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SO HELP ME GOD: REFLECTIONS ON LANGUAGE, THOUGHT, AND THE RULES OF EVIDENCE REMEMBERED

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"[B]y our doing and our ways of knowing we make ourselves what we are."[1]

INTRODUCTION

"Many crucial facts lie beyond the time and place of [an] interaction or lie concealed within it."[2]

From its earliest form, the trial by ordeal,[3] the Anglo-American trial has aspired to achieve a

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1. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 140 (1987) (paraphrasing an Aristotelian insight).

2. N. SCOTT MOMADAY, THE NAMES: A MEMOIR (1976).

3. *See* CASSELL'S LATIN-ENGLISH DICTIONARY (1987). Ordeal comes from the Latin roots meaning justice of God. *Id.*

Rationalist Model[4] of adjudication characterized by rectitude.[5] It was this aspiration that eventually

4. *See* W. L. TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 16-17 (1985); W.L. TWINING, RETHINKING EVIDENCE 71 (1994). Twining developed the theory of the "rationalist model of adjudication." W. L. TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 16-17 (1985). The theory asserts that the fundamental aim of modern adjudication is rectitude of decision-making. *Id.* Rectitude is achieved by the correct application of substantive law to the true facts of a dispute. The facts are determined through the accurate evaluation of relevant and reliable evidence by a competent and impartial adjudicator applying the specified burden and standard of proof. *Id.* There must be adequate safeguards against corruption and mistake and adequate provision for review and appeal. *Id*. Methodologically, I proceed from Twining's assertion that "by and large the leading Anglo-American scholars and theorists of evidence from Gilbert [(1754)] to Wigmore [(1st ed. 1904-08)] (and, for the most part, until the present) have either implicitly or explicitly accepted" the "rational core" of the Rationalist Model of Adjudication. Twining lists the factors that comprise the rational core:

A. Prescriptive
1. The direct end
2. of adjective law
3. is rectitude of decision through correct application
4. of valid substantive laws
5. deemed to be consonant with utility (or otherwise good)
6. and through accurate determination
7. of true past facts
8. material to
9. precisely specified allegations expressed in categories defined in advance by law, i.e. facts in issue,
10. proved to specified standards of probability or likelihood
11. on the basis of the careful
12. and rational
13. weighing of
14. evidence
15. which is both relevant
16. and reliable
17. presented (in a form designed to bring out truth and discover untruth)
18. to a supposedly competent
19. and impartial
20. decision-maker
21. with adequate safeguards against corruption
22. and mistake
23. and adequate provision for review and appeal.

B. Descriptive
24. Generally speaking this objective is largely achieved
25. in a consistent
26. fair

drove the necessity for, and development of, Rules of Evidence. Over time, as the trial gradually morphed from the ordeal into a more familiar model and narrative became a component of trial process, maintenance of the Rationalist Model fell upon the shoulders of the Rules of Evidence, which evolved accordingly. What is most intriguing about the evolution of the Rules and maintenance of the Rationalist Model is the existence of two premises, little mentioned in scholarship today, upon which the foundation of rectitude rests. The first is the premise that from the time of the ordeal, God[6] has been and continues to be an essential component of the rectitude of the trial. God's presence still lingers in the courtroom in spite of successful attempts of principle and rule to operate a secular, rationally based system of law. The second premise is that the underlying mission of the Rules, also essential to rectitude, is its linguistic function;[7] in other words, the management of trial orality or narrative which was historically a late comer to trial process. This linguistic function is related to and has been dependent upon the presence of God in the courtroom. Together the premises are woven into the fabric of the trial process in the modern day courtroom which has become a seminal speech event.

In this article I introduce and examine the significance of these two premises in the evolution of the rationalist model of trial and the correspondent ideology of the Rules of Evidence. I posit through both narrative and empirical data that the premises are neither fully appreciated nor fully

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27. and predictable manner that encompasses rectitude of process. *Id.*

5. *See* J.I. RODALE, THE SYNONYM FINDER 998, n.1 (1978) (including the following as synonyms for rectitude: moral virtue, moral strength, integrity, probity, morality, uprightness, rightness, goodness, virtuousness, righteousness, honorableness, honor, virtue, decency, upstandingness, respectability, good character; veracity, honesty, truthfulness, credibility, guilelessness, scrupulousness; impeccability, unimpeachability, irreproachability, uncorruptness, cleanness).

6. I define God or the spiritual presence of God in a non-religious paradigm. Despite the fact that God's initial official inclusion in the Anglo-American trial can be traced to Church involvement in the social administration of community, the concept of a God or Gods who inspire us to all of the characteristics of rectitude is as old as mankind. It is this aspect of spirituality or a divine presence that causes us to aspire to a higher level of behavior. This is the definition of God to which this article refers. Whether we are reminded of such a God through symbolism (verbal, spatial, or tangible) or an actual sense of the presence of God, what I suggest is that the awareness, whether conscious or unconscious, takes our mind to places where we might be guided by higher aspirations. We can be transported to a super position of spirituality which can be distinguished from the everyday world. The courtroom has been conceived with characteristics that aspire to take us to such a place.

7. When referencing the linguistic function I distinguish it from a substantive function as follows: The linguistic function guides the use of language mindful of the relationship between language and thought in the seminal speech event which the trial has become. The substantive function represents a concern for the fairness, relevance, and reliability of introduction of certain kinds of evidence.

explored in scholarship today. I suggest that as a result the Rules are potentially weakened in their ability to maintain the rationalist balance to which the trial aspires, both in process and outcome.

The relationship of the two premises to the operation of the courtroom is a complex notion to comprehend. The difficulty stems from the need to view ideas about the trial as a seminal speech event through an interdisciplinary lens. In any speech event the meaning of language is enriched by the uses that people make of it, including the symbolic components as well as the written and unwritten rules of that usage.[8] The uses and the meanings transmitted, are historically, situationally, socially, and culturally dependent.[9]

In light of these ideas, this article posits that the significance of the premises to the operation of the speech event we call a trial is threefold. First, God or the symbolic presence of God was purposefully transported from the trial by ordeal into the Anglo-American courtroom as an integral part of the early attempts to form a Rationalist Model of adjudication. Second, as the trial settled into the courtroom and trial procedure gradually developed to incorporate elements of a speech event, the need for rules that advanced the goals of the Rationalist Model that choreographed and controlled the unique use of language[10] in the courtroom emerged. Since God's presence was fixed into the courtroom both prior to and during the early introduction of both language and rules into the trial process, the spiritual presence became an integral piece of the foundation upon which the later operation of the linguistic function of the Rules of Evidence was built. Finally, although the linguistic function of the rules is so inherent to the rationalist operation of the trial, and the presence of God and the trepidation of spoken language are such integral components of that function, it is surprising how conspicuously absent the topics are from any current scholarly dialogue about the courtroom, the trial process, or the Rules of Evidence. It is this absence of attention that renders the Rationalist Model vulnerable.

I must emphasize at the outset that the problem I raise is not that there is a lack of dialogue about God and the courtroom, about trial rhetoric, narrative, or about the law of evidence. In fact there are growing volumes of such scholarship. Rather, my concern is that currently the dialogue segregates topics which are intricately significant to the sustainability of our current Rationalist Model of adjudication, which relies upon the Rules of Evidence for rectitude of process and rectitude of outcome. Complicating the problem is the fact that it is easy to understand the segregated approach. Even within the scholarship of discourse analysis, the growing bodies of interdisciplinary writings on the relationship between language and thought have not yet focused upon the unique nature of the Rules of Evidence as rules of discourse.

Today scholarly conversations about God or the law of evidence as they relate to the Anglo-American courtroom take place within a purely substantive legal discussion not within the realm of anthropology, psychology, or ethno-linguistics. For example, interest in God's symbolic presence at

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8. NANCY BONVILLAIN, LANGUAGE, CULTURE, AND COMMUNICATION: THE MEANING OF MESSAGES 1 (1997).

9. *Id.*

10. As use of language became a component of the trial process itself as a means of achieving rectitude of process, the rectitude of outcome rules were needed to ensure the manner of usage did not undermine the goals of the Rationalist Model.

trial today, primarily focused on the substantive issue of separation of church and state, removes God from the courtroom setting.[11] Substantive interest in the law of evidence is focused upon such topics as the reliability and admissibility of scientific evidence; in other words, attention is on what evidence gets in or can be kept out, rather than upon the effect of the usage of a particular mode of language on the thought processes of jurors.[12] Notable scholarship today focuses on legal narrative[13] both surrounding and during the trial, but it too excludes recognition of the unique linguistic rules of evidence operative during the trial event. Finally, attention on trial rhetoric, which is actually a hot commodity in legal journals and on the conference circuit today, proceeds from a literary paradigm which explores various rhetorical techniques as they relate to the persuasive presentation of the trial story.

The problem which arises from these widely ranging fields of scholarship is that none of this scholarly dialogue about God or trial narrative is connected to or concerned with the significance of the linguistic function of the Rules of Evidence as they oversee the relationship between language and thought in the courtroom. And conversely, none of the scholarship of the law of evidence is connected to the linguistic function of the rules. Thus, two foundational components of the Rationalist Model, the inter-related spiritual or symbolic presence of God still operative in the courtroom and the complex characteristics of orality await notice enshrouded on the sidelines. This segregated attention to the purely substantive aspects of the courtroom event is parochial.

Within the legal academy, this limited perspective on the Rules of Evidence was not always

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11. *See, e.g.*, The Supreme Court, 2004 Term – Leading Cases, I. Constitutional Law, E. Establishment Clause, 2. *Government Display of Religious Symbols—Ten Commandments*, 119 HARV. L. REV. 248, 257 (2005) (commenting on the continued lack of clarity of United States Supreme Court Establishment Clause jurisprudence in two cases involving the display of the Ten Commandments on state property, including courtrooms and stating that "[i]f one understands liberty of conscience broadly, such that it is violated by indirect coercion of individual belief, the Ten Commandments monument might indeed transgress constitutional limits since, at least to some degree, it places the power of government behind a Judeo-Christian belief system and imposes on viewers a passive form of religious observance").

12. *See* Symposium, *Panel Three—The Role of Scientific Evidence*, 80 IND. L.J. 69 (2005) (discussing the Massachusetts Governor's Council Report's "unprecedented reliance on scientific evidence to help reduce the incidence of error in capital cases").

13. *See generally*, PAUL HEALD, LITERATURE & LEGAL PROBLEM SOLVING 3–13 (1998) (asserting that the marriage of law and literature can provide a basis for ethical discourse about the law); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE 386 (1992) (pointing out that "profound, sustained reflection about the nature of the emotions with a call for their dismissal from the pursuit of wisdom and understanding" has occupied "[t]hinkers as diverse as Plato, Aristotle, Epicurus, the Stoics, and Spinoza"); Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (providing a systematic appraisal of legal storytelling scholarship); Gerry Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A. 63, 63 (1986) (asserting that lawyers have forgotten something they once knew about storytelling and have mistakenly begun to speak through intellect rather than emotion).

the case. The early treatise writers and commentators on the evolution, nature, and purpose of the Rules of Evidence do include in their writings significant references to human nature and God as they relate to an oral search for truth, the linguistic function of the Rules. In 1810, Bentham wrote that "the field of evidence is no other than the field of knowledge."[14] Simon Greenleaf, who compiled the first American treatise on evidence in 1842,[15] is eloquently illustrative. He recognized the complexity of the law of evidence. He praised the "symmetry and beauty of this branch of the law," and, quoting Lord Erskine, noted that its principles were "founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life."[16] In 1849 W.M. Best, a Barrister of Gray's Inn, expounded on the "enunciation of truth . . . among men in their intercourse with each other," suggesting that truth is "secured by three guarantees or sanctions—the *natural* sanction, the *moral* or *popular* sanction, and the *religious* sanction."[17] These scholars were not simply "philosophizing" as some later criticized,[18] rather they recognized the inherent complexity and interdisciplinary nature of the law of evidence.

However, by the late 19th century scholarly focus had shifted primarily to the substantive development of the law of evidence. One impetus for direction toward the substantive can be found in the efforts of Bentham and others along with the British Parliament during the 19th century to eliminate or reconfigure the exclusionary rules.[19] The debate over exclusionary rules was long and

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14. William Twining, *Evidence as a Multi-Disciplinary Subject*, 2 LAW, PROBABILITY & RISK 91 (2003) (addressing the multi-disciplinary characteristics of Evidence; Twining quotes Bentham). *See also* JEREMY BENTHAM, AN INTRODUCTORY VIEW OF THE RATIONALE OF THE LAW OF EVIDENCE FOR USE BY NON-LAWYERS AS WELL AS LAWYERS (vi The Works of Jeremy Bentham 1-187, Bowring edition, 1837-43) (James Mill circa 1810, ed.).

15. SIMON GREENLEAF, A TREATISE ON EVIDENCE (1842).

16. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 508–09 (1889).

17. W.M. BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE 11 (1849). Best offers a definition of the Latin, "evidentia," and the French "evidence," from Johnsons Dictionary: "the conviction produced by the testimony of our senses." *Id.* at 8.

18. *Notes on Current Topics*, 42 AM. L. REV. 755, 764 (1908). This article focuses on Charles Frederic Chamberlayne, Esq.. Chamberlayne was recommended by Professor Thayer of Harvard as being a suitable person to write the new American edition of "Best" on the "Principles of the Law of Evidence." "The American notes to this edition at once commended themselves to the profession, not only in matter of substance, but by reason of a certain terseness of style, a characteristic directness and pungency of expression, a power of getting at the heart of things which has always given Mr. Chamberlayne a unique position, as contrasted with more philosophizing writers on the subject."

19. *See generally*, C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (1997). Allen presents an enlightening thesis suggesting that Bentham's "Immense influence" on the law

substantively focused. It moved discussion of one aspect of evidence law from the practitioners' dialogues of the early treatises to a broader political and social realm. Many scholars since have alternately critiqued Bentham's influence on evidence law and viewed evidence law through Bentham's substantive lens.[20] A second impetus for the shift emerged at the end of the 19th century in the search for an organizing principle through which to address the law of evidence. The perspective of one simple system of evidence doctrine, the one guiding principle, was first advocated by Thayer who died before thoroughly exploring this idea.[21] With Thayer's death at the turn of the century, his students, among them Wigmore, Chamberlayne, and McKelvey, took up the cause to continue the search for a "more excellent way" to present the law of evidence[22] and through which to understand and explore the earlier writings. This quest to find Thayer's "more excellent way" turned the scholarly exploration of evidence away from the earlier interdisciplinary "philosophizing" to a narrowing of focus.[23] From the end of the 19th century forth, aspects of the historical, spiritual, and psychological components of the Rules of Evidence embodied in the linguistic function, while occasionally referenced tangentially, essentially disappeared from the scholarly radar.

At its heart, this article is a prompt for remembrance of the linguistic function of the law of evidence and an invitation for an interdisciplinary dialogue about the complex relationship between language and thought at work in the extraordinary speech event we call a trial. My call for a recollection of an interdisciplinary linguistic conception of the function of evidence finds support from noted scholar William Twining who wrote in a 2003 article that "this is a particularly promising time to make evidence the subject of sustained inter-disciplinary attention"[24] and "for

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of evidence might be exaggerated. I reference Allen's perspective on the lengthy debates over the exclusionary rules. It suggests for my thesis that discussion of evidence law moved from the practitioner's realm into main stream political and social commentary during the 19th century. I suggest that this perspective from outside of the courtroom solidified focus on the substantive qualities of evidence law and away from focus on the unique orality or seminal speech event which was taking place in the courtroom.

20. *Id.*

21. *Id*. at 761. Chamberlayne believed that the law of evidence should be molded "into a scientific and flexible body of rules, which should force general adoption." Yet, even Chamberlayne seems conflicted, for he criticizes the "degradation of Evidence from a scientific system for reaching truth, to a bundle of empirical rules." *Id.* at 768. In so criticizing the direction that writings on Evidence have taken, Chamberlayne also criticized Thayer's reliance on the historical perspective. *Id.* at 760-61. And Thayer himself, who perceived of a guiding principle around a best evidence rule, attacks and downplays Erskine's sentiments in his Preliminary Treatise on Evidence, *At the Common Law*, published by Little, Brown, and Company (Boston 1898) at 509.

22. *Id.* at 758-63.

23. *See generally*, IMWINKELREID & WEISSENBERGER, AN EVIDENCE ANTHOLOGY (1996).

24. Twining, *Evidence as a Multi-Disciplinary Subject, supra* note 14, at 1.

making Evidence a multi-disciplinary field in its own right."[25]

In Part I of this article I present the reader with an interdisciplinary lens through which to consider the trial as a seminal speech event. The focus is upon the broader conceptions of a speech event and the relationship between language and thought. I draw upon available knowledge from the anthropology of orality; sociological aspects of the relationship between language and thought; the psychology of symbolism; and architectural theories of space and meaning. I introduce concepts that endorse a rediscovery of the significance of the linguistic function of the Rules of Evidence and examination of the historically inter-related oral and spiritually symbolic features deeply embedded in the modern courtroom event. In Part I the focus is on what we can "know" now about the complexity of the trial as a speech event from various interdisciplinary approaches. Parts II and III trace the linguistic evolution of the trial from the ordeal, where God's voice provided the absolute truth, to the modern trial that depends upon oral witness testimony choreographed by rules of evidence and remnants of oath to achieve a qualified truth, a seminal speech event. I posit throughout that the Anglo-American trial has from the beginning aspired to the reasoned thinking espoused by Plato, Spinoza, and the rest, and that the Anglo-American trial evolved over a long period of time into an oral process that uses rules of evidence to deflect the emotionally based aspects of narrative in an attempt to lead the jury to a reasoned, rather than an emotionally driven judgment. Part II tells the first half of the linguistic story of the trial with a focus on the events and ideas that triggered introduction of human voices into the trial process from the ordeal which featured God's voice to that of the jury and then the lawyer. From this history emerge the two premises: the steadfast presence of God, symbolic or actual, and the delayed and hesitant entry of narrative into trial procedure. Part III synthesizes from available sources the story of the introduction and evolution of the modern witness voice and the concurrent development of rules of evidence. These sources include tangential mention of the witness in historic writings about the Anglo-America trial; early treatises on evidence which show a preference for written "testimony" and expound on the philosophical nature of man; and the only treatise ever written on the law of witnesses dated 1887. I illustrate the ways in which the early writers on the law of evidence embraced a broad interdisciplinary perspective in their treatises. In the Conclusion I briefly explain how focus shifted to the development of substantive evidence law which took prominence in legal scholarship. I conclude that scholarly unconsciousness of the linguistic function of the rules poses immediate dangers to the Rationalist Model of Adjudication.

I. An Interdisciplinary Lens: On Rationalism and the Hidden Dimensions of the Trial Speech Event

Today the terminology of discourse analysis and the perspective of architects and anthropologists provide the means to more explicitly consider the "hidden dimensions" of the speech event we know of as a trial and the courtroom within which it takes place. These "hidden dimensions" include both written and unwritten rules of communication and interpretation, symbolic influence and meaning, and perception of place. They are themselves complex as they emanate from our innate biology as well as from historic patterns and experience. They provide windows into the intriguing role that rules of evidence play in the relationship between language and thought

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25. *Id.* at 2.

operational in an oral Rationalist Model of adjudication.

This brief introduction to some of the "hidden dimensions" of communication and the interdisciplinary approaches to their study is offered to introduce the reader to a linguistic lens through which to view the history of the Anglo-American trial and to consider the ideas presented in this article. In the linguistic history of the trial which follows in Parts II and III the reader will view two aspects of the trial story related to the relationship between language and thought and the linguistic significance of the rules of evidence. The first is that the symbolic presence of God still lingers in the courtroom and exerts an influence on the speech event that takes place there. The second, a multi-layered aspect, is that until the lawyer entered the courtroom, fairly late in its history, several things were true: the trial narrative was primarily ritualistic and symbolic; narrative was not the favored medium for presenting knowledge at trial; and the rules of evidence, focused on control of the use of language as a source of knowledge, began to evolve as soon as human narrative, that of the witness, was expanded into the trial procedure. The way language is used and structured influences our ways of knowing.[26]

A. The Speech Event: Setting,[27] Scene, & Symbolism

Edward T. Hall has explained the significance of man's perception of social and personal space. Hall was the first to refer to spatial implications as the "hidden dimension" in man's interactions.[28] Additionally, scholars of architecture, religion, and psychology through various studies point out the subliminal power of space.[29]

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26. *See* GLENDON, *supra* note 1, at 140 (citing an Aristotelian insight, "[B]y our doing and our ways of knowing we make ourselves what we are."). *See also* BENJAMIN WHORF, LANGUAGE, THOUGHT AND REALITY 32 (1956). Describing how language shapes the way humans conceive of and structure reality, Whorf suggests two hypotheses about the relationship between language and thought. The second is that "[T]he structure of the language one habitually uses influences the manner in which one understands his environment. The picture of the universe shifts from tongue to tongue." *Id.* at vi. *See also* M. SCOTT MOMADAY, THE MAN OF WORDS 2 (1997) (using stories to explore the implications of language).

27. DEBORAH SCHIFFRIN, APPROACHES TO DISCOURSE 49–50, 141–42 (1994).

28. *See generally*, EDWARD T. HALL, THE HIDDEN DIMENSION (1966) (explaining the significance of our sensory worlds and the implications of those perceptions on how we use and understand interactions provides insight into the "hidden dimensions" operative in the courtroom).

29. *See, e.g.*, Ken Kusmer, *Architects, Scientists Study Sacred Spaces*, VALLEY NEWS, July 30, 2004 ("The connection between design and devotion is under study by a group of clerics, neuroscientists and architects who are trying to understand how the mind reacts to the sensation of entering a house of worship."). "At the level of architectural experiences, or more specifically the human response to planes, it is clear that 'space matters.' The attributes of space from shapes, to color, thermal conditions, light (both natural and artificial), and sound are perceived by our sensory systems, processed through the thalamus and midbrain, and sent to the cortex to

It is not by chance that the architectural space designed as the setting for the indoor trial has inherent meaning. Even today the courtroom exudes an atmosphere of solemnity reminiscent of houses of worship. Its interior spatial design is symbolic of church architecture. The specialized seating arrangements, the wooden benches all suggest the presence of a higher authority. God's symbolic presence reminds us of our humanity and calls upon our sense of integrity in our quest for truth.[30] The use of language is ritualistic. It is not by whim that as a prerequisite to participation in the speech event, there is the swearing of oaths.[31] The oath or affirmation which is spoken by every witness symbolically whispers the embedded memory of the sentiment, "So help me, God." One need only look up at the frieze around the ceiling of the Supreme Court chamber in which advocates address the Court to witness a biblical presence. Spatial and linguistic symbolism from the beginning was intended to support a trial characterized by rectitude.

Scholars of architecture recognize the symbolic power of place. They understand that space can impart messages metaphorically, expressively, and symbolically.[32] Etlin explains "the equivalent to [the] metaphorical character [of a place] is to be found in the narrative arrangement of the space.[33] Expressive character has its counterpart in the expressive qualities of space [that] . . .

