

Certainty, laws and facts in Francis Bacon's jurisprudence

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Introduction

Certainty is an epistemological category implied in at least two crucial issues of early-modern jurisprudence: the certainty of law (legal certainty) and the certainty of facts (factual certainty). Any historical study approaching questions related to early-modern legal certainty should therefore focus both on laws and on facts. Francis Bacon's emphasis on legal certainty in his project for law reform has been widely acknowledged in earlier and recent works.¹ It has even been suggested that certainty "is the quality Bacon associates with a general positivist science capable of producing laws valid for both nature and the state."² However, no studies so far have attempted to explain in what sense Bacon understood legal certainty. The same can be said of his notion of factual certainty. Although studies have suggested that Bacon applied criteria drawn from the domain of the law in order to establish facts, assess testimonies and transmit factual reports in the methodology of natural history,³ his views concerning legal facts, and particularly concerning factual certainty in jurisprudence, have never been systematically explored.

My overarching view is somewhat different from the interpretations which associate Bacon's legal views on certainty to his ideas on natural philosophy⁴ in that I think his concept of certainty in jurisprudence needs to be clarified and specified before drawing conclusions about its possible commonalities with natural philosophy and natural history. The present study will explore Bacon's views on certainty in his legal thought and practice, hoping that it may lead to a better understanding of the epistemological side of his legal thought and prompt further studies to examine its possible connections to his treatment of certainty as it applies to the laws and facts of nature.⁵

Although throughout his legal career Bacon encountered and dealt with problems arising from legal as well as factual certainty, he never defined or described the kind of certainty typical of laws and facts. His elusive notions of certainty have to be traced throughout the wide extent of his legal writings and his interventions in legal cases. As we shall see, legal certainty was a major preoccupation in Bacon's law reform project, while factual certainty did not play such a significant role. This lesser interest in factual certainty evinced in Bacon's writings and practices does not imply, however, that he considered factual certainty any less important than legal certainty: he clearly expressed that the work of the "judges of facts" who "try and decide the issues and points of facts" is "a matter no less important to the sum of justice than the true and judicious expositions of the laws themselves."⁶ If anything, Bacon's lack of emphasis on factual certainty reflects his belief that the current practices and doctrines in English law regarding the establishment of

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facts were not in need of substantive reform. Conversely, he judged that English law sorely needed legal certainty and concentrated his efforts on achieving it through reform.

I. Legal certainty

Legal certainty has been an ideal of jurisprudence from the age of Justinian to the present. It was perceived as the law in its perfection and a warranty of justice. In Roman law it was contrasted with the original uncertainty of law, characteristic of the primitive stages of societies in which human affairs were ruled by unstable laws and lacked a fixed legal system.⁷ The quest for certainty therefore entailed a critical view of the current legal system. By the sixteenth century, common lawyers were deeply worried about the difficulties arising from legal uncertainty and sought to remedy the obscurity, ambivalence and confusion of the laws of their time. Numerous projects attempted to systematize and rationalize the laws, in order to curb uncertainty.⁸

Deeply connected with the question of certainty were the discussions on the interpretation of the law. Renaissance jurisprudence understood interpretation as an act that bestowed certainty on the meaning of the law, which could only be done by the legislator, the judge, or the jurist. Interpretation was a broad and complex task comprising the resolution of ambiguities, the determination of a speaker's or writer's intention, and the nature of objective meaning.⁹ Since the law was an imperfect text, legal interpretation was a particular and unavoidable form of mediation, for an absolutely certain and totally unambiguous law was assumed to be an unachievable ideal. At the same time, interpretation carried the risk of misrepresentation of the right meaning of the law. In point of fact, laws were perceived as having different degrees of certainty and, as a consequence, it was thought they belonged to the realm of probable knowledge.¹⁰ Given these conditions, one can see why early-modern law reform projects failed in most cases, due largely to the contradiction implied in searching for a completely certain, unambiguous and explicit law while believing at the same time that interpretation was an ever-necessary supplement of law.

Bacon's interest in legal certainty became manifest at the turn of the sixteenth century, when he was vying for a position at court as an advocate for legal reform.¹¹ The role he played in the masque *Gesta Grayorum* (1594), presented at Gray's Inn and attributed to him,¹² places much practical emphasis on counseling the fictitious "Prince of Purpoole"¹³ to "purge out the multiplicity of Laws, clear the incertainty of them, repeal those that are snaring, and prize the execution of those that are wholesome and necessary."¹⁴ Legal certainty is seen in this passage as the end-product of a process of clarification parallel to the elimination of inaccurate laws. A few years later, in the dedicatory epistle addressed to Queen Elizabeth of *A Collection of Some Principal Rules and Maxims of the Common Laws* (composed by 1596 and printed posthumously in 1630),¹⁵ Bacon's advice was "to enter into a general amendment of the states of your laws, and to reduce them to more brevity and certainty." The multiplicity of laws is again judged to interfere with legal certainty, which is thought to be "the principal and most just challenge" in English law.¹⁶

The quest for legal reform and certainty was not merely an excuse to advance Bacon's early professional ambitions: it was truly a central and permanent concern of his public agenda.¹⁷ In fact, Bacon's most detailed views on legal certainty are to be found in his later work titled *Exemplum Tractatus de Justitia Universali, sive de Fontibus Juris, in uno titulo, per Aphorismos* (1623).¹⁸ Unfinished as it is – and unusually systematic when compared to other writings by Bacon – the *Tractatus* deals primarily with legal certainty and showcases the mature mind of a genuine jurist who had been head of the Court of Chancery until only a couple of years before publishing this work.¹⁹ The *Tractatus* states at the very beginning that certainty is such an important component of the law that without certainty the law cannot be just. In addition to three other conditions, Bacon argues that for a law to be good (*bona lex*), it must be certain in its promulgation (*intimatione certa*).²⁰ Being the first "dignity of the laws," certainty is a necessary (but not

sufficient) condition for justice.²¹ The reference to the promulgation of the law highlights the link between legal certainty and the interpretation of the law. The law is expressed in words whose meanings are to be interpreted by a legal authority. However, the lawmaker has to promulgate the laws with certainty in order to forestall as much as possible arbitrary interpretations on the part of the judge, and the best law is the one that allows for the least discretion in a judge's interpretation. Certainty is precisely the quality conducive to that goal. In other words, the more certain a law is, the less leeway it allows for a judge's interpretation, and vice-versa.²²

The general account given above does not break new ground and is very much in keeping with the tradition of Roman law.²³ However, Bacon also introduced noticeable innovations when he turned his attention to the particular kinds and causes of uncertainty as well as their remedies. As we shall see, he devised an unprecedented, systematic and detailed body of diagnostic analyses and practical guidelines on the issue of legal certainty that had bearing on later developments of English law reform.²⁴ As a whole, these guidelines exhibit the distinctive mark of Bacon's legal work in their skillful intermixing of deep erudition with his long and rich experience in the legal profession.

In Bacon's view, given that English law "is no Text law" but a succession of judicial acts collected in Year Books or Reports, "as these Reports are more or less perfect, so the Law itself is more or less certain."²⁵ Laws can be uncertain in two ways: (1) when there is no law covering a particular case; or (2) when a law is ambiguous or obscure. The *lacunae* of the law stem from the limitations of human reason, which is unable to prescribe all at once the laws embracing every possible human act. This shortcoming can be remedied in four ways:²⁶ (i) by deducing the lacking law from similar laws (aph. 11–20); (ii) by using examples from which a new rule of justice can be extracted (aph. 21–31); (iii) by instituting special courts like the praetorial court (a court of equity, like the Court of Chancery) and the censorial court (a court with extraordinary discretion in criminal matters, like the Star Chamber) (aph. 41–46). The recurring conflicts of jurisdiction between Chancery and other courts that Bacon had to deal with led him to state that the praetorial courts should be kept in within proper limits, for otherwise everything might become "a matter of discretion" (aph. 43).²⁷ The fourth way to fill legal *lacunae* is: (iv) by merging pre-existent laws so that the omitted case be covered by them (aph. 47–51).

The uncertainty arising from the obscurity of the law is explained, again, as due to four causes: (i) excessive accumulation of laws; (ii) ambiguous laws; (iii) inattentive and disorderly methods of exposition; (iv) contradictions or inconsistencies among judgments. To correct the excessive accumulation, Bacon urged the periodical examination of the legal corpus, and the composition of new statutes (aph. 53–58) and the arrangement of a digest of laws, inspired by the Justinian model (aph. 59–61). This process of systematization and rationalization would remove obsolete laws, avoid contradictions, eradicate repetitions and preserve the most concise formulations.

