and an obstacle to the discovery of the truth. The law of the church nevertheless continued to make extensive use of oaths in practice.[17] Despite the changes in procedural law that occurred as the result of the scholastic revival of the twelfth century, the oath continued to occupy a central place in the law of proof. In my reading of the tests, the purpose of preserving them was that they provided one way to discover what had happened in a matter that came before a judge. Very often, oaths were used only when other forms of proof were not available. There, they were the best that courts could do.

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[16] X 2.27.7.

At the same time, it was not only in such circumstances that the oath was used. Often alternate, other forms of proof could have been employed, but the courts nevertheless had recourse to oaths as means of meeting the problems raised in litigation. I shall give evidence on this point in a minute. This finding seemed particularly unexpected to me because, according to most accounts, it was the church that first recognized the need for adequate means of discovering facts. By this showing, the canon law ought to have rejected old forms of proof. How to explain the persistent use of oath? I think the best explanation is that the oath was used as the best means possible under the circumstances to discover the truth. Oaths were not always reliable, that much is certain. The medieval jurists said so themselves. However, more often than we have realized, oaths provided the most reliable way of establishing what had actually happened.

Perhaps most important, violation of an oath was treated as an offence against God, since in a sense it was the invocation of God's name that gave any oath its special force. Deliberate perjury was a serious crime and a serious danger to the soul's health. God himself would punish the perjurer even if he escaped earthly sanctions.[18] This attitude towards oaths has all but disappeared today, and it is difficult to recapture the intellectual climate in which its effects were felt. But any serious work with the sources will show that the jurists of earlier centuries took oaths with real seriousness. The oath was treated as a way of "satisfying others fully of the truth" by the natural lawyers.[19] To knowingly swear a false oath was to risk one's immortal soul, and the presumption was that no one would willingly do that. *Nemo praesumitur immemor salutis suae*. In a religious age, this made sense.

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[17] See, e.g., J. G. Bellamy, *The Criminal Trial in Later Medieval England* (Toronto 1998), 34.

[18] See, e.g., Julius Clarus, *Sententiarum receptarum, liber quintus* [*Practica criminalis*] (Venice 1595) § *periurium*, no. 11.

If it seems at first sight that medieval lawyers placed too great faith in the efficacy of oaths, and that this led them into a foolish trust that men would not swear false oaths, that impression is quickly dispelled by looking at their treatment of the law of oaths. For them, perjury was an ever present danger. Through ignorance or self-interest, men and women did in fact swear false oaths. The canonists recognized this. Their response was to try to devise means to assure that this happened as rarely as possible. And that is the point of this paper – to show how the system of oaths they formulated was designed to discover the truth where the truth was essential for determining the outcome of litigation. I will not argue that the system they devised was perfect. They themselves did not expect that it would be. But its goal was to undercover the truth. The texts themselve say this.

Practice in the Courts

What the medieval law does not show, of course, is whether or not these rules, together with the preference for treating litigation as a search for truth that went with them, were effective in fact. I want, therefore, to move to a closer examination of the subject as put into practice in the English courts, looking first at criminal cases and then at civil cases, in each case examining the normal mode of proof used in the courts.[20] In criminal cases, that was by means of formal oaths; in civil cases by witness proof.

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[19] J. G. Heineccius (d. 1741), *Methodical System of Universal Law*, Lib. I, c. 7 § 206.

[20] The following abbreviations are used throughout this contribution to the repositories where the records are now kept:

BI	Borthwick Institute of Historical Research, York
BKRO	Buckinghamsire Record Office, Aylesbury
BL	British Library, London
CCA	Cathedral Library and Archives, Canterbury
GRO	Gloucestershire Record Office, Gloucester
CUL	Cambridge University Library

Criminal Cases

The English church enjoyed (if that is the right word) an extensive jurisdiction over conduct contrary to current ideas about personal morality. It covered sexual offences like fornication or adultery, verbal offences like scandal-mongering or defamation, religious offences like absence from church or blasphemy, monetary offences like failure to pay tithes or church rates, social offences like sorcery or pandering, and a range of other minor offences, some statutory, some merely traditional. Throughout the Middle Ages and into the early modern period, proof in these prosecutions was almost always by compurgation, an oath based system of dispute resolution. If persons were publicly reputed to have committed an offence that fell under the church's jurisdiction denied having committed it, they were routinely required to swear a personal oath affirming their innocence and also to find a number of compurgators to swear an additional oath to their belief in the veracity of the defendant's oath. The accused swore "de veritate" the compurgators "de credulitate". This system has been treated harshly by modern historians. They have described it as 'a farce'[21] or 'a pantomime'[22] – all insulting phrases used to assert that these oaths were no real hurdle at all. These assertions overlook what actually happened. There were many safeguards.