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be recognized in a conscious way." Eve A. Edelstein, *Neuroscience & the Architecture of Spiritual Spaces* 4 (2004).

30. *See* Laurie C. Kadoch, *Five Degrees of Separation: A Response to Judge Sheldon's* The Sleepwalkers's Tour of Divorce Law, 49 ME. L. REV. 321, 356 (1997) (citing ARTHUR KOESTLER, THE SLEEPWALKERS: A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE 20-29 (MacMillan Co. ed., 1968)). Koestler writes of the spiritual quest of the cosmologers, Kepler and Copernicus. During the Middle Ages, when these men lived, reality and truth were defined by the Church which placed man at the center of the universe. The Church taught that life was a spiritual test and winning or losing salvation depended upon the battle or choice between two opposing forces in the universe: the force of God and the destructive forces of the devil. In the medieval world everything was explained in spiritual terms. Koestler explains that Kepler and Copernicus, who were fathers of what we view as the "Scientific Revolution," were searching for a new philosophy to explain the truth. *Id.* at 354.

31. *See* Nova Roma, Religio Romana, *Oath to Iuppiter*, http://www.novaroma.org/religio_romana/oath_iuppiter.html (last visited Sep. 13, 2007) for a reference to early Roman oaths to the Gods. The Gods were used to judge and punish transgressors. The oaths were sworn outdoors, so that they could be properly viewed from the heavens. A stone or flint was held during the reciting of the oath and then hurled as far away as possible. One oath, from Festus, s.v. lapidem silicem was: "Si sciens fallo, tum me Dispiter salva urbe arceque bonis eicat ut ego hunc lapidem." Translation: "If I knowingly deceive, then may Iuppiter throw me out of my property, keeping the city and citadel safe, as I cast this stone." *Id.*

32. RICHARD A. ETLIN, SYMBOLIC SPACE 30 (1994).

33. *Id.*

reflect . . . values. Symbolic character, [is] achieved through the creation of temple-like spaces . . . [and can] achieve a deeply rooted emotive response."[34] Etlin calls the "latter type numinous space."[35] He further suggests that "in all three types of . . . space--narrative, expressive, and numinous—the process of ritualized actions often play a significant role."[36] Spatial design of the courtroom has been and continues to be utilized to support reason.

Carl Jung's theories provide another lens through which to view the linguistic importance of the rules of evidence as they guard the multiple layers of meaning awakened during the trial event. He suggests that a word or image has the ability to act as a symbol in the unconscious mind separate from reason. Jung makes a distinction between "cultural" symbols" and "natural symbols."[37] The cultural symbols are those that have been used to express "eternal truths," and that are still used in many religions. Examples of these from western religions are the cross and the Star of David. The cultural symbols have gone through many transformations and even a long process of more or less conscious development, and have thus become collective images accepted by civilized societies, illustrated by the Supreme Court frieze. Such cultural symbols, often religious, nevertheless retain much of their original numinosity or "spell." Cultural symbols are implicitly and explicitly embedded in the trial and visible in the courtroom's church-like setting and the use of oath incident to oral testimony.

According to Jung, because the natural symbols "are derived from the unconscious contents of the psyche, they therefore represent an enormous number of variations. . . . In many cases they can still be traced back to their archaic roots–i.e. to ideas and images that we meet in the most ancient records and in primitive societies."[38] Jung bemoans the predicament of modern man. He seems to assert a delicate balance between "rationalism" and "numinous symbols and ideas."[39] He suggests that spiritual symbols have the ability to push man forward towards a "rationalism" characterized by integrity and that the absence of such symbols and ideas can "put man['s rationalism] at the mercy of the psychic underworld."[40]

Jung's theory uncovers part of the reason that unfettered storytelling or use of narrative at trial might work so well as a tool of persuasion. His theory illuminates the need for the linguistic function of the rules of evidence because uncontrolled use of language can tap into the symbolic meaning of words. "As the mind explores the symbol, it is led to ideas beyond the grasp of

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34. *Id.*

35. *Id.*

36. *Id.*

37. CARL G. JUNG, MAN AND HIS SYMBOLS 93 (1964).

38. *Id.* at 94.

39. *Id*.

40. *Id*. at 93–104.

reason."[41] In this way a technique such as storytelling might be used to circumvent the rules of evidence. The story can convey messages to the unconscious psyche that are prohibited by the rules of evidence through the ordinary use of language. For example, the rules prohibit questions that elicit information from a witness that might arouse emotion and, therefore, be more prejudicial than probative.[42] But in storytelling emotion can be raised implicitly rather than explicitly. In that way, it is harder for the rules to guard against its potentially prejudicial nature. Stories can impart subliminal messages. In fact, courts have universally condemned the explicit use of religiously charged closing arguments as confusing, unnecessary, and inflammatory.[43]

Jung's theories provide further insight into the importance of spatial symbolism operative at trial.[44] In explaining that a word or image is symbolic when it implies something more than its obvious and immediate meaning, of particular import is Jung's discussion of the relationship between numinous symbols and rationalism. He suggests that man's capacity to respond to numinous symbols and ideas is critical to positive rationalism and that it is also critical to man's survival. According to Jung "[m]an is bound to follow the adventurous promptings of his scientific and inventive mind and to admire himself for his splendid achievements."[45] In doing this man can lose his awareness of numinous symbols. Jung seems to suggest that when rationalism is split apart from the ability to respond to numinous symbols it can be dangerous.[46] The danger lies in the possibility of parochial thought that can occur when man so whole heartedly embraces a novel idea and discards others, thus narrowing his perspective instead of broadening it with expanded multi-faceted considerations.

Anthropologists illuminate another aspect of parochial thought relative to the language—thought relationship. It stems from an understanding of the difference between oral and literate modes of thought. Plato's *Trial of Socrates*[47] illuminates the age old complexity of the language-

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41. *Id*. at 94.

42. *See* STEVEN GOODE & OLIN GUT WELLBORN, III, COURTROOM EVIDENCE HANDBOOK 76 (4th ed. 2001) (Authors comments for Rule 403/AC(6); Rule 404(b)/AC(10); Rule 413/AC(5); Rule 414/AC(5); Rule 415/AC(5)).

43. *See, e.g.*, Sandoval v. Calderon, 231 F.3d 1140, 1151 (9th Cir. 2000); Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996) (ruling that prosecution's religiously loaded arguments at sentencing with references to Noah and the flood, Jesus and the crucifixion were highly improper).

44. *See generally* JUNG, *supra* note 37 (In bemoaning the plight of modern man Jung explains that numinous symbols and ideas are critical to healthy rationalism). *Id.* at 94.

45. *Id.*

46. *Id.* Jung suggests that man's "genius shows an uncanny tendency to invent things that become more and more dangerous . . . ." *Id.* at 101.

47. PLATO, THE REPUBLIC 66-67 (Francis Macdonald Cornford trans. 1966) [hereinafter, PLATO, THE REPUBLIC]. In The Apology, Plato dramatizes the trial of Socrates which took place

in Athens in 399 B.C. PLATO, THE APOLOGY, PHAEDO, AND CRITO OF PLATO (Hastings Crossley eds., 1909). In Plato's words Socrates was charged as follows: "Socrates is an evil-doer, and a curious person, who searches into things under the earth and in heaven, and he makes the worse appear the better cause, and he teaches the aforesaid doctrines to others." *Id.* at 8. Not coincidentally, Socrates was on trial for using language in the form of questions to encourage others to examine thought. His use of questions to engage the intellect set the mold for the use of cross-examination in the rationalist model of adjudication and the Socratic method of inquiry as the predominant model of pedagogy at law schools today. In The Apology, Socrates presents his case to the jury and, in so doing, makes clear that he understands that in the legal setting language could be used either to engage the intellect or to distract it.

Plato provides no separate commentary or context in The Apology. The transcribed words speak for themselves. Socrates' words evidence an awareness of the complex relationship between orality and literacy and of the impact of the use of language on the decision-making process in the legal arena. One can focus entirely on the first paragraph of Socrates' opening argument to recognize his amazing awareness of two critical ideas. First, there is a complex relationship between language and thought which is complicated by dual modes of communication-- orality and literacy. Second, the courtroom provides a unique setting within which to view the differences between orality and literacy and underscores the need for the rules of evidence to direct that the language used at trial be structured and used differently from ordinary language:

> How you have *felt*, O men of Athens, at *hearing the speeches* of my accusers, I cannot *tell;* but I *know* that *their persuasive words almost made me forget who I was*: such was the *effect of them*; [emphasis added]

Id. at 8.

In his opening words Socrates underscores the power of persuasive rhetoric. By asking how the men 'felt' he distinguishes between feeling and thinking as they relate to rhetoric. He next points out that while persuasive, rhetoric is not the correct path to the truth:

> and yet they have hardly *spoken a word of truth*. But many as their falsehoods were, there was one of them which quite amazed me;--I mean they *told* you to be upon your guard, and not to let yourselves be *deceived by the force of my eloquence*. [emphasis added]

Id.

Here Socrates points out that the orators themselves are aware of the untruthfulness of powerful rhetoric when they attack the 'force of [his] eloquence.' He further suggests that his accusers are guilty of using rhetoric to hide a true description of Socrates' dialogue:

> They ought to have been ashamed of *saying* this, because they were sure to be detected as soon as I *opened my lips* and displayed my deficiency: they certainly

> did appear to be most shameless in *saying* this, unless by force of eloquence they mean the force of truth; for then I do indeed admit that *I am eloquent. But in how different a way from theirs*! [emphasis added]

Id.

Socrates is articulate in his recognition of two different uses of language: one rhetoric to persuade; the other language used to find the truth. He goes on to describe the difference between the two:

> Well, as I was *saying*, they have hardly uttered a *word*, or not more than a *word*, *of truth*; but you shall hear from me the whole truth: not, however, *delivered after their manner*, in a *set oration* duly *ornamented with words and phrases*. [emphasis added]

THE APOLOGY, PHAEDO, AND CRITO OF PLATO at 8.

Here Socrates commentary is reminiscent of Ong. He describes the rhetorical oral use of language as 'set oration duly ornamented with words and phrases.' He then distinguishes his use of language:

> No, indeed! But *I shall use the words* and arguments which *occur to me at the moment*; for I am certain that this is right, and that at my time of life I ought not to be appearing before you, O men of Athens, in the character of a *juvenile orator*—let no one expect this of me. [emphasis added]

Id.

In telling his audience that he will 'use the words and arguments which occur to me at the moment' Socrates distinguishes literate from oral thought. Literate use of language fosters and suggests individual thought.

Next Socrates talks about a native language and suggests that a court of law might require a different language. He appears to recognize the importance of context to understanding the use of language:

> And I must beg of you to grant me one favor, which is this–[i]f you *hear* me using the same *words* in my defense which I have been in the habit of using, and which most of you may have heard in the agora, and at the tables of the money changers, or anywhere else, I would ask you not to be surprised at this, and not to interrupt me. For I am more than seventy years of age, and this is the first time that I have ever appeared in *a court of law*, and I am quite a *stranger to the ways of the place*; and therefore I would have you regard me as if I were really a stranger, whom you would excuse if he *spoke* in his *native tongue*, and after the fashion of his country; [emphasis added]

Id.

thought relationship at trial.

Plato placed knowledge along a divided line illustrating the relevant degrees of knowledge. The highest level of knowledge recognized by Plato concerns knowledge that "can be known [only] after sufficient dialectic, serious discussion that attends carefully to the meaning of philosophical terms and the differences between ideas."[48] The dualities recognized by this ancient philosopher at the divide between the oral and the literate worlds are the same intertwined complexities with which the Rules of Evidence contend.

The relationship between orality and literacy in the use of language is further explained by Walter Ong's premise that the technological problems of communication recognized by Plato continue to plague humankind because we continue to be "biologically, sociologically, and psychologically closer to our oral roots."[49] Today we take for granted that language can and should be used as an effective tool for analytic thought because we live in a primarily literate world. Not so long ago, however, the majority of people in the world were not literate. For this majority, knowledge was available in oral form only. Orality was valued as a vessel of knowledge, rather than as a means to examine or expand knowledge. Survival depended upon the ability of a people to retain knowledge orally.[50] Early humans developed storytelling as an effective structural use of

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Finally, Socrates directs his audience to ignore the manner of the speech, to ignore the rhetoric, and to concentrate on thinking about justice which for him signified the truth. This directive is reminiscent of a modern judges' admonition to the jury which might include the following instructions: *It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.*

> [T]hat I think is not an unfair request. Never *mind the manner*, which may or may not be good; but think only of the justice of my cause, and give heed to that: *let the judge decide justly* and *the speaker speak truly* and give heed to that. . . ." (emphasis added)

Id.

48. DON E. MARRIETTA, INTRODUCTION TO ANCIENT PHILOSOPHY 72 (1998).

49. *Id; see also* Laurie C. Kadoch, *Seduced by Narrative: Persuasion in the Courtroom*, 49 DRAKE L. REV. 71, 79 (2000) (citing WALTER ONG, ORALITY AND LITERACY TECHNOLOGIZING OF THE WORD 5-30 (1982) (discussing the basic differences between the use of writing and oral verbalization in different cultures).

50. *See generally* ERIC A. HAVELOCK, PREFACE TO PLATO (1963)(Havelock suggests that until the Hellenistic Age the only methods of storing knowledge were oral devices. By this point in history the responsibility for maintaining the collective body of knowledge had created a poet profession. The prized asset of these early professional poets was an exceptional ability for

language to attain that goal. The responsibility for maintaining the collective body of knowledge created a poet profession. Initially storytelling was a device used to foster the perpetuation of knowledge. Theater, for example, was first developed as an instrument for species survival, not as entertainment.

The relationship between collective memory and story is directly pertinent to understanding the necessary linguistic role of the rules of evidence. The connection lies in the relationship between man's oral roots and analytic thought. The additional role of the ancient poet as teacher further illustrates the point. The poets' traditional methods of oral instruction fostered concrete thinking and discouraged change or individual thought or abstraction.[51] Their goal was to teach students to experience knowledge in memory instead of to analyze or understand it.[52] There was little room in orality for independent thought or analysis, the goals of the rationalist model of adjudication.

Walter Ong in *Orality and Literacy, The Technologizing of the Word*, suggests that humans are more comfortable with concrete rather than analytic thought.[53] Ong discusses the implications of the differences between orality and literacy today.[54] His focus is on thought and its verbal expression in oral culture and literate thought and expression in terms of their emergence from and

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memory. Rhythm, rhyming, and repetition became tools of memory for the poet. Mnemonic devises, use, and structure of language, vocabulary, syntax, and dramatization were all devised to aid the poet's own memory and the memory of the audience).

51. PLATO, THE REPUBLIC, *supra* note 47, at 66-67. In Athens the state was responsible for the education of boys. The school day consisted of lessons in 'Grammatic,' reading and writing; 'Music,' memorizing and reciting epic and dramatic poetry, singing lyric poetry, lyre playing, arithmetic and geometry; and 'Gymnastic,' athletic exercises. *Id.*

52. *Id.* at 45.

53. WALTER ONG, ORALITY AND LITERACY TECHNOLOGIZING OF THE WORD 47 (1982). *See* Murray Ogborn, *Storytelling Throughout Trial: Increasing Your Persuasive Powers*, 1995 TRIAL 63, 63 (1995). "Social scientists have studied the impact of the delivery [of information] on how the message is received. The three primary channels of delivery are verbal (words); vocal (how the message is delivered); and nonverbal (facial expressions, eye movements, or body positions). . . . Experts say that the actual words count for only about 10 percent of the impact. The vocal message (inflection and resonance) accounts for about 40 percent of the impact." *Id. See also* ISABEL BRIGGS MEYERS ET AL., A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR 157 (1998). The Meyers-Briggs Indicator (MBTI) statistics which suggest that more people in the general population prefer concrete to analytical or theoretical thinking. *Id.* at 157-58. The statistics indicate that 28.3% of men and 25.1% of women prefer analytical or theoretical thinking. *See id.* In contrast, 74.9% of men and 71.7% of women prefer concrete thinking. *See id.* It is interesting to note that the Myers-Briggs indicator is based upon Jung's archetypes.

54. *See* ONG, *supra* note 53, at 47.

relation to orality.[55] He suggests that the characteristics of oral thought can be unfamiliar and at odds with the literate mode. The most significant differences are evident in the structure and use of language. Oral thought and expression are often highly organized, but the organization is unfamiliar and often uncongenial with the literate mind. The organization tends to be formulaic. It is often structured around proverbs and other set expressions.[56] It is aggregative rather than analytic, participatory rather than distant,[57] and situational rather than abstract.

Two facts underlie the consequences of these differences which can affect the operation of communication particularly in the legal arena. First, there is a heavy oral residue which continues to mark thought.[58] Second, we are generally oblivious to the dual and contradictory methodologies of oral and literate thought within our own mind, as well as in others. Therefore, we are often unmindful not only of the many levels on which our own thought is affected by different structure and use of language but also of the many levels on which our own language affects the thought processes of others. Since the legal processes surrounding a trial are primarily concerned with obtaining, assessing, and communicating information the differences can have significant implications.

As Ong suggests, orality fosters thought organized around the familiar, structured around common proverbs or story lines. It encourages participatory rather than distanced thinking. It is not analytic.[59] This is the thought process of jurors that story-oriented lawyers and scholars suggest lawyers should strive to engage.[60] They have learned from social scientists that "[s]torytelling is a natural–almost innate–capability everyone possesses. . . . [And that by] [l]earning to use this talent effectively in all aspects of trial [they] will increase [their] power to persuade jurors to decide in

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55. *Id.*

56. Ogborn, *supra* note 53, at 64 (referring to ROGER SCHANK, TELL ME A STORY: NARRATIVE AND INTELLIGENCE (1990) suggesting "that experience lets us know how to act and how others will act in given stereotypical situations. That knowledge is called a script. Taken as a strong hypothesis about the nature of human thought, a script obviates the need to think; no matter what the situation, people may use no more thought than what is required to apply a script. Schank's hypothesis holds that everything is a script and that very little thought is spontaneous.").

57. Participatory suggests emotional involvement while distance relates to the rational perspective.

58. Ogborn, *supra* note 53, at 64.

59. Ong's ideas suggest that the persuasive use of storytelling as the preferred method of trial advocacy especially at closing argument may help the lawyer tap into a common group participatory thinking tied to a familiar story line rather than foster individual analysis of the legal issues and relevant facts. ONG, *supra* note 53, at 31–77.

60. Spence, *supra* note 13, at 63.

favor of [their] clients."[61]

The inter-related linguistic and symbolic aspects of the courtroom affect both the interaction and the interpretation of the interaction that takes place there as well as the characteristics of thought generated. Anthropologists and scholars of discourse offer insight into contextual aspects of interaction. Participants take cues from place when determining the operative linguistic rules. Gumperz explains the complexities which must be accounted for in discourse analysis due to the existence of multiple alternative interpretations beyond the sentence level.[62] For example, lawyers are aware of the unique rules of discourse of the courtroom inherent in the rules of evidence. The witness is, hopefully, made aware of the solemnity of his/her duty to tell the truth by oath and the characteristics of Etlin's "numinous" space. And the juror is reminded not only by the judge of his/her duty to interpret the discourse according to the rules operative in that place but also by oath and the characteristics of Etlin's "narrative and expressive" space. The lay audience, on the other hand, is not made aware of the special language that is being spoken, or of the multiple contextual aspects of the discourse. The lay person may interpret the trial's interactions to be "simply storytelling." However, the participants are (or should be) constantly reminded by the linguistic rules of evidence that it is not.[63]

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61. *See* Kadoch, *Seduced by Narrative*, *supra* note 49, at 83 (citing Ogborn, *supra* note 53, who suggests "[t]o indoctrinate–that is to educate–we must listen to jurors [during voir dire and then later during trial] and reframe what they tell us in terms of the story we want to tell on behalf of our client." *Id.* Ogborn further states that "[t]he story must be told so that jurors can easily index it to their own favorable scripts while we appeal to visual, auditory, and kinesthetic channels of understanding." *Id.*

62. *See generally* JOHN GUMPERZ, DISCOURSE STRATEGIES (1982). In synthesizing the fundamental research on communication from a wide variety of disciplines Gumperz develops a broadly based theory of conversational inference. *Id*.

63. *See* SCHIFFRIN, *supra* note 27, at 49-50, 141-42. While I do not pretend to understand discourse analysis, it provides the terminology that allows me to begin to think about and explore the linguistic aspects and significance of the rules of evidence. Schiffrin explains how ethnographers of communication analyze communicative patterns using a method of participant observation. Their aim is to observe what members of the group involved in the communication know about how to "make sense" out of the experience and how to communicate those interpretations. In undertaking such studies, the classification grid proposed by Hymes known as the SPEAKING GRID is used to identify and label different possible components of the communication. The speech situation includes the setting or scene in which the speech occurs [for our purposes, the courtroom]. This includes the physical circumstances and the subjective definition of the occasion. The next unit is the speech event: "activities, or aspects of activities, that are directly governed by rules or norms of speech [for our purposes the rules of evidence]." The smallest unit is the speech act. Hymes does not define this unit. However, John Austin and John Searle, two philosophers, "developed speech act theory from the basic belief that language is used to perform actions; thus, its fundamental insights focus on how meaning and action are related to language [for our purposes the meaning given to the words spoken and the relationship between language and thought]. Although speech act theory was not first developed as a means

B. The Speech Act: Message, Form, Content[64] & Rules or Norms of Speech[65]

The instrumental function of the rules of evidence is to regulate the various mechanisms for implementing the oral adjudicatory trial process. I perceive that role to be a linguistic function. I add this perspective to, and proceed from, Twining's rationalist model of adjudication.[66] Twining's theory "asserts that the fundamental aim of adjudication is rectitude of decision-making."[67] Its "principle features have by and large been accepted by the leading scholars in the Anglo-American tradition of specialist writings on evidence."[68] According to Twining, rectitude is achieved by the

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of analyzing discourse, some of its basic insights have been used by many scholars (e.g. Labov and Fanshel 1977; see also chapter 8) to help solve problems basic to discourse analysis." Using the GRID observers additionally consider the participants (speaker, sender, addressor, hearer, receiver, audience, addressee); the ends (purposes and goals, outcomes); act sequence (message, form, and content); key (tone, manner); instrumentalities (forms of speech); norms of interaction and interpretation (specific properties attached to speaking, interpretation of norms); and genre (textual categories). These categories could be used to identify the separate and dual linguistic and substantive functions of the rules of evidence. *Id.*

64. *Id.*

65. *Id.* at 142

66. *See* TWINING, RETHINKING EVIDENCE, *supra* note 4, at 71, *et seq.* *See also* I.H. DENNIS, THE LAW OF EVIDENCE ch.2, 20 (1999) (citing L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) on adjudication. "The principle attributes of adjudication, as described by Fuller are that the parties involved participate in the decision by presenting proofs and reasoned arguments. By 'proofs' Fuller means evidence designed to persuade the adjudicator to uphold a particular party's factual contentions by drawing the appropriate inferences. The term 'reasoned arguments' embodies the idea that the dispute is to be resolved within an instrumental framework governed by rationality. In other words, the adjudicator is expected to decide the dispute by the exercise of reason in determining the relevant issues of fact and law. Personal prejudice and irrelevant reasons would not be acceptable grounds for decision." *Id.* at 21 n.2 (citing TWINING, RETHINKING EVIDENCE, *supra* note 4, at 71, *et seq.*).

