Prologue

Should the law restrain the freedom of the trier of facts to determine the value of evidence in criminal cases? This question intensely preoccupied nineteenth-century lawyers. On the continent of Europe, the triggering event for mulling it over was the challenge which the French revolutionary idea of free evaluation of evidence presented to traditional legal proof rules of Roman-canon origin. In England, responsible for stirring the debate was Jeremy Bentham's scathing critique of the subjection of fact-finding activity to legal regulation. Although his primary target was rules on the admissibility of evidence, he also lambasted rules of weight. In the battle over the fate of the *ancien régime*'s justice system, which relied on legal proof rules, the debate became politicized and acrimonious. As the conceptual scaffolding for this debate, continental legal theorists posited a stark contrast between two fact-finding schemes – one rejecting and the other adopting legal constraints on the fact-finders' assessment of the value of evidence. English jurors were placed in the former and continental professional judges in the latter scheme. In this Manichaean opposition, English jurors appeared completely free from legal constraints, while continental judges seemed like robotic implementers of Roman-canon rules on the quantity and quality of evidence, required to arrive at factual findings irrespective of their personal assessment of evidence. This opposition was accepted as true in common law countries and became the dominant account of how factual findings were made on the continent during the *ancien régime*. The account stuck like a burdock, and still represents the conventional view in both continental and Anglo-American lands. It is usually accompanied by an evolutionary theory, holding that the assessment of evidence untethered from legal rules is the cornerstone of enlightened justice, and represents the irreversible stage in the evolution of forensic fact-finding. The evolution started with irrational appeals to God, was followed by blind reliance on Roman-canon legal proof, and culminated in the assessment of

evidence free from legal chains. In this progressivist vision of the path leading to free evaluation of evidence, any regression appears like a return to the dark Middle Ages.

This study will challenge not only the conventional account of the opposition between Roman-canon and modern approaches to rules on the assessment of evidence, but also the view that the absence of these rules represents the apogee of the historical development of forensic fact-finding. Yet because of the byzantine complexities of the Roman-canon fact-finding scheme, the major part of the study will necessarily be devoted to reconstructing the scheme and examining how it functioned in the dominant form of the *ancien régime*'s criminal process.

THE ROAD MAP OF INQUIRY

The study will include eleven short chapters and an Epilogue. The opening chapter will explore the genesis of the Roman-canon fact-finding scheme in criminal cases. It is hazardous, of course, to speculate about what induced Roman-canon jurists to adopt the scheme. The dry bones of texts they left behind, and on which we must rely, can too easily be covered with contemporary flesh and blood, and nonexistent motives attributed to those who wrote them. In a triumph of temerity over scruple, the study will nevertheless venture an answer to the multifaceted and contested issue of the scheme's origin. Two families of theories dealing with the subject will be examined and found wanting. The attraction of the scheme's progenitors to rules on the value of evidence will be attributed not only to the allure of Roman law and certain biblical texts, but also to the needs of the court organization pioneered by the Church of Rome for the supervision of decisions made on the lower echelons of authority. In regard to crimes which entailed sanguinary punishments, the attraction to rules of this nature, the study will propose, was reinforced by Christian moral theology. The unsettling undertow beneath these rules will then be ascribed to the demands of harsh criminal policy that sprang up in late medieval times. The realization of this policy required that a large dose of discretion be granted to judges in the implementation of rules on the value of evidence. If applied mechanically, Roman-canon authorities recognized, these rules would often produce inaccurate verdicts.

Chapter 2 will seek to reconstruct the epistemic assumptions of Roman-canon evidence which are of interest to this study. On this issue conventional wisdom finds a stark difference between modern and premodern fact-finding schemes. The study will first address the question whether late medieval architects of Roman-canon evidence really believed that fidelity to proof-sufficiency rules guaranteed accurate outcomes. If such a belief existed, it would support the conventional opinion that these rules were automatically applied. Is it true, the study will ask, that the progenitors of the Roman-canon system disregarded sensory experience and defended claims to factual knowledge by blind invocation of authoritative rules?

This theme will be examined through the writings of the greatest late-medieval jurists on the nature of factual inquiry. Stitched into the tapestry of the law, their preference of direct over circumstantial evidence will then be canvassed. The chapter's end will be devoted to the sensitive and emotionally charged question, rife with clamorous dissents, whether the use of coerced confessions in the inquisitorial process was rational.