First, admission to compurgation was always by order of the judge, and judges could refuse to admit the accused to purgation if in their consciences they concluded that

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DRO Devon Record Office, Exeter
DUL Durham University Library
SRO Somerset Record Office, Taunton

[21] F. W. Maitland, in *The History of English Law before the time of Edward I*, 2d ed. rev. (Cambridge 1968), I:443.

[22] F. G. Emmison, *Elizabethan Life: Morals and the Church Courts* (1973), 294.

the accused would perjure himself. No doubt, this was what sometimes happened, though it is hard to know how often. Second, before compurgation could go ahead, an opportunity to object was given to any interested party. This too happened in fact.[23] The number and circumstances of the purgation were also within the control of the judges. If examination of the accused suggested the danger of perjury, they could require a large number of compurgators and set its performance in a place where large numbers of neighbours were assembled. The number of compurgators assigned was "arbitrary" – meaning that it was fixed by the judge according to the circumstances.[24]

The court records show judicial intervention in several additional ways. It happened, for example, when the compurgators offered were unsatisfactory. Canon law required several things of potential compurgators. They had to be of good repute, free from public crime or *infamia*. They must be neighbors of the accused, familiar with his character. They must in appropriate cases be of equivalent status, a rule most notably observed for accused persons who were clerics. The Act books show that these devices of control were not dead letters. Proffered compurgators at Canterbury in an assault case of 1452 were challenged because they had allegedly been participants in the crime. The successful purgation of John Honte was annulled at Hereford in 1454 because 'he did not purge himself with neighbors but with other strangers.' At Rochester in 1445, the judge rejected proposed compurgators 'because they were not of the place where the offense

[23] E.g., Ex officio c. Broksall (Canterbury 1453), CCA, Act book X.1.1, f. 43v: Quo die magister Johannes Bred contradixit purgationi dicti Edmundi et haet ad promo producendum'. Private parties were given the opportunity to object to the compurgation and prove the truth of the charge by ordinary witness process; e.g., Ex officio c. Cowpland (York 1440), BI, Act book D/C AB.1, f. 96, in which the defendant appeared with twelve compurgators to meet the charge of adultery, but 'uxor dicti Thome Cowpland publice obiecit offerens se suis probationibus super articulo predicto'.

[24] See, e.g., William Hale, *A Series of Precedents and Proceedings in Criminal Causes* (London 1847, repr. Edinburgh 1973) 277; the number of compurgators in this collection ranging from two to eight.

was committed.' It is true of course that the official records may conceal negligence or corruption on the part of some judges, It would be foolish to ignore the possibility. But what little direct evidence there is suggests some vigilance on the part of the ecclesiastical officials to safeguard canonical purgation.

In practice, the publicity that attended compurgation may have been as important as these formal safeguards. Purgation was an open act, subject to the influences of public knowledge and social pressure. Compurgators had to live with their neighbors after the event. Canon law and English practice reflected the preference for openness at this final stage of criminal cases. Court scribes routinely recorded the names of the compurgators in the Act books themselves, so that their oaths in favor of the accused were a matter of official record. Moreover, the judges normally set the parish church of the accused as the place of purgation. For example, where Nicholas Romeshed appeared before the court at Rochester accused of theft and murder, the judge admitted him to purgation, and assigned his parish church at Tunbridge as the place and the vicar there as the officiant at the oath-taking itself. Where the supposed offense had included 'pollution' of the churchyard, the place assigned for purgation was the church to which the churchyard belonged. This site must have been meant to put pressure on the accused to tell the truth.

