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The Call to Witness: Historical Divides, Literary Narrative, and the Power of Oath

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THE CALL TO WITNESS: HISTORICAL DIVIDES, LITERARY NARRATIVE, AND THE POWER OF OATH

NANCY COOK*

A decade ago, in her book, Narrative, Authority and Law, Robin West posed these questions: How might we develop a moral sensibility with which to criticize law that is independent of the influence of law? How should we criticize law from a moral point of view, given the influence of law over our moral beliefs? What is the role of narrative in this enterprise?

The “Call to Witness” is an entreaty to look to narratives as acts of witness for a partial answer to these questions. Narratives bring to light the real conflicts underlying court cases and law, the motives that are dismissed as irrelevant, and the ever-present ambiguity of circumstances. Picking up at key moments in time before or after the law is invoked, stories demonstrate the consequences of our actions and the agonizing responsibilities of choice. These are the stories people want to tell, but cannot in the confines of the legal system, and the stories people are afraid to tell, but recognize as crucial to justice.

If narrativity is a necessary part of moral claims made on behalf of those traditionally excluded from processes of law, and if the telling of heretofore silenced experiences in narrative form is essential to correcting the imbalance, lawyers must be engaged in the narrative process. Certainly, lawyers are well positioned to serve as witnesses to the operations of law and justice institutions in society. The Article examines the meanings that might be attached to the witness role and the ways in which such a role might be performed. The contextual lenses of legal history and literary testimonial narrative provide the mechanisms through which concepts of witnessing can be analyzed and understood.

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The position of lawyers in the social order provides them with the opportunity, and a privileged position from which, to testify. Legal history affords some clues as to how this might be accomplished, but narrative theories provide significantly greater guidance. What history demonstrates is that both in the way it frames and focuses the search and in the way it defines and limits roles, the law has evolved over time to assure that facts, if not truth, will be obscured in the judicial system. Long ago, legal developments led to strict limitations on the role witnesses play in the system and, consequently, on the role of lawyers in the system. Thus, a different construct is called for.

Literary and narrative theories provide the best strategies for communicating and otherwise breaching the gaps between what is experienced and what is understood by the community to be truth. Narrativists 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. They can instruct our ideas about how we relate to client populations, especially those least well served by the existing judicial system. Literary analysts have also addressed the ethical implications involved in telling and, more importantly, re-telling. These are all matters that concern lawyers.

While narrative theory is emphasized in the analysis of witness role and method, another essential historical element in law and history brings the discussion full circle. It is not just the act of bearing witness, facilitated by lawyers' professional privileges, that can make a difference, but the promise of truth—a covenant, a sacred oath—that signals and constitutes a return to authentic witnessing. Here the oath is shown to be a key connector between the lawyer's role as advocate and the lawyer's role as public citizen, between courtroom narrative and testimony, and between storytelling and truth.

Using literary narrative witnessing strategies, lawyers can shed light on hidden aspects of the justice system and on laws' effects. Lawyers should therefore 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.

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I. INTRODUCTION

More than two decades ago, in her book, *Narrative, Authority and Law*, Robin West posed these provocative questions:

“[Do the] goals and the laws we enact that reflect them well serve our best understanding of our true human needs, our true human aspirations, or our true social and individual potential, as gleaned from the stories we tell . . . [?]”¹

“How might we develop a moral sensibility with which to criticize law that is . . . independent of the influence of law?”²

“How should we criticize law from a moral point of view, given the influence of law . . . over our moral beliefs?”³

West, who has been described as more of a theorist of stories than storyteller,⁴ offered a few suggestions for moving ahead on the agenda. First she noted that “traditional methods” of humanism—“writing, reading, and responding to narrative texts”—are “at least a partial answer.”⁵ She added that critiques should not be limited to law itself but should encompass the commonly shared moral beliefs with which we typically engage in criticism.⁶ In her words, what is needed is “careful,

1. ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 7 (1993).

2. *Id.* at 6.

3. *Id.* at 2.

4. L.H. LaRue, *West on Story and Theory*, 92 MICH. L. REV. 1786, 1790 (1994); see also Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After “The Law,”* 60 VAND. L. REV. 555, 573 (2007) (reviewing WEST, *supra* note 1) (describing the work of West, among others, as a “more highbrow form of legal literary analysis”).

5. WEST, *supra* note 1, at 2–3.

6. *Id.* at 6.

systematic study of the narratives and critiques of narratives that we tell each other about the substance of our lives.”⁷ One conclusion West reached was that the imbalance in narrative created by inequality, including inequality in narrative resources and power, “must be corrected by the telling in narrative form of the heretofore silenced experiences.”⁸

West’s questions remain unanswered, although certainly they have provoked much discussion.⁹ The continuing call for publication of silenced and underrepresented voices haunts us with its failures to rectify the imbalance about which West and others have written. In this Article, I offer a new perspective on the problem, with a proposal that takes into account the power of narrative, the historical constraints of legal process,¹⁰ the underpinnings of commonly shared moral beliefs, the all but forgotten significance of oaths, and the “illusory, partial, interpretable, . . . and, most importantly, complex” nature of truth.¹¹ The focal point for the analysis is the concept of “witness.”

A. *The Problem: Lost Story and Truth*

This investigation into the concept of witnessing looks well beyond conventional roles assigned to players in the modern American judicial system, taking cognizance of the fact that, while lawyers may be instrumental in the production of courtroom testimony, in the course of their lawyering work, lawyers are also outsider observers of client lives and insider observers of legal institutions and operations. Consequently, 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.

Without question, lawyers provide support for witnesses within the judicial system. Yet despite the fact that throughout history some

7. *Id.*

8. *Id.* at 10.

9. See, e.g., IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES 22–23 (1995); Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 652–53 (2001); LaRue, *supra* note 4; Barbara Stark, *Bottom Line Feminist Theory: The Dream of a Common Language*, 23 HARV. WOMEN’S L.J. 227, 236 (2000).

10. See Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1462–63 (2005).

11. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5 (1996).

lawyers and witnesses have demonstrated considerable creativity and resourcefulness in the courts, most revelations there are circumscribed. In the courtroom, witnesses are called upon to speak of what they have seen. What they have seen, and profess to know firsthand, however, is often understood in relation to what they “knew” previously.¹² Courtroom witnesses in some sense possess the “truth” before they are observers of legally relevant events; in most cases, they conform new knowledge to the old.¹³ Receptivity to information is dependent on and reflective of existing collective “knowledge.” When performing their juridical roles, therefore, witnesses tend to draw on this accepted truth or knowledge, resulting, more often than not, in an affirmation or perpetuation of preexisting knowledge paradigms. Jurors and judges do the same.

Many lawyers have reflected on the gap between what passes for truth in the judicial system and what goes on in clients’ lives.¹⁴ Robert Cover, for example, in his groundbreaking work on narrative, notes the dissonance between official systems of justice and the normative worlds

12. C.A.J. COADY, *TESTIMONY: A PHILOSOPHICAL STUDY* 262–63 (1992) (noting that psychological critiques of eyewitness testimony reflect extensive reliance on the word of others in assessing truth).

13. 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).

14. See, e.g., Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 945–46 (2006) (“[N]arrative [is] . . . essential to the project of charting the space between law as it is imagined and law as it is experienced.”); 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. POL’Y & L. 197 (1999) (illustrating impossibility of portraying client’s truth by utilizing sexual harassment defense in a 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 (1989) (analyzing misunderstandings in interactions between the court and a Spanish-speaking defendant and between lawyers and the defendant-client who dismissed the lawyers); Carolyn Grose, *A Persistent Critique: Constructing Clients’ Stories*, 12 CLINICAL L. REV. 329 (2006) (addressing problems in transgendered client representation); Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271 (2012) (inadequacy of trial narrative in the Trayvon Martin case); Menkel-Meadow, *supra* note 11, at 6 (critique of adversary system arises from observation that binary representation oversimplifies, leaves much out, and is not the best way to ascertain truth); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN’S L. REV. 683 (2011) (discussing issues in context of clients’ wills).

in which people live.¹⁵ Interactions with client populations in some instances reportedly bear no resemblance to either 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.¹⁶ The pressure to conform client stories to certain patterns and stereotypes can be frustrating;¹⁷ indeed, the “perceived tenuousness of the connection between the concrete immediate injustices of practice and the remote justice that is supposed to redeem,” says William Simon, is cause for “moral anxiety.”¹⁸ Much has been written about the importance of letting clients tell their own stories in their own ways.¹⁹ 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.²⁰ The real stories are too

15. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

16. See, e.g., Anthony V. Alfieri, *Reconstructive 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); Evelyn H. Cruz, *Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless*, 17 ST. THOMAS L. REV. 811 (2005) (addressing problem of loss of truth in immigration cases); Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157 (2009) (addressing limitations on truth telling in domestic violence litigation); Lucie E. 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).

17. See, e.g., Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41, 52 (1994) (describing pressure to present client story “in a way a judge would understand”); Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477 (1996) (describing pressures in representing victims of domestic violence). As Tony Alfieri observes, lawyers may find that when they achieve legal victories while staying within the constraints of legal process, they do so “at the expense of democratic empowerment and minority collaboration.” Alfieri, *supra* note 10, at 1463.

18. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 3 (1998).

19. See, e.g., Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995); Alex J. Hurder, *Negotiating the Lawyer–Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000).

20. Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992) (examining situation 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.

long, too complex, and, frankly, 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.²¹

In addition, for lawyers, the witness role has meaning that extends outside 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 legal system in operation. 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. That same information, however, could have significant value to a citizenry that understands how acts of narration create functional history, and to a society in which, over time, functional history operates as, and then becomes, accepted “truth.” If, as Robin West concludes, narrativity is a necessary part of moral claims for change made on behalf of those traditionally excluded from processes of law, and if the telling of heretofore silenced experiences in narrative form is essential to correcting the imbalance,²² lawyers must be engaged in the narrative process. Certainly, lawyers are well positioned to serve as witnesses to the operations of law and justice institutions in society. For that to proceed in a principled fashion, it is necessary to examine what meanings are attached to the witness role and how such a role might be performed.

Part II of this Article covers some definitional foundations by which concepts of witnessing can be analyzed and understood.²³ Part III looks at witnessing specifically through the lens of legal history. What this history demonstrates is that, both in the way it frames and focuses the search and in the way it defines and limits roles, the law has evolved over time to function with a narrow scope. In American courts, 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 disclosure of what they know. Historical turns have almost assured that

Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213, 213–16 (1991) (describing struggle over alternative ways to balance client’s desire for truth and justice with practical exigencies of plea bargain).

21. Carrie Menkel-Meadow has argued that the adversary system may be outdated for essentially this reason. Menkel-Meadow, *supra* note 11, at 5.

22. WEST, *supra* note 1, at 10.

23. See *infra* Part II.

facts, if not truth, will be obscured in the judicial system. Long ago, legal developments led to strict limitations on the role witnesses play in the system and, consequently, on the role of lawyers in the system.²⁴

In Part IV, I explore the literary narrative tradition of witnessing.²⁵ 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. These are all matters that concern lawyers.

Part V develops the idea that current literary testimonial narrative can serve as a model for lawyer witnessing.²⁶ Historical parallels and similarities in purposes and issues are drawn. This Part includes an exploration of civic and professional values, a careful look at the underlying concept of “truth telling,” and an analysis of the role that oaths have played. Part VI concludes with a “Call to Witness,” with specific reference to using literary narrative strategies to bring to light hidden aspects of the justice system and the law’s effects.²⁷

II. DEFINITIONAL FOUNDATIONS

Postmodernism has invested testimony with legitimacy as discursive practice.²⁸ As used here, “testimony” denotes simply the act of relating what one has seen or heard. The actor in this construct is generally referred to as the “witness.” Because testimony is utilized to preserve experience and is relied on in the historical construction of truth, it is recognized as being central to the conscientious care of memory and truth.²⁹ Thus, authorship of testimony—the act of witness—is commonly viewed as an act of personal and civic responsibility.