67. TWINING, RETHINKING EVIDENCE, *supra* note 4, at 71 *et seq.*

68. *Id.* *See also* TWINING, THEORIES OF EVIDENCE, *supra* note 4, at 17-18. In writing about the Rationalist Model and the acceptance of the model, Twining makes clear that the worlds of the various treatise writers were in many respects vastly different from each other. He provides the following examples:

> Bentham wrote before the creation of a regular police force; 'Wigmore was already an old man when Bonnie and Clyde got their first machine gun'; today's evidence scholars are, *inter alia*, struggling with the implications of the computer revolution. Again, Bentham's psychology–in some respects original and ahead of

correct application of substantive law to the true facts of a dispute.[69] I suggest that such an application requires rules of discourse that promote the pursuit of ideas about truth, fairness, individual rights, and other values.[70] By necessity this pursuit of rectitude within an oral rationalist model of adjudication causes the rules to de-construct the story of the dispute. By de-construction of story I mean the breaking apart of the telling of the facts of a case through question and answer format in contrast to a continuous and chronological or literary story narrative.

Today in the Rationalist Model, the rules of evidence confine the telling of the trial narrative by reducing the kinds of knowledge that are considered relevant to the issue or just in the balance of competing legal principles (the substantive function) before the court and by forcing the de-construction of the legal story (the linguistic function). The lawyer acts as narrator, but can speak directly to the adjudicator during the telling of the "story" only in the opening statement and the closing argument. In fact, Rule 611 of the Federal Rules of Evidence, which covers objections to mode and order of interrogation and presentation, includes an objection to narrative form.[71] The

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> its time–did not go much beyond the psychological theory association of David Hartley and his disciples; Wigmore, even in 1937, drew heavily on James Sully's *The Human Mind*, published in 1892; he wrote as if Freud and Jung had not yet appeared and as if there was widespread consensus among 'scientific' psychologists. In 1981, there were reported to be several hundred articles devoted to psychology and published in a single year. Yet the continuity of the central ideas in evidence scholarship is truly remarkable. *Id.* at 18.

Twining suggests that among the factors that might explain the continuity of the "rational core" is that "Anglo-American evidence scholarship is rooted in a single philosophical tradition--English empiricism, as represented by Locke, Bentham, J.S. Mill" and others. *Id.*

69. *Id.* As Twining indicates, this is an instrumentalist model:

> It presupposes that rectitude of decision is a necessary condition of the administration of justice under the law. The model then embodies the idea that the pursuit of truth through reason is a necessary means in achieving rectitude. In light of the model some of the instrumental aims of the law of evidence become clearer. At a straightforward level the law should aim to assist in the achievement of rectitude by ensuring that as far as possible the evidence before the adjudicator is relevant and reliable, that it is presented in a form which is designed to bring out truth and discover untruth and that the appropriate burdens and standards of proof are clearly specified. *Id.*

70. *See generally* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 340 (J.S. Mill, ed. 1827) (surveying the many theoretical topics of the law of evidence in 1827, Bentham goes on to attack the exclusionary rules in operation based upon the knowledge of his day). Twining discusses Bentham's theory from which his own derives in TWINING, THEORIES OF EVIDENCE, *supra* note 4; *see also* I.H. DENNIS, *supra* note 70.

71. *See* GOODE & WELLBORN, *supra* note 42, at 177-82. The authors comments explain with

lawyer's speech is confined to the asking of questions at all other times, with the exception that s/he can directly object either to questions asked by the opposing lawyer or to answers given in response.[72] The objections are used to confine or limit the discourse and include the ability to object to the person[73] whose voice is speaking, the manner[74] of the speaking, the choice of words,[75] the foundation of knowledge,[76] or the form of the question[77] or answer.

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regard to the "narrative" objection:

> Although the narrative form is not per se objectionable, it is well within the court's discretion to require counsel to employ more pointed questions. When a narrative question is likely to provoke a response containing hearsay or other inadmissable evidence, the court ought to exercise its discretion and require more specific questions.

Id. *See* United States v. Pless, 982 F.2d 118, 1123 (7th Cir. 1992). *See also* COLIN TAPPER, CROSS & TAPPER ON EVIDENCE 271-72 (9th ed. 1999). Tapper explains that one reason for "the ban (sometimes loosely described as 'the rule against narrative'[)]. . . was the ease with which evidence of this nature can be manufactured." *Id*. at 271. He references POTHIER ON OBLIGATIONS vol. 2, 289 (1806), for an additional proposition that the reason for the ban was "[t]he necessity of saving time by avoiding superfluous testimony. . . ." It has been this lawyer's experience to also hear the use of the objection, "Narrative!" to object to a witness answer that is not responsive to the question. *Id* at 272 n.3.

72. A lawyer can request that the argument over an objection be made at "side bar" out of the hearing of the jury. This means that the dialogue concerning the objection occurs at the judge's bench and is engaged in low voices.

It is also possible for a lawyer to request "voir dire" on an evidentiary issue and then the jury is asked to leave the courtroom. In such an event, the witness would be called to the stand and questions asked and answered for the purpose of demonstrating the admissibility or lack thereof of the witness or the content of the witness' words.

73. *See* FED. R. EVID. 602 (requiring witnesses to have personal knowledge); FED. R. EVID. 501 (addressing privilege).

74. *See* FED. R. EVID. 611(a) (addressing non-responsive answers); FED. R. EVID. 803 Hearsay.

75. *See* FED. R. EVID. 611 (addressing compound questions, leading questions, asked and answered questions, assuming facts in evidence, questions beyond the scope of direct, argumentative).

76. FED. R. EVID. 803.

77. *See* FED. R. EVID. 611(a) (addressing compound questions); FED. R. EVID. 611(c) (addressing leading questions).

Evidence law confines the manner in which the lawyer may speak in two major discourse events, the opening statement[78] and the closing argument.[79] S/he can not use argument in the opening statement and s/he can only include facts that s/he knows will be admissible under the rules and become a part of the narrative during trial.[80] In this context, prohibited argument includes the drawing of conclusions or inferences and the characterization of facts. Only at the end of the trial can s/he make argument.[81] In doing so, s/he is confined to arguing issues that were placed into evidence through the witnesses' trial testimony.[82] On closing argument s/he tries to re-construct the story. In between s/he narrates the story through direct and cross examination of witnesses.[83] This narration takes the form of questions and answers. The lawyer's speech is further confined by rules concerning the formulation of the questions.[84] S/he can ask witnesses considered "friendly" only direct questions beginning with such words as who, what, or where. The question can not suggest the answer. With unfriendly witnesses s/he is allowed and even encouraged to use leading

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78. *See* U.S. v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring). The purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole." *Id*. The opening is not to be used as a subterfuge to present inadmissable evidence or nonexistent evidence to the jury to circumvent the rules of evidence and professional responsibility. *See, e.g.*, Gov't of Virgin Islands v. Turner, 409 F.2d 102, 103 (3d Cir. 1968) (The lawyer can not present argument or make argumentative statements). *See, e.g.*, U.S. v. Gladfelter, 168 F3d 1078 (8th Cir. 1999); U.S. v. Somers, 496 F.2d 723 (3d Cir. 1974).

79. *See* U.S. v. Taylor, 54 F.3d 967 (1st Cir. 1995). The function of a closing argument is to provide counsel the opportunity to marshal the evidence and to present it, along with permissible inferences, to the jury in the best possible light on behalf of the client and to attempt to explain away evidence which is unfavorable. The lawyer must not refer to facts not placed into evidence through questioning of witnesses. U.S. v. Beckman, 222 F.3d 512 (8th Cir. 2000). Courts have also universally condemned religiously charged arguments. *See, e.g.*, Sandoval v. Calderon, 231 F.3d 1140, 1151 (9th Cir. 2000); Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996) (prosecution's religiously loaded arguments at sentencing with references to Noah and the flood, Jesus and the crucifixion were highly improper).

80. *See Dinitz*, 424 U.S. at 612.

81. W.L. TWINING, RETHINKING EVIDENCE, *supra* note 4.

82. *Id.*

83. *See generally* THOMAS A. MAUET, TRIAL TECHNIQUES (4th ed. 1996) (providing direction on various techniques of trial advocacy, Mauet explains opening and closing statements and direct and cross examination).

84. *Id.* at n.35.

questions. That means the questions can include the answer. The most effective cross examination questions are those that must be answered yes or no. The lawyer is taught never to ask a question on either direct or cross examination for which s/he does not already know the answer.[85] During the time the opposing lawyer tries to narrate the opposing client's story, the first lawyer tries to direct the narrative by using the rules of evidence to object to the inclusion of a particular witness or type of evidence. Additionally, s/he can use the rules to object to her opponent's tone, syntax, construction, and use of language.

Thus, "deconstruction" of the trial story is accomplished by the confined question and answer speech format and the use of objections. While the linguistic rules that break apart the story are critical to the oral, rationalist model of adjudicatory process that has evolved out of earlier modes of trial, they have complex consequences for the trial participants and the lay audience. They shape the way the lawyer must navigate the rules of evidence to tell the client's story. They influence the way the public perceives the story, trial lawyers, and their use of language in the courtroom. They affect the way the adjudicator, often the jury, perceives the story and reaches a decision.[86] They drive the current rhetorical trend of courtroom storytelling.[87] The operation today of a rationalist model of adjudication in a system reliant on orality places a lofty burden on the rules of evidence because an inherently contradictory relationship exists between language, analytic thought, and storytelling. The task is complicated by biological, sociological, and psychological characteristics of humans as they relate to orality as discussed above.

'Herald, read the accusation! Said the King.
On this the White Rabbit blew three blasts on the trumpet,
and then unrolled the parchment-scroll, and read as follows:
'The Queen of Hearts, she made some tarts.
All on a summer day:
The Knave of Hearts, he stole those tarts,
And took them quite away!'
'Consider your verdict,' the King said to the jury.
'Not yet, not yet! The Rabbit hastily interrupted.
'There's a great deal to come before that!'[88]

II. Linguistic History Part One: On Rationalism and Trial Voices of God, the Jury, and the Lawyer

85. *Id.*

86. *Id.*

87. *See* Kadoch, *Seduced by Narrative*, *supra* note 49, at 72 (citing Murray Ogborn, *Storytelling Throughout Trial: Increasing Your Persuasive Powers*, 1995 TRIAL 63, 63-64).

88. ROGER LANCELYN GREEN, THE WORKS OF LEWIS CARROLL 98 (The Hamlyn Publishing Group Ltd. 1965).

A. Introduction

"Many crucial facts lie beyond the time and place of [an] interaction or lie concealed within it."[89] There is no interaction for which this sentiment is truer than for the seminal interaction which occurs in courtrooms across America every day-- the trial. In this part of the trial story I highlight the historically "crucial facts" about the Anglo-American trial which lie beyond and concealed within the courtroom relevant to the two premises. This is the story of how God's voice moved seamlessly from the trial by ordeal and oath to the field of the trial by battle and on into the trial of the courtroom. It paints the picture of the early role of the jury that symbolically expressed the voice of God once the older trial methods fell into disfavor. It is the story of how ritualistic use of language as a preface to the trial led to introduction of the lawyer's voice into the courtroom which in turn led to the use of the lawyer's voice during the trial process itself to examine and expand the substantive law.

As Laurence Tribe points out, there is reason even in processes that might seem unreasonable today. "[O]ne must acknowledge that there was wisdom of sorts even in trial by battle--for at least that mode of ascertaining truth and resolving conflict reflected well the deeply- felt beliefs of the times and places in which it was practiced."[90] Likewise, the reliance on oaths was based on a sincere belief in God's justice. Until bodies of substantive law were developed to make it possible to distinguish between facts and law, it was reasonable to base factual decisions on authoritative knowledge.

It is debatable whether God's presence at the Trial by Ordeal was symbolic or actual because justice at this early primitive trial, it was believed, was meted out by God himself. The word "ordeal" is from the Latin meaning justice from God as are words such as deity.[91] God's presence in the very meaning of the word given to the primitive trial process corroborates the general belief in God's ability to mete out justice.

Gradually, God's role in the trial became more symbolic in nature. It was present in the reliance on oath in the Trial by Compurgation and the Trial by Witnesses.[92] It was present in the use of the authoritative jury that was selected on the basis of the trustworthiness of their oaths.[93] It was

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89. *See* M. SCOTT MOMADAY, THE NAMES 97 (1976) "The past and the future [are] simply larger contingencies of a given moment; they b[ear] upon the present and give it shape." *Id.* "The events of one's life take place, *take place*. How often have I used this expression, and how often have I stopped to think what it means? Events do indeed take place; they have meaning in relation to the things around them." *Id.* at 142.

90. *See* AN EVIDENCE ANTHOLOGY 395 (Edward J. Imwinkelreid & Glen Weisberger, eds. 1996) (citing Tribe).

91. CASSELL'S LATIN-ENGLISH DICTIONARY, *supra* note 3, at 794.

92. *See generally* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF COMMON LAW, PART II (5th ed. 1956).

93. *Id.*

pre-eminent in the introduction of the modern witness into the narrative.

History of the Anglo-American trial makes clear that narrative in the primitive trial methodologies was purely symbolic. What I mean by this is that the trial narrative was expressed through the ordeal or battle rather than through actual words. In the Trial by Compurgation and Trial by Witnesses the narrative consisted solely of the ritualistic swearing of oaths. This was a purely symbolic use of language as the outcome was based on the oath rather than upon any substantive communication. Even with the advent of the jury the narrative was primarily symbolic. Initially, after elaborate and ritualistic pleadings, the jury merely proclaimed the primitive mode of proof through which the trial would be enacted.[94] Later when the primitive modes of proof lost favor or were abolished, the jury simply used its own authoritative knowledge to issue a decision.

It was not until the advent of the lawyer, necessitated by the elaborately ritualistic use of language, that any oral narrative became a part of the actual trial rather than a mere precursor to the main event. In fact, initially, even the lawyer's narrative took place during the preliminary pleadings.[95] As the lawyer's verbal sparring at trial led to the broader development of substantive law, the trial narrative expanded.

What makes the presence of God and the absence of narrative in this story particularly noteworthy is the fact that models far more similar to our own modern trial than the trial by ordeal operated more than a thousand years before the history of the Anglo-American trial begins in 1066 with the Norman Conquest. And philosophers long ago already recognized the need to examine the weaknesses inherent in a trial reliant upon the spoken word. Over two thousand years ago, Socrates singled out the link between language and thought for the focal point of his remarks to the jury that would decide whether he lived or died.[96] This ancient philosopher understood the perplexity he faced in an oral trial, the necessity to mediate the fact that the mode of the speech event holds perhaps an even greater sway over the thought processes of the audience than the substantive content of the message.[97] This is the same linguistic perplexity with which the Anglo-American rules of evidence have struggled since the trial moved into the courtroom and evolved into an oral adjudicatory process. It is the same perplexity addressed in this article. And perhaps it was this perplexity which guided the nascent Anglo-American trial to rely in its early permutations solely on the voice of God and to exclude narrative dialogue until late in its history.

B. God's Voice in Early Modes of Trial[98]

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94. *Id.* at 108.

95. *Id.* at 399.

96. PLATO, THE REPUBLIC, *supra* note 47, at 66-67.

97. *See* HAVELOCK, *supra* note 50. My thanks to Myrna Frommer of Dartmouth College for introducing me to Havelock's thesis. Writing about Plato's attack on the poets, Havelock presents a persuasive argument that what Plato was really attacking was the different ways that language can be used to influence thinking. *See supra* note 47.

98. *Deuteronomy* 32:4.

Prior to the eleventh century under English law, man essentially looked to the intervention of God to settle disputes in one of two ways.[99] The first method was the trial by ordeal, in which the accused's "guilt was tested by his or her susceptibility to injury."[100] The second method of dispute resolution involved one of several methods of oath swearing by both the accused and "oath helpers" who swore supporting oaths.[101] At the time these were rational approaches that sought a trial characterized by rectitude. It is interesting to find the foundations of the two premises of this article at the very beginnings of the trial's history. God's actual presence at trial is illuminated and God's voice declared the outcome through oversight of the ordeal.[102] The interesting linguistic aspect of the oath swearing methods of proof is that they required specific ordering of words.[103] "The theory was that the fear of God would prevent people from swearing [false oaths]."[104]

These early methods of dispute resolution involved, essentially, interaction between man and his maker and the belief that God would reveal the truth through the outcome of the ordeal or the oaths.[105] Later, an adversarial system developed.[106] The first methodology of this system was trial by battle.[107] The only oral part of this process consisted of the stating of a claim and a denial. Rules began to develop to ensure fairness of process.[108] From this approach eventually evolved the idea that each party to the dispute should have the chance to defend himself.[109] The defense was purely physical. This early adversarial process operated on a belief that God's truth was might.[110]

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99. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 3 (1983). *See also*, Kadoch, *Seduced by Narrative*, *supra* note 49, at 9.

100. TANFORD, *supra* note 99, at 3.

101. *Id.*

102. *See infra* Section II.B.1. The first premise is that God is and continues to be an essential component of the rectitude of the trial.

103. *See infra* Section II.B.1. The second premise is that the underlying mission of the rules is the management of the orality or narrative process of the trial, a linguistic function. Early on, even the minimal human orality allowed as a part of the trial process was confined.

104. TANFORD, *supra* note 99, at 3. The linguistic control was tied to God. Thus, from the beginning, the inter-relationship of the two premises.

105. *See id.*

106. *See* TANFORD, *supra* note 99, at 3.

107. *Id.*

108. *See id.*

109. *See id.*

110. *See id.* ("Although still based on the assumption that God would make the truthful party

1. Trial by Ordeal

The Trial by Ordeal rested upon the belief that God would intervene by sign or miracle to determine the factual dispute between two parties. This was a universal belief among primitive cultures. The Ordeals were a semi-magical or perhaps even psychological test form of trial and included tests by hot iron,[111] hot and cold water,[112] and the cursed morsel.[113] Ordeal was a strict

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victorious, trial by battle required that both parties to a dispute confront each other.").

111. PLUCKNETT, *supra* note 92, at 114. The Ordeal by Hot Iron was administered during Mass pursuant to the rituals provided for in old service books. Bernard Knight, *History of the Medieval English Coroner System, Crowner, Part 5: Trial by Ordeal, Injuries & Outlaws, By Fire & Water, available at* http://www.britannia.com/history/articles/coroner5.html (last visited Sep. 13, 2007) [hereinafter "Knight, Part 5"]. Texts indicate that the defendant carried a bar of red-hot iron in his hands and walked nine marked paces. *See* PLUCKNETT, *supra* note 92, at 114 n.1. "This and other forms are translated in Sayre, *Cases on Criminal Law,* 28-32, from Liebmann, *Gesetze.* See generally, Lea, Superstition and Force, and much illustrative material in A.L. Poole, Obligations of Society, 82 ff." *Id.* "[T]he hand was sealed and kept under seal for three nights and afterwards the bandages removed. If it is clean, God be praised; but if unhealthy matter is found where the iron was held he shall be deemed guilty and unclean." *Id.* The psychological pressures of being tested by God could make hands sweat and guilt or nervousness might cause the iron to cool and, thus, cause a guilty verdict. *Id.*

112. PLUCKNETT, *supra* note 92, at 114 (referring to the service books). A variant of the Trial by Hot Iron was the Trial by Boiling Water. The accused was required to plunge his hand into a bowl of boiling water to pluck out a stone. The hand wrapping followed the procedure set forth at *supra* note 111.

> [L]et the hands of the accused be bound together under the bent knees after the manner of a man who is playing the game *Champ-estroit*. Then he shall be bound around the loins with a rope strong enough to hold him; and in the rope will be made a knot at the distance of the length of his hair; and so he shall be let down gently into the water so as not to make a splash. If he sinks down to the knot he shall be drawn up saved; otherwise let him be judged a guilty man by the spectators. *Id.*

Probably preferable was Ordeal by Cold Water. The accused was tied up with knees trussed to the chest and lowered into cold water by a rope. *See also* Knight, Part 5, *supra* note 111. If he sank, God had declared him innocent, and he was pulled from the water. If he floated, he was dragged off for hanging. As with the Ordeal by Fire, odds were on the side of the accused. Records indicate that this test was only applied to men until the later witch-hunting period. Men generally have a lower body fat and studies have shown that a bound man rarely floats in cold water unless he is significantly fat. However, a fit man might float if his lungs filled with air. Nervousness or guilt could lead to a person's sucking in a lot of air. The manner of trussing the knees to the chest made it very difficult to take in large quantities of air. In one reported case, an

ritual performed only by the church. For the person who was tested and found innocent the Ordeal rested alongside baptism, marriage, and extreme unction.[114] The Ordeal was outlawed in 1215 by an Edict of the Lateran Council.[115]

2. Trial by Oath

There were two models of oath swearing trials, the Trial by Witness and the Trial by Compurgation. Both depended on the use of oaths sworn to an avenging God.[116]

The Trial by Witness refers to the use of oaths by a group of people called a secta.[117] The secta was made up of one or more people willing to swear an oath on behalf of a party.[118] Each member of the secta was required to swear under an oath of God to a belief in one party's story.[119] No distinction was made with regard to the component parts or individual facts of the accused's story.[120] The oath simply signified a blanket belief in the story. As the focus on oath and the process through which it was presented and judged suggest, the secta were not treated as witnesses to any event.[121] They need not have seen or heard anything to attest to the truthfulness of the accused's oath. The ability of the accused to amass a greater number of witnesses was the formal test. The only measure of proof was the number of oaths to God.[122]

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abbot was ordered put to the test by water. He pre-tested the Ordeal several times in a large tub of water to ensure that he would float. He did. But on the day of the real test, panic caused him to gulp in large amounts of air and he floated. Perhaps his fear that God knew the truth was his downfall.

113. PLUCKNETT, *supra* note 92, at 114. This was an ordeal used only for the trial of a member of the clergy. This trial "consisted of making the accused swallow a piece of food in which was concealed a feather or such like; if he was successful, he was innocent, but if he choked he was guilty." *Id.*

114. *See* Jo Beverley, *Trial by Ordeal, available at* http://members.shaw.ca/jobev/ordeal.html, (last visited Sep. 13, 2007), (referencing a study of records of Ordeals by Barrister Margaret Kerr).

115. PLUCKNETT, *supra* note 92, at 118.

116. PLUCKNETT, *supra* note 92, at 114.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 304 n.8 (1926), ii 636; Y.B. 16 Ed

Reliance on the secta was in disfavor by 1314 and in 1343 the courts decided that its existence did not even create a presumption for the plaintiff.[123] However it remained a necessary form of pleading until the 14th century.[124] As late as 1560 it was used to determine whether a woman's husband was alive or dead.[125] And there is one recorded case as late as 1834 in England where the old Trial by Witness was used in the context of determining the living status of a woman's husband.[126] While the practical existence of the Trial by Witness faded, the visible influence and ritual of the process remained until 1852.[127] Until that date, the plaintiff's initial declaration was required to conclude with the ritualistic words "et inde producit sectam."[128]

The second form of trial by oath was Proof by Compurgation or Law Wager. While this sounds much like the Trial by Witnesses, it was an alternate method with its own procedure. Trial by Compurgation relied on the swearing of an oath by the defendant and compurgators (companions). The process was common to many of the barbarian tribes who invaded the Roman Empire and it was adopted by the Church because the custom became so common and widespread.[129] Compurgation was in essence a character test and, in a time when the oath held accepted religious sanctions, it might be hard for a disreputable person to find co-swearers.