After these preliminaries, Chapter 3 will prepare the reader for the review of those parts of the Roman-canon fact-finding scheme that are capable of revealing the extent to which Roman-canon judges were bound by law in assessing the value of evidence. This approach will necessitate a somewhat unconventional tour of Roman-canon evidence. Separately considered will be situations in which observance of legal proof could require the judge to convict defendants whom he considered innocent, and situations in which these rules could require him to abstain from convicting defendants whom he considered guilty. The former situation will be referred to as the *positive* effect of legal proof and the latter as its *negative* effect. These two possible effects will be analyzed against the background of the highest Roman-canon standard of full proof (*probatio plena*) required for the imposition of sanguinary punishments (*poenae sanguinis*, *poenae ordinariae*). This standard required either the testimony of two unimpeachable eyewitnesses to the crime or the defendant's confession.

Chapters 4 and 5 will then explore whether the highest Roman-canon standard of proof ever produced the positive effect – that is, required the judge to convict a defendant even if he considered him innocent. Chapter 4 will explore the impact of the rule requiring two unimpeachable eyewitnesses, and Chapter 5 the impact of the rule requiring the defendant's in-court confession. Contrary to standard accounts, these rules never compelled the judge to impose blood punishment if he found the testimony of the two eyewitnesses or the defendant's confession unreliable. The conventional view, the study will claim, results from paying insufficient attention to activities the judge was expected to perform in establishing whether the required eyewitnesses were unimpeachable and the confession truthful.

Chapter 6 will address the negative effect of Roman-canon full proof. What was the judge supposed to do when full proof was missing, but other evidence in the case convinced him of the defendant's guilt? The study will show that the Roman-canon scheme was more rigid in this regard, and could require the judge to disregard his personal evaluation of the evidence. Only in its negative impact, then, did Roman-canon evidence generate a gap between legally mandated outcomes and outcomes favored by the inquisitorial process's hunt for the truth. The resulting tension produced a split in Roman-canon legal doctrine. A minority held that blood punishment could be imposed even in the absence of full proof if the probative force of legally insufficient evidence was overwhelming. Court practice, we will see, varied across continental jurisdictions.

However, the extent to which the judge's fact-finding freedom was legally bound cannot properly be established by focusing solely on rules of proof sufficiency. Admissibility rules must also be considered. On first inspection this seems to be wrong, since the purpose of these rules is to exclude evidence from consideration by the judge, rather than to direct him how to assess their value. Yet as Chapter 7 will demonstrate, the institutional milieu of the inquisitorial process could obliterate the distinction between admissibility rules and rules of weight, since the judge was often exposed to reliable testimony of legally incompetent witnesses. When this occurred, the law required that he attribute no probative value to information he found convincing. Whether rules on this subject were firm or vacillated will be exposed to scrutiny.

Chapter 8 will look at instruments designed to reduce the damage which the negative effect of Roman-canon full proof caused to crime control interests. The need for these instruments was keenly felt by judges when their inability to find two eyewitnesses or to obtain a confession prevented them from imposing blood punishment on a defendant of whose guilt they were convinced on legally inadequate evidence. Their urge to punish, their *furor puniendi*, needed some release. As we will see, most important for providing this release was the possibility of imposing criminal sanctions milder than death or serious bodily punishment (*poena extraordinaria*). After we have examined the rules dealing with the evidence needed for imposing these punishments, it will became clear why a measure of fact-finding freedom burst into court practice as inevitably as trees leaf out in spring. Also useful in compensating for the judges' inability to impose blood punishment were intermediate judgments between conviction and outright acquittal. They enabled the imposition of onerous restrictions on the freedom of defendants who were in limbo, neither convicted nor fully acquitted. And as the finality of these judgments was suspended, the door was left open for the resumption of prosecution if full Roman-canon proof became available at a later date.

Chapter 9 will summarize findings about the degree to which Roman-canon fact-finding arrangements influenced the freedom of judges in assessing the value of evidence. The chapter will survey the pronouncements of Roman-canon jurists on the wiggle room judges enjoyed in implementing proof sufficiency rules. It will become obvious that this wiggle room accommodated the tension between legal proof and the need for effective law enforcement that characterized the Roman-canon fact-finding arrangements. The judges' limited discretion (*arbitrium regulatum*) will emerge as the key for unlocking the mystery of how evidence law was implemented in the inquisitorial process.