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See infra* Part V.

27. *See infra* Part VI.

28. LINDA J. CRAFT, *NOVELS OF TESTIMONY AND RESISTANCE FROM CENTRAL AMERICA* 6, 17 (1997).

29. PAUL RICOEUR, *The Hermeneutics of Testimony* (David Stewart & Charles E. Reagan trans., 1972) [hereinafter RICOEUR, *Hermeneutics of Testimony*], in *ESSAYS ON BIBLICAL INTERPRETATION* 119, 123–24 (Lewis S. Mudge ed., 1980).

The term “witness,” when used as a verb, generally signifies one of two things in modern parlance: to behold or to attest.³⁰ The word “behold,” meaning to take in and to perceive, could be considered passive;³¹ the word “attest” is clearly active, meaning to give out, to testify.³² One form of the verb focuses on those who see and, in response, give credence to their perceptions; the other situates the action in those who speak and, in so doing, touch others.

Although it proceeds from the “irreplaceable performance of the act of seeing,”³³ as a matter of public duty, witnessing involves more than movement from seeing/hearing to comprehension in the “behold” sense of the word. Witness is not merely an act of reproduction; it is an act of transmission. Thus, “testimony is not perception itself but the report, . . . the story, the narration of the event.”³⁴ The task for the witness is to transfer things seen to the level of things said, as honestly as possible.³⁵

Once the witness moves to narration, and ownership of story is assumed, “testimony is at the service of judgment.”³⁶ This is so because the act of testifying places the testimony into the care of listeners and thereby becomes subject to interpretation and change.³⁷ Narrating witnesses are engaged in a complex process, capturing primary perception or experience with words, communicating that perception or experience to others, and subjecting the process of telling to analysis.³⁸ It is no linguistic accident that those who give testimony are often said to “bear witness.” “Bearing witness” implies something more than

30. THOMAS G. LONG, *THE WITNESS OF PREACHING* 78 (1989).

31. Long frames it as active: “to be present and active as an observer.” *Id.*

32. *Id.* Long adds the meaning “making others aware.” *Id.*

33. SHOSHANA FELMAN, *The Return of the Voice: Claude Lanzmann’s Shoah* [hereinafter FELMAN, *Return of the Voice*], in SHOSHANA FELMAN & DORI LAUB, *TESTIMONY: CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS, AND HISTORY* [hereinafter TESTIMONY] 204, 206 (1992).

34. RICOEUR, *Hermeneutics of Testimony*, *supra* note 29, at 123.

35. *Id.*

36. *Id.*

37. 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* 173, 178 (Roberta S. Kremer ed., 2001).

38. See DORI LAUB, *An Event Without a Witness: Truth, Testimony and Survival* [hereinafter LAUB, *Event Without Witness*], in TESTIMONY, *supra* note 33, at 75, 75.

testifying does; it denotes gravity, weight, consequence.³⁹ It suggests that testimony is formative and not just informative.⁴⁰ For this reason, testimony is recognized in history, literature, and religion as serving truth not only through preservation of historical memory but by virtue of its creative and potentially transformative properties.

These notions are deeply embedded in law. In all respects testimony is, or certainly should be, the concern of lawyers. The legal system—the adversarial trial system in particular—is intended to be a search for truth. Lawyers are invested, and thus implicated, in this profession that currently supports as truth the pronouncements of judges and jurors,⁴¹ designated factfinders who rely on the testimony of a kinship body of oath-takers, i.e., witnesses.⁴² The lawyers are not mere technicians in the judicial 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. They have the power to make or direct choices determining whether the judicial system operates more as a restrained editorial board on truth or as a public forum on matters of concern to the community. In some cases, lawyers can lay the groundwork for the future, ensuring that controversial or unaccepted evidence is recorded, even if the facts are not acknowledged or recognized as such. In these ways, lawyers are already engaged in discovering and shaping truth through the use of testimony. The related question 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, are uniquely qualified to assume a civic, testimonial role with respect to the operations of law and aspirations for justice in society. The

39. Anne P. Rice, *Introduction* to WITNESSING LYNCHING: AMERICAN WRITERS RESPOND 1, 23 (Anne P. Rice ed., 2003) [hereinafter WITNESSING LYNCHING] (“[L]iterary text carries the burden of remembering . . .”).

40. Signorini, *supra* note 37, at 193.

41. Etymologically, those who fulfill a promise. WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1011 (David B. Guralnik & Joseph H. Friend eds., college ed. 1968) [hereinafter WEBSTER’S DICTIONARY]. It should be noted that the root of “jury” is same as that for “oath,” and the “basic sense” of root words for oath is “a going to fulfill a promise.” *Id.* at 795, 1011.

42. Etymologically, those who see or know. *Id.* at 1680; *see also id.* at 1678, 1680 (showing that the root of “witness” is knowledge and that “witness” is derivative of “wit”; also refers to “wise” for etymological root, identifying Middle English, Anglo-Saxon, and Indo-European roots of “wise” as signifying “see” and “know,” and Latin root as meaning “to see”); 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 3659 (5th ed. 2002) (identifying root of “witness” as Indo-European base “*weid*,” meaning “to see”).

contextual lenses of legal history and literature provide insights that aid the resolution of that question.

III. LEGAL HISTORY LENS.

A pervasive notion, especially in the United States, is that “law” is best understood as a series of authoritative texts.⁴³ These texts presumably have acquired authority by means of a lengthy, mostly logical, and representative process. To the extent that the law has been thus arrived at through participative methods, it can be considered democratic. Hence, legal texts can be codified to inject a strong measure of validity to substantive rights and processes. 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.”⁴⁴

But the idea of law as text obscures the actual processes by which laws are both devised and applied.⁴⁵ 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.⁴⁶ There would, indeed, be no law without the social conditions to which it is applicable.⁴⁷ This has material implications in 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, it is possible to see how the law is “more practical than logical.”⁴⁸ In particular, the sometimes traumatic encounters between cultures (such as Norman and Anglo-Saxon or Roman Catholic and Celtic-Christian) produced social

43. William E. Forbath, Hendrik Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 761–62 (noting the dominant view, which 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”).

44. *Id.* at 761.

45. *Id.* at 764–65. The authors question the dominant conception of “the law” as constituted in discrete texts. *Id.* They urge examination of the search for meaning, how issues were debated, and what rules of discourse were or were not abided by. *Id.*

46. *Id.* at 765 (“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.”).

47. JOHN MAXCY ZANE, *THE STORY OF LAW* 43 (2d ed. 1998).

48. *Id.* at 260.

compromises and legal amalgams that help explain the current state of oral testimony.⁴⁹

Anglo-Saxon England in the several centuries prior to the Norman invasion was steeped in feudalism.⁵⁰ Life was simple and brutal for many people.⁵¹ Small towns in rural communities predominated, and English life was characterized by limited literacy, limited travel, and limited life span.⁵² The countryside was subject to harsh weather conditions, disease and epidemic, and high infant mortality.⁵³ These conditions gave rise to a “profoundly supernatural understanding of the world.”⁵⁴ The credibility of reports about abnormal and inexplicable events, from a listener’s point of view, “depended [upon] . . . the authority of those who reported them.”⁵⁵ 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.⁵⁶ Assertions that an angel appeared or that demons possessed someone carried as much weight as explanations based on global warming or post-traumatic stress might in today’s world.

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.⁵⁷ 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 bred reliance on authority, which ordinarily meant God and God’s “chosen” agents, such as bishops and kings.⁵⁸

If a high-level agent was not readily available, people looked elsewhere for confirmation. At the popular level, a pervasive belief in

49. See 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 203 (1926) (observing that English law was influenced by canon law and “primitive ideas”); see also Forbath et al., *supra* note 43, at 761 (reflecting on the “[v]arious inputs—social, cultural, economic, political—[that] produce outputs, or legal texts,” which form the common law).

50. ZANE, *supra* note 47, at 211.

51. OLDRIDGE, *supra* note 13, at 5.

52. *See id.*

53. *Id.*

54. *Id.* at 6.

55. *Id.* at 7; see also MICHAEL MCKEON, THE ORIGINS OF THE ENGLISH NOVEL 1600–1740, at 21 (1987) (noting medieval “dependence on received authorities”).

56. OLDRIDGE, *supra* note 13, at 7.

57. ZANE, *supra* note 47, at 211.

58. OLDRIDGE, *supra* note 13, at 6; ZANE, *supra* note 47, at 211–12.

the invisible world of demons, angels, and ghosts, and in their intervention, helped explain the world.⁵⁹ Thus, when formal Catholicism met the baffling events of every-day existence, the intersection gave rise to a cult of saints.⁶⁰ Although an erudite vision dominated in the upper echelons of the Church, that vision remained in contradistinction to the nonlinear mysticism applied by ordinary people to the practical needs of daily existence.

The climate of dependency on the supernatural helps explain medieval society's respect for authoritative texts, chief of which was the Bible.⁶¹ The revelations contained in Hebrew scriptures might be conceived of as someone (i.e., God) speaking through the prophets.⁶² The writer of the sacred texts is the second author, or the medium, chosen by the unseen God to reveal some of what He, that same God, previously concealed. What has been concealed is ultimate truth, and faith consists of accepting as truth the words as spoken or written by the medium.

This world view sheds light on the respect for oaths, which were a widely utilized method for resolving disputes during this time.⁶³ In the absence of empirical proof, 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, as in scripture, to initiating a 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.⁶⁴ Hence there is a strong connection between the idea of oath taking in the medieval legal world and the prophetic notion of scripture as the word of God.

59. OLDRIDGE, *supra* note 13, at 6.

60. JACQUES LE GOFF, *HISTORY AND MEMORY* 71 (Steven Rendall & Elizabeth Claman trans., Columbia Univ. Press 1992) (1977).

61. MCKEON, *supra* note 55, at 73–76.

62. PAUL RICOEUR, *Toward a Hermeneutic of the Idea of Revelation* (David Pellauer trans., 1976) [hereinafter RICOEUR, *Hermeneutic of Revelation*], in *ESSAYS ON BIBLICAL INTERPRETATION*, *supra* note 29, at 73, 75–76.

63. See Laurie C. Kadoch, *So Help Me God: Reflections on Language, Thought, and the Rules of Evidence Remembered*, *RUTGERS J.L. & RELIGION*, Fall 2007, at 1, 8 (tracing the linguistic development of trials from the Anglo-Saxon period when “God’s voice provided the absolute truth”).

64. 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 41, at 1011.

When, in 1066, the Normans invaded the isle of Britain, a major transformation in English life began. Times were still difficult; the years between the invasion and the ascendance of the Stuart and Tudor dynasties were fraught with plagues that restricted social intercourse, isolated communities, and contributed to communication breakdowns and social unrest.⁶⁵ At the same time, however, Europe was experiencing a “literacy revolution” and an “acceleration of the empirical and historicizing impulse.”⁶⁶ The Magna Carta made its appearance in 1215, a day was divided into twenty-four equal parts in 1330,⁶⁷ Chaucer’s *Canterbury Tales* were composed just before the turn of the fifteenth century,⁶⁸ and Copernicus’s theory of the universe revolutionized scientific thought in the middle of the sixteenth century.⁶⁹

For a long time, elitist Church governance coexisted with popular custom. But a changing Europe brought into relief the differences between the intellectualized, 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 supernatural mystique, as what was previously invisible became known.⁷⁰

65. 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 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 219, 240–41 (Comm. of the Ass’n of Am. Law Schs. ed., 1908) [hereinafter 2 SELECT ESSAYS]. Prior to that time, law enforcement was strictly a local affair, accomplished through mutual pledges. *Id.* 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. *Id.* 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.*

66. MCKEON, *supra* note 55, at 35.

67. DANIEL J. BOORSTIN, *THE DISCOVERERS* 39 (1st Vintage Books ed. 1985).

68. *Id.* at 521–23. William Caxton (1422–1491), publisher of *The Canterbury Tales*, has been called the “midwife of a flourishing English literature.” *Id.* An English translation of the Bible, named for King James I (1566–1625), was published shortly thereafter. *Id.* at 523–24. The first folios of William Shakespeare’s plays were also compiled during the reign of James I. *See id.* at 521, 549.