The ambiguity of the law stems from its verbosity, its excessive conciseness or from inconsistencies between the preamble and the body of the law (aph. 65–71). The wording of the ideal law should strike a balance between verbosity and excessive brevity.²⁸ Ordinary laws that people usually interpret on their own and without a lawyer's counsel must be clearly laid out "as if it were with a finger." The "safer and truer" kind of interpretation "proceeds according to the sense of the law."²⁹ As for preambles, when used properly, they can serve to reveal the "intent and sense" of the law.³⁰

A large part of the *Tractatus* (aph. 72 to 93) provides instruction on how to improve the promulgation of laws by means of reports, auxiliary books, *responsa et consulta prudentium* and lectures.³¹ The guidelines pay particular attention to the preparation of accurate law reports (aph. 73–76), which must record legal cases in a concise and accurate manner, register the judgments word by word, provide the arguments used by the judges to support their ruling and quote authorities as briefly as possible. For Bacon, these reports should be written by learned lawyers rather than judges.³²

Auxiliary books should support the “science and practice of the law” (aph. 79–88).³³ Provided that they are read and used with care and prudence, Bacon considered them to be useful in legal education.³⁴ Bacon mentions six kinds of auxiliary books: *Institutiones* (a clear and slight sketch of the laws); *De verborum significatione* (a law dictionary); *De diversis regulis juris* (a collection of Maxims of the Law); *Antiquitates legum* (compilations of disused laws, which although deprived of authority, are still venerable); *Summae* (abridgments of the laws) and *Agendi formulae* (arrays of forms of pleading).

The last aphorisms of the *Tractatus* (aph. 94–97) deal with the causes and remedies of “contradictions and inconsistencies of judgments,” which have been introduced as one source of legal uncertainty. They are said to stem from hasty decisions by judges, rivalry between Courts, bad law reports and overly permissive guidelines for questioning court decisions. Bacon recommended practical strategies to control and limit the legal proceedings that allowed for these practices.

Maxims, authorities and reason

The book *De diversis regulis juris*, included among the auxiliary books listed in the *Tractatus*, contributes “more than anything else” to legal certainty.³⁵ Bacon’s conviction that there was a strong connection between the *regulae juris* (maxims of the law) and the certainty of laws can be detected at least as far back as 1596, when he wrote his own book of *Maxims*.³⁶ During his years at Trinity College, he studied rhetoric and dialectics, and became familiar with civil law and methodical legal literature.³⁷ Like other members of the Inns of Court with a university background, he tried to apply Continental legal theory to the methodizing of the common law. Late in the sixteenth century, several methodical works inspired by Continental civil law were produced at the Inns with didactical and theoretical purposes. Bacon’s *Maxims* were conceived within this context.

For the author, the maxims of the law are the “foundations of the law,” “the full and perfect conclusions of reason,” “the general decrees of reason,” “the rules and grounds” dispersed throughout the body of the laws, the “ballast” of the laws.³⁸ This characterization of the maxims interweaves common law with civil law traditions³⁹ by blending a theoretical interest in the systematization of civil law and the practical aspects of a case-oriented approach as that of common law. The civilians influenced the distinction that Bacon draws between laws (contained in statutes and cases) and generalizations (maxims).⁴⁰ Bacon understands maxims as laws of laws, since the particular laws are their point of departure. Just as a compass points to the poles, the maxims point to the laws, once the laws have been settled.⁴¹ The gathering of maxims should be the task of the most skilled and wisest jurists, who must pay attention to “the more subtle and hidden rules, which can be extracted from the harmony and congruence of the laws and the cases.”⁴² Bacon’s idea of the strong dependence of the maxims on the laws reproduces literally a passage of *De diversis regulis juris* (a title of Justinian’s *Digest*): “the law should not be derived from rules, but the rule should be made out of the existing law.”⁴³ Furthermore, he recognizes that some rules collected in his book correspond to rules of Roman law.⁴⁴

Bacon’s views concerning the relationship between legal certainty and maxims are also very much in keeping with those of his fellow common lawyers. The notion of “maxim” prevailing among early-modern English common lawyers is captured in John Rastell’s law dictionary,⁴⁵ which blends two fundamental, long-standing elements of the notion of maxim deeply rooted in the common law tradition. On the one hand, the idea that maxims are firmly grounded on reason, held by St. Germain.⁴⁶ On the other hand, the assumption that maxims result from a process of induction. John Fortescue’s *De laudibus legum Angliae*,⁴⁷ is, to my knowledge, the first English legal source that established the inductive origin of maxims.⁴⁸ He claimed to follow Aristotle’s *Analytica posteriora* in stating that the rules of law are known not by

demonstration but by “induction through the senses and the memory.”⁴⁹ The time-honored English conviction that law had immemorial origins and a rational character, synthesized in the ubiquitous dictum “common law is common reason,”⁵⁰ underpins the idea that maxims are conclusions of reason exempt from proof. This is in keeping with Bacon’s own idea that the laws of different countries were grounded on a common source as if they “were dictated *verbatim* by the same reason.”⁵¹ Hence, maxims can be gleaned from agreements in the laws of different legal systems.

The central role of legal certainty was expressed in Thomas Littleton’s *Tenures*, a seminal work on common law that ends with the famous statement that by “the arguments and the reasons in the law, a man may more sooner arrive at the certainty and the knowledge of the law.”⁵² On the other hand, early-modern books of maxims written at the Inns of Court shared with Bacon the view that maxims allow for legal certainty. For instance, William Fulbeck claimed that for “the certaine knowledge of matters, it is good that the law should be bounded by certaine rules and limits.” For a man to know with certainty what his rights are, the law needs to manifest itself to him “as it were by finger point.”⁵³ For that reason, Fulbeck concluded that “it is to good purpose, that the Law should be definite in it selfe, and should consist of certaine conclusions.”⁵⁴ Fulbeck did not hesitate to claim that the writing of law is “a principall cause” of legal certainty: without it the law is “of small credit,” since a changing law lacks authority and force.⁵⁵

In contrast to Bacon’s books of maxims, Fulbeck’s work provides valuable insights on legal probability and certainty. According to Fulbeck, probability and certainty are directly proportional to the obscurity or the clarity of the wording of laws. When laws are uncertain and fail in their purpose due to their omissions or their ambiguity, they are best interpreted through “common reason and intendment.”⁵⁶ In that case, interpretation must seek to find the more probable meaning of the law:

The principall meane to enquire after the truth of euey thing, is to examin of two or more contrarie reasons whether is more probable. That which is plausible to common understanding is tearmed probable, and when the words of a covenant or deuise be clear and manifest, we follow the literall sense of them without farther investigation, because in things that be certaine, and apparant, there is no place for coniecture: but when the words be obscure, or when something is omitted, least the graunt, covenant, or deuise do faile, we have alwaies recourse to that which is more probable, and wee imagine that more was spoken then written, and more intended, then uttered. [...] where the words of the law do faile, the law it selfe doth faile.⁵⁷

A similar approach can be found in John Doddridge’s *Methodus studendi* (1629),⁵⁸ the most remarkable methodological work from the Inns of Court. Doddridge distinguished several types of maxims according to the four Aristotelian causes,⁵⁹ and the sections devoted to the material and formal causes of maxims are particularly relevant to the present study. With respect to their material causes, maxims (also called “grounds and rules”) are divided into “general grounds” – which are the fundamental grounds of law applying to all branches of law and shared with sciences such as logic, natural and moral philosophy, etc.⁶⁰ – and the “particular maxims” belonging to specific fields of law, such as contracts, etc.⁶¹

According to their formal cause, Doddridge distinguished “primary grounds” from “secondary grounds,” the key of this distinction being the relationship of each kind of proposition with truth. The primary grounds import “a necessary or knowne truth which cannot be impugned.” Imprinted in the mind of every man and discerned by the light of nature, they are “most certaine and undoubted” so that they do not require any confirmation.⁶² In contrast, the secondary grounds involve probability and hold a truth that is subject to exceptions. They are “not so well knowne by the light of Nature, as by other meanes” and because they “comprehend great probability,” they

“need no great profe to be confirmed.” Secondary grounds are said to be probable “because although the manifest truth of them be unknown, yet neverthesse they appeare to many, and specially to wise men, to be true.”⁶³ Finally, Doddridge held that legal certainty relies heavily on maxims.⁶⁴

Remarkably, Bacon’s book of *Maxims* does not delve into the theoretical considerations and definitions regarding certainty, probability, proof and truth offered by Fulbeck and Doddridge. Why did Bacon not follow this path? It can be inferred that he did not think it was necessary. No existing collection of maxims satisfied him,⁶⁵ but he objected to specific ways of displaying maxims and quoting authorities, rather than to their theoretical grounds.⁶⁶ Bacon thought it was better to provide an example of the work to be done instead of deep theoretical preliminaries. Accordingly, he wrote a collection of 25 maxims, adding to each of them detailed examples of its applications; thus, the reason for the law contained in the maxims is skillfully integrated with the legal practice. Rather than defining legal certainty and probability, Bacon sought to show the actual ways in which legal certainty is achieved. The outcome, however, is unsuccessful for the very reason that the theoretical vagueness tends to blur Bacon’s statements.

According to Bacon, for law students to profit from maxim books, maxims should not be isolated from examples as they were in other books, for this kind of presentation leads maxims to be perceived as dead words.⁶⁷ As for the use of authorities, he was critical of the practices prevalent in his day. In early-modern England, precedents, that is to say, reports of old cases collected in Year Books and abridgements, and the decisions judges made based on them, were gaining an authority that they had never had before. Lawyers and litigants expected to find in these legal precedents the “judgment’s reasons,” the result of “artificial reason,”⁶⁸ as authorities were considered necessary to legitimate legal norms.

