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Witness

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Witness

by Nancy Cook

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Introduction



This is Truth. The primary meaning of “true,” the adjective, is “faithful, loyal, constant.”¹ Its etymological root is the word for “tree,” a fact that is significant conceptually, since it suggests that truth, while stable, is not unchanging or immutable. “Truth” is also etymologically related to the word “trim,” with its alternative, ambiguous meanings, “to prepare; fit out; dress” (as in trim the Christmas tree) and “to put in proper order; make neat or tidy...” (as in trim the front bushes).² Thus, truth might be described as a tidy growth of collective understandings which, taken as a whole, stands the test of time and the onslaughts of contradictions. There is both ambiguity and irony here, but the tree -- whether trim as in dressed up, or trim as in tidied up — is, nevertheless, a useful symbol for truth.

The legal system – the adversarial trial system in particular – is intended to be a search for truth. Within that system, witnesses play an essential role. While performing their juridical roles, witnesses often draw on accepted truth or knowledge, resulting, more often than not, in an affirmation or perpetuation of the already existing truth "tree."

¹ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1563 (College ed. 1968) [hereinafter WEBSTER'S DICTIONARY].

Nevertheless, because they bring their individual perceptions and experiences to the task, witnesses do have the power to modify or "trim" the truth.

In all respects, truth is the concern of lawyers. Lawyers are invested, and thus implicated, in a profession that currently supports as truth the findings of judges and jurors (etymologically, those who fulfill a promise),³ who rely on the testimony of a kinship body of oath-takers, *i.e.*, witnesses (etymologically, those who see or know).⁴ The lawyers are not mere technicians in the process, identifying witnesses, documents, and tangible evidence to be plugged into a truth-finding machine; they are instrumental in producing or shaping testimony, the product of witnessing. In this way, lawyers are engaged in discovering and shaping truth.

But in addition, for lawyers, the witness role has meaning that extends beyond the parameters of the judicial system, and well into the social milieu. Lawyers apprehend client experiences that never get public disclosure; they are also intimate observers of the operation of the legal system. In other words, they are themselves witnesses. Because of this, in both direct and collateral ways, lawyers have access to information that is, strictly speaking, only peripherally related to legal proceedings, but that potentially could be used in trimming the truth tree.

In this article, I examine the concept of "witness," both as a verb and as a noun. My interest in this topic has been prompted by frustrations with the circumscribed role of

² *Id.* at 1557.

³ *Id.* at 795 (root of "jury" is same as that for "oath"); *id.* at 1011 (the "basic sense" of root words for oath is "a going to fulfill a promise").

⁴ *Id.* at 1680 (identifies knowledge as root of "witness" and notes "witness" is derivative of "wit"); *id.* at 1678 (defining "wit" and referring to "wise" for etymological root); *id.* at 1678 (identifying Middle English, Anglo-Saxon, and Indo-European roots of "wise" as signifying "see" and "know," and Latin root as meaning "to see."); SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, Vol. 2, 3655 (5th ed. 2002) [hereinafter OXFORD DICTIONARY] (identifying root of "witness" as Indo-European base, "*weid*," meaning "to see") .

lawyers in the judicial system's truth-telling enterprise and, more profoundly, by concerns with lawyers' restrained capacity to help shape truth in the larger, social-cultural sense. The question I ask, therefore, is whether lawyers, who are positioned to witness (as in behold) so much about society, and have the social authority to witness (as in attest to) what they have seen, have an obligation, or at least a right, to speak out. If so, what are the parameters of this role, what are its roots, and what is the nature of the discursive practice of a lawyer's witnessing?

The meaning of witness is not quickly discerned. The experts in lexicography provide guidance, but not clarity. "Witness" and its derivative, "testimony," come from Middle English words meaning "to see" or "to know," definitions which, like the dual meanings of "trim," are not necessarily interchangeable.⁵ At the word's core is another word, "wit," which in miscellaneous modern dictionaries is defined variously as "the natural ability to perceive and understand; intelligence";⁶ "[t]he mind as the seat of consciousness; thought";⁷ or, most inclusively, "powers of thinking and reasoning; intellectual and perceptive powers."⁸ These denote possibly very different states of mind. The word witness as a verb incorporates the same confusion; thus the act of witnessing can only be said vaguely to be a process of drawing connections between seeing and knowing, and between knowing (or seeing) and telling.

In life, as in the dictionary, distinctions between knowing and perceiving are often blurred. Yet this uncertainty appears to have had little practical impact on the general usage of the term "witness," particularly in circumstances in which its application might

⁵ See *supra* note ____.

⁶ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2049 (3rd ed. 1996) [hereinafter AH DICTIONARY].

⁷ OXFORD DICTIONARY, *supra* note ____ at 3655.

satisfy a need to have truth verbalized or publicly exposed. The impetus to speak about what has been seen or is known, to package it as narrative, is found in many contexts, including religion, politics, history, medicine, art and, of course, law. Within all these traditions it is apparent that the act of narration creates functional history, which, over time, operates as, and then becomes “truth.”

One starting assumption I make is that witnesses have significantly greater value whenever, in the search for truth, facts are obscured or at least are not evident. It is important to ask, then, whether truth is obscured in the legal system.

Many lawyers have reflected on the gap between what passes for truth in the judicial system and what goes on in clients’ lives.⁹ Interactions with client populations reportedly bear no resemblance to the ways their stories play out in courtrooms or the ways their lives are portrayed by judges and other professional players in the justice system.¹⁰ The pressure to conform client stories to certain patterns and stereotypes can be frustrating,¹¹ and much has been written about the importance of letting clients tell their

⁸ WEBSTER'S DICTIONARY, *supra* note ___ at 1678

⁹ See *e.g.* Nancy L. Cook, *In Celia's Defense: Transforming the Story of Property Acquisition in Sexual Harassment Cases into a Feminist Castle Doctrine*, 6 Va. J. Soc. Policy & L. 197 (1999) (illustrating impossibility of portraying client's truth by utilizing sexual harassment defense in criminal assault case); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991) (looking at representative inadequacies in portraying lives of Black women); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 Mich. L. Rev. 2459 (analyzing misunderstandings in interactions between court and Spanish-speaking defendant and between lawyers and defendant-client who dismissed the lawyers).

¹⁰ See *e.g.*, Anthony V. Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107 (1991) (demonstrating how normative content of client's story falsified by advocate); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990) (contrasting and analyzing lawyer's portrayal and client's portrayal of client's situation in welfare case).

¹¹ See *e.g.*, Elizabeth M. Schneider, *Resistance to Equality*, 57 U. Pitt. L. Rev. 477 (1996) (describing pressures in representing victims of domestic violence); Nancy Cook, *Legal Fictions, Clinical Experiences, Lace Collars and Boundless Stories*, 1 Clin. L. Rev. 41, 51-53 (1994) (describing pressure to present client story "in a way a judge would understand.")

own stories, in their own ways.¹² But lawyers know, and usually clients know, they do so at some risk. Telling the client's story the client's way often has costs.¹³ The real stories are too long, too complex, and too depressing. Of much of life it might be said that knowledge, truth, story and reality are fluid, contingent and relative, but in the judicial system there is little appreciation for that. Nuanced tales do not script well in trial settings.

Moreover, most witnesses and fact-finders are prone to fit new information into preexisting knowledge paradigms. In the courtroom, witnesses are called upon to speak of what they've seen. What they've seen, and profess to know firsthand, however, is often understood in relation to what they "knew" previously.¹⁴ Receptivity to information is dependent on and reflective of existing collective "knowledge" about what is and isn't so. Courtroom witnesses are thereby possessed of "truth" before they are observers of legally relevant events; in most cases, they conform new knowledge to the old.¹⁵ Jurors and judges do the same. As a consequence, facts are easily distorted. This is particularly so if the truth – that tidy growth of collective understandings – is under the control of only some in the community.

¹² See e.g. Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 Buff. L. Rev. 71 (1996); Herbert Eastman, *Speaking truth to Power: The Language of Civil Rights Litigators*, 104 Yale L. J. 763 (1995); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485 (1994); Robert Cochran, Jr. *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice and the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 Wash & Lee L. Rev. 819 (1990).

¹³ Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 Hastings L. J. 971 (1992) (examining case in which client in criminal case elected to forego plea offer and go to trial to tell story despite lack of legally cognizable defense); see also William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213, 213-216 (1991) (describing struggle over alternative ways to balance client's desire for truth and justice with practical exigencies of plea bargain).

¹⁴ C.A.J. Coady, *TESTIMONY, A PHILOSOPHICAL STUDY* 262-263 (1992) (noting that psychological critiques of eyewitness testimony reflect extensive reliance on word of others in assessing truth).

¹⁵ Even knowledge obtained through direct experience will be rejected if it conflicts with what one already understands to be true. Darren Oldridge, *STRANGE HISTORIES* 169 (2005).

Accordingly, the search for truth that lawyers, as participants in the legal system, are presumably engaged in, must, paradoxically, expand beyond the confines of the legal profession's truth-seeking model if truth is to be the outcome. Lawyers can, and even should, serve as witnesses in society. For that to happen, it is necessary to explore what meanings are attached to the witness role and how such a role might be performed.

In considering the question of a witness role for lawyers, I have chosen to look at witnesses through three separate lenses: the lens of legal history; the lens of Christian religion; and the lens of testimonial or literary narrative. My goal in doing has been simply to understand the conceptual development of witnessing from varying perspectives, and attempt to locate or situate lawyers within the different traditions. For reasons that I hope will become clear, I identify the lenses by descriptive, metaphorical terms: the periscope, a fly's eyes, and an open window, respectively.

Part I of the article examines the legal context. The legal history is important to the project because it informs our ideas in law about the search for truth. The section is called the "View Through a Periscope" because both in the way it frames and focuses the search and in the way it defines and limits roles, the law functions with a narrow scope.

Even if witnesses were not dependent on pre-existing "knowledge" or influenced by other sources, they would not often be able to make a full assessment of what is true. Historical turns have almost assured that facts, if not truth, will be obscured in the judicial system. Legal developments led to severe limitations on the role witnesses play in the system, and, consequently, on the role of lawyers in the system. In early English history, to the extent that witnesses had any involvement in legal proceedings, their impact derived from the power of the oath, which was an appeal to an essentialist

authority. Increased reliance on external proof in post-medieval Britain meant a decline in the significance of the oath, but not a meaningful expansion of the role of narration. Like a periscope, the modern judicial system quickly constricted the range of oral testimony, prescribing the witness's narrative framework and ultimately depriving the parties -- and society as a whole -- of the gravity of the oath-taking act.

In Part II, religious history and its potential application to lawyers is explored. Christian religions, although replete with the language of "witnessing" and "testimony," do not have a unified understanding of the terms. Any particular faith may illuminate role options for lawyers who subscribe to or practice that faith, but there is no single religious tradition of witnessing that can be reliably viewed as a model for lawyers. The section is entitled "View Through a Fly's Eyes" because, like the compound lens of a fly's eye, Christian history has produced a multiplicity of angles from a single viewpoint.

The religious perspective is important, nonetheless. When tracing the history of Christianity, one thing that comes into relief is the shift from the language of "covenants" in the early scriptures to the language of "testaments" in the early Christian era. Inherent in the shift is a change in emphasis similar to that outlined in the legal context: from a reliance on an unseen authority to a preference for proof or evidence. The prophets of pre-Christian times, who conveyed the word of God and the promise of redemption, were replaced by disciples, preachers and witnesses, whose concerns were historicity, authenticity and the claim to knowledge.

After the death of Jesus, questions arose in the Christian community concerning the definition of "word of God," the content of testimony, and the role of witnesses. To the extent that these matters were subsequently settled by the institutionalized Catholic

Church, they were revisited, with intensity, pursuant to the Protestant Reformation. The Christian tradition, therefore, asks relevant questions: How does a witness's story get told? How does truth get communicated as testimony? It is these questions, still unresolved, that have meaning for lawyers concerned with exposing everyday truths and shaping historical, cultural truth.

Another important legacy of the early Christians is the narrative structure in which the gospels were framed. In the gospel stories can be seen a dramatic change in story construction with respect to plot, historical context, chronology, and authorship. Centuries later, when England was rocked by the Reformation, counter-Reformation and secularism, the structural narrative foundations of the gospels evolved into and were recast into new literary forms. Not coincidentally, literary narratives in the form of memoirs, histories, romances and novels surged just as the legal system -- having finally accepted the idea of oral testimony and independent juries -- moved definitively, nevertheless, toward evidentiary restrictions on narrative. Literature then assumed much of the social function of narration.

It is thus to literary narrative that lawyers must turn in fashioning a witnessing role for themselves. While legal history and Christian religious tradition provide background and perspective, narrative theories offer the most useful concepts. In Part III, therefore, this article turns to experiential narratives that have developed as a response to silencing and the denial of subjectivity. A review of witnessing writers -- from the post-Holocaust works of Albert Camus, Primo Levi and Elie Weisel, to neocolonial resistance novels, to American fictional and nonfictional testimonials about racial violence, to the memoirs of the unnamed recovering from gendered and poverty-based trauma --

demonstrates the importance of testimonial narrative to self-preservation and the shaping of history. This section is called “View Through an Open Window” because it suggests that narrative operates from a place of relative safety but looks outward and prospectively.

The discursive process utilized by and reflected on by writers is transferable to lawyers. Among other parallels, the relationship aspects of literary narrative are highly relevant to the work many lawyers engage in. Literary narrative writers struggle with the dialectic between oppressor and oppressed, the ownership of truth, vicarious trauma, authenticity of voice, and many other issues that resonate for attorneys wanting to use experience responsibly to help construct truth.

This investigation thus opens up many questions relating to the roles and obligations of witnesses, and with respect to lawyers as witnesses, in particular. At its simplest, the final conclusion is the proposition that as lawyers we should take a serious look at the role of witnesses in society, not in the isolated and confining context of the judicial system, but in the community at large, where we all have an interest in, and responsibility for, nurturing truth. While narrative theory is emphasized in the analysis of witness role and method, one essential historical element in both law and religion brings the discussion full circle. It is not just the act of bearing witness to what is seen, heard or experienced by virtue of our professional privileges that can make a difference, but the promise of truth -- a covenant, a sacred oath -- that signals and constitutes a return to the etymological basis of truth.

Part I View Through a Periscope: The Legal-Historical Lens

Introduction

A pervasive notion, especially in the United States, is that "law" is best understood as a series of authoritative texts.¹⁶ These texts, presumably, have acquired authority by means of a lengthy, mostly logical, and representative process. They can be depended upon to provide a strong measure of validity with respect to substantive rights and procedural fairness. To the extent that the law has been thus arrived at through participative methods, it can be considered democratic.

But the idea of law as text obscures the actual processes by which laws are both devised and applied.¹⁷ The formal rules are a small part of what the law is. An outgrowth of communal human relations, law in operation is, essentially, social interaction.¹⁸ There would, indeed, be no law without the social conditions to which it is applicable.¹⁹ Law is, therefore, democratic in the classical sense; it is of and by the people.²⁰

This has material implications for the investigation into the history and tradition of witnessing. The role of witnesses in western law is better traced through the changes in societal relationships than through textual developments and refinements. By looking at the evolution of witnesses in the legal system as a whole, and not primarily through texts,

¹⁶ William E. Forbath, Hendrik Hartog, & Martha Minow, *Introduction: Legal Histories from Below*, 1885 Wisc. L. Rev. 759, 761-762. (The dominant view presumes that the object of legal historical study is a "known and distinctive body of texts," and that these texts, within the hands of a select group, constitute "the law.") In large part, historians rely on this conception since they (like most people) prefer to think of law as "embodied in authoritative texts whose authority is external to us." *Id.*

¹⁷ *Id.* at 764. The authors question the dominant conception of "the law" as constituted in discrete texts. They urge examination of the search for meaning, how issues were debated, and what rules of discourse were or were not abided by.

¹⁸ *Id.* ("To us, law is not the formal banner, but its travels in the crowds grasping for it; not a singular voice, but the cacophony of many voices, including those usually unheard.")

¹⁹ John Maxcy Zane *THE STORY OF LAW* 43 (2nd ed. 1998).

²⁰ *Id.* at 2-3 (discussing law as outgrowth of social relations).

it is possible to see how the law is "more practical than logical."²¹ In particular, the sometimes traumatic encounters between cultures (such as Norman and Anglo-Saxon or Roman Catholic and Celtic-Christian) produced social compromises and legal amalgams that help explain the current state of oral testimony.²²

In this Part, I show how historical legal developments led to strict limitations on the role witnesses play in the legal system, and, consequently, on the role of lawyers in the system. In early English history, to the extent that witnesses had any involvement in legal proceedings, their impact derived from the power of the oath, which was an appeal to an essentialist authority. Even with increased reliance on external proof in post-medieval Britain, and a decline in the significance of the oath, the role of narration was not trusted to courtroom witnesses. In the end, the modern judicial system both prescribed the witness's narrative framework and deprived the parties -- and society as a whole -- of the gravity of the oath-taking act. Not surprisingly, this narrative restraint has worked to the detriment of the poor, women, and minority cultures, who have little control over assumptions that operate as accepted truth in the absence of counterstory.

I present here a necessarily truncated review of relevant legal history, and one that does not fully capture the nuances and contradictions, nor the drama, of the changing legal system. My interest is in, first, the origins of witnesses, and, second, the roles they have assumed. To a great extent, the focus is limited to English history, and thus both conforms to a certain bias and is confined to a narrow scope. The report is filtered through the works of legal historians and, as a consequence, the text of this section also

²¹ *Id.* at 260.

²² See Sir William Holdsworth, *A HISTORY OF ENGLISH LAW*, Vol. IX 208 (observing that English law was influenced by canon law and "primitive ideas."); see also Forbath et al, *supra* note ___ at 761 (reflecting on

follows normative academic conventions of form, language and reasoning. The legal experts have, in effect, written a common narrative that privileges the rule of law and is highly critical of Anglo-Saxon community roots.²³

Since it is the legal scholars' narrative that has largely defined witnesses in our legal system, however, it is where I begin. For convenience, the legal history is broken down roughly into three categories: The time before the Norman Invasion of 1066; between the Invasion and the Protestant Reformation, approximately the years 1100 through 1550 C.E.; and "modern times," meaning after 1550.

Anglo-Saxon England before the Norman Invasion of 1066

The Setting. Anglo-Saxon England, in the several centuries prior to the Norman invasion, was steeped in feudalism. Life was simple and brutal for many people. Small towns in rural communities predominated. English life was characterized by limited literacy, limited travel, and limited life span. The countryside was subject to harsh weather conditions, disease and epidemic, and infant mortality was high.²⁴

These conditions gave rise to a “profoundly supernatural understanding of the world.”²⁵ When inexplicable events were experienced and then reported, their credibility, from a listener's point of view, depended on the authority of those who reported them.²⁶ Tellers took pains to establish the reliability of their sources rather than rely on other principles of logic, and the most reliable of sources were of supernatural or divine origin.

the “[v]arious inputs- social, cultural, economic, political- product outputs, or legal texts.” which formed the common law).