69. *Id.* at 22.

70. *See* Brian Manning, *The Levellers and Religion*, in RADICAL RELIGION IN THE ENGLISH REVOLUTION 65, 67–68 (J.F. McGregor & B. Reay eds., 1984).

As these events were unfolding, the Normans' presence was being felt in England. All social and governmental institutions felt the force of cultures colliding. The impact of these changes was of course tremendous. In the religious milieu, progress meant decreasing reliance on authority, with those in authority struggling to maintain their place in the hierarchy.⁷¹ The situation was ripe for conflict, and as 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.⁷²

Thus began a transition from a society that was highly dependent on unseen powers to one characterized to a much greater extent by claims to knowledge, demands for proof, and assertions of participatory rights. The changes had profound and lasting effects on witnessing in legal forums.

In the Anglo-Saxon period, there were no witnesses of the modern type, who would provide factual information to aid in decision making.⁷³ Testimony was rarely produced in court for any purpose.⁷⁴ For the most part, disputes were settled by appeals to God, some of which were direct and some of which were made through intermediaries.⁷⁵ To the extent that people were called to court, they appeared not for the purpose of convincing a human judge to make or accept factual deductions, but simply to call on God as a witness to the truth.⁷⁶ These individuals were not, in current terminology, witnesses, but "oath-helpers."⁷⁷ They swore to a belief in a party's claim but not to any fact.⁷⁸ The probative force of

71. See *id.* at 65 (describing the Levellers' belief that common people could discover the meaning of religious texts); see also Susan Mosher Stuard, *Women's Witnessing: A New Departure*, in WITNESSES FOR CHANGE: QUAKER WOMEN OVER THREE CENTURIES 3, 9–10 (Elisabeth Potts Brown & Susan Mosher Stuard eds., 1989) (discussing Quakers' rejection of privilege and a belief in individual worth).

72. See Manning, *supra* note 70, at 67.

73. HOLDSWORTH, *supra* note 49, at 177–78.

74. *Id.* at 177.

75. 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. James Bradley Thayer, *The Older Modes of Trial*, in 2 SELECT ESSAYS, *supra* note 65, at 367, 376, 383.

76. M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 61 (1942).

77. *Id.*

78. ZANE, *supra* note 47, at 215–16.

oral testimony thus came not from the logic of its content but from the act of taking an oath.⁷⁹

Procedurally, a formal dispute was initiated by a foreoath, a sworn statement by the plaintiff asserting a wrong and the truth of his claim.⁸⁰ 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 “prove” or establish that the case was serious, genuine, and not frivolous.⁸¹ A summons would be issued and the defendant would be expected to counter with a sworn denial.⁸²

All oral pleading was done in accordance with strict formalities and set forms.⁸³ Precise verbal accuracy was demanded.⁸⁴ This substantiated the “truth” of the party’s assertions. If there was the slightest hesitation or stuttering, the party’s cause could be lost.⁸⁵ A contemporary maxim captured the stringency of the formula: “He who fail[s] in a syllable fail[s] in everything.”⁸⁶ The practice, which seems unnecessarily rigid to modern sensibilities, illustrates the reliance on invisible powers prevalent in the Middle Ages; God, according to this perspective, would ensure that the honest person spoke clearly and precisely.

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.⁸⁷ Thus, the natural progression of

79. Moreover, “[t]hat probative force 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.” HOLDSWORTH, *supra* note 49, at 204; *see also* JAMES AUSTIN HUGHES, WITNESSES IN CRIMINAL TRIALS OF CLERICS: AN HISTORICAL SYNOPSIS AND COMMENTARY 11 (1937).

80. KNAPPEN, *supra* note 76, at 59; ZANE, *supra* note 47, at 214–15. In many cases, the plaintiff was also required to give sureties. KNAPPEN, *supra* note 76, at 59. In criminal cases, as a general matter, formal charges would be brought and the complainant introduced “evidence.” *See* HUGHES, *supra* note 79, at 7. The person accused was required to answer. *See id.*

81. KNAPPEN, *supra* note 76, at 59; ZANE, *supra* note 47, at 214–15.

82. KNAPPEN, *supra* note 76, at 59; ZANE, *supra* note 47, at 215. According to a then-surviving Germanic custom, “In the early days a man’s relatives were required to produce him in court when required.” KNAPPEN, *supra* note 76, at 58.

83. KNAPPEN, *supra* note 76, at 59.

84. *Id.*

85. *Id.*

86. *Id.*

87. HOLDSWORTH, *supra* note 49, at 204.

advocacy was toward establishing a kind of numerical superiority. From Roman law, incorporated into Anglo-Saxon law, had come the idea that two witnesses were needed for proof.⁸⁸ 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.⁸⁹ Trial by witnesses, therefore, soon evolved into a system known as “wager of law.”⁹⁰ 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.⁹¹ Given such circumstances, it was only a matter of time before the buying and selling of oaths became lucrative business practice.⁹²

Following the Norman Invasion of 1066, a transition to external proof began, eventually investing witnesses with a narrative role. Perhaps the most significant custom introduced by the Normans leading to this outcome was the jury.⁹³ In the Norman system, community members might be called on to aid the court in its deliberations.⁹⁴ 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

88. *Id.* at 203–04, 208. It had first become a rule of canonical law, having precedent in both the Old and the New Testaments. *Id.* at 203.

89. James B. Thayer, *The Jury and Its Development* (pt. 1), 5 HARV. L. REV. 249, 261 (1892).

90. ZANE, *supra* note 47, at 216.

91. HOLDSWORTH, *supra* note 49, at 204.

92. A separate class of “witness” existed primarily in criminal cases. In such 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. KNAPPEN, *supra* note 76, at 61; *see also* HOLDSWORTH, *supra* note 49, at 178–79; ZANE, *supra* note 47, at 216. Following the Norman invasion, trial by battle was also employed. KNAPPEN, *supra* note 76, at 195. 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. *Id.* This practice was an extension of the general assumption “that divine will and righteousness are immanent in human affairs.” MCKEON, *supra* note 55, at 35. 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 stone, Hubert Hall, *The Methods of the Royal Courts of Justice in the Fifteenth Century*, in 2 SELECT ESSAYS, *supra* note 65, at 418, 428, or by submerging himself the length of several yards, without floating upward, in cold, still waters consecrated for the purpose by a priest, KNAPPEN, *supra* note 76, at 62. 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.” Hall, *supra*, at 428. Over time, the rite “degenerated into a meaningless form of law.” *Id.*

93. ZANE, *supra* note 47, at 422.

94. *Id.*; *see also* KNAPPEN, *supra* note 76, at 195–96.

this practice in England so that, by the time of Henry II (1133–1189), the Saxon custom of compurgation or wager of law had combined with the Norman tradition of using the jury as a fact-finding body.⁹⁵ The English began to allow parties to gather their oath-helper groups together into witness-juries.⁹⁶

Jurors in this transitional time 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.”⁹⁷ Eventually, in England, these groups engaged in decision making, relying heavily on pleadings but not limited to any particular type of information.⁹⁸ Verdicts were rendered on the basis of the jurors’ “own conscious persuasion of the facts, and not merely by supervising external tests.”⁹⁹

Despite the Normans’ political (as well as military) dominance,¹⁰⁰ 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 end, although the *secta* of Anglo-Saxon times evolved into proof witnesses,¹⁰¹ it was not before significant “reforms” made long-lasting impressions on the system.

A window of opportunity existed in this period for the development of narrative witnessing, fortified by the solemnity of the oath, but progress was hampered by circumstances. The purchase and sale of oaths had become a profitable business, and perjury was rampant.¹⁰²

95. KNAPPEN, *supra* note 76, at 195.

96. *Id.* at 61.

97. HOLDSWORTH, *supra* note 49, at 181.

98. KNAPPEN, *supra* note 76, at 195–96.

99. John Henry Wigmore, *A General Survey of the History of the Rules of Evidence*, in 2 SELECT ESSAYS, *supra* note 65, at 691, 692. Their decision-making responsibility meant they could not be separately examined, however; rather, they were asked only to render a verdict. It was not considered the business of the courts to ascertain how the verdict was reached. HOLDSWORTH, *supra* note 49, at 181.

100. Heinrich Brunner, *The Sources of English Law*, in 2 SELECT ESSAYS, *supra* note 65, at 7, 20–21; *see also* ZANE, *supra* note 47, at 422 (“At last had come the Normans, then the leading race in Europe, and they came not to ruin but to save . . .”).

101. Thayer, *supra* note 75, at 377.

102. ZANE, *supra* note 47, 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.”).

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 great a stupidity as wager of law.”¹⁰³ It meant only that instead of purchasing oaths outright, unscrupulous litigants would bribe the community witnesses.¹⁰⁴ These attempts to influence the jury led to maintenance laws.¹⁰⁵

Because oath-takers were so easily bought, the law permitted parties to sue for “maintaining” false suits.¹⁰⁶ The common law courts granted damages for successful maintenance suits.¹⁰⁷ Unfortunately, heavy fines imposed on juries who were found to have made wrong decisions filled the King’s coffers¹⁰⁸ 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.¹⁰⁹ As a consequence, the liars continued to be bought; but honest people were afraid to be witnesses, and they could not be compelled to be.¹¹⁰ 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 take oaths.¹¹¹ Expansion of witness narrative was thereby curtailed.

A major turning point in legal procedure came with the passage of the Statute of 1562–1563, granting courts the power to compel witnesses

103. *Id.* at 254.

104. HOLDSWORTH, *supra* note 49, at 182.

105. *See* Thayer, *supra* note 89, at 261.

106. ZANE, *supra* note 47, at 253–54.

107. Spence, *supra* note 65, at 244.

108. ZANE, *supra* note 47, at 258.

109. *Id.* at 253–54.

110. *Id.* at 254, 258.

111. *Id.* at 259. There were those who agitated for reform. Among them was Henry de Bracton, best known as the original compiler of cases from the Anglo-Saxon period. *Id.* at 238. His efforts to bring into the courts the practice of witness examination failed, however. In England, the eclectic jury, rather than canonical procedure, assumed the place of earlier modes of proof. HOLDSWORTH, *supra* note 49, at 181. The Catholic Church’s abuse of the oath in the thirteenth century is cited by Andrew Bentz as the impetus for the privilege against self-incrimination. Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 VA. L. REV. 897, 900, 909–10 (2012).

to testify.¹¹² In addition, a new rule governing probes into attainted jury allegations prohibited an appellate body's reliance on any evidence not before the allegedly offending jury.¹¹³ These changes in procedure spelled the demise of maintenance suits, but they arrived too late to encourage witness narration.¹¹⁴ 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.¹¹⁵

From the seventeenth century on, verdicts were based not on the jurors' own knowledge but on evidence produced in court.¹¹⁶ This change made the appearance of witnesses necessary and had a profound effect on the laws of evidence and pleading.¹¹⁷ The division of witness and juror roles soon gave rise to laws regulating evidence.¹¹⁸ Indeed, once the jury's role changed, and oral testimony became the norm, the need for *limits* on testimony became apparent.¹¹⁹ 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 ensure that courts kept to the issues and to prevent them from being misled.¹²⁰ Thus it was that evidence law started with rules of exclusion.

In devising rules of exclusion, the courts were concerned first not with relevance, however, but with the competency of witnesses.¹²¹ This is not surprising given the history of testimony and its reliance on “primitive idea[s]” about the intrinsic value of the oath.¹²² The widespread abuse of the sacred oath galvanized a campaign to restrict its

112. HOLDSWORTH, *supra* note 49, at 185; KNAPPEN, *supra* note 76, at 406. This change was initiated and first enforced on behalf of the Crown and soon was utilized in all but criminal cases. Wigmore, *supra* note 99, at 693.