III. (R.S.) ii 86-90; Selden, Notes to Fortescue, De Laudibus c. 21; Coke, Fourth Instit. 279; Faux v. Barnes (1698). "The question at issue was whether a woman's husband was alive. The woman 'came and proved her husband's death by four people who were sworn and who agreed with each other in all things.' At another day the other party 'proved that the husband was alive by twelve people who were sworn and who agreed with each other in all things.' And because the latter proof 'was better and greater than the woman's proof' she lost her action." *Id.*

123. *Id.* at 301.

124. *Id.*

125. HOLDSWORTH, *supra* note 122, at 303.

126. *Id.*

127. *Id.* at 301.

128. *Id.* at 301 n.6 (citing STEPHEN, PLEADING 370 (1827) 15, 16 Victoria c. 76 § 49). BLACK'S LAW DICTIONARY 653 (4th ed.), translates the phrase: "And thereupon he brings suit." See definition of secta: "In old English law, suit; attendance at court; the plaintiff's suit or following, i.e., the witnesses when he was required, in the ancient practice, to bring with him and produce in court, for the purpose of confirming his claim, before the defendant was put to the necessity of answering the declaration." *Id*. at 1520.

129. *See* HOLDSWORTH, *supra* note 122, at 301 n.7 ("The Salians, the Ripuarians, the Alamanni, the Baioarians, the Lombards, the Frisians, the Norsemen, the Saxons, the Angli and Werini, the Anglo-Saxons and the Welsh, races whose common origin must be sought in prehistoric past all gave this form of purgation a prominent position in their jurisprudence, and it may be said to have reigned from southern Italy to Scotland.").

If a defendant denied the charge against him swearing an oath and using a set form of words[130] and if he could get a certain number of compurgators to swear an oath to support his denial, he won his case.[131] If a defendant could not get the required number, or the compurgators did not swear in the proper form, it was said "the oath bursts," and he would lose.[132] Originally, there was not a set number of required compurgators.[133] Three to six seemed to be sufficient in manorial courts while the Fleta[134] thought the number should be double the number of secta used to swear to the claim. In 1342, it was settled that the required number was twelve, a precursor to the modern jury of twelve.[135] The status of the compurgators did not matter. There was no requirement that they witness the event in question. There was no procedure to test the basis or reliability of the oath. The main difference between this method of proof and that of proof by witness was the requirement that the words be spoken in an exact manner. This focus on specific linguistic procedure is the first step toward the development of rules surrounding the use of language at trial.

The manner in which the words must be sworn evolved over time. Eventually there were very minute rules dependent on the nature of the principal. For example, in the fourteenth century, specific rules of compurgation were set down where a married woman was sued for her ante-nuptial debt, and later a case is reported to show how a dumb person must wage his law.[136]

Because there were no fact-finding methods built into the procedure and no requirements that the compurgator be an actual witness, the only way that perjury could be found was to lose the "battle of oaths." The fact that the compurgator could be punished for an oath that was later, outside the process of the trial, determined to be false, placed some incentive on the compurgator to individually judge the truthfulness of the defendant before offering support. However, while the potential for punishment might have encouraged the individual compurgator to think twice before giving his oath and to engage in individual fact-finding, this was done outside the process. There

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130. *Id.* at 305 n.3 (referring to examples in Lea, Superstition and Force, Essay I.; P. and M. ii 631-34).

131. *Id.* at 305.

132. *Id.*

133. *Id.*

134. *See* BLACK'S LAW DICTIONARY 767-68 (4th ed.). It explains that the name Fleta was "given to an ancient treatise on the laws of England, founded mainly upon the writings of Bracton and Glanville, and supposed to have been written in the time of Edw. I. The author is unknown, but it is surmised that he was a judge or learned lawyer who was at that time confined in the Fleet prison, whence the name of the book. " *Id*. *See* also CASSELL, *supra* note 3, which explains that the word Fleta comes from the second conjugation verb *fleo* which means to weep for or lament. *Id.* at 227.

135. HOLDSWORTH, *supra* note 122 (citing Y.B. 16 Edward III. (R.S.) ii 16.).

136. *Id.* at 306. The first sign of ideas that oaths must be treated differently depending on the voice of the speaker. *Id.*

was no mechanism for the compurgator to speak anything besides an oath.[137] When asked by the party outside the trial, he could simply decline to be a compurgator. Despite the disfavor of the compurgator method of proof that arose as a result of the change in liability for the compurgator, in certain contexts it survived well into the nineteenth century.[138]

3. Trial by Battle

Trial by Battle also relied on the judgment of God. The battle was conducted under oath. Each party swore to the truth of their position. However, their success depended on their skill in battle and not the number of co-swearers. The method had been universally relied upon by barbarian tribes and adopted easily by Christianity. It rested on the belief that God would provide victory on the side of right. It was a perilous method fought to the death. While popular fiction portrays the trial by battle as knightly duels, it was used most often when ordinary people accused each other of crimes or as a kind of civil prosecution when the law was not clear.[139] Men fought with no holds barred. The weapon was usually a stick.

This method of proof applied to witnesses as well as principals. If someone stepped forward to dispute one party's assertions, that "adverse witness" could be compelled to defend their veracity in battle.[140] A court could also be compelled to defend its judgment.[141] Only infants, women, or those over sixty years old could decline the battle.[142] A woman could challenge a man to Ordeal by

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137. This is an additional illustration of the interrelation of the two premises, control of orality and a related reliance on God to effectuate the rectitude of the trial.

138. PLUCKNETT, *supra* note 92, at 115. Canonical Purgation was simply the continued use of compurgation by the Church. There were strong religious beliefs against false oath. A disreputable person would have difficulty finding compurgators. The Church used Purgation where other modes of proof were impossible. *Id.* As mentioned earlier, its favor or disfavor varied dependent on the court survived long after the Reformation in ecclesiastical courts. However, the Assize of Clarendon makes clear that the royal courts had little respect for compurgation as a means of criminal defense although certain towns and even the city of London retained it with special rules in cases of felony. In civil matters it commanded popular respect. The citizens of London regarded the wager of law as superior. As late as 1364 they obtained a statute preserving their right to the wager of law as a defense in actions of debt and detinue. In fact, it continued as a viable mode of defense into the nineteenth century, although the civil courts tried to replace it with the jury trial. It was last used in 1824 and was not abolished until 1833. *Id.*

139. J. BEVERELY, LORD OF MIDNIGHT (Topaz 1998).

140. PLUCKNETT, *supra* note 92, at 117 (citing BRACTON'S NOTE BOOK NO. 980 (1224)).

141. *Id.*

142. *Id.* (citing to Ashford v. Thornton, 1 Barn. & Ald. 405 (1818).

Battle, in which case the man was buried up to his waist in the ground as a handicap.[143] As with the other early modes of trial, there was no fact finding mechanism. Truth was decided by the outcome of the battle. Again trust was placed with God to declare a truthful outcome.

The Trial by Battle became obsolete for much the same reason as the compurgation. The church turned against it.[144] Because it operated side by side with the more rationally based forms of adjudication that developed, it eventually appeared barbaric. It became more of a curiosity than the norm.[145] However, there are sporadic reports of isolated cases. In England, the Trial by Battle existed until the nineteenth century as an alternative in real actions and as a means of disproving an appeal of murder.[146] It lingered as the duel, and was in fact, a recognized judicial solution that could be and was selected by an accused until 1819.[147]

C. From God's Voice to the Jury, *"You are my witnesses."*[148]

Emerging from these early trial procedures two ideas related to the premises of this article stand out. First, concepts of God are bound to man's beliefs about justice. Second, the peculiar use of ritualistic language as a pre-trial component is also connected to God through its similarity to language spoken in houses of worship. This purely pre-trial, ritualistic use of language, coupled with the discrediting by the Church of the Trial by Ordeal at the Fourth Lateran Council, heralds the infancy of the voices of the jury and the lawyer.

1. Antecedents of the Modern Jury

Maitland defined the jury as "a body of neighbors summoned by a public officer to answer

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143. BEVERELY, *supra* note 139.

144. PLUCKNETT, *supra* note 92, at 119 (citing BRACTON'S NOTE BOOK, no. 1038 (1225), for the proposition that because champions could be bought, the church found it an unsuitable means of proof).

145. *Id.* at 117-18.

146. PLUCKNETT, *supra* note 92, at 118.

147. *Id.* (citing 59 George III. c. 46 (1819)). Plucknett relates a curious incident with the trial by battle that pitted the American colonies against England. *Id*. at 117-18. In 1774 because of various events occurring in Boston, the British governor decided to improve the methods of justice by abolishing the battle on appeals for murder. *Id.* This proposal aroused furor in England from those who regarded the trial by battle to be "a great pillar of the constitution." *Id.* The mode remained a viable choice. *Id.* The last attempt to bring an appeal of murder by trial by battle was frustrated by the act abolishing trial by battle in both real actions and appeal of murder. *Id. See also* BEVERELY, *supra* note 139.

148. *Isaiah* 43:10.

questions upon oath."[149] This definition suggests the antecedents of the use of the jury outside the formal mechanism of the adversarial court. Indeed, before the formation of a formal system of courts with recognized legal causes of action, communities had to settle disputes locally. Those were the days when men were born, lived out their days, and died within the boundaries of a single village. Neighbors shared knowledge of the most intimate events. Survival depended on intimate knowledge of the local terrain.[150] "[L]ocal jurors were frequently chosen from families having a long tradition of jury service because '[s]uch individuals were more likely to possess the means to stay abreast of local events and benefit from the vast compass of intra-and extra familial relationships. . . .'"[151]

A person's reputation, once formed in childhood, followed him to the grave. One important and accepted body of local knowledge was made up of information about the trustworthiness of members of the community. The critical value of a person's oath was understood, as was the knowledge that all oaths were not equal. It is from this recognition that we should understand the antecedents of the modern jury. Because we are so familiar with our modern jury concept, we must keep in mind the contextual relationship between God, oath, and the early jury. The more modern antecedents of the jury emerge from two significant events in the history of trial procedure: the loss of the Ordeal as an accepted mode of trial, and the jurisdictional loss by the communal or county courts over pleas of lands to the royal court.[152]

The jury was made up of all those members of a local community whose oaths could be most trusted. Initially, there was no set number.[153] They were the holders of local knowledge and

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149. PLUCKNETT, *supra* note 92, at 107 (citing SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 117 (2d ed. 1898)).

150. Joyce and Richard Wolkomir, *When Bandogs Howle & Spirits Walk*, SMITHSONIAN 40 (Jan. 2001). The Wolkomirs' article studies the nighttime hours across the centuries and details pre-industrial society's intimate relationship with their environment, necessitated by the dangers of life in the intense dark of night.

151. Judy M. Cornett, *Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth Century English Law and Literature*, 4 WM & MARY J. WOMEN & L. 1, 12 (citing Sherri Olson, *Jurors of the Village Court: Local Leadership Before and After the Plague in Ellington, Huntingdonshire*, 30 J. BRIT. STUD. 237, 245 (1991)).

152. PLUCKNETT, *supra* note 92, at 109 n.4 (citing *Monumenta Germaniae Historica, Capilaria,* ii. No. 188, *translated in* H. POUND AND THEODORE F.T. PLUCKNETT, READINGS, 141). The earliest recorded use of a jury in the capacity for royal administrative inquiry goes back to the ninth century when Emperor Louis the Pious, son of Charlemagne ordered in 829 that royal rights would no longer be ascertained through voluntary production of witnesses under oath for the parties involved in the dispute against the government, but rather "by sworn statement of the best and most credible people of the district." *Id.* Thus, the recognition of the comparative worth of personal oaths. And although the decision in a case was not overtly left to God, God continued to be prominent in the process by giving the decision-making authority to those whose oaths were most reliable. *Id.*

153. PLUCKNETT, *supra* note 92, at 120. "By the middle of the thirteenth century . . . [the

custom.[154] As arbiters of truth, they were allowed to base declarations upon their own knowledge, as well as upon knowledge found in narrow groups of acceptable sources which included the church, the early scholastic writers, the Bible, and the writers of classical antiquity.[155]

The historical jury that began to overtly replace God's role in the trial process did not adhere to a fact based or narrative methodology of inquiry than did the ordeal or the various trials by oath.[156] The early jury trial process had no mechanism for distinction between fact-finding and the law. The law, applied through the jury, only named the trial process. God, in effect continued to declare the trial outcome.

Eventually the jury assumed a broader role, though it continued to be a role foreign to our modern concept of jury. Jury service is now more of a political act. The jury functioned as an investigative or administrative body.[157] As the jury received more complex cases that required knowledge beyond that of the neighborhood, the juror's duties included discovery of facts.[158] The jurors would have to go out and try to find the facts which exceeded their local knowledge.[159] Thus, juries began to resolve various civil suits.[160] Juries also acted as accusing bodies in criminal suits in the manner of current grand juries.[161] In 1220 at Westminster, it was first reported that the jury sat in judgment at a criminal trial with the authority to acquit or convict.[162]

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justices] selected a petty jury from among the numerous jurors present in court, and took the verdict of those twelve men." *Id.* at 126.

154. CORNETT, *supra* note 151, at 17.

155. *See generally* PLUCKNETT, *supra* note 92, Chapter 4.

156. JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME (1997) (quoting F. MAITLAND, "Our criminal procedure . . . had hardly any place for a law of evidence. In lieu of the ordeals the common law accepted the rough verdict of the countryside, without caring to investigate the logical processes, if logical they were, of which that verdict was the outcome.").

157. Cornett, *supra* note 151, at 12. "As Sherri Olson has shown, service as a juror of a local court tended to correlate highly with service in other local political offices; 'the men most frequently called upon to fill the important posts of reeve, beadle, bailiff, affeeror, constable, ale taster, collector of court fines, and hayward were men who either had or would serve as juror.'"

158. *Id.*

159. *See id.* at 248.

160. George Fisher, *The Jury's Rise As Lie Detector*, 107 YALE L.J. 575, 585-87 (1997).

161. *See id.*

162. *Id. But see* HOLDSWORTH, *supra* note 122, at vol. I book I 323, making clear that this use of jury in a criminal case still operated side by side with the compurgation, ordeal, or battle. What changed by the end of the twelfth century was that a person accused of a crime by a private

A distinction must be made between the grand jury, which acted as an accusing body, and the petty jury that was involved in the process at trial. Initially, it appears that the grand jury was often asked to also declare guilt or innocence based on the jurors' own knowledge.[163] But as in the earlier role of the jury where they had simply declared the mode of proof, sometimes additional jurors were added for the second phase when guilt or innocence was declared.[164] During the 13th and early part of the 14th centuries, the procedures for selecting and using a jury remained uncertain.[165] Judges were free to follow whatever procedure they desired.[166]

Two considerations gradually began to shape the process. Those were opposing considerations for the accused and for the interests of the crown.[167] These considerations present the first hint of the modern rational approach to the trial process. The idea that fairness should be a component in at least the selection of the decision-making body eventually leads to a focus on the process of the trial itself, not simply the mode. "As early as the days of Bracton it was recognized that upon an enquiry as to guilt or innocence of the prisoner, the prisoner ought to be allowed to object to members of the jury on the ground that they were his personal enemies."[168] An accused could also object to the presence of a petty juror who had served on the grand jury.[169] In 1351-1352, a statute was enacted forbidding any member of an indicting jury from sitting on the petty jury in cases involving trespass or felony.[170] The petty jury, therefore, began to be its own entity made up of jurors drawn from the country at large rather than from those chosen by the crown for the grand jury.

The transformation of the jury as a body of witnesses into a judicial body was gradual. It has been suggested that two factors directly influenced the transformation.[171] The first was the mode of jury selection itself. Law was created conferring the right to parties to object to a specific person

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person had the right by payment to choose trial by jury.

163. HOLDSWORTH, *supra* note 122, at 324.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See id.* Holdsworth recounts the story of a knight's trial in 1302. "[The K]night objected to the jury because they had presented him, and because, not being knights, they were not his peers. The latter cause of objection was deemed to be valid; a jury of knights was impanelled; and he was given a chance to object to individual members of this jury." *Id.*

170. HOLDSWORTH, *supra* note 122, at 325.

171. *Id.* at 332.

sitting as a juror.[172] The second was the means by which the jury could inform itself with regard to the facts in issue relevant to the case.[173] Both factors had a significant impact on the evolution of the trial process and both illuminate the continuing influence of God's initial role in trial process. Additionally, both factors are significant with regard to the development of rules surrounding factual findings at trial.

Evaluation of the jury selection process was one catalyst in the transformation of the jury from witness to adjudicator. Ideas about juror bias and fairness of process led to a rule that allowed a party to eliminate personal enemies from the jury. This was the first step in the differentiation between jurors and witnesses. It also signaled an evolving recognition that witnesses might be relevant to a fact-finding process. If the jury remained the body of witnesses, then a party might have a means to eliminate knowledge of specific facts from the courtroom. This in turn eventually led to the routine use of an additional voice in the trial narrative, the sworn witness. In the sixteenth century, reliance on sworn witness testimony became the norm.[174] However, at the same time, the reluctance to trust mortal voices remained and marked the rules which later developed to control the introduction of witnesses, as well as their use of language in the courtroom.

This hesitation is illustrated by the second factor, the means by which the jury could gather facts. Initially, the law was unconcerned with the method in which a jury secured knowledge.[175] This derived essentially from the jury itself or from the jury's own investigation. Since the jury could both present and find facts, they evolved into a powerful body. The initial acceptance of this power may relate to the ancient reliance on the all powerful voice of God. In other words, the community was more able to accept the voice of an authoritative body than it was to accept individual mortal voices of witnesses. The inherent fear of mortal testimony caused a continued reliance on the trusted authoritative knowledge of the jury.

Jurors were drawn from those likely to know.[176] Two cases cited in Thayer on Evidence illuminate this.[177] In one case, "[a] jury of Florentine merchants living in London [was] summoned to decide as to an act alleged to have taken place at Florence." In the other case, "a jury of cooks as to the quality of food sold." These cases illustrate that juries could be chosen for their specialized knowledge and that the independent use of that knowledge to decide a case was expected.[178]

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172. *See infra* note 186.

173. HOLDSWORTH, *supra* note 122, at 333-36.

174. HOLDSWORTH, *supra* note 122, at 334.

175. *Id.* at 333.

176. *Id*

177. *See id.* at 333 and n.5. The goal was to gather reliable information is shown in the jury selection in two cases cited in JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898).

178. Interestingly, the two examples foreshadow the modern use of the expert witness, a concept that in and of itself was later slow in earning acceptability in the courtroom. See *infra* Part VI.

The reliance on a specialized jury to adjudicate particular issues created a contradiction with regard to the exclusion of women from the juror pool. Judy Cornett juxtaposes "Blackstone's venerable - and tautological - explanation of women's disqualification from jury service, *propter defectum sexus*, with the exception to that disqualification, the jury of matrons, a special jury impanelled whenever the fact of a woman's pregnancy was at issue."[179] Cornett, drawing upon disparate historical and literary sources, illustrates that:

> [I]t becomes clear that Woman's moral, intellectual, and legal authority was debated in terms of the nature of her Reason. Women's possession of Reason and their ability to deploy it conventionally were seen as problematic. In contrast to the overly emotional creatures painted by the nineteenth century, women were constructed by eighteenth-century sources . . . as beings less intelligent than men, less able to convert their perceptions into generalized conclusions. In short, they were represented as untrustworthy judges.[180]

The fact that women were excluded from juries based upon a belief, however misinformed, that they lacked reason illustrates that the trial process did consciously aspire to a "rational core."

The growing power of the jury raised questions regarding false verdicts. During the period when the character of the jury was predominantly that of witness, jurors could be found guilty of perjury, a concept which at the time applied only to jurors.[181] As procedural law evolved, it in turn influenced the substantive law of trial testimony through the law of perjury which was later extended to the trial witness. As the jury's judicial role increased, jurors' liability with regard to an incorrect verdict expanded. Jurors were now liable not as perjurers, but rather for the verdict itself.[182] The new method for penalizing jurors who had made a false oath was called writ of attaint. Writ of attaint first appeared in 1202 in the civil pleas confined to the possessory assizes.[183] The severity of punishment under a writ of attaint included imprisonment for a year, forfeiture of goods, a reputation as infamous, having their wives and children turned out, and their lands laid to waste.[184] The remedy for a successful writ of attaint included the reversal of the jury's verdict.[185] This linguistic

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179. Cornett, *supra* note 151, at 2.

180 *Id.* at 3.

181. HOLDSWORTH, *supra* note 122, at 337 n.3. "Thus, the perjury of a juror was the only perjury known to the law til a statute of Elizabeth extended it to witnesses, Stephen, H.C.L. i 307;" An example of how changes in process led to the development of substantive law. *Id*.

182. *Id.* at 341.

183. *Id.* at 337.

184. *Id.*

185. *Id.* at 338.

history of the jury ends here as the character of the jury changed from being a witness into a decision-making body with no additional voice during the trial.

A subtle idea emerges from the authoritative and unchallenged role that the jury held for such a long time in the decision-making process. It suggests that the jury was a symbol of authoritative knowledge. It is reminiscent of the earlier acceptance of the concept in trials by ordeal or battle that there existed for each case one knowable right answer that was known only by God. The jury's knowledge like that of God could not be questioned. The voice of the jury also had a symbolic aspect. It spoke only under oath to God. Its voice symbolically represented the voice of God. At the time and place, the basis of the trust placed in the jury's voice had rational validity because jurors were selected from those most likely to know and for those whose oaths were believed to be beyond reproach. There were no bodies of substantive law which could be applied to facts in a given case. As long as the trial was, thus, marked by the absence of any decision-making methodology that distinguished between fact and law, neither the legal process nor the public had an effective tool for challenging an authoritative verdict.

Holdsworth explained that even after "[t]he jury had ceased to have first hand acquaintance with the facts in issue, . . . they could still find a verdict from their own knowledge."[186] That

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186. HOLDSWORTH, *supra*, note 122, at Vol. IX, 176. *See id*. at 175. He connects this power of the jury to the reason the system disallowed extrinsic evidence with regard to documentary evidence. Thus, the thread of the symbolic role of the jury, leads to the lawyer's use of pleadings, and eventually to the need for witnesses. Holdsworth explains that in the fifteenth century with regard to issues of land ownership a belief existed that "[t]he sealed instrument will not merely *prove* the transaction, but rather by replacement will now *be* the transaction." *Id.* This led to the rule that "no extrinsic evidence could be admissible to vary its contents." *Id.* Holdsworth explains the effect that literacy had on the development of the rule. First, "the community was becoming more generally lettered, and this in turn had resulted from the spread of the printing process in the late fifteenth century. Reading and writing were no longer the mysterious arts of a few. It was natural to hold that a man was bound by his written version of the transaction, when he might easily guard himself against the writings being deficient in some of the agreed terms." *Id.* Second, mercantile custom was making for the modern rule. The parties were not allowed to offer evidence to dispute those bills and notes and policies which, in the sixteenth century, were beginning to be known to the lawyers." *Id.* Holdsworth further explains the impact of the Statute's of Wills and Frauds on exceptions to this rule in the sixteenth century. As will be discussed in depth in the next section, from the lawyer's use of pleading and later witnesses to address his client's case, the substantive law evolved.