²³ The "legal lens" discussed in this Part reveals an ultimately narrow perspective on witnessing; while the formalist approach to witness testimony prevailed in the legal system, the mores and customs of the common people can still be mined for impact, a point that is discussed *infra*, at ____.

²⁴ Darren Oldridge, *supra* note ____ at 5.

²⁵ *Id.* at 6.

²⁶ *Id.* at 7; see also Michael McKeon, *THE ORIGINS OF THE ENGLISH NOVEL 1600-1740* 21 (1987) (noting medieval "dependence on received authorities").

Assertions that an angel appeared or that demons possessed someone carried as much weight then as explanations based on global warming or post-traumatic stress might in today's world.

In line with the norms of the day, most writers attributed their stories to a higher authority.²⁷ This practice of attribution endured with the development of purely fictional works.²⁸ Consequently, written texts, like their oral counterparts, could take on an almost magical quality; there was a willingness to accept as truth articulations coming out of "reputable" publications. By far, the most trusted text was the Bible,²⁹ in which the "natural and supernatural flow into each other, man and God go hand in hand."³⁰ Also considered trustworthy were works by Plato and Aristotle, and writings by well-established Christian patriarchs such as Augustine.³¹

Throughout the Middle Ages, no serious distinctions were drawn between religious and political authority,³² as the collective understandings of the patrician classes were "transformed" with the spread of Christianity both as a religion and an ideology.³³ The Christianity of the Middle Ages and the Renaissance, moreover, was "astonishingly

²⁷ Christine de Pizan, for example, writing of women's contributions to history, uses the convention of a conversation with allegorical apparitions, Reason, Rectitude, and Justice. Christine de Pizan, *THE BOOK OF THE CITY OF LADIES* 12-14 (1982) (Earl Jeffrey Richards, translator; original English publication in 1521, translated by Brian Ansley under the title *THE BOKE OF THE CYTE OF LADYES*. See *id.* at Introduction, xix). Attribution to spiritual guides was true even of what theologian Paul Ricoeur calls the "prophetic discourse" of biblical texts, i.e., discourse "which declares itself pronounced in the name of . . ." Paul Ricoeur, *ESSAYS ON BIBLICAL INTERPRETATION* 75 (Lewis Mudge, ed. 1980).

²⁸ E.L. Doctorow, *ESSAYS AND CONVERSATIONS* 19 (Richard Trenner, ed. 1983).

²⁹ McKeon, *supra* note ___ at 36

³⁰ Doctorow, *supra* note ___ at 18.

³¹ Oldridge, *supra* note ___ at 6

³² See Foster R. McCurley & John Reumann, *WITNESS OF THE WORD: A BIBLICAL THEOLOGY OF THE GOSPEL* 3 (1986). Commenting on the pervasiveness of religious references in the sixteenth century politics of Oliver Cromwell and the seventeenth century radicalism of Edmund Ludlow, the authors say: "for such men, religion and politics were inseparable."

³³ Jacques Le Goff, *HISTORY AND MEMORY* 68 (1992).

comprehensive and enduring.”³⁴ Although disrupted by the emergence of popular heresy from the eleventh century on, Christianity's core beliefs remained intact, dominating social and political life, until the scientific rationalism of the eighteenth century took root.³⁵ The Catholic Church hierarchy also had a "monopoly on intellectualism," and, therefore, on historical narrative.³⁶

Faith mattered greatly in a world in which inference could not be easily supported by scientific data, and this was true in the legal system as much as elsewhere. Perhaps for that reason, "truth" was not discussed much in the law. The Anglo-Saxons did not appear to experience the same postmodern angst of twentieth and twenty-first century westerners that truth, dependent on ever-expandable information, is relative, contingent and uncertain. They talked, rather, in dualistic terms of right and wrong. And in this world ruled by supernatural good and evil forces,³⁷ an oath had particular value; the strongly held belief in divine intervention was presumed to check many inclinations to falsely call on the potential intervenors.³⁸

The Legal System. With respect to dispute resolution during this time, throughout England, but in the small rural towns especially, peace-keeping and local governance were informal matters.³⁹ Most disputes were about land⁴⁰ and, when they arose, conflicts were largely handled by informal tribunals. Magistrates conducted the proceedings orally; given the low rate of literacy, it could not have been otherwise. From early on,

³⁴ Oldridge, *supra* note ___ at 6. See also McKeon, *supra* note ___ at 34 (calling Christian thought "that remarkably stable edifice").

³⁵ Oldridge, *supra* note ___ at 6

³⁶ Le Goff, *supra* note ___ at 68.

³⁷ Oldridge, *supra* note ___ at 9 ("...all medieval and Renaissance thinkers accepted that supernatural beings participated in earthly affairs.")

³⁸ See Zane, *supra* note ___ at 214 (discussing the value of oaths).

³⁹ McCurley & Reumann, *supra* note ___ at 3.

⁴⁰ Zane, *supra* note ___ at 238.

both parties to the dispute were required to be present.⁴¹ Since, in addition to all matters being conducted orally, virtually everything about people's lives was public and the most intimate details of their lives were visible, many modern procedural protections were inconceivable; questions about notice and opportunity to be heard, for example, were not major concerns.

For a long time, then, "due process" issues stayed in the background, despite the fact that the Anglo-Saxons inherited a very old custom of one-sided attestation.⁴² Conflicts were resolved not so much by a process of reasoning as by "proof."⁴³ To call the conflict resolution proceedings a "trial" would not be accurate, and in fact, the term was not in common use for many years. Other labels were applied in Anglo-Saxon times, including *purgatio*, *probatio* and *defensio*.⁴⁴ "Trial," Thayer says, would be an anachronism; in these times, "people 'tried' their own issues."⁴⁵

A formal dispute was initiated by a foreoath, a sworn statement by the plaintiff asserting a wrong and the truth of his claim.⁴⁶ Thus, for example, the plaintiff would aver that a neighbor stole his cow, or that he was owed money for rent. He would then produce a *secta* (literally, a "suit"), which was a group of friends or allies organized to

⁴¹ In the early days, a man's relatives were required to bring him in. M.M. Knappen, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 58 (1942).

⁴² James Bradley Thayer, "Older Modes of Trial" in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY BY VARIOUS AUTHORS, Vol. II 376 (compiled and edited by a Committee of the Association of American Law Schools 1908) [hereinafter ESSAYS].

⁴³ Holdsworth, *supra* note ___ at 178

⁴⁴ Thayer, ESSAYS, *supra* note ___ at 375

⁴⁵ *Id.*

⁴⁶ Zane, *supra* note ___ at 214-215; Knappen, *supra* note ___ at 59. In many cases, the plaintiff was also required to give sureties. *Id.* In criminal cases, as a general matter, formal charges would be brought and the complainant introduced "evidence." The person accused was required to answer. James Austin Hughes, WITNESSES IN CRIMINAL TRIALS OF CLERICS 9 (1937).

“prove” or establish that the case was serious, genuine, and not frivolous.⁴⁷ A summons would be issued and the defendant would be expected to counter with a sworn denial.⁴⁸

All oral pleading was done in accordance with strict formalities and set forms. Precise verbal accuracy was demanded. This substantiated the "truth" of the party's assertions. If there was the slightest hesitation or stuttering, the party's cause could be lost. A contemporary maxim captured the stringency of the formula: “He who fails in a syllable, fails in everything.”⁴⁹ The practice, which seems unnecessarily rigid to modern sensibilities, illustrates the reliance on invisible powers prevalent in the Middle Ages; God, in this world view, would insure that the honest person spoke clearly and precisely.

Following the presentation of the foreoath and denial, a court would issue a preliminary judgment. This was a decision to “award proof” to one party; *i.e.*, inviting that party to offer support for his position, in a manner prescribed by the court.⁵⁰ The judgment could be based on the court's view of parties' characters and demeanor as well as on the substantive nature of the claims. If the plaintiff had pleaded the case properly, no further proof might be expected.⁵¹ If further proof was permitted at this point, the party producing the proofs would have the full burden (and opportunity) to make the case. Courts did not ask any questions or otherwise interfere with the presentation of a case.⁵²

In the latter half of the Middle Ages, when written forms came into use, many of the oral traditions were incorporated into judicial proceedings. Pleadings and evidence

⁴⁷ Zane, *supra* note ___ at 214-215; Knappen, *supra* note ___ at 59.

⁴⁸ Zane, *supra* note ___ at 215; Knappen, *supra* note ___ at 58. According to a then-surviving Germanic custom, “In the early days, a man’s relatives were required to produce him in court when required.” *Id.* at 58.

⁴⁹ *Id.* at 58-59.

⁵⁰ *Id.* at 60.

⁵¹ Zane, *supra* note ___ at 215.

were initially, and for a very long time, indistinguishable. Allegations and assertions coincided. The belief that the right decision would be reached by manifest “proof,” rather than by some then rudimentary process of reasoning, continued.⁵³

Witnesses. In the Anglo-Saxon period, there were no witnesses of the modern type, who would provide factual information to aid in decision making.⁵⁴ Testimony was rarely produced in court for any purpose. For the most part, disputes were settled by appeals to God, some of which were direct and some of which were made through intermediaries.⁵⁵

To the extent that people were called to court, they appeared not to convince a human judge to make or accept factual deductions, but simply to call on God as a witness to the truth. These individuals were not, in current terminology, witnesses, but oath-takers.⁵⁶ They swore to a belief in a party's claim, not to any fact.⁵⁷ The probative force of oral testimony thus came not from the logic of its content, but from the act of taking an oath. “That probative force,” moreover, “was attached, not so much to the matter to which [the witnesses] testified under the sanction of an oath, as to the act of swearing to the truth of a fact under the prescribed forms.”⁵⁸

Over time, the witnesses of Anglo-Saxon times could loosely be divided into three types. Closest to the concept of today's trial witness was the transaction or preappointed witness, a person who was present at an event and signed a document attesting to that fact. In some situations, the minority of cases, witnesses swore to

⁵² Hughes, *supra* note ___ at 9.

⁵³ Holdsworth, *supra* note ___ at 178.

⁵⁴ Holdsworth, *supra* note ___ at 177.

⁵⁵ Or by fighting. If the defendant insisted on an opportunity to make his case, there would be nothing left to do but fight it out Thayer, *ESSAYS*, *supra* note ___ at 376; 383.

⁵⁶ Knappen, *supra* note ___ at 61.

⁵⁷ Zane, *supra* note ___ at 215-216.

observations made in the course of a legal transaction. The role of such a witness was rigidly defined and limited to formal or solemn matters.⁵⁹ Most commonly, the preappointed witness was used to attest to a sale of livestock or chattels,⁶⁰ but these formal witnesses also served to give proof of age (usually, attesting to a birth), death, or marriage (as when a "woman was endowed").⁶¹ At the time of the "official transaction," preappointed witnesses would be those "who have affixed their seals" to a document memorializing the event.⁶² The oaths sworn by preappointed witnesses were not promissory but "assertory."⁶³ Such persons were spoken of as being "solemnly taken to witness."⁶⁴ They were not required to appear in court.

In the absence of definite proof (such as that provided by sworn documents), reliance was placed more directly on God. The secta, who, in the days before writing was standard pleading procedure, were asked to stand by a party, evolved into proof-witnesses or compurgators.⁶⁵ As their predecessors had been, compurgators were asked to swear to the truth of a party's pleading,⁶⁶ and, in theory, they risked God's wrath if they assisted a person of bad character.⁶⁷ They appeared before a tribunal, but no factual evidence was

⁵⁸ Holdsworth, *supra* note ___ at 204; see also Hughes, *supra* note ___ at 11.

⁵⁹ Holdsworth, *supra* note ___ at 178.

⁶⁰ Knappen, *supra* note ___ at 60.

⁶¹ Thayer, ESSAYS, *supra* note ___ at 376-377.

⁶² Holdsworth, *supra* note ___ at 177.

⁶³ *Id.* at 178.

⁶⁴ *Id.* at 179.

⁶⁵ Thayer, ESSAYS, *supra* note ___ at 380. Later, the oath was made to the credibility of a party, stating a belief in the party's assertion. *Id.* at 383.

⁶⁶ John Henry Wigmore, "A General Survey of the History of the Rules of Evidence" in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY BY VARIOUS AUTHORS, Vol. II 693 (compiled and edited by a Committee of the Association of American Law Schools 1908). Wigmore says this arrangement was "in effect a matter of contract."

⁶⁷ Knappen, *supra* note ___ at 61.

presented. This practice gave rise to the term "trial by witnesses."⁶⁸ Compurgation was by far the most common form of trial in the later Anglo-Saxon era.⁶⁹

Because certainty is attained, in such a world view, not by analyzing the substance of a claim or witness credibility, but by an appeal to divine authority, added value could reasonably be assumed to follow from increasing the number of oaths.⁷⁰ Thus, the natural progression of advocacy was toward establishing a kind of numerical superiority. From Roman law, incorporated long before into Anglo-Saxon law, had come the idea that two witnesses were needed for proof.⁷¹ Hence, if a plaintiff produced two swearers, the defendant would need to produce four; if the plaintiff had six, the defendant had to have twelve.⁷² Trial by witnesses, therefore, soon evolved into a system known as "wager of law."⁷³ In this scheme, the value of witnesses – who were not fact-reporters in the first instance – came to be measured in quantitative, much more than qualitative, terms.⁷⁴

The final class of "witness" was, in some ways, the sole class of witness. In criminal matters, it was believed that the defendant could not be punished on the "mere testimony" of humans; he or she was entitled to submit to an ordeal, that is, to be tested directly before God as the ultimate witness.⁷⁵ This practice was an extension of the

⁶⁸ Thayer, *ESSAYS*, *supra* note ___ at 380.

⁶⁹ *Id.* at 383.

⁷⁰ Holdsworth, *supra* note ___ at 204.

⁷¹ *Id.* at 208 (It had first become a rule of canonical law, having precedent in both the Old and the New Testaments.)

⁷² James B. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 249, 261 (1892) [hereinafter *The Jury*].

⁷³ Zane, *supra* note ___ at 216.

⁷⁴ Holdsworth, *supra* note ___ at 204.

⁷⁵ Knappen, *supra* note ___ at 61; Zane, *supra* note ___ at 216. Holdsworth, *supra* note ___ at 179. Following the Norman invasion, trial by battle was also employed. A popular method of dispute resolution in the time of John I (1166-1216), it was in most respects a reversion to blood feuds of earlier times. Knappen, *supra* note ___ at 195.

general assumption "that divine will and righteousness are immanent in human affairs."⁷⁶

The idea was that the accused could appeal to God to establish innocence, by, for example, successfully sticking his hand in boiling oil to retrieve a smooth stone⁷⁷ or by submerging himself the length of several yards, without floating upward, in cold, still waters consecrated for the purpose by a priest.⁷⁸

Between the Invasion and the Reformation (1100-1550).

Cultural Shifts. In 1066, the Normans invaded the isle of Britain and took complete control. Under William I ("the Conqueror," 1027-1087), a major transformation in English life began. Times were difficult; the years between the invasion and the ascendance of the Stuart and Tudor dynasties were fraught with plagues that restricted social intercourse and isolated communities, and contributed to communication breakdowns and social unrest.⁷⁹ At the same time, however, Europe was experiencing a "literary revolution" and an "escalation of the empirical and historicizing impulse."⁸⁰ The Magna Carta made its appearance in 1215, a day was divided into twenty-four equal parts in 1330,⁸¹ Chaucer's Canterbury Tales were composed just before the turn of fifteenth

⁷⁶ McKeon, *supra* note ___ at 35.

⁷⁷ Hubert Hall, "The Methods of the Royal Courts of Justice in the Fifteenth Century," in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY BY VARIOUS AUTHORS, Vol. II 428 (compiled and edited by a Committee of the Association of American Law Schools 1908). Hall reports that "in the old days of simple piety and austere faith before the Conquest, the ordeal was always performed as a solemn religious mystery, with divine intercession sought through prayer and fasting." Over time, the rite "degenerated into a meaningless form of law." *Id.*

⁷⁸ Knappen, *supra* note ___ at 62.

⁷⁹ The first Justices of the Peace, whose job it was to maintain order, were not appointed by the Crown until the time of Edward III in the thirteenth century. George Spence, "The History of the Court of Chancery" in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY BY VARIOUS AUTHORS, Vol. II 240-241 (compiled and edited by a Committee of the Association of American Law Schools 1908). Prior to that time, law enforcement was strictly a local affair, accomplished through mutual pledges. Even with the imposition of criminal sanctions for breaches of the peace during the reign of Richard II (1377-1399), there was no real enforcement of laws promoting public order. Special commissions to look into the status of the poor under Henry III's reign (1216-1272) did little to alleviate the disorderly conditions that prevailed. *Id.*

⁸⁰ McKeon, *supra* note ___ at 35.

⁸¹ Daniel J. Boorstin, THE DISCOVERERS 39 (1985).

century,⁸² and Copernicus's theory of the universe revolutionized scientific thought in the middle of the sixteenth century.⁸³

As these events were unfolding, the Normans' presence was being felt in England. All social and governmental institutions were impacted. Among other cultural incompatibilities, the inquisitorial legal system to which the Norman conquerors were accustomed was far different from the accusatorial tradition of the Anglo-Saxons.⁸⁴ In contrast to Anglo-Saxon procedures, oral testimony (of the fact-reporting variety) was commonly relied upon in decision-making on the continent. In addition, citizen juries, summoned to court to share their knowledge about events in question, often played a role in determining the outcome of disputes.⁸⁵ Notions of separation of powers also infused the Norman system.⁸⁶

Despite the Normans' political (as well as military) dominance,⁸⁷ however, changes in the English legal system developed more through compromise and local accommodation than through royal fiat or any legislative imposition. The process changed gradually, with significant concessions to Anglo-Saxon tradition. The modern witness is thus not so much a product of design as an accidental blend of cultures. In the

⁸² William Caxton (1422-1491), publisher of the *CANTERBURY TALES*, has been called the "midwife of a flourishing English Literature." *Id.* at 523. An English translation of the Bible, named for King James I (1566-1625), was published shortly thereafter. *Id.*

⁸³ *Id.* at 22.

⁸⁴ Hughes, *supra* note ___ at 7.

⁸⁵ Zane at 422, *supra* note ___; Phoebe A. Haddon, *Rethinking the Jury*, 3 *Wm. & Mary Bill of Rts. J.* 29, 35 (1994).

⁸⁶ Zane, *supra* note ___ at 422.