Bacon held very different views. In the preface to *Maxims*, he argued that even though it might be more pleasant and ostentatious to quote authorities, he refrained from such a course of action because he deemed it “a matter undue and preposterous to prove rules and maxims.” On the other hand, he added that in the examples he presented for explaining the maxims, he intended “expressly to weigh down the authority by evidence of reason.”⁶⁹ Authorities, only when necessary, may be quoted as occasional complements in order to explain maxims. The “warranty” given by them, however, should never be understood as the proof of a maxim, since the rational grounds and “the evidence of reason” are what convey its legitimacy. The maxim sums up the reason contained in the laws and summarizes the “certain sense” of the law by means of a clear sentence. This stress on reducing the use of authorities is a mark that distinguishes Bacon’s approach from the traditional perspectives of English common law.

Law interpretation in the making

Bacon’s work as a law practitioner provides many hints of his approach to achieving legal certainty. His interpretations of statutes and legal cases showcase the concrete ways in which he attempted to bring more certainty to English law. These sources allow us to grasp how a Baconian interpretation of the law works and what its assumptions are. His views are to be placed in the wider context of the various English law books on statutory interpretation circulating in the late sixteenth and early seventeenth centuries, most of which bear strong similarities to the Continental doctrines on interpretation.⁷⁰ As we shall see, although Bacon did not explicitly formulate a systematic doctrine of legal interpretation, his guides, rules and practices, like those of his fellow common lawyers, echo those of Roman law.

Bacon described the law as a transcendent, intelligent, intentioned and autonomous entity. He frequently referred to the “very natural sense,”⁷¹ “the sense of law” and the “natural construction,”⁷² and the “natural exposition” (*expositio naturalis*) of the law.⁷³ A natural construction

displays “the intent and letter of the statute, the sense.”⁷⁴ Bacon’s efforts to unravel deviant interpretations are done “without offering violence to the letter or sense.”⁷⁵ When giving his interpretation of the legal clause “without impeachment of waste” (*absque impetitione vasti*), he insisted that his construction of the sense of it “is natural in respect of the words, and, for the matter, agreeable to reason and the rules of law.”⁷⁶ The law “never intends error or falsehood,”⁷⁷ knows its words⁷⁸ and employs them according to its ends. When necessary, the law can place the words distinctly “at will”: “the wisdom of the law uses to transport words according to the sense, and not so much to respect how the words do place, but how the acts, which are guided by those words, may take place.”⁷⁹ When arguing a case of revocation of uses, Bacon pointed out that the law does justice in taking words so “as no material part of the parties intent perish.” Hence, in order to preserve the parties’ intent, occasionally the law admits of senses different from the usual meanings ascribed to the words.⁸⁰ Thus, it becomes evident how the admirable wisdom of the law has “consent with the wisdom of philosophy, and nature itself.”⁸¹

Bacon contrasts the interpretations that search for the true sense of the law to those whose aim is to exhibit the useless subtlety of human wit (*expositiones contentiosas*).⁸² The right interpretation aims “to open the law upon doubts, and not to open doubts upon the law”⁸³ because to make something clear is “the true use” of the human mind.⁸⁴ Wise lawmakers should take into consideration “by what means Lawes may be made certaine, and what are the causes & remedies of the doubtfulness and *incertaintie* of Law.”⁸⁵ Expertise and control are fundamental requisites for reaching legal certainty, both in legislating and in interpreting the law. Judges are permitted to interpret the law because of their legal expertise, their task being to interpret the law and to discover its adequate application to particular cases.⁸⁶ In fact, a considerable amount of Bacon’s energies was directed at avoiding ambiguity in pleadings and setting out rules for interpreting the law.⁸⁷ An example of this can be found in his exposition of Maxim 3, where the difficulties arising from pleadings rife with “ambiguity of words,” “incertainty of the intendment,” “impropriety” and “repugnancy and absurdity of words” are presented and solved by means of detailed examples.⁸⁸

How does the interpretation of the law actually work? Most often Bacon strove to remove ambiguity and obscurity from the wording with tools provided by rhetoric, grammar and dialectic in a manner quite in keeping with the tradition of Roman law.⁸⁹ For instance, in determining the sense of the word “value” he argued that, first of all, it is necessary to consider “what the law generally doth intend by the word *value*.”⁹⁰ In trying to “construct” the true meaning of the legal concept of use, he finds it helpful to consider firstly what a use is not.⁹¹ Ambiguity is cleared up after a methodical examination and careful weighing of arguments *pro* and *contra*.⁹² In addition, when discussing the sense of the legal concept of use, Bacon’s interpretation draws attention to the proper sense of Latin prepositions.⁹³ To expound legal statutes, he recommended the common procedures of “scholars” who firstly “seek out the principal verb.”⁹⁴ Occasionally, he employed etymologies for grasping the right interpretation.⁹⁵ Furthermore, the consideration of the general context of the statute is said to shed light on words whose sense cannot be gleaned by other means,⁹⁶ for that reason the *interpretatio contemporanea* is “of greatest credit.”⁹⁷

In defining the situations in which interpretation of the law is admissible, Bacon’s guidelines draw heavily on Continental law doctrine: “as no expediency ought to cause judges to decline from the truth of the law where it is express and direct, so in *ambiguis eam sequimur quae vitio caret*.”⁹⁸ In cases where two or more interpretations can be grounded on equally acceptable reasons, Bacon urges an assessment of the inconveniencies produced by each of them, relying once again on another rule of Roman law: “*verba sunt intelligenda, ut res magis valeat quam pereat*.”⁹⁹ When an interpretation is based on unsatisfactory reasons, “the absurdity and incongruity of the reason alleged destroys the conclusion, credit and authority of it.” Hence, it leads to the

conclusion that the case “is of no credit against such a mass of arguments and reasons.”¹⁰⁰ Having removed the wrong interpretations, Bacon proceeds to apply a typical methodical argumentation for grounding the clear and certain interpretation, which conveys the “true sense” of the law.¹⁰¹

Innovative directions in a traditional pattern

As we have seen, Bacon integrated elements of Roman law and common law into a project of law reform centered on legal certainty. Although in so doing he did not diverge from traditional patterns regarding legal certainty, he did introduce a noticeable innovation in that he developed a specific analysis of the causes of uncertainty, provided detailed directions for its remedy bearing in mind the practical complexities of the legal system, opposed to the traditional “abuse” of authorities and emphasized the practical applications of maxims by means of examples.

Bacon’s notion of legal certainty is underpinned by two main assumptions. On the one hand, legal certainty is subject to degrees and is strongly grounded on the rational character of the law. On the other hand, legal certainty hinges on the relationship between the words of the law and the “intents” of the law. A law is certain insofar as the words that express it denote its intent accurately. In this regard, Bacon’s notion of legal certainty is objective rather than subjective. Certainty is thought to be an objective condition of the law instead of being a subjective state of mind. Accordingly, this kind of certainty does not need to be proven, but to be elucidated by the interpreter who makes the meaning of the law understandable to those who are not legal experts. Interpretation is therefore the human attempt to deliver the objective meaning of the law conceived by the lawmaker at its promulgation. When the “promulgation” (*intimatio*) is certain enough, there is minimal need of interpretation. In contrast, when the promulgation of the law is obscure and ambiguous, the work of interpretation becomes more demanding and the interpreter needs to clarify the meaning of the law.

From these basic assumptions derive some consequences about who may be an interpreter and how legal hermeneutics should be accomplished. The act of mediation (interpretation) between the written law and its implicit intent must be done by the jurists, learned people (the “wise men”) who know the reasons of the law. Otherwise, it would be impossible to discover its hidden sense. But jurists should be acquainted not only with the reasons of the law but also with those disciplines serving hermeneutic purposes, namely the arts related to language and probable reasoning: rhetoric, grammar and dialectics.

II. Factual certainty

Before looking into Bacon’s account of certainty in legal facts, I would like to consider very briefly several practices and doctrines regarding facts in early-modern English law that are particularly relevant to this study.¹⁰² After the Lateran Council abolished trials by ordeal in 1215, establishing facts took center stage in legal procedure. In England proof by ordeal was replaced by the jury trial system, which differentiated the functions of the jury from the functions of judge in making the first responsible for establishing the facts (matters of facts) and the second responsible for the application of the law (matters of law).