> *Non est factum* was always a good plea to a deed; and, in the sixteenth century it was admitted that the effect even of the sacred fine could be nullified by proof of fraud or illegality. Moreover, as the practice of merely averring facts in the pleadings decayed, and the practice of summoning witnesses to give oral evidence on oath spread; and as the idea that the jury could find a verdict from its own knowledge decayed, and as the fact that it relied solely on evidence documentary or oral became more obvious; there was not quite the same objection to allowing modifications of the strict rules as in earlier days. Hence, in the late sixteenth and seventeenth centuries, we begin to get some small development as to the facts which could be

symbolic power was handed from God to the jury is suggested by the respect accorded their verdicts.

D. How the Lawyer Got His Voice

I Know you lawyers can with ease
Twist words and meanings as you please;
That language, by your skill made pliant,
Will bend, to favor every client;
That 'tis the fee limits the sense
To make out either side's pretense,
When you peruse the clearest case,
You see it with a double face,
For skepticism's your profession,
You hold the doubt in all expression
Hence is the Bar with fees supplied,-
Hence eloquence takes either side;
Your hand would have but paltry gleaning
Could every man express his meaning.
Who dares presume to pen a deed
Unless you previously are feed?
Tis drawn, and to augment the cost,
In dull prolixity engrossed;
And now we're well secured by law,
Till the next brother find a flaw.

-Benjamin Franklin[187]

Just as the voice of the jury spoke in evolving capacities before lodging itself in its present personification, so did the voice of the lawyer. And as the shaping of the jury shepherded the evolution of the trial process itself, so did the voice of the lawyer. The lawyer's actual role within the courtroom as well as his perceived role from without, as expressed in Franklin's poem, is a direct result of the peculiar use of language that evolved as the trial changed from a physical ordeal to an oral production. The religious origins of the ancient trial methodologies made the move from ritualistic ordeals to ritualistic use of language a natural evolutionary step. The shift from the jury as witness to development of an oral process that had to rely on mortal sources of knowledge and new "ways of knowing" was defined by the introduction of the lawyer. Each step in the profession's evolution can be characterized by the role the lawyer was needed, required, or allowed to play in the trial, with regard to the identification of legal issues and relevant facts.[188] The technical complexity[189] in the use of language and the exclusionary rules that evolved in this regard, eventually led to the need for an educated legal voice.

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proved by extrinsic evidence, though the transaction had been reduced to writing.

Id. at 166. First, however, comes the lawyer and his use of pleadings and then the rules surrounding the competence and compellability of witnesses.

187. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (Simon & Schuster 2003).

188. *See* HOLDSWORTH, *supra* note 122, at 216-30.

189. ARTHUR R. HOGUE, THE COMMON LAW (1986). Factors related to the evolution of procedural law influenced the introduction of a legal professional into the trial arena. By the end of the thirteenth century, the common law was a system of complexity that was due in part to nascent attempts to develop and apply the burgeoning bodies of law, which were causing a gradual shift of interest from procedure to substance.

1. Language in the Early Trials

During the early Anglo-Norman period of the twelfth century, there had been no one in the King's service specializing full-time in adjudication; nor any legal bureaucracy.[190] Rather, primitive litigation had consisted of a plaintiff setting out his claim or grievance in a plaint.[191] It has been suggested that it was this element of the Anglo-Saxon legal proceeding that required the greatest degree of skill since "it had to be made in settled formal terms and had to be composed and spoken correctly."[192] However, there are few surviving accounts to confirm this belief. It is certain though, that a plaintiff would typically need to show a cause of action, recognizable by customary law, followed by a method of showing proof as discussed above.[193] While the plaintiff did not have to follow a set formula of language in the proceedings, significant importance was placed on avoiding self-contradiction, a violation which would result in a fine or other penalty.[194]

Additionally, a plaintiff may have been required to use specific and formal expressions in setting out his complaint. This aspect of the proceedings was very important because "judgment would be given on the basis of what he had actually said and not on what he meant to say. Anything he had once said could not subsequently be unsaid by him."[195]

Some scholars suggest that the defense's case required much less skill and care to detail than the plaintiffs did.[196] A defendant would merely make a formal denial of each claim point by point. However, a defendant was given the opportunity to have a third party present him to court in the form of the defendant's warrantor.[197] This first evidence of a party relying on the oral skills of an alternate person appears before the trial moved into the courtroom. A warrantor simply confirmed the veracity of the defendant's statement. The parties were then offered the choice of having their oath put to proof by compurgation, ordeal, or battle. Sometimes the method of proof was dictated to them. "Because it was God who was judging between the parties, there was no need for the defendant to make any other kind of defense. God would not be misled in the way that a jury later could be by factual situations supporting the plaintiff's claim, but which actually exonerated the defendant."[198]

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190. *Id.*

191. PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 3 (1992).

192. *Id.* at 4.

193. *Id*.

194. *Id.*

195. *Id.*

196. *Id.*

197. BRAND, *supra* note 191.

198. *See* PLUCKNETT, *supra* note 92, at 399. The only trials that provide any recorded history

As the trial moved indoors into the courtroom and alternate procedures were substituted for the primitive trial methodologies, focus on process turned to specific rules which dictated the ritualistic use of language. A party's claim needed to "be made in settled formal terms and had to be composed and spoken correctly."[199] The rules surrounding the use of language by the pleader became so complex that the help of a person with special language skills became advantageous to parties involved in a legal dispute. At first these helpers were simply friends or relatives.

Initially pleadings were the central stage of the trial process and not merely preliminaries.[200] It is likely that in their earliest forms, pleadings consisted of sworn statements and were, thus, a means for determining truth.[201] The final proof stage of the trial consisted of compurgation or ordeal. Thus, the first pleadings were oral altercations – the preliminary rounds before the main physical event. It is probable that when the King's Court later needed pleading forms, the King's Court adopted many of those that were already in common or customary use.

2. Responsalis

Around 1154, the term "responsalis" began to appear in documented courtroom records.[202] The responsalis initially was a friend or relative who knew the party personally and could vouch for him.[203] The responsalis could take the place of either party to an action.[204] Court records suggest that the responsalis was concerned with procedural steps, such as appearances and defaults.[205] No

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that can be followed during this period are those involving high ecclesiastical dignitaries. Church records provide no evidence of a legal professional and on the contrary suggest that dignitaries conducted their cases in person. The word "advocate," however, first appears in connection with the Church, although it is not the advocate we know today. Rather, the term "advocate" seems to refer to special protectors whom churches and laymen sought in the dark ages. A person called an advowson had the right to present a fit person to the church or church official to fill a vacant position. *Id.*

199. BRAND, *supra* note 191, at 3.

200. PLUCKNETT, *supra* note 92, at 399.

201. *Id.* at 400. Plucknett provides an example of such a pleading: Plaintiff, "In the name of the living God, as I money demand, so have I lack of that which N promised me when I mine to him sold." Defendant: "In the name of the living God, I owe not to N sceatt nor shilling nor penny nor penny's worth; but I have discharged to him all that I owed him, so far as our verbal contracts were at first." *Id.*

202. PLUCKNETT, *supra* note 92, at 215-30.

203. *Id.* at 216.

204. PLUCKNETT, *supra* note 92, at 215-30.

205. *See id.*

particular legal knowledge or training was necessary to fill this role.[206] To be appointed, the responsalis was typically required to be presented in person before the court by the respective litigant.[207] As noted earlier, the adversarial system during this time often afforded a litigant a choice between trial by battle or by assize[208] where he would seek the jury's determination. So, the responsalis played a minor role.

Eventually, it was no longer required that the litigants appoint a close friend or relative as their representative. Rather, parties could appoint representatives on an ad hoc basis. By the year 1200, the title of responsalis was reserved for representatives who were appointed out of court, without court approval.[209] If a responsalis answered on behalf of his client, a court would not accept his statements until they had been specifically ratified by the principal.[210]

2. Attorney[211]

By the reign of Henry III (1216-1272), the word attorney appeared in plea rolls in connection with a party's pleadings.[212] The attorney was more helpful than the responsalis because he was appointed in court by the party and had the power to bind his principal to a plea.[213] The attorney's role was not one of advocacy because the outcome continued to be decided by one of the ancient modes of trial. The attorney actually "took his client's place in the litigation and conducted the [initial] proceeding in his client's name."[214] The most significant attributes of such an "attorney" were integrity and diligence.[215]

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206. *See id.* The writ of 1292 first addressed legal education. *See id.* at 217-18.

207. BRAND, *supra* note 191, at 46.

208. *Id.*

209. *Id.*

210. *Id.*

211. WEBSTER'S NEW INTERNATIONAL DICTIONARY 150 (G & C. Merriam Company, Wash. D.C. 1909). The word *attorney* derives from the verb *attorn* which means to direct, turn; in *Feudal Law* — to turn or transfer homage and service (to a lord). This is the act of feudatories, vassals, or tenants, upon alienation of the estate: *Modern Law* — to agree to become a tenant to one as landlord to an estate previously held of another. *Attorney* is defined as one who is legally appointed by another to transact business for him. In England under the Judicature Act of 1873, the title attorney was abolished and attorneys at law were denominated solicitors.

212. PLUCKNETT, *supra* note 92, at 216.

213. *Id.*

214. *Id.* at 216.

215. *Id.* at 216. *See also* Kadoch, *supra* note 49, at 92.

3. Narrator

Perhaps in the reign of Henry III, but certainly by the reign of Edward I (1272-1307), there was one of the greatest outbursts of reforming legislation.[216] A new voice appeared in the courtroom; the narrator, or "*conteur*" as he was called in French.[217] The law and the business of courts had become more complicated and the system was ready for the introduction of another player. The trial process and the individual parties were already comfortable with the presence of the attorney at the pleading stage of the trial. Parties who had less confidence in their ability to tell their tale competently began to seek help in testifying in the appropriate forms.[218] A party hired a narrator to tell his story in court.[219] The narrator became an intellectual legal combatant and a regular profession whose exploits are recalled in the Year Books.[220]

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216. *See* PLUCKNETT, *supra* note 92, at 27-31. The Statute of Westminster (1275) made many changes in procedure. *Id.* at 27. The Statute of Gloucester (1278) made important amendments to the law of land. *Id.* In 1284 there is a long statute that essentially is a short treatise on the state of the common law. *Id.* In 1285 a series of statutes were enacted including the second Statute of Westminster "which leaves hardly a single department of the law untouched." *Id*. Chapter 24 of the Statute of Westminster makes provision for the:

> [S]teady expansion of the law by the enlargement of the available writs in certain narrowly defined circumstances [w]hensoever from henceforth it shall happen in Chancery that there is to be found a writ in one case, but not in another case although involving the same law and requiring the same remedy, the clerks of the Chancery shall agree in framing a writ, or else they shall adjourn the plaintiffs to the next Parliament, or else they shall write down the points upon which they cannot agree and refer them to the next Parliament, and so a writ shall be framed by the consent of the learned in the law; to the end that the court from henceforth shall no longer fail those who seek justice.

Id.

217. BRAND, *supra* note 191, at 48.

218. PLUCKNETT, *supra* note 92, at 216-17. *See* Kadoch, *supra* note 49, at 92; *see also* GEOFFREY RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 90 (1977).

219. PLUCKNETT, *supra* note 92, at 216-17.

220. *Id*. at 217. Focus at this time continued to be on the process rather than on a reasoned application of substantive law. Courts at this time enforced a strict rule that all argument was to be done during the pleadings. *Id.* at 399-400. The argument was one of process, namely the wording of the writ. This was important because the wording essentially dictated the outcome. No argument took place during the actual trial. Rather, the main trial process consisted of the submission of the previously specified question to the jury. Usually, the jury had already come to a decision after receiving the writ *venire facias*. *Id.*

During this time, attorneys and narrators continued to work side by side. Attorneys were retained "*ad prosequendum ad narrandum*, to follow and defend causes mechanically, continuing a suit by issuing the process and making the necessary entries."[221] In contrast, the narrator was employed *ad narandum*, to recite the count or declaration before judges. His work evolved into that of argument at the bar, and as a natural consequence, judges eventually came to be chosen from this class, evolving to counselor and then to barrister.

Certainly the work of the attorney influenced the law for it was he who could bind his client through pleadings.[222] But it was the more "nimble fencing at the bar of the court" of the narrator that "became so essential to the success of an action at law" that appears most evident in the legal literature of the time.[223] During the time that "the common law was still young and just setting out to extend its jurisdiction and enlarge its store of doctrine," the narrator's voice was profoundly important for the development of the law.[224] At some time impossible to pinpoint, the functions of the two became the "province of the professional lawyer."[225] The role the narrator was able to play in the intellectual legal sparring foreshadowed the need for an educated legal profession. And the direction that legal education took had a significant impact on the way the profession and, in turn, the trial narrative evolved.

From the Norman Conquest until 1362, French was the language of the courts.[226] French was replaced with English, but the pleading forms continued in translation without substantial change. All of these forms were oral and their origins were oral.

The recording of cases in the plea rolls, however, consisted of a brief narrative of the proceedings with no reporting of the actual pleadings.[227] This is consistent with the Norman roll which was narrative and ignored the forms used by the parties.[228] Over time a permanent and more consistent method of recording was established. Entries in the plea rolls became longer and settled in their wording. They bore a direct relationship to the actual forms used at trial. By the reign of Henry III, the roll forms were settled and remained essentially the same for the next six hundred years.[229] In the Classical Plea Roll, the old oral count, which is made in Latin, is directly

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221. *Id.*

222. *Id*. at 217.

223. *Id*. at 220.

224. PLUCKNETT, *supra* note 92, at 221.

225. *Id.*

226. *Id.* at 400.

227. *Id.* at 402.

228. *Id.*

229. *Id.*

represented for the first time on the roll.[230] This model roll makes a deliberate attempt to include all of the essential details and not merely the general substance of the parties' allegations.[231] Under the old system, the exact words spoken by the lawyer were important. Under the new system, the words the clerks recorded on the roll became more important.

This shift of focus from the form to the understood substance of the lawyer's words as reported in the clerks' written recordings had a profound effect on the lawyer's use of language and on his considerations at trial. Lawyers had to think about the effect of their words and the clarity of their message, not just a memorized presentation. The interpretation by the clerks could no longer be assumed. This "thinking out loud" on the part of lawyers could occur within the preliminary arguments and tentative pleadings between the parties because nothing was recorded by the clerks until the parties reached their definite positions and then presented them in final form to the court. This method provided the lawyer with opportunities for orally reasoned thought.

The early Year Books refer to lawyers "'licking their plea into shape' in open court."[232] This was a step forward from the earlier trial where any oral pleading that was initially uttered was binding.[233] This is the first overt evidence of the lawyer's importance with regard to the

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230. *Id*. at 403.

231. *Id.*

232. *Id.*

233. Examples of pleadings of the period, illustrated in THEODORE F.T. PLUCKNETT, STUDIES IN ENGLISH LEGAL HISTORY (1983), include:

The Earl of Lancaster

The 1327 pleadings in the trial of the Earl of Lancaster give an interesting insight into the oral arguments of this period. The Earl was represented by his brother, Henry of Lancaster, who was known as a prominent lawyer of the time. The Earl was charged with committing "notorious" acts of treason. Henry of Lancaster made three arguments to the common law court. First, he argued that the Earl could not be condemned "without arraignment and without answer." *Id*. at 550. The concept of arraignment, which has since become a symbol of common law courts, is significant because it was "the putting of a prisoner to answer, and inviting him to make a defense." *Id*. at 546.

The second error argued was against the charge of notoriety which at the time excluded all defenses because "notorious facts need no proof and admit no defense." *Id.* Henry urged that while the procedure may be legitimate during wartime, "the King ought not to record the guilt of a person in time of peace." *Id.* at 546. He proposed a test to distinguish peacetime from wartime. Essentially, the test defined a state of war to be when there is the suspension of the normal work of the courts. He argued that the Earl's offenses, capture and trial took place in peace time "because the chancery and other places of the King's court were open and administering justice in the accustomed manner to all who sough it throughout that period, nor did the King rise with banner of war displayed during that period." *Id.*

Henry of Lancaster's final objection was that his brother deserved to be tried by his fellow peers. Judgment was reversed on all counts and the Earl was released. These arguments

relationship between process and the substantive development of the law. However, this burgeoning freedom, accorded lawyers for a means of rational thought about a claim, also placed a self-imposed limitation on the lawyer who did not have access to the rolls and who could not be sure what was recorded. The lawyer had to think carefully about the clarity of his words and their effect upon an audience, i.e., the clerk. Additionally, it placed authority for formulation of the case in the clerk's hands as it was the recorded form that was to be followed, and the

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became the foundation for many arguments in subsequent trials and later served as precedent. The issue of notoriety has played a significant role in the development of early criminal law. Initially, due to the notorious nature of the alleged facts,

> [P]unishment fell upon the defendant who was suspected rather than proved guilty. The common enrolment in the royal courts non potest dedicere semms to mean that the accused had in fact no defense to offer, rather than the he was debarred by law from presenting a defense even when he had one.

Id. at 548. After *Lancaster*, the concept of notoriety has since served to put the accused on trial rather than determine his guilt. Therefore, Lancaster's persuasive arguments established the rule that "assignment and hence an opportunity for defense were essential to a valid trial." Moreover, *Lancaster* propelled Parliament into great prominence as the court for state trials by cementing the rule that the accused must be tried by his fellow peers.

Thomas of Berkeley

In 1330, Thomas of Berkeley was charged, by today's doctrine of respondeat superior, with the murder of King Edward II. His trial was procedurally unusual in that it is recognized as being quite modern compared to similar trials during this period. In short, Berkeley was brought before Parliament where he was accused rather than indicted. The court gave him the opportunity to defend himself with pleadings of fact and by denying, by implication, certain points of law. He pled not guilty and was tried by a jury of knights who were his peers. The importance of this trial is that it contained rules of law, which had not yet been recognized. This would indicate that a mediaeval lawyer's role involved advocating against the unknown.

The recorded procedure suggests an oral altercation cast into the form of rather unusual pleadings. Thomas of Berkeley appeared in custody before the lords in parliament, and it was said to him that he had been the custodian of the deposed Edward II, who had been murdered in Berkeley Castle. How would he acquit himself of that death? Thomas answered that this was the first he head heard of the murder, and that he had nothing to do with it. The point was put to him that since he was Edward's custodian, he ought to excuse himself. Berkeley had his excuse ready, he was ill at the time, and was not in the castle when the crime was alleged to have been committed. The court then made a further proposition: Berkeley appointed his own servants, was he not responsible for them? To this he answered he trusted his servants as himself, and so finally pleads not guilty. Seven weeks later, a jury of fellow knights found him not guilty, but parliament reversed the legal point of his liability for his servants. *Id.* at 546.

judgment was based upon the recording.[234] The early importance of oral pleadings and the related significance of the clarity of the lawyer's spoken word demanded a learned group of professionals and drove the evolution of the legal professional which in turn directed the evolution of the trial narrative.

One of the outstanding judges of the fifteenth century, Littleton,[235] said to his son of legal education "it is one of the most honorable, laudable, and profitable things in our law to have the science of well pleading in actions real and personal; and therefore I counsel thee especially to employ thy courage and care to learn this."[236]

Through the Middle Ages, the development of the legal profession[237] began to focus more and more on the substance rather than just the form of language in the pursuit of analytical thought to prove a client's case. This was a major shift for the legal system. A sentiment reminiscent of Socrates and expressed by Plowden was first printed in 1588. It articulates the shift with clarity:

> From this Judgment and the cause of it the Reader may observe that it is not the Words of the Law but the internal Sense of it that makes the Law, and our Law (unlike all others) consists of two Parts, viz: of Body and Soul: the Letter of the Law is the Body of the Law and the Sense and Reason of the Law is the Soul of the Law, because the reason of the Law is the soul of the law. And the Law may be likened to a Nut which has a Shell, so you will receive no Benefit by the Law, if you rely on the Letter, and as the Fruit and Profit of the Nut lies in the Kernal and not in the Shell, so the Fruit and Profit of the Law consists in the Sense more than in the Letter.[238]

5. Process and Education: Evolution of the Lawyer's Voice

The possibility for the eventual evolution of the early legal voices into that of the 'professional lawyer' was born out of the complex ritualistic orality of the trial pleadings around the time the attorney and narrator were practicing side by side.[239] As the presence of a legal voice made the use of pleadings effective, it also created the need for a sanctioned mode of legal education. In a move to maintain control of the lawyers, Edward I issued a royal writ in 1292 that placed the

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234. PLUCKNETT, *supra* note 92, at 404-05.

235. *Id.* at 277-78, 399. Littleton was a member and reader of the Inner Temple. *Id.* at 277. He became a serjeant in 1453 and a judge of Assize in 1455. *Id.* He authored the treatise *Of Tenures. Id.*

236. *Id*. at 399.

237. *Id.* at 215-30.

238. *See* JOHN MAXCY ZANE, THE STORY OF LAW 279 (1927).

239. *Id.* at 217. The attorneys at this time were important because they could bind their clients through pleading. *Id.* The narrator told the client's story. *Id.* At some point, impossible to pin point directly, these functions become the province of the professional lawyer. *Id.*

education of aspiring legal professionals under the control of the court.[240] It also promised those who sought education, a monopoly on the profession. The writ did not effect those legal professionals already acting as pleaders.

It is significant that the court rather than the university[241] was given control over legal education particularly because, by this time, legal appointments to the bench traditionally came from the ranks of the legal profession. While society was concerned with the necessary development of substantive bodies of law at this time, the courts and lawyers continued to spend their days in the oral, ritualistic procedural setting of the courtroom. That this perspective had a significant effect on the form that legal education took in the Inns of Court as well as on the continuing evolution of the trial narrative is evident.

It is logical to assume that had the universities been given control over legal education, the trial process might have evolved quite differently, perhaps to such an extent that the written word might have eventually become the vehicle for intellectual combat rather than just the later means of the pleading stage of the trial. The teaching at university would likely have been "dogmatic and doctrinal" and presented through the use of texts and text books.[242] Instead, the Inns of Court, where instruction until the seventeenth century was almost wholly orally conducted through readings and moots, arose out of the authority given the courts over legal education.

Whether the Inns were formed in the thirteenth or fourteenth centuries is uncertain. The Inns functioned as a combination residential law school, social club, and trade union. They may also have originally functioned as residence halls for out of town lawyers coming to London for the relatively short law terms.[243] The development of the Inns and their role in the legal system mirrors the adaptive characteristics of the trial process itself. Over time, the Inns of Court adapted themselves to the changing needs of the system and the conditions of society.[244]

Apprentice lawyers rented rooms at the Inns, formed dining clubs, and listened to seasoned

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240. *Id*. at 218. The writ was sent to Meetingham C.J. and other judges of the Common Bench.