⁸⁷ Heinrich Brunner, "Sources of English Law" in *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY BY VARIOUS AUTHORS*, Vol. II 20-21 (compiled and edited by a Committee of the Association of American Law Schools 1908); see also Zane, *supra* note ___ at 422 ("At last had come the Normans, then the leading race in Europe, and they came not to ruin, but to save.")

end, although the secta of Anglo-Saxon times evolved into proof witnesses,⁸⁸ it was not before significant "reforms" made long-lasting impressions on the system.

Perhaps the most significant of the customs introduced by the Normans was the jury.⁸⁹ In the Norman system, community members might be called on to aid the court in its deliberations. Skepticism about the efficacy of ordeals and doubts about the reliability of God as a judge of legal affairs contributed to the eventual adoption of this practice in England, so that by the time of Henry II (1154-1189), the Saxon custom of compurgation had combined with the Norman tradition of using the jury as a fact-finding body.⁹⁰ The English began to allow parties to gather their oath-helper groups together into witness-juries.

Jurors, then, were witnesses in the sense that they produced the evidence or proofs relied upon, but they were also much more. The jury was considered a "test to which the parties had consented"; it "represented the voice of the country-side."⁹¹ Eventually in England these groups engaged in decision making, relying heavily on pleadings, but not limited to any particular type of information.⁹² Decisions were rendered on the basis of the jurors' "own conscious persuasion of the facts, and not merely by supervising external texts."⁹³ Their decision-making responsibility meant they could not be separately examined; rather, they were asked to give a verdict. And it was not the business of the courts to ascertain how the verdict was reached.⁹⁴

⁸⁸ Thayer, *ESSAYS*, *supra* note ___ at 377.

⁸⁹ Zane, *supra* note ___ at 422.

⁹⁰ Knappen, *supra* note ___ at 195.

⁹¹ Holdsworth, *supra* note ___ at 181.

⁹² Knappen, *supra* note ___ at 195.

⁹³ Wigmore, *supra* note ___ at 692.

⁹⁴ Holdsworth, *supra* note ___ at 181.

Jurisdictional Conflicts. The jury was thus a recognizable institution in England by the twelfth century, and by mid-thirteenth century, it had assumed the role of fact-finder.⁹⁵ But while the jury system, which garnered the intellectual assets of reasoning individuals, might have led to trial by witnesses, that development was impeded by the general chaos of the fourteenth and fifteenth centuries.⁹⁶ During this time, the largely oral languages of the Anglos, Saxons and Normans conflated into Middle English.⁹⁷ The zeal of the Catholic Church that led to Crusades and Inquisitions also provoked the Reformation, and then the Counter-Reformation. Most notably with respect to witness roles, the battle between the Crown and Rome was being played out in, among other places, the judiciary.

In the wake of the Norman invasion, England had moved toward power divisions.⁹⁸ Manifestations of this can be seen in the parallel development of common law courts and chancery courts,⁹⁹ followed, in time, by the expansion of parliamentary power.¹⁰⁰ During this period, the legal system saw many variations of witnesses.¹⁰¹ While a clear, detailed account of the evolution of the judiciary isn't possible, it can be said that

⁹⁵ Brunner, *supra* note ___ at 20-22; Sir Frederick Pollock, "The King's Peace in the Middle Ages" in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY BY VARIOUS AUTHORS, Vol. II 415 (compiled and edited by a Committee of the Association of American Law Schools 1908); Wigmore, *supra* note ___ at 692.

⁹⁶ Holdsworth, *supra* note ___ at 181.

⁹⁷ In the fifteenth century, there were almost as many dialects in England as there were counties, and the languages were not mutually intelligible. Boorstin, *supra* note ___ at 522.

⁹⁸ Spence, *supra* note ___ at 261-262. Susan Mosher Stuard says these divisions affected all aspects of life; the country operated on the basis of "polarized schema" that divided public and private spheres and relegated women to the private (considered "left," dark and evil), while men occupied the public sphere of right and good. Susan Mosher Stuard, "Women's Witnessing: A New Departure" in WITNESSES FOR CHANGE: QUAKER WOMEN OVER THREE CENTURIES 6-7 (Elisabeth Potts Brown & Susan Mosher Stuard, eds. 1989).

⁹⁹ Spence, *supra* note ___ at 236-237; 245.

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¹⁰¹ These included: the secta, compurgators, community witnesses, inquisition jurors, and jurors of the assize. See Thayer, ESSAYS, *supra* note ___ at 377.

there was considerable procedural confusion, and that part of the confusion resulted from jurisdictional tensions that existed among the various judicial authorities.

An elaborate, mostly Anglo-Saxon system of proof was in place in the common law courts during what Holdsworth describes as the "disordered state of country" of the fourteenth and fifteenth centuries.¹⁰² Among the formalities insisted upon in the common law courts was a requirement in contract cases that any documents submitted be under seal. Many parties could not meet this requirement and thus pursued their suits in local courts which permitted wager of law, the practice which pitted one party's oath-helpers against the other's, with a favorable decision often going to the party supported by the greatest number of oaths.¹⁰³

At the same time, in a haphazard way, the Norman-influenced witness-jury was expanding its role,¹⁰⁴ and was increasingly relied on to assemble knowledge and reach decisions. For a long time, the knowledge so assembled, however, was not informed by eyewitnesses.¹⁰⁵ Facts were brought to juror-witnesses' attention through pleadings rather than through oral testimony.¹⁰⁶ "Witness" yet implied oath-taking; juries, it was thus said, "witnessed to a verdict."¹⁰⁷

As compared to common law courts, chancery was very informal. A petitioner would present the Lord Chancellor with a "bill" setting forth the grounds of a complaint. The defendant would be ordered under penalty (*sub poena*) to answer. The court ordinarily acted on written testimony¹⁰⁸ but personal examination under oath was

¹⁰² Holdsworth, *supra* note ___ at 178.

¹⁰³ Zane, *supra* note ___ at 237. See description *supra* at ___.

¹⁰⁴ Holdsworth, *supra* note ___ at 178.

¹⁰⁵ Wigmore, *supra* note ___ at 354-358.

¹⁰⁶ Knappen, *supra* note ___ at 200.

¹⁰⁷ Zane, *supra* note ___ at 255.

¹⁰⁸ *Id.* at 258.

permitted.¹⁰⁹ If the court determined that more evidence was needed, testimony would be taken in secret by special commissioners.¹¹⁰

Unlike the common law courts, which dispensed justice through a penalty system, chancery granted money damages in some situations.¹¹¹ Another variance related to language. Once English came into general use late in the fifteenth century, pressure grew to have oral testimony in the courts. Gradually, all courts accommodated to this pressure,¹¹² but the English language was employed in chancery by 1435.¹¹³ These differences affected public perception and usage of the courts.

Maintenance Reforms. A window of opportunity existed in this period for the development of narrative witnessing, fortified by the solemnity of the oath, but it was severely hampered by circumstances. The buying and selling of oaths had become a profitable business and perjury was rampant.¹¹⁴ Although with the ingress of the Normans, the community witnesses system, which relied on fact-oriented testimony and not on sworn oaths, soon replaced wager of law even in the local courts, this system was "almost as stupid as wager of law which preceded it."¹¹⁵ It meant only that instead of purchasing oaths outright, unscrupulous litigants would bribe the community witnesses.¹¹⁶ These attempts to influence the jury led to maintenance laws.¹¹⁷

Because oath-takers were so easily bought, the law permitted parties to sue for "maintaining" false suits. Tensions between chancery and the common law courts

¹⁰⁹ Spence, *supra* note ___ at 243.

¹¹⁰ Knappen, *supra* note ___ at 293.

¹¹¹ Spence, *supra* note ___ at 243.

¹¹² Zane, *supra* note ___ at 258.

¹¹³ *Id.* As Zane notes, until language assimilation occurred, jury trials would not have been possible.

¹¹⁴ *Id.* at 253. ("The spectacle of wager of law had confirmed every lawyer in the opinion that the witnesses a litigant produces are produced because they are ready to commit perjury.")

¹¹⁵ *Id.* at 254.

¹¹⁶ Holdsworth, *supra* note ___ at 182.

continued to grow, and at least partly as a response to the chancery courts' practice of awarding money damages, the common law courts granted damages for successful maintenance suits.¹¹⁸ Heavy fines imposed on juries who were found to have made wrong decisions filled the King's coffers,¹¹⁹ but did little to encourage participation in the judicial truth-finding process.

Maintenance, it turned out, was the reform that kept honest witnesses away. The threat of suit was supposed to — but did not — discourage false oaths.¹²⁰ As a consequence, the liars continued to be bought; but honest people were afraid to be witnesses, and could not be compelled to be.¹²¹ Despite evidence of widespread disregard for the gravity of an oath, swearing was deemed such a serious matter that law and policy makers were reluctant to put people's souls in jeopardy by forcing them to swear oaths. Meanwhile, as maintenance suits proceeded, each new decision-making body had to be twice the size of the last one, and the procedure became unwieldy.¹²²

There were those who agitated for reform. Among them was Bracton, best known as the original compiler of cases from the Anglo-Saxon period.¹²³ His efforts to bring into the courts the practice of witness examination failed, however.¹²⁴ In England, the eclectic jury, rather than canonical procedure, assumed the place of earlier modes of proof.¹²⁵

Accommodation. Despite the apparent chaos, changes in trial procedure progressed gradually toward a division between the jury's role as fact gatherer and that of

¹¹⁷ Thayer, *The Jury*, *supra* note ____ at 261.

¹¹⁸ Spence, *supra* note ____ at 244.

¹¹⁹ Zane, *supra* note ____ at 258.

¹²⁰ *Id.* at 253-254.

¹²¹ *Id.* at 254; 258.

¹²² *Id.* at 259.

¹²³ *Id.* at 238. Bracton (also spelled "Brachton") produced the first compilation of cases in 1260.

¹²⁴ Holdsworth, *supra* note ____ at 180.

¹²⁵ *Id.* at 181.

decision-maker. At the height of the Middle Ages, juries were sources of information rather than judges of fact; they came from local neighborhoods, and were sworn as witnesses, not as triers of fact. But by the late Middle Ages, witnesses had come to be distinguished from jurors.¹²⁶ The continental jury, when blended with the Anglo-Saxon model, thereby melded into a fact-finding community conscience.

The ultimate replacement of proof by compurgation or ordeal with verdict by jury, as it is now comprehended, had several effects. It camouflaged any obvious reliance on canonical procedure.¹²⁷ It also marked a turn toward human hegemony in determining outcomes, with an accompanying belief in a human ability to ascertain the past through concrete investigation.¹²⁸ At the same time, the nature of the trial as a kind of test, with overtones of the verdict as demonstrating divine approval, was preserved.¹²⁹

Post-Reformation: 1500 C.E. to Modern Times.

Stabilization. By the sixteenth century, some degree of normalcy had been restored to England, and the reigns of the Tudors and Stuarts were characterized by relative stability. The centralization of political states extended from the European continent to England¹³⁰ and stimulated an interest in national history.¹³¹ Intercontinental exploration and scientific discovery followed. Under Henry VIII (1509-1558) and Cardinal Thomas Wolsey (d. 1530), England was moving toward legal reform.¹³² Henry wrested historical record keeping from Benedictine and Franciscan monks, who had for

¹²⁶ *Id.* at 127; Knappen, *supra* note ___ at 292-293;

¹²⁷ Holdsworth, *supra* note ___ at 181. This mattered as the conflict between the Roman Church and Crown intensified.

¹²⁸ McKeon, *supra* note ___ at 35.

¹²⁹ See Holdsworth, *supra* note ___ at 181 (noting that the early jury's free reign in decision-making preserved Anglo-Saxon ideas about the nature of trial and proof).

¹³⁰ Spence, *supra* note ___ at 263.

¹³¹ Le Goff, *supra* note ___ at 190.

¹³² Spence, *supra* note ___ at 263.

centuries maintained the documentary archives. This, in turn, led to a secularization of history, and a concomitant breakdown in the authority of myth and legend.¹³³

To be sure, the conflict between Church and Crown created repeated crises, and ultimately precipitated the Revolution of the mid-seventeenth century, when "[w]ell-established, if not always well-respected institutions collapsed like the proverbial house of cards."¹³⁴ Despite the upheaval occasioned by the Church/Crown conflict and the ensuing proliferation of separatist, antiestablishment religions, however,¹³⁵ judicial life reflected an increasing preference for non-violent dispute resolution.

In the legal domain, some confusion between juries and witnesses still existed. But a major turning point in legal procedure came with the passage of the Statute of 1562-63, granting courts the power to compel witnesses to testify.¹³⁶ This change was initiated and first enforced on behalf of the Crown,¹³⁷ and soon was utilized in all but criminal cases. Moreover, a new rule governing probes into attainted jury allegations prohibited an appellate body's reliance on any evidence not before the allegedly offending jury.¹³⁸ These changes in procedure spelled the demise of maintenance suits.¹³⁹

Changes in the legal system, while slow, were probably inevitable given how unmanageable it had become.¹⁴⁰ The inception of English as the language of choice and common usage was followed by the general employment of witnesses and a natural

¹³³ Le Goff, *supra* note ___ at 190. But *cf.* McKeon, *supra* note ___ at 42 (asserting the continuing grip of mythology on English thinking).

¹³⁴ McCurley & Reumann, *supra* note ___ at 4. McCurley & Reumann note that between 1640 and 1649 England saw the abolition of the Star Chamber, the Court of High Commission, Episcopacy and church courts, Councils of Wales and of the North, and the House of Lords. England also witnessed the execution of the Archbishop of Canterbury and of the King himself.

¹³⁵ Knappen, *supra* note ___ at 196.

¹³⁶ Knappen, *supra* note ___ at 406; Holdsworth, *supra* note ___ at 185.

¹³⁷ Wigmore, *supra* note ___ at 693.

¹³⁸ Zane, *supra* note ___ at 259.

¹³⁹ *Id.* at 259.

progression toward logical persuasion in the courts.¹⁴¹ By the time the Tudors came to power, the jury — in its hybrid form -- already was the almost exclusive method of decision; once the fear of suits for maintenance was lifted in the mid-sixteenth century, it was only a matter of time before the jury divested itself of its witness role and became solely the trier of facts.¹⁴²

Evidence Law. From the seventeenth century on, verdicts were based not on the jurors' own knowledge, but on evidence produced in court.¹⁴³ This change made the appearance of witnesses necessary and had a profound effect on the laws of evidence and pleading.¹⁴⁴ Although it took two hundred years, ultimately the legal system privileged some notion of the quality of oral testimony over a notion of quantity of sworn oaths.¹⁴⁵

The division of witness and juror roles gave rise to the law of evidence.¹⁴⁶ Once the jury's role changed, and oral testimony became the norm, the need for *limits* on testimony became apparent.¹⁴⁷ Unless court proceedings were to be interminable, some regulation on time and admissibility was inevitable. The primary purposes behind the earliest evidentiary rules were to insure that courts kept to the issues, and to prevent them from being misled. Thus it was that evidence law started with rules of exclusion.

In devising rules, the courts were concerned first not with relevance, however, but with the competency of witnesses.¹⁴⁸ This is not surprising given the history of testimony

¹⁴⁰ *Id.* at 422.

¹⁴¹ Holdsworth, *supra* note ___ at 126; Wigmore, *supra* note ___ at 692-693.

¹⁴² Knappen, *supra* note ___ at 406; Zane, *supra* note ___ at 259-260.

¹⁴³ Wigmore, *supra* note ___ at 692.

¹⁴⁴ Holdsworth, *supra* note ___ at 126.

¹⁴⁵ Wigmore, *supra* note ___ at 692-693.

¹⁴⁶ Holdsworth, *supra* note ___ at 126; 207; Zane, *supra* note ___ at 423.

¹⁴⁷ *Id.*

¹⁴⁸ Wigmore, *supra* note ___ at 693.

and its reliance on “primitive ideas” about the intrinsic value of the oath.¹⁴⁹ The widespread abuse of the sacred oath galvanized a campaign to restrict its use; the pendulum swing from wager of law was to laws of evidence permitting only “worthy” persons to take the oath.

This foreshortened court proceedings, and had the added effect of excluding whole classes of people from the decision-making process. Once it was determined who was trustworthy and therefore legally competent to swear, rules establishing a privilege not to testify were devised.¹⁵⁰ In time, rules permitting cross examination, prohibiting hearsay, and establishing other relevancy limits on evidence were adopted.¹⁵¹ These early evidentiary issues have shaped court proceedings ever since.

Legacies. Despite the procedural adaptations that limited both the number of narrative contributors in the courts and the scope of the narration permitted, the legal system yet contains the smoldering remnants of medieval practices and traditional Anglo-Saxon roots. In the English system, as it developed, evidence rules were never solely dependent on a doctrine of patent relevancy; everything, in its way, was a matter of inference, permitting considerable reliance on personal knowledge and experience.¹⁵² The open-ended questions of direct examination in the American judicial system provide some elasticity in the presentation of a story, and juries are given considerable latitude in assessing the information that does come before them.

It can also be said that while oral evidence procedures were affected indirectly by theories underlying canonical law, including the primacy accorded to eyewitness

¹⁴⁹ See Holdsworth, *supra* note ___ at 204-205 (discussing inferences drawn from biblical foundations of oath-taking and suggesting they were illogical).

¹⁵⁰ Wigmore, *supra* note ___ at 693; Holdsworth, *supra* note ___ at 127.

¹⁵¹ Wigmore, *supra* note ___ at 693.

testimony,¹⁵³ they were derived equally from the oath-swearing contests, and even from the ordeals, of Anglo-Saxon times.¹⁵⁴ It was the conviction that external forces would oversee and, if necessary, intervene in human affairs that led to a reliance on oaths in the first instance. Thus, to the extent that modern court practices reflect the compurgator system's ultimate distrust of testimony,¹⁵⁵ they also rebound to the earlier Anglo-Saxon belief in the value of oaths.¹⁵⁶ There even remains some tendency to value the credibility of an oath-taker over the substance of witness testimony.¹⁵⁷

Another enduring aspect of pre-literate England has been the continuing identification of law with unwritten custom.¹⁵⁸ According to this precept, law is as it always was, going back to ancient, and even mythical, times.¹⁵⁹ The idea is consistent with early beliefs in and reliance on *a priori* authority; its philosophical foundations can also be traced to Judeo-Christian roots.¹⁶⁰

Today there remains, in addition, a notion of jury as community conscience,¹⁶¹ a medieval tradition that persisted long after the jury became the detached, objective judge

¹⁵² Holdsworth, *supra* note ___ at 128.

¹⁵³ See Le Goff, *supra* note ___ at 185 (tracing this notion to the ancient Greeks).