Chapters 10 and 11 will move from the historical to the comparative plane and interrogate what constraints on the judges' freedom to evaluate evidence persist in contemporary criminal procedure, and how they relate to constraints in the Roman-canon fact-finding scheme. Chapter 11 will examine this question in regard to procedures in the continental legal tradition, where the principle of free evaluation

of evidence is now professed to be the lodestar. The evolution of this principle will be traced from its original French form of inscrutable personal conviction (*conviction intime*) to its now prevailing intersubjectively articulated variant (*conviction raisonnée*). It will turn out that this more recent variant tolerates significant limitations on judges' fact-finding freedom. Although legal doctrine denies legal character to most of these limitations, we will see that the denial is not realistic. In contrast to the Roman-canon system, however, the modern variant of these limitations eschews rules requiring a specified quantity and quality of evidence for conviction. It espouses instead a general proof-sufficiency formula requiring that evidence supportive of conviction must leave no doubt in the adjudicators' minds. But we will see that it also includes rules on steps judges must take in arriving at factual findings, and rules mandating disregard of some species of evidence, no matter how persuasive they may appear to judges. The constraining effects of these rules will exhibit open and subtle parallels to the negative effects of Roman-canon legal proof rules.

Chapter 11 will seek to establish whether functional counterparts of Roman-canon legal proof rules can be found in common law jurisdictions. Here the comparison of the two systems will be bedeviled by differences between the Roman-canon unitary and the common law bicameral trial court. The division of the latter in two parts will require separate consideration of the law's *aspirations* as reflected in the judge's instructions to the jury, and their *realization* in the jury's verdict. In regard to aspirations, unsuspected affinities will come into view with the Roman-canon fact-finding system. It is only when the realization of these aspirations becomes the subject of comparison that major contrasts with the Roman-canon system become evident in regard to the adjudicators' fact-finding freedom.

The Epilogue will pull together the threads of the study's narrative. Two contrary dispositions toward the adjudicators' freedom to evaluate evidence will be identified in both premodern and modern criminal procedure, neither disposition strong enough to defeat or put the other to flight. Quite understandably, then, it will transpire that the Roman-canon fact-finding scheme and its contemporary counterparts were not radically opposed, the former adopting, the latter rejecting legal constraints on the evaluation of evidence. It will emerge instead that they both adopted intermediate positions between these two extremes. More unexpectedly, the study will reveal the remarkable endurance of legal proof in its negative form. The argument will be made that this form does not deserve disparagement as the relic of an inferior stage in the evolution of forensic evidence. On the contrary, the study will attempt to show that well-chosen negative proof rules could be useful in contemporary procedural systems. And as scientific and technological advances produce knowledge capable of extending law into areas presently left to the adjudicators' innate cognitive processes, the importance of these rules is likely to grow and find burgeoning acceptance. The final pages of the study will then propose that the evaluation of evidence free from legal intrusion does not deserve to be hailed as an irreversible historical achievement and an ideal fact-finding arrangement.

THE ELUSIVE UNITY OF ROMAN-CANON EVIDENCE

As most of the terrain to be traversed in this study will be in the domain of Roman-canon evidence law, it is worth stressing at the outset a difficulty that any cicerone must face in guiding the reader through this hugely varied legal landscape. The difficulty stems from the fact that Roman-canon evidence law changed greatly depending on the type of proceedings to which it applied. Civil and criminal evidence differed considerably, especially in respect of the judge's freedom to depart from the rules of evidence when they seemed to him over- or under-inclusive. But even criminal evidence – with which this study is solely concerned – constituted a single system only in its main outline. If one ventures beyond, differences surface between evidence in the two types of criminal proceedings developed by the Church of Rome and adopted later by secular jurisdictions. The older "accusatorial" type of proceeding (*processus per accusationem*) was patterned on the criminal process of the later Roman Empire. It was organized as a private prosecution, instituted on the initiative of a private prosecutor. He and the accused were required to submit evidence which was then developed by the judge. But as of the thirteenth century, this type of proceeding was gradually overshadowed – and in some places totally eclipsed – by the "inquisitorial" type (*processus per inqusitionem*), conceived as a judicially instituted and conducted investigation.[1] Here the active role of the judge in collecting evidence had a significant effect on its evaluation. Only the fact-finding scheme in this dominant form of the *ancien régime*'s criminal justice will be canvassed in this study.