> Concerning attorneys and learners ('apprentices') the lord King enjoined Meetingham and his fellows to provide and ordain at their discretion a certain number, from every county, of the better, worthier and more promising students . . ., and that those so chosen should follow the court and take part in its business; and no others.

Id.

241. *See* PLUCKNETT, *supra* note 92, at 219. Legal learning certainly had been available before this writ. *Id.* However, they were not schools of English law. *Id.* And in 1234 all, 'law schools' in London were closed by royal edict. *Id.*

242. *Id.*

243. *Id.* at 225-26.

244. PLUCKNETT, *supra* note 92, at 225-26.

lawyers as they taught the students about the law and subtlety in court. The students arranged moots and followed a case method, which "from that day to this has been especially important to common law teaching."[245] It is significant that the legal teachings held in these Inns, were very similar to actual practice in the courtrooms.[246]

Arguing about writs was a regular exercise in the Inns of Court by the first half of the fourteenth century.[247] "An accurate knowledge of the Register of Writs and of the form of action which each writ originated was the foundation of the professional knowledge of a medieval lawyer."[248] "Each writ . . . initiated a different form of action, with its own process for compelling the defendant's appearance, its own methods of trial and its own appropriate form of judgment."[249] The lawyer's use of language in the courtroom was required to adapt to the requirements of different writs. Likewise, it was through the lawyer's use of language that new writs were developed.

If no writ existed to deal with the issue presented by a case, the lawyer would have to petition the Chancery who would meet and frame a new writ under the provisions of the Statute in *consilimi causu*.[250] In this way, the medieval lawyer "made up" his role and helped the law evolve through use of the oral trial process as new issues presented themselves. Legal education also developed in this way and was made up of the memorizing of scripts to present known writs[251] and the arguing of the law to sharpen the mind for novel actions.[252] The profession continued to evolve as the professional's voice became the primary voice of the trial narrative as well as the primary force of any further development of trial process.

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245. PLUCKNETT, *supra* note 233.

246. *Id.*

247. J.H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 13 (1986).

248. RADCLIFFE & CROSS, *supra* note 218, at 80.

249. *Id.*

250. *See* CASSELL, *supra* note 3. A *consilium* is defined as a deliberation or consultation. *Id.* at 127. *Causa* means with good reason. *See id.* A causula is defined as a little law suit. *Id.* at 88.

251. The Writs of Entry, http://vi.uh.edu/pages/bob/elhone/entry.html (last visited Oct. 8, 2007) Common law at this point did not rely on precedent, but on analogy. Therefore, litigants sought highly skilled orators to plead on their behalf. The emphasis on oratory skills can be seen in the writings of the court reporters during this period. The reporters, actually apprentice lawyers, did not particularly care about the outcome of the case. They were only interested in hearing the experts argue and "once they knew what could be pleaded, the resolution of what the factual situation actually was uninteresting: they only needed to know how to plead." *Id.*

252. PLUCKNETT, *supra* note 92, at 221.

6. Serjeant-at-Law

The term narrator eventually gave way to the term serjeant-at-law which first appeared some time after 1310.[253] There is debate over the origin of the term because the term implies a permanent relationship of employment.[254] It has been suggested that this might mean royal employment.[255] Evidence of this interpretation is supported by the fact that the Crown began to appoint serjeants at the time that the term became commonly associated with lawyers.[256] That would mean, however, that the Crown employed all narrators.[257] Whatever the origin of the term, the functions of the serjeant are easily distinguished from those of the attorney and required the serjeant to have profound legal learning and quick wit.[258]

The function of the serjeant-at-law was to present arguments to the court.[259] The serjeant-at-law had to have a quick intellect in order to think on the spot.[260] A solid knowledge of law was critical to success.[261] The serjeant-at-law also had to have a facile ability with at least three languages because court proceedings were in Norman French, the written record of the case was in Latin, and conversation with clients was often in one of several "barbarous dialects."[262] The serjeant-at-law was not, however, allowed to use rhetoric, unnecessary pedantry, or cleverness to persuade the court.[263] The justices would not let serjeants stray far from the legal issue before them.[264] The words used by the serjeant-at-law were direct and their diction unadorned.[265]

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253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. PLUCKNETT, *supra* note 92, at 222.

259. *Id.*

260. *Id.*

261. *Id.*

262. ZANE, *supra* note 238, at 289.

263. PLUCKNETT, *supra* note 92, at 222.

264. *Id.*

265. *Id.* Nowhere during the middle ages do we find a trace of rhetoric in the English courts. True to their administrative origin, they kept themselves in a strictly business attitude. It is only after the Renaissance that we find the bad old classical tradition of Greece and Rome which turn lawsuits into an oratorical contest appearing in England. *Id.*

Plucknett says of the serjeants task that they:

> [C]onduct[ed] these altercations (which later are so carefully arranged by counsel in written pleadings) orally in court, and apparently with little previous knowledge of what lay behind them or of which way they would turn. It seems that there was always room for surprise, and that each side did its utmost to conceal facts from the other side.[266]

The serjeant made the argument. His was the primary voice. There was no story told either directly or by cross examination through witnesses at this point in the evolution of the trial narrative.[267]

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266. *Id.*

267. *See* BAKER, *supra* note 247, at 76. The author explains that during the Middle Ages, trials were considered fair if run with procedural accuracy. The lawyer's task was to ensure that the pleadings process was flawless. As explained above, there did not exist a body of substantive law upon which to measure the fairness.

> In the Middle Ages, legal development had hardly reached [the stage of showing proof]. We know very little of how the problem of proof was handled in jury trials, in all probability its importance had hardly even been realized. There was certainly very little a modern lawyer would regard as law of evidence. Consequently, the emphasis rested not on the problem of proof, but upon the orderly conduct of the proceedings as a whole. A mediaeval critic would demand that the procedure of a trial should be flawless, that all the delays should be accorded that the writs and rolls should be scrupulously accurate, that there should be no error on the record. In taking this attitude, the mediaeval lawyer was concentrating on a problem, which he knew was within his competence, and which was for centuries to be fundamental. A rigidly settled procedure is the first requirement for the development of a legal system, and the Middle Ages achieved it.

BAKER, *supra* note 247, at 76.

See also RADCLIFFE AND CROSS, *supra* note 218, at 80-84. In their book, THE ENGLISH LEGAL SYSTEM, the authors describe the process. Note, however, that while the authors use the word "story," this word refers to the pleas as previously explained.

> Originally, the pleadings were conducted orally in open court and entered on the record of the case by the clerk. The plaintiff's counsel began by telling his story, whence the use of the word count which remained in use until the Judicature Acts for the various paragraphs in the plaintiff's declaration (now called the statement of the claim) and is still in use for the different paragraph's of an indictment. The plaintiff's counts were met by the defendant's pleas, which still remain oral in criminal proceedings. This system of oral pleadings determined the character of the Year Books which are almost entirely devoted to a detailed report of the

In that context:

> [T]he early serjeant was rather in the dark about his case until he had wrung a few admissions from his adversary. Consequently, what a serjeant said might or might not correspond to the facts of the case. Those facts are in the knowledge of the party but not of his serjeant, unless he has seen fit to enlighten him. So when there is a chance that an alleged state of facts may be material to the decision of the case, the serjeant has to "get himself avowed", that is to say, procure a confirmation or denial by the party or his attorney of the statement made by the serjeant. The party therefore has the advantage of a second thought before he finally commits himself to the line of action proposed by the serjeant."[268]

The serjeants held a highly respected position from the beginning.[269] They had exclusive right of audience in the Court of Common Pleas and usually fewer than ten were in practice at one time.[270] When a rare position opened in this exclusive club, new serjeants would be chosen from the "double readers" in the Inns of Court.[271] Being called to join the serjeants was a highly celebrated affair in that the position represented the highest form of dignity:

> These were the men whose arguments were reported in the Yearbooks, and who in that way were responsible for fashioning the common law. Their exclusive right of audience in their own court made them the wealthiest advocates in the world. They were the cream of the profession.[272]

> moves of both sides until finally one or the other was maneuvered into a position by which he had to abide. Oral pleadings were superseded by the exchange of written pleadings at the end of the mediaeval period but the common law system of pleading still retained, after the change, its outstanding characteristics of a system under which the parties were compelled to frame with great exactness the precise issue which they wished to submit to the adjudication of the court and all pleadings were bound to end in a single issue, either of law or fact, to be decided in the first case by the judgement of the court, and in the second by a verdict of a jury. The system was excessively rigid and technical, particularly its requirement that every issue should not only be certain, but also single.

Id.

268. PLUCKNETT, *supra* note 92, at 223.

269. *Id.*

270. BAKER, *supra* note 247, at 78. *See also* PLUCKNETT, *supra* note 233, at 375-76, where author states serjeants were appointed through patents from the king.

271. *Id.*

272. BAKER, *supra* note 247, at 78.

"[T]hey ranked as knights and surrounded themselves with elaborate and costly ceremonial."[273] The courtroom was used to ritual and welcomed it.[274] By the end of the 14th century, serjeants enjoyed the privilege of being the only legal group from which judicial appointments were made.[275] This policy created a strong relationship between the bench and bar. They had also consolidated their position by becoming a guild in complete control of the legal profession and of legal education.[276] This control as suggested above has had a significant impact on the evolution of the oral adjudicatory trial process.

7. Apprentices and Barristers

While the name "apprentice" connotes "student," apprentices were actually professional lawyers whose position fell right below that of a serjeant.[277] They were learned lawyers and are considered the most difficult class to define.[278] Apprentices were members of the Inns of Court where they learned from the serjeants and themselves:

> [T]he apprentices undertook the heavy burden of legal teaching. The serjeant may well have fancied himself as a sort of doctor, bestowing rings and liveries, and wearing coif and hood and robe, but the men who taught were not the serjeants, but the apprentices.[279]

They then carried their studies into real practice in the courtrooms. Membership in the Inns "is the clearest indicator of [their] professional status and as a warrant claiming the vague qualification 'learned in the law.'"[280]

Barristers are the direct descendants of the apprentices, and the traditions upheld by them

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273. PLUCKNETT, *supra* note 92, at 223.

274. *Id.* "The creation of a serjeant obliged him to provide a feast comparable to a king's coronation, to distribute liveries and gold rings in profusion, and to maintain the proceedings for seven days." "[E]very serjeant had his own pillar in St. Paul's Cathedral which served him as office and consultation room." *Id.*

275. BAKER, *supra* note 247, at 79.

276. PLUCKNETT, *supra* note 92, at 223-24. "In 1877 the order was dissolved, Serjeants' Inn sold, and the proceeds divided among the surviving members." *Id.* at 224.

277. BAKER, *supra* note 247, at 88.

278. *Id.*

279. PLUCKNETT, *supra* note 233, at 338.

280. BAKER *supra* note 247, at 76.

today in the Inns of Court are those founded by the apprentices.[281] Originally, there were two groups of barristers, "the utter (or outer) barristers, who were the most notable rank among the apprentices and were privileged to argue in the mock trials or moots which were staged for the instruction of the students."[282] The students, themselves, were known as the inner barristers.[283] The apprentice was in essence the true common law lawyer who "[was] self-educated, and looked solely to the profession for the technical development of their system."[284] Barristers had secured their position and were being elected to parliament by 1504.[285] They established their authority in court by pleading their "degree," by 1591.[286]

During the sixteenth century, England saw a significant increase in wealth. This prosperity created more lawsuits, which required the building of more courts, which produced a need for more lawyers.[287] The legal profession boomed during this era and its structure, having the foundation already set, began to build upward. Up until this point, many trials were not open to the public and were typically conducted in secret. As the government also grew in this time of prosperity, it was important that the public believe the legal system was lawful and just.[288] Thus, to appeal to public sentiment, the majority of trials were opened to the public.

By the later half of the seventeenth century, members of the English legal profession had immigrated to the American colonies. These entrepreneurs brought English law books, procedure, and new ideas with them to the New World. The rights granted to the colonists were set forth in a set of colonial documents written by the English judiciary.[289] Because English law governed the colonists, they had access to England's state trial reports, treatises, and other legal readings. Included in the legal precedent that crossed the Atlantic were the laws choreographing the trial, known today as the law of evidence.[290]

The lawyer's concurrent struggles to fulfill his unique linguistic role in the oral process

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281. PLUCKNETT, *supra* note 233, at 338.

282. PLUCKNETT, *supra* note 92, at 225.

283 *Id.*

284 *Id.*

285 *Id.*

286. PLUCKNETT, *supra* note 92, at 111-12.

287. BAKER, *supra* note 247, at 127.

288. *See infra*, Part IV.

289. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 578 (1992).

290. *Id.*

and to diligently represent his client's interests, drew the trial process inexorably forward toward the more modern version of a "Rationalist Model" of adjudication. This was so because the lawyer was pre-eminent in the expanded use of process, not only to develop the substantive law, but also to test its applicability. Once the substantive law began to expand, it provided a means beyond process to consider the fairness of a trial. Before, the focus with regard to fairness was on the lawyer's precise use of language through pleadings; the lawyer was now set loose to use language in the courtroom to develop an analytic form of inquiry and to expand the substantive law through common law development. The development by lawyers of methods for examination of the facts and application of the law made inevitable the expansion of the trial narrative beyond the pleadings. As a result, rules of evidence began to evolve, helped along by the lawyer's understanding of the power of language. Those rules served two purposes. First, they allowed a forum for development of substantive rules concerning admissibility of various types of evidence. Second, they provided linguistic guidelines for the trial which was becoming a seminal speech event. Scholarly writing abounds on the substantive function of the rules of evidence. This article is focused on the scarcity of scholarship on the linguistic function. As witnesses took a more integral part in the narrative, a method of cross-examination became necessary. It was the lawyer, listening on behalf of his client, who recognized that the search for truth required a rationally based means to control the use of oral testimony. Rules of trial discourse eventually emerged to control the lawyer's own use of language and witness testimony to tell his client's story. However, so deeply embedded was the fear of mortal testimony traced from the ancient modes of trial reliant on oath that, from the beginning, the lawyer's use of oral witness evidence was handicapped. His telling of the trial narrative was strictly controlled by the "rational core" that guided the ways of knowing operative at trial as the process evolved.

III. Linguistic History Part Two: On Rationalism, the Witness Voice and Rules of Evidence

The people's voice is odd,
It is, and it is not, the voice of God.
[Vox populi vox Dei] Letter to Charlemagne [A.D. 800]

-Alcuin

A. Introduction

It was the lawyer who gave voice to the modern witness through his expanded role as facilitator of the introduction of facts to the trial.[291] The growing distinction between facts and law at trial expanded the trial narrative. It led to a new species of witness who was allowed to speak in response to questions about the facts posed by the lawyer. The examination of facts by the lawyer through the use of the witness voice brought a new dimension to the Anglo-American

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291. *See supra* notes 155-61 and accompanying text (commenting on the lack of distinction between law and facts). The modern witness referred to here, whose role it is to introduce facts upon which the law can be applied, speaks only in response to the lawyer's questions.

trial process that, in turn, necessitated development of rules of evidence that guarded the Rationalist model of trial. As the rules took shape they embraced two separate functions to support the Rationalist model of adjudication. First, was the linguistic function which guided the use of language, mindful of the relationship between language and thought in the seminal speech event which the trial had become. Second, was the substantive function, a concern for the fairness, relevance, and reliability of the introduction of certain kinds of evidence. In this section, I focus primarily upon the linguistic function of evidence, illustrating its recognition in the early treatises as an interdisciplinary topic, its connection to reliance on God, distrust of narrative, and its concurrent development with the introduction of the modern witness voice.[292] I focus on the substantive function only briefly at the end of the section to illustrate my point that by the beginning of the twentieth century scholarly, discussion of evidence centered purely on substantive aspects of evidence law.[293]

The story of the witness[294] voice is particularly intriguing because it illustrates and synthesizes the two premises related to the linguistic function of the rules of evidence and also underscores the current segregation of scholarship. In the telling of the witness story, a timeline and interconnectedness emerge between the linguistic function of the rules of evidence, the rational core, distrust of narrative and the lingering presence of God. The synthesis is evident in the nature of the sources which tell the story of the witness, in the interdisciplinary discussions in the primary sources which connect the premises, and in the concurrent timelines of events. The shift from scholarly concern for the linguistic function to examination of the substantive is evident by the end of the nineteenth century, as scholars include less interdisciplinary discussion, less pondering of philosophy, less mention of God, and less concern with the nature of man, and focus instead on a search for one organizing principle of evidence[295] and the further evolution of a substantive body of evidence law.

The sources which together tell the pieces of the witness story include general legal histories, early treatises on evidence, and the only treatise ever written on the law of the witness. The general legal histories are interesting because of the scarcity or absence of treatment of the witness (in the modern sense). The absence of significant mention of the witness in general histories supports the premise that acceptance of narrative in the modern sense was a long time in coming to the courtroom, and the witness was not historically a central player. The witness did not begin to appear regularly in the courtroom until the seventeenth century.

B. Early Perspectives on the Witness Voice and the Law of Evidence

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292. *See supra* notes 14-17 and accompanying text.

293. *See supra* notes 19-23 and accompanying text.

294. Witness here refers to the witness who in the modern sense testifies to facts, not simply swearing oaths as in early forms of trial.

295. *See supra* note 19 and accompanying text.

The public trial that existed in the Middle Ages and well into the sixteenth century illustrates the general absence of witness testimony that emphasized on the lawyer's voice. Radcliffe and Cross summarize a typical trial in their book *The English Legal System*. They write:

> Originally, the pleadings were conducted orally in open court and entered on the record of the case by the clerk. The plaintiff's counsel began by telling his story, whence the use of the word count [from the French, raconteur] which remained in use until the Judicature Acts for the various paragraphs in the plaintiff's declaration (now called the statement of the claim) and is still in use for the different paragraph's of an indictment. The plaintiff's counts were met by the defendant's pleas, which still remain oral in criminal proceedings.[296] This system of oral pleadings

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296. *See generally*, BAKER, *supra* note 247, at 289-90. The concept of "presumed innocent until proven guilty" had not yet been established. *Id.* at 289. Under the common law of England, the justice system did not initiate civil actions or the prosecution of criminals; it was left to the victims or their families to bring suit against the alleged wrongdoer. *See* Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN 271, 287-91 (2002). While women could not sit on a jury and nor enter the legal profession, they are found in the yearbooks as private prosecutors in rape cases. In criminal proceedings, while the plaintiff could retain counsel, the defendant could not because he was required to "put himself on trial." *Id.* at 273. Despite numerous demands from the defendant that he be allowed to confront his accusers, state criminal prosecutions of this period relied primarily on hearsay to convict the accused. It was believed that the oath was "the chief guarantor of evidentiary reliability." The use of out-of-court statements denied the defendant the truth-seeking device of cross-examination. *Id.* Not until the end of the seventeenth century, after defendants were licensed to retain defense counsel, were they afforded the right to cross-examination. BAKER, *supra* note 247, at 287. The first stage of a civil trial and a criminal trial were the pleadings and the arraignment, respectively. In criminal trials, the defendant was indicted. He was not entitled to a written copy of the original indictment to avoid "trifling exceptions to grammar or form." *Id.* at 282-83. He was then asked to answer the charge of guilty or non-guilty. *Id.* at 283. The court would next ask, "'[c]ulprit, how wilt thou be tried?'" *Id.* The automatic response was, "'[b]y God and the country.'" *Id.* If he failed to answer in this exact way and wording, it was as if he had waived his plea. For charges of high treason, petty larceny and misdemeanor, and felony appeals, this "was tantamount to a conviction." *Id.* Those deliberately mute were charged with less severe petty felonies. Torture could be used to try to make them speak. *Id.* "Standing mute of malice was made equivalent to a conviction in all cases" in 1772. *Id.* at 284. This barbaric glitch in the common law continued until 1741 and was a remnant of the secret trials of years past. *Id.*

The advent of defense lawyers made it possible for defendants to avoid self-incrimination and these practices were soon abolished. *Id.* at 287. Until the end of the seventeenth century, however, a criminal defendant was not entitled to a lawyer unless the evidence presented raised a question of law. *Id.* at 286. This exception was unavailable in appeals and misdemeanors. *Id.* The rational for denying the defendant counsel was that "the trials would take too long if men of law were allowed; [and] no one could better speak about the facts than the prisoner himself." *Id.* Note, that speaking by the defendant was allowed in the pleading phase only. *Id.* Additionally, if

> determined the character of the Year Books which are almost entirely devoted to a detailed report of the moves of both sides until finally one or the other was maneuvered into a position by which he had to abide. Oral pleadings were superseded by the exchange of written pleadings at the end of the mediaeval period but the common law system of pleading still retained, after the change, its outstanding characteristics of a system under which the parties were compelled to frame with great exactness the precise issue which they wished to submit to the adjudication of the court and all pleadings were bound to end in a single issue, either of law or fact, to be decided in the first case by the judgment of the court, and in the second by a verdict of a jury. The system was excessively rigid and technical, particularly its requirement that every issue should not only be certain, but also single.[297]

Note that what the authors describe as the lawyer "telling his story" is not storytelling, but rather the whipping of pleadings into shape as described above. Also noteworthy, is the absence of mention of the examination of witnesses. In fact, there was no place for the modern witness in these trials:

> [E]arly law knows no witnesses of the modern type–no witnesses who can be compelled to disclose facts known to them, in order to assist the court to come to a conclusion as to the facts in issue in a case. For, as we have seen, such a conclusion was reached, not by a process of reasoning from evidence, but by some one of several alternative forms of proof selected by the plaintiff or the court, after the parties had stated their respective cases in the right form, and in accordance with the elaborate rules of procedure.[298]

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an accused was made to defend himself, "peradventure his conscience will prick him to utter the truth, or his countenance or gesture will show some tokens thereof, or by his simple speeches somewhat may be drawn from him to bolt out the verity of the cause, which would not happen if counsel did the speaking."*Id.* at 287. In 1695, a statute was passed rescinding the rule prohibiting defense counsel to represent a defendant in court. *Id.* Retraction of this rule "accompanied the establishment of rules of evidence and trial procedure, and the cessation of the practice of questioning the prisoner during trial." *Id.* In fact, the defendant was excluded from testifying under oath on his own behalf. *Id.*

297. RADCLIFFE & CROSS, *supra* note 218, at 179.

298. HOLDSWORTH, *supra* note 122, at 177-178. Holdsworth distinguishes between the modern witness and the earlier "preappointed witness–the secta which appears to back a plaintiff's claim, the witnesses who have affixed their seals to a writing, and the official transaction witnesses." *Id.* at 177. Holdsworth explains that:

> The functions of the old pre-appointed witnesses were rigidly defined. The secta swore to their belief in the plaintiff's claim; the witnesses to the deed to its genuineness; and the transaction witnesses to the sale which they had been called to

During the Middle Ages, there was not yet a distinction between law and facts, and the concept of evidence of proof meant little. Trials were considered fair if they were run with procedural accuracy, not with the showing of a burden of proof.