¹⁵⁴ "[J]uries still continued for a long period to attach much weight to an oath merely as an oath."

Holdsworth, *supra* note ___ at 208. See also Wigmore, *supra* note ___ at 692 (noting long-time observance of "due formalities" of an oath with no attendant reliance on powers of reason).

¹⁵⁵ Zane, *supra* note ___ at 216. Zane throughout makes clear his disdain for wager of law in particular, and the oath-taking system in general. The "evil results" of wager of law, he says, were "probably the reason why for hundreds of years, in the English common-law procedure, trial by actual witnesses was unknown."

¹⁵⁶ Wigmore, *supra* note ___ at 692.

¹⁵⁷ See Holdsworth, *supra* note ___ at 208 (tracing rule prohibiting impeachment of one's own witness to the weight accorded the oath); but *cf* Le Goff, *supra* note ___ at 185-186 (noting that the eyewitness has been accorded special status since time of Herodotus).

¹⁵⁸ McKeon, *supra* note ___ at 41 (citing to J. G. A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957)); Boorstin, *supra* note ___ at 483.

¹⁵⁹ This conclusion can be gleaned, for example, from the Stuart monarchs' claims to be descended from the legendary Arthur of Camelot. McKeon, *supra* note ___ at 42.

¹⁶⁰ An extensive analysis of the history and interpretation of biblical texts can be found in a series of essays accompanying and following the Hebrew Bible, the Apocryphal/Deuterocanonical Books and the New Testament in *The New Oxford Annotated Bible* (3rd ed. 2001).

¹⁶¹ Holdsworth, *supra* note ___ at 181-182.

of facts.¹⁶² With respect to current attitudes about the jury's role, historians attach significance to the early utilization of lay jurors; and it has been pointed out that community participation is consistent with the jury's institutional origins.¹⁶³

Similarly, while the narrowness of the modern witness's narrative role seems out of synch with the increasing reliance on external proof that coincided with the passing of the medieval era, it may, in fact, reflect the most powerful underlying convictions of that early age. The desire for control over irrepressible testimony heralded the introduction of evidentiary constraints. Meanwhile, advances in record collection and preservation brought inflated confidence in eyewitness testimony and documentary materials,¹⁶⁴ and rationalism became the buzzword of intellectual circles in the seventeenth century. Judicial procedure emphasized the logical content of human speech, so much so that the preternatural quality of the oath was all but forgotten. In the end, formal completion of judicial process was emphasized over virtuous certainty, with loss to story.

The apparent significance of oaths declined,¹⁶⁵ but the power of the oath did not disappear; it simply went underground. In Anglo-Saxon times, the singular function of witnesses was to take an oath; there was no narration. After the Invasion, jurors were charged with ascertaining the story behind a case, but there was as yet still no courtroom narrative. When juror and witness roles developed and then diverged, evidentiary rules

¹⁶² Holdsworth, *supra* note ___ at 356 (observing that at least into the seventeenth century, evidence was admitted to "inform the conscience of the court."); see also Thayer, *ESSAYS*, *supra* note ___ at 365-375.

¹⁶³ Thus, Phoebe Haddon contends, it is appropriate to advance a communitarian agenda in civil practice. Haddon, *supra* note ___ at 33.

¹⁶⁴ See McKeon, *supra* note ___ at 43. Archiving is an ancient practice, and in Europe, it began in earnest in the early thirteenth century. Le Goff, *supra* note ___ at 75. Previously, in ancient Greece, official memory officials were relied on by the judiciary to be keepers of official data. With the advent of documentation, they became archivists. *Id.* at 63.

¹⁶⁵ See Barbara J. Shapiro, *PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND 141-144* (1983) (describing the conflict over the relative values of eyewitness testimony and traditional reliance on attested documents).

redefined the boundaries of their respective domains. Both jurors and witnesses continued to take oaths, however, and the presumed authority of the oath was not challenged.

Jurors were now no longer expected to discover the story of a case on their own; the story was brought to them, through evidence and oral testimony. This begins the era of courtroom narrative. But courtroom narrative was very quickly circumscribed, ostensibly in order to rein in long, untidy stories. Coincidentally, the role of story narration, moreover was not, however, entrusted to witnesses, who had, through the practice of wagering law, shown fallibility and disrespect for the oath.. Story narration was, rather, given over to the expanding field of literature. It is in that field that the gravity and inherent promise of oaths has taken root, and it is to that field that the law must look if the role of witnesses is to be taken seriously in current circumstances.

Part II View Through a Fly's Eyes: The Christian Religious Lens

Introduction.

Before turning to the ways in which literary methodologies have nourished testimonial narrative, it is useful to examine another area where the tradition of witnessing has a long and influential history. That field is religion.

The concept of witnessing in religion is an ancient one. The term "witness" is commonly referenced in the Judeo-Christian scriptures, and the notion that people are called upon to speak of or for God almost certainly precedes even the oldest of these writings.¹⁶⁶ Because Christianity became the dominant religion in Euro-American

¹⁶⁶ For an extensive analysis of western legal roots in Islam, see John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. Rev. 1635 (1999).

culture, however, this Part focuses on the scriptures of the Old and New Testaments that form the basis of western Christian ideology.

Christian religions, although replete with the language of "witnessing" and "testimony," do not uniformly interpret the terms. Any particular faith may illuminate role options for lawyers who subscribe to or practice that faith, but there is no single religious tradition of witnessing that can be reliably viewed as a model for lawyers. The multiple creeds of Christianity do have one thing in common, however; they all originated in the same place. The Hebrew Bible provides their common source material.

Scriptural writings in the Old Testament¹⁶⁷ are believed to be the word of God.¹⁶⁸ Within the scriptures are revelations, the importunings of Yahweh spoken through the mouths (or the pens) of the chosen.¹⁶⁹ The chosen speakers, or prophets, are those impelled by God to speak to the people, in God's name, concerning God.¹⁷⁰ Scripture is not simply a matter of textual message, however; biblical writers "value narrative, continuity, canonicity, and the exactness of sources."¹⁷¹ In this way, the scriptures function as a means of "remembrance."¹⁷²

When the manuscripts constituting the New Testament were written, they were not conceived of as being wholly separate from those of the Hebrew scriptures; rather, they were conceived of, and constructed as, both a fulfillment of the earlier scriptures and

¹⁶⁷ I use the term "Old Testament" to refer specifically to the Christian version of the pre-Christian biblical texts. The "Hebrew Bible," the Jewish text, is referred to and relied on more generally throughout this section. My primary source for both the Hebrew Bible and the New Testament texts is THE NEW OXFORD ANNOTATED BIBLE, *supra* note ____.

¹⁶⁸ McCurley & Reumann, *supra* note ____ at 38.

¹⁶⁹ Ricoeur, *supra* note ____ at 75.

¹⁷⁰ *Id.* at 92.

¹⁷¹ McKeon, *supra* note ____ at 33.

¹⁷² Both Judaism and Christianity have been called "religions of remembrance." Le Goff, *supra* note ____ at 68.

an extension of them.¹⁷³ Beginning with the first stories of the gospels, characters operated within the context of cultural traditions forged in the old scriptures.¹⁷⁴ The original disciples viewed the Jesus stories as "decisive new developments in the story of Israel," but not as a new religion.¹⁷⁵ Accordingly, the New Testament was created with the notion that the full text — old and new — incorporates scripture, a message from God and a revelation by and of God.¹⁷⁶ This gospel, or God's "good news" is explicitly part of the ministry of Jesus.¹⁷⁷ In the Christian script, Jesus is the one, true "witness" who reveals God or the word of God.¹⁷⁸

The creation of the Christian Bible, like the compilation of the Hebrew Bible, was a long and complex process, well beyond the scope of this article. But it is important to recall that it was constructed from multiple, diverse texts, and that in the process of formation, many competing texts were weeded out.¹⁷⁹ It is also significant that a semantic change from the Hebrew scriptures as "covenants" to the Christian scriptures as "testaments." took place in the early Christian era.¹⁸⁰ In this way, Christians, who were

¹⁷³ Thomas G. Long, *THE WITNESS OF PREACHING* 42 (1989).

¹⁷⁴ See e.g. Timothy E. Yates, *CHRISTIAN WITNESS IN THE TWENTIETH CENTURY* 6 (1994) (making the point in reference to John the Baptist); Marion Lloyd Soards, "Introduction to Luke" in *THE NEW OXFORD ANNOTATED BIBLE NT* 93 (3rd ed. 2001) (commenting on Luke's statement that Jesus' coming is a fulfillment of a promise of salvation); *THE NEW OXFORD ANNOTATED BIBLE NT* 21 (3rd ed. 2001) [hereinafter *OXFORD BIBLE*] (notes to Matt. 10: 1-5, highlighting how naming of apostles is connected to twelve tribes of Israel). [Pagination in *THE NEW OXFORD ANNOTATED BIBLE* begins in the Old Testament and begins anew with the first book of the New Testament. For this reason, page numbers are designated "OT" or "NT" to distinguish the Old Testament pages from the New Testament pages.]

¹⁷⁵ Richard A. Horsley, "Introduction to Mark" in *THE NEW OXFORD ANNOTATED BIBLE NT* 57-58 (3rd ed. 2001)

¹⁷⁶ McCurley & Reumann, *supra* note ___ at 38.

¹⁷⁷ *Id.* at 4. The term "gospel" or "good news" did not originate with the New Testament writings. In other contexts, from which it was apparently borrowed, or in which it had been previously applied, "gospel" referred to politically authoritative news, such as announcing the birth of an emperor. PHEME PERKINS, "Introduction to The Gospels" in *THE NEW OXFORD ANNOTATED BIBLE NT* 3 (3rd ed. 2001).

¹⁷⁸ Long, *supra* note ___ at 46-47.

¹⁷⁹ David Rhoads, *THE CHALLENGE OF DIVERSITY: THE WITNESS OF PAUL AND THE GOSPELS* 3 (1996).

¹⁸⁰ See McCurley & Reumann, *supra* note ___ at 13-14 (explaining that "testament," as taken from Greek, referred to a person's last will and was also used in reference to the Hebrew term for covenant, which conveyed the idea of a promise. The Latin word *testamentum* came to encompass both meanings.)

focused on historical record and authentication, laid claim to the verifiable truth of their narratives.¹⁸¹ But while injecting meaning into a historical record, the New Testament compilers subordinated history to theology.¹⁸²

The shift in name thus signifies a shift in perspective, certainly within the Christian community. Gone from the narration is any idea of blind chance that may have existed in pre-Christian texts; the entire New Testament text is vested with meaning and direction.¹⁸³ In it, the disembodied voice of Yahweh, filtered through His chosen spokespersons, is now a flesh-and-blood witness to Jesus, with a decidedly different role. The prophets of pre-Christian times, who conveyed the word of God and the promise of redemption, were, in the New Testament, replaced by disciples, preachers and witnesses, whose concerns are historicity, authenticity and the claim to knowledge.

Very soon after the death of Jesus, questions arose concerning the definition of "word of God," the content of testimony, and the role of witnesses. These questions are particularly relevant to lawyers concerned with exposing everyday truths and shaping historical, cultural truth. While the issues remain unresolved, the exploration and study of the concepts lends findings and analyses that may prove helpful to lawyers on similar quests.

Historical Developments

The Gospels. The gospels¹⁸⁴ were written to retell the story of Jesus to a new generation.¹⁸⁵ In Mark's text, by all accounts the first to be written,¹⁸⁶ Jesus is

¹⁸¹ Northrup Frye, *THE SECULAR SCRIPTURE: A STUDY OF THE STRUCTURE OF ROMANCE* 18 (1976).

¹⁸² Le Goff, *supra* note ___ at 159.

¹⁸³ *Id.* at 185.

¹⁸⁴ DEFINE

¹⁸⁵ McCurley & Reumann, *supra* note ___ at 89.

¹⁸⁶ Soards, *supra* note ___ at NT58; McCurley & Reumann, *supra* note ___ at 1-2. The dates have been established to be between about 65-70 C.E. Soards, *supra* note ___ at NT 58.

immediately identified as God's messenger and a teacher.¹⁸⁷ His mission was to proclaim the good news¹⁸⁸ and, according to Mark, his followers were exhorted to do likewise.¹⁸⁹ In this way, Jesus inaugurated the reign of God, not by destroying, but by continuing to build.¹⁹⁰ Thus, while the promises of old are rendered complete, Mark made clear that he was also telling a new story, one in which escalating conflicts lead to the denouement of death and resurrection.¹⁹¹ Mark was perhaps the first to provide this type of narrative framework,¹⁹² in doing so, he produced a radical change in story structure by injecting an ideologically-grounded, telological chronology.¹⁹³

There are variations on Mark's themes in the gospels of Matthew and Luke. In Matthew's gospel, Jesus is anointed by God; having been granted wisdom and authority, he could be likened to Moses. His Jewishness is highlighted along with his connections to earlier scriptures.¹⁹⁴ Matthew's gospel suggests that action is to be expected of believers; the goal is to teach by example and to heal, and thereby obliterate sin.¹⁹⁵

Luke is the image maker, presenting Jesus as "the Lord," God's son, and the savior.¹⁹⁶ Luke's concern was with memory, and memory, in Luke's terms, meant commemoration of Jesus.¹⁹⁷ The goal was to preserve the words of Jesus and insure their

¹⁸⁷ Mark 1: 2-23.

¹⁸⁸ Rhoads, *supra* note ___ at 61. See also Mark 1: 1-3 (John the Baptist is "[t]he beginning of the good news of Jesus Christ"; Mark 1: 14-15 (After John's arrest, Jesus went into Galilee, proclaiming the "good news of God" and telling his listeners to repent and "believe in the good news.")

¹⁸⁹ McCurley & Reumann, *supra* note ___ at 4 (citing to Mark 13:10; 14:9).

¹⁹⁰ See Rhoads, *supra* note ___ at 60-61 (Mark's emphasis on healing, providing, and confronting difficulties "inaugurated God's reign on earth.")

¹⁹¹ Soards, *supra* note ___ at NT 57.

¹⁹² Perkins, *supra* note ___ at NT 3.

¹⁹³ Le Goff, *supra* note ___ at 188.

¹⁹⁴ Perkins, *supra* note ___ at NT 7.

¹⁹⁵ Rhoads, *supra* note ___ at 61.

¹⁹⁶ Soards, *supra* note ___ at NT 93.

¹⁹⁷ Le Goff, *supra* note ___ at 70-71. See also Acts 1: 8 (where Jesus' followers are called on to be his witnesses); Acts 4: 33 (reporting that the apostles "gave their testimony to the resurrection of the Lord

preservation by means of messianic dissemination. Luke also understood that text is an engagement with history.¹⁹⁸ Tying up the past had to be the prelude to the future; accordingly, in Luke's gospel, Jesus is explicitly connected to earlier generations and comes in fulfillment of God's promise of salvation.¹⁹⁹ As verification, Luke took care to reference his sources.²⁰⁰

Read separately or together, the three synoptic gospels provide many possible conceptions of and roles for witnessing. They all involve speaking out: preaching, teaching, retelling the story, or preserving the words as originally told. They all gather strength from the post-crucifixion stories of Jesus' reappearance and the Pentecost, in which Jesus directs his followers to share the news of his life and resurrection.²⁰¹ In the story of the Pentecost, the apostles, in hiding, are visited by the Spirit and told to go forth and observe his teachings.²⁰² Matthew's gospel ends with Jesus exhorting his followers to "make disciples of all nations" and to engage in "teaching them to obey all that I have commanded you."²⁰³

These stories also emphasize the relationship building that ensues from shared experiences and beliefs. It is thus possible to understand Christian gospel as focused in community.²⁰⁴ Luke's gospel, in particular, emphasizes the organization of a community

Jesus"). The Acts are widely believed to have been authored by Luke. Christopher R. Matthews, "Introduction to the Acts of the Apostles" in THE NEW OXFORD ANNOTATED BIBLE NT 183 (3rd ed. 2001).

¹⁹⁸ Yates, *supra* note ___ at 4.

¹⁹⁹ Soards, *supra* note ___ at NT 93.

²⁰⁰ *Id.* at NT 94.

²⁰¹ McCurley & Reumann, *supra* note ___ at 315 (citing to Mark 16: 7, where unknown man at site of Jesus' tomb advises women who have come to anoint Jesus' body to "tell his disciples" that he will meet them; Matt. 28: 19, where Jesus tells eleven of his followers to "make disciples of all nations"; John 20: 21, where, after his death, Jesus appears to a group of disciples, saying that "As the Father has sent me, so I send you.")

²⁰² Colin Williams, WHERE IN THE WORLD: CHANGING FORMS OF THE CHURCH'S WITNESS 37 (1963).

²⁰³ Matt. 28: 16-20.

²⁰⁴ See *e.g.*, *id.* at 47; Rhoads, *supra* note ___ at 125.

of the faithful, a core group of disciples who will continue to grow and remain connected by their faith.²⁰⁵

The gospel of John, the last to be written, is qualitatively distinguishable from the other three, and its difference can be seen as providing a counterpoint to any conceptualization of witness role that may be taken from Matthew, Luke and Mark. John's gospel is concerned with the transcendent being; for him, to be saved is to see the light and, at the moment of seeing, choose light over darkness. Knowledge of God is the key to eternal life, and seeing provides the opportunity for belief.²⁰⁶ John's highly metaphorical composition describes God as "the Word" and Jesus as the light.²⁰⁷

Jesus, the light, manifests God, and is God in the flesh.²⁰⁸ Jesus alone has seen God,²⁰⁹ and Jesus' mission in the world is to make God known through his presence.²¹⁰ Evil people want to avoid the light, and prefer to seek their own glory over God's.²¹¹ This light, which is knowledge of God and eternal life, John asserted, is accessible in the present, through Jesus.²¹² As John saw it, turning away from the light signals damnation, the denial of knowledge of God. The light, or the spirit, is the source of Christian witness; believers witness by being.²¹³

Early Christian Witness. No single, clear witnessing agenda or mandate has been adopted from the four gospels or even from the three synoptic gospels. Through them, new meaning was being attached to notions of "witness" and "testimony," but the

²⁰⁵ See Soards, *supra* note ____ at NT 95.

²⁰⁶ Rhoads, *supra* note ____ at 122.

²⁰⁷ *Id.* at 119; 128.

²⁰⁸ McCurley & Reumann, *supra* note ____ at 39; Rhoads, *supra* note ____ at 119.

²⁰⁹ *Id.* at 119.

²¹⁰ Rhoads at 129.

²¹¹ *Id.* at 123.

²¹² *Id.* at 127-130.