By Tudor times, jurors were required to reach unanimous verdicts according to conscience.¹⁰³ The prominence of conscience as the primary principle of decision is remarkable in the courts of equity, particularly in the Court of Chancery, to the point that the Lord Chancellor (a position which Bacon held from 1617 to 1621) was frequently described as “the keeper of the king’s conscience.”¹⁰⁴ The Court of Chancery, on the other hand, did not make a clear distinction between matters of law and matters of fact in that the Lord Chancellor acted as both juror and judge.¹⁰⁵

Something similar happened in another court in which Bacon also served, the Star Chamber, where the Privy Counsellors sat as a panel of judges of both law and facts.¹⁰⁶

Early-modern civil and criminal procedures distinguished the gathering of evidence directed by court's officers, mainly by the judges, and the trying of facts, which was the work of the jury. The jury was then a passive body whose exclusive duty was to examine and weigh the evidence: it did not prepare the lists of questions to be asked to witnesses, neither did it participate in them. Such a job was done by court officers, like Bacon, who assisted inquiries in the Star Chamber and other courts. Occasionally, jurors were permitted to add evidence derived from their own knowledge, to request more evidence or to suggest new interrogations or witnesses. But on the whole, the jury did not intervene in the inquiry and it was expected that its verdict should not be influenced by the court. However, in practice, the autonomy of the jury was not always rigorously enforced. Judges often tried to secure the "right" verdict and issued instructions to manage the evidence accordingly.¹⁰⁷ As we shall see, on occasion Bacon was instrumental in intrusions of this kind.

In English criminal trials there were no firm rules establishing minimum standards of evidence for conviction until well into the eighteenth century.¹⁰⁸ Consequently, there was no appellate review of verdicts due to insufficient evidence.¹⁰⁹ Treason trials represented one exception in this regard, since a series of statutes required two witnesses as a standard of proof. This requirement was also to be found in some non-treason statutes, like the Blasphemy Act of 1697.¹¹⁰ On the other hand, although it was commonly assumed that circumstantial evidence was inferior to eyewitnesses or to confession, at the beginning of the eighteenth century hearsay and past convictions were still frequently accepted as evidence and no rule prohibited them.¹¹¹ If evidence obtained from witnesses was lacking, presumptions could fill the void.¹¹² Explicitly or not, the certainty of legal facts was assumed to be subject to degrees of probability and understood as a kind of moral certainty.¹¹³

Having sketched out this background, we are now in a position to evaluate Bacon's thought and practice concerning legal facts and factual certainty. Throughout the different stages of his legal career, as examiner, court officer, advocate, advisor and judge, he was well acquainted with the procedures of civil and criminal trials for establishing facts. In none of these roles did Bacon show any deep worry about the standard procedures for establishing facts. Besides, it is worth noting that the sources dealing with Bacon's activity as Lord Chancellor¹¹⁴ do not reflect a particular concern for factual certainty either. On his accession to the Chancellorship he had other priorities, mainly solving the pre-existing tensions between equity and common law jurisdictions, which were a pressing problem for King James.¹¹⁵ The set of ordinances he left, which on the whole summarized existing practice,¹¹⁶ introduced no relevant innovations with regard to establishing facts and factual certainty.¹¹⁷ As we shall see in the sections below, Bacon's speeches, essays, proposals, instructions and interventions in legal cases tend to reinforce and to enforce the ongoing legal doctrines and practices of his day. They do not evince the will to introduce any substantive change in procedures or doctrines concerning factual certainty.

Testimony, evidence and objective factual certainty

Since the 1590s, Bacon worked as assistant of examinations on several occasions, appointed by the Privy Council.¹¹⁸ Examinations consisted of interrogatories, written documents that grouped a long list of questions into several articles. Exceptionally, they were supplemented by torture sessions, at the order of the Privy Council.¹¹⁹ As examiner, Bacon prepared interrogatories organized into "degrees of questions" according to the ideas he had formed based on previous information and sought to confirm them through the testimony of the respondents. The "degrees of questions" made it possible to test the truthfulness of the respondent, so that the consistency in his or her

replies indicated, though did not prove, their truth and gave them credence. The same applied to concurrent responses of several independent respondents. Throughout this elaborate procedure for gathering testimonies, responses were checked against previous information.

The Court of Chancery followed a procedure for examinations similar to that of the Star Chamber, with the exception that the defendants were not subjected to interrogatories under oath. Instead, defendants were compelled to give a satisfactory sworn answer to each of the plaintiff's allegations.¹²⁰ When serving as Lord Chancellor, Bacon fixed this practice by establishing a rule according to which "the defendant is not to be examined upon interrogatories, except it be in special cases, by express order of the court."¹²¹ The reason for this rule was to guarantee the accused his or her right against self-incrimination. In keeping with this rule, in the explanation of Maxim 3 of his book of *Maxims*, Bacon states that: "in pleading a man shall not disclose that which is against himself: and therefore [...] the plea shall not be taken in the hardest sense, but in the most beneficial, and to be left unto the contrary party to allege."¹²²

Along the same lines, another one of Bacon's rules of Chancery was designed to protect witnesses from self-incriminating interrogatories. That rule establishes that examinations of the credibility of witnesses were permitted only in extremely particular cases, "by special order, which is sparingly to be granted."¹²³ By this rule, Bacon was again reinforcing a procedure that the Court of Chancery had been applying since late in the sixteenth century.¹²⁴ The same concern about this privilege emerges in his recommendation that the oath *ex officio* applied by the ecclesiastical Court of High Commission whereby a person might be compelled to self-incriminate should be suppressed following the model of other jurisdictions. Bacon raised objections not only to the oath *ex officio* but also to the fact that in this procedure the examined was not even informed of the charges of which he or she was being accused. The whole procedure, Bacon argued, was contrary to the "laws and customs of this land and state," since "by the law of England no man is bound to accuse himself."¹²⁵ Moreover, Bacon claims that in "highest cases of treason," where torture is used "for discovery, and not for evidence," the accused were not compelled to answer self-incriminating questions under oath.¹²⁶

It is certainly astonishing to see that Bacon did not condemn the use of torture in interrogations of extraordinary cases investigated by the Star Chamber, while being at the same time worried about guaranteeing the application of the privilege against self-incrimination. Did he believe that physical torment was less damaging for a person than self-incrimination? Bacon's considerations on self-preservation provide insights which help us to understand his apparently ambivalent approach on this point. The appetites for self-preservation and for the preservation of the whole are central concepts underpinning Bacon's view of nature, morality, politics and theology. Bacon argued that self-preservation was one of the fundamental appetites guiding man's behaviors.¹²⁷ Indeed, self-preservation was integral to the natural law tradition that informed the privilege against self-incrimination in its canon law origins. Compulsory answers under oath ran counter to self-preservation insofar as they could force the accused to confess a crime and therefore endanger his or her life.¹²⁸ From this perspective, Bacon judged the oath *ex officio* to be unacceptable because it was contrary to a fundamental appetite of human nature, but he did not feel that torture had the same damaging effects, provided that its goal was to obtain information and not to risk the life of the defendant being subjected to interrogation.¹²⁹

The contrast between the use of torture for "discovery" and its use for "evidence" provides some insight into Bacon's conception of factual certainty in that it draws a distinction between information and judicial evidence.¹³⁰ For Bacon, evidences are "proofs of an issue" and issues are "the state of the question and conclusion." Accordingly, issues "shall incline and apply all the proofs" as tending to a particular conclusion in order to persuade the jury to agree with it. If one party thinks that the evidence is "not proving the issue," or that it is "remote" (distant in

time or lacking probative value), “short” (imperfect), “impertinent” (irrelevant, not belonging to the matter in question) and “uncertain” (incomplete, imprecise, ambiguous), the law allows for a “demurrer upon the evidence.”¹³¹ In Bacon’s opinion, the goal of torture may not be to obtain evidence, since the testimony might be unreliable given that the individual has been forced to reply by means of physical torment. However, although the testimonies extracted from torture sessions would never by themselves constitute a proof, they provide information that might help to ascertain an alleged fact or to prevent crimes (particularly plots and treason), insofar as they reveal something formerly unknown by the court.¹³² The certainty of that information should be checked against further reliable information. After all, and notwithstanding his political interests and personal ambitions, Bacon believed that judicial inquiry should seek to establish facts with certainty and not be used to obtain unreliable testimonies, for its supreme purpose was to make justice and/or prevent dangers to the public interest.

To achieve these purposes, Bacon argues that the task of fact-finding demands a “wise and sifting examination of the fact,” especially when testimonies are “obscure and failed.”¹³³ The credit of witnesses must be examined so that “in cases as in testimonies, if one is found faulty in one point it deserves no credit in others.”¹³⁴ Testimonies should be checked against legal writings (*instrumenta*), for if the writings cited have no credit, the credit of the testimony fails as well.¹³⁵ It is worth noting that Bacon, in this context, wants to ponder the reliability of the testimony and not the certainty of the fact: testimonies are intermediaries between the facts themselves and the fact-finders.¹³⁶ The trustworthiness of the witness provides a high expectation that his or her testimony is true and gives a hint that they could provide “proofs of the issue” but not necessarily factual certainty.