Civil Cases

On the civil or ‘instance’ side, that is in disputes between private parties, the oath played a lesser procedural role in practice. Testimony of witnesses and evaluation of their probative value under the complicated law of proof adopted in the ius commune were the norm. And where oaths were used, they were used where all else had failed. Marriage

cases are probably the best example. Where one person sued another to establish the existence of a clandestine contract of marriage between them and to have themselves declared validly married under the law of the medieval church, it often happened that the plaintiff was unable to produce sufficient proof to do so – two eye witnesses to the contract itself. However, they might have proof of a sort: public fame, mutual gifts denoting marriage, perhaps one witness. When this happened, judges sometimes simply dismissed the case, leaving the parties to their consciences, but they also sometimes required defendants to swear an oath that there had been no marriage contract like that alleged by the plaintiff.[25] If one asks why this was done, I think the most realistic answer is that the judges wished to do all they could to reach the correct result. Adding the oath was not required by the canon law, and would not be used today, but under the circumstances of the time, it was regarded as an added security that the right result was being reached. Judges could not reach certainty. That was admitted. The oath might be perjured. But they wished to do what they could.

It is significant that marriage cases were not the only place within the church's jurisdiction where suppletory oaths were used. In cases involving tithes,[26] last wills and testaments,[27] and simple contracts to pay money,[28] oaths were used to make up for a lack of full proof. The initiative in these cases sometimes came from the party himself (or his proctor), alleging that he had offered *probatio semi-plena* to prove his case and should be

[25] Ex officio c. Penrose (Bath and Wells 1527), SRO, Act book D/D/Ca 2, f. 43; material was introduced, however, to show cause why no compurgatory oath should be admitted.

[26] Hudson c. Cooke (Bath and Wells 1622), SRO, Act book D/D/Ca 230, f. 94.

[27] Barstall c. Smyth (Canterbury 1398), CCA, Act book Y.1.2, f. 92v.

[28] E.g., Watson c. Thomson (Durham 1490), DUL, DCD.CB.Pr.Off., f. 17, the defendant admitted a debt of 2s 6d, but claimed he had paid part and been forgiven the rest by the plaintiff, adding that he would abide by the plaintiff's oath as to the latter ('in eo vult stare eius dicto').

permitted to supply the deficiency by his own oath.[29] It sometimes came from the opposite party, as in the marriage cases just mentioned, where one party in effect offered to abandon his claim if the other would take an oath that the allegations against him were not true. This procedure – the so-called *delatio iuramenti* – occupied an established place in English court practice.[30] Its object was to supply an additional guarantee that the court had done all it could to reach the correct result.

The same thing was true in the more normal form of proof on the civil side. Witness testimony was the normal way of proceeding, as just noted. In administering this system, judges routinely sought to impress upon witnesses the necessity of telling the truth. Instructions for the examination of witnesses have survived from an early period, and they all stress that the examiner must act to secure the truth. He must warn all witnesses about the dangers of perjury. He must question them according to the questions and articles propounded by the parties, but he should go further if the answers to these questions proved ambiguous or unsatisfactory. He must probe the memory of the witnesses to discover what they knew.

The task of evaluating the evidence of course belonged to the judges, not to the persons who examined the witnesses. Most often the actual examination would have occurred outside of court, in private. The judges often knew only what the depositions recording what had been said in these examinations contained. Even here, however, the judges retained the power to recall witnesses and to carry out a separate examination ex

[29] E.g., Semour c. Coward (York 1628), BI, MS. Cons.AB.67, f. 97v: 'dominus suus intencionem suam in hac causa deductam plusquam semiplene seu saletem semiplen probavit, quare peciit iuramentum suppletorium domino suo defendendum fore'.

[30] E.g., Forston c. Hills (Canterbury 1454), CCA, Act Book Y.1.5, f. 29v: "Pars actrix petit quod pars rea veniret ad iudicium et vult deferre sibi iuramentum;" Young c. Laurances (Bath and Wells 1528), SRO, Act book D/D/Ca 2, p. 63: "Deinde iudex detulit iuramentum dicte Phanne super memissis;" Mundye c. Bryte (Gloucester 1553), GRO, Act book GDR 7B, p. 294: "sub ea conditione, viz. quod ipsa purgabit se bina manu honestarum etc."

officio.[31] Discovery of the truth, though sometimes impossible to reach, was the goal of the law of proof in the ius commune.