²¹³ McCurley & Reumann, *supra* note ____ at 388.

strategy for early Christians remained vague. One coincidence that bears noting is the coupling of the words for "witness" and "martyr." In Greek - the language of the highly influential, early Christian evangelist Paul — martyr is the word for witness.²¹⁴ A Middle English word with Anglo-Saxon roots (*martir*) denoted a person who suffers capital punishment.²¹⁵ In the New Testament, the Greek "martyr" appears to conflate with English word "martir" to attain its current meaning of "a person who chooses to suffer or die rather than give up his faith or his principles."²¹⁶ In early Christian terms, then, a martyr was first a witness.²¹⁷ Significantly, church leaders crystallized Christian memory around them.²¹⁸

The death of Stephen, generally regarded the first of the Christian witness-martyrs, is recorded in the Acts of the Apostles,²¹⁹ the New Testament book directly following the gospels. At the scene of Stephen's slaying, shortly after Jesus' death, was Paul, who is reported to have approved of the killing.²²⁰

Thus was Paul introduced. Educated, literate, and professionally employed, Paul was well positioned to lead. His subsequent conversion to Christianity, occasioned by a lightning strike, even as he was "still breathing threats and murder against the disciples,"²²¹ bore the marks of legend. Ten or twelve years following his conversion,

²¹⁴ Long, *supra* note ___ at 44.

²¹⁵ OXFORD DICTIONARY, *supra* note ___ Vol. 1 at 1709.

²¹⁶ WEBSTER'S DICTIONARY, *supra* note ___ at 901.

²¹⁷ Ricoeur, *supra* note ___ at 113; Le Goff, *supra* note ___ at 71. This is not to suggest that martyrdom is an "argument" or "proof" of anything. It is, rather, "a test, a limit"; it is the extreme version of witnessing. Ricoeur, *supra* note ___ at 113.

²¹⁸ Le Goff, *supra* note ___ at 71.

²¹⁹ Acts 7: 54-60.

²²⁰ Acts 8: 1. Also said to be on the scene were "witnesses," who, under Jewish law, were officials required to cast the first stones at those being executed according to law. OXFORD BIBLE, *supra* note ___ at NT 198 (editor's notes to Acts 7: 58 - 8: 1).

²²¹ Acts 9: 1-7.

Paul began to write and, through his writing, to interpret events.²²² Speaking out to (and against) those in power, he transformed authorship into authority.²²³

Lutheran theologian Foster McCurley notes the common perception of Paul as having changed the “religion of Jesus” into a “religion about Jesus.”²²⁴ Paul’s leanings toward administrative order prompted the melding of his substantive interpretations into rules, giving the whole Christian venture structure. A community of believers became an institutionalized church, complete with rites, ministry and hierarchy.²²⁵ While giving the Christian enterprise clarity of purpose and direction,²²⁶ Paul's evangelism promoted the concept of revelation as being dictated, thereby taking away any subjective understanding of scripture.²²⁷ Authority, moreover, became a dominant characteristic of the Church.²²⁸ In accordance with this vision, the preacher – the religious leader – assumed the role of witness in the Christian community.²²⁹

The Medieval Church. As the Christian Church organized, the missiological, historical vision derived from the Acts of the Apostles, as well as from the words of Paul and other epistle-writers, assumed prominence. By the medieval period in Europe, the Christian Church had become the Catholic Church; it was highly organized, wealthy and powerful, particularly as compared to the loose and ever-changing confederations of feudal states that constituted a rough system of government and political power.

²²² See McCurley & Reumann, *supra* note ___ at 323 (In Paul, the "message and messenger intertwine."); Rhoads, *supra* note ___ at 61 (noting that in Paul's letters, "the standards of judgment are explicitly stated by the author in addressing the readers.")

²²³ Williams, *supra* note ___ at 109.

²²⁴ McCurley & Reumann, *supra* note ___ at 323.

²²⁵ *Id.*

²²⁶ Le Goff, *supra* note ___ at 185.

²²⁷ Ricoeur, *supra* note ___ at 76.

²²⁸ Long, *supra* note ___ at 42-43.

²²⁹ See *id.* at 44 (Church has set preacher apart for the "crucial activity of going to the scripture to listen for that truth.")

The Catholic Church operated as a governing body for the majority population, and Church policy of the time dictated that the commemoration of Jesus was the primary focus of the Church. In their daily lives, however, most people probably gave little thought to the complexities of Church regulation or the theoretical justifications for the dogma and rules that flowed from Rome. Illiteracy was still the norm.²³⁰ This bred reliance on authority, which ordinarily meant God and God's "chosen" agents, such as bishops and kings.

If a high-level agent wasn't readily available, people looked elsewhere for confirmation that something was or was not so. At the popular level, a pervasive belief in the invisible world of demons, angels, ghosts, and their intervention helped explain the world.²³¹ Thus, when formal Catholicism met the inexplicable events of every-day existence, the intersection gave rise to a cult of saints.²³² Although the Pauline vision dominated in the upper echelons of the Church, it nonetheless remained in contradistinction to the nonlinear mysticism being applied to the practical needs of daily existence.

The climate of dependency helps explain medieval society's respect for authoritative texts, chief of which was the Bible.²³³ There is a strong connection between the idea of oath-taking in the medieval world and the prophetic notion of scripture as the word of God. The revelations contained in Hebrew scriptures might be conceived of as someone (God) speaking through the prophets.²³⁴ The writer of the sacred texts is the second author, or the medium, chosen by the unseen God to reveal some of what He

²³⁰ Oldridge, *supra* note ___ at 6.

²³¹ *Id.* at 6-7.

²³² Le Goff, *supra* note ___ at 71.

²³³ See discussion *supra* at ___.

(God) has previously concealed. What has been concealed is ultimate truth, and faith is accepting as truth the words as spoken (or written) by the medium.

This world view also sheds light on the respect for oaths. When proofs did not otherwise exist, it was natural to call on God as the great authority. It is a relatively small (although highly significant) step from accepting as truth that which is sent by God through a spokesperson to initiating that dialogue with God proactively and accepting as truth words spoken pursuant to an oath. A perceived familiarity with unseen agents such as saints and demons may have helped this process along.²³⁵

Reformation. For a long time, elitist Church governance coexisted with popular custom. But a changing Europe brought into relief the differences between the erudite, prescriptive orthodoxy of Church rule and the occultish, numinous beliefs and practices that typified ordinary life. The Middle Ages ushered in Gutenberg's Bible and increased literacy, commercial exchange, world travels and the rising middle class, the seeds of scientific discovery and rationalism, and centralized government. These changes took away some of the fear and uncertainty that had fed the mystique, as what was previously invisible became known.²³⁶

The impact of these changes was of course tremendous. In the religious milieu, progress meant decreasing reliance on authority.²³⁷ Those in authority struggled to maintain their place in the hierarchy. The situation was ripe for conflict, and as

²³⁴ Ricoeur, *supra* note ___ at 76.

²³⁵ The significance of oaths can be traced to the word's etymology: an oath involves "going to fulfill a promise"; it implies faithfulness, constancy and, therefore, truth. Webster's Dictionary, *supra* note ___ at 1011.

²³⁶ Brian Manning, "The Levellers and Religion" in *RADICAL RELIGION IN THE ENGLISH REVOLUTION 67-68* (J.F. McGregor & Barry Reay, eds. 1984).

²³⁷ See Manning, *supra* note ___ at 65 (describing the Levellers belief that common people could discover the meaning of religious texts); Stuard, *supra* note ___ at 9-10 (discussing Quakers' rejection of privilege and a belief in individual worth).

governments became more centralized, and military forces with them, the Church found itself in a competition for dominance. Assaults on the Church were instigated in political circles, but opponents and critics took aim at the Church's ideological and intellectual foundations as well.

Martin Luther's protests and Henry VIII's break with Rome constituted sweeping rejections of Catholic Church officials' authority.²³⁸ What Luther initiated as a documentary, empirical critique and defense of biblical scholarship²³⁹ turned out to be a mere prelude to radical, separatist, and antiestablishment reform movements that transformed religious and political power.²⁴⁰ On the surface, the conflict played out in the Reformation and parallel developments. At another level, however, simmered a debate about the meaning of testimony, the role of the witness in society, and even the efficacy of oaths.²⁴¹

The Protestant Reformation was a decisive moment for Christian witness.²⁴² Breaking the hold of institutionalized Catholic authority made possible a reclamation of the witness role by the Church's faithful, and has even been declared a second Pentecostal moment.²⁴³ Rather than reconstitute itself along a unified cord of agreement, however,

²³⁸ B. Reay, "Radicalism and Religion in the English Revolution: an Introduction" in *RADICAL RELIGION IN THE ENGLISH REVOLUTION* 4 (J.F. McGregor & B. Reay, eds. 1984) [hereinafter, "Introduction"].

²³⁹ Le Goff, *supra* note ___ at 183; see also B. Reay, "Quakerism and Society" in *RADICAL RELIGION IN THE ENGLISH REVOLUTION* 146 (J.F. McGregor & B. Reay, eds. 1984) [hereinafter, "Quakerism"] (quoting leading Quaker scholar Christopher Hill as saying the Quakers "demote[d] the Bible from its central position in the protestant scheme of things to make it a book like any other").

²⁴⁰ See McKeon, *supra* note ___ at 83 (discussing the "crucial dilemma in epistemology" occasioned by the religious reform movement).

²⁴¹ See e.g., Stuard, *supra* note ___ at 37 (discussing new roles for women preachers); *id.* at 14 (describing Quaker leader George Fox as utilizing stereotypically feminine expression in his personal witnessing).

²⁴² Williams, *supra* note ___ at 44-45.

²⁴³ Reay, "Quakerism," *supra* note ___ at 146; see also Williams, *supra* note ___ at 44-45 (suggesting Christianity made a wrong turn at this point resulting from the erroneous conclusion that spreading the gospel had been accomplished by eyewitnesses to Jesus' ministry).

the Christian organization seemed to fracture.²⁴⁴ In opposing the corruption of the Catholic Church, Protestants went to extremes of detachment.²⁴⁵ The result was a multiplication of Christian creeds along dual strands, one having a strong authoritarian bent and one characterized by spiritual autonomy and independence of thought and action. The renewed authoritarian vigor exemplified by Calvinists, Lutherans, and Puritans, for example, contrasted with the individualism typified by such groups as Levellers, Diggers, and Quakers,²⁴⁶ and, most strongly, with such philosophers of religious tolerance as Roger Williams.²⁴⁷

Post Reformation Theories.

The Fly's Eyes. I call the religious perspective the "fly's eyes" lens because Christian theologians of the sixteenth and seventeenth centuries, collectively situated in the same biblical text, held multiple points of view. Despite their shared position, each saw the world from a different angle. They left many claims to a witnessing history, but no unified tradition.

The emergent variations in role definition are not even easy to categorize. One notable Post-Reformation contention is that a witness is one who has an encounter with the biblical text.²⁴⁸ Another thesis makes community life central to the act of witnessing.²⁴⁹ A number of examples can also be given of worldwide conversion as the

²⁴⁴ Long, *supra* note ___ at 79?

²⁴⁵ McKeon, *supra* note ___ at 41.

²⁴⁶ E.g., Manning *supra* note ___ at 65 (noting how the Levellers rejected the authority of the clergy and learned men.).

²⁴⁷ For a thorough analysis of the impact of Roger Williams's views on religious tolerance, see Edward J. Eberle, *Roger Williams's Gift: Religious Freedom in America*, 4 *Roger Williams U. L. Rev.* 425 (1999) and Edward J. Eberle, *Another of Roger Williams's Gifts: Women's Right to Liberty of Conscience: Joshua Verin v. Providence Plantations*, 9 *Roger Williams U. L. Rev.* 399 (2004).

²⁴⁸ See generally Long, *supra* note ___ at 42-44.

²⁴⁹ See generally Rhoads, *supra* note ___ at 125-32; Williams, *supra* note ___ at 92-97 (providing modern examples).

goal and methodology of witnessing.²⁵⁰ In wide-ranging contexts, particular experiences have given rise to interpretations that validate those specific experiences.²⁵¹ Each of these multifarious interpretations finds support in biblical text.

Witness as Authoritative Textual Encounter. One way of conceptualizing witnesses in the Christian tradition is in the context of scripture. If God speaks through the scriptures, the scriptures *are* the word of God. The writers of scripture — its *authors* - - thus are endowed with authority to speak. The new scriptures, no less than the old, carry this imprimatur.²⁵²

If a reader encounters God in scripture,²⁵³ the "beholding" of God is, then, an encounter with text.²⁵⁴ Prior to the time of the Reformation, few could "witness" in this way, since few were literate. Most Christians were dependent on educated Churchmen to relate the experience of encounters with God through scriptures; the practice of relegating to preachers the role of retelling the "good news" to the common people, a natural outcome of literacy, was thereby established.

Theologian Thomas Long asserts that the idea of preacher as witness has its roots in the works of Paul.²⁵⁵ The preacher's role as teller — re-teller, actually — has persisted since early Christian times. Like a trial witness, Long writes, the cleric has beheld truth

²⁵⁰ See Yates, *supra* note _____. Yates provides a decade-by-decade look at Christian missiology in the twentieth century. The first ten years, for example, he calls the "mission of expansion." *Id.* at 7-33; the decade from 1910-1920 he calls the "Church of the people." *Id.* at 34-56.

²⁵¹ Rosetta E. Ross, *WITNESSING AND TESTIFYING: BLACK WOMEN, RELIGION, AND CIVIL RIGHTS* 13-14 (2003) (recounting the development of testimonial theory coming out of conversion experiences of slaves and former slaves).

²⁵² McCurley & Reumann, *supra* note ____ at 40; see also Long, *supra* note ____ at 44 (exploring idea of preacher as witness); Ricoeur, *supra* note ____ at 92 (asserting that prophets are "driven to speak").

²⁵³ Long, *supra* note ____ at 45.

²⁵⁴ *Id.* at 79.

²⁵⁵ *Id.* at 42 (citing to Acts 20: 24, where Paul is quoted as referring to the "ministry which I received from the Lord Jesus, to witness to the gospel of the grace of God.")

(through a textual encounter) and stands willing to tell that truth.²⁵⁶ The action is authorized because both the community and the Church have delegated the witness role to the preacher.²⁵⁷

Witness as Spreading the "Good News." A second theory emphasizes the extent of dissemination over authority to speak. In this view it is all important that the word of God (i.e., scripture) includes the story of Jesus and what he accomplished.²⁵⁸ The New Testament gospel or "good news" is a message about Jesus, his life, death, resurrection, and the salvation he heralds that is meant for all.²⁵⁹ All, therefore, must be informed.

Having been classified as scripture, the works in the New Testament acquired scripture's manifest authority.²⁶⁰ Under this claim of authority is a mandate to speak, and the role of Christian witness, in accordance with the mandate, is to spread the word. Strongly supported by Mark, the first of the gospel writers, is this idea of a speaking imperative.²⁶¹ The inclusion of the Pentecost story in the Acts of the Apostles provided an often evangelical zeal to the task. The mission of witnessing in such a conceptualization is international²⁶² and cross-cultural.²⁶³ In some circles this has meant a

²⁵⁶ *Id.* at 43-44 (preacher is "sworn in" as a "trustworthy" witness). It has been pointed out that the trial theme is common in the gospels. Speaking about Jesus' trial before Pontius Pilate, Paul Ricoeur observes, moreover, that it is "only an episode in the great cosmic trial of truth." Ricoeur, *supra* note ___ at 19.

²⁵⁷ Long, *supra* note ___ at 44-45. Long distinguishes the preacher's encounter from the common adherent's, suggesting a privileged or right-based encounter.

²⁵⁸ McCurley & Reumann, *supra* note ___ at 39.

²⁵⁹ *Id.* at 3; 39; 56. Once again, the etymology is instructive here. The Greek root of the word "gospel" is the verb "preach"; only later is the term used to refer to content. Perkins, *supra* note ___ at NT 3.

²⁶⁰ McCurley & Reumann, *supra* note ___ at 38; 40.

²⁶¹ See Rhoads, *supra* note ___ at 61 (In Mark, one way Jesus "demonstrated the presence of God's rulership" was through "prophetic confrontations with the authorities.") See generally McCurley & Reumann, *supra* note ___ at 1-4.

²⁶² Yates, *supra* note ___ at 7; Williams, *supra* note ___ at 45.

²⁶³ Yates, *supra* note ___ at 6.

push for worldwide conversion.²⁶⁴ Conversion, and not intertextual experience, is thus viewed as an encounter with God.²⁶⁵

Witness as Imitative Action. Another version of the Christian witness begins with the idea that Jesus was the model teacher, and that imitation of him spreads the word.²⁶⁶ Jesus, it is said, bore witness to God by his example.²⁶⁷ In this version God speaks not just in words, but from the world; His concern is with the concrete actuality of life.²⁶⁸ There is support for this idea, for example, in the fact that Luke highlights Jesus' interactions with the marginalized in society, such as women, the poor, and the very sick.²⁶⁹

Also taking a cue from the Pentecost story, those who promote the notion of witnessing through action assert that the spirit of God acts through individuals. Their call to witness is based on the belief that God demands that they take Jesus' teachings to meet new needs.²⁷⁰ Testimony in the form of speech may also be expected, but the role of the witness is to reflect God, and thus witnessing involves helping others. Acts of service and even heroism are part of the "everyday practices of witnessing and testifying."²⁷¹ As Paul Ricoeur notes, "ultimate testimony is understood to be total engagement of a life."²⁷²

²⁶⁴ See generally, *id.* at 34-56.

²⁶⁵ See e.g. Ross, *supra* note ___ at 13-15.

²⁶⁶ McCurley & Reumann, *supra* note ___ at 113 (teaching role clear in Matthew's version of Sermon on the Mount); Williams, *supra* note ___ at 37 (task of Holy Spirit to train disciples in life of Jesus).

²⁶⁷ Rhoads, *supra* note ___ at 61-62. One argument given in support of this asserts that the gospel stories of Jesus imitate his method by a style of writing meant to show, rather than tell.

²⁶⁸ Williams, *supra* note ___ at 94.

²⁶⁹ Soards, *supra* note ___ at NT 94.

²⁷⁰ McCurley & Reumann, *supra* note ___ at 388.

²⁷¹ Ross, *supra* note ___ at 223. Ross demonstrates this point in the context of the experiences of black women civil rights activists. See *id.* at 235. The purpose of testimony and witnessing, Ross says, is to assert divine intervention in ordinary circumstances. *Id.* at 13.

²⁷² Ricoeur, *supra* note ___ at 19.