The certainty of the fact must be accomplished by means of a complex set of proofs, one of whose integral parts are criteria of precision and accuracy. Maxim 24 of Bacon’s book of *Maxims*, probably inspired by a Roman rule,¹³⁷ establishes three degrees of certainty for determining the identity of things or persons, and gives precise directions on how to reach the highest certainty possible:¹³⁸

There be three degrees of certainty: presence; name; and demonstration or reference: whereof the presence the law hold of greatest dignity, the name in the second degree, and the demonstration or reference in the lower, and always the error or falsity in the less worthy shall not control not frustrate sufficient certainty and verity in the more worthy.¹³⁹

The “presence of the body” removes errors of name or of indirect references to the thing or person.¹⁴⁰ Bacon introduced a further intermediate category between presence and name, constituted by “a kind of representation” of the presence (e.g., a picture that represents the body of an absent person).¹⁴¹ Again, names may be more or less certain, assuming that the proper names obtain the highest degree of certainty possible for this category. Precise information about time and space offer more certainty than vague references.¹⁴² As for things that do not have a proper name, a concurrence of certain circumstances referring to the thing is said to convey enough certainty of its identity.¹⁴³

Thus, Bacon assumes that the visibility of the thing or person yields more certainty than any other kind of proof of its identity. The more precise the name, space, time and circumstances, the more certain the alleged facts.¹⁴⁴ Bacon is implying that the degrees of certainty described in this rule can be extracted from the testimonies of trustworthy witnesses, but the certainty itself lies objectively in the alleged facts and not in the reported testimony. In this context, Bacon conceives certainty as an objective attribute of facts equivalent to precision and accuracy. On the other hand, in the next section, we shall see that he also held a subjective notion of factual certainty which does not clash with this objective notion.

Judges of facts, conscience and subjective factual certainty

Like most English jurists of the day, Bacon was convinced that the institution of the jury was one of the “fundamental laws and customs of England.”¹⁴⁵ In his opinion, trial by jury manifested the excellence of common law procedures by shortening trials, by preventing infinite series of examinations and re-examinations, and by avoiding the use of “rigorous torture” in capital crimes, in contrast to the practice of continental law.¹⁴⁶ Besides, Bacon believed trial by jury to be superior to the continental system of inquisition, for the law does not give its “trust and confidence” to one and the same person for being both judge of laws and judge of facts.¹⁴⁷ Moreover, “straitness and coercion” are unique features of English jury trials, in compelling jurors to give unanimous verdicts rapidly and on the basis of “full proof and evidence.”¹⁴⁸

Bacon (at least in theory) emphasized that a jury trial had to secure the autonomy of juries’ consciences and understandings, stating that jurors are not to be bound by the “evidence and proofs” produced by the prosecution. He admitted that jurors were free to add further evidence out of their own knowledge.¹⁴⁹ Jurors must be free to weigh the evidence and, if necessary, be allowed to require the testimony of new witnesses (unless the required witnesses had been found guilty of perjury).¹⁵⁰ Notwithstanding, Bacon’s interventions were sometimes at odds with this defense of the jury’s autonomy, and at the same time in line with the usual English practice. As Attorney General, he was assigned to a murder case in which the jury was composed of noblemen (because the accused were noblemen).¹⁵¹ Although Bacon claimed to be convinced that the evidence of the case was “of a good strong thread,” he advised “that the thread must be well spun and woven together” and that, given the particular difficulties of the case and the social status of the accused and the jurors, the Steward of Judgment must be carefully chosen and “be able to moderate the evidence and cut off digression.” Furthermore, Bacon added, special attention should be paid to “the ordering of the evidence.”¹⁵² This attitude reveals as much court partiality as a general distrust of the jurors’ competence.

Given these antecedents, it is not surprising that Bacon worried about the practical problems of forming suitable juries. In his time, the only qualification required by English law for being a juror was to be a freeholder,¹⁵³ and it was a common practice to call the same persons to serve in juries more than once. Jurors were assigned to multiple trials during the same session and verdicts were expected to be quick, so jury sessions seldom lasted more than a few weeks. Given these circumstances and exigencies, experienced jurors were thought to be particularly efficient.¹⁵⁴ On the other hand, since jury service was time-consuming and cumbersome and carried no prestige, the gentry used their influence on law officers to extricate themselves from the duty.¹⁵⁵ As a result, gentlemen rarely served as jurors and juries were composed mostly of modest freeholders.

This situation led Bacon to complain that the responsibility of jury trials rested mostly on men that were “either simple and ignorant, and almost at a gaze in any cause of difficulty.” He regretted that those men became so accustomed to serve as jurors that they “have almost lost that tenderness of conscience which in such cases is to be wished.” They actually served in juries as if jury service were their occupation. Bacon insisted that juries should be constituted by “men of such quality, credit, and understanding, as are worthy to be trusted with so great a charge.” In order to repair this long established practice and “to restore” the jury trial “to the ancient integrity and credit,” he wrote a set of instructions aiming to get the gentry to fulfill their jury duty.¹⁵⁶ For Bacon, jurors had to be learned persons, but not necessarily law experts,¹⁵⁷ having “tenderness of conscience” and impartiality. In an accusation speech, he praised the “singular temper and indifference” of the examinations of the case, saying that it was conducted “without prejudice.”¹⁵⁸ On the other hand, Bacon recommended that judges arrange and direct the evidence in trials and, at the same time, examine the case impartially.¹⁵⁹ The above shows that Bacon shared the widespread view in

English common law that the establishing of facts should rely on the private knowledge and conscience of honest, learned and impartial people.

Bacon's interventions in various cases show that he himself took seriously the requirement of a satisfied conscience to reach verdicts. In the trial of Edmund Peacham, accused of high treason, he was commissioned to interrogate the accused under torture and, after one of the examinations, said he was "bound in conscience" to advise James to reassess the case.¹⁶⁰ In a report of a case decided by Bacon as Lord Chancellor, we find that he "declared himself to be satisfied in two points [...] as appeared evidently both by testimony and upon the face and tenor of the conveyance itself [...]" Henceforth, he decided what he thought "fit and more agreeable to equity and conscience."¹⁶¹ A key example to analyze is the report, written by Bacon's hand and signed by the investigative commission, of the evidence presented in the trial of John Cotton, accused of high treason for being allegedly the author of the manuscript of "Balaam's Asse":¹⁶²

[we] have advisedly perused and weighed all the examinations and collections which were formerly taken [...]. We thought fit also to take some new examinations [...]. Upon the whole matter, we find the cause of his imprisonment just, and the suspicions and presumptions many and great [...]. But nevertheless, the proofs seem to us to amount to this: that it was possible he should be the man [who wrote the manuscript]; and that it was probable likewise he was the man: but no convicting proofs that may satisfy a jury of life and death, or that may make us take it upon our conscience, or to think it agreeable to your Majesty's honour (which, next our conscience to God, is the dearest thing to us on earth) to bring it upon the stage.¹⁶³

A number of issues arise from these examples. On the one hand, in this context, Bacon understands factual certainty as a subjective state of mind. The report of Cotton's case clearly shows that the "possibility" and "probability" supplied by the evidence were deemed insufficient to satisfy the conscience of the fact-finders. Facts are judged to be certain or uncertain by the conscience of honest, learned and impartial men: the fact is certain insofar as it is thought to be so. The conscience of the judges of facts weighs the evidence in order to establish whether or not the alleged facts are proved and, thus, are established as more or less certain.

On the other hand, what Bacon is doing here is suggesting that it is possible and probable (it could be proved) that the accused had committed the crime, but also that it is not impossible that he did it not so. From the registers of the Cotton case that have survived, we can see that the evidence included some proofs conferring objective factual certainty, that is to say precise and exact evidence about time, place, name and circumstances.¹⁶⁴ Still, this body of evidence was not considered enough to prove the accusation before the conscience of the commissioners. The fact that Cotton authored the manuscript might or might not have been proven, so the possibility still remained that he was in fact not guilty. Human actions are free, they are neither regular nor predictable: no honest, learned and impartial examiner, judge or juror could be convinced, without further proof, of what Cotton actually did.

I want to argue that these last considerations on the nature of human actions play a relevant role in Bacon's thought about factual certainty. Recent work has shown that Bacon devoted much thought to the education of the powers of the mind and that he believed the human mind to be dominated by passions ("perturbations and distempers"), which he sought to counter with the "culture of the mind."¹⁶⁵ Being conditioned by passions, human free will does not necessarily follow the basic precepts of doing good and avoiding evil that the mind can discover by its own natural light.¹⁶⁶ Consequently, there is no regularity in the response of human agents to any set of moral circumstances: there is a wide range of possible actions. This conception of the human mind sheds light on Bacon's thoughts on establishing legal facts in that he assumes that the distempered condition of human mind, its changing, varying and uncontrolled behaviors, make it impossible to appeal to any universal regularity in human affairs, so that there is no fixed

and regular pattern against which the certainty of legal facts can be evaluated. Given that human actions are so variable, those who try to establish a fact in a legal case have to bear in mind that huge range of possibilities. How to be certain that one among many possible courses of actions actually took place?

Objective factual certainty undoubtedly plays a role in this process: imprecise and vague factual data would hardly satisfy the conscience of fact-finders. However, precise and accurate knowledge of names, places, time and circumstances could prove to be insufficient to convince the judges of facts. In Bacon's view, certainty understood in the objective sense is a necessary rather than a sufficient condition, since additional evidence could be needed in order to "bound the conscience" and reach a verdict. Thus, objective and subjective factual certainty do not clash but coexist, the former functioning as ground for the latter but not as its guarantee.