A particularly clear example of the importance of this goal on the civil side comes from the law regulating who could serve as a legitimate witness in litigation. Although it developed into a very complicated system, the starting point for the law of proof in the *ius commune* remained simple and remarkably consistent over the years. Any person could be cited to offer testimony as a witness before a court, unless specifically prohibited by law.[32] However, many persons were prohibited, men and women of servile condition could not serve as witnesses.[33] The canon law provided a reason for their exclusion: 'a slave will often not testify truthfully out of fear of the master'.[34] The same rule in the Roman law provision was thus 'canonized'.[35] In fact, the list of those specifically prohibited for acting as witnesses turned out to be quite long under both systems. The prohibitions aimed at excluding the testimony of slaves proved far from unique. Women were theoretically prohibited from testifying in criminal or testamentary causes. So in most situations were minors, infamous persons, paupers, heretics, convicted criminals, domestic servants, and several others.[36] Enemies and accomplises in crime were also excluded.[37] These disqualifications worked their way into the medieval

[31] E.g., Precedent book (early 16th century), BKRO, MS. Arch. Paper.Bucks.c.215, fols. 81v-82, mentioning this power 'pro informationis conscientiae nostrae'.

[32] E.g., Tancred Bononiensis, *Ordo Iudiciarius*, Pt. 3, tit. 6, in *Pillius, Tancredus, Gratia Libri de iudiciorum ordine*, F. C. Bergmann ed. (Göttingen 1842, repr. Aalen 1965) 223: 'Testes possunt esse omnes qui non prohibentur'.

[33] Ibid, 'Servi prohibentur'.

[34] X 5.40.10: 'Conditione si liber non servus. Nam saepe servus metu dominantis testimonium supprimit veritatem'.

[35] Authen, Coll. 7, tit. 2 (*De testibus*) also C. 4.20.11, dealing with a case where a witness alleged himself to be free, the other side alleging that he was not.

[36] All taken from Tancred, (note 32) tit. 6.

[37] X 2.20.10.

glossa ordinaria, the standard reference point for most lawyers.[38] In the end a quite large class of potential witnesses was to be excluded from giving testimony because it was thought that their testimony would be unreliable.

However intellectually pleasing it may have seemed, this scheme was too restrictive to be workable. It could become an obstacle to justice. The example of testimony by slaves is particularly instructive, and so far as we can tell from the court records, the law elaborated by the canonists was followed in practice.[39] Despite the apparent bar against testimony by slaves, the classical Roman law had itself admitted the their testimony under certain circumstances, normally when no other way of establishing the truth was possible. Even then the jurists fastened the requirement that the slave be tortured before being admitted to testify. The texts themselves breached the ordinary rule. The canon law was also willing to allow the testimony of slaves where a special reason existed, as in the case of a woman who, it was reputed, had been sexually assaulted by a cleric.[40] Without her testimony, how else would the truth be known? Once begun, the search for exceptions became something like an academic game, though a game with a good purpose: the purpose being the discovery of the truth.

By the time of William Durantis in the thirteenth century, the subject seems almost lost in confusion, but some of what he wrote illuminates the subject of this study. Durantis dealt, for example, with the *adscripticius*, holding that he could lawfully testify, relying on two texts from the Codex that seem not quite in point but did treat these men

[38] *Gl. ord*. ad Dig. 22.5.3, v. *inimicitiae*: 'Conditio, sexus, aetas, discretio, fama, et fortuna, fides in testibus ista requires'.

[39] E.g., Nycoll c. Stonden (Exeter 1533), DRO, Chanter MS. 778, s.d. 16 December, objection being taken on the basis of servile status; see generally Charles Donahue, Jr., 'Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law', in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, M. S. Arnold et al. eds. (Chapel Hill, NC, 1981), 127-58.

[40] X 2.20.3.

as bearing some rights.[41] He then took up the question of the *statuliber*, the slave freed under a condition in his master's will, holding that he could not testify. Until the condition was fulfilled, he remained a slave.[42] Durantis dealt with the problem of what to do when a person had become a slave (or being a slave had been manumitted) and wished to testify to an event that had happened before the change in his condition.[43] He sought to discriminate between witnesses on the basis of ties of fidelity or friendship with the party producing him, a treatment that opened up the possibility of allowing greater leeway to slaves than a standard which excluded them categorically.[44] The most than can honestly be said of his treatment is that it showed the possibilities opened up by the scholastic method of the medieval Schools. It needed a steadier hand, however, to work out the kinks.