Witness as Reflection of the Light. At the far end of the spectrum is a theory based on John's gospel promoting the idea that Jesus *is* the Word, made manifest in the flesh.²⁷³ God's communication with humanity is both symbolic and experiential.²⁷⁴ As expressed by the author, "The testimony is this: God has given us eternal life."²⁷⁵ According to this view, only Jesus (the son of God) has beheld God, and thus it is only through him that humans can transcend the flesh and attain spiritual knowledge of God.²⁷⁶ By appearing on earth in the flesh, Jesus made the abstraction of God more comprehensible, and thus believable.²⁷⁷

Jesus is thus the unifier, and, as the only one to have actually *seen* God, the sole true witness. Faith is centered in the relationship to the human/divine Jesus.²⁷⁸ Belief in this construction is not based on verbal persuasion or concrete proofs, but on a transformative moment that occurs, mysteriously, as the result of the connection to God through Jesus.²⁷⁹ Once the connection to the divine is made, the only "witnessing" that takes place is the act of living. Believers show by their lives that God is within²⁸⁰ and thereby serve as witnesses to the truth of their beliefs.²⁸¹

Semantics.

One final way to think about the variations in ideas about witnessing is to look again at the words. As Thomas Long notes, witness has two meanings: to behold and to

²⁷³ McCurley & Reumann, *supra* note ___ at 39.

²⁷⁴ Rhoads, *supra* note ___ at 119; 122; 124.

²⁷⁵ 1 John 5: 11.

²⁷⁶ Rhoads, *supra* note ___ at 121-122; 125.

²⁷⁷ *Id.* at 125.

²⁷⁸ *Id.* at 125-126.

²⁷⁹ *Id.* at 126. The leap of faith described by Rhoads might be analogized to that required in accepting testimony pursuant to an oath.

²⁸⁰ *Id.* at 125; 132.

²⁸¹ *Id.* at 131.

attest.²⁸² The first, meaning to take in and to perceive, could be considered passive;²⁸³ the second is clearly active, meaning to give out, to testify.²⁸⁴ One form of the verb places the focus on those who see and, in response, believe; the other situates the action in those who speak and, in so doing, persuade others.

When witness is defined as a proactive verb, it leads to a model of witnesses as testifiers. The role of the witness is to speak out, and the life of a witness is bound up with testimony.²⁸⁵ Illustrative of this concept is the gospel of Matthew, which is notably written with reference to a particular community, and most significantly, that community's leaders and governors.²⁸⁶ From such a viewpoint, the witness is not a neutral observer, but a social activist, involved in the experience even as it is being related.²⁸⁷

Although the etymology of the word suggests that its original meaning was closer to the idea of beholding or sight, current definitions place the word squarely in the category of speech-action. Most variations on the witnessing theme in Christian circles seem to focus on the "attesting to" form, rather than on the "beholding" form. The two definitions are not necessarily inconsistent, of course, and with the many variations extant, a "Christian" definition of witness role cannot be clearly delineated.

Different conceptions of witnessing are also apparent from the linguistic turns various groups have made in identifying key roles in their paradigms. The Latin root of the word "minister," for example, is "servant."²⁸⁸ "Preacher," on the other hand is a

²⁸² Long, *supra* note ___ at 78.

²⁸³ Long frames it as active: "to be present and active as an observer." *Id.* at 78.

²⁸⁴ *Id.* Long adds the meaning "making others aware."

²⁸⁵ Long, *supra* note ___ at 43.

²⁸⁶ J. Andrew Overman, "Introduction to Matthew" in THE NEW OXFORD ANNOTATED BIBLE NT 8 (3rd ed. 2001).

²⁸⁷ See Long, *supra* note ___ at 46.

²⁸⁸ WEBSTER'S DICTIONARY, *supra* note ___ at 937.

derivative of *praedicare*, defined as "to proclaim."²⁸⁹ The word "vicar," used in the Anglican Church, comes from Middle English, Old French and Latin sources, all assigning the meaning "change" to the word; it signifies one who stands in for another.²⁹⁰ The Anglican rector, for whom the vicar stands in, is the person who holds the tithes of the parish. "Rector," also utilized in other Christian religions, has the same root as *rex*, regent, and Richard; it means ruler.²⁹¹ "Priest" has multiple linguistic origins, including Anglo-Saxon and Greek, all of which equate "priest" with "elder."²⁹² These designations help clarify the intended roles of participants in church liturgy and suggest different perspectives on how active or passive, and how autonomous, each person's role might be.

The molding of language to fit purpose goes back to the original New Testament texts: "Disciple," a term used in all four gospels to denote a follower of Jesus, comes from the conjunction of two Latin words, *dis* (apart) and *capere* (to hold or seize) and refers to "learning";²⁹³ "apostle," however, an appellation generally reserved for a select twelve of Jesus' associates,²⁹⁴ comes from the Greek, *apo* (from) and *stellein* (to send). It refers to a person who is sent forth. In just these two words can be seen the potential distinctions between definitions of witnesses as those who are sent forth to speak and those who see or behold.

Finally, language relates to another important legacy of the early Christians: the narrative structure in which the gospels were framed. The shift from "covenant" to

²⁸⁹ *Id.* at 1147.

²⁹⁰ *Id.* at 1623.

²⁹¹ *Id.* at 1216.

²⁹² *Id.* at 1156.

²⁹³ *Id.* at 416.

²⁹⁴ The three synoptic gospel writers explicitly identify twelve followers as Jesus' chosen apostles. Matt 10: 1-4; Luke 6: 12-16; Mark 3: 13-19. Elsewhere in the four gospels, the term is reserved for the twelve. But it appears again in the Acts of the Apostles, referring to Paul. See OXFORD BIBLE, *supra* note ___ at NT 107 (editor's notes to Luke 6: 12-16).

"testament" was not merely semantic, not simply the start of a new story, but the signal of a dramatic change in story construction. In the gospels can be found plotline, historical context, traceable chronology, and *author-ity*, much of which, at the time the gospels were composed, was novel or undeveloped in literary texts. Many centuries later, the structural narrative foundations of the gospels were developed into and recast as romances and novels.

The diffusion of witness goals and strategies in the religious context makes it difficult to use religious tradition as a solid model for lawyer witnessing. Those same goals and strategies are foundational, however, and the authorities on Christian witness have provided historical, methodological, and, in some respects, values theories that have fed testimonial literature. It is thus appropriate at this point to employ the narrative lens.

Part III View Through an Open Window: The Narrative Lens

Introduction.

The "View Through an Open Window" considers the role of witness from a modern narrative perspective. Narrative in this context means, broadly, storytelling, but the claim to witness in modern literature and, similarly, in narrative psychology, takes as its reference point traumatizing or cataclysmic events.²⁹⁵ Thus, for purposes of this article, the term testimonial narrative denotes a storytelling of relatively recent origin that is explicitly undertaken in response to injury. The narratives discussed in this section

²⁹⁵ Post-Holocaust writers, for example, have made specific claims to a witness role. See e.g. Shoshana Felman & Dori Laub, *TESTIMONY : CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS AND HISTORY* (1992) (discussing the novels of Albert Camus); *Id* at 116 (discussing the writings of Elie Weisel); Franca Molino Signorini, "The Duty and Risk of Testimony: Primo Levi as Keeper of Memory" in *MEMORY AND MASTERY, PRIMO LEVI AS WRITER AND WITNESS* 177; 183 (Roberta Kremer, ed. 2001) (discussing the work of Primo Levi).

have in common a truth-speaking element; the authors, moreover, self-identify as witnesses. For the most part, I focus on published stories, both fictional and nonfictional, but I also draw on scholarly work done in the psychological field.

Literary and narrative theories have significantly aided our understanding of witnesses. Theories of testimonial narrative have developed around multiple aspects of the process of telling. They have explored the relationships between primary subject and listener or observer, and they are concerned with form and process and their attendant ramifications for truth. Literary analysis has also addressed the ethical implications involved in telling and, more importantly, re-telling.

The discursive process utilized by and reflected on by writers is transferable to lawyers. The relationship aspects of literary narrative, in particular, are highly relevant. These narrative witnesses struggle with the dialectic between oppressor and oppressed, the ownership of truth, vicarious trauma, authenticity of voice, and many other issues that resonate for attorneys wanting to use experience responsibly to help construct truth.

It is to literary narrative theories that I believe lawyers must turn in fashioning a witnessing role for themselves. In this Part, I use three types of narrative to elucidate the relevant points: trauma recovery; response to silencing; and community resistance. First, however, I consider some crucial connections in narrative discourse. The role of literary fiction in the transition from a largely illiterate society to a literate one is briefly described. Then follows an examination of the relationships between the post-medieval disciplines of history and literature, and a look at the essential function of memory in transforming truth to story and story to truth.

Storytelling Bridges

The Fiction Bridge. The function of literary genres is to mediate and explain intractable problems.²⁹⁶ To some extent this involves attempting to discover what is "real" or ascertain what is true. According to novelist and essayist E.L. Doctorow, one way fiction mediates today's world is by illuminating factual information so that it will be perceived.²⁹⁷

But Doctorow posits that "there must have been a world once in which the act of telling a story was in itself a presumption of the truth."²⁹⁸ In that time, literature "bound the present to the past, the visible with the invisible, and it helped to compose the community necessary for the continuing life of its members."²⁹⁹ This resonates with what is known about Anglo-Saxon and medieval times, when the cult of dependence was strong. In literature, as in politics, religion, and other cultural fields, prior to the seventeenth century, "the reigning narrative epistemology involve[d] a dependence on received authority and a priori traditions."³⁰⁰ People accepted authoritative sources without interrogation, thereby simplifying the task of mediation for literature.

It is no accident that the rise of the novel coincided with a shift to externally based evidence and oral testimony in the courts, as well as with the crisis in biblical interpretation marked by the Reformation and Counter-Reformation. In all these changes can be seen a reordering of proof and knowledge, and a redefining of truth and

²⁹⁶ McKeon, *supra* note ____ at 419.

²⁹⁷ Doctorow, *supra* note ____ at 24.

²⁹⁸ In our society, he says, there is no such "presumption of truth in the act of storytelling except in the minds of children." *Id.* at 18.

²⁹⁹ *Id.*

³⁰⁰ McKeon, *supra* note ____ at 21.

righteousness. Essentially, this period experienced a movement from the unassailable truth of *veritas* to the contingent, fact-based reality of *vera*.

Fiction constitutes one bridge between the old world, characterized by the oral transmission of knowledge and assumed truths, and the new, that of skepticism and tangible proof.³⁰¹ It is indirect, intuitive, nonverbal;³⁰² and yet, fiction is concrete in imagery and detail. Arising as it did, at the end of an era when truth and virtue, God and politics, were wholly integrated, the novel in particular was formulated to mediate "not questions of truth and questions of virtue in themselves so much as their division, their separation from each other."³⁰³

A line was being drawn throughout society, dividing known from unknown. Scientific disciplines were formed to cast matters into fields of relative certainty, and the gray areas soon came under the rubric of the arts and humanities. For that reason, it is necessary to look briefly at the discipline ultimately relegated to just the other side of the dividing line from literature. That discipline is History.

The History Bridge. History, like literature, came into its own as a discipline in the decades linking medieval to modern life. Jacques Le Goff, who has analyzed western history by stages,³⁰⁴ identifies the Greco-Roman period as a starting point. At that time, the discipline was concerned with "investigations" and "testimonies,"³⁰⁵ founded on the principle of truth.³⁰⁶ History, Le Goff says, takes truth as its norm.³⁰⁷ Early on, historians

³⁰¹ See Doctorow, *supra* note ___ at 16 (calling relationship between fiction author and reader a "ritual transaction" during which "instructive emotion is generated in the reader from the illusion of suffering an experience not his own").

³⁰² Fiction is "not an entirely rational means of discourse." *Id.*

³⁰³ McKeon, *supra* note ___ at 419.

³⁰⁴ See generally, Le Goff, *supra* note ___ at 185.

³⁰⁵ *Id.* at xvi.

³⁰⁶ *Id.* at 185. Cicero, he notes, calls history "the light of truth" *Id.* at 187.

³⁰⁷ *Id.* at 114.

subscribed to the notion that history should be "sought everywhere," in the daily lives, work, and leisure of the people.³⁰⁸ The intent was to illuminate what was real by detecting and recording what happened.

Although its western roots can be traced to ancient Greece, history was not always considered a distinct discipline. In the Middle Ages it was conceived of as a branch of rhetoric.³⁰⁹ Rhetoric included invention (finding something to say), disposition (organization), elocution (stylization), action (performance), and memorization.³¹⁰ It was thereby associated with storytelling and drama.

History and narrative, like literature and narrative, are closely linked. That "something happened" is history; someone telling someone that something happened is narrative. History entails establishing facts through narration, while narrative is a verbal act functioning as a historical report.³¹¹ An essential determinant of historical structure is the location of data in a narrative sequence; writing history involves rearrangement of the past, subject to the influences of social, ideological, and political structures.³¹² History is not pure narrative; it seeks causes.³¹³ Thus it is interpretive narrative, not mere chronology, and not science.³¹⁴

In England, history was closely aligned with genealogy,³¹⁵ vesting it with social, financial and political implications. There were, in addition, parallels to the Old and New

³⁰⁸ *Id.* at 162.

³⁰⁹ McKeon, *supra* note ___ at 36.

³¹⁰ Le Goff, *supra* note ___ at 67. Action and memorization were eliminated as communications moved from oral transmission to written. *Id.*

³¹¹ Felman & Laub, *supra* note ___ at 93 (1992).

³¹² Le Goff, *supra* note ___ at xi.

³¹³ Le Goff, *supra* note ___ at 162; see also *id.* at 187 (quoting Greek historian Polybus as saying that "if one takes away from history the 'why,' and the 'how,'... what remains ... cannot become an object of study").

³¹⁴ Felman & Laub, *supra* note ___ at 94.

³¹⁵ See McKeon, *supra* note ___ at 36 (noting that in the Middle Ages, history's "principle trope was that of the lineage").

Testaments and, by association, these imbued history with biblical connotations.

Rhetorical form and practice were adapted to Christianity by Augustine.³¹⁶ Thus, all good intentions notwithstanding, history evolved with ideological mutations.

History, as opposed to narrative, has always been affiliated with documentation, and for that reason perhaps it became aligned more with the social sciences than with the creative arts. Writing provided the means for storing information and for committing knowledge to memory, which are primary purposes of the specialty. Documentation also permitted examination of information over time,³¹⁷ so that writing initiated a "profound transformation in collective memory"³¹⁸ And if writing insured the preservation of selected information, printing "stabilized culture itself and the past in particular as a realm of experience henceforth susceptible to objective study."³¹⁹ The impact of printing technology produced even internal modifications in psychic life.³²⁰

The Middle Ages, to a great extent, marked the transition from oral transmission of information to written.³²¹ It also marked the separation of fiction and nonfiction. Although, for a brief period, "romances," a compound of perceived and imagined experience, thrived, the genres soon followed discrete courses. Early memoirs were distinguished from histories,³²² and romances became highly controversial works of imagination. As the line between known and unknown was more sharply drawn, historians gravitated toward the comfort of proof and empirical certainty. In history, the

³¹⁶ Augustine (354-430 C.E.) was bishop of Hippo (Africa) and author of two notable theological works, *CONFESSIONS* and *THE CITY OF GOD*. Le Goff, *supra* note ___ at 70. As previously indicated, *supra*, pp ___, the gospel writers were influential in establishing modern narrative structure.

³¹⁷ Le Goff, *supra* note ___ at 59.

³¹⁸ *Id.* at 58.

³¹⁹ McKeon, *supra* note ___ at 43?

³²⁰ Le Goff, *supra* note ___ at 61.

³²¹ McKeon, *supra* note ___ at 43.

³²² Le Goff, *supra* note ___ at 186.

narrator "disappears,"³²³ producing an illusion of neutrality or objectivity. The modern historian is thus neither source nor witness; while still speaking in a narrative voice, the historian has become, unlike a literary narrator, a "specialist in the study of change."³²⁴

Notwithstanding its apparent detachment, history has an imaginative impact on both the past and the present, and thus has moral implications.³²⁵ Decisions about what to preserve in memory are critical in providing moral direction.³²⁶ Additionally, the power to destroy memory, as the counterweight to the power of production, carries added weight in a literate world.³²⁷ To the extent that history, as a discipline, fails to acknowledge all this, literature fills in the gap. Accordingly, some literary writers see themselves as having a role in the construction of history; they feel the urgency of bringing consciousness up to speed with precipitant events.³²⁸ The truth must be recorded, and now, before new historical circumstances reshape it. Storytellers nurture, as well as guard and preserve, memory.

The Memory Bridge. Memory is the raw material of history; history, in turn, nourishes memory.³²⁹ Memory ends where history begins; conversely, history begins where memory fades.³³⁰ In ancient Greece, memory took the form of a goddess. Mnemosyne, daughter of Uranus, god of the heavens, and, by Zeus, mother of the muses,

³²³ Ricoeur, *supra* note ___ at 77. In this way, the historian, in effect, recreates the external authority that was prevalent in medieval times. See Forbath et al, *supra* note ___.

³²⁴ Le Goff, *supra* note ___ at 160.

³²⁵ Elie Weisel, "Forward," in DIMENSIONS OF THE HOLOCAUST, LECTURES AT NORTHWESTERN UNIVERSITY 1 (1977) (annotated by Elliot Lefkowitz) [hereinafter, "Foreword"].

³²⁶ See e.g., Anne P. Rice, WITNESSING LYNCHING: AMERICAN WRITERS RESPOND 22 (2003) (observing in the context of racial violence that "national identity depends as much on what we choose to forget as on what we remember").

³²⁷ Le Goff, *supra* note ___ at 68

³²⁸ See Felman & Laub, *supra* note ___ at 114 (discussing the work of Albert Camus). This is similar to the urgency expressed by the gospel writer, Luke. Luke 1: 3 (explaining that he writes "so that you may know the truth..."). See generally, *supra*, pp__.

³²⁹ Le Goff, *supra* note ___ at 114 (acknowledging that memory is a stake in the power game, serves collective and individual interests, and is subject to conscious and subconscious manipulation).

had two roles: to preserve human heroic deeds and to preside over lyric poetry. She is also credited with inventing words and language. She thus represents the bridge between history and literature, between what happens and what is told, between reality and truth. The goddess, it has been said, revealed the secrets of the past to the poet.³³¹

The concept of divine revelation in Greek mythology has a parallel in biblical texts, where truth is passed from an omnipotent God to the prophet. A paradox is presented in each context: that poetic discourse may be closer to the truth than descriptive discourse. In Paul Ricoeur's words, the poetic, or literary, function "incarnates" a concept of truth.³³² It seems, then, that mythos is the way to true mimesis; a literary presentation of reality, rather than a "slavish imitation" of chronology and factual detail transports listeners and readers across time, and precipitates a metamorphosis.³³³ This is the function of witness.