113. ZANE, *supra* note 47, at 259.

114. *See id.*

115. KNAPPEN, *supra* note 76, at 406; ZANE, *supra* note 47, at 259–60.

116. Wigmore, *supra* note 99, at 692.

117. HOLDSWORTH, *supra* note 49, at 126.

118. *Id.* at 207; ZANE, *supra* note 47, at 423.

119. ZANE, *supra* note 47, at 423.

120. *See* Wigmore, *supra* note 99, at 693.

121. *Id.*

122. *See* HOLDSWORTH, *supra* note 49, at 204–05 (discussing inferences drawn from biblical foundations of oath taking and suggesting they were illogical).

use; the pendulum swing from the vilified wager of law was to laws of evidence permitting only “worthy” persons to take the oath.¹²³

This foreshortened court proceedings but 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.¹²⁴ In time, rules permitting cross examination, prohibiting hearsay, and establishing other relevancy limits on evidence were adopted.¹²⁵ These early evidentiary issues have shaped court proceedings ever since.

Additionally, starting in about the sixteenth century, the trial became a forum not for spokespersons of all-knowing beings but for custodians of the past; witnesses became chroniclers, not oracles.¹²⁶ History had come into its own as a discipline in the decades linking medieval to modern life, and it – not literature – provided the paradigm for legal narrative. At its earliest developmental stages in western civilization,¹²⁷ the discipline of history was concerned with “investigations” and “testimonies,”¹²⁸ founded on the principle of truth.¹²⁹ 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.”¹³⁰ History, again, as opposed to narrative, has always been affiliated with documentation.¹³¹ Writing provided the means for storing information and for committing knowledge to memory. Documentation also permitted examination of information over time.¹³² These

123. See Wigmore, *supra* note 99, at 693–94.

124. HOLDSWORTH, *supra* note 49, at 127; Wigmore, *supra* note 99, at 693.

125. Wigmore, *supra* note 99, at 693.

126. See Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560–1640*, 10 YALE J.L. & HUMAN. 229 (1998).

127. See generally LE GOFF, *supra* note 60, at 185.

128. *Id.* at xvi.

129. *Id.* at 185. History, Le Goff says, “takes truth as its norm.” *Id.* at 114. Cicero, he notes, for example, calls history “the light of truth.” *Id.* at 187 (quoting 2 MARCUS TULLIUS CICERO, DE ORATORE *36).

130. *Id.* at xi.

131. Early on, historians subscribed to the notion that history should be “sought everywhere,” in the daily lives, work, and leisure of the people. *Id.* at 162. The intent of early publications was to illuminate what was real by detecting and recording everything that happened. *Id.*

132. *Id.* at 59–60.

characteristics of history as a discipline suited the courtroom culture that was developing around evidence law.

As the divide between known and unknown grew in significance, trial lawyers, like historians, aligned themselves with those on the side of empiricism.¹³³ By the late eighteenth century, the dominant narrative in law—as in science, history, and even literature and Christian religions—was one of “carefully managed circumstantial evidence.”¹³⁴ Even when direct testimony was available, the “narrative arranged from circumstantial evidence [was] . . . the most favored proof of all.”¹³⁵ Retrospectively, this evolution of the Anglo-American trial has been viewed as an attempt to lead fact finders, through the use of evidentiary rules, to judgments based in reason, unclouded by emotion.¹³⁶

In early English history, to the extent that witnesses had any involvement in legal proceedings, their impact had derived from the power of the oath, which was an appeal to an essentialized authority. Even with increased reliance on external proof in post-medieval Britain, and a decline in the significance of the oath, however, the role of narration was not entrusted to courtroom witnesses. The textual law grew, but the social foundations were de-emphasized. In the end, the 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.

IV. LITERARY LENS

The idea of “witness” in literature has followed a very different course from that in the legal realm. The need for witnessing, from the literary narrator’s perspective, stems from loss of story. Loss of story may be occasioned by, among other things, oppression, subordination, or trauma, and may occur at the individual level or at a broader community level. The loss may be of past stories, current events, or future stories. Essentially, literary witnesses feel compelled to recite narratives that have not been heard, either because a version of the story has been denied by listeners or because there has been an absence

133. See Ross, *supra* note 126, at 230.

134. ALEXANDER WELSH, *STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND*, at ix (1992).

135. *Id.* at x.

136. Kadoch, *supra* note 63, at 8.

of an “addressable other” to hear the story.¹³⁷ Literary witnesses seek to recover lost stories; stand up to the silencers and subordinators; counter hegemonic stories; correct the record through collaborative action; and expose or shape cultural and historical truths. The circumstances occasioning the need for witness are variable: original witnesses may die or otherwise be unavailable, or stories may be incomplete. In some instances, the literary narrator becomes a conduit for a story that could not even be witnessed in the first instance.¹³⁸

In the literary field, some writers have made specific claims to a witness role.¹³⁹ 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,¹⁴⁰ the Holocaust,¹⁴¹ and the African slave experience.¹⁴² A powerful personal need for release from silence is similarly well documented.¹⁴³ In the case of trauma, for example, the actual experience may be blocked or delayed,¹⁴⁴ preventing production of a contemporaneous narrative.¹⁴⁵ The victim is silenced, but not by the direct imposition of

137. See DORI LAUB, *Bearing Witness, or the Vicissitudes of Listening* [hereinafter LAUB, *Bearing Witness*], in TESTIMONY, *supra* note 33, at 57, 68 (emphasis omitted) (noting the gravity of this situation for trauma victims); Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631 (2012) (exploring victim’s artistic response to trial proceedings that did not authentically represent her story).

138. In such cases, the lack of known particulars does not obviate the need for telling because, from the literary witness’s point of view, it is the connectivity—or the journey—between the past and the future that matters. See, e.g., SERGIO PARUSSA, *WRITING AS FREEDOM, WRITING AS TESTIMONY: FOUR ITALIAN WRITERS AND JUDAISM* 26–28 (2008) (developing the idea that such story remnants have value).

139. See, e.g., TESTIMONY, *supra* note 33 (discussing the novels of Albert Camus); SHOSHANA FELMAN, *Camus’ The Plague, or a Monument to Witnessing* [hereinafter FELMAN, *Camus’ The Plague*], in TESTIMONY, *supra* note 33, at 93, 116 (discussing the writings of Elie Wiesel); Signorini, *supra* note 37, at 183 (discussing the work of Primo Levi).

140. E.g., CRAFT, *supra* note 28, at 6–7, 15–17.

141. E.g., Lucy S. Dawidowicz, *The Holocaust as Historical Record*, in DIMENSIONS OF THE HOLOCAUST: LECTURES AT NORTHWESTERN UNIVERSITY 21, 24–27 (1977) [hereinafter DIMENSIONS OF THE HOLOCAUST] (annotated by Elliot Lefkowitz).

142. E.g., ROSETTA E. ROSS, *WITNESSING AND TESTIFYING: BLACK WOMEN, RELIGION, AND CIVIL RIGHTS* 14 (2003). 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. *Id.* at 223–25.

143. Signorini, *supra* note 37, at 177; Elie Wiesel, *The Holocaust as Literary Inspiration*, in DIMENSIONS OF THE HOLOCAUST, *supra* note 141, at 5, 10.

144. LAUB, *Bearing Witness*, *supra* note 137, at 57.

145. CASSIE PREMO STEELE, *WE HEAL FROM MEMORY: SEXTON, LORDE, ANZALDÚA, AND THE POETRY OF WITNESS* 3 (2000).

another's power; rather, the individual's psyche closes the paths to perception. Breaking self-imposed silence or breaking through externally imposed barriers to speech often calls into service narrative methods involving a coach or literary ally. Along these lines, E.L. Doctorow asserts that modern psychology is, in essence, the "industrialization of storytelling."¹⁴⁶ People who experience psychic or emotional distress meet with professionals who listen and encourage patients to talk out their pain. Trauma victims—and their therapists, coaches, or allies 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.¹⁴⁷

Literary witnesses recognize that storytelling is not a solitary activity. It requires a listener or a reader; a narrative involves a telling *to*. Even in the most difficult of situations, where oral or written narration is blocked, stories are told to someone, although that someone may be imagined or dreamed.¹⁴⁸ Moreover, such reclamation of story and identity is needed at both the individual level¹⁴⁹ and at the group level.¹⁵⁰ Significantly, it is also deemed required by future generations.¹⁵¹ More than just personal identity insurance,¹⁵² recovered stories often serve as a testimonial bridge between those living in the present and those who follow or survive.¹⁵³ This is sometimes consciously experienced as a compulsion to tell.¹⁵⁴

146. E.L. Doctorow, *False Documents*, AM. REV., Nov. 1977, at 215, as reprinted in E.L. DOCTOROW: ESSAYS AND CONVERSATIONS 16, 26 (Richard Trenner ed., 1983).

147. SUZETTE A. HENKE, SHATTERED SUBJECTS: TRAUMA AND TESTIMONY IN WOMEN'S LIFE-WRITING, at xxii (1998).

148. See Signorini, *supra* note 37, at 178, 193. One example Signorini gives is of concentration camp internees reporting dreams in which the dreamer would be recounting his or her experiences to someone at home. *Id.* at 178.

149. CRAFT, *supra* note 28, at 4.

150. Signorini, *supra* note 37, at 186 (noting that "identity is shaped by . . . [our] memory of . . . [the] past").

151. Thus, in occupied Poland, Emmanuel Ringelbaum encouraged ghettoized Jews to record the details of their existence by keeping diaries. Dawidowicz, *supra* note 141, at 24–25. "I regard it as a sacred task," one worker wrote, adding that the time would come when the world would know. *Id.* at 25. 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. *Id.* at 27.

152. Signorini, *supra* note 37, at 186.

153. Austin Sarat, *Bearing Witness and Writing History in the Struggle Against Capital Punishment*, 8 YALE J.L. & HUMAN. 451, 454 (1996).

154. As Elie Wiesel has said of his own writing, "The urge to bear witness was overwhelming." Wiesel, *supra* note 143, at 11; see also ROSS, *supra* note 142, at 223 (witness

When the goal is recovery, the process may be one of re-enactment—or, more accurately, an original experiencing—of traumatizing events.¹⁵⁵ But recovery can take place at the social as well as at a personal level, with the historical accounting at stake,¹⁵⁶ or to ensure that the narrative sets the record straight so that people do not suffer or die in vain.¹⁵⁷ The narration of experience can, in an essentialized way, constitute an “ethic of recollection” such that, for victims, “[s]urvival and bearing witness become reciprocal acts.”¹⁵⁸

Alternatively to or coincidentally with story, recovery may be the production of a counterstory, in which the witness is saying, “*this* is what really happened.” Counterstories are common responses to oppression; told one person at a time, they are often heroic in content. The counterstory may be unique and deeply personal, but in such a narrative, often the personal becomes representational.¹⁵⁹ The impetus for the counterstory can be a desire to raise awareness,¹⁶⁰ to correct injustices, or simply to register protest.¹⁶¹ Speech may be seen as a

narration comes from the need a person “has to tell somebody” (internal quotation marks omitted)).

155. See FELMAN, *Camus’ The Plague*, *supra* note 139, at 117–18.

156. 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.” Dawidowicz, *supra* note 141, at 24–26. Dawidowicz quotes from a 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. *Id.* “What we could not cry out to the world,” the archivist said, “we buried in the ground.” *Id.* In a similar vein, Anne Rice, in an anthology of anti-lynching works, notes the determination to counteract the “staggering . . . amnesia” about racial violence. Rice, *supra* note 39, at 2.

157. Lacey Baldwin Smith, *Forward* to DIMENSIONS OF THE HOLOCAUST, *supra* note 141, at 1, 1. Through their testimony, witnesses can insist that the world remember. See Sarat, *supra* note 153, at 462.