III. Conclusion

Bacon's concepts of legal and factual certainty share some common features. Above all, they share the belief that absolute certainty is an ideal unachievable in practice, out of reach for the human mind, belonging to the realm of what others have called moral certainty. For the law, absolute certainty would only be possible in a perfect world and with a self-evident text that required no interpretation. In turn, absolute certainty concerning legal facts would imply the unlikely situation that facts be directly observed by juries. On the other hand, however, both legal and factual certainty need to fulfill criteria of coherence and precision such as those involved in the search for a univocal and fixed legal language and for the objective aspect of factual certainty, which demands precision and accuracy of name, circumstances, place and time.

Notable differences between legal and factual certainty become apparent when we turn to look at the metaphysical, epistemic and anthropological assumptions underlying Bacon's treatment. His notion of legal certainty is grounded on the basic supposition that the law is rational (and universal, as we have seen) and legal certainty a linguistic matter. Ideal legal certainty demands that words have the capacity to convey in a clear and manifest manner the intrinsic rationality of the law. To the extent that the perfect certainty of laws is beyond reach, Bacon sought to mend this flaw mainly through the systematization of the laws and the proper exposition of maxims. This systematization brings order and coherence to an otherwise chaotic body of laws. At the same time, maxims provide a framework that controls legal interpretation. Since the law is rational and fixed, interpretation is expected to reflect the permanent, wise and consistent ends it intended to achieve.

Whereas in the case of law certainty does not require any proof in order to be interpreted, but only to exhibit the "evidence of reason," in the case of facts, certainty results from the process of analyzing proofs in the light of different kinds of empirical evidence. Objective factual certainty provides grounds to know the facts with precision and accuracy but does not necessarily bring on the state of "satisfied conscience" envisaged for subjective factual certainty. Given the unpredictable and irregular nature of human actions, the proofs required for legal facts are far removed from the rational and constant basis of the law. Undoubtedly, Bacon allows for the idea that some expectations about regular human behavior play a role in establishing facts. Those expectations are incorporated in legal trials of facts, for instance, when testimonies of trustworthy people are expected to be true, so that they may yield a proper amount of certainty to jurors' conscience. But this kind of certainty is only about testimonies, and testimonies are merely intermediaries between the facts and the fact-finders. It is the certainty of the fact itself which still remains to be weighed, entangled as it is in the irregularity and unpredictability of human actions highly conditioned by the mind's "perturbations and distempers."

Finally, a brief and merely tentative suggestion for further research on the possible connections between legal and factual certainty in the domain of law and Bacon's ideas on certainty in natural philosophy and natural history is in order. I would suggest that there are obvious differences of context between Bacon's work on each field, which should lead us to be very careful before pointing out similarities in the notions of certainty they present. Whereas in the realm of positive law the man is both a lawmaker and an interpreter of law, in the realm of nature the man is only an interpreter of the laws of nature. In spite of the emphasis that the *Instauratio magna* placed on the active and transforming character of human operations upon nature, God remains the lawmaker of nature. But it is precisely in the legislative act, in the promulgation of laws that the main pillar of Bacon's account of legal certainty lies. Furthermore, even if we were to accept that the interpretation of the laws of nature has some parallel with the interpretation of positive laws, would the notion of certainty implied in Bacon's concepts of the inquisition of nature be understood in entirely linguistic terms as in the case of legal certainty? I would conjecture that the answer would be negative.

This difference of context is also noticeable with respect to the facts of legal trials and the facts of nature. Legal facts belong to the realm of human actions and their irregularity and unpredictability clearly contrast with Bacon's view according to which nature is nothing but the "constant and everlasting laws" imposed by God at the creation.¹⁶⁷ Indeed, the irregular and unpredictable character of human actions is central to Bacon's views of the ways in which certainty of legal facts can be achieved. When weighing evidence, the judges of facts may need more than objective factual certainty to satisfy their consciences, for the fact that individuals do not act necessarily according to a universal pattern means that many possibilities can be presupposed. That kind of presupposition could hardly be held by a natural historian examining the certainty of the facts attested by testimonies.

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Notes

1. Shapiro, "Sir Francis Bacon," 352–56; Coquillette, *Francis Bacon*, 139, 244–56, 289–91; Martin, *Francis Bacon, the State*, 106–7; Mohnhaupt, "'Lex certa'," 81.
2. Wheeler, "The Invention of Modern Empiricism," 86.
3. Daston, "Baconian Facts," 39–40; 48; Martin, *Francis Bacon*, 166–67; Shapiro, *Culture of Fact*, 117–132; Shapiro, "Testimony in Seventeenth-Century," 250–51.
4. Wheeler, "Invention of Modern Empiricism," 86.
5. This issue will not be addressed in the present work, but in further studies in the future.
6. Bacon, *Proclamation concerning Jurors*, *Works of Francis Bacon*, vol. 10, 390. All references to Bacon are from *The Works of Francis Bacon*, edited by Spedding, Ellis and Heath, unless indicated otherwise. The English translations are mine.
7. Stein, *Regulae iuris*, 109–10.
8. Mohnhaupt, "'Lex certa'," 73–89.
9. Maclean, *Interpretation and Meaning*, 2–3. On legal interpretation in a wider context see Kelley, "Hermes, Clio, Themis."
10. Mohnhaupt, "'Lex certa'," 81; Maclean, *Interpretation and Meaning*, 26–28; 207; Maclean, "Evidence, Logic, the Rule," 230.
11. Neustadt, "Making of the Instauration," 70–71. On Bacon's attitudes in seeking public positions see *ibid.*, chapters 3 and 4.
12. The attribution of *Gesta Grayorum* to Bacon is only conjectural, see *Works of Francis Bacon*, vol. 8, 325–29.
13. Neustadt, "Making of the Instauration," 76–78.

14. Bacon, *Gesta Grayorum*, in *Works of Francis Bacon*, vol. 8, 339–40.
15. On the dating and the circumstances of this text, see Neustadt, “Making of the Instauration,” 52–53; Coquillette, *Francis Bacon*, 35–48.
16. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 319.
17. Bacon’s first public statement on law reform was made in 1593 (*Speech to the Parliament*, in *Works of Francis Bacon*, vol. 8, 214), whereas the last remaining document on the same subject is dated 1621 (*An Offer to the King of a Digest to be Made of the Laws of England*, in *Works of Francis Bacon*, vol. 14, 357–64). On Bacon’s law reform see Shapiro, “Sir Francis Bacon,” 331–62.
18. Hereafter *Tractatus*, in *De Augmentis Scientiarum*, in *Works of Francis Bacon*, vol. 1, 803–27.
19. For a detailed analysis of the work see Coquillette, *Francis Bacon*, 236–56; Shapiro, “Sir Francis Bacon,” 352–56. The *Tractatus* has strong similarities with the proposal for reforming the English law written by Bacon in 1616 – *A Proposition touching the Compiling and Amendment of the Laws of England* (*Works of Francis Bacon*, vol. 13, 61–71) – and with *Maxims* (1596).
20. Bacon, *Tractatus*, 805, aph. 7. In early-modern legal lexica *intimare* is identified with the verb *denuntiare* (to denounce): to announce, to make known, to declare, to proclaim. See Spiegel, *Lexicon iuris civilis*, s.v., 303; Kahl, *Lexicon Iuridicum*, s.v., 1395.
21. Cf. Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 635: “quod certum non est iustum non est.”
22. Bacon, *Tractatus*, 805: “Optimam esse legem, quae minimum relinquit arbitrio iudicis: id quod certitudo ejus praestat.” Cf. *ibid.*, 813, aph. 46.
23. For the Roman law background see Monhaupt, “‘Lex certa’,” 79–81.
24. Shapiro, “Sir Francis Bacon.”
25. Bacon, *A Memorial touching the review of Penal Laws and the Amendment of the Common Law* (ca. 1614), in *Works of Francis Bacon*, vol. 12, 85. On the circumstances of this text see Neustadt, “Making of the Instauration,” 202–5.
26. Some of these are reminiscent of the modes of interpretation developed in Renaissance Roman law. See Maclean, *Interpretation and Meaning*, 116–24.
27. See fn. 115 below.
28. To some extent these considerations about the ambiguity of laws can be associated with Bacon’s treatment of the idols of marketplace, particularly with the idols constituted by the “muddled and ill-defined” names of existing things. Bacon, *Novum organum*, I.60, in *Oxford Francis Bacon*, vol. 11, 92–93.
29. Bacon, *Tractatus*, 819. These ideas echo Renaissance Roman law notion of *significatio* and its cognates. See Maclean, *Interpretation and Meaning*, 97–98.
30. Cf. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 417–18 and *Chudleigh’s Case*, in *ibid.*, vol. 7, 625.
31. On the Roman origins of this recourse see Stein, *Regulae iuris*, 78–79.
32. By the sixteenth century the sheer number of law reports made their use very cumbersome. Books of abridgments of law began to be published in order to relieve lawyers and jurists. On English law sources see P. Winfield, *Chief Sources*, and Baker, *Introduction*, ch. 11.
33. The section on auxiliary books in the *Tractatus* has as precedent the proposal to the King in Bacon, *Amendment of the Laws*, 69–71.
34. On Bacon’s views on legal education see Coquillette, “‘Purer Fountains’.”
35. Bacon, *Tractatus*, 822–23, aph. 82.
36. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 319–20. On the sources of Bacon’s maxims see Hogan, Mortimer and Schwartz, “On Bacon’s Rules,”; Hogan and Schwartz, “Translation”; Coquillette, *Francis Bacon*, 35–48.
37. For an overall survey of this background see Coquillette, “Legal Ideology and Incorporation.”
38. Bacon, *A Brief Discourse upon the Commission of Bridewell*, in *Works of Francis Bacon*, vol. 7, 509; Bacon, *Tractatus*, 823, aph. 82; Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 319–20; Bacon, *Amendment of the law*, 70. Like other contemporary English lawyers, Bacon uses “rules” and “maxims” interchangeably. John Doddridge, for instance, notes that maxims receive many names: grounds, maxims, principles, eruditions, laws positive, rules or propositions. Doddridge, *English Lawyer*, 151–54. See Stein, *Regulae iuris*, 67–108; Neustadt, “Making of the Instauration,” 33–55.
39. Stein, *Regulae iuris*, 170–75; Coquillette, *Francis Bacon*, 38; Neustadt, “Making of the Instauration,” 61–62. On the semantics of *regulae juris* in early-modern Roman law see Maclean, “Expressing Nature’s Regularities,” 30–36.
40. Stein, *Regulae iuris*, 171–72.