In the end, distinctions between history and literary fiction may be too keenly drawn. "History rushes onward while thought reflects," observes Albert Camus.³³⁴ But history is not an event or experience itself, nor is it necessarily a reconstruction of the past. It consists of mediated experience, mediated reflection, mediated recollection.³³⁵ There is no history except as it is composed,³³⁶ and thus it is improbable that history would exist without scholars.³³⁷ And because historical discourse is a product of ideology

³³⁰ Signorini, *supra* note ___ at 189 (citing to Maurice Halbwachs, *LA MEMORIA COLLECTIVA*) (1987)).

³³¹ Le Goff, *supra* note ___ at 64; Boorstin, *supra* note ___ at 480.

³³² Ricoeur, *supra* note ___ at 101-102.

³³³ *Id.* at 102. Ricoeur calls this "redescription."

³³⁴ Felman & Laub, *supra* note ___ at 114 (quoting Albert Camus).

³³⁵ See Ricoeur, *supra* note ___ at 106 (asserting that all reflection is mediated; that there is no immediate self consciousness, and therefore no unmediated self consciousness). See also Le Goff, *supra* note ___ at 59 (asserting that there is no unmediated collective memory).

³³⁶ See Doctorow, *supra* note ___ at 24.

³³⁷ Le Goff, *supra* note ___ at xvii.

and imagination, it is, also, a form of fiction.³³⁸ Thus it is possible to conclude, as E.L. Doctorow does, that there is no fiction or nonfiction -- only narrative.³³⁹

Testimonial Narratives

Literary narratives have developed as a response to silencing and the denial of subjectivity. A review of works -- from Holocaust journals, to neocolonial resistance novels, to testimonies about racial violence, to the memoirs of the unnamed recovering from gendered and poverty-based trauma -- demonstrates the importance of literary narrative to self-preservation and the shaping of history.

There are any number of ways to classify testimonial literature and narratives. What I describe are three types that can be distinguished on the basis of whether they are "personal" or "communal"; the degree to which the truths they hold forth consist of historical or verifiable realities; and how close the narrator is to the original experience that is the subject of the narration. For purposes of this discussion, I identify the types as trauma recovery, response to silencing, and community resistance. These are not clear, precise divisions; the categories, however, provide a convenient way to frame the issues.³⁴⁰

Trauma Recovery. Modern psychology, E. L. Doctorow asserts, is the "industrialization of storytelling."³⁴¹ People who experience psychic or emotional distress meet with professionals, who listen and encourage patients to talk out their pain. While this is generally true of clinical practice, therapists specifically engaged with trauma

³³⁸ Doctorow, *supra* note ___ at 24.

³³⁹ *Id.* at 26.

³⁴⁰ In the theological context, Paul Ricoeur identifies three "dialectic moments of testimony" that are roughly similar to the three types of testimonial narrative I describe. For Ricoeur, the breakdown is: 1) event and meaning (comparable to trauma recovery); 2) trial and false testimony (silencing response); and 3) historical (resistance novel). See Ricoeur, *supra* note ___ at 113-114.

³⁴¹ Doctorow, *supra* note ___ at 26.

patients often find themselves in the midst of a witnessing event. Trauma victims — and their therapists along with them -- go through a process of narrative recovery, both in the sense of acquiring lost history and in the sense of restoring health.³⁴²

In the case of trauma, the actual experience may be blocked or delayed.³⁴³ Unlike most life experiences, traumatic ones may produce no contemporaneous narrative.³⁴⁴ The victim is silenced, but not by the direct imposition of another's power; rather, the individual's psyche closes the paths to perception.

Silence for trauma victims is often a sanctuary as much as it is a prison.³⁴⁵ Yet it is symptomatic of trauma that blocked experiences then make repeated intrusions into consciousness.³⁴⁶ The process of recovery involves the re-enactment or, more accurately, the original experience, of the traumatizing events.³⁴⁷ When the therapist or a sympathetic listener is engaged, speaker and listener can go through a sometimes prolonged process of re-enactment.³⁴⁸ In one sense, this is an unblocking of experience; but there is more to it. Once owned, the memory must be shared and given meaning by relating it to the present.³⁴⁹

For some, there is an even more pressing, moral inducement; the narration of experience constitutes an "ethic of recollection." For these trauma victims, "survival and

³⁴² Suzette A. Henke, *SHATTERED SUBJECTS: TRAUMA AND TESTIMONY IN WOMEN'S LIFE-WRITING* xxii (1998).

³⁴³ Felman & Laub, *supra* note ___ at 57.

³⁴⁴ Cassie Primo Steele, *WE HEAL FROM MEMORY: SEXTON, LORDE, ANZELDUA, AND THE POETRY OF WITNESS 3* (2000).

³⁴⁵ Felman & Laub, *supra* note ___ at 58.

³⁴⁶ Henke, *supra* note ___ at xvii.

³⁴⁷ Felman & Laub, *supra* note ___ at 117-118.

³⁴⁸ *Id.* at 95.

³⁴⁹ Signorini, *supra* note ___ at 193.

bearing witness become reciprocal acts."³⁵⁰ Testimony in this context is an act of truth telling.³⁵¹ What matters is honesty, a commitment to truth.³⁵² Holocaust survivor and writer Primo Levi, for example, described himself as a bearer of secrets from which he had to be released in order to regain his humanity.³⁵³ Although he saw himself as "haunted by a secret," and believed that by revealing it, he would be able to put it behind him and forget, he concluded that he was mistaken; he came to believe that he had a moral obligation to tell what had happened.³⁵⁴

Response to Silencing. A different type of testimonial narrative is to be found in response to externally imposed silencing. This narrative is the counterstory, and, like trauma recovery, is devised primarily as nonfiction. In this responsive narration, the witness is saying, "*this* is what really happened." Such stories, told one person at a time, are often heroic in content. The counterstory may be unique and deeply personal, but in such a narrative, often the personal becomes representational.

The response to silencing narrative comes out of a compulsion to tell. Accordingly, during the time of the Nazi regime, Elie Weisel says, "the urge to bear witness was overwhelming."³⁵⁵ Holocaust writer Dorothy Rabinowitz explores this idea further, reflecting on how many survivors understand that they inhabit two worlds: one the real world of the traumatizing experience, and one the "absurd" world outside the

³⁵⁰ Felman & Laub, *supra* note ___ at 117 (quoting from Terrence Des Pres, *THE SURVIVOR – AN ANATOMY OF LIFE ON THE DEATH CAMPS* 32 (1977)).

³⁵¹ Arthur W. Frank, *THE WOUNDED STORYTELLER* 135 (1995).

³⁵² *Id.* at 132.

³⁵³ Signorini, *supra* note ___ at 177.

³⁵⁴ *Id.* at 174.

³⁵⁵ Elie Weisel, "The Holocaust as Literary Inspiration," in *DIMENSIONS OF THE HOLOCAUST, LECTURES AT NORTHWESTERN UNIVERSITY* 10 (1977) (annotated by Elliot Lefkowitz) [hereinafter "Holocaust"].

traumatic place, populated by those who don't share the experience. When the two worlds collide, the call of truth can overcome the safety of silence.³⁵⁶

In the counterstory context, there is often awareness that the audience is History. For example, Lucy Dawidowicz writes that participants in Oneg Shabbat, an effort to create and preserve records of the Warsaw ghetto, saw themselves as "creating a chapter of history."³⁵⁷ In a similar vein, Anne Rice, in an anthology of anti-lynching works, commends the authors' fight against the "staggering amnesia" about racial violence.³⁵⁸ Another example is Austin Sarat's interviews of lawyers representing people put to death under U.S. capital punishment laws. Sarat observes how these lawyers, often working against great odds, in a highly frustrating environment, see themselves as having a role greater than mere criminal defense.³⁵⁹ They are writing history, telling stories that otherwise would not be remembered.³⁶⁰ For them, the court is not only a decision-maker, but an archive.³⁶¹ What otherwise would seem frivolous or wasted in the doing takes on meaning in the long term.³⁶²

Community Resistance Novels. Resistance novels are representative of a final category of testimonial narrative. In conventional taxonomies, these works would be

³⁵⁶ Dorothy Rabinowitz, "The Holocaust as Living Memory," in DIMENSIONS OF THE HOLOCAUST, LECTURES AT NORTHWESTERN UNIVERSITY 35, 37 (1977) (annotated by Elliot Lefkowitz).

³⁵⁷ Lucy S. Dawidowicz, "The Holocaust as Historical Record," in DIMENSIONS OF THE HOLOCAUST, LECTURES AT NORTHWESTERN UNIVERSITY 21, 24-26 (1977) (annotated by Elliot Lefkowitz). (quoting from document produced at the behest of historian Emmanuel Ringelbaum, who importuned the writing of diaries in the Polish ghetto during the German occupation and explicitly urged efforts at historical preservation in the face of imposed silence. "What we could not cry out to the world," another archivist said, "we buried in the ground.")

³⁵⁸ Rice, *supra* note ___ at 2.

³⁵⁹ Austin Sarat, *Bearing Witness and Writing History in the Struggle Against Capital Punishment*, 8 Yale J. L. & Human. 451, 455 (1996).

³⁶⁰ *Id.* at 459.

³⁶¹ *Id.* at 456.

³⁶² *Id.* at 460-461.

classified as fiction, but they are, also, explicitly, responses to oppression.³⁶³ Writers of resistance novels see literature as a way to correct injustices, or to at least register protest;³⁶⁴ for them, speech is a political act.³⁶⁵ As with narratives in response to silencing, the speaker's voice matters; here, however, it is not verisimilitude, but truth in the larger sense that is sought to be conveyed. The impression of potent narratives that go untested and unchallenged in the world at large pervades the resistance narrative as it does the counterstory. The creators are looking at how discourse works, not just what it means.³⁶⁶ Resistance literature is subversive and usually marginal, but not merely for the sake of being so.³⁶⁷

According to Linda Craft, the resistance novel is non-heroic,³⁶⁸ its creation demands ego suppression, and, theoretically, the solitary hero figure disappears.³⁶⁹ The emphasis here is on a communitarian enterprise. Consequently, authorship involves a relationship between narrator and listener. For the writer, there must be a willingness to engage the "Other," eliminating privileged aspects of discourse.³⁷⁰ Additionally, solidarity between the writer, who is *letrado* (intellectual), and primary witness is essential.³⁷¹ As a dialectic between oppressor and oppressed,³⁷² the testimonial novel

³⁶³ Linda J. Craft, *NOVELS OF TESTIMONY AND RESISTANCE FROM CENTRAL AMERICA* 5-6; 15-17 (1997). Craft discusses testimonial novels specifically as a response to neocolonialism.

³⁶⁴ Weisel, "Holocaust," *supra* note ___ at 8.

³⁶⁵ Craft, *supra* note ___ at 3; 6 (discussing the work of Nobel Prize recipient Rigoberta Manchu).

³⁶⁶ *Id.* at 7.

³⁶⁷ *Id.* at 22.

³⁶⁸ *Id.* at 2 (examining the novels of Nobel laureate Rigoberta Manchu).

³⁶⁹ *Id.* at 20-21. (This is similar to the position taken by Primo Levi, who saw himself not as a writer, but as a person who happened to be a witness, and was therefore called to speak. Signorini, *supra* note ___ at 174; 183-84. Invited to judge, Levi declined, preferring to serve only as the witness. *Id.* at 180.)

³⁷⁰ Craft, *supra* note ___ at 5.

³⁷¹ *Id.* at 20.

³⁷² See *id.* at 16; 20.

becomes the "field of conflict."³⁷³ This is more than just an intellectual alliance; it intentionally exposes – and exploits -- the connection between knowledge and power.³⁷⁴

Goals of Testimonial Narrative.

Testimonial narratives may well be a natural outgrowth of the literary impulse. It is certainly possible to see Mnemosyne's influence in each of the three categories described. The previous examples of testimonial narrative reveal some common or overlapping characteristics, but they also expose different authorial motives and methodologies. It may be useful, therefore, to examine the human aims of these works.

Although every story is told with multiple, and personal, motivations, the aims of testimonial narrative can be broken into six general categories: finding voice; denial of subjectivity; social action; preservation of history; shaping history; and honoring the lost. The goals identified here relate to both fictional and nonfictional narratives (to the extent that such divisions can be made) although some are more clearly applicable in one sphere or the other.

Finding Voice. Franca Signorini notes that many concentration camp internees reported dreams in which the dreamer would be recounting his or her experiences to someone at home.³⁷⁵ This common experience suggests a powerful need for release from silence,³⁷⁶ as well as a need to affirm the reality of the experiences. Such reporting dreams are tied up with identity, both as a reflection of desire to claim one's own self-representation³⁷⁷ and as a recognition that identity is shaped by memories of the past.³⁷⁸

³⁷³ *Id.* at 3.

³⁷⁴ *Id.* at 7; compare Rice, *supra* note ___ at 3 (describing interracial alliances in relation to anti-lynching efforts).

³⁷⁵ Signorini, *supra* note ___ at 178.

³⁷⁶ *Id.* at 177; Weisel, Holocaust, *supra* note ___ at 10.

³⁷⁷ Craft, *supra* note ___ at 4.

³⁷⁸ Signorini, *supra* note ___ at 186.

Denial of Subjectivity. The idea that narrative is a means of denying the subjectivity imposed by dominant discourse has been explored in multiple contexts, including those in relation to post-neocolonialism,³⁷⁹ the Holocaust,³⁸⁰ and the African slave experience.³⁸¹ Testimonial narration encompasses a commitment to survival to insure that truth is not lost to history. The author is saying, in effect, "I survive to speak."³⁸² History is understood as a means to combat indifference; the narrative sets the record straight so that people do not suffer or die in vain.³⁸³ Through their testimony, witnesses can insist that the world remember.³⁸⁴

Social action. In one sense, narrative testimony can register a simple protest³⁸⁵ or a desire to raise awareness.³⁸⁶ The writing can also operate as an appeal to the community,³⁸⁷ perhaps thereby to galvanize action.³⁸⁸ Testimony, in this way, is forward-looking.

Preservation of History. The wish to preserve history is repeatedly cited by chroniclers as a reason for bearing witness, and is subsumed as a goal in other motives, such as denial of subjectivity and finding voice.³⁸⁹ These writers want to insure that history will include the knowledge they have acquired. The explicitly historical aim suggests a fact-based, although not necessarily empirical, mission. When statistical

³⁷⁹ E.g. Craft, *supra* note ___ at 16.

³⁸⁰ E.g. Dawidowicz, *supra* note ___ at 24-27.

³⁸¹ E.g. Ross, *supra* note ___ at 14. By way of example, Ross subsequently relates how civil rights activists brought into focus a norm of relationship that challenged the primacy of individual rights.

³⁸² *Id.* at 41.

³⁸³ Weisel, "Foreword," *supra* note ___ at 1.

³⁸⁴ Sarat, *supra* note ___ at 462.

³⁸⁵ Rice, *supra* note ___ at 23; Craft, *supra* note ___ at 15.

³⁸⁶ Rice, *supra* note ___ at 3.

³⁸⁷ Felman & Laub, *supra* note ___ at 204.

³⁸⁸ Rice, *supra* note ___ at 1.

³⁸⁹ See e.g., Rice, *supra* note ___ at 3; 23; Weisel, "Holocaust," *supra* note ___ at 9; Weisel, "Foreword," *supra* note ___ at 1; Signorini, *supra* note ___ at 179; 188-189; Sarat, *supra* note ___ at 454; 462.

evidence is lacking, the witness's word is a vital source of knowledge. Diaries and journals are the source material for history.³⁹⁰

This motivation is more than the *desire* to be heard; it is experienced as a duty owed to history. Thus, in occupied Poland, Emmanuel Ringelbaum encouraged ghetto Jews to record the details of their existence by keeping diaries. "I regard it as a sacred task," he wrote, adding that the time would come when the world would know. It was for this reason, also, that the Sonderkommandos of Auschwitz, whose lot it was to remove the bodies of the murdered from gas chambers, surreptitiously recorded their stories.³⁹¹ More than personal identity insurance,³⁹² these works serve as a testimonial bridge between those living in the present and those who follow or survive.³⁹³

Shaping History. Both fiction and nonfiction writers say that while preserving stories for history is one goal, another is, in effect, rewriting history.³⁹⁴ At times, this means creating an accurate account, but it also suggests a providential approach with a recognition that history will be rewritten and sculpted. Often, these writer-witnesses have an even more ambitious agenda: to shape the future. Shoshana Felman and Dori Laub, analyzing the literary, post-traumatic representation of history, discuss Albert Camus' work in this way, elucidating his hope of transforming society through testimony.³⁹⁵ Similarly, Franca Signorini says that the writers of the Holocaust want not only to affirm their factual reality, but desire that their work serve as an admonition.³⁹⁶

³⁹⁰ Weisel, "Holocaust," *supra* note ___ at 9 (quoting from the diary of Holocaust victim Chaim Kaplan).

³⁹¹ Dawidowicz, *supra* note ___ at 27.

³⁹² Signorini, *supra* note ___ at 186 (noting that identity is shaped by our memory of the past).

³⁹³ Sarat, *supra* note ___ at 454.

³⁹⁴ See Craft, *supra* note ___ at 7.

³⁹⁵ Felman & Laub, *supra* note ___ at 95.

³⁹⁶ Signorini, *supra* note ___ at 179.

Honoring the Lost. Finally, a not insignificant goal is to honor the dead and the lost.³⁹⁷ Literature plays a crucial role in the mourning of catastrophic events, especially where there has been a "radical forgetting" in historical and other areas.³⁹⁸ "This will be the richest material for the mourner . . .," notes Holocaust survivor Lucy Dawidowicz. "This will be the most powerful subject matter for the avenger."³⁹⁹ Elie Weisel, who reports that he can "never stop seeing [the victims]," adds to that observation, "I belong to them."⁴⁰⁰ Even as testimony fulfills the obligation to speak, however, it recognizes its failure to cancel its "referential debt" to the one whose experiences are recounted.⁴⁰¹

Process and Method

Witnessing proceeds from the "irreplaceable performance of the act of seeing."⁴⁰² The task for the witness is to transfer things seen to the level of things said.⁴⁰³ Such work can occur on multiple planes. At one level, the person who conducts the transfer may be a witness to her own personal experience. In such a case, the witness has dual, and potentially conflicting, roles. Thus, although the primary subject can certainly tell her own story to the world,⁴⁰⁴ testimony is often narrated by an observer or listener. The existence of Other in this context has been recognized as valuable to the process of trimming the truth tree. Telling and re-telling a story are a means of universalizing the experience,⁴⁰⁵ but part of the verification process is the presence and participation of a

³⁹⁷ Rabinowitz, *supra* note ___ at 41; Rice, *supra* note ___ at 3.

³⁹⁸ *Id.* at 23.

³⁹⁹ Dawidowicz, *supra* note ___ at 25.

⁴⁰⁰ Felman & Laub, *supra* note ___ at 116 (citing to Elie Weisel).