158. FELMAN, *Camus’ The Plague*, *supra* note 139, at 117 (quoting TERRENCE DES PRES, *THE SURVIVOR: AN ANATOMY OF LIFE IN THE DEATH CAMPS* 31 (1976)) (internal quotation marks omitted).

159. Holocaust writer Dorothy Rabinowitz explores this idea, 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 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. Dorothy Rabinowitz, *The Holocaust as Living Memory*, in DIMENSIONS OF THE HOLOCAUST, *supra* note 141, at 35, 37.

160. *E.g.*, Rice, *supra* note 39, at 3.

161. *E.g.*, CRAFT, *supra* note 28, at 15; Rice, *supra* note 39, at 23; Wiesel, *supra* note 143, at 8.

political act.¹⁶² Witnesses deliberately seek to use discourse as a tool; they look at how discourse works, not just what it means.¹⁶³ Testimony provided in this way may be intentionally subversive and even marginal.¹⁶⁴

At times, more than the urge to create an accurate account is at work. There being a recognition that history inevitably will be rewritten and sculpted, witnesses may have an ambitious agenda: to shape the future, in effect, writing or rewriting history.¹⁶⁵ 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.¹⁶⁶ Fiction writer Russell Banks reveals a similar intention to expose the hidden consequences of law and social policy in the context of juvenile sex offender legislation.¹⁶⁷

Whether writing fiction or nonfiction, and whether addressing a contemporary audience or a future audience, what literary witnesses believe to be at stake is nothing less than truth.¹⁶⁸ Even a commitment to truth, of course, assures neither accuracy nor honesty. The problems of loss of story and concomitant loss of truth are not readily solved by deliberate efforts to recover lost stories, oppose silencers and oppressors, publish counterstories, and correct or manipulate the historical record, even when those efforts are accompanied by a sincere commitment to honesty or truth telling. For a literary narrator, whether first-hand or secondary witness, such a commitment often raises the

162. CRAFT, *supra* note 28, at 3 (discussing the work of Nobel Prize recipient Rigoberta Menchú).

163. *Id.* at 7. Franca Signorini, for example, says that the writers of the Holocaust not only want to affirm their factual reality but desire that their work serve as an admonition. Signorini, *supra* note 37, at 179.

164. CRAFT, *supra* note 28, at 22.

165. *Id.* at 7.

166. FELMAN, *Camus' The Plague*, *supra* note 139, at 95.

167. Patrick Anderson, Book Review, WASH. LAW., Jan. 2012, at 40 (reviewing RUSSELL BANKS, *LOST MEMORY OF SKIN* (2011)), available at <http://www.dcb.org/bar-resources/publications/washington-lawyer/articles/january-2012-books-in-the-law.cfm>, archived at <http://perma.cc/KE72-JRZ4>.

168. ARTHUR W. FRANK, *THE WOUNDED STORYTELLER: BODY, ILLNESS, AND ETHICS* 137, 139 (2d ed. 2013). This is no less the case when silence has come about through trauma and operates as much as a sanctuary as it does a prison. See LAUB, *Bearing Witness*, *supra* note 137, at 58. It is symptomatic of trauma that blocked experiences—what the subconscious recognizes as truth—make repeated intrusions into consciousness against the conscious will. HENKE, *supra* note 147, at xvii. 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.” Signorini, *supra* note 37, at 177.

question of “how to remain faithful to the truth of historical facts while going beyond the objective and detached language of history.”¹⁶⁹ In fact, witnesses for whom memories are an integral part of a narrative are likely to experience a tension created between “the rights of imagination and the rights of history.”¹⁷⁰ Accordingly, the roles, boundaries, and methods of narrative witnesses need to be carefully defined.

The role of a witness is to testify, but the terms “witness” and “testify,” in noun, verb, or derivative form, are distinguishable. *Testimony* designates the act of “relating what one has seen or heard.”¹⁷¹ “The *witness* is author of this action”¹⁷² Thus, “testimony is not perception itself but the report, . . . the story, the narration of the event.”¹⁷³ Important distinctions also must be made between the primary witness or experiencer and the ultimate narrator, who may or may not be the primary witness. The work of the witness can occur on multiple planes. While the need for testimony invariably arises out of primary experience, the act of testifying may be assumed by someone other than the primary witness.¹⁷⁴ These distinctions are of great significance to witnesses who see themselves as operating in the literary field.

While the primary subject can certainly tell her own story,¹⁷⁵ when the individual who had the experience being narrated is also the narrator, the witness has dual, and potentially conflicting, roles. A writer can be split in two, into “creator and documentarian, teller and listener.”¹⁷⁶ Most often, in the literary witnessing context, the witness is one who has seen another’s experience or who has heard the first-hand account of an experience from another. This addresses, to some extent, any concern that, in a case of first-person reporting, the narrator may lack the detachment necessary for honest reporting.

169. PARUSSA, *supra* note 138, at 33.

170. *Id.*

171. RICOEUR, *Hermeneutics of Testimony*, *supra* note 29, at 123.

172. *Id.* (emphasis added).

173. *Id.*

174. Narration by a listener or observer may spring from the same impulse that motivates primary witnesses: the desire “to give meaning to suffering” or an urge to justify, or “prove,” claims to experiential meaning. Signorini, *supra* note 37, at 177.

175. A full exploration of this question can be found in Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

176. Doctorow, *supra* note 146, at 21. Although Doctorow is speaking of novelists, he professes in the essay to see no real distinction between fiction and nonfiction. *Id.* at 24–25.

Moreover, the narration by one who is not a first-hand experiencer has some advantages. The verification process may be facilitated by the presence and participation of a sympathetic agent or intermediary narrative co-producer, perhaps one educated in the art of discourse.¹⁷⁷ Telling and re-telling a story are means of universalizing the experience¹⁷⁸ or of what Parussa describes as “putting the past, through an active act of memory, back into the flow of life.”¹⁷⁹ Again, skill and experience can facilitate this function of witnessing. Authenticity is further realized because the observer-witness or a listener-witness goes through the original experience in some way. The primary experience may then be passed on by that person to a different audience, one that might not otherwise have been accessed.

Audience is an important concept in literary witnessing. Testimony is not monologue; it cannot take place in solitude. It requires the “intimate and total presence of an *other*.”¹⁸⁰ Testimony happens through communication, between “the one who testifies and the one who hears the testimony.”¹⁸¹ In this way, a relationship, however tenuous, is created. Indeed, all authorship involves a relationship between narrator and listener,¹⁸² with the listener being a key player¹⁸³ who “comes to be a participant [in] and co-owner of” the story.¹⁸⁴ And, as Paul Ricoeur notes, “[i]t is only by hearing” that one “can believe or not believe in the reality of” what a witness says.¹⁸⁵ The participants in testimonial narration—the primary subject, who has experienced something, and the observer-narrator or listener-reteller—are in one relationship.¹⁸⁶ Audience adds another dimension, and a different, new

177. CRAFT, *supra* note 28, at 19.

178. See Signorini, *supra* note 37, at 185.

179. PARUSSA, *supra* note 138, at 169.

180. LAUB, *Bearing Witness*, *supra* note 137, at 70–71.

181. RICOEUR, *Hermeneutics of Testimony*, *supra* note 29, at 123; Signorini, *supra* note 37, at 177.

182. CRAFT, *supra* note 28, at 19–20.

183. SHOSHANA FELMAN & DORI LAUB, *Forward to TESTIMONY*, *supra* note 33, at xiii, xvi; STEELE, *supra* note 145, at 4. Felman and Laub note that, in some situations where the trauma memory has been suppressed, even though there may be documentation and historical evidence, the trauma as a known event may not have been taken cognizance of and hence may not have been “witnessed.” LAUB, *Bearing Witness*, *supra* note 137, at 57.

184. LAUB, *Bearing Witness*, *supra* note 137, at 57.

185. RICOEUR, *Hermeneutics of Testimony*, *supra* note 29, at 123.

186. CRAFT, *supra* note 28, at 19–20.

relationship is formed when the experience, translated into words, reaches that audience.

Testimony as *story*, Ricoeur also explains, is “found in an intermediary position between a statement made by a person and a belief assumed by another on the faith of the testimony of the first.”¹⁸⁷ A relationship of trust, in other words, between narrator and audience, is essential to acceptance and preservation of the story. Literary witnesses assume the responsibility for establishing this trust, and one challenging aspect of the literary witness’s position is always in mediating the relationship between the one who had the original experience and the ultimate listeners. Gloria Anzaldúa describes the situation as one in which the witness exists in two worlds, in what she terms the “[b]orderlands.”¹⁸⁸ As a writer attempting to reliably relate primary experience to another, Anzaldúa says she lives in a state of “psychic unrest,” engaged in “an endless cycle of making it worse, making it better, but always making meaning out of the experience, whatever it [might] be.”¹⁸⁹ Ricoeur frames this idea as “dialectic moments of testimony” and identifies three types of testimonial narrative that develop from the relationship between primary witness/experiencer and literary narrator/witness.¹⁹⁰ The interactivity may involve event and meaning (as in the case of trauma recovery), trial and false testimony (as in a counterstory to the dominant story), and historical archiving (as in a proactive production of historical record).¹⁹¹

When not in the position of primary witness, a witness’s secondary experience can fall along a continuum from passive listening, to participation as ally, to vicarious experience. In the simplest form of testimonial narrative, a story goes from an observer to publication. A narrator in this depiction might be described as “an informed and an honest witness,” whose role is “only to say: this is what happened, when he knows that it actually did happen.”¹⁹² One step removed is the situation in which the literary witness has not been a first-hand observer

187. RICOEUR, *Hermeneutics of Testimony*, *supra* note 29, at 123.

188. GLORIA ANZALDÚA, *BORDERLANDS / LA FRONTERA: THE NEW MESTIZA* 72–73 (1987).

189. *Id.* at 73; *see also* PARUSSA, *supra* note 138, at 126 (describing negotiation between subject and the surrounding world in the context of Judaism).

190. RICOEUR, *Hermeneutic of Revelation*, *supra* note 62, at 113.

191. *See id.* at 113–14.

192. Sarat, *supra* note 153, at 455 (emphasis omitted) (quoting FELMAN, *Camus’ The Plague*, *supra* note 139, at 101).

but has heard the story from one who was. In this situation, for the listener, as for the primary witness, recollection is a process of discovery; knowledge is in process, it is evolving and happening.¹⁹³

The role of the witness thus takes many forms. The literary witness has been variously identified as facilitator,¹⁹⁴ “enabler of the testimony,”¹⁹⁵ medium of story,¹⁹⁶ shaman,¹⁹⁷ and conduit.¹⁹⁸ Narrative witnesses frequently will enter into the primary experience vicariously,¹⁹⁹ thereby electing to become victims themselves.²⁰⁰ In some resistance narratives, the literary witness is said to speak in a collective voice²⁰¹ and may, by deliberate choice, form an alliance with the primary subject with an explicit aim to make the relationship democratic.²⁰² In many other contexts, the narrator conspires with a community to “pass on the collective wisdom” of the group.²⁰³

To legitimize the testimony, and to ensure its authenticity, the narrative witness must incorporate experience from the Other’s experience, even in those cases in which the literary narrator is also a primary witness.²⁰⁴ Notably, for the literary writer who is a secondary witness, this willingness to engage the Other requires elimination of privileged aspects of discourse.²⁰⁵ Solidarity between the writer, who is *letrado*, or intellectual, and primary witness is essential.²⁰⁶ Their work together has been described as a dialectic between oppressor and oppressed,²⁰⁷ in which the testimonial novel becomes the “field of conflict.”²⁰⁸ In this sense, the work of literary witness is non-heroic;²⁰⁹ its

193. LAUB, *Bearing Witness*, *supra* note 137, at 62.

194. See FELMAN, *Camus’ The Plague*, *supra* note 139, at 109.

195. LAUB, *Bearing Witness*, *supra* note 137, at 58; see Wiesel, *supra* note 143, at 5.

196. STEELE, *supra* note 145, at 2.

197. ANZALDÚA, *supra* note 188, at 66.

198. CRAFT, *supra* note 28, at 20.

199. LAUB, *Bearing Witness*, *supra* note 137, at 57.

200. FELMAN, *Camus’ The Plague*, *supra* note 139, at 117–18 (describing the philosophy of Albert Camus).

201. *Id.*

202. CRAFT, *supra* note 28, at 21.

203. Doctorow, *supra* note 146, at 21.

204. See LAUB, *Bearing Witness*, *supra* note 137, at 58.

205. CRAFT, *supra* note 28, at 15.

206. *Id.* at 20.