Fortunately, this happened. It did not happen by distinguishing various grades of servitude, although these would be relevant in applying some of the practical tests used in the mature *ius commune*. It came instead by putting the decision into the hands of judges, who were instructed to apply the principles that underlay the subject but to do so with discretion.[45] The primary such principle was the need to determine the truth, and result is instructive, well illustrating a recurring pattern in the thought and work of the jurists. Josephus Mascardus, whose elephantine treatise on the law of proof established itself as the standard guide in the seventeenth century,[46] treated the subject of testimony by men (and women) or servile status at length. He began by stating the general rule: under the

[41] William Durantis, *Speculum iudiciale*, (Basel 1573, repr. Aalen 1975), Lib. I, pt. 4, tit. *De teste*, no 40.

[42] Ibid.

[43] Ibid, no. 27.

[44] Ibid, no. 21.

[45] See the instructive treatment in John Cairns, 'Slavery and the Roman Law of Evidence in Eighteenth-Century Scotland' in) *Mapping the Law: Essays in Memory of Peter Birks*, Andrew Burrows and Lord Rodger of Earlsferry eds (Oxford 2006), 599-618, at 602-03.

Roman law, no slave could serve as a witness.[47] Slaves were regarded as having no legal existence. However, even in the Justinianic texts, certain exceptions existed, and Mascardus took account of some of the reasons given for them. He noted that where the truth could not otherwise be discovered, the testimony of a slave might be admissible. This result had been teased out of the civilian texts, and a good reason for it was found in dealing with cases involving the conduct of a master in the privacy of his own house. Privacy was hard to preserve in a society with many servants, and one can easily imagine how often it must have happened that the only witness to a man's unlawful acts would have been a domestic servant, perhaps a slave by status. For this reason, the law of evidence in the *ius commune* opened the category of permissible witnesses to include persons who commonly knew the facts, even though they were slaves. The jurists had carved out an exception to the ordinary rule, and Mascardus endorsed it. In the balance, truth was more important than the status of a witness. In some cases only a man of woman of servile condition would know the truth. Therefore he (or she) must be admitted as a legitimate witness. Of course this was a concession to need, not the grant of a right. That need was to discover the truth, not to treat the slave as if he were a free person.

Conclusion

That is my reading of the evidence surveyed. Establishing the truth was the primary goal of the law. This theme and this evaluation are only somewhat different, of course, from the more general characterization of the growth of our law of proof: it is more normal to

[46] Mascardus, *De probationibus* (Venice 1593), Concl. 1358, no. 14.

characterize the course of development as moving from "irrational" means of proof to more rational and scientific forms.[48] The latter meant abandoning the ordeal and proof by oath in favour of the law of proof by documents and witness testimony.[49] It is not the contention of this paper to assert that these characterizations of what happened are wrong. It is instead to emphasize what is not so often emphasized: that the underlying purpose of the changes was to find better ways of discovering the truth. We might follow this theme into other aspects of the law – for instance the development of the discovery of documents, the emergence of cumpulsion of witnesses, or the refinements made to office of the notary public. We might also examine what I have not done except by implication: the changes in the law of evidence within in the English common law. So far as I can see, the same result would emerge.

It may seem obvious that the procedural system of any legal system is meant to make it possible for a judge (or jury) to know what actually happened so that the law can be applied accurately. However, somehow historians have lost sight of that obvious point. They have strained to find a 'social meaning' in the evidence. In my view, looking closely at the *ius commune*, from both a doctrinal and a practical perspective, shows that their efforts, valuable though they have been, have sometimes gone too far. They have caused historians to look away from the main point of the procedural law of the *ius commune*.

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[47] Dig. 50.17.32.

[48] See, e.g., R. C. van Caenegem, *The Birth of the English Common Law* (Cambridge 1973), 62-84.

[49] See Massimo Jasonni, *Il Giuramento: Profili di uno studio sul processo di secolarizzazione nel diritto canonico* (Milan 1999).