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 206.

⁴⁰³ Ricoeur, *supra* note ___ at 123.

⁴⁰⁴ A full exploration of this question can be found in Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *MARXISM AND THE INTERPRETATION OF CULTURE* (Cary Nelson & Lawrence Grossberg, eds. (1990).

⁴⁰⁵ Signorini, *supra* note ___ at 185

sympathetic agent or intermediary narrative co-producer, especially one educated in the art of discourse.⁴⁰⁶

Consequently, most often, the witness is thought of as one who has seen another's experience, or who has heard the first-hand account of an experience from another. The primary experience may then be passed on to a different audience by the person who has observed the experience or listened to its recounting. With respect to participants in testimonial narration, there has been shown to be a relationship between the primary subject, who has experienced something, and the observer-narrator or listener-reteller.⁴⁰⁷ To some extent, this comes about because the observer-witness or a listener-witness also goes through the original experience in some way. Such secondary experience can fall along a continuum from passive listening, to participation as ally, to vicarious experience.

There are, therefore, any number of witnessing acts, varying in degree of involvement, proximity to primary experience, and extent of moral responsibility. While vastly different possibilities present themselves, what seems clear is that at stake are subjective, metaphysical and civic truths, not in an abstract, intellectual sense, but at the level of human interaction. There is the one who has experienced and the one who has observed or who has heard. In this way, a relationship, however tenuous, is created.

Moreover, a relationship is formed when the experience, translated into words, reaches an audience. At this stage, there is the one who testifies and the one who hears the testimony. Paul Ricoeur notes that it is only by hearing that one can believe or not believe in the reality of what a witness says.⁴⁰⁸ Testimony as story, he explains, is "found in an intermediary position between a statement made by a person and a belief assumed

⁴⁰⁶ Craft, *supra* note ___ at 19.

⁴⁰⁷ Craft, *supra* note ___ at 19-20 (1997).

by another in the faith of the testimony of the first."⁴⁰⁹ A relationship of trust, in other words, is essential to acceptance -- and preservation -- of the story.

Witness Role.

In the simplest form of testimonial narrative, a story goes from the listener/observer to publication. Thus, the witness has been variously identified as facilitator,⁴¹⁰ enabler of the testimony,⁴¹¹ medium of story,⁴¹² and conduit.⁴¹³ A narrator in this depiction might be described as an "informed and honest witness," whose role is "only to say: this is what happened, when he knows that it actually did happen."⁴¹⁴

But the situation is rarely that simple. In some cases, by deliberate choice, the publisher forms an alliance with the primary subject and aims to make the relationship democratic.⁴¹⁵ In resistance narratives, for example, the publisher is said to speak in a collective voice;⁴¹⁶ in many other contexts, the writer conspires with a community to "pass on the collective wisdom" of the group.⁴¹⁷ The burden of the narrative witness is solitary;⁴¹⁸ she speaks in her own language, disguised in "enlightened bias,"⁴¹⁹ yet connectivity allows her to speak for and to others.⁴²⁰

The listener's experience with a story is far from irrelevant.⁴²¹ As both eyewitness and spokesperson for a disenfranchised community,⁴²² at the very least, the listener

⁴⁰⁸ Ricoeur, *supra* note ___ at 123.

⁴⁰⁹ *Id.*

⁴¹⁰ Felman & Laub, *supra* note ___ at 109.

⁴¹¹ *Id.* at 58; Weisel, Holocaust, *supra* note ___ at 5.

⁴¹² Steele, *supra* note ___ at 2.

⁴¹³ Craft, *supra* note ___ at 20.

⁴¹⁴ Sarat, *supra* note ___ at 455 (citing to Felman and Laub, *supra* note ___ at 101).

⁴¹⁵ Craft, *supra* note ___ at 21.

⁴¹⁶ *Id.*

⁴¹⁷ Doctorow, *supra* note ___ at 21.

⁴¹⁸ Felman & Laub, *supra* note ___ at 3.

⁴¹⁹ Doctorow, *supra* note ___ at 21.

⁴²⁰ Felman & Laub, *supra* note ___ at 3 (although, as Albert Camus recognized, a witness cannot speak for all. See *id.* at 118).

comes to be participant in and co-owner of the story.⁴²³ A writer can be split in two, into "creator and documentarian, teller and listener."⁴²⁴ Beyond that, the narrative witness often enters into the primary experience vicariously.⁴²⁵ Accordingly, what the witness seeks to do frequently may be nothing less than recreate the experience in text.⁴²⁶ To legitimize the testimony, and to insure its authenticity, the witness has to incorporate experience from the Other's experience.⁴²⁷ Witnesses thereby elect to become victims; this is an act of choice.⁴²⁸

The dialogic and dialectical relationship of passing on experience through witnessing or testimony raises issues of social and ethical responsibility. There is more to witnessing than going from seeing or hearing to understanding; once ownership of the story is assumed, and the witness moves to narration, the "testimony is at the service of judgment."⁴²⁹ This is so because the act of testifying changes things.⁴³⁰ Narrative witnesses are engaged in a complex witnessing process, capturing the primary experience through words for themselves, relating to the experience of others, and subjecting the process of witnessing to analysis.⁴³¹ This necessitates alternation and complicity between perception and narration; from the witness is demanded engagement without interference.⁴³²

⁴²¹ *Id.* at xvi; 45; Steele, *supra* note ___ at 4.

⁴²² See Craft, *supra* note ___ at 3.

⁴²³ Felman & Laub, *supra* note ___ at 57.

⁴²⁴ Doctorow, *supra* note ___ at 21. Although Doctorow is speaking of novelists, he professes in the essay to see no real distinction between fiction and nonfiction.

⁴²⁵ Felman & Laub, *supra* note ___ at 57.

⁴²⁶ Rice, *supra* note ___ at 23.

⁴²⁷ Felman & Laub, *supra* note ___ at 58.

⁴²⁸ *Id.* at 117-118 (describing the philosophy of Albert Camus).

⁴²⁹ Ricoeur, *supra* note ___ at 123.

⁴³⁰ Signorini, *supra* note ___ at 178.

Connections

Connections to Religion. Literary testimonial narratives also have connections with those in the religious context. Some writers are actually motivated, if only partially, by religious injunctions. "Remember and observe" is the command from the Torah that Elie Weisel responds to.⁴³³ According to Rosetta Ross, civil rights activism reflected everyday practices of witnessing and testifying.⁴³⁴ At the very least, says Franca Signorini, witnesses to traumatizing events benefit from comparisons to biblical witnesses, who had the ability to perceive signs; like the biblical models, testimonial narrators in the modern world present a "disturbing and disquieting" mirror of ourselves. They represent neither saints nor demons, but people like us.⁴³⁵

More often, however, testimonial writers rely on more generalized notions of moral necessity. "I owe them my roots and memory. I am duty-bound to serve as their emissary," Elie Weisel reflects.⁴³⁶ Not to tell, he says, would be perjury.⁴³⁷ Albert Camus speaks more generally of an obligation to make a moral act out of every publication.⁴³⁸ While testimonial narratives may bear some relation to individual's religious roots, the call to witness, for the most part, comes from a different impetus.⁴³⁹

Legal Connections. In the judicial system, at the level of legal judgments, where truth is narrowly confined and defined, reliability may be sorely lacking even insofar as

⁴³¹ Felman & Laub, *supra* note ____ at 75.

⁴³² Craft, *supra* note ____ at 20.

⁴³³ Weisel, "Holocaust," *supra* note ____ at 5.

⁴³⁴ Ross, *supra* note ____ at 223.

⁴³⁵ Signorini, *supra* note ____ at 185-186.

⁴³⁶ Felman & Laub, *supra* note ____ at 116 (quoting Elie Weisel).

⁴³⁷ *Id.* at 204 (citing to Elie Weisel); See also Signorini, *supra* note ____ at 174 (attributing similar views to Primo Levi).

⁴³⁸ See Felman & Laub, *supra* note ____ at 114.

⁴³⁹ Compare Christian witness goals explored *supra* at pp ____.

eyewitness testimony is utilized.⁴⁴⁰ Opportunities to create testimonial narrative in the literary model do exist in law, however, and in the courtroom setting. One example, reported by Dorothy Rabinowitz, illustrates how the testimonial codes of a courtroom can be challenged by a witness for the sake of truth and history.

In the years following World War II, Holocaust survivors learned that the public, and the courts, could tolerate only so much truth. Many, if they told their stories at all, grew accustomed to speaking with the clinical detachment of professional witnesses. In one case involving the potential deportation of a man believed to have been responsible, as a member of the Nazi regime, for many murders, one woman challenged the implicit narrative expectations. Having heard historical facts denied, and truth mangled, she testified according to her own conscience.⁴⁴¹ She thereby gave voice to the kind of a testimonial narrative that had rarely found expression in a U.S. court setting.

In a striking parallel to testimonial narrative goals, Drucilla Cornell points out that there are two audiences for every legal act: present and future.⁴⁴² For this reason, Austin Sarat argues, lawyers make strategic choices with testimony to impact the future of law as well as the outcome of a case.⁴⁴³ Thus lawyers, as well as courageous witnesses, can engage in the struggle for justice through the strategic use of testimony. Sarat has demonstrated, for example, how death penalty lawyers not only operate to resist injustice through conventional testimony, but also generate testimonial narratives with a goal

⁴⁴⁰ Coady, *supra* note ___ at 262-264 (1992) (discussing studies concerning eyewitness unreliability, including problems with empiricism).

⁴⁴¹ Rabinowitz, *supra* note ___ at 35-37.

⁴⁴² Sarat, *supra* note ___ at 453-54 (citing to Drucilla Cornell). For comparable observations in literary narrative, see *supra*, pp__.

⁴⁴³ Sarat, *supra* note ___ at ____

toward the future where, by virtue of transcripts and other documentation, present injustice will be remembered.⁴⁴⁴

This is not a false hope. The most remembered and, therefore, arguably the most important, cases in history are those in which the judgments have been seriously questioned.⁴⁴⁵ Along these lines, it has been suggested that more important than restoring the public's sense of justice, a public trial can safeguard collective memory.⁴⁴⁶ This, again, is an important aim of testimonial narrative.

Conclusions

Postmodernism has invested testimony with legitimacy as discursive practice.⁴⁴⁷ It is recognized in history, literature, religion and psychology as having creative and potentially transformative properties. Thus, witness, the authorship of testimony, is still an appropriate concept for the conscientious care of memory and truth. These are, or certainly should be, the concern of lawyers. The memory that is maintained through testimony, and the truth that is thereby "trimmed" can only serve justice, however, if the testimony is formative, and not just informative.⁴⁴⁸

Testimony designates the act of relating what one has seen or heard. The witness is author of this action.⁴⁴⁹ Thus testimony is not perception itself, but the report, the story, the narration of the event.⁴⁵⁰ It comes from the need a person "has to tell somebody";⁴⁵¹ it is the impulse to give meaning to suffering.⁴⁵² Moreover, it wants to justify, or "prove,"

⁴⁴⁴ *Id.* at 454 *et seq.*

⁴⁴⁵ Doctorow, *supra* note ___ at 23.

⁴⁴⁶ Signorini, *supra* note ___ at 179.

⁴⁴⁷ Craft, *supra* note ___ at 17.

⁴⁴⁸ Signorini, *supra* note ___ at 193.

⁴⁴⁹ Ricoeur, *supra* note ___ at 123.

⁴⁵⁰ *Id.*

⁴⁵¹ Ross, *supra* note ___ at 223

⁴⁵² Signorini, *supra* note ___ at 177.

claims to its meaning, and that can only happen through communication.⁴⁵³ To the extent that law, despite its claims to a search for truth, does not satisfy these needs, witnesses must look elsewhere for a narrative forum.

There are, generally, two kinds of witness: judicial and prophetic. Judicial is involved when truth is sought or exposed in court. Too often, truth is hidden or truncated in the courts, but the justice system does create opportunity for public moral condemnation, and at times is utilized that way. At least in some circumstances, then, judicial witness gives the public a sense of, or belief in, justice.

The other type of witness is prophetic. In this sense, witness is memory, part of the "everlasting acquisition of social shared consciousness."⁴⁵⁴ Austin Sarat, in his examination of capital defense representation, uses similar language, distinguishing the litigation voice of the lawyer from the "prophetic voice" that helps bridge the gap between present injustice and "future redemption."⁴⁵⁵

Lawyers are instrumental in fashioning the testimony of witnesses in the judicial system, and often make or direct choices determining whether the judicial system operates more as an editorial board on truth or more as a public forum on a matter of concern to the community. In the prophetic sense, lawyers lay the groundwork for the future, insuring that truth is recorded, even if that means they have to temporarily "bury it in the ground."⁴⁵⁶ This, too, involves them in the ultimate "trimming" of the truth tree.

⁴⁵³ *Id.*; Ricoeur, *supra* note ___ at 124.

⁴⁵⁴ See Signorini, *supra* note ___ at 179-180. Anne Rice separates the judicial form of testimony into two types: one legislative and one "at the bar of public opinion." The first, in her scheme, uses conventional evidence, such as documents and witness statements; the second uses "poetry and description and analysis" to draw attention to issues, mobilize responses, and influence power agents. Rice, *supra* note ___ at 1.

⁴⁵⁵ Sarat, *supra* note ___ at 454.

⁴⁵⁶ See *supra* note ___.

Lawyers in these situations are the support for witnesses; but in providing that support, they are also witnesses. This work that has legal and ethical implications has political, social and moral implications as well. Their position provides lawyers with the opportunity, if not the responsibility, to testify. While law and religion afford some clues as to how this might be accomplished, narrative theories provide significantly greater guidance. They can instruct our ideas about how we relate to client populations, especially those least well served by the existing judicial system. Moreover, they provide strategies for communicating and otherwise breaching the gaps between what is experienced and what is understood by the community to be truth.

An historical review of western law, religion and society also informs this investigation. Centuries ago, the perceived presence of an essentialist authority pervaded everyday life; the role of witness was to communicate its presence. Even as "romance" and "history" developed, although "rooted in the empirical," they were yet "empowered by an essentialist authority."⁴⁵⁷ But by the seventeenth century, reliance on external evidence signaled the decline of essentialist authority, heralding the transformation from metaphysics and theology to epistemology.⁴⁵⁸ The sixteenth and seventeenth centuries saw a "change in attitudes about how truth and virtue are most authentically signified."⁴⁵⁹

Now, society "runs on empirical thinking and precise calculations."⁴⁶⁰ Knowledge has taken on a character of infinite process which results not just in quantitative changes in knowledge, but the qualitative transformation of history.⁴⁶¹ In such a world, it appears

⁴⁵⁷ McKeon, *supra* note ____ at 38.

⁴⁵⁸ *Id.* at 83.

⁴⁵⁹ *Id.* at 20.

⁴⁶⁰ Doctorow, *supra* note ____ at 17.

⁴⁶¹ Le Goff, *supra* note ____ at 115.

that "[t]o be saved by a transcendent Truth requires the increasingly separable and prior act of being empirically convinced of it"⁴⁶²

But through this movement away from essentialist authority as the center of knowledge, we have also come to the understanding that truth does not exist outside power, as some eternal, neutral given waiting to be discovered.⁴⁶³ In other words, there are no facts in themselves, divorced from meaning; for a fact to exist, meaning must be introduced.⁴⁶⁴ Neither truth nor meaning is static or unassailable, moreover; a responsiveness is called for.⁴⁶⁵ Thus, witnesses are needed, more than ever.

I am suggesting that lawyers take seriously the role of witnesses in society, and that they begin to look to themselves to serve in the witness role. An appreciation of this role requires more than an understanding of the legal conception of witness, and probably more than a grounding in religious tradition. It requires an appreciation of the role of memory, both as archive of history and creator of poetic language; and it demands commitment to truth.

What insures truth-telling in this vision? Is there a way to make storytelling "as valuable as a club or a sharpened bone" as it perhaps was in the past?⁴⁶⁶ The answer may lie in the ancient rite of moral obligation that was once depended upon to insure truth-telling: the oath. Taken seriously, the "commitment or risk assumed by the witness makes testimony more than a simple narration of what was seen," says Paul Ricoeur.⁴⁶⁷ Witness

⁴⁶² McKeon, *supra* note ___ at 83 (discussing claims respecting the "truth" of scriptures) (citation omitted).

⁴⁶³ Craft, *supra* note ___ at (referencing Michel Foucault).

⁴⁶⁴ Doctorow, *supra* note ___ at (citing to Nietzsche). "[E]very fiction is a false document in that compositions of words are not life," Doctorow reminds us; hence the witness's battles with the ethics and moral obligations of telling. *Id* at 20.

⁴⁶⁵ Ross, *supra* note ___ at 15.

⁴⁶⁶ Doctorow, *supra* note ___ at 18.

⁴⁶⁷ Ricoeur, *supra* note ___ at 113.

is also a "commitment of the pure heart" and may even be a commitment unto death.⁴⁶⁸ It is this notion of a grave, personal responsibility for truth that can vitalize legal and religious traditions of witnessing. It is no linguistic accident that those who give testimony are often said to "bear witness." Bearing witness says more than testifying; it denotes gravity, weight, consequence.⁴⁶⁹

Considered in this way, the act of witness "belongs to the tragic destiny of truth."⁴⁷⁰ The witness therefore has the responsibility of insuring that truth is ethically framed, by committing narrative to memory, and memory to history.⁴⁷¹ This alone is a grave responsibility. But other matters demand attention as well. There is a need to work out the ownership of truth⁴⁷² and the struggle to resolve the witness's inability to say all or be completely true.⁴⁷³ The narrator must also deal with a confluence of roles: that of victim, witness, and judge.⁴⁷⁴ Finally, the witness must find a way to survive the witnessing.⁴⁷⁵

This investigation thus opens up many questions relating to the roles and obligations of witnesses. The where and how of lawyer witness is broad and, while not developed here, is of obvious importance. The first steps we lawyers must take, however, are to recognize our place in the tradition of witnessing and to acknowledge the existence of a witnessing role outside the limited confines of the judicial system. The task then before us will be to determine what forms that witness will take.

⁴⁶⁸ *Id.*

⁴⁶⁹ See Rice, *supra* note ___ at 23 (literary text carries the "weight of remembering").

⁴⁷⁰ Ricouer, *supra* note ___ at 113.

⁴⁷¹ See Felman & Laub, *supra* note ___ at 204.

⁴⁷² *Id.* at 61; 206; Coady, *supra* note ___, chap 4.

⁴⁷³ Felman & Laub, *supra* note ___ at 197 (failure of representation discussed in the context of Albert Camus' novel, THE FALL); Signorini, *supra* note ___ at 178 (Primo Levi's struggles with this issue explicated).

⁴⁷⁴ Felman & Laub, *supra* note ___ at 198.

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