41. Bacon, *Tractatus*, in *Works of Francis Bacon*, vol. 1, 823, aph. 85.
42. *Ibid.*, 823, aph. 82. Cf. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 320. A similar distinction and musical image is to be found in François Hotman, a prominent French Humanist jurist: “Regula sit sententia quaedam generalis, quae ex plurium legum mente a Iurisconsultis notat atque animad-versa, paucis verbis summam quandam earum consensionem et tanquam harmoniam complectiur. [...] Leges esse tanquam voces, et sonos singulos: Regulam vero esse tanquam harmoniam et concentum,” Hotman, *Observationum liber secundum*, 32, 34. This definition was widely adopted. It is reproduced, for instance, by Kahl’s *Lexicon Iuridicum*, s.v. *regula*, 800; Schardius, *Lexicon iuridicum*, s. v. *regula*, 805. See Stein, *Regulae iuris*, 171–72.
43. Bacon, *Tractatus*, in *Works of Francis Bacon*, vol. 1, 823, aph. 85. Cf. *Digest* 50.17.1 (Paulus).
44. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 321.
45. Rastell, *Les Termes de la Ley*, 438–39. The first edition was printed in London in Latin, ca. 1523. Bacon was well acquainted with this work, the only common law dictionary existing in his day, although he had little regard for it. See Coquillette, *Francis Bacon*, 113. Cf. Bacon, *Amendment of the Laws*, 70.
46. St. Germain, *Dialoges*, I.8, fols. 15–16.
47. *De laudibus legum Angliae* was originally written about 1470. See Winfield, *Chief Sources*, 316–317.
48. On the use of inductive reasoning in law see Maclean, *Interpretation and Meaning*, 72–76.
49. Fortescue, *De laudibus legum Angliae*, fol. 21v–22r.
50. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 415. See McCabe, “Francis Bacon,” 112.
51. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 321.
52. Littleton composed the *Tenures* about 1481. I quote from the following edition: Littleton, *Treatise of Tenures*, 693.
53. Fulbeck, *A direction or preparatiue*, fol. 4v. Cf. Bacon, *Tractatus*, in *Works of Francis Bacon*, vol. 1, 819, aph. 68: The sense of laws must “ad captum vulgi tanquam digito monstrari.”
54. Fulbeck, *A direction or preparatiue*, fol. 4v–5r.
55. *Ibid.*, fol. 6r.
56. *Ibid.*, fol. 35r.
57. *Ibid.*, fols. 33v–34r.
58. The *Methodus studendi* was printed posthumously in 1629 as *The Lawyers Light*, and was published again in 1631 as part of *The English Lawyer*. It has been conjectured that this work was composed before the accession of James I and therefore available to Bacon. See Neustadt, “Making of the Instauration,” 42–48.
59. Doddridge, *English Lawyer*, 117–22; 154. On the Aristotelian background of the books of maxims see Stein, *Regulae iuris*, 34–36.
60. Doddridge, *English Lawyer*, 155–64.
61. *Ibid.*, 164–90.
62. *Ibid.*, 191.
63. *Ibid.*, 191, 194, 196. St. Germain had depicted as “probable” the “positive laws” in a very similar manner: “The lawe of man the which sometime is called the lawe positive is deryved by reason as a thing which is necessarily and probable, following of the lawe of reason, and of the lawe of god. And that is called probable [in] that it appeareth to many, and especially to wise menne, to be true.” St. Germain, *Dialogues*, book 1, chap. IV, fol. 7r. This definition of “probable” was traditional in Renaissance Roman law, see Maclean, *Interpretation and Meaning*, 92–93. See also Deman, “Probabilis.”
64. Doddridge, *English Lawyer*, 260. Cf. *ibid.*, 241.
65. Besides Germain’s *Dialogues*, Doddridge’s *Methodus studendi* and Fulbeck’s *A preparative*, Bacon may have been acquainted with the Anonymous, *Principia sive maxime legum Angliae* (1546) and Henry Finch’s *Nomotechnia* (1613). Coquillette, *Francis Bacon*, 37–38, points out that it is difficult to know the extent to which Bacon was familiar with these works, since for the most part, we cannot be certain at what time they were originally written and circulated at the Inns of Court. However, Neustadt, “Making of the Instauration,” 29–51, 61–62, provides sufficient evidence of Bacon’s acquaintance with Fulbeck’s and Doddridge’s works.
66. Bacon, *Tractatus*, in *Works of Francis Bacon*, vol. 1, 822–23, aph. 82.
67. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 323.
68. On “artificial reason” in common law, Neustadt, “Making of the Instauration,” 46–47; Smith Fussner, *Historical Revolution*, 29–32; Berman, *Law and Revolution, II*, 241–44. On the rhetorical and

- dialectical basis of the techniques of “artificial reason” in common law, see Giuliani, “The Influence of Rhetoric.” On the rhetorical background of English law see Schoeck, “Rhetoric and Law.”
69. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 322. Cf. Bacon, *Amendment of the Laws*, in *Works of Francis Bacon*, vol. 7, 70; *Tractatus*, in *Works of Francis Bacon*, vol. 1, 822–23, aph. 82.
 70. Maclean, *Interpretation and Meaning*, 181–86.
 71. Bacon, *Chudleigh’s case*, in *Works of Francis Bacon*, vol. 7, 623.
 72. Bacon employed frequently the terms “construction” and “interpretation” indistinctly. The legal meaning of construction provided by OED is similar to the legal meaning of “interpretation.”
 73. Bacon, *The Jurisdiction of the Marches*, in *Works of Francis Bacon*, vol. 7, 598.
 74. Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 624–25.
 75. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 398.
 76. Bacon, *Case of Impeachment of Waste*, in *Works of Francis Bacon*, vol. 7, 528.
 77. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 361.
 78. Bacon, *The case of Revocation of Uses*, in *Works of Francis Bacon*, vol. 7, 565.
 79. *Ibid.*, 558–59.
 80. *Ibid.*, 561. See also Maxim 11 in Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 350. Here Bacon touches briefly on a controversial issue that divided Renaissance Roman law commentators: whether or not the interpretation of law must rely on the *usus* or *consuetudo loquendi*. See Maclean, *Interpretation and Meaning*, 132–35.
 81. Bacon, *Case of Impeachment of Waste*, in *Works of Francis Bacon*, vol. 7, 529. For more references to “the wisdom of the law” see *ibid.*, 533; Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 420, 421
 82. Bacon, *The Jurisdiction of Marches*, in *Works of Francis Bacon*, vol. 7, 598.
 83. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 396.
 84. Bacon, *The Case of Revocation of Uses*, in *Works of Francis Bacon*, vol. 7, 558.
 85. Bacon, *The Advancement of Learning*, 180.
 86. Bacon, “Essay of Judicature,” in Bacon, *The Essayes*, 165–69.
 87. See Maxims 3, 10, 13, 16, 25, in Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7.
 88. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 338–39.
 89. The starting point in this regard is particularly *Digest* 34.5. See Maclean, *Interpretation and Meaning*, *passim*, esp. 125–35.
 90. Bacon, *The Case of Revocation of Uses*, in *Works of Francis Bacon*, vol. 7, 565.
 91. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 398.
 92. For an example of this procedure see Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 630.
 93. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 417.
 94. *Ibid.*, 423–24.
 95. Bacon, *Case of Impeachment of Waste*, in *Works of Francis Bacon*, vol. 7, 531–32. On the use of etymologies in the Roman law tradition, see Maclean, *Interpretation and Meaning*, 109–11.
 96. Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 628–29.
 97. Bacon, *The Jurisdiction of Marches*, in *Works of Francis Bacon*, vol. 7, 298.
 98. *Ibid.*, 618. The first rule is similar to *Digest*, 32.35 (Paulus). Cf. *Digest* 1.3.23. The second rule resembles *Digest* 1.3.19 (Celsius). Cf. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 336–37. The rule is applied, for instance, in Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 631 and seems to be appealed to in Bacon, *Case of the Impeachment of Waste*, in *Works of Francis Bacon*, vol. 7, 528.
 99. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 336. The rule is similar to D 34.5.12 (Julianus). For more interpretation rules resembling Roman law see *ibid.* 336–37.
 100. Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 622.
 101. See, for instance, Bacon, *Case of Impeachment of Waste*, in *Works of Francis Bacon*, vol. 7, 539–40.
 102. This summary relies mainly on Baker, *The Reports of Sir John Spelman*, vol. 2; Baker, *Legal Profession*, ch. 3; Shapiro, *Culture of Fact*, 8–33; Martin, *Francis Bacon*, ch. 4.
 103. Shapiro, “Beyond Reasonable Doubt”, 11–18.
 104. Jones, *Elizabethan Court*, 44.
 105. Baker, *Introduction*, 105–6.
 106. Cardwell, “Francis Bacon, Inquisitor,” 276. Bacon was appointed as officer for examinations and later as Clerk of the Privy Council in the Star Chamber in 1608.
 107. Langbein, “Criminal Trial,” 285–316; Berman, *Law and Revolution, II*, 284–87.