Common features of Roman-canon evidentiary arrangements are difficult to pinpoint, however, even within this greatly narrowed focus. A principal reason for this difficulty is the polyphonic character of late medieval legal sources regulating these arrangements. Consider that Roman-canon evidence did not spring from a single legislative source, nor was it built like a coral reef, case by case. Rather it emerged from the work of late medieval university scholars and Church lawyers engaged in organizing the fragmentary evidence rules found in ancient Roman law and in scattered legal sources of the Church.[2] Where no consensus crystallized on an issue, judges would follow the opinions of jurists they considered

[1] For the description of the accusatorial process in Italian secular courts, see Hermann Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik*, vol. 1, 87–120 (1907). On the rise of the inquisitorial process, see Winfried Trusen, "Von den Anfängen des Inquisitionsprozesses zum Verfahren bei der Inquisitio Haereticae Pravitatis," in Peter Segl (ed.), *Die Anfänge der Inquisition in Mittelalter*, 39–76 (1993). For a brief outline of criminal proceedings developed by the Church of Rome, see Mirjan Damaška, "The quest for due process in the age of inquisition," 60 *Am. J. Comp. L.* 919, 921–926 (2012).

[2] Secular scholars (*viri scolastici*) focused on the Digest, Code and Novels in Justinian's codification of Roman law, while lawyers of the Church focused on Gratian's Decretum. But although secular (civil) and ecclesiastical law were formally separated, their interpenetration was so intense that it is appropriate to term the final product "Roman-canon" evidence. It should be noted, however, that the final product of this fusion is often designated as *ius commune* evidence, or learned evidence law.

most respected.[3] But even respected jurists sometimes equivocated on the question of how flexible the rules on the value of evidence ought to be. Often they also failed to indicate the type of criminal process to which their opinions on a point of evidence law related: many of their pronouncements seem to have been directed to the more sophisticated and theoretically challenging accusatorial form of criminal proceedings, rather than to the prevailing inquisitorial form of interest to this study. This decentralized mode of lawmaking produced uncertainties in the law, similar to those that arise in common law jurisdictions when several lines of precedents compete for recognition. In a word, legal waters were muddied at their source. Princely ordinances of the early modern period introduced more order in this scholarly law and reduced its dissonances. But they gave rise to changes in attitudes toward the rigidity of evidence rules, particularly in jurisdictions where codification of the law was coupled with institutional innovations, such as the separation of investigative functions from decision-making.[4] The decline in the importance of blood punishments in the early modern period was yet another source of changes, especially in regard to the scope of applicability of the Roman-canon full proof standard.

As a result of all these transformations doubts arise whether the Roman-canon fact-finding scheme can be perceived as a unity with common characteristics. Responsible for these doubts is the scheme's long life. Its roots were planted in the twelfth century, and its vocabulary and doctrinal framework completed a century later, at the time when the inquisitorial process was officially recognized by the Church of Rome. Once established, the scheme's *dur désir de durer* was long-lasting. Even in the nineteenth century, after the French revolutionary principle of free evaluation of evidence began its victorious march on the continent, the scheme did not completely disappear. Like light after sunset, much of its doctrinal framework survived in some continental countries.[5] To be sure, variety thrived within this stubbornly persisting framework – a variety due to stupendous and multifaceted changes that took place in Europe between the thirteenth and nineteenth centuries.[6] Nor was the variety limited to diachronic differences. Synchronic spatial

[3] On the details of this scholarly law in late medieval northern Italy, see Woldemar Engelmann, *Wiedergeburt der Rechtskultur in Italien*, 212–228 (1938). It is true that local customs, urban statutes and sporadic royal ordinances could supersede this law, but it still remained influential as an instrument for interpreting customs, statutes, and ordinances, or as a tool for filling gaps in legal sources.

[4] These two functions, as we will see, were usually fused in the medieval forms of the inquisitorial process.

[5] On the margins of continental legal culture, the final flickers of Roman-canon evidence lingered until the twentieth century. For the Kingdom of Serbia, see Tihomir Vasiljević, *Sistem Krivičnog Procesnog Prava*, SFRJ, 311 (1965).