> A medieval critic would demand that the procedure of a trial should be flawless, that all the delays should be accorded that the writs and rolls should be scrupulously accurate, that there should be no error on the record. In taking this attitude, the mediaeval lawyer was concentrating on a problem, which he knew was within his competence, and which was for centuries to be fundamental. A rigidly settled procedure is the first requirement for the development of a legal system, and a rigidly settled procedure is the first requirement for the development of a legal system, and the Middle Ages achieved it.[299]

Holdsworth suggests that "two connected principles . . . rendered the modern use of witnesses legally impossible. The first of these principles was that no one ought to be convicted of a capital crime by mere testimony.[300] The second was that a witness was neither competent nor compellable to testify to a fact, "unless when that fact happened, he was solemnly taken to witness."[301] In other words, a person would have needed to be under oath at the time an event

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> witness. 'When the witness was adduced he came merely in order that he might swear to a set formula. His was no promissory oath to tell the truth in answer to questions, but an assertory oath.' They did not supply evidence upon which the court could decide, but proof of the particular facts to which they were called upon to testify.

Id. at 178-79. Holdsworth points out that "[t]he existence of the trial by witnesses was a recognition of the fact that they were a mode of proof as conclusive as battle, compurgation, or ordeal." *Id.* at 179.

299. BAKER, *supra* note 247, at 76.

300. HOLDSWORTH, *supra* note 122, at 179. The first principle harkens back to the primitive modes of trial where an accused person was accorded the right to make his proof through battle, ordeal, or compurgation. *Id.* It was considered an unacceptable break with this tradition to force an accused to submit the question of guilt or innocence to a jury without having the opportunity to make his proof. *Id.*

301. *Id.* at 179. The second principle is illustrated by Holdsworth in a case of 1291-92 in which:

> [T]he king attempted to compel certain magnates to take an oath as to the existence of certain facts. All of them asserted that it was a thing unheard of that they should be thus compelled to swear; and, in spite of repeated attempts to get them to change their minds, they persisted in their refusal to take the oath without a consultation with

was witnessed to later be considered competent to relate what was observed. Holdsworth explains that both principles profoundly influenced the development of the mediaeval common law on this topic.

Holdsworth points out that:

> [I]n old collections of oaths, a witnesses' oath to tell the truth in answer to questions is found. But it is quite clear that they did not lead, in the mediaeval period, to any change in the old principle that a person could not be compelled to testify, nor to any general use of oral [evidence] as was made in that period of documentary evidence."[302]

Despite the common law rules that undermined the use of witnesses:

> [T]hrough the mediaeval period, the courts, in certain cases, were beginning to make use of the testimony of witnesses of the modern type. These cases illustrate the manner in which the old ideas were being gradually undermined [by lawyers]. . . . [They] pave the way for the recognition by the Legislature in 1562 of the necessity for compelling witnesses to come forward to testify to the court.[303]

The idea eventually arose that a public trial might provide a process more conducive to proof than trials or depositions conducted in private. While the public trial offered no more reasoned fact-finding procedures than did the closed trial, nevertheless, it opened the process to public scrutiny. This must have had an impact on the later evolution of a reasoned approach to fact-finding and a broader trial narrative.

The most famous demand for production of witnesses by a defendant was by Sir Walter Raleigh in 1603.[304] He was on trial for treason against the King and his accuser Lord Corbham was never brought before a jury to testify.[305] Rather, testimony from other witnesses about what

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their peers.

Id. at 179-80. This idea derives from the view that a person could not be compelled to be a compurgator. *Id.* at 180. The only witnesses who could be compelled were those who had placed their signature to a deed. HOLDSWORTH, *supra* note 121, at 180. They could be compelled to testify that it was their signature. *Id.* As late as 1455, the argument that a person could not be compelled to appear in court as a witness appears in the Year Books. *Id.* As a consequence of these two principles, the English law on witnesses and their evidence was slow to evolve. *Id.*

302. *Id.* at 181.

303. *Id.* at 183.

304. Berger, *supra* note 289, at 570.

305. *Id*

Lord Corbham had said was used to convict Raleigh.[306] His famous statement is an eloquent illustration of how significant cross-examination is in seeking the truth, "[p]roof of the Common Law is by witness and jury: let Corbham be here, let him speak it. Call my accuser before my face, and say what I have done."[307]

Blackstone's *Commentaries* provide an inside view of the trial process and the participants in that process by the time it traveled to the American colonies in the seventeenth century. He also suggests that the technique of cross-examination in open trial lends itself to the search for truth. He writes:

> This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.[308]

With regard to witness testimony, Blackstone's commentary can be misleading. Despite the fact that the Legislative Act of 1562 made it possible to compel witness testimony, there were significant restrictions placed on the use of witnesses by rules concerning witness competence. These rules were in effect in England and the American colonies and, in fact, were operative well into the nineteenth century.

C. Evidence Shift From Linguistic to Substantive Focus

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306. *Id.* at 570-71.

307. *Id.* at 571. Note that eventually the substantive body of evidence law prohibited the use of "hearsay" evidence.

308. *Id.* at 583 (citations omitted) (quoting a verse from chapter 23 of Blackstone's *Commentaries*, first published in 1765, reprinted in Philadelphia in 1771; 3 WILLIAM BLACKSTONE, COMMENTARIES 345). Note that this use of "witness" is nothing like the modern notion of a witness who provides factual evidence through oral testimony. The early witness only gave oaths as discussed in Part I of this linguistic history.

Certainly during the seventeenth and eighteenth centuries as the witness became more familiar to the courtroom, rules of evidence were in the developmental stage. The first known writing on evidence is dated 1735.[309] It simply introduces a small number of cases with no further analysis or discussion.[310] By 1726, Sir Geoffrey Gilbert memorialized the emerging rules and thoughts on evidence when he penned the first treatise on evidence which was later published posthumously in1754.[311] Gilbert takes a philosophical approach, showing a preference for written "testimony" as do the treatises which follow through the first American treatise written by Greenleaf in 1842. Throughout the eighteenth and nineteenth centuries, these early treatises expound on the nature of man, mention God, are reliant on oath, and distrust orality. I give greater attention to Gilbert's treatise and the one and only treatise ever written on the law of witnesses, dated 1887 and published in America, because they provide bookend views of the relationship between introduction of the witness, distrust of orality, reliance on God, and an interdisciplinary consideration of evidence law. I also highlight illustrations of similar perspective in other treatises written in the late nineteenth century. Both the treatment of the subject matter by the treatises and the dates at which they were penned, support synthesis of the premises.

Gilbert's treatise illustrates the interdisciplinary considerations of the law of evidence operative at the time, the preference for written testimony over oral testimony, and the continued reliance on God to operate a Rationalist model of trial advocacy.

There is no question that Gilbert subscribed to a rationalist view of the trial and the law of evidence. Gilbert prefaced his treatise with some ideas derived from Locke's *Essay*

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309. DANIEL MCKINNON, THE PHILOSOPHY OF EVIDENCE vii (1812). McKinnon reports, "The earliest publication on evidence, is an anonymous work produced in the year 1735; at which period, as the author informs us in his preface, there was nothing extant professedly written on the subject." *Id.* McKinnon goes on to say that the work has been attributed to Nelson and was a "mere collection of cases, with very little comment or connection." *Id.*

310. *Id.*

311. G. GILBERT, THE LAW OF EVIDENCE 3-4 (1st ed. 1754). *See* ALLEN, *supra* note 19, at 2. Allen provides the following information about Gilbert in footnote 2:

> Gilbert (1674-1726) held judicial appointments in Ireland and then, from 1772, was a Baron of the English Court of Exchequer, becoming Chief Baron in 1725. The treatises that appeared under his name were all published posthumously, that on evidence being first published in Dublin in 1754. The last edition, by J. Sedgwick, was published in London in 1801. See the entry by John H. Langbein in A.W.B. Simpson, ed., *Biographical Dictionary of the Common Law* (London, 1984), p. 206; William Twining, 'The Rationalist Tradition of Evidence Scholarship', in *Rethinking Evidence* (Evanston, Ill., 1994), pp. 35-38.

Id.

Concerning Human Understanding.[312] Locke believed that all knowledge "is derived from experience, observation, and perception."[313] In his Essay, Locke suggests that "[w]ords, in their primary or immediate signification, stand for nothing but the ideas in the mind of him that uses them. . ."[314] Locke provides philosophical reference for Gilbert. Gilbert's concurrent acceptance of the exclusionary rules incident to witness competence, *see infra*, and his acceptance of the scientific concept of Locke's theories of probability might seem contradictory today. However, both are supported by Locke's sentiments about human understanding.

The first half of Gilbert's treatise presents the principles and rules of evidence law. The second half presents information about what was proper or improper to prove in specific issues before the court (the substantive topics). Here, I will address the former section of the treatise.[315]

At the outset, Gilbert divides evidence into two sorts, written and unwritten.[316] Curiously, in doing so, he refers to each of the types of evidence as testimony.[317] In his treatise, Gilbert ranges "all Matters in the Scale of Probability,"[318] making abundantly clear that the probability of unwritten evidence far exceeds that of oral evidence.[319] It is interesting that in making clear his own preference, Gilbert notes that he is at odds with the poets' preference for

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312. *See* GILBERT, *supra* note 311, at 1. Gilbert stated that:

> In the first Place, it has been observed by a *very learned [see side reference to "Mr. Locke"] Man, that there are several Degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeliness, even to the Confines of Impossibility; and there are several Acts of the Mind proportion'd to these degrees of Evidence, which may be called the Degrees of Assent, from full Assurance and Confidence, quite down to Conjecture, Doubt, Distrust, and Disbelief.

Id.

313. *See* WILLIAM TWINING, EVIDENCE AND PROOF 36 (Alex Stein ed., 1992). *See* Gerald J. Postema, *Fact, Fictions, and Law: Bentham on the Foundations of Evidence, in* FACTS IN LAW 37, 48 (William Twining ed., 1983).

314. TWINING, *supra* note 4, at 39 n.48.

315. *See* GILBERT, *supra* note 311, at 113-99.

316. *Id.* at 5.

317. *Id.* at 4.

318. *Id.* at 1.

319. *Id*.

the oral:

> Cicero in his declaiming *pro Archia Poeta*, gives a handsome Turn in Favour of the unwritten Evidence, pleading there for the Freedom of the Poet, when the Tables of the Enfranchisement were lost: and it is to this Sense, *"We have here the plain Testimony of a Man of Integrity and Honour, which can never be corrupted or changed, and can we be prejudiced in the want of the Tables that are confess'd to be Subject to much Corruption and Alteration?"* But the Ballance of Probability is certainly on the other Side, for Testimony of an honest Man, however fortified with the Solemnities of an oath, is yet liable to the Imperfections of Memory, and as the Remembrance of things fail and go off, Men are apt to entertain Opinions in their Stead, and therefore the Argument turns the other way, in most cases; For the Contracts reduced to Writing, are more advantageously secured from all Corruption, by the Forms and Solemnities of the Law, than they possibly could have been, if they were retain'd in Memory only; from hence therefore, we shall begin with the written Evidence, that has the first Place in the Discourses of Probability.[320]

In all Gilbert devotes eighty-six pages in his treatise to documentary evidence and only eighteen to oral testimony. When on page eighty-six of his treatise, Gilbert finally "consider[s] the unwritten Evidence, or the Proofs from the Mouths of Witnesses . . . . "[321] He begins his discussion with a description of exclusions stating, "[a]nd here we must consider who are totally excluded from Testimony, and by what Rules we may distinguish the Truth on contradictory Evidence."[322] Gilbert identifies two types of persons who should be excluded; those who are in "want of Integrity and [those who are in want of] Discernment."[323] He next divides those persons lacking integrity into several categories: persons interested in the matter in question;[324] witnesses not permitted to testify for want of integrity because they are stigmatized;[325] witnesses excluded from testimony because they are infidels;[326] and witnesses excluded because they have been excommunicated.[327] Finally, he lists those categories of people lacking in discernment.

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320. *Id.* at 4-5 (emphasis in original).

321. *Id.* at 86.

322. *Id.*

323. *Id.*

324. *Id.* at 87.

325. *Id.* at 100.

326. *Id.* at 103.

327. *Id.*

They include "*Ideots, Madmen,* and *Children* under the Age of common Knowledge."[328]

Gilbert explains that interested persons include all people who might benefit personally from testifying because "there is very little Credit to be given to a Man's own Oath where there is no probable Circumstances to support it."[329] Neither a plaintiff nor a defendant could be a witness in his own cause.[330] Husbands and wives could not be witnesses for or against each other with two exceptions.[331] The first operated in cases of High-Treason.[332] The second dealt with rape or bodily injury of the wife by the husband.[333] Gilbert explains the problem with interested persons:

> Now where a Man who is interested in the Matter in Question, wou'd also prove it, 'tis rather a Ground for Distrust than any just Cause of Belief; for Men are generally so short-sighted, as to look at their own private Benefit which is near to them, rather than to the Good of the World that is more remote, therefore from the Nature of human Passions and Actions, there is more Reason to distrust such a bias'd Testimony, than to believe it; it is also easy for Persons who are prejudiced and prepossessed to put false and unequal Glosses for what they give in Evidence, and therefore the Law removes them from Testimony, to prevent their sliding into Perjury, and it can be no Injury to Truth, to remove those from the Jury, whose testimony may hurt themselves, and can never induce any rational Belief."[334]

Those persons not permitted to testify for want of integrity included persons who had committed a crime that implicated truthfulness. Gilbert explains the Stigmatization:

> Now there are several Crimes that so blemish, that the party is ever afterwards unfit to be a Witness, as Treason, Felony, and every *Crimen falsi*, as Perjury, Forgery, and the like; and the Reason is very plain, because every plain and honest Man affirming the Truth of any matter under the Sanction and Solemnities of an Oath, is [e]ntitled [sic] to Faith and Credit, so that under such Attestation the Fact is understood to be fully proved.
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328. *Id.* at 103.

329 *Id.* at 94.

330. *Id.*

331 *Id.* at 96.

332. *Id.*

333. *Id.* at 97.

334. GILBERT, *supra* note 311, at 87.

> But where a Man is convicted of Falsehood and other Crimes against the common Principles of Honesty and Humanity, his Oath is of no Weight, because he hath not the Credit of a Witness, and there is equal or greater Presumption against him than can be on his Behalf; for the Presumption is benign and humane to every Man produced as a Witness, that he will not falsify or prevaricate in Matters of such Importance as all Affairs of Justice are.[335]

The third category of excluded witness indicated by Gilbert are the Infidels.[336] Gilbert explains "they are under none of the Obligations of our Religion, and therefore they are not under the influence of the Oaths that we administer; and where the binding Force of an Oath ceases, the Reasons and grounds of Belief are absolutely dissolved."[337] An exception was made for Jews with regard to this rule under the common law by the time of Gilbert. However, they could not testify as witnesses under the rules of civil law. Gilbert explains:

> Jews are daily allowed to be Witnesses because they can swear on the Old Testament which is Part of our Belief, therefore their Oaths do induce a Belief of the Fact, which they attest; but those are totally excluded by the Rules of the Civil Law, which seems a little partial in their ordinary Methods of Testimony, and which says, *Judei et Heretici contra Orthodoxox produci in Judicio Testes nequeunt*.[338]

Excommunicated persons composed the fourth category of those excluded as witnesses.[339] Persons excommunicated by the Church were considered to be not under the influence of any religion. Such persons were excluded from "human Conversation."[340] So serious was this event that it appears the laws went so far as to excommunicate those who conversed with the excommunicated.[341] "Popish Recusants"[342] also fell into this category. Gilbert explains "for when the Pope pretended to excommunicate Kings, it seemed proper to

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335. *Id.* at 100-01.

336. *Id.* at 103.

337. *Id.*

338. *Id.* at 103.

339. *Id.*

340 *Id.*

341 *Id.*

342 *Id.*

encounter his Faction with their own Weapons."[343]

Before moving to the final section of his treatise which addresses evidence as to particular issues, Gilbert includes on pages 104-112 a discussion of probability with regard to witness testimony. Gilbert says that "[p]robability arises from the Agreement of any Thing with a Man's own Thoughts and Observations from the Testimony of others who have seen and heard it."[344] Here Locke's influence is evident. Gilbert observes:

> And here it is first to be considered, that in all Courts of Justice the Affirmative ought to be proved, for it is sufficient barely to deny what is affirmed until the contrary be proved, for Words are but the Expressions of Facts, and therefore when nothing is said to be done, nothing can be said to be proved; and this is the Rule both in the Common and Civil Law. The Civil Law says *Probatio imponitur ei qui allegat, negantis autem per rerum naturam nulla ast probatio.*[345]

Gilbert's treatise stood as the only published word on evidence for eighty years. It was not until the turn of the century that other lawyers and jurists on both sides of the Atlantic added their observations on evidence to those of Gilbert. He stands as the first published author of a rationalist model of adjudication illustrated by rules of evidence operative at trial.

As illustrated by Gilbert's treatment of oral evidence, witness testimony was not a favored approach in a process that was supposed to be characterized by reason. Only the oath made it acceptable at all. The case of *The King v. White*[346] illustrates the predominant belief operative well into the nineteenth century that for a witness' testimony to be acceptable it must be based upon a traditional belief in God expressed in open court through the oath.

> On the trial of an indictment at the Old Bailey for horse-stealing, in October Session 1786, Thomas Atkins was called as a witness to support the prosecution. Being examined on the voir dire he said, that he had heard there was a God, and believed that those persons who tell lies would come to the gallows; but acknowledged that he had never learned the catechism, was altogether ignorant of the obligations of an oath, a future state of reward and punishment, the existence of another world, or what became of wicked people after death.

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343. *Id.* at 103.

344. *Id.* at 104.

345. *Id.*

346. The King v. White, 168 Eng. Rep. 317 (Crown Cases 1 Leach 430 at 317 (1925)) *available at* http://books.google.com/books?id=QQs-AAAAIAAJ&pg=PA129&lpg=PA129&dq=%22the+king+v+white%22+on+the+trial+of+an+indictment+at+the+old+bailey+for+%22horse+stealing%22&source=web&ots=h7X4lB8MhO&sig=0Z8DSfmHXD34mlXd_VMjuTgUkQk (last visited October 8, 2007).

> The Court rejected him, as being incompetent to be sworn: for that the Oath is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice.[347]

Throughout the early writings on evidence, as in Gilbert, the broad and interdisciplinary scope of the topic is highlighted. Writing, a Philosophy of Evidence in 1812, Daniel McKinnon, Esq., a barrister of Gray's Inn, writes, "There is no branch of jurisprudence more universally applicable to the concerns of common life, than the law of evidence."[348] McKinnon illustrates the intersection of the two premises suggested in this article when he writes in the opening to Chapter 1:

> The material world may be considered as a compound of objects, or elementary parts, which have the property, as well separately as in conjunction, of producing different impressions or effects on our organs of sense. These impressions, when communicated to the brain through the nerves of the respective organs, give birth to certain corresponding affections of the mind. The *rationale* of the intellectual or mental perception, and the organic office assigned to the brain, are amongst the secrets of nature still involved in impenetrable obscurity. The ingenuity indeed of ancient and modern philosophers has often been directed to the solution of this great mystery; but all that has been hitherto written[349] on the subject, serves only to demonstrate that the mind is a manifestation of divine power, as yet incomprehensible to us, and without any parallel in the works of the creation.[350]

Greenleaf, who published the first American treatise on the Law of Evidence in 1842, provides a further illustration recognizing the interdisciplinary nature of evidence and the foundational elements of distrust of narrative and reliance on God related to the law of evidence. He includes the following consideration of the *General Nature and Principles of Evidence*[351] in his 14th edition dated 1883:

> No inquiry is here proposed into the origin of human knowledge; it being assumed,

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347. *Id.*

348. DANIEL MCKINNON, PHILOSOPHY OF EVIDENCE (London, 1812).

349. *Id.* at 1-2 (citing THOMAS REID, AN INQUIRY INTO THE HUMAN MIND ON THE PRINCIPLES OF COMMON SENSE (1764) (providing a survey of different hypothesis of the most celebrated ancient and modern philosophers)).

350. *Id.*

351. SIMON GREENLEAF, GREENLEAF ON EVIDENCE 14 (14th ed. 1883).

> on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge acquired by an individual, through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge having been acquired through the perception of others[352] It is not easy to conceive that the Supreme Being, whose wisdom is so conspicuous on all his works, constituted man to believe only upon his own personal experience
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> . . .
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> At an early period, however, we begin to find that, of the things told to us, some are not true, and thus our implicit reliance on the testimony of others is weakened: first, in regard to particular things in which we have been deceived; then in regard to person's whose falsehood we detected; and, as these instances multiply upon us, we gradually become more and more distrustful of such statements, and learn from experience the necessity of testing them by certain rules. Thus, as our ability to obtain knowledge by other means increases, our instinctive reliance on testimony diminishes, by yielding to a more rational belief.[353]

Greenleaf's discussion of testimony points out the rational, if misplaced, basis of exclusionary rules that narrowed the roles of those people eligible to testify at trial and the dependence upon the linguistic function of the law of evidence. Until nearly the turn of the twentieth century, criminal defendants**,** interested parties**,** and those unfit to take an oath to God, as explained below, were unwelcome on the witness stand.

In 1887, five years after Greenleaf's fourteenth edition appeared, an American lawyer, Stewart Rapalje published the first and only treatise entirely devoted to the law of witnesses.[354] The fact that Rapalje's work is the only complete treatise devoted entirely to the law of the witness and witness testimony, and that it has only recently been made generally available through a 1997 reprint, also supports the premises of this article: that witness narrative received a late invitation to the courtroom; that it was not favored; that God was a necessary element of the invitation when it did arrive; and that early on evidence scholars pondered the broader depths of the topic, but by the turn of the twentieth century interest on evidence had taken a more parochial perspective.

Rapalje himself notes in his preface that in a similar search in 1882 he was unable to find any such treatise.[355] It should be noted that Raplje recorded his law of witnesses more than 180

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352. *Id.* (citing JOHN ABERCROMBIE, INQUIRIES CONCERNING THE INTELLECTUAL POWERS & THE INVESTIGATION OF TRUTH 45-46 (1833)). Note Greenleaf also cites later in the same paragraph to DANIEL MCKINNON, PHILOSOPHY OF EVIDENCE 40 (London, 1812). and to THOMAS REID, AN INQUIRY INTO THE HUMAN MIND ON THE PRINCIPLES OF COMMON SENSE (1764).

353. *Id.* at 14-15.