207. See *id.* at 20.

208. *Id.* at 3–5.

209. *Id.* at 2 (examining the novels of Nobel laureate Rigoberta Menchú).

creation demands ego suppression in order that the solitary hero figure of the narrator disappears.²¹⁰ It is more than just an intellectual alliance, then; the collaboration intentionally exposes—and exploits—the “connection between knowledge and power.”²¹¹

Although much about this work is collaborative or communitarian, the burden of the narrative witness is nevertheless solitary.²¹² She speaks in her own language, disguised in “enlightened bias,”²¹³ by means of connectivity that allows her to speak for and to others.²¹⁴ Such work is not without hazards. What the witness seeks to do may be nothing less than recreate the experience in text.²¹⁵ Thus, there is a need to work out the ownership of truth²¹⁶ as well as a constant struggle to resolve both the primary and secondary witnesses’ inability to say all or be completely true.²¹⁷ The narrator must also deal with a confluence of roles: that of victim, witness, and judge.²¹⁸ Finally, the witness, who has “had the privilege of surviving and who therefore ha[s] the responsibility . . . [of bearing] witness,” must find a way to survive the witnessing.²¹⁹

V. THE LITERARY TESTIMONIAL NARRATIVE AS A MODEL FOR LAWYERS

Many parallels can be drawn between the work of narrative witnesses and that of civic-oriented lawyers. In both fields can be found

210. *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 37, at 174, 183–84. Invited to judge, Levi declined, preferring to serve only as the witness. *Id.* at 180.

211. CRAFT, *supra* note 28, at 7 (quoting BARBARA HARLOW, RESISTANCE LITERATURE 116 (1987)) (internal quotation mark omitted); *cf.* Rice, *supra* note 39, at 3 (describing interracial alliances in relation to anti-lynching efforts).

212. SHOSHANA FELMAN, *Education and Crisis, or the Vicissitudes of Teaching* [hereinafter FELMAN, *Education and Crisis*], in TESTIMONY, *supra* note 33, at 1, 3.

213. Doctorow, *supra* note 146, at 21.

214. FELMAN, *Education and Crisis*, *supra* note 212, at 3. Although, as Albert Camus recognized, a witness cannot speak for all. FELMAN, *Camus’ The Plague*, *supra* note 139, at 118.

215. Rice, *supra* note 39, at 23.

216. COADY, *supra* note 12, ch. 4; WITNESSING LYNCHING, *supra* note 39, at 61.

217. SHOSHANA FELMAN, *Camus’ The Fall, or the Betrayal of the Witness* [hereinafter FELMAN, *Camus’ The Fall*], in TESTIMONY, *supra* note 33, at 165, 197 (failure of representation discussed in the context of Albert Camus’ novel *The Fall*); Signorini, *supra* note 37, at 177–78 (explicating Primo Levi’s struggles with this issue).

218. FELMAN, *Camus’ The Fall*, *supra* note 217, at 198.

219. PARUSSA, *supra* note 138, at 127; *see also* FELMAN, *Camus’ The Fall*, *supra* note 217, at 195–96.

untold stories of silencing, oppression, and trauma. Professionals in both fields confront many of the same issues, including the struggle with the dialectic between oppressor and oppressed, the ownership of truth, vicarious trauma, and authenticity of voice. The testimonial discursive process utilized by and reflected on by writers is transferable to lawyers; the relationship aspects of literary narrative, in particular, are highly relevant.

Moreover, both law and literature carry the scorings of a historical divide. In literature, that divide placed literary fiction and poetry in opposition to history; in law, the divide separates common narrative from hard evidence. In jurisprudence, as in history, the natural religions, and the sciences, “carefully managed circumstantial evidence” dominated the late eighteenth and the nineteenth centuries.²²⁰ In all these areas, but in law in particular, “a narrative arranged from circumstantial evidence became the most favored proof of all,”²²¹ overwhelming evidence of things not seen.²²² In Robin West’s words, unquantifiable knowledge “acquired sympathetically” lost purchase, leading to the “incredibly exalted role we accord to rationality in modern legal discourse.”²²³ This bears noting because, as Tony Alfieri points out, lawyers’ failure to appreciate the widespread institutional subordination associated with such systemic conditions inevitably leads to frustration in the pursuit of more democratic legal process ideals.²²⁴

In the literary narrative context, considerable strides have been made toward bridging the gap. Many experts understand the function of literary genres to “mediate and explain intractable problems.”²²⁵ To some extent this involves attempting to discover what is “real” or to ascertain what is true, with heavy reliance on sympathetically acquired knowledge and with little or no regard for empirical evidence. This is not to say such knowledge is fanciful or not fact-based. Rather, 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.²²⁶

220. WELSH, *supra* note 134, at ix; *see also* Kadoch, *supra* note 63, at 3 (noting how the management of trial narrative occurred late in the development of trial process).

221. WELSH, *supra* note 134, at x.

222. *Id.* at xi.

223. WEST, *supra* note 1, at 325.

224. Alfieri, *supra* note 10, at 1462–63.

225. *E.g.*, MCKEON, *supra* note 55, at 419.

226. Doctorow, *supra* note 146, at 24.

The same cannot be said of law. In ways similar to those undertaken by literary witnesses, however, lawyers *could* shed light on hidden aspects of the justice system and our laws' effects. What is needed is a narrative construct, similar to that forged by literary narrators, that utilizes the experience, expertise, and privileged position of lawyers and does not dismiss the stories deemed immaterial by the judicial system or silence the voices of those most impacted by it.

Even a superficial exploration of the legal milieu illuminates possible applications of literary witnessing theory to law. First, there can be little doubt that modern law practice involves elements of story construction.²²⁷ This is true inside the courtroom, and it is true for law practice outside the courtroom as well.²²⁸ Story construction is a creative process, but while truth may be the hoped-for systemic outcome, truth may or may not be the goal of individuals involved in any story's construction within the judicial system. Story can be purposefully manipulated,²²⁹ or the system may unintentionally constrain accuracy and affect trustworthiness. At the level of legal judgments, where modern trial narrative is structured by rules of evidence,²³⁰ reliability may be sorely lacking even when eyewitness testimony is utilized.²³¹

227. At one time, lawyers' roles in practice were far more "amorphous and diverse." C.W. Brooks, *The Common Lawyers in England, c. 1558-1642*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 42, 42 (Wilfrid Prest ed., 1981). For an examination of lawyers' roles in early Anglo-American history, see Stephen Botein, *The Legal Profession in Colonial North America*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA*, *supra*, at 129.

228. Christine B. Harrington, *Outlining a Theory of Legal Practice*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 49, 63 (Maureen Cain & Christine B. Harrington eds., 1994) (asserting that the whole "concept of legal practice . . . should be treated as . . . historical construction").

229. This is common in litigation in the United States and elsewhere and an almost inevitable consequence of an adversary system. See Menkel-Meadow, *supra* note 11, at 58. Richard Weisberg explores the destructive capacity of language and story construction in an examination of lawyers' work in Vichy France that resulted in the deportation and deaths of many Jews. See RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 143-75 (1992).

230. Kadoch, *supra* note 63, at 8.

231. COADY, *supra* note 12, at 262-64 (discussing studies concerning eyewitness unreliability, including problems with empiricism). See generally RALPH NORMAN HABER & MAURICE HERSHENSON, *THE PSYCHOLOGY OF VISUAL PERCEPTION* (2d ed. 1980); ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1996); *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Peter J. Graham, *The Reliability of Testimony*, 61 *PHIL. & PHENOMENOLOGICAL RES.* 695 (2000); D. Michael Risinger, Michael J. Saks, William C. Thompson & Robert Rosenthal, *The*

Opportunities to create testimonial narrative in service of truth do exist in law, however, and a literary model of witnessing can be used in the courtroom setting. As Drucilla Cornell has pointed out, there are two audiences for every legal act: present and future.²³² For this reason, lawyers may make strategic choices with testimony to impact the future of law as well as the outcome of a case.²³³ Thus lawyers, as well as courageous courtroom witnesses, can engage in the struggle for justice through the strategic use of testimony. The testimonial codes of a courtroom can be challenged by a witness for the sake of truth and history.²³⁴ Austin 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 toward the future where, by virtue of transcripts and other documentation, present injustice will be remembered.²³⁵ Indeed, it may well be that, more important than restoring the public's sense of justice, a public trial can safeguard collective memory.²³⁶ While far from the norm, this approach to the lawyer's role *within* the confines of the judicial system is consistent with the aims of testimonial narrative.

The advantages of broadening perspectives both on testimonial narrative (to embrace the participation of lawyers as public citizens) and on conceptions of lawyering roles (to include testimonial narrative outside the courtroom) are many. An "ideological conception of legal

Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1 (2002).

232. Sarat, *supra* note 153, at 453–54 (citing Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1687 (1990)). It has been noted that the most remembered, and, therefore, arguably the most important, cases in history are those in which the judgments have been seriously questioned. Doctorow, *supra* note 146, at 23.

233. Sarat, *supra* note 153, at 455–56, 463, makes the case that storytelling of the type permitted in mitigation in capital cases should be utilized more broadly.

234. One example is reported by Dorothy Rabinowitz. Rabinowitz, *supra* note 159, at 37. Rabinowitz notes, in the years following World War II, Holocaust survivors learned that the public and the courts could tolerate only so much truth. *Id.* at 35–36. Many survivors, if they told their stories at all, grew accustomed to speaking with the clinical detachment of professional witnesses. *Id.* In one case involving the potential deportation of a former Nazi believed to have been responsible for many murders, one woman challenged the implicit narrative expectations. *Id.* at 37. Having heard historical facts denied, and truth mangled, she testified according to her own conscience, in defiance of courtroom protocols. *Id.* She thereby made accessible real experiences that had rarely found expression in a U.S. court setting. *Id.*

235. Sarat, *supra* note 153, at 454–63.

236. See Signorini, *supra* note 37, at 179.

practice,” as opposed to one confined to functional and structural definitions, takes note of and analyzes consequences of lawyering work.²³⁷ This alone might reinforce the idea of an expanded role definition. Perhaps more importantly, however, narrative work, as critical legal theory, narrative theory, and law and humanities have illuminated, is closely associated with the work of humanists and humanitarians,²³⁸ and just as literature can elucidate minority and discounted positions, the literary or narrative form can be used to expose the relationship between law and justice.²³⁹ The “sympathetic judgment” demanded of those engaged in narrative is apt to lead to a search for the causes of suffering and motivate action in eradicating suffering.²⁴⁰ Those causes are likely to be tied into institutional injustice and inequality.

This is not to say that narrative in law is identical to literary narrative. Limited opportunity exists to fully engage in narrative within the confines of the judicial system. Limits within the system exist in part because the legal context always involves the application of state-sanctioned authority. Additionally, law is embedded in its own normative codes. Within this context, certain narratives are assumed and many are excluded.²⁴¹ Courts use power to limit the number of voices that have access to justice, thereby suppressing the possibilities for communal participation in law-making.²⁴²

Judges, however, do not have to limit voices; they can exercise their power to admit other voices.²⁴³ Nor is it only judges who have the authority to control or broaden a narrative; practicing lawyers have been vested with considerable authority as well. And lawyers are not

237. Harrington, *supra* note 228, at 63.

238. See KIERAN DOLIN, *FICTION AND THE LAW: LEGAL DISCOURSE IN VICTORIAN AND MODERNIST LITERATURE* 8 (1999). Dolin also notes that James Boyd White sees law, like literature, as an interpretive and rhetorical enterprise, a “culture of argument.” *Id.* (quoting JAMES BOYD WHITE, *Reading Law and Reading Literature: Law as Language, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 77, 78–79 (1985)) (internal quotation marks omitted).