108. Baker, *Legal Profession*, 289–91; Shapiro, “*Beyond Reasonable Doubt*”, *passim*.
109. Langbein, *Prosecuting Crime*, 80 ff.
110. Langbein, “Criminal Trial,” 266; Macnair, *Law of Proof*, 249–54. Shapiro, “*Beyond Reasonable Doubt*”, 192, quotes the laws of 1547, 1552 and 1661 which established the two-witness requirement for treason trials and points out that this requirement apparently lapsed temporarily in the seventeenth century, as is shown in the trial of Sir Walter Raleigh.
111. For examples of cases which used hearsay and past convictions as evidence see Langbein, “Criminal Trial,” 291–93; 300–305; and Baker, *Legal Profession*, 289–90.
112. Shapiro, “*Beyond Reasonable Doubt*”, 192; Macnair, *Law of Proof*, 154–55, shows that in early-modern equity this criterion was commended by Lord Chancellor Emerton and was put into practice in various cases by Lord Chancellor Nottingham.
113. Shapiro, “To A Moral Certainty.”
114. Coquillette, *Francis Bacon*, 201–2, 206, has pointed to the “very poor resources” we can count on to describe Bacon’s activity as head of Chancery.
115. Coquillette, *Francis Bacon*, 196–201; Klinck, *Conscience*, 167–69. See Bacon, *Speech on Taking his Seat in Chancery*, in *Letters and Life*, vol. 6, 184–87.
116. Jones, *Elizabethan Court*, 313.
117. See rules 68–79 in Bacon, *Ordinances in Chancery*, in *Works of Francis Bacon*, vol. 7, 768–70. On the law of proof in early-modern Chancery, see Macnair, *Law of Proof*.
118. On Bacon and interrogatories see Cardwell, “*Inquisitio rerum ipsarum*,” especially chapter 3 and Appendix A. See also Martin, *Francis Bacon*, 78–84.
119. On the use of torture in early-modern England see Jardine, *Reading on the Use*, and Langbein, *Torture and the Law*, part 2.
120. Jones, *Elizabethan Court*, 214–15, 245–48. See also Cardwell, “Francis Bacon Inquisitor,” 276; Martin, *Francis Bacon*, 81.
121. Bacon, *Ordinances in Chancery*, in *Works of Francis Bacon*, vol. 7, 769, no. 70.
122. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 340.
123. Bacon, *Ordinances in Chancery*, in *Works of Francis Bacon*, 769, no. 72.
124. In contrast, the privilege against self-incrimination as applied to witnesses was established in common law courts during the 1640s at the latest. Macnair, “Early Development,” 69–70; 78–79, and Macnair, *Law of Proof*, 180–83; 185–230; 236. See also Jones, *Elizabethan Court*, 244–48 and Langbein, “Criminal Trial,” 354.
125. See also Bacon, *Tractatus*, in *Works of Francis Bacon*, vol. 1, 812, aph. 39. Cf. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 340
126. Bacon, *Certain Considerations touching the Better the Pacification and Edification of the Church of England*, in *Letters and Life*, vol. 3, 114.
127. Bacon, *De augmentis scientiarum*, in *Works of Francis Bacon*, vol. 7, 717; Bacon, *Advancement of Learning*, 136–37. I deal with this topic in a forthcoming article.
128. Macnair, “Early Development,” 71.
129. For another approach see Hanson, “Torture and Truth,” 62–66.
130. Martin, *Francis Bacon*, 82–83; Langbein, *Torture and the Law*, 90.
131. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 341.
132. Langbein had shown that in England from 1540 to 1640 torture was mostly used preventively, “to identify and forestall plots and plotters.” See Langbein, *Torture and the Law*, 90.
133. Bacon, *Proclamation of Jurors*, in *Letters and Life*, vol. 3, 390.
134. Bacon, *Chudleigh’s Case*, in *Works of Francis Bacon*, vol. 7, 619–20.
135. *Ibid.*, 627.
136. This echoes Bacon’s ideas on testimonies regarding the facts of nature, *Parasceve*, in *Oxford Francis Bacon*, vol. 11, 466–68. Serjeantson, “Testimony and Proof,” 208–21, has rightly pointed out how Bacon’s norms for natural history draw a clear distinction between establishing the trustworthiness of the witness behind the testimonies and establishing the *res* of which the testimony talks about.
137. *Digest* 18.1.9.1 (Ulpian).
138. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 380–84.
139. *Ibid.*, 380.
140. Cf. *Digest* 34.5.21 (Paulus).
141. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 381.
142. *Ibid.*, 342, Maxim 4. As Lord Chancellor Bacon applied these criteria for factual certainty, for instance, in *Lawson v Marshall*, *Marshall v Lawson* (1618), in Ritchie, *Reports of Cases*, 103.

143. Ritchie, *Reports of Cases*, 381.
144. On the application of this rule see Goodrich, *Law in the Courts*, 150–53.
145. See Baker, *Legal Profession*, 267.
146. On the differences in judicial torture between Continental Europe and England, see Langbein, *Torture and the Law*.
147. Bacon, *Proclamation concerning Jurors*, in *Letters and Life*, vol. 3, 390–91.
148. Bacon, *Reading on the Statute of Uses*, in *Works of Francis Bacon*, vol. 7, 419–20.
149. Bacon, *Maxims*, in *Works of Francis Bacon*, vol. 7, 341–42.
150. For instance, Bacon allowed the inclusion of additional facts at the request of the plaintiff and even ordered new reports in order to review his former opinion in *Farrington and others v Throckmorton and others*, in Ritchie, *Reports of Cases*, 179–80.
151. Howell, *Complete Collection*, 899–1023.
152. Bacon, *The King's Attorney's Letter to the King touching the Proceeding with Somerset*, 22 January 1615, in Bacon, *Letters and Life*, vol. 5, 231–32.
153. Women were by custom excluded. Baker, *Legal Profession*, 269.
154. Langbein, "Criminal Trial," 277–81; Baker, *Legal Profession*, 269–70.
155. Shapiro, *Culture of Fact*, 23–25. On problems related to the selection of jurors in the Elizabethan court of Chancery see Jones, *Elizabethan Court*, 476–77.
156. Bacon, *Proclamation concerning Jurors*, in *Letters and Life*, vol. 3, 390–91.
157. *Ibid.*
158. Bacon, *Accusation of Sir John Wentworth, Sir John Hollys and Mr. Lumsden*, in *Letters and Life*, vol. 5, 217.
159. Bacon, *Essay on Judicature*, in Bacon, *The Essayes*, 166–67.
160. Bacon, *Letter to the King concerning Peacham*, 12 March 1614, in Bacon, *Letters and Life*, vol. 5, 126. On Bacon's participation in interrogatories with warrants for torture see Langbein, *Torture and the Law*, 85, 116–21. On Peacham's case see Bacon, *Letters and Life*, vol. 5, 90–129 and Clegg, *Press Censorship*, 97, 101.
161. *Long v Long* (1620) in Ritchie, *Reports of Cases*, 219–20.
162. On Cotton's case see the preface by J. Spedding, *Letters and Life*, vol. 5, 4.
163. Bacon, *Report on the Evidence against John Cotton*, *Letters and Life*, vol. 5, 4–5. The report was also signed by H. Montagu and H. Yelverton.
164. *The National Archives*, 8ANC7 112–67. On Cotton's case see Clegg, *Press Censorship in Jacobean England*, 100–101.
165. Corneanu, *Regimens of the Mind*, ch. 1.
166. Bacon, *Advancement of Learning*, 183.
167. Bacon, *A Confession of Faith*, in *Works of Francis Bacon*, vol. 7, 221.

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