354. STEWART RAPALJE, LAW OF WITNESSES (1887).

years after Gilbert penned the first treatise on evidence and that the same themes arise. With regard to his purpose in writing his treatise, Rapalje writes:

> Five or six years since, while preparing a brief, the writer had occasion to look up many of the earlier as well as the more recent authorities upon the competency and credibility of witnesses; and while doing so, was greatly impressed with the discovery that these, as well as all other matters appertaining to the law of Witnesses, were very briefly and inadequately treated of in the existing text-books on Evidence. This state of things, taken in connection with the fact that no distinctive treatise on witnesses had ever been written, so far as he could ascertain, by any English or American legal author, induced the writer to prepare this book, in the hope that it would serve to fill one of the few still remaining gaps in the literature of the law.[356]

In all, Rapalje devotes 533 pages to his discussion of the law of witnesses. Here I focus on two aspects of his treatise most relevant to my thesis: first, those rules of witness competency that deal with "moral"[357] disqualifications and the range of the Enabling Statutes which abolished the disqualifications, which is connected to my first premise, the significance of God to orality and the rules of evidence; second, the sections on examination of witnesses by lawyers which connects to the second premise, orality and the linguistic function of the rules.

Rapalje explains the exclusion of various classes of persons from service as a witness in detail.[358] By the time he wrote in 1887, statutory abolition of incompetency of witnesses based on religion had been recently abolished through Enabling Acts in England and most of the United States during the prior two decades. Rapalje notes that prior to the abolition of religious competency rules, the law had already made allowance for those who believed in a god other than the Christian god.[359] He explains that because "[t]he law; in its charity, presume[d] that every one offered as a witness in a court of justice, believe[d] in the existence of a Supreme Being,"[360] the law placed the burden on the person who sought to disqualify a witness to offer evidence of the infirmity.

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355 *Id.* at iii.

356. *Id*.

357. *Id.* § 11, at 11.

358 *See generally,* RAPALJE, *supra* note 354, at 1-26.

359. RAPALJE, *supra* note 354, § 11, at 13. "If the witness believes in a Deity, whether the God of the Christians, or of the Jews, or a heathen idol, he will be competent, and if not a Christian, the oath will be administered to him according to the from in use in his own country . . . ." *Id.*

360. *Id.* § 12, at 13.

With regard to "moral disqualifications"[361] Rapalje explains the law prior to the Enabling Acts:

> It being the rule of universal application that on all trials, civil or criminal, oral evidence must be given under the sanction of an oath (except in cases where; by statute, the substitution of a solemn affirmation is permitted), it naturally follows that one who, from defect of religious sentiment, is insensible to the obligation of an oath, ought not to be permitted, even if willing, to blasphemously invoke the name of a Supreme Being, in whose existence as 'the rewarder of truth and avenger of falsehood,' he does not believe.[362]

Rapalje reports that by 1880 the following states had abolished the right of a party to object to witness competence based upon "want of belief in the existence of a God:"[363] Arizona, California, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Texas, Vermont, Virginia, and Wisconsin.[364] In Connecticut and New Hampshire, state statutes softened the requirement, asking merely for a belief in the existence of a Supreme Being.[365] In Montana and New York the requirement remained "that [a] witness should believe in a God *who will punish false swearing.*"[366] Georgia and Massachusetts continued to hold that disbelief could be used to attack credibility.[367] The language used by those states that swept away religious defect, included "'all persons,' or 'every human being,' or 'everyone who can understand an oath,' shall be competent . . . ."[368]

During the latter half of the nineteenth century the restrictions on interested parties and criminal defendants also began to be abolished. By the time Rapalje wrote his treatise, these

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361. *Id.* § 11, at 11. For an interesting corollary see also PLUCKNETT, *supra* note 92, at 227 discussing the concurrent moral disqualification of Catholic lawyers from the Inns of Court and the practice of law in the Courts.

362. *Id.* § 11, at 11 (citing to Lord Hardwicke (footnote omitted)). "Whether it be calmly insinuated with the elegance of Gibbon, or roared forth in the disgusting blasphemies of Paine, still it is atheism; and to require the mere formality of an oath, from one who avowedly despises, or is incapable of feeling, its peculiar sanction, would be but a mockery of justice." *Id.* at 11 n.1.

363. *Id.* at 15.

364. *Id.*

365. *Id.* at 15-16.

366. *Id.* at 16 (emphasis in original).

367. *Id.*

368 RAPALJE, *supra* note 354.

defects in a witness merely went to credibility. In the section of his treatise on witness examination, Rapalje notes the difficult task faced by the rules of evidence not readily apparent to the lay public:

> The controlling object being simply to elicit the truth from the witness, it would seem to the layman's mind a simple matter to formulate rules and regulations to that end, and which could rarely fail to accomplish it, 'but [as Rapalje points out] the character, intelligence, moral courage, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end.'[369]

Control over the manner and extent of an examination was as it is now under the control of the court and much attention given to the manner and form of the discourse. Pre-eminent, however, remained the reliance on oath, or a substitute affirmation, to influence the frame of mind of the witness.

Rapalje explains the prerequisite oath or affirmation which was required to be made in open court before any witness testimony even after the Enabling Acts. "To render the *viva voce* testimony of a witness legal evidence, it must be given under the solemn sanction of an oath or affirmation; and it is the duty of the party calling him to see that he is sworn."[370] Rapalje cites to the Maine case of Hawks v. Baker,[371] to illustrate the importance of the solemnity. The explanation is that, "[w]here a witness having testified, believing that he had been sworn, but by some oversight the oath had been omitted, and this was not discovered by either party till after the trial; nevertheless the verdict was set aside."[372] Rapalje further describes the administration of the oath or affirmation:

> As to the manner of administering the oath, the peculiar ceremony adopted in his [the witness'] own country, or which he deems most binding on his conscience, is to be resorted to.[373] Jews may be sworn on the Pentateuch,[374] with covered head; Mahometans, upon the Koran;[375] Gentoos, by touching the foot of a Brahmin;[376]

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369. *Id.* at 383 (citing GREENLEAF, *supra* note 351, at § 431).

370 *Id.* at 388 (citing Hawks v. Baker, 6 Me. 72 (Me. 1829)).

371. RAPALJE, *supra* note 354 (citing *Hawks*, 6 Me. 72).

372. *Id.* at 386 n.11.

373. *Id*. at 389 n.1, (citing Ormychund v. Barker, 1 Atk. 21 (1745)).

374. *Id.* at 389 n.2. "Id. 40, 42; Willes, 543; Cowp. 389; or on the Bible, if they say they are Christians. R. v. Gilham, 1 Esp. N.P. 285. And even a Christian may be sworn on the Old Testament, if he says he considers that a more binding form. Edmonds v. Rowe, Ry & Moo. N.P. 77." *Id.*

> Chinese, by the ceremony of killing a cock, or breaking a saucer, the witness declaring that if he speaks falsely, his soul will be similarly dealt with;[377] a Scotch covenanter, and a member of the Scottish Kirk, by holding up the hand, without kissing the book.[378] Quakers, and others who profess to entertain conscientious scruples against taking an oath in the usual form, are allowed to make an affirmation, *i.e.* a solemn religious asseveration, that their testimony shall be true.[379]

Rapalje also provides some insight into the formulation of questions and answers during witness examination. In doing so he never once uses the word "story or narrative." Instead he describes an examination conducted through questions and answers. Raplje explains the linguistic rules forbidding leading questions during a lawyer's examination of his own witnesses.[380] He notes the exception with regard to the witness who turns hostile.[381] He explains "that on direct examination of a witness, leading questions, *i.e.*, questions indicating or suggesting the answers the party wishes should be given, cannot be put."[382] He notes that a lawyer can object to the propriety and/or sufficiency of a witness' answers.[383] The witness may state only facts and not conclusions.[384] Rapalje says that it is a "well-settled rule . . . that the

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375. RAPALJE, *supra* note 354, at 389 n.3. "Morgan's Case, 1 Leach, C.C. 64; Fachina v. Sabine, 2 Str. 1104." *Id.*

376. *Id.* at 389 n.4. "See Ormychund v. Barker, 1 Atk. 21." *Id.*

377. *Id.* at 389 n.5. " R. v. Enhelman, Car. & Marsh. 249; R. V. Alsley, O. B. Sess. 1804; Peake Ev. 141 n (5th ed.)." *Id.*

378. RAPALJE, *supra* note 354, at 389 n.6. " Mildrone's Case, 1 Leach C.C. 459; Walker's Case, Id. 498; Dutton v. Colt, 2 Sid. 6; Mee v. Reid, Peake N.P. 22. And so may an ordinary American witness. Gill v. Caldwell, 1 Ill. 28; Doss v. Birks, 11 Humph. (Tenn.) 431; unless objection be made at the time. McKinney v. People, 7 Ill. 540." *Id.*

379. *Id.* at 389 n.7. " U.S. Rev. Stat. § 1. The usual form is, 'You do solemnly, sincerely, and truly declare and affirm,' etc. N.Y. Code Civ. Pro § 847. In Massachusetts, in early times, liberty to affirm was confined to Quakers. United States v. Coolidge, 2 Gall. (U.S.) 364. In New Jersey, a witness who does not object to being sworn cannot be allowed to affirm. Williamson v. Carroll, 1 Harr. (N.J.) 217." *Id.*

380. *See* RAPALJE, *supra* note 354, at 394-95.

381. *Id.* at 398.

382. *Id.* at 394.

383. *Id.* at 401.

384. *Id.*

answer of the witness must be *responsive* and *pertinent* to the question put, or it will be struck out on motion.[385] He describes cross-examination and notes again objections to the propriety and/or sufficiency of the witness' answers.[386] He explains how the judge can limit the scope of cross examination, re-direct, and re-cross, normally narrowing the scope of allowable topics each time.[387]

Rapalje's treatment of the general rules guiding witness testimony together with commentary supports the existence of the relationship introduced through the premises at the beginning of this article, namely the connections between God, distrust of oral narrative, the rules of evidence, and the rational model of adjudication. The connection is evident in his explanation of the significance of the prerequisite oath or affirmation. It underscores his discussion of witness examination. Rapalje's treatise on witnesses makes clear that reliance on oath was not simply a throw back to earlier beliefs, but rather, founded on a deep seated respect for oath and aspiration for a trial characterized by rectitude. The fact that his treatise on the witness stood singularly just before the turn of the century, and remains today the only focused writing on the law of the witness, is testimony to a shift in direction in evidence scholarship. By the time Rapalje published his witness treatise late in the nineteenth century, scholarly focus had shifted primarily to the substantive development of the law of evidence. From this point on writings on evidence took on a more parochial perspective.

One impetus for direction toward the substantive can be found in the efforts of Bentham and others which led the British Parliament, during the nineteenth century, to debate the exclusionary rules discussed by Rapalje.[388] A second impetus for the shift emerged at the end of the nineteenth century in the search by evidence scholars to find an organizing principle through which to address the law of evidence. The perspective of one simple system of evidence doctrine, the one guiding principle, was first advocated by Thayer who died before thoroughly exploring this idea.[389] With Thayer's death at the turn of the century, his students—Wigmore,

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385. *Id.* at 402.

386. *See generally* RAPALJE, *supra* note 354, at 405-416.

387. *See generally* RAPALJE, *supra* note 354, at 416-22.

388. *See generally* CHRISTOPHER J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (1997). Allen presents an enlightening thesis suggesting that Bentham's "immense influence" on the law of evidence might be exaggerated. I reference Allen's perspective on the lengthy debates over the exclusionary rules. It suggests, for my thesis, that discussion of evidence law moved from the practitioner's realm into main stream political and social commentary during the nineteenth century. I suggest that this perspective from outside of the courtroom solidified focus on the substantive qualities of evidence law and away from focus on the unique orality or seminal speech event which was taking place in the courtroom.

389. See ALLEN, *supra* note 388. Chamberlayne believed that the law of evidence should be molded into a scientific and flexible body of rules, which should force general adoption. Yet, even Chamberlayne seems conflicted for he criticizes the degradation of Evidence from a

Chamberlayne, and McKelvey—took up the cause to continue the search for a *more excellent way* to present the law of evidence[390] and to understand and explore the earlier writings on evidence. The quest by his students to find Thayer's "more excellent way" turned the scholarly exploration of evidence away from the earlier interdisciplinary "philosophizing."[391] From the end of the nineteenth century forth, aspects of the historical, spiritual, and psychological components of the Rules of Evidence embodied in the linguistic function - while occasionally referenced tangentially - essentially disappeared from the scholarly radar.

IV. Conclusion

In its infancy this article began as an exploration to answer the question whether the trial is simply storytelling, as a growing body of writings would have lawyers and the lay public believe.[392] I started by viewing the trial through the history of the introduction of the voices of the various participants into the courtroom, to hear, if it was storytelling, who was telling the story. I quickly discovered that the question was neither simple nor easily answered. Historical sources made clear that the voices of the witness and the lawyer were distinctly absent in the early parts of the story of the Anglo-American trial. Yet, as I was drawn back and forth between the history and the current writings on the trial as storytelling, I began to perceive the trial today in a more unconventional way, as a seminal speech event with rules of evidence that functioned as rules of discourse[393] which, in fact, were used not to encourage storytelling but rather to de-construct the story in support of a more reasoned result. I sought to understand this contradiction. Traditional sources provided a conventional lens. I wanted, however, to understand the "hidden dimensions"[394] of the courtroom dialogue and realized to do so I needed to view the history of the Anglo-American trial through an interdisciplinary lens. I turned to interdisciplinary works on discourse analysis and ethno-linguistics. As my exploration progressed I found some surprising answers to my simple "storytelling" question and discovered

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scientific system for reaching truth, to a bundle of empirical rules. In so criticizing the direction that writings on Evidence have taken, Chamberlayne also criticized Thayer's reliance on the historical perspective. And, Thayer himself, who perceived of a guiding principle around a best evidence rule, attacks and downplays Erskine's sentiments in A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. JOHN BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 509 (1898).

390. See DANIEL MCKINNON, THE PHILOSOPHY OF EVIDENCE vii, 94 (1812)

391. *See generally* EDWARD J. IMWINKELREID & GLEN WEISSENBERGER, AN EVIDENCE ANTHOLOGY (1996).

392. *See generally* Farber & Sherry, *supra* note 13, *and* Spence, *supra* note 13.

393. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 2 (1973).

394. "Many crucial facts lie beyond the time and place of [an] interation or lie concealed within it." *Id.*

that I had entangled myself in an interwoven yet sometimes puzzling thread of symbolism, rationalism, and narrative hidden within the Anglo-American trial.

From this warp emerged the simple answer to the question, "No, Virginia, the trial is not, nor has it ever been, simply storytelling." And from the answer to the seemingly simple question, in turn, the complex warp was visible. I tackled the complexity first by recognizing the two premises which emerged from the simple answer. The first premise being that from the time of the Ordeal, God has been and continues to be an essential component of the rectitude to which the trial has always aspired. In early trials, only God's voice was relevant. The second premise being that the underlying mission of the Rules, also essential to rectitude, is its linguistic function. In other words, the management of trial orality or narrative was historically a late comer to trial process. Since God's presence was fixed into the courtroom, both prior to and during the early introduction of both language and rules into the trial process, his spiritual presence became an integral piece of the foundation upon which the later operation of the linguistic function of the Rules of Evidence was built. Thus, we find the warp.

In the end this article is a call for remembrance of the linguistic function of the rules of evidence and an invitation for an interdisciplinary dialogue about the complex relationship between language and thought at work in the extraordinary speech event we call a trial.

As Laurence Tribe points out, there is reason even in processes that might seem unreasonable today. "[O]ne must acknowledge that there was a wisdom of sorts even in trial by battle—for at least that mode of ascertaining truth and resolving conflict reflected well the deeply-felt beliefs of the times and places in which it was practiced."[395]

Plato's famous parable of the cave can act as a metaphor for the different ways of knowing that can operate at a trial and the different ways of knowing that we can bring to the exploration of the trial. My friend Don Marietta explains the significance of the parable in layman's terms. He notes that Plato makes a distinction between "the sensible, of which there can be no knowledge but only opinion, and the intelligible, the realm of the real and knowable."[396] Of the parable he explains:

> People in the cave think they know something because they know images that show up on the wall of the cave and the order in which they appear, but they do not know that they are seeing shadows, not real things. The scene in the cave, dealing with sense experiences, is contrasted with events seen in the sunlight above the cave.....In Plato's ontology (theory of what is real), sunlit experiences are part of the realm of becoming, the unknowable. The cave experiences stand for ordinary sense experiences, those that the unenlightened consider real. The things seen in sunlight represent ideas known intellectually."[397]

Plato placed knowledge along a divided line illustrating the relevant degrees of

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395. *See* IMWINKELREID & WEISBERGER, *supra* note 391, at 395 (quoting Tribe).

396. DON E. MARRIETTA, INTRODUCTION TO ANCIENT PHILOSOPHY 72 (1998).

397. *Id.*

knowledge.[398] The highest level of knowledge recognized by Plato concerns knowledge that "can be known [only] after sufficient dialectic, serious discussion that attends carefully to the meaning of philosophical terms and the differences between ideas."[399]

Plato was all too aware that he lived in an oral world characterized by the lower degrees of knowing. As Havelock points out in *Preface to Plato*, Plato's negative assessment in the *Republic* of drama, poetry, music, and even children's stories is directly connected to the degree of thinking connected with the artistic use of language.[400] For Plato art was imitation. He believed that language should be used instead to spark the intellect.

Although Plato was pagan, he was religious and found a place in his philosophy for god.[401] In the *Republic*, Plato said that god is good; he causes only good, not evil. God does not change, assume disguises, or tell lies, contrary to what poets have written. Plato shared the common belief in a world soul, which he described as self-moving motion, the original aspect of the world's existence, and the universal cause of all change and motion, good and bad.[402]

The dualities recognized by this ancient philosopher at the divide between the oral and the literate worlds are intertwined with the warp which I uncovered in the Anglo-American trial. The courtroom has developed into a unique "place." The trial and the linguistic rules which guide it have been and continue to be shaped by the embedded remnants of ancient ritual, belief, and symbolism that survive there mostly unnoticed. God's presence still lingers in the courtroom in spite of successful attempts of principle and rule to operate a secular, rationally based system of law. That is good. The continued role of the witness oath as guardian of the trial narrative, while arguably only symbolic in nature, nevertheless is significant.

Architects understand that space can impart messages metaphorically, expressively, and symbolically.[403] Etlin explains "the equivalent to [the] metaphorical character [of a place] is to be found in the narrative arrangement of the space. Expressive character has its counterpart in the expressive qualities of space [that] . . . reflect . . .values. Symbolic character, [is] achieved through the creation of temple-like spaces . . . [and can] achieve a deeply rooted emotive

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398. *Id.*

399. *Id.* at 75.

400. ERIC. A. HAVELOCK, PREFACE TO PLATO 254 (1982).

401. *Id.* Marrietta notes a dialogue in the *Parmenides* in which "the old Parmenides gets the young Socrates to agree that the forms [this highest form of knowledge] are completely different from the world; therefore, only the gods can know them. Then Socrates objects to the implication that the gods do not know or care about the world, and agrees with Parmenides that only an exceptional person can know the forms." *Id.*

402. MARRIETTA, *supra* note 396, at 69.

403. *See* RICHARD A. ETLIN, SYMBOLIC SPACE: FRENCH ENLIGHTENMENT ARCHITECTURE & IT'S LEGACY 30 (1994).

response."[404] Etlin calls the "latter type 'numinous space.'"[405] He further suggests that "in all three types of . . . space—narrative, expressive, and numinous—the process of ritualized actions often play a significant role."[406]

The symbolism of the courtroom affects both the interaction and the interpretation of the interaction that takes place there. Anthropologists and scholars of discourse offer insight into contextual aspects of interaction. Participants take cues from place when determining the operative linguistic rules. Gumperz explains the complexities which must be accounted for in discourse analysis due to the existence of multiple alternative interpretations beyond the sentence level.[407] For example, lawyers are aware of the unique rules of discourse of the courtroom inherent in the rules of evidence. The witness is, hopefully, made aware of the solemnity of his/her duty to tell the truth by the characteristics of Etlin's "numinous" space. And the jury is reminded not only by the judge of their duty to interpret the discourse according to the rules provided, but also by the characteristics of Etlin's "narrative and expressive" space. The lay audience, on the other hand, is not made aware that a special language is being spoken or of the multiple contextual aspects of the discourse. They may interpret the trial's interactions to be "simply storytelling."

Both Plato and Walter Ong provide insight into the dangers of the storytelling modality on the multiple contextual meanings of language. They suggest that such symbolic use of language taps into the known scripts of the unconscious and impedes rational and analytic thought. Thus, symbolism at trial has the potential for leading decision-making towards either the emotional or the rational.

Jung provides further insight into this symbolic dichotomy as it relates to the trial. In explaining that a word or image is symbolic when it implies something more than its obvious and immediate meaning, Jung illuminates both aspects of symbolism inherent in the trial. His ideas are relevant, therefore, to both the linguistic and spatial symbolism operative at trial as discussed above. Of particular import is Jung's discussion of the relationship between numinous symbols and rationalism.[408] He suggests that man's capacity to respond to numinous symbols and ideas is critical to positive rationalism and that it is critical to man's survival. According to Jung "[m]an is bound to follow the adventurous promptings of his scientific and inventive mind and to admire himself for his splendid achievements."[409] However, "his genius shows the

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404. *Id.*

405. *Id.*

406. *Id.*

407. GUMPERZ, *supra* note 62.

408. CARL G. JUNG, MAN AND HIS SYMBOLS (1964). In bemoaning the plight of modern man Jung explains that numinous symbols and ideas are critical to a healthy rationalism. *Id.* at 94.

409. *Id.* at 101.

uncanny tendency to invent things that become more and more dangerous. . . ."[410] Jung suggests that the danger lies in man's separation from, and lack of response to, numinous symbols. Jung's solution is a healing of the split.

I suggest that numinous symbolism has always been and continues to be available to guide rationalism at trial. In fact, it has the potential to help the rules of evidence guide the trial narrative away from storytelling towards its "rational core." Even Plato's dialogues suggest that numinous symbolism is good and linguistic symbolism of the poets is dangerous.

Today there is consensus among scholars and teachers of trial advocacy that "storytelling" is the most effective tool of persuasion at trial. Some go so far as to suggest that "[w]ithout story, all delivery in the world is meaningless" because as "[e]volutionary anthropologists tell us . . . our need for story is encoded in our genes."[411] The "hidden dimensions" provide insight into why any discussion of storytelling, exclusion, inclusion, or expansion of God or narrative in the courtroom implicates the linguistic function of the rules and thus, maintenance of the rational core.

Recently, through interdisciplinary collaboration, scholars have begun to study the ways in which church architecture enhances spirituality and how that spirituality influences various modes of thought. Today, neurologists working with legal scholars and others are beginning to identify areas of the brain activated by moral thought. We now have numerous studies that support Socrates' intuitive concerns about the various modes of speaking and the ways they can influence the thought process of the audience toward or away from the rational.

This broad knowledge base must be tapped by those charged with forming and reforming the rules of evidence, designing the buildings and courtrooms, and any others in a role to make decisions affecting the oral trial process or the setting in which it takes place. Lawyers already use much of this information to select juries and then to form as stories the facts they present. It is the role of lawyers to push the envelope of legal advocacy. It is in this way that legal process and substantive law have evolved and with them the rules of evidence. It is the role of scholars to explore the import of the "hidden dimensions."

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410. *Id.*

411. Videotape: Alan Blumenfeld & Katherine James, What Can Lawyers Learn From Actors, (The National Institute of Trial Advocates 2001) (on file with author/VLS library).