[6] Contrary to what is often thought, however, early modern lawyers remained remarkably aloof from developments in science and philosophy relevant to truth-discovery. We will see that some intellectual historians valiantly but unsuccessfully struggled to prove that Roman-canon evidence law was affected by science and philosophy as of the seventeenth century.

differences existed as well: even identical changes in the enveloping political, social, and intellectual environment did not always produce identical responses in criminal justice. But despite all this variety the unity preserving doctrinal framework persisted. The vocabulary and the conceptual apparatus crafted in late medieval times remained largely intact until the scheme was *in extremis*. So did the proof sufficiency rules and the downgrading of circumstantial evidence. The tension between legal proof rules and effective crime control likewise proved unvarying. Antithetical energies released by this tension generated an enduring fervor in both legal doctrine and court practice, responsible for producing the characteristic mélange of constraint and freedom in the evaluation of evidence.

The continuity of Roman-canon legal proof can easily be documented. Consider that seventeenth-century lawyers still read late medieval jurists and invoked their views as authoritative. A century later, a famous French lawyer, Muyart de Vouglans, castigated Cesare Beccaria for attacking Roman-canon evidence without familiarity with two sixteenth-century Italian jurists, who in turn sought support for their opinions in the writings of fourteenth-century scholarly jurists.[7] And in the nineteenth century, the learned German lawyer Carl Mittermaier could still not separate himself from a version of legal proof, despite his surprising familiarity with common law evidence. If you think about it, the longevity of the Roman-canon fact-finding scheme is nothing short of remarkable. It is as if categories of scholastic philosophy continued to be recognized by Marx and Engels, or as if the Byzantine pictorial style continued to inform Western painting from the time of Cimabue to the rococo frivolities of Boucher or Fragonard.

Features of the Roman-canon scheme relevant to the judge's freedom to evaluate evidence will be examined against the background of the scheme's most sophisticated strand, developed in northern Italy after the intellectual rebirth of the twelfth century. The strand will be used as a trunk for the scheme's branching variations. It was very influential in continental courts, and gained a quasicanonical status not only in the courts at the continent's center, but also in those on its margins. Among several late medieval expositors of the strand, special attention will be paid to a treatise of Albertus Gandinus and to the writings of two of the greatest fourteenth-century jurists, Bartolus de Saxoferrato and Baldus de Ubaldis. They made important contributions to Roman-canon evidence law, and their opinions carried great weight outside Italy for several centuries. Among several of their sixteenth-century successors, the study will most frequently refer to the opus of Prospero Farinacci, the "prince of criminal lawyers," whose books on procedure and evidence circulated widely across the European land mass. Among seventeenth-century authorities, most often cited will be the Dutch jurist Damhouder, and especially the somewhat younger German jurist and judge Benedict Carpzov. The latter's treatise on

[7] See Muyart de Vouglans, *Réfutation des Principes Hasardés dans le Traité des Délits et Peines*, 66–67 (Lausanne 1767).

criminal procedure, although devoted to the law of his native Saxony, was treated in several continental jurisdictions as if it possessed legislative force.[8] Sporadic glances at the French variant of legal proof will be based mainly on two eighteenth-century legal authorities, Daniel Jousse and Muyart de Vouglans.

The discussion of the Roman-canon fact-finding scheme will not be limited to its depiction in scholarly commentaries and treatises, however. Although the law as described by learned jurists did not float irrelevantly over actual goings-on in court-rooms, significant gaps are known to have existed – as they do in our time – between the arias of procedural doctrine and the recitative of court practice. But since archival studies of this practice are fragmentary and often inconclusive, the study will rely on legal opinions (*consilia*) delivered by Roman-canon legal experts in criminal cases, and on practitioners' manuals devoted to the collection of evidence in the inquisitorial criminal process. Leafing through these primary sources takes one, as through a magnifying glass, into many otherwise invisible facets of the Roman-canon fact-finding scheme.

Having marked the route to be travelled in this study, and alerted the reader to difficulties we will encounter along the way, let us now consider how the Roman-canon evidentiary arrangements for criminal cases came into being.

[8] See Roderick von Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. 1, 1, 67 (München-Leipzig, 1884).