239. *Id.* at 8–9 (citing WEISBERG, *supra* note 229).

240. WEST, *supra* note 1, at 326.

241. Cover, *supra* note 15, cited in DOLIN, *supra* note 238, at 10. In effect, Cover was witnessing in a way quite similar to biblical prophets.

242. DOLIN, *supra* note 238, at 14.

243. See *id.* at 11. Dolin places Cover in the company of theorists in social sciences, such as Clifford Geertz, Hayden White, and Louis O. Mink, who see narrative as way to make sense of social realities. *Id.*

limited to the confines of the judicial system in the telling of justice stories. Practicing lawyers, in fact, to a far greater extent than judges, can act as citizens outside case- and court-related boundaries.²⁴⁴ Lawyers are particularly well positioned to engage in social narrative; they have some control over public legal consciousness by virtue of the fact that they are continuous players in the operative systems, allowing them to have significant input into how language is created, translated, and then re-created into meta-language.²⁴⁵

Essayists Stephen Trimble and Terry Tempest Williams, writing about Utah's wilderness lands in a concerted effort to preserve those lands, provide a useful example of witnessing within and outside of the confines of normative legal discourse. In the struggle to create Yellowstone National Park, they report, advocates used "scientific evidence, lyrical descriptions, and—above all—the stunningly powerful photographs of William Henry Jackson and the lush painting of Thomas Moran" to persuade Congress of the need for protective legislation.²⁴⁶ Similarly, Martha Minow describes early work of Gary Bellow and California farmworkers in which the workers confronted public utilities providers at a community meeting with "proof" of below-standard potable water in the form of individual stories and individually gathered bottles of filthy water.²⁴⁷ The underlying causes were corrected and the affected households were compensated for past damages.²⁴⁸ The lawyers in these situations stood ready to act as lawyers, but legal machinations did not move the process of change—stories did. Lawyers, as citizens, always have this kind of option.

There are sound justifications for a movement toward citizen-lawyer witnessing. Just as some literary narrativists see the role of witness as a moral responsibility, many members of the legal profession are guided in their work by personal moral codes. In the literary field are many writers who have acknowledged being motivated, if only partially, by

244. As Christine Harrington notes, lawyers "construct ideologies about law for different audiences." Harrington, *supra* note 228, at 57. Lawyer-client relationships, she further says, are only "one arena." *Id.*

245. *Id.* at 56.

246. T.H. Watkins, *Introduction: Bearing Witness*, in *TESTIMONY: WRITERS OF THE WEST SPEAK ON BEHALF OF UTAH WILDERNESS* 9, 9–10 (Stephen Trimble & Terry Tempest Williams eds., 1996).

247. Martha Minow, *Political Lawyering: An Introduction*, 31 *HARV. C.R.-C.L. L. REV.* 287, 287–88 (1996).

248. *Id.*

religious injunctions. “Remember and observe” is the command from the Torah that Elie Wiesel responds to.²⁴⁹ According to Rosetta Ross, the civil rights activism of the latter twentieth century reflected everyday, religiously grounded practices of witnessing and testifying.²⁵⁰ 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 the rest of humanity.²⁵¹ They represent neither saints nor demons, but people like everyone else.²⁵²

Other—perhaps many more—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 Wiesel reflects.²⁵³ Not to tell, he says, would be perjury.²⁵⁴ Albert Camus speaks more generally of an obligation to make a moral act out of every publication.²⁵⁵ Such motives are familiar to many lawyers who, similarly, are guided in their work by moral and even religious principles.²⁵⁶

Lawyers, in addition to sharing the same or similar values held by testimonial writers, must abide by professional standards of ethical conduct. An awareness of these moral, ethical, and professional responsibilities informs lawyers’ forays into narrative witnessing. The ethical foundations of witnessing for lawyers are different and in some

249. Wiesel, *supra* note 143, at 5 (internal quotation marks omitted).

250. ROSS, *supra* note 142, at 223.

251. Signorini, *supra* note 37, at 185–86.

252. *Id.* at 186.

253. FELMAN, *Camus’ The Plague*, *supra* note 139, at 116 (quoting Elie Wiesel, *Why I Write*, in CONFRONTING THE HOLOCAUST: THE IMPACT OF ELIE WIESEL 200, 202 (Alvin H. Rosenfeld & Irving Greenberg eds., 1978)).

254. FELMAN, *Return of the Voice*, *supra* note 33, at 204 (citing to Elie Wiesel); *see also* Signorini, *supra* note 37, at 174 (attributing similar views to Primo Levi).

255. *See* FELMAN, *Camus’ The Plague*, *supra* note 139, at 114.

256. *See* Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101 (1998); Daniel O. Conkle, *Professing Professionals: Christian Pilots on the River of Law*, 38 CATH. LAW. 151, 167–72 (1998); Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney–Client Relationship*, 16 REGENT U. L. REV. 233 (2004); Bruce A. Green, *The Religious Lawyering Critique*, 21 J.L. & RELIGION 283 (2006); Azizah al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH. L. REV. 947, 961 (1996) (“[R]eligion subconsciously informs our individual professional practice . . .”); *see also* Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 453 (1999) (observing that although they have not “embraced religion,” the authors have been “powerfully influenced by it”).

respects more complicated. The Model Rules of Professional Responsibility lay the groundwork; the Preamble to the Model Rules directly addresses the role of lawyer as “public citizen having special responsibility for the quality of justice.”²⁵⁷ Among other things, the Rules direct that a lawyer “should cultivate knowledge of the law beyond its use for clients” and “employ that knowledge in reform of the law.”²⁵⁸ Lawyers’ professional values, therefore, not only allow for a witnessing role outside the judicial context but support such a role.

Addressing the normative bases for rights and duties of legal educators to speak out, Robert Kuehn notes, first, that lawyers are well positioned to address social and political problems in society, their educational, practice, and professional cultural backgrounds having prepared them to do just that.²⁵⁹ In addition, he points out, the norms of the legal profession include not only pro bono service but a duty to improve the law and legal systems.²⁶⁰ Thus, a lawyer is clearly justified in seeking a forum in which to meet these responsibilities.

The ways in which lawyers may meet their obligations to the profession, the community, and society are not specified, but neither are such roles historically predetermined or decreed.²⁶¹ Certainly, bearing witness to the conditions of clients’ lives and the state of law in operation fits within the expectations. It is a way to recognize that law is a service occupation²⁶² and to recognize that legal systems intersect and often overlap with political systems.²⁶³ Indeed, it is a particularly effective way.²⁶⁴

257. MODEL RULES OF PROF’L CONDUCT pmbi. (1983).

258. *Id.*

259. Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 254 (2003). Kuehn further observes that “[I]aw professors, too, have stepped out of the classroom . . . to address perceived injustices.” *Id.* at 255.

260. *Id.* at 274–76.

261. Harrington, *supra* note 228, at 59 (citing William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 469 (1984)).

262. *See, e.g.*, Stuart Scheingold, *The Contradictions of Radical Law Practice*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION*, *supra* note 228, at 265, 270 (noting that “the premise of liberal lawyering is that clients have interests as well as disputes”).





263. Scheingold, for example, talks about lawyers who seek “to combine political sensitivity with a conventional sense of professional responsibility.” *Id.* at 269.

264. *See, e.g.*, WEISBERG, *supra* note 229, at 251 (“Stories about law . . . provide a unique source of understanding, likely to bring a greater ethical awareness to late twentieth-century legal communication.”). It might even be seen as an imperative. *See* PARUSSA, *supra*

VI. THE CALL TO WITNESS

Whether understood as elemental to ethical or moral obligations, conceived of as a means of achieving social justice, or simply viewed as a needed adjunct to legal proceedings in the public space, the idea of lawyers as witnesses to some degree ultimately is about a relationship to truth. What “truth” is, of course, is a metaphysical question beyond resolution, yet the pursuit of truth is nonetheless an aspect of lawyering work. Accordingly, some exploration of what is meant by “truth” is warranted.



This is Truth: , so is this: , this: , and this: .²⁶⁵

The primary meaning of “true,” the adjective, is “faithful; loyal; constant.”²⁶⁶ Its etymological root is the word for “tree,”²⁶⁷ 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 a turkey or a Christmas tree) and “to put in proper order; make neat or tidy” (as in trim a mustache or a bush).²⁶⁸ 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 etymology of the word should be kept in mind while considering a cultural manifestation of truth’s centrality to narrative in law. An often acknowledged mandate that supports narrative witnessing is the lawyers’ oath. Many of the oaths lawyers take for admission to a state

note 138, at 26 (reflecting on role of “those who have had the privilege of surviving and who therefore have the responsibility of bearing witness and putting history back into motion”).

265. Gurica, Clip Art of Tree, OPENCLIPART (Feb. 27, 2009), <https://openclipart.org/detail/21735/tree>, archived at <https://perma.cc/UP5D-U5QM>; Jykhui, Clip Art of Red Aifowers Tree, OPENCLIPART (June 8, 2013), <https://openclipart.org/detail/179135/red-aifowers-tree>, archived at <https://perma.cc/D78G-T2SG>; Merlin2525, Clip Art of Winter Tree 1, OPENCLIPART (Jan. 9, 2012), <https://openclipart.org/detail/166963/winter-tree-1>, archived at <https://perma.cc/25C8-4UBK>; Stevepetmonkey, Clip Art of Palm Tree, OPENCLIPART (Sept. 25, 2010), <https://openclipart.org/detail/86761/palm-tree>, archived at <https://perma.cc/BMZ4-RQ7T>.

266. WEBSTER’S DICTIONARY, *supra* note 41, at 1563.

267. *Id.*

268. *Id.* at 1557.

bar include a promise to “do no falsehood.”²⁶⁹ This promissory language dates back at least 350 years, to the earliest recorded lawyers’ oaths in England.²⁷⁰ In the United States, as recently as 1908 a Model Oath was on same the footing as the Model Rules’ precursor, the ABA Canons of Professional Conduct.²⁷¹ The oath, in fact, may be the key connector between the lawyer’s role as advocate and the lawyer’s role as public citizen, between courtroom narrative and testimony, between storytelling and truth.

The exact origins of oaths are unknown, but the oath is an ancient tradition. Indeed, a “belief in the self-operative magic of the oath” preceded even the belief in the oath as a harbinger of divine intervention.²⁷² “The oath was a self-curse, uttered in conditional form, operating irrevocably upon occurrence of the condition.”²⁷³ It later evolved into a call on a Supreme Being to witness, punish, or both if spoken words proved false.²⁷⁴ Throughout early Anglo history, the oath operated as a means of social control.²⁷⁵

What the Germanic tribes brought to the practice of oath taking was a different conception of truth. Their notion of truth corresponded to a condition of having prevailed; the spoken oath was an expression of solidarity with those whose success gave them power.²⁷⁶ In the German tradition, the oath carried no presumption of, or even association with, knowledge.²⁷⁷

As a result, as the northern European cultures began to merge, the oath underwent a transformation.²⁷⁸ In the early Middle Ages, in Anglo-Saxon legal culture, the oath was sometimes the judgment itself, still very much operating as truth per se.²⁷⁹ But by the late Middle Ages,

269. Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 4 (2009).

270. *Id.*

271. *Id.* at 43. Shortly before the ABA Canons were replaced by the Model Rules in the early 1980s, some minor changes were made to the Model Oath. *Id.* at 43–44. Ethics compilations no longer include the Model Oath, but it has not been repealed. *Id.*

272. Helen Silving, *The Oath* (pt. 1), 68 YALE L.J. 1329, 1363 (1959).

273. *Id.* at 1330.

274. Andrews, *supra* note 269, at 7.

275. Silving, *supra* note 272, at 1389.

276. *Id.* at 1340.

277. *Id.* at 1334, 1345.

278. *See id.* at 1361–63.

279. *Id.* at 1362.

oaths, as a general matter, had taken on more characteristics of a promise, a personal assurance of future truthful or honest conduct.²⁸⁰

Changing social conditions, more democratic social power structures, and cognitive, technological, and scientific advances affected the population's interface with objective realities.²⁸¹ The merger of continental inquisitorial practices with the British Isles' tradition of appeals to superhuman powers meant a still potent but largely undefined oath was operating in the courts. Ultimately, the oath became a promise to tell what was in the witness's own knowledge.²⁸² This, then, came to represent truth.

For the last several centuries, since the advent of evidence laws, the emphasis of in-court testimony has been on such "knowledge" or "true representations" of the acts described.²⁸³ This differs markedly from what preceded and reflects the growth of probabilistic thinking in late Renaissance Europe.²⁸⁴ Initially, evidence law proponents and commentators did not see evidence as divorced from the oath and its claims to knowledge based in religion and human morality,²⁸⁵ but the move from intangible proof to empirical evidence coincidentally impacted understandings of truth.²⁸⁶ The "modern regard for the evidence of things" meant a complementary distrust in representations of things not seen or quantified.²⁸⁷ The oath lost its super-utilitarian function. Over time, there were many calls to abandon the oath as irrational, based as it was on long-ago abandoned ideas of humanity's relationship to the supernatural.²⁸⁸

The oath was not abandoned, however. In the late nineteenth century, evidence scholar Simon Greenleaf observed that a shift had been made: a courtroom witness taking an oath no longer called on God as witness; rather, the oath was a way to call on the witness to be

280. *Id.* at 1352.

281. *Cf.* HELEN SILVING, SOURCES OF LAW 15 (1968).

282. Silving, *supra* note 272, 1347–48.

283. WELSH, *supra* note 134, at 10–11.

284. *Id.* at 11.

285. Kadoch, *supra* note 63, at 6.

286. As Kadoch notes, the early tolerance for reliance on intangible proof in conjunction with reliance on "hard" evidence was later criticized. *Id.* at 6–7. At the same time, John Locke wrote of how reliance on testimony in court was limiting to history. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. IV, ch. 16, § 11, at 664 (Peter H. Nidditch ed., 1975).

287. WELSH, *supra* note 134, at 12.

288. Silving, *supra* note 272, at 1357–58, 1389.

conscious of God.²⁸⁹ Similarly, but more broadly, Wigmore noted the value of the oath as promoting a witness's awareness of "superhuman moral retribution."²⁹⁰ Thus, the oath continued to be utilized, if only for whatever value could be gleaned from sending a message to witnesses that their testimony was a grave undertaking.²⁹¹ It is noteworthy that the oath is still recognized as significant, solemn if not sacred.²⁹² The apparent significance of oaths declined,²⁹³ but the power of the oath did not disappear; it simply went underground.

Where this dive into legal and literary history leads is to a suggestion that the inherent promise of the oath took root in literary narrative. It is as if, for several centuries, literary narrators have been the guardians of the solemn promise needed to "well serve our best understanding of our true human needs."²⁹⁴ Lawyers who seek to honor that promise, then, may find guidance from the literary field and role models in literary narrative witnesses.

Centuries ago, the perceived presence of an all-knowing authority pervaded everyday life; the role of witness was to communicate its presence. The singular function of witnesses was to take an oath; there was no narration. After the Norman Invasion, jurors were charged with ascertaining the story behind a case, but there was as yet no courtroom narrative. Over time, juror and witness roles developed and then diverged, ultimately leading to the kind of in-court testimony with which western societies are now familiar. Courtroom narrative was very quickly circumscribed, however, in part to rein in long, untidy stories. More to the point, the role of story narration was not entrusted to witnesses, who had, through the practice of wagering law, shown fallibility and disrespect for the oath.

289. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 364a, at 504 (Boston, Little, Brown, & Co., 16th ed. 1899), *cited in* Silving, *supra* note 272, at 1371.

290. 6 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1816, at 285–86 (3rd ed. 1940), *quoted in* Silving, *supra* note 272, at 1371. Silving calls this "civil blackmail." Silving, *supra* note 272, at 1389 (internal quotation marks omitted).

291. Silving, *supra* note 272, at 1371.

292. Andrews, *supra* note 269, at 55.

293. See BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE 141–44 (1983) (describing the conflict over the relative values of eyewitness testimony and traditional reliance on attested documents).

294. WEST, *supra* note 1, at 7.

The desire for control over irrepressible testimony heralded the introduction of evidentiary constraints. The modern judicial system quickly constricted the range of oral testimony, not only prescribing the witness's narrative framework but ultimately attenuating the gravity of the oath-taking act. By the seventeenth century, reliance on external evidence signaled the decline of essentialist authority, heralding the transformation from metaphysics and theology to epistemology.²⁹⁵ The sixteenth and seventeenth centuries saw a "change in attitudes about how truth and virtue are most authentically signified."²⁹⁶

Meanwhile, advances in record collection and preservation brought inflated confidence in eyewitness testimony and documentary materials,²⁹⁷ and rationalism became the buzzword of intellectual circles in the seventeenth century.²⁹⁸ Judicial procedure emphasized the logical content of human speech, so much so that the preternatural quality of the oath was all but forgotten.²⁹⁹ In the end, formal completion of judicial process was emphasized over virtuous certainty, with loss to story in the judicial system. Story narration was slowly given over to the expanding field of literature. "Romance" and "history" developed, "rooted in the empirical" yet still "empowered by an essentialist authority."³⁰⁰

Now, society "runs on empirical thinking and precise calculations."³⁰¹ Knowledge has taken on a character of infinite process, which results not just in quantitative changes in knowledge but the qualitative transformation of history.³⁰² In such a world, it appears that "[t]o be saved by a transcendent Truth requires the increasingly separable and prior act of being empirically convinced of it."³⁰³ But through this movement away from a priori authority as the center of knowledge, we have also come to the understanding that truth does not exist outside

295. SHAPIRO, *supra* note 293, at 182–83, 261.

296. MCKEON, *supra* note 55, at 20.

297. *See id.* at 43. Archiving is an ancient practice, and in Europe, it began in earnest in the early thirteenth century. LE GOFF, *supra* note 60, at 75. Previously, in ancient Greece, official memory officials were relied on by the judiciary to be keepers of official data. *Id.* at 63. With the advent of documentation, they became archivists. *Id.*

298. LE GOFF, *supra* note 60, at 149, 194–95.

299. GREENLEAF, *supra* note 289, § 364a, at 504.

300. MCKEON, *supra* note 55, at 38.

301. Doctorow, *supra* note 146, at 17.

302. LE GOFF, *supra* note 60, at 115.

303. MCKEON, *supra* note 55, at 83 (discussing claims respecting the "truth" of scriptures).

power, as some eternal, neutral given waiting to be discovered.³⁰⁴ In other words, there are no facts in themselves, divorced from meaning; for a fact to exist, meaning must be introduced.³⁰⁵ Neither truth nor meaning is static or unassailable; moreover, a responsiveness is called for.³⁰⁶ In such an environment, witnesses are needed, more than ever.

A marriage of the rational, empirical side of thought with the intuitive, story-oriented side is long overdue. The conceptual duality that has pitted the tangible-empirical against the intangible-imaginative for two hundred years is certainly more of a tension than a divide. Addressing this issue, Parussa explains:

The point is not to concentrate on the threat that imagination may pose to the integrity of historical narratives but to move from historical events to the explanations and knowledge that are created through the narration of events—and, at the same time, to move to a kind of narrative that incorporates historical facts without denying the existence and the importance of the subjective gaze.³⁰⁷

He is speaking of an evolutionary process, a progression of events that moves from a cognitive understanding to an interpretation of events, then proceeds to a narrative of those events which includes both deliberate choice and placement of known facts and some injection of meaning. This constitutes, as he notes, “a difficult but vital exercise of mediation between history and imagination: an act of ethical responsibility toward the historical past as well as an act of free imagination and preparation of the future that lies ahead.”³⁰⁸

Again, the integration of apparent opposites is deeply embedded in both history and mythology. History, we now understand, nourishes memory.³⁰⁹ “[M]emory ends where history begins”; conversely, history

304. CRAFT, *supra* note 28, at 6 (referencing Michel Foucault).

305. Doctorow, *supra* note 146, at 23 (quoting 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.

306. ROSS, *supra* note 142, at 15.

307. PARUSSA, *supra* note 138, at 36.

308. *Id.* at 37.

309. LE GOFF, *supra* note 60, 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).

begins where memory fades.³¹⁰ In ancient Greece, memory, the raw material of history, took the form of a goddess. Mnemosyne, daughter of Uranus, god of the heavens, and, by Zeus, mother of the muses, had two roles: to preserve human heroic deeds and to preside over lyric poetry.³¹¹ She is also credited with inventing words and language.³¹² 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.³¹³

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."³¹⁴ 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.³¹⁵ This is the function of witness.

Considered in this way, the act of witness "belongs to the tragic destiny of truth."³¹⁶ The witness therefore has the responsibility of ensuring that truth is ethically framed by committing narrative to memory and memory to history.³¹⁷ 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. Lawyers have the ability to contribute to the revival of the power of witnessing, simply "trust[ing] that the story is powerful enough to transform."³¹⁸

310. Signorini, *supra* note 37, at 189 (citing MAURICE HALBWACHS, *LA MEMORIA COLLETTIVA* (1987)).

311. LE GOFF, *supra* note 60, at 64.

312. *See id.*

313. *Id.*; *see* BOORSTIN, *supra* note 67, at 480–81.

314. RICOEUR, *Hermeneutic of Revelation*, *supra* note 62, at 102.

315. *Id.* Ricoeur calls this "redescription." *Id.*

316. *Id.* at 113.

317. *See* FELMAN, *Return of the Voice*, *supra* note 33, at 204.

318. Marie A. Failing, *Is Tom Shaffer a Covenantal Lawyer?*, 77 NOTRE DAME L. REV. 705, 792 (2002).

VII. CONCLUSION

The work that lawyers do has not only legal and ethical implications, but political, social, and moral implications as well. Their position in the social order provides lawyers with the opportunity, and in fact a privileged position from which, to testify. While law affords 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. 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.

What ensures 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?³¹⁹ The answer, as I have tendered, may lie in the ancient rite of moral obligation that was once depended upon to ensure truth-telling: the oath. While narrative theory is emphasized in the analysis of witness role and method, this 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 lawyers’ professional privileges that can make a difference, but the promise of truth—a covenant, a sacred oath—that signals and constitutes a return to authentic witnessing.

The “Call to Witness” is an entreaty to look to stories and narratives, acts of witness in both fictional and nonfictional forms, for a partial answer to the questions posed by Robin West a decade ago. Narratives bring to light the real conflicts underlying court cases and law, the motives that are dismissed as irrelevant, and the ever-present ambiguity of circumstances. Picking up at key moments in time before or after the law is invoked, stories demonstrate the consequences of our actions and the agonizing responsibilities of choice. These are the stories people often want to tell but cannot, and the stories people are afraid to tell but recognize as crucial. Using literary narrative witnessing strategies,

319. Doctorow, *supra* note 146, at 18.

lawyers can shed light on hidden aspects of the justice system and our laws' effects. Thus witness—the authorship of testimony—is still an appropriate concept for the conscientious care of memory and truth. The memory that is maintained through testimony, and the truth that is thereby shaped, can only serve justice, however, if the testimony is formative, and not just informative.